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

Proceeding	92048092
Party	Defendant H2OCEAN INC.
Correspondence Address	Kevin H. Fabrikant Law Offices of Kevin H. Fabrikant & Assoc. P.L. Regions Bank Building, 450 North Park Road, Suite 300 Hollywood, FL 33021 UNITED STATES khf@khflaw.com
Submission	Motion to Suspend for Civil Action
Filer's Name	KEVIN H. FABRIKANT, ESQ.
Filer's e-mail	khf@khflaw.com
Signature	/s/ KEVIN H. FABRIKANT
Date	11/19/2007
Attachments	Motion to Suspend Proceedings.pdf (8 pages)(75094 bytes) Exhibit A.pdf (50 pages)(1075266 bytes)

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

Fleming and Company, Pharmaceuticals,
Petitioner,

Cancellation No. 92048092
Reg. No. 3,074,033

v.

H2Ocean, Inc.,
Respondent.

_____ /

**RESPONDENT’S MOTION TO SUSPEND PROCEEDINGS AND INCORPORATED
MEMORANDUM OF LAW**

Respondent, H2Ocean, Inc. (“H2Ocean”), moves the Trademark Trial and Appeal Board (the “Board”), pursuant to 37 C.F.R. §2.117(a) and TBMP 510.02(a), to suspend this action until such further time as the United States District Court for the Southern District of Florida determines nearly identical issues involving nearly identical parties, and states:

I. INTRODUCTION

This is an action for cancellation of Respondent H2Ocean's registered trademark, Ocean Aid Spray (the “Mark”), by Petitioner, Fleming and Company, Pharmaceuticals (“Fleming”). Fleming’s Petition for cancellation of the Mark is based on grounds of likelihood of confusion between the parties’ marks and fraud. Following the filing of the instant action, and prior to knowledge of same, H2Ocean filed the action styled, *Ocean Aid, Inc. v. Fleming and Company, Pharmaceuticals, d/b/a Fleming & Co. Corporation*, Case No. 07-80889-CIV-Ryskamp, pending before the United States District Court for the Southern District of Florida (the “District Court Action”). Fleming has answered H2Ocean’s Complaint in the District Court Action and asserted counterclaims demanding cancellation

of the Mark's registration and seeking damages for alleged violations of the Lanham Act and state trademark laws. See Complaint for Declaratory Judgment and Answer and Counterclaim filed in the District Court Action attached hereto as collective **Exhibit A**. Discovery has not commenced by any party to this action and, as of the date of filing this Motion, H2Ocean has not responded to Fleming's Petition for Cancellation.

II. SUMMARY OF THE ARGUMENT

Where related claims by the same parties are brought before the Board and a federal district court, it is the standard procedure of the Board to suspend its proceedings pending the outcome of the district court action. See *Alfred Dunhill of London, Inc. v. Dunhill Tailored Clothes, Inc.*, 293 F.2d 685 (Ct. Cust. App. 1961).¹ Here, Petitioner's counterclaim in the District Court Action seeks relief which is inclusive of the relief sought in this action. The District Court is also demanded to declare H2Ocean's right to use the Mark and determine issues of state and federal trademark infringement and unfair competition. Staying this proceeding during the pendency of the District Court Action will likely ensure that all issues are concluded in one forum and will further judicial economy as the District Court's determination will have a direct bearing on the cancellation issues in this proceeding.

¹Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceedings will have a bearing on the issues before the Board. See TBMP 510.02(a).

III. ARGUMENT

A. THE BOARD SHOULD SUSPEND THIS PROCEEDING AS THE DISTRICT COURT ACTION WILL RESOLVE ALL ISSUES PRESENTLY BEFORE THE BOARD

It is well established that the Board has concurrent jurisdiction over registration and cancellation of trademarks with the federal district courts. See 15 U.S.C. §§1119, 1067. The Board, however, does not have jurisdiction to determine issues of trademark infringement. See 15 U.S.C. §1067. Instead, the Board is established to determine and decide the parties' respective rights of registration in contested proceedings. *Id.* As such, when questions regarding a registration's validity are raised along with issues of trademark infringement, the district court should determine both issues. See *Goya Foods, Inc. v. Tropicana Products, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848 (2d Cir.1988) (where a district court suit concerns infringement, the interest in prompt adjudication of all issues far outweighs the value of having the views of the PTO).

H2Ocean has a clear legal right to have the District Court determine whether or not its Mark infringes upon Fleming's mark. See 28 U.S.C. §2201.² Furthermore, given the federal and state unfair competition claims raised by Fleming through its counterclaim in the District Court Action, the parties would have to re-litigate a similar issue regarding the likelihood of consumer confusion as to the source of the goods. See 15 U.S.C. §1052; See *also, Goya Foods*, 846 F.2d at 854 (following the registration proceeding a district court

²See *Goya Foods*, 846 F.2d at 854 (delaying consideration of a declaratory action pending the outcome of a TTAB proceeding undercuts the purpose of declaratory relief by either forcing the alleged infringer to either abandon use of the trademark or persist in piling up potential damages).

would still independently have to determine the validity and priority of the marks and the likelihood of consumer confusion as to the source of the goods).

Here, the issues presented to the Board are properly raised under the Board's authority to determine H2Ocean's right to registration of its Mark. However, a determination by the Board as to the validity of the Mark's registration will not significantly affect the declaratory relief sought in the District Court Action or a determination of whether the Mark infringes upon Petitioner's mark and violates the Lanham Act and state trademark laws. See *Goya Foods*, 846 F.2d at 854 (any presumptions raised by obtaining a trademark registration, or resisting cancellation of, do not significantly affect the course of a trademark infringement action); See also, *Whopper-Burger, Inc. v. Burger King Corp.*, 171 U.S.P.Q. 805, 807 (T.T.A.B. 1971)(stay of Board proceeding is proper as a decision by the district court would be binding on the Patent Office whereas a determination by the Patent Office as to the registrant's right to retain its registration would not be binding or res judicata in respect to the district court proceeding).³

While this Action may resolve whether the Mark's registration is valid, it will not resolve the issues raised in the District Court Action. Even if the Board determines cancellation of H2Ocean's Mark is appropriate, the same would not resolve all the issues

³Although the Board's determination in the registration proceeding is considered controlling in the district court on issues of fact "unless the contrary is established by testimony which in character and amount carries thorough conviction," this ostensibly deferential standard is substantially qualified because "the civil action before the [d]istrict [c]ourt is intended to be a trial *de novo*. See *Goya Foods*, 846 F.2d at 852-53; citing *Wilson Jones Co. v. Gilbert & Bennett Manufacturing Co.*, 332 F.2d 216, 218 (2nd Cir. 1964).

presented in the District Court Action.⁴ As such, a stay by the Board of the instant proceedings is proper.

B. JUDICIAL ECONOMY FAVORS A STAY OF THE PROCEEDINGS UNTIL THE DISTRICT COURT ACTION IS FINAL

Judicial economy warrants a consolidation of issues into one forum as the District Court's determination will have a direct bearing on the cancellation issues in this proceeding. See *The Other Telephone Co. v. Connecticut National Telephone Company, Inc.*, 181 U.S.P.Q. 779 (Dec. Comm'r Pat. 1974). The parties' dispute and controversy over the right to use the Mark gives H2Ocean the right to seek a determination of non-infringement from the federal courts. See 28 U.S.C. §2201.⁵ H2Ocean also has a clear legal right to have the federal court determine whether or not its Mark infringes upon the Petitioner's marks. See *Goya Foods*, 846 F.2d at 854 (delaying consideration of a declaratory action pending the outcome of a T.T.A.B. proceeding undercuts the purpose of declaratory relief by either forcing the alleged infringer to either abandon use of the trademark or persist in piling up potential damages).

Should the Board decide issues related to cancelling H2Ocean's Mark, the very same issues will be heard again by the District Court. See 15 U.S.C. §1071. Furthermore, the District Court, when determining whether to cancel a registration, should hear the

⁴However, the District Court Action can resolve all of the issues raised in this cancellation proceeding.

⁵The purpose of a declaratory judgment is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim. See *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 150 U.S.P.Q. 88 (9th Cir. 1966).

issues *de novo*. See *Goya Foods*, 846 F.2d at 853. Here, having the Board determine whether cancellation of H2Ocean's Mark is proper will only result in duplicate litigation in the District Court Action. While the Board's determination will be influential upon the District Court, the findings of fact by the Board are not conclusive upon the District Court's considerations. *Id.* The District Court is authorized to hear testimony and consider evidence that may have already been presented to the Board in this proceeding. *Id.* The duplicate presentation of testimony and evidence may provide for inconsistent results and burdens the Board and the District Court as a previous determination by the Board is not binding in the District Court Action. Moreover, the party litigants will incur additional costs. As such, judicial economy favors having these proceedings stayed pending final adjudication in the District Court Action.

