F-1713

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/513,143

For the trademark "VITASILK-C"

Published in the Official Gazette on December 23, 2003

Vitacilina Corporation of America, Opposer, vs. Rosa West Laboratories, Inc. Applicant.	Opposition No.: 91159389

Commissioner for Trademarks
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Arlington, Virginia 22202-3513

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APPLICANT'S OPPOSITION

TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND

APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Applicant, Rosa West Laboratories, Inc. (hereafter "Rosa West" or "Applicant") hereby opposes the Motion of Vitacilina Corporation of America (hereafter "Vitacilina" or "Opposer") for Summary Judgment and requests the Trademark Trial and Appeal Board to deny the Opposer's Motion for Summary Judgment on its opposition to the registration by Applicant of "VITASILK-C" for use in conjunction with non-medicated skin care products and further, based on the fact that there truly is no triable issue of fact, Applicant files its cross-motion for summary judgment on Opposer's Opposition and requests the Trademark Trial and Appeal Board to grant Applicant's trademark registration for "VITASILK-C".

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I.

APPLICANT'S OPPOSITION

TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

A. PRELIMINARY STATEMENT

On or about May 4, 2000, Applicant filed an application for a trademark registration on the Principal Register for the mark "VITASILK" which was assigned Application Serial No. 76/040,993. The Trademark Office found that there was no confusing similarity between Applicant's mark for "VITASILK" and any other issued registration or pending application and approved the application. The application was published for opposition on January 22, 2002. The Applicant prosecuted the application on its own without the benefit of legal counsel.

Opposer subsequently filed an opposition to the registration. The Opposition was filed on March 19, 2002 and assigned TTAB Opposition No. 151,186. Unfortunately, Applicant was not represented by counsel and did not appreciate the significance of the Opposition and inadvertently allowed a default to be entered against it because it did not appreciate the necessity of having to respond to the Opposition.

It is emphasized that there was absolutely and totally no litigation on the merits whatsoever and no ruling by the Trademark Trial and Appeal Board on the merits but it was simply an inadvertent default which the Applicant without the benefit of legal counsel permitted to have entered against it.

Therefore, there is absolutely and totally no litigation on the merits and no *res judicata* as to the merits of Opposer's argument that there is a likelihood of confusion between its mark "VITACILINA" and the Applicant's mark "VITASILK".

Thereafter, with the benefit of legal counsel, Opposer filed a new trademark application for "VITASILK-C" for non-medicated skin care products in the nature of multivitamin facial treatments, namely facial scrubs and masks, which was based upon actual use dating back to March 23, 1996 and commercial use in interstate commerce on March 20, 1997, and once again, the Trademark Examiner found no prior registration or pending application that was confusingly similar with "VITASILK-C" and approved the application for publication.

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The Opposer thereafter filed an opposition against the present application which is the present Opposition No. 91159389. The Opposer seeks to win the case not based on the merits, but based on the fact that Applicant without the benefit of counsel inadvertently allowed a default judgment to be entered into because it did not respond to the Notice of Opposition.

It is respectfully submitted that in the interests of justice due to the fact that two times the Trademark Office has clearly found that there is no confusing similarity between the marks and as will be presented in the Cross-Motion for Summary Judgment, there truly is no confusing similarity between Opposer's mark and Applicant' mark and therefore, Opposer's' Motion for Summary Judgment on the basis of res judicata should be denied.

B. STATEMENT OF FACTS

Opposer is in the business of manufacturing and selling skin ointments, antifungal creams, and other similar products. However, its only registration is for the trademark "VITACILINA", Registration 1,063,707 registered on April 19, 1977, strictly and solely for skin ointment. This is in International Class 5 and therefore, presumably, it is a medicated skin ointment.

Applicant, Rosa West is in the business of manufacturing skin care products and has applied to register the trademark "VITASILK-C" for use in conjunction with non-medicated skin care products in International Class 3 and in particular, non-medicated skin care products in the nature of multivitamin facial treatments, namely facial scrubs and masks.

Applicant has had actual use of the trademark since at least as early as March 23, 1996 and has had actual use in interstate commerce of the trademark since at least as early as March 20, 1997.

During the entire period of time of Applicant's use, there has been absolutely and totally no instances of confusion whatsoever between Applicant's mark and Opposer's mark. Clearly, the two products are for different purposes in totally different classes and therefore, the products are totally dissimilar and are not sold to the same consumers for the same purposes.

