



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Bach Flower Remedies Limited,)
)
 Opposer,)
)
 v.)
)
 Absolutely Natural, Inc., by name change)
 from Richards Distributing, Inc.)
)
 Applicant.)

Atty. Ref.: DJB/5027-97

Opposition No. 91200168
Serial No.: 85/111,156

**OPPOSER'S OPPOSITION TO APPLICANT ABSOLUTELY NATURAL, INC.'S
MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR SUA SPONTE
SUMMARY JUDGMENT AS TO STANDING**



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I. INTRODUCTION

Opposer, Bach Flower Remedies Limited (“Bach”) submits this brief in opposition to Applicant’s Motion for Summary Judgment. With regard to likelihood of confusion, genuine issues of material facts exist which clearly preclude an award of summary judgment to Applicant as a matter of law. Conversely, there is no genuine dispute as to Bach’s standing to bring this opposition and, accordingly, summary judgment should be granted to *Opposer* as a matter of law on that point.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Since at least as early as 1951, Bach, through predecessors and related companies (hereafter “Bach”), has continuously engaged in the manufacture and sale of natural remedies and preparations under the trademark RESCUE REMEDY. Declaration of Joel Tominey (“Tominey Dec”) ¶ 7.

2. In approximately 1961, Bach started to sell its RESCUE REMEDY products in an oral (dropper) form in the U.S. Subsequently, it expanded its product line in the U.S. to an herbal beverage sold under the RESCUE REMEDY trademark beginning in September 1979. Tominey Dec. ¶¶ 8, 9.

3. In 1995, Bach expanded its product line in the United States to include skin cream under the mark RESCUE CREAM to soothe, moisturize and restore irritated or damaged skin. Tominey Dec. ¶ 10; Declaration of Curt Finckler (“Finckler Dec”) ¶ 6.

4. In March 2009 in the U.S., Bach began selling RESCUE Gel to soothe muscle aches and pain and in April 2009 in the U.S., Bach began selling RESCUE Balm to moisturize and protect the lips. Tominey Dec. ¶ 13; Finckler Dec. ¶9.

5. Bach has expanded its RESCUE product line to include other products under the RESCUE mark in the United States and in other countries, such as RESCUE REMEDY Spray (2002), RESCUE Sleep (2006), RESCUE Pastilles (2007), RESCUE Energy (2009), RESCUE Gum (2010). Tominey Dec. ¶ 14; Finckler Dec. ¶ 10.

6. Bach has continuously sold the above mentioned products (paragraphs 2-5 herein) under the marks RESCUE, RESCUE REMEDY and RESCUE CREAM (“RESCUE marks”) in the U.S. from their respective first-use dates to the present. Tominey Dec. ¶¶ 8-14; Finckler Dec. ¶¶ 6-11.

7. Bach is the owner of the Reg. Nos. 1237564, dated Nov. 17, 1980 (RESCUE REMEDY); 1822260, dated Feb. 22, 1994 (RESCUE REMEDY); 2517685, dated Dec. 11, 2001 (RESCUE); 3147761, dated Sept. 26, 2006 (RESCUE CREAM). Bach also is the owner of App. Serial No. 77/485,289 (RESCUE), filed May 28, 2008, for goods in Classes 3 and 5, among others. Notice of Opposition, Ex. A. Tominey Dec. ¶¶ 18-19, Ex 3.

8. Since at least as early as January 2001, Bach has been selling its RESCUE products in the United States, including topical skin care preparations, in packaging prominently displaying the mark RESCUE alone (“RESCUE products”). Tominey Dec. ¶¶ 11, 15-17, Exhibits (“Ex”) 1-2; Finckler Dec. ¶ 7, 11, Ex 1-2.

9. Bach promotes and sells its line of RESCUE products in over 70 countries, including the United States. Tominey Dec. ¶ 7.

10. Bach’s RESCUE products have been extremely successful worldwide and in the U.S. Tominey Dec. ¶¶ 32, 33, Confidential (“Conf”) Ex 12; Finckler Dec. ¶¶ 28, 29, Conf Ex 11.

The RESCUE brand is one of Bach’s most valuable brands. Tominey Dec. ¶ 42.