IV. CONCLUSION

As the District Court's determination of exact issues involving similar parties in the District Court Action will be definitive of the issues before the Board, these proceedings should be stayed until a final adjudication has been reached in the District Court Action. Moreover, staying this proceeding weighs heavily in the interest of judicial economy and would benefit the parties by having all issues between them resolved in one forum.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically through the Electronic System for Trademark Trials and Appeals on this 19th day of November, 2007 on all counsel or parties of record on the attached service list.

RESPECTFULLY SUBMITTED:

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Attorneys for Respondent

BY: /s/ KEVIN H. FABRIKANT
KEVIN H. FABRIKANT, ESQUIRE
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

MAGISTRATE JUDGE
WITUNAC

Case No.: _____ -CIV- _____

07-80889

CIV-RYSKAMP

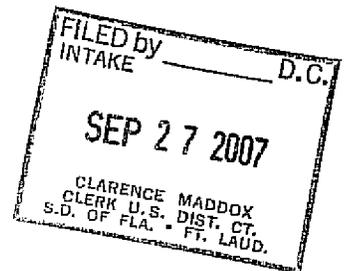
OCEAN AID, INC.,

Plaintiff,

vs.

FLEMING AND COMPANY,
PHARMACEUTICALS, D/B/A
FLEMING & CO. CORPORATION,

Defendant.



COMPLAINT FOR DECLARATORY RELIEF

OCEAN AID, INC. (hereinafter Plaintiff or "OCEAN AID"), by and through its undersigned counsel, hereby files this suit against Defendant FLEMING AND COMPANY, PHARMACEUTICALS, D/B/A FLEMING & CO. CORPORATION (hereinafter Defendant or "FLEMING"), and alleges:

1. OCEAN AID brings this Action for Declaratory Relief pursuant to 28 U.S.C. § 2201, *et seq.*, the Declaratory Judgment Act, the trademark laws of the United States, 15 U.S.C. § 1051, *et seq.*, and under applicable state and common law.
2. This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. § 1121, *et seq.*, and 28 U.S.C. §§ 1331, 1228, 1367(a) and 2201.
3. Venue in this Court is proper under 28 U.S.C. § 1391(b) because the facts, matters and events giving rise to the claims set forth herein have in large part occurred in this Judicial District, OCEAN AID is located in this Judicial District, and OCEAN AID is qualified to do business in the State of Florida. Upon information and belief, the Defendant is doing

EXHIBIT

A

business in this Judicial District and is, therefore, subject to personal jurisdiction in this District.

PARTIES

4. OCEAN AID is a corporation organized and existing under the laws of the State of Florida with its principle place of business at 3533 High Ridge Road, Boynton Beach, FL 33426. OCEAN AID is the successor licensee of the "Ocean Aid Spray" ® trademark (the "Mark") for the sea salt-based products that are administered with a unique bag-in-a-can dispensing system. H2OCEAN, INC. filed and was granted trademark registration for the Mark, and entered into a subsequent license for all uses of the Mark to OCEAN AID. The goods and services that are the subject of this Mark are set forth in Exhibit "A", H2OCEAN, INC.'s Principle Register publication. OCEAN AID is engaged in interstate commerce in the operation of its business. OCEAN AID has been granted and is the licensee of Trademark Registration Number 3074033 for its Mark. Attached hereto as Exhibit "B" is a copy of OCEAN AID's Mark.

5. Upon information and belief, Defendant is a corporation duly organized and existing under the laws of the State of Missouri with its principal place of business at 1733 Gilsinn Lane, Fenton, MO 63026, and is during all relevant times conducting business within this Judicial District. Upon information and belief, Defendant is in the business of manufacturing and selling medical-related products including a saline-based solution for use as a nasal spray, which is sold in interstate commerce. Defendant owns the mark "Ocean" pursuant to Registration Number 1652123.

BACKGROUND FACTS

6. OCEAN AID has been advertising and selling products under the Mark since 2005.

The products containing the Mark consist of a tall narrow metal can that is substantially white, with the trade name "Ocean Aid" printed in large font across the upper part of the can, a logo of OCEAN AID printed in the middle of the can, and the Mark "Ocean Aid Spray"® printed across the lower part of the can in a consistent font size, among other print. The dispensing mechanism consists of a white button on the top of the can that is depressed to release pressure which causes the contents to be emitted. Uses of the product bearing the Mark include using it as an external cleaning and wound healing promoter, uses in a person's mouth for cleaning and reducing harmful bacteria growth, and as more particularly set forth in the Mark's Registration.

7. Defendant's product at issue is a far smaller plastic bottle with the name "Ocean" printed in large font across the middle of the bottle, with an exaggerated "O", among other text, and has a large orange-colored screw-on cap. The bottle is squeezed to release the contents upward in a spray, or downward in a stream. Uses of Defendant's products bearing the mark "Ocean" are limited to it serving to moisten nasal passages and membranes. Attached hereto as Exhibit "C" is a copy of the Defendant's mark.

8. OCEAN AID's products containing the Mark are advertised and sold through thousands of independent distributors throughout the United States, as well as on-line, in print magazines, and in stores. Very substantial market penetration has been established by OCEAN AID's products containing the Mark represented further by sales of millions of bottles.

9. Defendant also has been selling its products bearing the registered trademark "Ocean" through retail stores and on-line.

10. Defendant has asserted that its registration of the mark "Ocean" precludes OCEAN

AID from validly using and registering its Mark.

11. Defendant provided OCEAN AID with its notice and cease and desist correspondence, a copy of which is attached hereto as Exhibit "D". Defendant has demanded that OCEAN AID begin to phase-out the use of its Mark on its products.

12. OCEAN AID however has refuted and denies Defendant's assertion that the Mark infringes upon Defendant's registered mark.

13. An actual case and controversy presently exists among the parties hereto concerning the allegations of trademark infringement, trade dress infringement, and false designation of origin under the Trademark Act of July 5, 1946, as amended, and under state law.

14. OCEAN AID is under a reasonable apprehension that it will imminently face a lawsuit from the Defendant on the grounds alleged herein and in Defendant's demand correspondence to OCEAN AID.

COUNT - I
(Declaratory Judgment - Trademark Infringement)

15. OCEAN AID realleges paragraphs 1 through 14 as if fully set forth herein.

16. Defendant claims that OCEAN AID's use of its registered Mark "Ocean Aid Spray" ® on the advertising and sales of its products infringes the Defendant's registered mark "Ocean". Accordingly, OCEAN AID's reasonable apprehension of impending litigation for trademark infringement and related claims and causes of action is well-founded.

17. Defendant's rights under the trademark "Ocean" does not vest the right to exclude all others from using the word "ocean" in conjunction with any other words such that the cumulative is a distinctively different mark than Defendant's "Ocean" mark.

18. OCEAN AID is therefore entitled to a judgment declaring that its use,

advertisement, promotion, sale, offering for sale, distribution and marketing of a salt-based formula using the word "ocean" in conjunction with the words "aid spray" have not and do not otherwise violate any rights to the Defendant's trademark "Ocean", or otherwise provide for unfair competition with the Defendant either under the United States Trademark Act of 1946, 15 U.S.C. § 1051 *et seq.*, or applicable state law.

WHEREFORE, OCEAN AID respectfully demands this Honorable Court enter an order declaring OCEAN AID's rights to use, exploit, promote and sell its products containing the Mark "Ocean Aid Spray" , and that such does not violate any rights Defendant has to the mark "Ocean", attorneys fees and costs of litigation under 15 U.S.C. § 1117 and Section 57.105, Florida Statutes, and such further relief this Honorable Court deems just and proper.

COUNT - II

(Declaratory Judgment - False Designation of Origin; 15 U.S.C. 1125(a))

19. OCEAN AID realleges paragraphs 1 through 14 as fully set forth herein.
20. OCEAN AID has affixed to its products the Mark, which products are manufactured, advertised, marketed, promoted and sold throughout the United States.
21. Defendant has affixed to its products its mark "Ocean". The Defendant's products are also manufactured, advertised, marketed, promoted and sold throughout the United States.
22. The Defendant's products bearing the "Ocean" mark are used exclusively as a nasal spray. Whereas, OCEAN AID's Mark is affixed to products that promote external wound cleaning properties, as well as for use as an oral cleanser.
23. However, the Defendant has set forth demand of infringement and likelihood of confusion by the consuming public because of OCEAN AID's use of its Mark upon its

products. Defendant contends that OCEAN AID's continued use of its Mark will cause:

- a) confusion, mistake and/or deception in the marketplace;
- b) give the false and misleading impression that the products bearing the Mark "Ocean Aid Spray" are likely to be thought of as having been derived by, manufactured by, promoted by, sold by, affiliated with, and/or endorsed by the Defendant, or that OCEAN AID is the source of the products bearing the "Ocean" mark;
- c) the consuming public to believe that OCEAN AID is passing off its products bearing the Mark as a product of the Defendant.

