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

Proceeding	91174465
Party	Plaintiff Vitamin World, Inc Vitamin World, Inc Vitamin World, Inc 90 Orville Drive Bohemia, NY 11716 UNITED STATES
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Submission	Other Motions/Papers
Filer's Name	Scott B. Fisher
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Signature	/SBF/
Date	05/14/2007
Attachments	VitaminWorldFirstQualityPapersinOpptoMotAmend.pdf (58 pages)(4024456 bytes)

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

In the Matter of Consolidated Trademark Applications:

Application Serial No.	:	78/854,326
Filing Date	:	April 5, 2006
Publication Date:	:	November 21, 2006
Mark	:	**FEMTEX CROWN JEWEL**
Int'l Class	:	005
For	:	Feminine hygiene products, namely tampons and feminine cleansing cloth

Application Serial No.	:	78/704/010
Filing Date	:	August 31, 2005
Publication Date	:	November 14, 2006
Mark	:	**FEMTEX**
Int'l Class	:	005
For	:	Sanitary products, namely, feminine hygiene cleansing cloth

VITAMIN WORLD, INC.,	:	
Opposer,	:	
vs.	:	**Opposition Nos.: 91/174,465**
	:	**91/174,466**
FIRST QUALITY HYGIENIC, INC.,	:	
Applicant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO
APPLICANT'S MOTION FOR LEAVE TO FILE
AN AMENDED ANSWER WITH COUNTERCLAIM

Opposer in this consolidated proceeding, Vitamin World, Inc. ("Vitamin World" or "Opposer"), submits this Memorandum of Law in opposition to the motion of applicant, First Quality Hygienic, Inc. ("First Quality" or "Applicant"), pursuant to Fed. R. Civ. P. 13(f) and 15(a) and C.F.R. § 2.106(b)(2)(i) and § 2.107, to amend its Answer to assert a

counterclaim against Opposer to cancel Opposer's U.S. Registration No. 2,438,301 for the mark FEMGEST (the "FEMGEST Registration"). Purportedly based on "newly discovered evidence," First Quality seeks leave to cancel the FEMGEST Registration on the grounds of abandonment and alleged fraud in the procurement and maintenance of the registration. However, since First Quality's motion is untimely and the alleged counterclaim is legally insufficient, would serve no useful purpose, and is without merit, First Quality's motion for leave to amend should be denied with prejudice in its entirety.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Opposer, by duly recorded assignment, is the owner of all right, title and interest in the FEMGEST Registration, registered March 27, 2001, in the Principal Register, for "Medicated topical transdermal creams for application to irritated or itchy skin" in International Class 005. Affidavits under Sections 8 and 15 of the Trademark Act (15 U.S.C. § 1065) have been filed, accepted and acknowledged by the U. S. Patent and Trademark Office ("PTO").

On or about February 15, 1997, Bio-Nutritional Formulas, Inc. ("Bio-Nutritional") began using in commerce the FEM-GEST Mark. *See* Opposer's Answer to Applicant's Interrogatory No. 1, attached as Exhibit "A" to the accompanying Declaration of Scott B. Fisher, Esq. ("Fisher Decl."). At that time, Bio-Nutritional was a subsidiary of Nutrition Warehouse. *Id.* In or about November, 1999, Bio-Nutritional filed for U. S. trademark registration of the FEMGEST mark. *Id.* At or about the same time period, NBTY, Inc. (a leading vertically integrated manufacturer, marketer and distributor of a broad line of vitamins, minerals, dietary and nutritional supplements), acquired the assets of Nutrition Warehouse, which included the right, title and interest in the FEM-GEST and FEMGEST

marks, by virtue of a merger of Bio-Nutritional with and into Nutrition Warehouse Acquisition Corp. *Id.* After acquiring the FEMGEST mark, NBTY assigned the rights to the FEMGEST mark to its wholly-owned subsidiary, Vitamin World. *Id.* Home Health, a division of American Health, Inc. (which is another wholly-owned subsidiary of NBTY), produces and distributes products bearing the FEMGEST mark. *Id.* The PTO recorded the assignment of the FEMGEST mark to Vitamin World in February, 2005. *Id.*

