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

Proceeding	91200168
Party	Defendant Absolutely Natural, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Bach Flower Remedies Limited,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91200168
)	Serial No.: 85/111,156
Absolutely Natural, Inc.)	
)	
Applicant.)	

APPLICANT’S REPLY BRIEF

There is no genuine issue of material fact. Applicant is entitled to judgment as a matter of law. The only issues are:

Whether third-parties use marks with the word “rescue” on products in Class 3?

Whether third-parties have registered marks including the word “rescue” for us on goods in Class 3?

There is no genuine issue of material fact.

The material facts are not controverted. The only issue is a question of law:

Whether Applicant is entitled to registration of the suggestive mark SUNBURN RESCUE as a matter of law?

The Trademark Attorney who examined the application concluded that SUNBURN RESCUE is not confusingly similar to any trademark in a registration or application.

There are many third-party registrations in Class 3 which include “rescue” as part of a mark. That fact is uncontroverted.

There are many applications for third-party registrations in Class 3 which include “rescue” as part of a mark. That fact is uncontroverted

There are many third-party uses of trademarks which include the word “rescue” for products that would be included within Class 3. That fact is uncontroverted.

There are many commercial advertisements for products sold by third-parties which include the word “rescue” that would be included within Class 3. That fact is uncontroverted.

Opposer is one of many companies which includes the word “rescue” in trademarks for goods that are or would be classified in Class 3. That fact is uncontroverted.

The declarations of the Opposer's counsel Bunton and De Luca present arguments that do not arise to genuine issues of material fact.

The declaration of Carl Finkler, Director of Marketing of Nelson Bach USA contains no controverted material fact. The declaration of Joel Tominey, Commercial Manager of Bach Flower Remedies' parent A. Nelson & Co., contains no controverted material fact. However, the Tominey U.K. declaration should be struck because it does not comply with 28 U.S.C. 1746 as a matter of law.

Many third parties have registered or applied for registration in Class 3 of trademarks that include the word "rescue". Many third parties have advertised goods that would be classified in Class 3 using trademarks including the word "rescue". Many third parties sell goods that would be classified in Class 3 using trademarks including the word "rescue".

Opposer is one of many companies that have registered or applied for registration and advertise and sell products having trademarks that include the word "rescue".

There is no genuine issue of material fact.

The issues may be decided as a matter of law for the reasons stated in Applicant's motion for Summary Judgment.

The Opposer's Counsel DeLuca's arguments that "nearly half" of the registrations are not used for skin creams implies that that more than half or the majority of the registrations are used for skin creams, moisturizers and cleansers as stated in Applicant's Motion. That fact is not disputed.

Opposer's Counsel correctly points out there is no RIGHT RESCUE. On page 8 of Applicant's Motion RIGHT RESCUE was incorrect; R inadvertently replaced an N. The correct

registered mark in Class 3 is NIGHT RESCUE as shown in Applicant's Exhibit 109. On the same page VASELINE was misspelled.

Opposer's Counsel quoted Opposer's Counsel DeLuca's argument. It is believed the matter discussed was fully answered. The *jus terii* defense in the Answer was based on the 47 registrations in Class 3 for marks including RESCUE.

Opposer's Counsel argues that the exhibits 1001-1018 are not properly authenticated. Each of those exhibits displays its URL source and the date and is self-proving as well as verified.

Opposer's Counsel argues that the number of websites is quite limited. That is not a controverted fact.

The Opposer's Counsel objected to the Bouwsma declaration. The Bouwsma Exhibits 1058-1, -2 and -3 are described as a summary of exhibits 1001-1057 and are admissible as a summary. Summaries are encouraged.

Opposer's Counsel objected to the date that the photographs were taken for Richard's deposition. Counsel is correct. The date the photographs were taken was April 29, 2012.

Opposer's Counsel objected to the Barber declaration, as not saying who purchased the products. The Barber Declaration stated clearly that Absolutely Natural Inc., the Applicant, purchased the products.