24. OCEAN AID seeks a declaration that its use of the Mark upon its products in the course of its manufacturing, advertising, marketing, promoting and sales throughout the United States does not cause a likelihood of confusion in the marketplace as to Defendant's products bearing its mark "Ocean".

WHEREFORE, OCEAN AID respectfully demands this Honorable Court enter an order declaring that OCEAN AID's manufacturing, advertising, marketing, promoting and sales throughout the United States does not cause a likelihood of confusion in the marketplace as to Defendant's products bearing its mark "Ocean", attorneys fees and costs of litigation under 15 U.S.C. § 1117 and Section 57.105, Florida Statutes, and such further relief this Honorable Court deems just and proper.

DEMAND FOR JURY TRIAL

OCEAN AID demands trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED



BY: _____

KEVIN H. FABRIKANT, ESQ.

FL BAR NO.: 0170070

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Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51, and 52

Reg. No. 3,074,033

United States Patent and Trademark Office

Registered Mar. 28, 2006

TRADEMARK
PRINCIPAL REGISTER

Ocean Aid Spray

H2OCEAN INC. (FLORIDA CORPORATION)
1301 WEST NEWPORT CENTER DRIVE
DEERFIELD BEACH, FL 33442

FOR: COSMETICS AND SKIN CARE PRODUCTS, NAMELY, SKIN CARE PREPARATIONS, SKIN AND FACIAL CLEANSERS, BODY SPRAYS, FACE AND BODY BEAUTY CREAMS, BODY GELS, AND BODY AND FACIAL SCRUBS, FACIAL MASKS, PRE-MOISTENED COSMETIC CLEANSING WIPES, BATH SALTS, FACE AND BODY MOISTURIZING SPRAYS, NON-MEDICATED BODY SOAKS, NAIL CARE PREPARATIONS, HAND AND FOOT DEODORANT SPRAYS, SKIN CREAMS, BEAUTY GELS, BODY SCRUBS, SUN TAN LOTION, SUN TAN GELS, SUN TAN SPRAYS, SUN-BLOCK LOTIONS, SUN-BLOCK GELS, SUN-BLOCK SPRAYS, PERSONAL DEODORANTS, SHAVING PREPARATIONS, AFTER-SHAVE LOTIONS, AFTER-SHAVE GELS, AFTER-SHAVE SPRAYS, SHAVING CREAMS, SHAVING FOAMS, SHAVING GELS, SHAVING LO-

TIONS, SHAVING SPRAYS, HAIR CARE PREPARATIONS, HAIR STYLING GELS, HAIR STYLING MOUSSES, SHAMPOOS, SOAPS, NON-MEDICATED MOUTH RINSES, TOOTHPASTE, TEETH WHITENING SPRAYS, TEETH WHITENING GELS, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 4-5-2004; IN COMMERCE 5-8-2005.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SPRAY", APART FROM THE MARK AS SHOWN.

SN 76-573,736, FILED 2-2-2004.

GEOFFREY FOSDICK, EXAMINING ATTORNEY

EXHIBIT A



EXHIBIT B

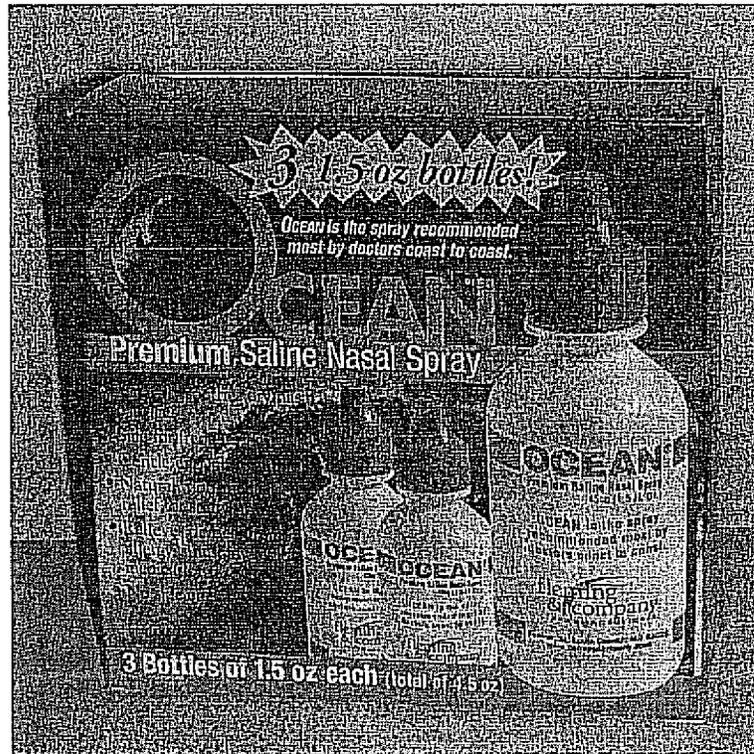


EXHIBIT C

From: Paul Fleischut [mailto:PFleischut@senniger.com]
Sent: Tuesday, September 11, 2007 8:46 AM
To: eddie@oceanaidproducts.com
Subject: Fleming / OCEAN

Dear Mr. Kolos -

Following up on our conversation yesterday, Fleming is considering whether it wishes to engage in discussions with you about a joint development and/or buy out type arrangement.

In the interim, on the independent issue of the use of OCEAN AID SPRAY, we ask that you confirm, by the September 14 date mentioned in our letter, that your company will phase out OCEAN AID SPRAY and abandon the trademark registration. We have filed a Petition for Cancellation of this registration in the U.S. Trademark Office to preserve Fleming's rights. The Trademark Office will be sending this to you in due course, provided it has your current mailing address.

Sincerely,

Paul Fleischut

From: Paul Fleischut [mailto:PFleischut@senniger.com]
Sent: Friday, September 21, 2007 2:52 PM
To: Eddie Kolos
Subject: RE: Fleming / OCEAN

Dear Eddie -

The issue as to the infringement of OCEAN is a separate matter from any business negotiations. We request your prompt confirmation that you are discontinuing use of OCEAN AID SPRAY and any other mark containing OCEAN. Provided you confirm this by September 25, Fleming is amenable to a 60-day phase-out period. If we do not receive your confirmation of this by September 25, Fleming will assume you are not willing to make this change. Fleming's federally registered rights to OCEAN are legally incontestible under Section 15 of the federal Lanham Act.

I expect it may be quite some time, and well after September 25, before Fleming decides whether it wishes to negotiate further with you on your patents and product ideas. You certainly must pursue your option of selling the ideas to someone larger than Fleming.

I look forward to hearing from you.

Sincerely,

Paul Fleischut

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 07-80889-Civ-Ryskamp/Vitunac

OCEAN AID, INC.,

Plaintiff,

v.

JURY TRIAL DEMANDED

FLEMING AND COMPANY,
PHARMACEUTICALS, d/b/a
FLEMING & CO. CORPORATION,

Defendant and
Counterclaim-Plaintiff,

v.

OCEAN AID, INC., and
H2OCEAN, INC.,

Counterclaim-Defendants.

DEFENDANT'S ANSWER AND COUNTERCLAIM

Defendant Fleming and Company, Pharmaceuticals ("Fleming"), for its Answer to the Complaint for Declaratory Judgment ("Complaint") of plaintiff Ocean Aid, Inc. ("Ocean Aid"), and for its Counterclaim against Ocean Aid and H2Ocean, Inc. ("H2Ocean"), states as follows:

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT

I. Answering Paragraph 1, Fleming admits that the Complaint purports to state claims pursuant to the Declaratory Judgment Act and the trademark laws of the United

States, but Fleming denies that any such claims have merit. Fleming denies all allegations of Paragraph 1 not specifically admitted.

2. Answering Paragraph 2, Fleming admits that jurisdiction is proper in this Court. Fleming denies all allegations of Paragraph 2 not specifically admitted.

3. Answering Paragraph 3, Fleming admits that it conducts business in this district and that venue is proper in this district. Fleming is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore denies them.

Parties

4. Answering Paragraph 4, Fleming admits that Exhibit A to the Complaint is a copy of U.S. Trademark Registration No. 3,074,033 for OCEAN AID SPRAY, but Fleming is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore denies them. Fleming specifically denies the validity of the OCEAN AID SPRAY trademark.