Upon information and belief, Bio-Nutritional first used and first used in commerce the FEM-GEST Mark on or about February, 1997, in connection with topical transdermal creams. *See*, Opposer's Answer to Applicant's Interrogatory No. 4, included in Fisher Decl. as Exhibit "A". Upon acquiring the assets of Nutrition Warehouse, including the rights to the FEMGEST mark, in or about November, 1999, Opposer continued commercial use of the mark, including continuing to use the FEMGEST mark as a transdermal progesterone cream for women, in which such use has continued to the present. *Id.*

On or about December 8, 2006, Opposer timely filed Notices of Opposition against Applicant's then-recently published marks, FEMTEX and FEMTEX CROWN JEWEL (collectively, the "FEMTEX Marks"). Applicant seeks to register FEMTEX, Application Serial No. 78/704,010, in International Class 5, for "Sanitary products, namely, feminine hygiene cleansing cloths" and seeks to register FEMTEX CROWN JEWEL, Application Serial No. 78/845,326, in International Class 5, for "Feminine hygiene products, namely tampons and feminine cleansing cloth". On or about May 1, 2007, the Trademark Trial and Appeal Board (the "Board") granted the parties' joint motion to consolidate the proceedings into the parent Opposition No. 91/174,465 proceeding. In both cases, Opposer contends that it will be injured by Applicant's use of the FEMTEX Marks because those marks are

substantially similar to Opposer's FEMGEST mark and they are confusingly similar in appearance, sound, connotation, and commercial impression to the FEMGEST mark and, therefore, likely to cause confusion in the marketplace. A copy of the Notices of Opposition filed in this proceeding are attached as Exhibit "B" to the Declaration of Holly Pekowsky ("Pekowsky Decl.") in support of Applicant's motion for leave to amend.

On or about January 17, 2007, Applicant served and filed Answers to each Notice of Opposition. Copies of Applicant's Answers are attached as Exhibit "B" to the Fisher Declaration. Neither Answer sets forth a counterclaim seeking to cancel the FEMGEST Registration.

ARGUMENT

APPLICANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER SHOULD BE DENIED

Applicant seeks leave to amend its Answers to assert a counterclaim against Opposer to cancel the FEMGEST Registration on the grounds of (i) abandonment and (ii) alleged fraud on the PTO in obtaining and maintaining the FEMGEST Registration. *See* Applicant's Memorandum of Law in Support of Motion to File an Amended Answer ("App. Memo. of Law"), pp. 1-2. Applicant's motion is premised on self-described "recently discovered information" that Opposer has not used the FEMGEST mark on the goods described in its application for registration and that it knew at the time it filed its application for registration and/or at the time it filed the Section 8 and 15 Declarations, that it was not using the FEMGEST mark on the goods described in the application. *See* App. Memo. of Law, pp. 3-4 and 6. As the proposed counterclaim is untimely, legally insufficient, would serve no useful purpose, and is without merit, Applicant's motion for leave to amend should be denied with prejudice.

A. **Legal Standard**

While Fed. R. Civ. P. 15(a), made applicable to this proceeding by 37 C.F.R. § 2.116(a), provides that leave to amend a pleading "shall be freely given when justice so requires",[1] it has been held that, "[w]here it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend." Lucente v. Int'l. Business Machines Corp., 310 F.3d 243, 258 (2nd Cir. 2002) (internal cite omitted). *See* TBMP § 507.02 ("where the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, or would serve no useful purpose, the Board normally will deny the motion for leave to amend.").

Moreover, counterclaims for cancellation of pleaded registrations in opposition proceedings before the Board are governed by 37 C.F.R. § 2.106(b)(2)(i). *See* TBMP § 313.04. Under that statute,

> A defense attacking the validity of any one or more of the registrations pleaded in the opposition shall be a compulsory counterclaim if grounds for such counterclaim exist at the time when the answer is filed. If grounds for a counterclaim are known to the applicant when the answer to the opposition is filed, the counterclaim shall be pleaded with or as part of the answer. . . .

37 C.F.R. § 2.106(b)(2)(i). *See also* S&L Acquisition Co. v. Helene Arpels, Inc., 9 U.S.P.Q.2d 1221, 1224 (TTAB 1987) (where the Board denied applicant's motion to amend the answer to add an additional ground to an existing counterclaim since such ground was available at the time the original answer with the counterclaim was filed).

[1] Fed. R. Civ. P. 13(f) similarly provides that, "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment."

