ESTTA Tracking number: **ESTTA29033**

Filing date: **03/24/2005**

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

Proceeding	91159389
Party	Plaintiff VITACILINA CORPORATION OF AMERICA ,
Correspondence Address	JAMES WALSH ARNOLD & PORTER LLP 555 TWELFTH STREET, NW WASHINGTON, DC 20004-1202 trademarkdocketing@aporter.com
Submission	Opposer's Response to Applicant's Cross-Motion for Summary Judgment
Filer's Name	James Walsh
Filer's e-mail	trademarkdocketing@aporter.com
Signature	/james walsh/
Date	03/24/2005
Attachments	Vitacilina SJ Response.pdf (3 pages)

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

VITACILINA CORPORATION OF AMERICA, Opposer,	:	
v.	:	Opposition No. 91159389
ROSA WEST LABORATORIES, INC. Applicant.	:	

OPPOSER'S RESPONSE TO APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

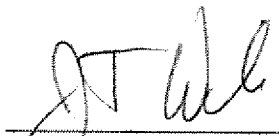
Opposer Vitacilina Corporation of America ("Vitacilina" or "Opposer") hereby responds to the Cross-Motion for Summary Judgment by Applicant Rosa West Laboratories, Inc. ("Rosa West Labs" or "Applicant") as follows:

It is not necessary for the Board to consider Applicant's cross-motion for summary judgment because the motion for summary judgment submitted by Opposer on February 1, 2005 takes precedence because of Applicant's default in the earlier TTAB proceeding referenced in Opposer's motion for summary judgment (Opposition No. 151,186). In February 2003, the TTAB granted Opposer's motion for summary judgment against Applicant in Opposition No. 151,186 as conceded, and the application was subsequently abandoned. It would be illogical to permit the Applicant to overcome their lack of response to Opposer's summary judgment motion in the earlier proceeding with a summary judgment motion now. As explained in Opposer's motion for summary judgment in this proceeding, Rosa West Labs is not entitled to a registration for the mark VITASILK-C because VITASILK and VITASILK-C are legally identical, the goods in

both applications are legally identical and the principle of res judicata applies. The earlier ruling of the Board in Opposition No. 151,186 precludes the Board from considering Applicant's current motion for summary judgment. Also, Applicant's arguments concerning their lack of legal representation is without merit at this stage in the proceedings.

Turning to the merit of Applicant's cross-motion for summary judgment, if considered, the motion must be denied. The Applicant has not presented any evidence in support of its motion, thus making the motion for summary judgment the equivalent of a motion for judgment on the pleadings. There are obvious issues of fact regarding the likelihood of confusion. The parties' marks are highly similar, sharing the same sequence of beginning syllables. Furthermore, the goods of the parties are either overlapping or closely related. Applicant relies on the purely technical administrative distinction based on classifications to attempt to distinguish the goods of the parties while disregarding the common channels of trade and common customers and users of the skin care products of the parties.

Accordingly, if the Board reaches consideration of the Applicant's cross-motion for summary judgment, it must be denied so that that Board can consider the numerous factual issues at trial, after discovery.

By: 

James Walsh
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999

Dated: March 24, 2005

Attorney for Opposer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2005, I caused to be served by First Class Mail, postage prepaid, a copy of the foregoing Motion for Summary Judgment on:

Thomas I. Rozsa
ROZSA & CHEN, LLP
15910 Ventura Blvd.
Suite 1601
Encino, CA 91436-2815

Elizabeth Vary