5. Answering Paragraph 5, Fleming admits that it is a Missouri corporation with a principal place of business at 1733 Gilsinn Lane, Fenton, Missouri 63206. Fleming admits that it uses its OCEAN® trademark with its nasal spray products, as well as other products, which products are sold in interstate commerce, and that it owns U.S. Trademark Registration No. 1,652,123 for such trademark. Fleming denies all allegations of Paragraph 5 not specifically admitted.

Background Facts

6. Answering Paragraph 6, Fleming states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

7. Answering Paragraph 7, Fleming admits that Exhibit C to the Complaint purports to depict Fleming's OCEAN® brand nasal spray product, the uses of which include those stated. Fleming admits that the bottle depicted in Exhibit C has an orange cap and that the contents can be discharged if pressure is applied on the outer walls of the bottle. Fleming denies all allegations of Paragraph 7 not specifically admitted.

8. Answering Paragraph 8, Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

9. Answering Paragraph 9, Fleming admits the allegations stated therein.

10. Answering Paragraph 10, Fleming admits that it has filed a cancellation action with the Trademark Trial and Appeal Board ("TTAB"). A copy of Fleming's cancellation action is attached hereto as Exhibit A. Fleming also admits that it has given notice to Ocean Aid that Ocean Aid should cease its use of the OCEAN AID SPRAY trademark. Fleming specifically denies all allegations of Paragraph 10 not specifically admitted.

11. Answering Paragraph 11, Fleming admits it requested that Ocean Aid cease using the OCEAN AID SPRAY trademark. Fleming states that the contents of Exhibit D to the

Complaint speak for themselves. Fleming specifically denies all allegations of Paragraph 11 not specifically admitted.

12. Answering Paragraph 12, Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

13. Answering Paragraph 13, Fleming admits there is a dispute between the parties. Fleming specifically denies all allegations of Paragraph 13 not specifically admitted.

14. Answering Paragraph 14, Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

Count I
(Declaratory Judgment - Trademark Infringement)

15. Answering Paragraph 15, Fleming incorporates herein its answers to Paragraphs 1-14 above. Fleming denies all allegations of Paragraph 15 not specifically admitted.

16. Answering Paragraph 16, Fleming admits that Ocean Aid's use of OCEAN AID SPRAY infringes Fleming's OCEAN® trademark. Fleming is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore denies them.

17. Answering Paragraph 17, Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

18. Answering Paragraph 18, Fleming specifically denies that Ocean Aid is entitled to declaratory relief. Fleming denies all allegations of Paragraph 18 not specifically admitted.

Count II

(Declaratory Judgment - False Designation of Origin; 15 U.S.C. § 1125(a))

19. Answering Paragraph 19, Fleming incorporates herein its answers to Paragraphs 1-18 above. Fleming denies all allegations of Paragraph 19 not specifically admitted.

20. Answering Paragraph 20, Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

21. Answering Paragraph 21, Fleming admits that it sells products bearing the registered OCEAN® trademark, which products are manufactured, advertised, marketed, promoted, and sold throughout the United States. Fleming denies all allegations of Paragraph 21 not specifically admitted.

22. Answering Paragraph 22, Fleming denies that its use of the OCEAN® trademark is so limited, and Fleming is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies them.

23. Answering Paragraph 23, Fleming admits that its Counterclaim herein states causes of action for, *inter alia*, Trademark Dilution and Trademark Infringement under the Lanham Act. Further answering Paragraph 23, Fleming states that the content of the

Counterclaim speaks for itself. Fleming denies all allegations of Paragraph 23 not specifically admitted.

24. Answering Paragraph 24, Fleming admits that the Complaint purports to seek declaratory relief for Ocean Aid. Fleming specifically denies that Ocean Aid is entitled to declaratory relief. Fleming denies all allegations of Paragraph 24 not specifically admitted.

Additional and Affirmative Defenses

A. The Complaint fails to state a claim against Fleming upon which relief can be granted.

B. The claims asserted in the Complaint against Fleming are barred, in whole or in part, based on the doctrines of waiver, laches, acquiescence, and/or estoppel.

C. The claims asserted in the Complaint against Fleming are barred, in whole or in part, due to Ocean Aid's bad faith, unclean hands, and/or other inequitable conduct.

D. The claims asserted in the Complaint against Fleming fail for the reasons stated in Fleming's Counterclaim set forth below.

WHEREFORE, Fleming denies that Ocean Aid is entitled to any relief, as prayed for in its Complaint or otherwise, and respectfully prays for entry of judgment dismissing Ocean Aid's Complaint with prejudice, and for such other and further relief as this Court deems just and proper.

COUNTERCLAIM

Defendant and Counterclaim-Plaintiff Fleming, for its Counterclaim against Ocean Aid and H2Ocean, states as follows:

Parties, Jurisdiction, and Venue

1. Fleming is a corporation organized and existing under the laws of Missouri having an address at 1733 Gilsinn Lane, Fenton, Missouri 63206.

2. Upon information and belief, Ocean Aid is a corporation organized and existing under the laws of Florida with its principal place of business at 3533 High Ridge Road, Boynton Beach, FL 33426.

3. Upon information and belief, H2Ocean is a corporation organized and existing under the laws of Florida with its principal place of business at 3533 High Ridge Road, Boynton Beach, FL 33426.

4. This action arises under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and under state statutory and/or common law.

5. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1332, 1338, and 1367.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

7. Upon information and belief, this Court has personal jurisdiction over Ocean Aid and H2Ocean as both entities have a principal place of business and conduct business in this district.

Facts Giving Rise to the Counterclaim

8. Fleming is in the business of manufacturing and selling various health and beauty products.

9. Fleming is the record owner of Registration No. 1,652,123 for the OCEAN® trademark. Fleming uses the OCEAN® trademark in connection with a line of health and beauty products, including OCEAN® Premium Nasal Spray, OCEAN® Ultra Sterile Saline Mist, OCEAN® Complete Sinus Rinse, OCEAN® for Kids, and OCEAN® Moisturizing Gel. Fleming filed its application to register the OCEAN® trademark on April 20, 1990, and Registration No. 1,652,123 issued on July 30, 1991. Fleming has used the OCEAN® trademark continuously in interstate commerce since at least as early as January 31, 1973. See Exhibit B attached hereto.

10. Fleming has invested substantial amounts of time, resources, and efforts in marketing its goods with the OCEAN® trademark. Since Fleming began promotion of products in connection with the OCEAN® trademark, sales of products bearing the OCEAN® trademark have increased substantially, and the OCEAN® trademark became well-known to consumers well before (1) Ocean Aid began use of the OCEAN AID SPRAY trademark and (2) H2Ocean applied to register the OCEAN AID SPRAY trademark.

11. Fleming began using OCEAN® in connection with the goods identified in Registration No. 1,652,123 at least as early as January 31, 1973, and has continuously used OCEAN® in connection with the goods identified in Registration No. 1,652,123 and consumers have come to associate Fleming's OCEAN® mark with the type of goods identified in Registration No. 1,652,123.

12. Fleming's OCEAN® trademark, Registration No. 1,652,123, is incontestable under 15 U.S.C. § 1065.

13. Upon information and belief, Ocean Aid is the exclusive licensee of trademark Registration No. 3,074,033 for the OCEAN AID SPRAY trademark. H2Ocean filed its application for the OCEAN AID SPRAY trademark on February 2, 2004 and licenses the OCEAN AID SPRAY trademark to Ocean Aid. The OCEAN AID SPRAY trademark was granted to H2Ocean on March 28, 2006. Upon information and belief, neither Ocean Aid, H2Ocean, nor any related party of Ocean Aid or H2Ocean, made commercial use of the OCEAN AID SPRAY trademark for the goods identified in Registration No. 3,074,033 on or before April 5, 2004, the date H2Ocean identified as its date of first use when it filed its Statement of Use.

14. Ocean Aid uses the OCEAN AID SPRAY trademark to market and sell Ocean Aid Spray and Ocean Aid Skin Moisturizing Foam. See Exhibit C attached hereto.

15. Ocean Aid's use of OCEAN AID SPRAY to market and sell goods is in violation of Fleming's trademark rights for its federally registered OCEAN® trademark.

16. Upon information and belief, H2Ocean had specific knowledge of Fleming's trademark rights when it applied to register the OCEAN AID SPRAY trademark, and Ocean Aid had specific knowledge of Fleming's trademark rights when it began use of the OCEAN AID SPRAY trademark on its products. Accordingly, Ocean Aid's infringement of Fleming's federally registered OCEAN® trademark is willful and intentional.

17. On September 10, 2007, Fleming filed a Petition for Cancellation of the OCEAN AID SPRAY trademark before the Trademark Trial and Appeal Board. See Exhibit A attached hereto.