B. The Motion To Amend The Answer Is Untimely

Applicant's motion for leave to amend its Answer to include a counterclaim for cancellation of the FEMGEST Registration is based principally on Applicant's comparison of the goods and services description of the application for registration of the FEMGEST mark with generic warning language contained on the label of the FEMGEST transdermal progesterone cream product. As Applicant knew or should have known of the grounds for the proposed counterclaim to cancel the FEMGEST Registration at the time it filed its Answers to the Notices of Opposition in this consolidated proceeding, the motion is untimely under 37 C.F.R. § 2.106(b)(2)(i) and should be denied.

The application for registration of the FEMGEST mark identifies the goods and services using the mark in International Class 005, as follows:

> Medicated topical transdermal creams for application to irritated or itchy skin.

See Notices of Opposition, Exhibit "A". In support of the instant motion for leave to amend, Applicant contends that, "the container for the 'progesterone cream' currently sold by Vitamin under the FEMGEST mark specifically states that it should **not** be applied to irritated or itchy skin (*e.g.*, rashes): 'Do **not** apply to broken or irritated skin or areas affected by rashes.'" App. Memo. of Law, p. 3 and Pekowsky Decl., Exhibit "D" (emphasis added by Applicant). According to Applicant, the generic warning language on the label of the FEMGEST transdermal progesterone cream product supports the theories of (1) abandonment (in that neither Opposer nor its predecessors-in-interest "ever used the FEMGEST mark in connection with Creams for Irritated or Itchy Skin" [App. Memo. of Law, p. 3]) and/or (2) fraud on the PTO (in that Opposer "knew, or should have known, at the time it obtained the Subject Registration, and/or, at the time it filed its Section 8 and 15

Declarations . . ., that it was not using the FEMGEST mark on Creams for Irritated or Itchy Skin" [*Id.* at p. 6]).

Applicant claims that it did not discover the "new" information in support of the motion to amend until Opposer responded to Applicant's discovery demands in or about March, 2007. App. Memo. of Law at pp. 3-4.[2] That contention is disingenuous. In particular, the Notices of Opposition filed in this consolidated matter specifically cited the FEMGEST Registration as the basis for the opposition and specifically identified the goods and services identified in the application for registration of the FEMGEST mark. *See* Notices of Opposition, ¶ 1. In addition, Applicant and its counsel had unfettered access to the FEMGEST transdermal progesterone cream product and label annexed thereon at the time the respective Notices of Opposition were filed and served on Applicant and its counsel -- whether by virtue of the Board's electronic Trademark Document Retrieval system or available online on the Internet through a generic search of "FEMGEST" or through purchase on the Internet or at a retail establishment (such as the pharmacy located adjacent to counsel's office in which Applicant's counsel did, in fact, purchase the FEMGEST product from on March 29, 2007). *See* Pekowsky Decl., ¶ 12.

It cannot be disputed that at the time Applicant filed its Answers to the Notices of Opposition in this matter in or about January, 2007, that Applicant and its counsel knew or should have known by reasonable inquiry that (i) the goods and services description of the FEMGEST mark reads "Medicated topical transdermal creams for application to irritated or

[2] While Applicant seems to imply that Opposer's discovery responses were late (*see* App. Memo. of Law, p. 4), Applicant fails to disclose that (i) counsel were in the process of drafting and finalizing an appropriate confidentiality agreement concerning the disclosure of confidential information in this matter, and (ii) that Applicant was advised that Opposer's discovery responses would be forthcoming upon execution of the agreed upon confidentiality agreement, which they were.

itchy skin" and (ii) that the label of the FEMGEST transdermal cream product contains the following warnings:

> **WARNING:** Not for use by pregnant or nursing women. Consult doctor before use. Do not apply to broken or irritated skin or areas affected by rashes. **Discontinue use and consult your doctor if any adverse reactions** occur, such as skin sensitivity, rash, acne or vaginal spotting or bleeding. Do not apply to the same skin area as other skin products. Not intended for use by persons under the age of 18. Avoid contact with eyes. Do not use on children or animals.
>
> **WARNING:** This product contains Progesterone, a chemical known to the State of California to cause cancer. Consult with your physician before using this product.

See Pekowsky Decl., Exhibit "D".