11. Bach does not limit the sale of RESCUE products to any particular trade channel(s)

or customers(s). Bach sells and offers to sell its RESCUE products to independent retailers, retail stores, distributors, wholesalers and via the Internet through online stores. Tominey Dec. ¶¶ 35, 36, Conf Ex 13-14; Finckler Dec. ¶¶ 31, 32, Conf Ex 12-13; De Luca Dec. ¶ 22, Tab H (Opp. Response to Interrogatory No. 1).

12. Bach's RESCUE, RESCUE CREAM and RESCUE REMEDY products (hereafter "RESCUE" products) are sold through numerous retail channels of trade throughout the United States including, but not limited to, health food stores (*i.e.* Whole Foods, Sprouts, Earth Fare), supermarket/grocery stores (*i.e.* Hannaford, Shaws, Meijer), drug stores (*i.e.* CVS), clothing retailers (*i.e.* TJ Maxx), independent pet specialty stores, e-commerce sites, direct sales and potentially all other normal channels of trade for similar goods. Finckler Dec. ¶ 31.

13. Bach's RESCUE products are sold in the same channels of trade as other non-prescription skin creams, balms, gels, sprays or lotions that treat sunburn, prevent sunburn or otherwise soothe dry, chapped or irritated skin or lips. Tominey Dec. ¶ 37; Finckler Dec. ¶ 33.

14. The end users of Bach's RESCUE products in the United States include people of all ages and their pets. Tominey Dec. ¶ 38; Finckler Dec. ¶ 34.

15. Bach prominently advertises and markets its RESCUE trademarked goods via promotional materials (such as *Ladies Home Journal*, *People*, *Redbook*, *In Style*, *Esquire*, *Vogue*, *WSJ*, *Cooking Light*), on the radio, on the internet (including its website, www.nelsonsnaturalworld.com), at trade shows, on labels and packaging for Bach's products and on the goods themselves, giveaways and promotional items, flyers, advertisements and editorials in printed and online magazines, trade journals, point of sale advertising and other media, including social media such as *Facebook*, and through its extensive educational programs. Bach has advertised its RESCUE products in consumer publications in the U.S. since September 1985

and on the radio since 2005. Tominey Dec. ¶¶ 21-27, 29, Ex 4-8; Finckler Dec. ¶¶ 11, 13-24, Ex 1-8.

16. Bach has spent substantial amounts in advertising, promotion and marketing of its RESCUE products in the United States. Finckler Dec. ¶25, **Conf Ex 9**; Tominey Dec. ¶ 28, **Conf Ex 9**.

17. Through its counsel, Bach consistently monitors the U.S. Patent and Trademark Office database and the internet to identify confusingly similar, infringing or improper use of its RESCUE marks by third parties. Tominey Dec. ¶ 43. Bach has regularly policed its rights against third parties and taken steps in response to improper attempts to register or use its RESCUE marks in the U.S. Tominey Dec. ¶¶ 43-46, Ex. 15; De Luca Dec. ¶ 2, Tabs A, B; Bunton Dec. ¶ 2.

18. As the result of long, substantial and continuous use and promotion of the RESCUE products in the U.S. and elsewhere, Bach has achieved a widespread and favorable reputation and is well known and recognized for its preparations promoted and sold under the RESCUE marks. Tominey Dec. ¶¶ 40, 41; Finckler Dec. ¶ 36.

19. On August 19, 2010, Absolutely Natural, Inc. (formerly known as Richards Distributing), filed Application Serial No. 85/111,156 for the mark SUNBURN RESCUE for *sun care lotions, balms, gels, cremes, liquids and sprays* in Class 3 and *retail stores featuring sun care lotions, balms, gels, cremes, liquids and sprays*, in Class 35, based upon an intention to use the mark in commerce. The exclusive right to use the word SUNBURN has been disclaimed.

20. Absolutely Natural, Inc. (Applicant) has not yet commenced use of the mark SUNBURN RESCUE in commerce in the U.S. De Luca Dec. ¶13, Tab E., Applicant's Supplemental Response to Opposer's First Set of Interrogatories, Nos. 1, 2, 8.

