

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: June 21, 2007

Opposition No. **91174465**

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Vitamin World, Inc

v.

First Quality Hygienic, Inc.

Ann Linnehan, Interlocutory Attorney

This case now comes up for consideration of applicant's motion (filed April 23, 2007) for leave to amend its answer to assert a counterclaim to cancel opposer's pleaded registration. A copy of the amended answer is attached thereto. The motion has been fully briefed.

Applicant seeks to cancel opposer's pleaded registration on the grounds of abandonment and fraud. Applicant states that this amendment is triggered by recently discovered information concerning opposer's mark. Opposer objects to the motion to amend as untimely.

Amendments to pleadings by way of a motion to amend are liberally allowed at any stage of the proceeding where they are timely filed and entry would not be prejudicial and would further the ends of justice. See Fed. R. Civ. P.

15(a) and *Caron Corporation v. Helena Rubenstein, Inc.*, 193 USPQ 113 (TTAB 1976).

Contrary to opposer's contention, applicant's motion is not untimely. In this case, applicant did not learn of the factual basis for the counterclaim until it reviewed the relevant evidence during discovery and during its investigation of the labels used to package opposer's goods.

Inasmuch as applicant properly plead fraud with particularity and properly plead abandonment, the amended pleading does not suffer from any insufficiency and opposer would not suffer any real prejudice if applicant were permitted to add its counterclaim.

Moreover, the Board notes that discovery has yet to close and any difficulty resulting from the amended pleading amendment can be overcome through an extension of the discovery period. See *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 431 (TTAB 1985).

In view thereof, applicant's motion for leave to amend its answer is hereby granted. The amended answer is made of record.

The Board notes, however, that the counterclaim is informal because the requisite fee therefore has not been submitted. Applicant has until **July 6, 2007** to submit the requisite fee; following which opposer is allowed until **August 3, 2007** to file a reply to the counterclaim.

Proceedings herein are hereby suspended. Following submission of the above, trial dates, including the period for discovery, will be rescheduled.