If, in fact, Applicant believes that the warning notice on the label of the FEMGEST transdermal cream product to not apply the product to "broken or irritated skin or areas affected by rashes" supports the filing of a counterclaim seeking to cancel the FEMGEST Registration on the grounds of abandonment or fraud upon the PTO, those grounds undoubtedly existed at the time that Applicant filed its Answers in this consolidated proceeding. As Applicant failed to plead a counterclaim with or as part of its Answers in this case, the proposed counterclaim is untimely under 37 C.F.R. § 2.106(b)(2)(i) and the motion for leave to amend should be denied with prejudice. *See* S&L Acquisition Co. v. Helene Arpels, Inc., *supra*, 9 U.S.P.Q.2d at 1224; Vitaline Corp. v. General Mills, Inc., 891 F.2d 273, 276 (Fed. Cir. 1989) ("Enough facts, therefore, existed and were known to Vitaline at the time Vitaline filed its answer in the original proceeding for it to allege a counterclaim of abandonment. Despite the clear requirements of the rule, it failed to do so.") and Capital Speakers, Inc. v. Capital Speakers Club of Washington, D.C., Inc., 41 U.S.P.Q.2d 1030, 1996 TTAB LEXIS 23 * 11 (TTAB 1996) ("This Board will simply not

grant petitioner's March 1995 motion to amend to add a claim of fraud when petitioner was fully aware of all the facts that it needed to add such a claim in November 1991, well over 3 years earlier.").[3]

C. The Proposed Counterclaim Is Legally Insufficient And Would Serve No Useful Purpose

Aside from the untimeliness of Applicant's motion for leave to amend, the proposed counterclaim seeking to cancel the FEMGEST Registration is legally insufficient and would serve no useful purpose.

In its motion, Applicant contends that the grounds of abandonment and fraud in the procurement and maintenance of the FEMGEST Registration support the proposed counterclaim. Applicant's theory is premised on the warning notice contained on the FEMGEST product not to apply the product to "broken or irritated skin or areas affected by rashes." App. Memo. of Law, p. 3. However, warning notices on product labels are commonplace and they are routinely and regularly placed on labels (and are usually required by the appropriate regulatory agency) on various pharmaceutical and dietary supplement type products. In fact, *See* Fisher Decl. ¶¶ 9-11 and Exhibits "D", "E" and "F" thereto for a few examples of products containing registered marks intended to be used in connection with irritated or scarred skin and which similarly contain a generic warning not to use the product on broken skin. Regardless of why the aforementioned warning notice is contained on the label of the FEMGEST transdermal progesterone cream product, it cannot and does not support any claim that Opposer either abandoned the use of the FEMGEST

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[3] Perhaps the real reason for the timing of Applicant's motion to amend is not the alleged "newly discovered evidence" but rather an article which appeared in The National Law Journal national legal publication at or about the time that the instant motion was filed, entitled "TTAB has been canceling registrations for fraud". *See*, Fisher Decl., Exhibit "C".

mark on the medicated topical transdermal cream products or that Opposer committed fraud on the PTO in the procurement or maintenance of the FEMGEST Registration.

Similarly, Applicant cites to several "[a]dvertisements produced by Vitamin during discovery [which] also evidence that the creams sold under the FEMGEST Mark are not intended for Irritated or Itchy Skin." App. Memo. of Law, pp. 3-4 (brackets added). However, even if Applicant or its counsel were not aware of the referenced advertisements at the time the Answers were filed in this case, those advertisements do not support the grounds for the proposed counterclaim. For example, in one of the advertisements concerning the prior FEM-GEST mark used by Bio-Nutritional, the advertisement identifies the FEM-GEST product as "The Natural Cream for Women" which contained "natural progesterone which may help relieve symptoms associated with menopause, such as hot flashes, night sweats, mood changes and vaginal dryness." Pekowsky Decl., Exhibit "E". While not limiting its applicability to only those uses, the uses identified in the advertisement are entirely consistent with a medicated topical transdermal cream for application to irritated or itchy skin.

Similarly, in another advertisement from 2000 relied upon by Applicant (*See* Pekowsky Decl., Exhibit "G"), the advertisement identifies FEMGEST as a "progesterone cream" which was "[c]reated from naturally-occurring plant sterols, this transdermal progesterone cream was developed to help ease the discomfort caused by a woman's natural transitions and to help achieve a more harmonious balance." *Id.* In addition, the advertisement touted the "soothing comfort of FemGest." *Id.* As with the prior advertisement, this particular advertisement did not limit in any way the applicable uses of the FEMGEST product. Rather, the advertisement sufficiently identifies uses of the product

that are entirely consistent with a medicated topical transdermal cream for application to irritated or itchy skin. *See* Ecash Techs., Inc. v. Guagliardo, 137 F. Supp.2d 1069, 1079 (C.D. Cal. 2000) (holding that "a charge of fraud in the procurement of a trademark registration is a disfavored defense").