21. Prior to Applicant's filing its application to register the mark SUNBURN RESCUE, Bach's RESCUE brand had already become well known and recognized for its goods, including those in Classes 3, 5, 30 and 32. Tominey Dec. ¶ 41; Finckler Dec. ¶ 38.

22. Applicant's mark SUNBURN RESCUE incorporates Bach's RESCUE mark in its entirety and merely adds a descriptive word "SUNBURN" to Bach's RESCUE mark.

23. The Examiner examining Application Serial No. 85/111,156 required a disclaimer of the term "SUNBURN" apart from the mark as shown. The examiner obtained Applicant's authorization on December 8, 2010 to amend the application to add the disclaimer. De Luca Dec. ¶ 26, Tab L.

24. The parties' RESCUE, RESCUE REMEDY, RESCUE CREAM and SUNBURN RESCUE skin care products are commercially related products. Tominey Dec. ¶ 48.

25. There is no reason to believe that Bach's RESCUE products and particularly its RESCUE Cream and RESCUE Balm products would not be useful to soothe or provide relief from sun exposure or sunburn. Tominey Dec. ¶ 48; Finckler Dec. ¶ 40.

26. The skin care products sold or intended to be sold by the parties under the marks RESCUE, RESCUE REMEDY, RESCUE CREAM and SUNBURN RESCUE, respectively, are sold or intended to be sold through the same or similar channels of trade in the same commercial outlets to the same customers. Tominey Dec. ¶ 48; De Luca Dec. ¶ 13, Ex. E, (Applicant's Supp. Resp. to Opposer's First Set of Interrogatories, No. 1).

27. Customers and potential customers are likely to be confused between Opposer's use of the marks RESCUE, RESCUE REMEDY and RESCUE CREAM and Applicant's use of the mark SUNBURN RESCUE in connection with skin care products and retail stores featuring such goods. Tominey Dec. ¶ 48. Opposer will be damaged by the registration of the mark SUNBURN

RESCUE by Applicant. Tominey Dec. ¶ 50; Finckler Dec. ¶ 39.

III. ARGUMENT

A. Disputed Issues of Fact Preclude Summary Judgment on the Likelihood of Confusion Issue

Opposer does not dispute Applicant's statement of law, but makes the following additional points. A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show Inc.*, 23 USPQ 1471, 1472 (Fed. Cir. 1992). Further, "the record must be viewed in a light favorable to the party opposing the motion, and all justifiable inferences are to be drawn in the non-movant's favor." *Barmag Barmer Maschinenfabrik AG*, 221 USPQ 561, 564 (Fed. Cir. 1984).

B. The Undisputed Facts Establish Opposer's Standing as a Matter of Law

The undisputed facts establish Opposer's standing as a matter of law. *See* TBMP §528.08 ("[T]he Board may, in appropriate cases, enter summary judgment *sua sponte* in favor of the nonmoving party . . .") and cases cited at TBMP § 528.08, n. 1.

A plaintiff has standing under Section 14 of the Act when it shows a direct and personal stake in the outcome of the Board proceeding and a reasonable basis for its belief that it will be damaged. *See Ritchie v. Simpson*, 50 USPQ2d 1023, 1025- 26 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 2 USPQ2d 2021, 2023-24 (Fed. Cir. 1987). There is no requirement that any actual damage be proven to establish standing. *See Harjo v. Pro Football*, 30 USPQ2d 1828, 1832 (TTAB 1994).

It cannot realistically be disputed that Bach has a real interest in this proceeding and a reasonable basis for the belief of damage. Since long prior to the filing date of the opposed application, Bach has continuously used and extensively promoted its marks RESCUE, RESCUE

REMEDY and RESCUE CREAM in commerce in connection with its products. Facts 2-6, 8-16, 21. *See also* Tominey Dec. and Finckler Dec. Bach has made of record printouts from the USPTO databases showing the status and title of its pleaded Registration Nos. 1237564 (RESCUE REMEDY), 1822260 (RESCUE REMEDY), 2517685 (RESCUE) and 3147761 (RESCUE CREAM) and Application Serial No. 77/485289 (RESCUE) (hereafter collectively “RESCUE marks”). *See* Notice of Opposition, ¶¶ 2-3, 5 Ex. A.

