

ESTTA Tracking number: **ESTTA18513**

Filing date: **11/02/2004**

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

Proceeding	91162247
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Date	11/02/2004
Attachments	MotiontoStrike.11.02.04.pdf (6 pages)

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

**ROYAL LABS NATURAL COSMETICS,
INC.,**

Opposer

v.

**VISUAL CHANGES SKIN CARE
INTERNATIONAL, INC.,**

Applicant.

Opposition No. 91162247
Serial No. 78235588

**APPLICANT VISUAL CHANGES SKIN
CARE INTERNATIONAL, INC.'S
MOTION TO STRIKE OPPOSITION
PARAGRAPH NOS. 3 & 4 PURSUANT TO
FED. R. Civ. P. 12(f) AND TBMP § 506.**

I. INTRODUCTION.

Applicant VISUAL CHANGES SKIN CARE INTERNATIONAL, INC. (“Visual Changes” or “Applicant”) hereby moves the Trademark Trial and Appeal Board (“the Board”), pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Section 506 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), to strike Paragraph Nos. 3 & 4 of the Opposition of ROYAL LABS NATURAL COSMETICS, INC. (“Royal Labs” or “Opposer”), on the grounds that said paragraphs plead matter impertinent and immaterial to the Opposition.

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1 **II. STATEMENT OF FACTS.**

2 On April 9, 2003, Visual Changes filed United States Trademark Registration
3 Application Serial No. 78235588 (“Application”) for BELLAROMA under International Class 5
4 for Nutritional Supplements and International Class 9 for Electronic media, namely compact
5 discs, DVDs and video tapes on beauty and motivational topics. On July 27, 2004, pursuant to
6 15 U.S.C. § 1063, Visual Changes’ Application was published in the Official Gazette for
7 opposition by “[a]ny person who believe[d] that he would be damaged by the registration of
8 [Visual Changes’ trademark] upon the principal register.” On August 25, 2004, Royal Labs filed
9 a Request for an Extension of Time to Oppose Visual Changes’ Application. On September 23,
10 2004, Royal Labs filed its Opposition.

11 Royal Labs’ Opposition alleges that if Visual Change’s Application is allowed to issue as
12 a registered trademark, consumer confusion will likely result between Applicant’s mark,
13 BELLAROMA, and Opposer’s U.S. Registered Trademark No. 75222648, AROMA BELLA.
14 Opposer’s stylized trademark is used in connection with skincare products, moisturizing agents
15 and other beauty products, including topical skin vitamin supplements in International Class 3.
16 However, instead of properly supporting its allegation by referring to the goods covered by
17 Applicant’s Application, Opposer cites Applicant’s alleged use of the BELLAROMA trademark
18 on goods unrelated to those listed in Visual Changes’ Application. Opposer also attempts to
19 bolster its allegation with superfluous historical allegations about the parties’ previous business
20 dealings. Because these allegations as a matter of law have nothing to do with this Opposition,
21 they should be stricken.

22 **III. AS A MATTER OF LAW, PARAGRAPH NOS. 3 & 4 SHOULD BE STRICKEN**
23 **BECAUSE THEY CONTAIN IMMATERIAL AND IMPERTINENT**
24 **ALLEGATIONS.**

25 Proceedings before the Board are governed to a large extent by the decisions of the Court
26 of Appeals for the Federal Circuit. TBMP § 101.3. The United States Court of Appeals for the
27 Federal Circuit generally reviews procedural matters under the law of the regional circuit in
28 which the district court sits. Nitro Leisure Prods., L.L.C. v. Acushnet Co., 341 F.3d 1356, 1359
(Fed. Cir. 2003). In the Ninth Circuit, a court “may order stricken from any pleading . . . any

1 redundant, immaterial, impertinent, or scandalous matter.” Fantasy, Inc. v. Fogerty, 984 F.2d
2 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994) (internal citations
3 omitted). Additionally, “the function of a 12(f) motion to strike is to avoid the expenditure of
4 time and money that must arise from litigating spurious issues by dispensing with those issues
5 prior to trial. . . .” Id. Because Paragraph Nos. 3 & 4 contain immaterial and impertinent
6 allegations, which would prejudice Applicant by requiring the needless expenditure of time and
7 money, they should be stricken from the Opposition.