More importantly, as will be discussed in Applicant's Cross-Motion for Summary Judgment, the two marks are totally not confusingly similar.

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C. LEGAL ARGUMENT

Opposer's argument that the principal of *res judicata* precludes the re-litigation of this case is simply inaccurate. The fact is that there was no litigation of the case. The Trademark Office approved the initial trademark application filed by the Applicant without the benefit of legal counsel, Application Serial No. 76/040,993, and the mark was published for opposition on January 22, 2002. Opposer without the benefit of counsel did not realize that when it has received the notice of opposition by the Opposer, it was necessary to respond to the Opposition and therefore, inadvertently lost the opposition by default. It is emphasized that there were no legal arguments and no legal decision by the Trademark Trial and Appeal Board ruling that there was a likelihood of confusion between the two trademarks. In fact, there was no ruling at all because the Applicant simply allowed the opposition to be lost by default because it did not have the benefit of legal counsel. As admitted by the Opposer, no issues were actually litigated or decided in the first opposition proceeding. Therefore, there really is no *res judicata*.

Opposer cited Miller Brewing Co. Vs. Coy Int'l Corp., 230 U.S.P.Q. 675 (TTAB 1986). While the principles enunciated in Miller provide a guidance to the analysis as to whether the doctrine of *res judicata* applies in the instant case, Miller does not dictate an automatic result that the doctrine of *res judicata* would apply in all situations. As the Board pointed out in Metromedia Steakhouse Inc. Vs. Pondco II, Inc., 28 U.S.P.Q.2d 1205, 1208 (TTAB 1993), "[t]hese principles, however, lead to the opposite result when the facts of the instant case are considered." Here, Applicant's marks in the prior proceeding and the current proceeding are notably different with different commercial impression, such that they cannot be considered to be the same claim. The evidence relating to the issue of likelihood of confusion with the first mark is not precisely the same as the evidence with respect to the likelihood of confusion with the second mark.

Therefore, based on the above arguments, it is respectfully submitted that there is truly no *res judicata* and therefore, Applicant should be permitted to have registration of its trademark, especially in view of the Applicant's Cross-Motion for Summary Judgment, clearly showing that there was absolutely and totally no confusing similarity between the two marks.

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II.

APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Applicant Rosa West Laboratories, Inc. ("Rosa West" or "Applicant") hereby moves the Board for summary judgment against Opposer Vitacilina Corporation of America ("Vitacilina" or "Opposer").

A. PRELIMINARY STATEMENT

Applicant incorporates its preliminary statement set forth in its opposition to Opposer's Motion for Summary Judgment and also incorporates its statement of facts as set forth in Applicant's opposition to Opposer's Motion for Summary Judgment.

B. LEGAL ARGUMENT

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). A fact is material if it might significantly effect the outcome of the suit under the governing law. Id., at 248. An issue of material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the non-moving party. Id.. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party. Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court may discharge the moving party's initial burden in two cases. First, if the moving party demonstrates an absence of issues of material facts then the burden shifts to the non-moving party to show that a genuine issue of material fact does exist. Paxon Elec. Co., Inc. v. United States, 14 Cal. Ct. 634, 642 (1988). Alternatively, if the moving party can show that there is an absence of evidence to support the non-moving party's case, then the burden shifts to the non-moving party to proffer such evidence. Celotex, *supra*, 477 U.S. at 325. The non-moving party may not simply rely on the pleadings but must present significant probative evidence to support its claim. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

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It is respectfully submitted that this case is ripe for deciding on summary judgment as there is no triable issue of fact and as a matter of law, the Trademark Trial and Appeal Board can clearly rule that there would be no likelihood of confusion between the Applicant's mark "VITASILK-C" and the Opposer's mark "VITACILINA". The statement of facts as evidenced by the Opposer's registration and the Applicant's application speak for themselves. Specifically, Opposer's registration, Registration 1,063,707, a true and correct copy of which is attached hereto as **Exhibit 1** is for the trademark "VITACILINA" specifically and solely for skin ointment in International Class 5. Because it was registered in International Class 5 as opposed to International Class 3, it is abundantly clear that the skin ointment is medicated skin ointment.

As set forth in the trademark application which is of record in this case, a true and correct copy of a printout of which is attached hereto as **Exhibit 2** and incorporated herein by reference, the Applicant has sought to register the trademark "VITASILK-C" based upon actual use dating back to March 23, 1996 and actual use in interstate commerce dating back to March 20, 1997 for non-medicated skin care products in the nature of multivitamin facial treatments, namely facial scrubs and masks in International Class 3.