18. So long as Ocean Aid continues its unlawful infringement of Fleming's trademark rights, Fleming will continue to suffer irreparable harm that will not be fully compensable by money damages.

**COUNT I: Cancellation of the OCEAN AID SPRAY Trademark Registration
Under the Lanham Act**

19. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-18 of the Counterclaim as if set forth fully herein.

20. Fleming's OCEAN® trademark was registered over 10 years prior to H2Ocean's application for the OCEAN AID SPRAY trademark.

21. Fleming used the OCEAN® trademark in commerce for over 30 years prior to Ocean Aid or H2Ocean's first use of the OCEAN AID SPRAY trademark.

22. Fleming has not consented to Ocean Aid's use of the OCEAN AID SPRAY trademark.

23. H2Ocean's OCEAN AID SPRAY trademark is confusingly similar to Fleming's OCEAN® trademark and is likely to cause confusion, mistake or deception as to the source of origin, sponsorship, or approval of Ocean Aid's products in that consumers are likely to believe Ocean Aid's products are Fleming's products, or are in some way legitimately connected with, licensed, or approved by Fleming.

24. Registration No. 3,074,033 for the OCEAN AID SPRAY mark should be cancelled because of fraud committed in the procurement of that Registration.

25. Material misrepresentations of fact were made in the Statement of Use filed by the registrant (H2Ocean) in connection with the application that resulted in Registration No.

3,074,033 for OCEAN AID SPRAY. Specifically, the registrant knew or should have known that it had not used the OCEAN AID SPRAY mark on a material portion of the goods it identified in the application and that these representations were false and misleading. Registrant made these representations to the U.S. Patent & Trademark Office ("USPTO") with the intent to induce the USPTO to issue the registration, and agents of the USPTO reasonably relied upon the truth of such statements to grant the registration as issued. See Exhibit D attached hereto.

26. The OCEAN AID SPRAY trademark registration should be cancelled pursuant to § 2d of the Lanham Act, 15 U.S.C. § 1052(d).

27. Fleming will be damaged by the continued existence of Registration No. 3,074,033 on the Principal Register because it will give color of rights to Ocean Aid and/or H2Ocean in violation of Fleming's prior and superior statutory and common law rights in its OCEAN® trademark.

COUNT II: Federal Trademark Infringement Under the Lanham Act

28. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-27 of the Counterclaim as if set forth fully herein.

29. Ocean Aid's use of the OCEAN AID SPRAY trademark in connection with its health care products is likely to cause confusion, or to cause mistake, or to deceive consumers.

30. Through its activities, Ocean Aid has infringed Fleming's trademark rights in its OCEAN® trademark, and Fleming is entitled to relief pursuant to §§ 32, 34, and 35 of the Lanham Act, 15 U.S.C. §§ 1114, 1116, and 1117.

31. Fleming has suffered damages as a result of Ocean Aid's trademark infringement in an amount to be proven at trial. Moreover, the harm to Fleming arising from the acts of Ocean Aid is not fully compensable by money damages. Fleming has suffered and continues to suffer irreparable harm which has no adequate remedy at law, and which will continue unless such conduct is preliminarily and permanently enjoined.

COUNT III: Unfair Competition Under the Lanham Act

32. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-31 of the Counterclaim as if set forth fully herein.

33. Upon information and belief, Ocean Aid has used, in interstate commerce, Fleming's registered OCEAN® trademark in connection with the sale of certain health care products, which is likely to cause confusion, or to cause mistake, or to deceive consumers as to the affiliation, connection, association, origin, sponsorship, or approval of goods.

34. By engaging in these activities, Ocean Aid has engaged in unfair competition in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

35. Fleming has suffered actual damages as a result of Ocean Aid's unfair competition in an amount to be proved at trial. Additionally, the harm to Fleming arising from Ocean Aid's acts is not fully compensable by money damages. Fleming has suffered,

and continues to suffer, irreparable harm which has no adequate remedy at law and which will continue unless Ocean Aid is enjoined.

COUNT IV: Florida Unfair Competition

36. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-35 as if set forth fully herein.

37. By the aforesaid acts, Ocean Aid has engaged in unfair competition in violation of Florida common law.

38. Fleming is suffering, and will continue to suffer, damage and irreparable harm due to Ocean Aid's wrongful conduct.

COUNT V: Federal Trademark Dilution

39. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-38 as if set forth fully herein.

40. Fleming's OCEAN[®] trademark is distinctive and well known by consumers, and is, therefore, a famous mark.

41. Ocean Aid's use of its OCEAN AID SPRAY trademark dilutes the distinctive quality of Fleming's OCEAN[®] trademark in violation of § 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

42. Upon information and belief, Ocean Aid willfully intended to cause dilution of Fleming's OCEAN[®] trademark.

COUNT VI: Trademark Dilution Under Florida Law

43. Fleming hereby incorporates by reference each and every allegation contained in Paragraphs 1-42 as if set forth fully herein.

44. Fleming's OCEAN® trademark is distinctive and well known by the consuming public in Florida, for its association with various health care products, and is, therefore, a famous mark.

45. Ocean Aid's use of the OCEAN AID SPRAY trademark dilutes the distinctive quality of Fleming's OCEAN® trademark and presents a likelihood of injury to Fleming's business reputation.

46. Ocean Aid's actions have, and will continue to cause, a likelihood of injury to Fleming's business reputation and a dilution of the distinctive quality of Fleming's OCEAN® trademark in violation FLA. STAT. § 495.151.

47. Upon information and belief, Ocean Aid willfully intended to cause dilution of Fleming's OCEAN® trademark in Florida.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim-Plaintiff Fleming prays for the following relief:

A. Judgment in its behalf and against Ocean Aid and/or H2Ocean on each of Counts I through VI.

B. Preliminary and permanent injunctive relief enjoining Ocean Aid and H2Ocean from using the OCEAN AID SPRAY trademark, or any other word or term that is confusingly similar to Fleming's federally registered OCEAN® trademark.

C. An award of damages to Fleming in an amount to be determined, along with an award of Ocean Aid's profits earned as a result of its infringing conduct.

D. An award of Ocean Aid's profits derived from its use the OCEAN AID SPRAY trademark.

E. An Order trebling Fleming's damages award, along with an award of Fleming's attorneys' fees and costs for this action, and such other relief, including punitive damages, as the Court deems just due to the willful nature of Ocean Aid's infringement.

E. Prejudgment and post-judgment interest until such amounts are paid.

F. Such other and further relief as the Court deems just and proper.

Demand for Jury Trial

Fleming demands a trial by jury on all issues so triable.

Respectfully submitted,

By: /s/ Gary M. Pappas

GARY M. PAPPAS

Florida Bar No.: 0705853

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of *Defendant's Answer and Counterclaim* has been file with the Clerk of the Court by using the CM/ECF system on this 23rd day of October, 2007, to the following: Kevin H. Fabrikant, Esq., **KEVIN H. FABRIKANT & ASSOCIATES., P.L.**, *Attorney for Plaintiff*, Regions Bank Building, 450 North Park Road, Suite 300 Hollywood, FL 33021.

CARLTON FIELDS, P.A.

*Attorneys for Fleming and Company,
Pharmaceuticals*

100 Southeast Second Street, Suite 4000

Miami, Florida 33131-9101

Telephone: (305) 530-0050

Facsimile: (305) 530-0055

By: /s/Gary M. Pappas

GARY M. PAPPAS

Florida Bar No.: 0705853

gpappas@carltonfields.com

and

Keith A. Rabenberg (*proposed pro hac vice*)

SENNING POWERS

One Metropolitan Square, 16th Floor

St. Louis, Missouri 63102

Telephone: (314) 231-5400

Facsimile: (314) 231-4342

krabenberg@senniger.com

EXHIBIT "A"

Trademark Trial and Appeal Board Electronic Filing System, <http://esta.uspto.gov>

ESTTA Tracking number: ESTTA161659

Filing date: 09/10/2007

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Fleming and Company, Pharmaceuticals		
Entity	Corporation	Citizenship	Missouri
Address	1733 Gilsinn Lane Fenton, MO 63026 UNITED STATES		

Attorney Information	William D. O'Neill Senniger Powers One Metropolitan Square 16th Floor St. Louis, MO 63102 UNITED STATES ustrademarks@senniger.com, wonell@senniger.com Phone:314-231-5400
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Registration Subject to Cancellation

Registration No	3074033	Registration date	03/28/2006
Registrant	H2OCEAN INC. 1301 West Newport Center Drive Deerfield Beach, FL 33442 UNITED STATES		