The foregoing demonstrates that the grounds for the proposed counterclaim are legally insufficient and without merit. Moreover, the proposed counterclaim would serve no useful purpose and is clearly intended to harass Opposer and channel resources away from the validity of Opposer's claims challenging the registration of the FEMTEX Marks. Under the circumstances, the Board should exercise its discretion and deny Applicant leave to amend its Answer.

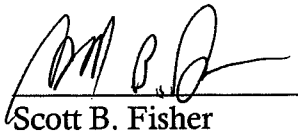
CONCLUSION

Based on the foregoing, it is respectfully requested that the Board deny with prejudice in its entirety Applicant's motion for leave to amend its Answer to include a counterclaim.

Dated: Garden City, New York
May 14, 2007

Respectfully submitted,

JASPAN SCHLESINGER HOFFMAN LLP
Attorneys for Opposer, Vitamin World, Inc.

By: 

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

In the Matter of Consolidated Trademark Applications:

Application Serial No.	:	78/854,326
Filing Date	:	April 5, 2006
Publication Date:	:	November 21, 2006
Mark	:	**FEMTEX CROWN JEWEL**
Int'l Class	:	005
For	:	Feminine hygiene products, namely tampons and feminine cleansing cloth

Application Serial No.	:	78/704/010
Filing Date	:	August 31, 2005
Publication Date	:	November 14, 2006
Mark	:	**FEMTEX**
Int'l Class	:	005
For	:	Sanitary products, namely, feminine hygiene cleansing cloth

VITAMIN WORLD, INC.,	:	
Opposer,	:	
vs.	:	**Opposition Nos.: 91/174,465**
	:	**91/174,466**
FIRST QUALITY HYGIENIC, INC.,	:	
Applicant.	:	

DECLARATION IN OPPOSITION TO
APPLICANT'S MOTION FOR LEAVE TO FILE
AN AMENDED ANSWER WITH COUNTERCLAIM

SCOTT B. FISHER, an attorney duly admitted to practice law before the United States Supreme Court; the United States Courts of Appeal for the Federal, Second and Fourth Circuits; the United States District Courts for the Southern and Eastern Districts of New York and the Districts of New Jersey, Maryland and the District of Columbia; and

before the Courts of the States of New York, New Jersey, Maryland, Virginia and the District of Columbia, declares, pursuant to 28 U.S.C. § 1746, the following to be true under penalty of perjury:

1. I am a partner with the law firm of Jaspan Schlesinger Hoffman LLP, attorneys for Opposer, Vitamin World, Inc. ("Opposer" or "Vitamin World"), in the above-captioned consolidated opposition proceedings. As such, I am fully familiar with the circumstances in these matters, based upon a review of the material maintained by this firm and Opposer, as well as material publicly available, except where stated on information and belief.

2. This Declaration is submitted in opposition to Applicant's motion, pursuant to Fed. R. Civ. P. 13(f) and 15(a), made applicable to this proceeding by 37 C.F.R. § 2.116(a), and 37 C.F.R. § 2.106(b)(2)(i), for leave to amend Applicant's Answer to assert a counterclaim seeking to cancel Opposer's U.S. Registration No. 2,438,301 for the mark FEMGEST (the "FEMGEST Registration), on the grounds of (i) abandonment and (ii) fraud upon the U. S. Patent and Trademark Office ("PTO") in the procurement and maintenance of the FEMGEST Registration. The legal bases supporting the denial of Applicant's motion for leave to amend are set forth in the accompanying Memorandum of Law in opposition to the motion, to which the Board is respectfully referred. The purpose of this Declaration is to reference and incorporate herein relevant documents for consideration of the motion and opposition, and to correct any inaccuracies set forth in the moving papers in support of the motion.

3. Attached as Exhibit "A" are Opposer's Answers to Applicant's Interrogatories Numbers 1 and 4 of Applicant's First Set of Interrogatories to Opposer, sworn to on March 14, 2007.