The Opposer's entire argument is that both trademarks contain the word "VITA" and therefore, there should be a likelihood of confusion. It is abundantly clear that when considered in their entireties, "VITACILINA" and "VITASILK-C" are totally different in every single way. The Applicant clearly argues as set forth in its affirmative defenses as part of its Opposition that there clearly and truly is no likelihood of confusion between the two marks for the following reasons;

1. Applicant alleges that for purposes of determining likelihood of confusion, a trademark must be considered in its entirety and not dissected into two component parts. Estate of P.D. Beckwith, Inc. v. Comm'n of Patents, 252 U.S. 538 (1920); In re Bed & Breakfast Registry, 791 F.2d 157, 229 U.S.P.Q. 818 (Fed. Cir. 1986).

Applicant alleges that Opposer has violated the well known trademark "anti-dissection" rule by dissecting Applicant's trademark into component parts and arguing that one part is more dominant than the other to allege a likelihood of confusion.

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The fact that Applicant's mark and Opposer's mark contain in part the word "VITA" does not make them confusingly similar. When compared in their entireties, "VITACILINA" and "VITASILK-C" are totally different in overall visual impression, pronunciation and meaning and are clearly not confusingly similar.

2. Applicant alleges that the commercial impression on average reasonably prudent consumers created by Applicant's mark "VITASILK-C" as a whole is not the same as nor confusingly similar with the Opposer's mark "VITACILINA". When compared in their entireties, the Applicant's mark is clearly different from the Opposer's mark and is not confusingly similar therewith.

3. Applicant alleges that under the overall impression analysis, there is no rule that an applicant cannot register a trademark which contains in part the whole of a prior registered mark. In re Merchandising Motivation, Inc., 184 U.S.P.Q. 364 (T.T.A.B. 1974). In Merchandising Motivation the Examiner stated that "no one has the right to incorporate the mark of another" and refused registration of mark "MMI MENSWEAR" over prior registration of mark "MEN"S WEAR". The Board reversed the Examiner's refusal because "the legal proposition put forth by the [E]xaminer [wa]s not absolute." Id., at 365.

In fact, the prior decision clearly indicates that there is no rule that confusion is automatically likely when an applicant's trademark contains in part the whole of a prior registered trademark. *See, e.g.*, S.C. Johnson & Sons, Inc. v. Johnson, 266 F.2d 129, 121 U.S.P.Q. 63 (6th Cir. 1959), *cert. denied*, 361 U.S. 820, 80 S. Ct. 65, 4 L. Ed.2d 65, 123 U.S.P.Q. 590 (1959); Clayton Mark & Co. v. Westinghouse Elec. Corp., 356 F.2d 943, 53 C.C.P.A. 951, 148 U.S.P.Q. 672 (C.C.P.A. 1964); Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 58 C.C.P.A. 735, 167 U.S.P.Q. 529 (C.C.P.A. 1970); Lever Bros. Co. v. Barcolene Co., 463 F.2d 1167, 59 C.C.P.A. 1162, 174 U.S.P.Q. 392 (C.C.P.A. 1972); Application of Ferrero, 479 F.2d 1395, 178 U.S.P.Q. 167 (C.C.P.A. 1973); Conde Nast Publications, Inc. v. Miss Quality, Inc., 5076 F.2d 1404, 184 U.S.P.Q. 422 (C.C.P.A. 1975); Plus Prod. v. General Mills, Inc., 188 U.S.P.Q. 520 (T.T.A.B. 1975); Lever Bros. Co. v. American Bakeries Co., 693 F.2d 251, 216 U.S.P.Q. 177 (2nd Cir. 1982).

In the above cited cases, the following registration of applicant's trademarks are granted over prior registered trademarks which were respectively incorporated entirely into the applicants' trademarks:

Applicant's Trademark	Prior Registered Trademark
MARK 75	MARK
JOHNSON MOP	JOHNSON
PEAK PERIOD	PEAK
ALL CLEAR	ALL
TIC TAC TOE	TIC TAC
COUNTRY VOGUES	VOGUE
PROTEIN PLUS	PLUS
AUTUMN GRAIN	AUTUMN

It is noted that in the above cited cases, no likelihood of confusion was found, when the prior marks incorporated were found to be suggestive, or alternatively, conveyed a different meaning as used alone.