Goods/Services Subject to Cancellation

<p>Class 003. First Use: 2004/04/05 First Use In Commerce: 2005/05/08 All goods and services in the class are cancelled, namely: Cosmetics and skin care products, namely, skin care preparations, skin and facial cleansers, body sprays, face and body beauty creams, body gels, and body and facial scrubs, facial masks, pre-moistened cosmetic cleansing wipes, bath salts, face and body moisturizing sprays, non-medicated body soaks, nail care preparations, hand and foot deodorant sprays, skin creams, beauty gels, body scrubs, sun tan lotion, sun tan gels, sun tan sprays, sun-block lotions, sun-block gels, sun-block sprays, personal deodorants, shaving preparations, after-shave lotions, after-shave gels, after-shave sprays, shaving creams, shaving foams, shaving gels, shaving lotions, shaving sprays, hair care preparations, hair styling gels, hair styling mousses, shampoos, soaps, non-medicated mouth rinses, toothpaste, teeth whitening sprays, teeth whitening gels</p>
--

Grounds for Cancellation

<i>Torres v. Cantina Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Priority and likelihood of confusion	Trademark Act section 2(d)

Mark Cited by Petitioner as Basis for Cancellation

U.S. Registration	1652123	Application Date	04/20/1990
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No.			
Registration Date	07/30/1991	Foreign Priority Date	NONE
Word Mark	OCEAN		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1973/01/31 First Use In Commerce: 1973/01/31 nasal preparation for dry nasal membranes		

Attachments	00528196.PDF (10 pages)(6457576 bytes)
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Signature	/wdo/
Name	William D. O'Neill
Date	09/10/2007

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

In the Matter of Trademark Reg. No. 3,074,033
Mark: OCEAN AID SPRAY
International Class: 3
Issued: March 28, 2006

Fleming and Company, Pharmaceuticals)

Petitioner,)

vs.)

H2Ocean, Inc.)

Respondent.)

Cancellation No.: _____

CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that this Petition for Cancellation is being submitted electronically through the Electronic System for Trademark Trials and Appeals (ESTTA) on this 10th day of September, 2007.


William D. O'Neill

PETITION FOR CANCELLATION

Fleming and Company, Pharmaceuticals, a Missouri corporation having an address at 1733 Gilsinn Lane, Fenton, Missouri 63026 (hereinafter referred to as "Petitioner"), believes it has been and will be damaged by Registration No. 3,074,033 for the mark OCEAN AID SPRAY, and hereby petitions for cancellation of said registration. The OCEAN AID SPRAY registration was issued on the Principal Register on March 28, 2006 for cosmetics and skin care products, namely, skin care preparations, skin and facial cleansers, body sprays, face and body beauty creams, body gels, and body and facial scrubs, facial masks, pre-moistened cosmetic cleansing wipes, bath salts, face and body moisturizing sprays, non-medicated body soaks, nail

care preparations, hand and foot deodorant sprays, skin creams, beauty gels, body scrubs, sun tan lotion, sun tan gels, sun tan sprays, sun-block lotions, sun-block gels, sun-block sprays, personal deodorants, shaving preparations, after-shave lotions, after-shave gels, after-shave sprays, shaving creams, shaving foams, shaving gels, shaving lotions, shaving sprays, hair care preparations, hair styling gels, hair styling mousses, shampoos, soaps, non-medicated mouth rinses, toothpaste, teeth whitening sprays, teeth whitening gels, in International Class 3.

As grounds for cancellation, Petitioner alleges on knowledge as to itself and otherwise upon information and belief, as follows:

1. H2Ocean, Inc. (hereinafter referred to as "Respondent") is the record owner of trademark Registration No. 3,074,033 for the mark OCEAN AID SPRAY. To the best of Petitioner's knowledge, Respondent's address is 3533 High Ridge Road, Boynton Beach, Florida 33426.
2. Respondent's Registration No. 3,074,033 was granted on March 28, 2006.
3. Petitioner uses the trademark OCEAN in connection with a line of health and beauty aid products, including OCEAN Premium Saline Nasal Spray, OCEAN Ultra Sterile Saline Mist, OCEAN Complete Sinus Rinse, OCEAN for Kids, and OCEAN Moisturizing Gel.
4. Petitioner owns U.S. Trademark Registration No. 1,652,123 for OCEAN for a nasal preparation for dry nasal membranes. Registration No. 1,652,123 was granted on July 30, 1991. Petitioner filed its application for Registration No. 1,652,123 on April 20, 1990. A copy of a current printout of information from the electronic database records of the United States

Patent and Trademark Office ("USPTO") showing the current status and title of Registration No. 1,652,123 is attached hereto as Exhibit A.

5. Petitioner began using OCEAN in connection with the goods identified in Registration No. 1,652,123 at least as early as January 31, 1973, which is long prior to the February 2, 2004 date that Respondent filed its application for Registration No. 3,074,033.

6. Since at least as early as January 31, 1973 when Petitioner began using OCEAN in connection with the goods identified in Registration No. 1,652,123, Petitioner has continuously used OCEAN in connection with the goods identified in Registration No. 1,652,123 and consumers have come to associate Petitioner's OCEAN mark with the type of goods identified in Registration No. 1,652,123.

Count I: Likelihood of Confusion

7. Petitioner hereby incorporates by reference the allegations in Paragraphs 1 through 6 hereof as if fully set forth herein.

8. Upon information and belief, neither Respondent nor any predecessor or related party of Respondent made commercial use of the trademark OCEAN AID SPRAY for the goods identified in Registration No. 3,074,033 prior to April 5, 2004, the date Respondent stated as its date of first use when it filed its Statement of Use for Registration No. 3,074,033.

9. Petitioner's date of first use in commerce for its OCEAN mark precedes Respondent's date of first use in commerce for its OCEAN AID SPRAY mark.

10. Respondent's use of the trademark OCEAN AID SPRAY is without Petitioner's consent or permission.

11. Respondent's use of the trademark OCEAN AID SPRAY for the goods identified in Registration No. 3,074,033 is likely to cause confusion, mistake or deception as to the source of origin, sponsorship or approval of Respondent's products in that purchasers are likely to believe that Respondent's products are Petitioner's products, or are in some way legitimately connected with, licensed, or approved by Petitioner.

12. Petitioner invested substantial amounts of time, resources, and effort in marketing its goods under the OCEAN mark. As a result of Petitioner's marketing efforts and the substantial sales of Petitioner's OCEAN products, Petitioner's OCEAN mark became well-known to consumers, and came to represent a most valuable goodwill owned by Petitioner, all long prior to February 2, 2004.

13. The Respondent's registration of OCEAN AID SPRAY is and will continue to be damaging to the Petitioner.

Count II: Fraud

14. Petitioner hereby incorporates by reference the allegations in Paragraphs 1 through 13 hereof as if fully set forth herein.

15. Respondent procured Registration No. 3,074,033 for OCEAN AID SPRAY by making material representations of fact, in its Statement of Use for the application, that

Respondent had used the OCEAN AID SPRAY mark on all of the goods it identified in its application.

16. Respondent knew or should have known that it had not used its OCEAN AID SPRAY mark on a material portion of the goods it identified in the application and that these representations were false and misleading.

17. Respondent made these representations to the USPTO with the intent to induce authorized agents of the USPTO to grant Respondent's registration for its OCEAN AID SPRAY mark.

18. The authorized agents of the USPTO reasonably relied upon the truth of Respondent's statements to grant Respondent's registration for the OCEAN AID SPRAY mark and would not have accepted Respondent's registration for the goods identified therein, but for Respondent's misrepresentations.

19. Respondent's Registration No. 3,074,033 for the OCEAN AID SPRAY mark should be cancelled because Respondent committed fraud in the procurement of that Registration.

20. Petitioner will be damaged by the continued existence of Respondent's Registration No. 3,074,033 on the Register because it will give color of rights to Respondent in violation of Petitioner's prior and superior statutory and common law rights in Petitioner's OCEAN mark.

WHEREFORE, registration by Respondent of the aforesaid trademark for the aforesaid goods is damaging to Petitioner and Petitioners prays that for cancellation of Registration No. 3,074,033.

Respectfully submitted,
FLEMING AND COMPANY, PHARMACEUTICALS

By: William D. O'Neill
Paul L. Fleischut
William D. O'Neill
Senniger Powers
One Metropolitan Square, 16th Floor
St. Louis, Missouri 63102
(314) 231-5400
Attorneys for Petitioner

Thank you for your request. Here are the latest results from the TARR web service.

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Serial Number: 74050996 [Assignment Information](#) [Trademark Document Retrieval](#)

Registration Number: 1652123

Mark (words only): OCEAN

Standard Character claim: No

Current Status: This registration has been renewed.