In light of its ownership of Bach’s valid and subsisting registrations and pending application, there can be no issue regarding Bach’s standing and priority. *See King Candy Co. v. Eunice King’s Kitchen Inc.*, 496 F.2d 1400 (CCPA 1974); *Cunningham v. Laser Golf Corp.*, 222 F.2d 943 (Fed. Cir. 2000). Accordingly, summary judgment should be granted in Bach’s favor on the issue of standing.

C. There are Numerous Facts Showing that A Likelihood of Confusion Clearly Exists

Applicant also seeks summary judgment on the issue of likelihood of confusion. The determination of a likelihood of confusion under Trademark Act § 2(d) must be based on an analysis of *all* of the probative facts which are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973). In general, no single factor is controlling. *Id.* at 567.

Applicant relies solely upon the sixth *du Pont* factor, *i.e.*, the number and nature of similar marks in use on similar goods, as the only basis for its motion on the likelihood of confusion issue, arguing that the weakness of Opposer’s marks precludes a finding of likelihood of confusion. While a single *du Pont* factor can potentially be dispositive in unusual circumstances, that is very clearly not the case here. Considering all of the relevant *du Pont*

factors and the evidence of record,¹ the sixth *du Pont* factor is certainly not the most relevant, let alone dispositive. Moreover, much of Applicant's evidence allegedly showing third-party use is unauthenticated, irrelevant and fails to make any connection between the "evidence" and the consuming public's awareness of it.

Applicant addressed *none* of the *du Pont* factors considered in a likelihood of confusion analysis *except the strength of the marks*. It did not state that it was not seeking summary judgment as to the other likelihood of confusion factors and nowhere indicated that its summary judgment motion was "partial." Thus, Applicant has apparently conceded that the remaining key factors favor Opposer. *See* Trademark Rule 2.127(a) (Every motion "shall contain a full statement of the grounds...."). Nevertheless, Opposer's brief addresses the other pertinent factors.

1. **Disputed Issues of Fact Exist Concerning the Strength of Opposer's Trademarks**

Applicant's sole basis for summary judgment on the likelihood of confusion issue is that Opposer's marks are allegedly weak and entitled to a narrow scope of protection (Applicant's Brief at 1). This assertion is based solely on Applicant's asserted evidence of active third-party registrations in Class 3² and alleged third-party use. However, Applicant's evidence is insufficient to even support a finding that Opposer's marks are weak let alone be dispositive of the entire likelihood of confusion issue. To the contrary, Opposer's evidence and Applicant's lack thereof lead to the opposite conclusion. In view of Opposer's objections to the admissibility, weight and relevance of Applicant's alleged evidence regarding the sixth *du Pont*

¹ The evidentiary factors to be considered in this case include at least the similarity of the marks as to appearance, sound, connotation and commercial impression; the similarity and nature of the goods; the similarity of established, likely-to-continue trade channels and targeted customers; the strength of the asserted marks; the fame of the prior marks and the purchasing conditions.

factor, a genuine dispute of material fact exists as to “the number and nature of similar marks in use on similar goods” and whether any third-party use tends to weaken Bach’s RESCUE marks.

Generally, the probative value of evidence under the sixth *du Pont* factor is limited absent a showing of the nature, extent and scope of such third-party uses and of the public’s likely awareness of such uses. *See Han Beauty, Inc. v. Alberto-Culver Co.*, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001). The probative value of such evidence also is limited to the extent that the goods and services in connection with which the third party marks are used are not similar to the goods at issue. *See Charrette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040 (TTAB 1989).

Here, Applicant fails to demonstrate the extent of the asserted third-party use, the nature of that use or the public’s awareness or exposure to the alleged use. Moreover, many of the goods associated with the asserted uses are completely unrelated to Opposer’s goods. The word RESCUE is also used in the asserted uses as as part of an informative phrase or in conjunction with other distinctive elements, such as house marks, which result in marks which create markedly different commercial impressions than that created by Applicant’s and Opposer’s marks.

a) Third Party Registrations

Applicant’s information concerning third-party registrations attached at Ex. 100-147, is not at all probative of the strength of Opposer’s marks and should be accorded no weight. For example, Applicant has made an inadequate showing that the marks found in the search are in use and, if used, that they are used for goods related to those of Opposer and Applicant.