4. Applicant alleges that the Opposer's mark "VITACILINA" has a totally different meaning from the Applicant's mark "VITASILK-C" and has a totally different visual impression and no one would confuse the two as emanating from the same source since they are totally different marks having totally different commercial impressions and totally different meanings in the marketplace.

5. Applicant alleges that the Opposer's goods and the Applicant's goods are totally different. Reviewing the one registration submitted as Exhibit A to the Opposition, Opposer's trademark is "VITACILINA" used only for skin ointment in the medicated class of International Class 5. In complete contrast, the Applicant's mark is "VITASILK-C" used in conjunction with the sale of non-medicated skin care products in the nature of multivitamin facial treatments, namely, facial scrubs and masks in International Class 3. Therefore, the products are totally different products registered in totally different trademark classes and are sold to totally different consumers for totally different purposes and sold in totally different channels of trade.

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6. Applicant alleges that when the Opposer's mark "VITACILINA" and the Applicant's mark "VITASILK-C" are compared in their entireties, the Applicant's mark and the Opposer's mark are not confusingly similar in overall sight, sound and meaning. The overall impression created by Applicant's mark is totally different in overall impression created by Opposer's mark.

7. Applicant alleges that Applicant's products and Opposer's products are sold to totally different consumers in totally different channels of trade which would therefore result in no likelihood of confusion whatsoever between the two marks.

Therefore, it is abundantly clear that the Trademark Examiners examining the application twice found that there was no confusing similarity between the mark "VITASILK" and "VITACILINA" and "VITASILK-C" and "VITACILINA". It is abundantly clear from the extensive arguments set forth above, that Opposer has absolutely and totally no case whatsoever to argue that there is a likelihood of confusion between the marks as the two marks are totally different. The marks themselves are totally different. The products with which they are sold are totally different and the channels of trademark through which they are sold are totally different. Therefore, on every single principle of trademark law, it is abundantly clear that when considered on its merits, there is absolutely and totally no confusing similarity between the marks and therefore, it is respectfully submitted that this case is now ripe for summary judgment and the Trademark Trial and Appeal Board should rule in favor of Applicant and dismiss Opposer's Opposition with prejudice.

III.

CONCLUSION

For all of the above reasons, it is respectfully submitted that in the current opposition proceeding is not subject to *res judicata* from the prior opposition proceeding as alleged by the Opposer because the Applicant's prior and current applications are not the same claim and therefore, in the interests of justice, the prior default found against the Applicant when it was not represented by counsel should not be held against the Applicant. As a result, Opposer's Motion for Summary Judgment should be denied.

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As is also abundantly clear from the arguments presented herein, and which were raised in the answer, the two marks are so totally different and sold with so totally different products in so totally different channels of trade that there would absolutely and totally be no confusion whatsoever and therefore, Applicant's Cross-Motion for Summary Judgment should be granted and Opposer's Opposition should be dismissed with prejudice.

If there is any fee required for filing of this APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, then the Commissioner for Trademarks is hereby authorized to charge our Deposit Account No. 18-2222 for any such appropriate fee.

Respectfully submitted,

Date: February 17, 2005

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CERTIFICATE OF MAILING

I hereby certify that the APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, CERTIFICATE OF SERVICE, and CERTIFICATE OF MAILING are being deposited with the United States Postal Service with sufficient postage as Express Mail, Mail Label No. EV 593944508 US, in an envelope addressed to:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dated: February 17 , 2005

Thomas I. Rozsa
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Attorney For Applicant

In Re Opposition No. 91159389

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the document entitled APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT was sent on February 17, 2005 via first class mail, postage prepaid, to the attorneys for the Opposer at the following address:

James Walsh, Esq.
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1206

Dated: February 17, 2005

Thomas I. Rozsa
Registration No. 29,210

In Re Opposition No. 91159389

EXHIBIT 1

The United States of America

CERTIFICATE OF RENEWAL

The registration shown in this certificate has been renewed in the United States Patent and Trademark Office to the named registrant.

The records of the United States Patent and Trademark Office show that an application for renewal of the registration for the mark shown in this certificate was filed in the Office, that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Commissioner of Patents and Trademarks, and that the registrant is entitled to renewal of the registration for the mark under the Trademark Act of 1946, as Amended.

A copy of the mark and pertinent data from the registration are a part of this certificate.

This registration shall remain in force for TEN (10) years, unless terminated earlier as provided by law.