Date of Status: 2001-10-26

Filing Date: 1990-04-20

Transformed into a National Application: No

Registration Date: 1991-07-30

Register: Principal

Law Office Assigned: LAW OFFICE 11

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2001-10-30



.....
LAST APPLICANT(S)/OWNER(S) OF RECORD
.....

1. Fleming and Company, Pharmaceuticals

Address:

Fleming and Company, Pharmaceuticals
1733 Gillsinn Lane
Fenton, MO 63026
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Missouri

.....
GOODS AND/OR SERVICES
.....

International Class: 005

Class Status: Active

nasal preparation for dry nasal membranes
Basis: 1(a)
First Use Date: 1973-01-31
First Use in Commerce Date: 1973-01-31

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2001-10-26 - First renewal 10 year
2001-10-26 - Section 8 (10-year) accepted/ Section 9 granted
2001-08-02 - Combined Section 8 (10-year)/Section 9 filed
1997-08-11 - Section 8 (6-year) accepted & Section 15 acknowledged
1997-07-28 - Section 8 (6-year) and Section 15 Filed
1991-07-30 - Registered - Principal Register
1991-05-07 - Published for opposition
1991-04-05 - Notice of publication
1991-01-31 - Approved for Pub - Principal Register (Initial exam)
1990-11-02 - Communication received from applicant
1990-08-29 - Letter of suspension mailed
1990-08-28 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record
Stuart N. Senniger

Correspondent
Stuart N. Senniger
Senniger, Powers, Leavitt & Roddel
One Metropolitan Square

10th Floor
St. Louis, MO 63102



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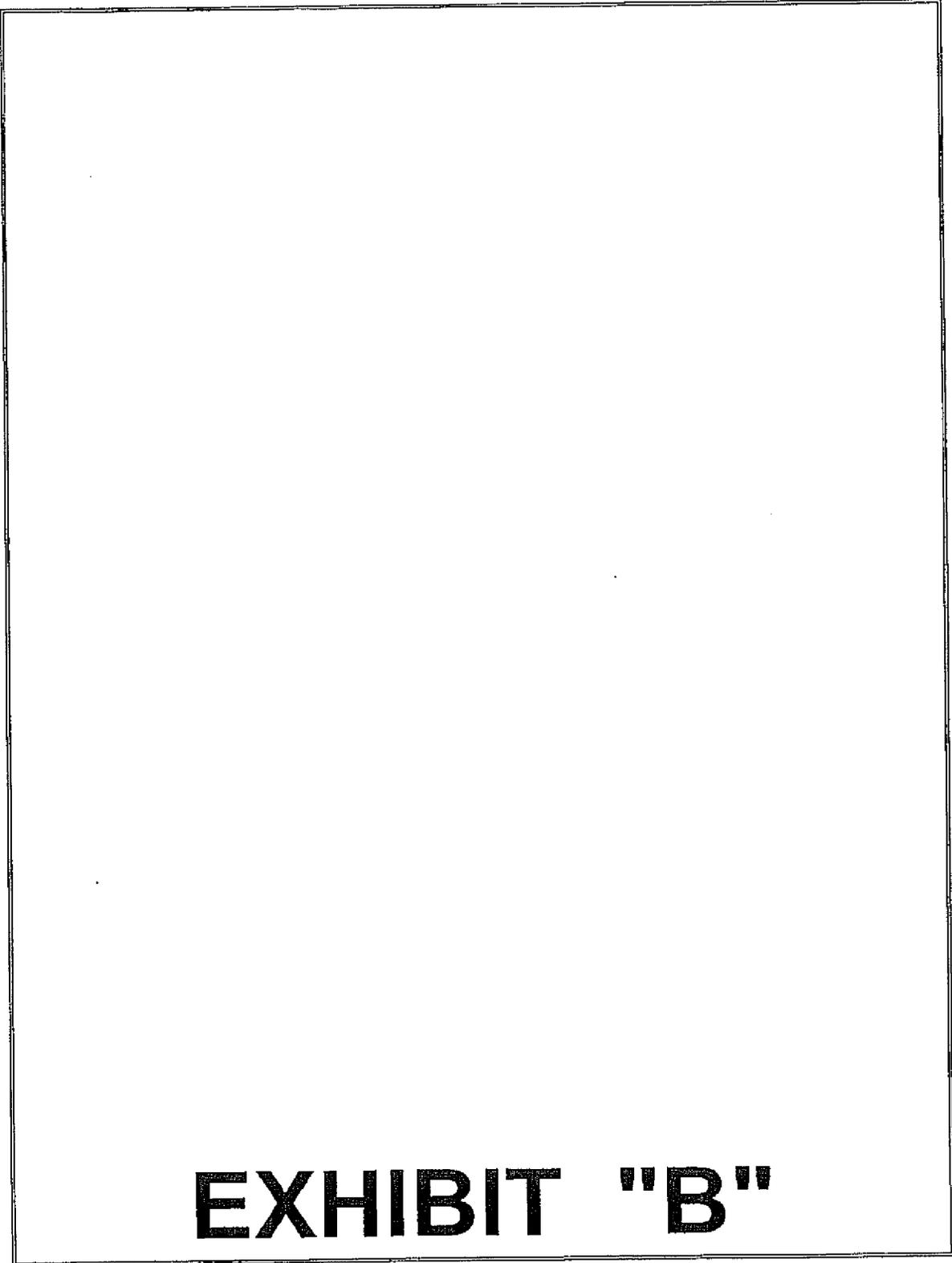
[Assignments on the Web](#) > [Trademark Query](#)

No assignment has been recorded at the USPTO

For Serial Number: 74050996

If you have any comments or questions concerning the data displayed, contact PRO / Assignments at 871-272-3550, v.2.0.1
Web Interface last modified: April 20, 2007 v.2.0.1

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Thank you for your request. Here are the latest results from the TARR web server.

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Serial Number: 74050996 Assignment Information Trademark Document Retrieval

Registration Number: 1652123

Mark (words only): OCEAN

Standard Character claim: No

Current Status: This registration has been renewed.

Date of Status: 2001-10-26

Filing Date: 1990-04-20

Transformed into a National Application: No

Registration Date: 1991-07-30

Register: Principal

Law Office Assigned: LAW OFFICE 11

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 40S -Scanning On Demand

Date In Location: 2007-10-05

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Fleming and Company, Pharmaceuticals

Address:

Fleming and Company, Pharmaceuticals
1733 Gilsinn Lane
Fenton, MO 63026
United States

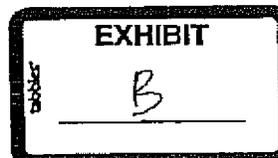
Legal Entity Type: Corporation

State or Country of Incorporation: Missouri

GOODS AND/OR SERVICES

International Class: 005

Class Status: Active



nasal preparation for dry nasal membranes

Basis: 1(a)

First Use Date: 1973-01-31

First Use in Commerce Date: 1973-01-31

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2007-10-05 - Case File In TICRS

2001-10-26 - First renewal 10 year

2001-10-26 - Section 8 (10-year) accepted/ Section 9 granted

2001-08-02 - Combined Section 8 (10-year)/Section 9 filed

1997-08-11 - Section 8 (6-year) accepted & Section 15 acknowledged

1997-07-28 - Section 8 (6-year) and Section 15 Filed

1991-07-30 - Registered - Principal Register

1991-05-07 - Published for opposition

1991-04-05 - Notice of publication

1991-01-31 - Approved for Pub - Principal Register (Initial exam)