Among the purchased products shown in the photogrpahs are:

- Vaseline
intensive rescue TM Ex. 1079
- Neutrogena
14- day skin rescue TM Ex. 1078

- Garnier
Moisture Rescue Ex. 1070, 1074
- KMS California
after sun rescue Ex. 1073
- now solutions
Wrinkle Rescue Ex. 1069
- Molton Brown Desert Bloom
Intensive Foot Rescue Ex. 1068
- Molton Brown
eye-rescue Ex. 1067
- Energize
RESCUE ROLLETTE Ex. 1065
- peaceful mountain
travel rescueTM
throat rescueTM
back neck rescueTM
cold and sinus rescueTM
stomach rescueTM Ex. 1064
- Desert Essence
Lip Rescue® Ex. 1063, 1071
- Jack Black
Eye Rescue Ex. 1062

On page 18 Opposer's Counsel misquotes King Candy v. Eunice King's Kitchen, 182 USPQ 108 (CCPA 1974). There the court upheld the TTAB's finding of no likelihood of confusion and held that weak marks are entitled to limited protection.

Opposer's registered marks are:

1,237,546 - RESCUE REMEDY in Class 032 for

herbal beverage made from essences (not essential oils) extracted from flowers.

1,822,260 - RESCUE REMEDY in Class 5 for

homeopathic pharmaceutical preparations made from flower extract for use in alleviating emotional and mental distress.

2,517,685 - RESCUE in Class 5 for:

homeopathic pharmaceutical preparations made from flower extract for use in alleviating emotional and mental distress.

And also in Class 30 for

herbal food beverage concentrate made from essences (not essential oils) extracted from flowers.

3,147,761 - RESCUE CREAM in Class 5 for

preparations made from flower extracts in the form of creams for alleviating emotional and mental distress.

Opposer's Counsel states that marks "evoke identical commercial impressions" That, of course, is untrue and is a question of law.

On page 19 Opposer's Counsel argues that the Applicant's mark and the Opposer's marks had similar appearance, pronunciation, meaning and commercial impression. That is not true. It is clear that in their entireties the marks are not confusingly similar in appearance, pronunciation, meaning and commercial impression.

Applicant's two words in SUNBURN RESCUE are connected by their meaning – rescuing from sunburn. The mark must be considered in its entirety. That connection gives the two-word mark the unique appearance, pronunciation, meaning and commercial impression.

Opposer's arguments of dominant feature have no significance, because the Applicant's two words are connected in meaning, one word giving the other word the meaning in the entirety.

Opposer's Counsel's arguments about similarities and relatedness of the goods is incredulous and is a matter of law.

The distinctions are that Applicant's goods are for one purpose – treating sun burned skin. Opposer's marks are for alleviating emotional and mental distress with essence extracted from flowers. That uncontroverted fact is seen in Opposer's registrations and in Opposer's products where alleviating emotional and mental distress is emphasized. The purpose of Opposer's goods are stated "to manage your everyday stress" in Opposer's BF00097. In Opposer's BF00179 active ingredients (flower extracts) are listed along with "Purpose[,] courage and presence of mind[,] focus when ungrounded patience with problems and people[,] balanced mind when losing control[,] softens impact of shock".

The goods listed in Opposer's registrations and the words written on its product packages are uncontested matters of fact.

Whether the differences in the goods of Opposer and Applicant make Applicant's SUNBURN RESCUE registrable, as previously concluded by the Examining Attorney, is a matter of law.

Opposer's Counsel's statement on page 21 that "the goods of the parties are substantially identical" exceeds credulity. Opposer's goods are stress relievers. Applicant's goods are applied after sunburn.

There is no evidence of Applicant's use, however its intended retail sales are described as in "retail establishments featuring sun care lotions, gels, crèmes, liquids and sprays". The question of what "featuring" means is a question of law. Applicant suggests that "featuring" has its ordinary meaning of something more than just selling.

There is no contested fact concerning channels of trade.

The target customers of Opposer's marks appear to be people in need of "alleviating emotional and mental stress".

The facts in Opposer's depositions and any material facts established in Opposer's Finkler and Tominey declarations are not contested. No targeted customers were set forth in those declarations. Applicant's target customers are people with sunburns. Who are targeted customers is a matter of law.

With the exception of opinions and any matters of laws expressed in the Tominey, Wimbledon, London U.K. declaration, no material fact is contested as a matter of law. The Tominey declaration should not be considered as a matter of law because it does not comply with 28 U.S.C. 1746.

No facts have been presented as to whether the Opposer's marks are well known.

There is no contested material fact concerning prices.

SUMMARY

There is no genuine issue of material fact. Applicant is entitled to judgment as a matter of law.

CONCLUSION

Granting Applicant's Motion for Summary Judgment is requested.

Respectfully,

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July 12, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion to Substitute is being filed electronically with the United States Patent and Trademark Office Trademark Trial and Appeals Board and being served by first class mail, postage prepaid, on July 12, 2012, on the following:

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