Bruce Lehman

Commissioner of Patents and Trademarks

Int. Cl.: 5

Prior U.S. Cl.: 18

Reg. No. 1,063,707

United States Patent and Trademark Office

Registered Apr. 19, 1977

10 Year Renewal

Renewal Term Begins Apr. 19, 1997

TRADEMARK
PRINCIPAL REGISTER

VITACILINA

VITACILINA CORPORATION OF AMERICA (CALIFORNIA CORPORATION)
9228 LAS TUNAS DRIVE
TEMPLE CITY, CA 91780

FOR: SKIN OINTMENT, IN CLASS 5 (U.S. CL. 18).

FIRST USE 7-27-1976; IN COMMERCE 8-5-1976.

SER. NO. 73-097,975, FILED 8-26-1976.

In testimony whereof I have hereunto set my hand and caused the seal of The Patent and Trademark Office to be affixed on July 15, 1997.

COMMISSIONER OF PATENTS AND TRADEMARKS

EXHIBIT 2

Source: Legal > Area of Law - By Topic > Trademarks > Trademark Registrations & Manuals > **Federal Trademarks**
Terms: **name (vitasilk-c)** (Edit Search)

© 2005 CCH CORSEARCH, VITASILK-C (WORDS ONLY)

Trademark Name: VITASILK-C

(WORDS ONLY)

Filing Date: April 21, 2003

Serial Number: 76-513143

Official Gazette Status: PUBLISHED - OPPOSED

Status Date: February 10, 2004

Goods/Services:
NON-MEDICATED SKIN CARE PRODUCTS IN THE NATURE OF MULTIVITAMIN FACIAL TREATMENTS, NAMELY, FACIAL SCRUBS AND MASKS (INTERNATIONAL CLASS: 3; US CLASS: 1, 4, 50, 51, 52, 6)

International Class:
3 (COSMETICS AND CLEANING PREPARATIONS) - PRIMARY CLASS

U.S. Class:
1 (RAW OR PARTLY PREPARED MATERIALS) - SECONDARY CLASS
4 (ABRASIVES AND POLISHING MATERIALS)
50 (MERCHANDISE NOT OTHERWISE CLASSIFIED)
51 (COSMETICS AND TOILET PREPARATIONS)
52 (DETERGENTS AND SOAPS)
6 (CHEMICALS AND CHEMICAL COMPOSITIONS)

Register Type: PRINCIPAL REGISTER

Active/Inactive: ACTIVE

PTO Internal Status: (774) OPPOSITION PENDING

PTO Status Date: February 10, 2004

First Use Date: March 23, 1996 (INTERNATIONAL CLASS: 3; US CLASS: 1, 4, 50, 51, 52, 6)

First Commerce Date: March 20, 1997 (INTERNATIONAL CLASS: 3; US CLASS: 1, 4, 50, 51, 52, 6)

Publication Date: December 23, 2003

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Word Count: 1

Description of Mark: THE MARK CONSISTS OF THE WORD AND LETTER "VITASILK-C" AS SHOWN IN DRAWING.

********** **OWNERSHIP INFORMATION** **********

Owner: ROSA WEST LABORATORIES, INC. (CALIFORNIA CORPORATION)
10639 CHANDLER BOULEVARD
NORTH HOLLYWOOD, CA 91601
AS OF December 23, 2003

Applicant:
ROSA WEST LABORATORIES, INC. (CALIFORNIA CORPORATION)
10639 CHANDLER BOULEVARD
NORTH HOLLYWOOD, CA 91601
AS OF April 21, 2003

Applicant: ROSA WEST LABORATORIES, INC. (CALIFORNIA CORPORATION)
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NORTH HOLLYWOOD, CA 91601
AS OF April 21, 2003

********** **TRADEMARK TRIAL AND APPEAL BOARD INFORMATION** **********

Plaintiff in Opposition:
VITACILINA CORPORATION OF AMERICA

Proceeding Type: OPPOSITION
Proceeding Number: 159389
Filing Date: January 30, 2004
Defendant in Opposition: ROSA WEST LABORATORIES, INC.
Defendant Serial Number: 76-513143
Defendant Trademark: VITASILK-C
Status: PENDING
Status Date: February 10, 2004
Update Date: February 03, 2005

Source: Legal > Area of Law - By Topic > Trademarks > Trademark Registrations & Manuals > **Federal Trademarks**
Terms: **name (vitasilk-c)** (Edit Search)
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Date/Time: Sunday, February 13, 2005 - 8:57 PM EST