² The classification of goods and services has no bearing on the question of likelihood of confusion. *See Jean Patou, Inc. v. Theon Inc.*, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993).

Third-party registrations are not evidence that the marks depicted therein are in use or that the public is aware of them, and they are thus of no probative value under the sixth *du Pont* factor. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given *any* weight”) (emphasis in original); *General Foods Corporation v. Ito Yokado Co., Ltd.*, 219 USPQ 822 (TTAB 1983) (“[third party registration] evidence does not aid us *a whit* in evaluating the likelihood of confusion as that question must be determined according to the environment which exists in the *marketplace*, not by what is reflected by the search files of this Office”).

Moreover, and contrary to Applicant’s contention that the majority of the cited registrations “are used for skin creams, moisturizers and cleansers” (App. Br. at 3), nearly half of Applicant’s cited registrations are *not* used for “skin creams, moisturizers and cleansers” and are thus not relevant. De Luca Dec. ¶ 3. See *In re Melville*, 18 USPQ2d 1386, 1388-89 (TTAB 1991) (registrations for goods unrelated to those at issue are irrelevant). As shown by the list in De Luca Dec., ¶ 3, nearly half of Applicant’s cited registrations are *not* used for “skin creams, moisturizers and cleansers.”

Many of Opposer’s cited marks also include other words or phrases which differentiate them from Opposer’s and Applicant’s marks in terms of sound, appearance, meaning or connotation and are even less relevant to the consideration of the strength of Opposer’s marks.

Applicant’s assertion that its cited registrations include “RIGHT RESCUE” and “A LOTIONAL RESCUE” is untrue. (App. Br. at 3). Applicant’s exhibits contain no registration for RIGHT RESCUE. USPTO status records also reveal that no Section 8 Declaration has been filed with respect to the registration of “A LOTIONAL RESCUE.” De Luca Decl., ¶ 27.

b) Applicant’s Alleged Evidence of Use of Third-Party Marks Should Not be Considered or Only Given Minimal Weight

i) The Declaration of James Wray

The Wray declaration and exhibits thereto should not be considered. Applicant did not disclose any third-party evidence of use in its initial disclosures. Nor did Applicant produce such evidence during discovery, even though Applicant apparently had possession of these exhibits during the discovery period and they were responsive to Opposer's discovery requests. *See De Luca Dec.* ¶¶ 11-13; 15-18. Applicant's failure to comply with discovery rules should preclude its untimely attempt to introduce responsive information at this time. *See TBMP* §527.01(e) and the cases cited in fn. 352.

Additionally, many of Applicant's exhibits (i.e., Ex. Nos. 1001-1013; 1015; 1017-1018, 1020-1027; 1029-1032) have not been properly authenticated and include no identification of their source. *De Luca Dec.* ¶¶ 4, 5. The images of many of the goods in Ex. 1001-1057 are also unclear and the wording illegible. Nor do those exhibits provide sufficient information to determine how they are used, if at all. *Id.* They should not be admissible. *Harjo v. Pro-Football Inc.*, 50 USPQ2d 1705, 1722 (TTAB 1999), *rev'd on other grounds*, 284 F.Supp.2d 96, 68 USPQ2d 1225 (D.D.C. 2003); *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) (excerpt from a newspaper or periodical is not admissible under 2.122(d) if it is incomplete, illegible or not fully identified as to its name and date of the published source).

Applicant's proffer of website printouts (Ex. 1001-1057) for the truth of the matters asserted therein is objectionable as hearsay, as is Mr. Wray's testimony to the same effect. Even if admissible, many of the proffered exhibits display goods unrelated to Opposer's goods (such as hair care products). *See De Luca Dec.* ¶¶ 4, 5.