8 **IV. ALLEGATIONS CONCERNING APPLICANT’S ALLEGED USE OF THE**
9 **MARK ON GOODS UNRELATED TO THOSE DESCRIBED IN THE**
10 **APPLICATION ARE IMMATERIAL AND IMPERTINENT TO THE**
11 **OPPOSITION.**

12 “In addition to standing, a plaintiff must also plead (and later prove) a statutory ground or
13 grounds for opposition or cancellation. A plaintiff may raise any available statutory ground for
14 opposition or cancellation that negates the defendant’s right to registration.” TBMP § 309.03(c).
15 With respect to this proceeding, allegations about Visual Changes’ alleged use of the
16 BELLAROMA trademark on products unrelated to those listed in the Application and not even
17 falling within the same International Classes as those listed in the Application do not constitute
18 statutory grounds for opposition.

19 “Our precedent requires the Board to look to the registration to determine the scope of the
20 goods/services covered by the contested mark.” Cunningham v. Laser Golf Corp., 222 F.3d 943,
21 948 (Fed. Cir. 2000) (internal citations omitted). “Proceedings before the Board are concerned
22 with registerability and not use of a mark. Accordingly, the identification of goods/services
23 statement in the registration, not the goods/services actually used by the registrant, frames the
24 issue.” Id. The issues of this case should be framed no differently.

25 Opposition Paragraph No. 3 specifically alleges that:

26 Opposer is aware that Applicant has made previous use of
27 its proposed mark BELLAROMA in connection with the
28 same goods for which the Opposer has registered the mark
AROMA BELLA. One example of this use is the
Applicant’s activity as an exhibitor of skincare products,
shown on the attached flyer from the International
Academy of Aesthetics Cutting-Edge Training Symposium
on September 27, 2003. Opposer believes that Applicant’s

1 goods for which Applicant seeks registration of the mark
2 BELLAROMA will be sold and distributed in conjunction
3 with such skincare products covered by Opposer's
4 registered mark AROMA BELLA and that the Applicant's
5 mark BELLAROMA will therefore be used in conjunction
6 with the offering of such products.

7 Opposer cites in Paragraph No. 3 Applicant's alleged use of its BELLAROMA mark on
8 goods unrelated and falling under a different International Class than the goods listed in the
9 Application. The proper time for Opposer to challenge Applicant's alleged use of
10 BELLAROMA in connection with skincare products under International Class 3 is when/if
11 Applicant's United States Trademark Registration Application Serial No. 78401332 is published
12 in the Official Gazette. Until then, Opposer's statement in Paragraph No. 3 is immaterial and
13 impertinent to this Opposition and should be stricken.

14 **V. ALLEGATIONS ABOUT THE PARTIES' PREVIOUS BUSINESS DEALINGS**
15 **ARE ALSO IMMATERIAL AND IMPERTINENT TO THE OPPOSITION.**

16 Likewise, superfluous historical allegations about the parties' previous business dealings
17 have nothing to do with this Opposition and should be stricken. Fantasy, Inc. v. Fogerty, 984
18 F.2d 1524, 1527 (9th Cir. 1993) ("Superfluous historical allegations are a proper subject of a
19 motion to strike.").

20 Opposition Paragraph No. 4 alleges that:

21 Applicant is aware of the Opposer, its products, and its
22 registered mark, inasmuch as Applicant has previously
23 been a customer of the Opposer, purchasing products
24 manufactured by the Opposer for distribution by the
25 Applicant under the Applicant's own prior brand names
26 (that did not include the name for which Applicant now
27 seeks registration, BELLAROMA).

28 Opposition Paragraph No. 4 creates serious risk of prejudice and delay to Visual
Changes. Allowing this paragraph to remain in the Opposition will unnecessarily complicate the
Opposition by inviting unwarranted discovery into the confidential business records of Visual
Changes without the possibility of yielding any evidence relevant to the Opposition. Because a
court may properly grant a motion to strike for the purpose of streamlining the ultimate
resolution of an action and focusing attention on the real issues in a case, striking this paragraph

1 from the Opposition is especially warranted. Fantasy, Inc., 984 F.2d at 1528; see also TBMP
2 § 506.01 (striking matter that has no bearing upon the issues in the case).

3 **VI. CONCLUSION**

4 For the reasons set forth above, Applicant Visual Changes respectfully requests that the
5 Board strike Paragraph Nos. 3 & 4 of the Opposition of ROYAL LABS NATURAL
6 COSMETICS, INC.

7
8 Dated: November 2, 2004

DOWLING, AARON & KEELER INC.

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10 By: _____ /S/
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12 Attorneys for VISUAL CHANGES SKIN
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