1990-11-02 - Communication received from applicant

1990-08-29 - Letter of suspension mailed

1990-08-28 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

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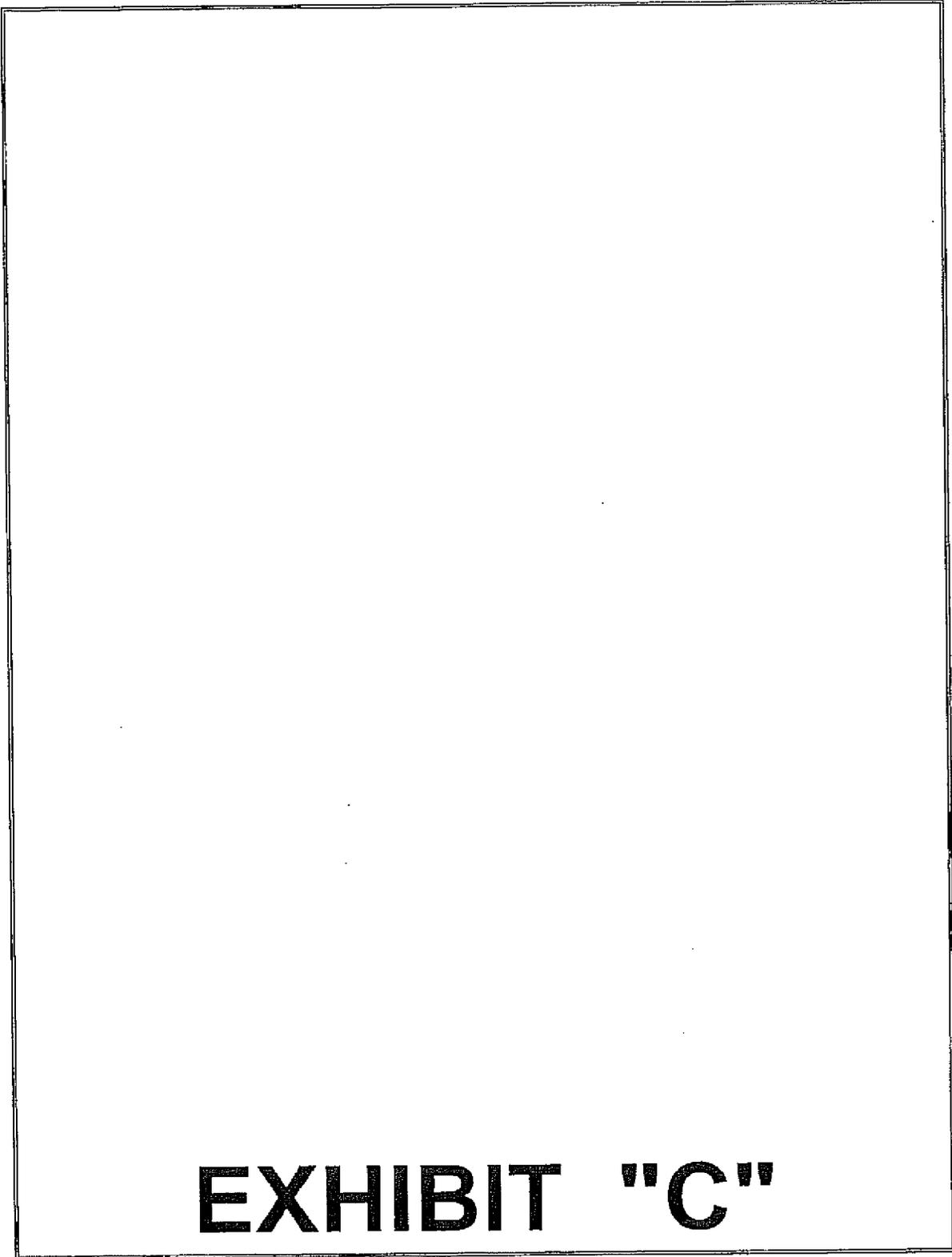


EXHIBIT "C"

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Research

Testimonials

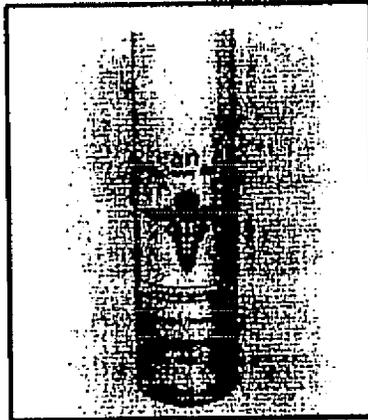
Professional Use

Clinical Studies

Doctors

Contact Us

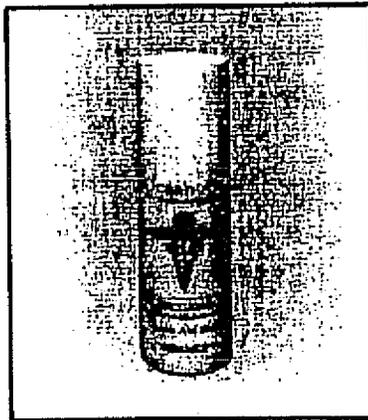
Ocean Aid Spray



Ocean Aid Spray is the ultimate a healing needs. This safe, effective and p assist the human body during its natura Ocean Aid Spray may help naturally reduce while helping protect the beneficial bact enzyme barrier works with the human imm protect the body and continues working for initial use. The natural sea salt used in th 82 trace elements and minerals that help The enzyme action combined with the elem from the sea salt create an optimal environ nourish the healing cells. By replicating balance and salinity of the body, Ocean ages and skin types. Ocean Aid Spray's protected from airborne bacteria by the Inn used in its packaging. [read more...](#)

[Read more...](#)

Ocean Aid Foam



Ocean Aid Skin Moisturizing Foam is i highest quality Pharmaceutical grade ingredi the body's natural healing process. This contains natural enzymes and over 82 tr minerals to help protect derma cells.

When Ocean Aid Foam is applied to the affe allows the moisturizing ingredients to pene Unlike ointments and petroleum based pro Foam will not clog derma pores. This will allc to breathe. [read more...](#)

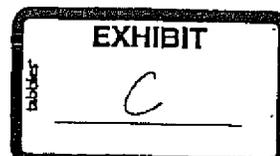


EXHIBIT "D"

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-10-18 14:26:42 ET

Serial Number: 76573736 Assignment Information Trademark Document Retrieval

Registration Number: 3074033

Mark

Ocean Aid Spray

(words only): OCEAN AID SPRAY

Standard Character claim: Yes

Current Status: A cancellation proceeding has been filed at the Trademark Trial and Appeal Board and is now pending.

Date of Status: 2007-09-11

Filing Date: 2004-02-02

Transformed into a National Application: No

Registration Date: 2006-03-28

Register: Principal

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

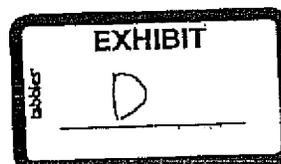
Current Location: 650 -Publication And Issue Section

Date In Location: 2006-02-15

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. H2OCEAN INC.

Address:
H2OCEAN INC.



<http://tarr.uspto.gov/servlet/tarr?regser=registration&entry=3074033>

10/18/2007

1301 West Newport Center Drive
Deerfield Beach, FL 33442
United States
Legal Entity Type: Corporation
State or Country of Incorporation: Florida
Phone Number: 954-427-6550
Fax Number: 954-596-2905

GOODS AND/OR SERVICES

International Class: 003

Class Status: Active

Cosmetics and skin care products, namely, skin care preparations, skin and facial cleansers, body sprays, face and body beauty creams, body gels, and body and facial scrubs, facial masks, pre-moistened cosmetic cleansing wipes, bath salts, face and body moisturizing sprays, non-medicated body soaks, nail care preparations, hand and foot deodorant sprays, skin creams, beauty gels, body scrubs, sun tan lotion, sun tan gels, sun tan sprays, sun-block lotions, sun-block gels, sun-block sprays, personal deodorants, shaving preparations, after-shave lotions, after-shave gels, after-shave sprays, shaving creams, shaving foams, shaving gels, shaving sprays, hair care preparations, hair styling gels, hair styling mousses, shampoos, soaps, non-medicated mouth rinses, toothpaste, teeth whitening sprays, teeth whitening gels

Basis: 1(a)

First Use Date: 2004-04-05

First Use in Commerce Date: 2005-05-08

ADDITIONAL INFORMATION

Disclaimer: "SPRAY"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2007-09-11 - Cancellation Instituted No. 999999

2006-03-28 - Registered - Principal Register

2006-02-14 - Law Office Registration Review Completed

2006-02-10 - Assigned To LIE

2006-02-01 - Allowed for Registration - Principal Register (SOU accepted)

2006-01-30 - Statement of use processing complete

2005-10-17 - Amendment to use informal response received

2005-10-17 - PAPER RECEIVED
2005-08-10 - Amendment to use held informal - letter mailed
2005-07-05 - Amendment to Use filed
2005-07-05 - PAPER RECEIVED
2005-06-21 - Notice of allowance - mailed
2005-03-29 - Published for opposition
2005-03-09 - Notice of publication
2004-09-21 - Law Office Publication Review Completed
2004-09-07 - Approved for Pub - Principal Register (Initial exam)
2004-09-07 - Examiner's Amendment Entered
2004-09-04 - Section 1(a) claim - Deleted
2004-09-04 - EXAMINERS AMENDMENT E-MAILED
2004-09-04 - Examiners Amendment - Written
2004-09-04 - Previous allowance count withdrawn
2004-08-30 - Assigned To LIE
2004-08-24 - Approved for Pub - Principal Register (Initial exam)
2004-08-24 - EXAMINERS AMENDMENT E-MAILED
2004-08-23 - Non-final action e-mailed
2004-08-23 - Assigned To Examiner
2004-02-19 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent
H2OCEAN INC.
1301 West Newport Center Drive
Deerfield Beach, FL 33442
Phone Number: 954-427-6550
Fax Number: 954-596-2905