Many of the Wray exhibits also include prominent use of the manufacturers' house marks or brands or other distinguishing elements and/or additional words, which further calls into

question their probative value. See, e.g., VASOLINE INTENSIVE RESCUE CLINICAL THERAPY SKIN PROTECTANT BODY LOTION and CLINIQUE INTENSIVE RESCUE RESXUE ANTIOXIDANT NIGHT MOISTURIZER (App. Br. At 8). The number of websites showing alleged third-party use is also quite limited. Additionally, there is nothing in the record to indicate the extent of the public exposure to the production of these web pages that marks and products were actually recognized by consumers. Finally, the Wray indicates no personal knowledge of any of the products in the exhibits.

If the Wray Declaration and exhibits are admissible at all, they are entitled to little or no probative weight.

ii) The Declaration of Jessica Bouwsma

The Jessica Bouwsma declaration and exhibits are not admissible evidence and, even if considered, should be accorded little or no probative value under the sixth *du Pont* factor.

Ms. Bouwsma declares that she “correlated a lists of advisements [sic] in Applicant’s Exhibits 1001-1057 provided by James C. Wray”; that she “produced the summary shown in Applicant’s Exhibits 1058-1, 1058-2 and 1058-3” and that “the compilation of the products shown are skin lotion and cream products available on the Internet.” However, she has not testified that she has any knowledge of the truth of any of the matters illustrated in Exhibits 1001-1057. Thus, her testimony is inadmissible hearsay as to her “compilation of the products.”

Ms. Bouwsma’s declaration has absolutely no foundation, *i.e.*, she has not indicated who she is, in what capacity she operates, who she works for, her age, etc. Thus, she has not been shown to be competent to testify as to the matters stated in her declaration. See TBMP § 528.05(b); Fed.R.Civ.P. 56(e).

Ms. Bouwsma's exhibits are unreliable. Her declaration does not indicate when she received materials from Mr. Wray or when and why she provided the attachments to her declaration. There is no correlation with Mr. Wray's exhibit numbers. Her exhibits are inaccurate to the extent that they include items that are not skin lotion and cream products - *e.g.*, some are hair products. De Luca Dec. ¶ 6. Additionally, some of the information in Ms. Bouwsma's exhibit does not correlate to the Wray exhibits. *Id.*, ¶ 7. Descriptions in her exhibits also contain inaccuracies. For instance, numerous products listed in her exhibits omit the house mark in the name of the product or include other errors. *Id.*, ¶ 9. She also has omitted some materials in the Wray exhibits from her exhibits (*e.g.*, Ex. 1016). *Id.* ¶ 8. Further, the exhibits consist merely of a list of alleged third-party marks, with no indication as to whether consumers are aware of them.

Even if considered, the Bouwsma declaration and exhibits should be entitled to no probative value.

iii) The Declaration of Charles Richards

As noted, Applicant failed to disclose third-party use allegedly including the word RESCUE in its initial disclosures or during the discovery period. Accordingly, Exhibit Nos. 1059-1061, which purport to be photographs of products "which use brand names including RESCUE," should not be admissible. De Luca Dec. ¶ 19.

The exhibits to Mr. Richards' declaration also lack sufficient authentication and identification., *e.g.* Mr. Richards does not indicate which products he ordered from the listings and what "additional advertised products" means, nor does he say from whom he ordered the specific products or how they were obtained. Nor does he indicate that he has any familiarity with the products.

Regarding Ex. 1059-1061, Mr. Richards' testimony that he ordered all the products and photographed them on the same day is highly implausible. In any event, the photos are not sufficiently clear to fully identify the products. De Luca Dec. ¶ 10. Moreover, Mr. Richards made no attempt to identify the products in his exhibits by brand name or product type or to identify whether the products are related to Opposer's goods. Nor did he provide any correlation between the photos included in his exhibits and the information in Exhibit Nos. 1001-1057 or indicate who took the photographs. For all of these reasons, Exhibit Nos. 1059-1061 and Mr. Richards' testimony are unreliable and should not be considered.

iv) The Declaration of Lindsey Barber

Neither Lindsey Barber nor the exhibits attached to her declaration (Ex. 1062-1079) were identified in Applicant's initial disclosures, nor disclosed during discovery, although covered by Opposer's discovery requests (De Luca Dec. ¶ 19) and should be disregarded solely for that reason.

Further, Ms. Barber does not indicate where the products were purchased, who purchased them or when the purchases took place. Ms. Barber also makes no attempt to identify the individual brand names or product types shown in the exhibits, whether they relate to Opposer's goods and whether she has any familiarity with the products. Her declaration and exhibits should be disregarded.

c) Even Weak Marks Deserve Protection against Confusingly Similar Marks

The courts and TTAB recognize that marks deemed "weak" are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (CCPA 1974); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982);

TMEP Sec. 1207.01(b)(ix). This is especially true where, as here, the marks evoke identical commercial impressions and are used on identical and closely related goods.” *In re Hub Distributing, Inc.* 218 USPQ 284, 286 (TTAB 1983).

2. **The Marks are Highly Similar in Appearance, Sound, Meaning and Commercial Impression**

Applicant’s mark SUNBURN RESCUE and Opposer’s pleaded RESCUE marks are similar in appearance, pronunciation, meaning and commercial impression. See Complaint, ¶ 9. The Board makes its determination of the similarities of marks by comparing them in their entireties in terms of appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir, 2005). This factor alone can be dispositive of proving a likelihood of confusion. *In re Mack*, 197 USPQ 755, 757 (TTAB 1977).

The term “SUNBURN” in Applicant’s mark is merely descriptive of the nature of Applicant’s products and was disclaimed by Applicant. Fact 23. Because the term “SUNBURN” is descriptive, the word “RESCUE” is the dominant element of Applicant’s mark. Greater weight is given to the dominant feature in determining whether there is a likelihood of confusion, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000).

In this case, Applicant’s mark shares the dominant feature “RESCUE” of Opposer’s marks. Applicant’s mark incorporates the entire registered mark RESCUE. The addition of the descriptive word SUNBURN in Applicant’s mark SUNBURN RESCUE does not obviate a likelihood of confusion. See *In re Xerox Corp.*, 194 USPQ 449 (TTAB 1977) (“6500” and “6500 LINE” are basically the same because the addition of the descriptive word “line” does not

distinguish the marks). Likelihood of confusion is often found where the entirety of one mark is incorporated within another.³ Where, as here, a substantial and distinctive part of Opposer's RESCUE marks has been appropriated, confusing similarity must be found to exist. *See In re Sawyer of Napa, Inc.*, 222 USPQ 923, 924 (TTAB 1983).

3. The Goods/Services are the Same, Similar and Related

The goods and services of the parties on or in connection with which the marks are intended to be used are the same, similar and related. The relatedness of the goods and services must be determined based on the goods identified in Opposer's pleaded registrations and pending application, *as well as* those on which the mark is in use in accordance with common law (*e.g.*, Bach's" skin creams and skin moisturizers, skin cleansers and skin toners; lip balms; cosmetic preparations" and the "balms, gels, cremes, liquids and sprays" covered by Applicant's opposed application) (See Facts 2-8, 19, 24-26). *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987).

The goods or services of the parties need not be identical or even directly competitive to find a likelihood of confusion. *See Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002). They only need to be related in some manner or the conditions surrounding marketing be such that they could be encountered by the same purchasers under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that the goods come from a common source or originate from the same producer. *In re Martin's Famous*

³ *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT & surfer design vs. CONCEPT); *Coca-cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER & soldier design vs. BENGAL); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL & design vs. WEST POINT); *China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 1341 (Fed. Cir. 2007) (CHI vs. CHI PLUS); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 54 CCPA 1295, 376 F.2d 324 (1967) (THE LILLY vs. LILLI ANN); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE vs. CREST CAREER IMAGES).

Pastry Shoppe, Inc., 748 F.2d 1565, 1567 (Fed. Cir. 1984). When conflicting parties' goods are closely related, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods or services. See *Ancor, Inc. v. Ancor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981).

Here, the goods of the parties are substantially identical or highly related and are likely to be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods are related in some manner or come from or are sponsored by, authorized by, or licensed by a common source. As evidence of the similarities, Opposer is submitting numerous use-based, third-party registrations showing that various entities have adopted a single mark for both sun care products and other skin creams in Classes 3 and 5. De Luca Dec. ¶ 20, Tab G. These registrations have probative value to the extent that they serve to suggest that the goods identified therein are of a type which may emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Opposer also is submitting evidence that third parties have used and suggested use of its products to soothe sunburn. Bunton Dec. ¶¶ 3-6, Ex. 1-5.

Further, Applicant's retail store services featuring sun care lotions, balms, gels, crèmes, liquids and sprays and Opposer's goods, namely, its skin lotions, balms, gels creams, sprays and oral preparations are related. See e.g., *In re Peebles, Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992) ("there is no question that store services and the goods which may be sold in that store are related goods and services for the purpose of determining likelihood of confusion"). Applicant's services are not limited as to type of sun care lotions, balms, gels, crèmes, liquids and sprays, so we can assume that it would sell all types, including the types offered by Opposer.

4. The Trade Channels are the Same

The goods in Applicant's SUNBURN RESCUE application and Opposer's RESCUE, RESCUE REMEDY and RESCUE CREAM registrations and application are not limited as to any channels of trade or classes of customers. Accordingly, they are presumed to travel through all ordinary channels of trade, including the channels of trade related to Applicant's sun care products and retail store services. *Time Warner Entertainment Co.*, 65 USPQ2d at 1662. See also *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000) ("Because the goods are legally identical, they must also be deemed to be sold in the same channels of trade to the same classes of customers").

5. The Targeted Customers are the Same

The goods covered by the respective applications and registrations of the parties are not limited as to any age groups or classes of customers. Therefore, the intended customers for Applicant's and Opposer's products must be presumed to be the same. See *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers"). The class of purchasers for retail skin care store services featuring skin care creams, etc., as well as for skin cream goods, include the general public and thus, at a minimum, overlap.

6. Opposer's RESCUE Marks are Well Known

By virtue of Opposer's continuous and substantial promotion and sale of goods covered by its pleaded registrations and application, its maintenance of high quality standards relating to those products and third-party recognition thereof, purchasers and others have come to recognize the RESCUE marks as indications of origin in Opposer and Opposer has established valuable

goodwill and exclusive rights in those marks. Tominey Dec., ¶ 40; Complaint, ¶8. Opposer's RESCUE marks had such recognition well before the filing of the application for the mark SUNBURN RESCUE. Tominey Dec , ¶ 41.

7. **The products are relatively inexpensive and purchasers exercise an ordinary standard of care**

Opposer's products are relatively inexpensive. Tominey Dec. ¶ 31. Purchasers of relatively inexpensive products are held to a lesser standard of purchasing care and, thus are more likely to be confused as to the source of the goods. *E.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984). No restrictions as to price are included in the involved registrations and applications. Thus, it is presumed that the products would be sold "at all the usual prices" at which Applicant's "sun care lotions, balms, gels, crèmes, liquids and sprays" would be sold. *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana, Inc.*, 98 USPQ2d 1921, 1933 (TTAB 2011). Such products are ordinary consumer items available at a relatively low cost. *See Eveready Battery Company, Inc. v. Green Planet, Inc.*, 91 USPQ2d 1511, 1516 (TTAB 2009) (purchasers of casual, low cost ordinary consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods).

IV. **CONCLUSION**

For the reasons set forth above, Opposer is entitled to judgment as a matter of law that it has standing to bring this opposition and, conversely, genuine issues of material fact preclude an award of summary judgment to Applicant on the likelihood of confusion issues, thus precluding the grant of Applicant's motion on that ground.

Respectfully submitted,

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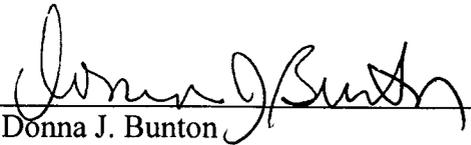
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S OPPOSITION TO APPLICANT ABSOLUTELY NATURAL, INC.'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR SUA SPONTE SUMMARY JUDGMENT AS TO STANDING was served on Applicant along with supporting declarations at the following address of record by depositing same in the United States mail, postage prepaid, this 22nd day of June 2012:

James C. Wray, Esq.
1493 Chain Bridge Road, Suite 300
McLean, VA 22101-5726



Donna J. Bunton