4. Any suggestion by Applicant in its moving papers that Opposer's discovery responses were late (*see* Applicant's Memorandum of Law, p. 4 and Declaration of Holly Pekowsky ["Pekowsky Decl."], ¶ 10) is disingenuous and fails to disclose that (i) counsel were in the process of drafting and finalizing an appropriate confidentiality agreement concerning the disclosure of confidential information in this matter, and (ii) that Applicant was advised that Opposer's discovery responses would be forthcoming upon execution of the agreed upon confidentiality agreement, which they were.

5. Furthermore, contrary to Applicant's assertion (*see* Pekowsky Decl., ¶ 11), Opposer did produce "specimens" of its FEMGEST transdermal progesterone cream product to Applicant in response to the referenced Document Request No. 12, identified as Bates-stamped documents VW0008; VW0010; VW0012; VW0014; VW0016; VW0071; VW0079 through 0083; V0089; VW0091 through 0093; VW0096; VW0107; VW0110; and VW0190 through 0192.

6. Applicant also fails to disclose that the advertisements referenced as Exhibits "E", "F" and "G" in support of Applicant's moving papers are only a sample representation of the advertising material produced by Opposer in response to Applicant's discovery requests.

7. Attached as Exhibit "B" are true and accurate copies of the Answers filed and served by Applicant, on or about January 17, 2007, to the Notices of Opposition in this consolidated proceeding.

8. Attached as Exhibit "C" is a true and accurate copy of an article published in *The National Law Journal*, April 23, 2007 edition, entitled "TTAB has been canceling registrations for fraud".

9. Attached as Exhibit "D" is a true and accurate copy of the Trademark Electronic Search System ("TESS") listing, dated as of May 14, 2007, for the mark NEW-SKIN SCAR THERAPY, in International Class 005, for "topical gel for the treatment of scars", U.S. Registration No. 2,963,180, together with a copy of the "Asked Questions" section from the website http://www.newskinproducts.com/scar-therapy-faq.htm (last visited on May 14, 2007). Question 6 of the "Asked Questions" section of the New Skin Products website indicates that the New-Skin® Scar Therapy product "can be used on new and existing keloid and hypertrophic scars resulting from surgery, injury, burns, acne and stretch marks", notwithstanding that the caution notice on the package of such product (*see* Question 15 of "Asked Questions" section) warns against using the product on "open wounds" and cautions not to "use on broken skin".

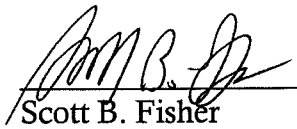
10. Attached as Exhibit "E" is a true and accurate copy of the TESS listing, as of May 14, 2007, for the mark NEURAGEL, in International Class 003, for "non-medicated topical pain reliever for nerve damages caused by shingles, diabetes, injury and related causes", U.S. Registration No. 3,105,857, together with a print-out from the website http://www.originbiomed.com/pages/neuragel_home.html (last visited on May 14, 2007), describing the uses of the product as a "topical application to the skin" for "discomfort associated with shingles and other chronic nerve damage" and a print-out from the website http://www.aviva.ca/shop/products.asp (last visited on May 14, 2007), indicating the warning notice on the NeuraGEL™ product to "not use on broken skin".

11. Attached as Exhibit "F" is a true and accurate copy of the TESS listing, as of May 14, 2007, for the mark BIO-OIL, in International Class 003, for "Essential oils for personal use, cosmetics", U.S. Registration No. 3,029,619, together with a print-out from the website http://www.bio-oil.info/en/home (last visited on May 14, 2007), describing the uses of the product to help "improve the appearance of scars, stretch marks and uneven skin tone" as well as for "aging skin and dehydrated skin", and a print-out from the website http://www.onlinepharmacy.co.nz/index.cfm (last visited on May 14, 2007), which indicates that the product "helps alleviate the discomfort frequently associated with scars, such as tightness and itchiness, as well as relieving the dryness" but contains a caution notice that the product is not for use "on broken skin".

I declare under penalty of perjury that the foregoing is true and accurate.

Dated: Garden City, New York
May 14, 2007

JASPAN SCHLESINGER HOFFMAN LLP
Attorneys for Opposer, Vitamin World, Inc.

By: 

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SBF/D548166/M048735

EXHIBIT "A"

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

In the Matter of Trademark Application

Applicant : First Quality Hygienic, Inc.
Serial No. : 78/704,010
Filed: : August 31, 2005
Mark : **FEMTEX**
Int'l Class : 005
For : Sanitary products, namely, feminine hygiene cleansing cloths
Published : November 14, 2006

---X

Vitamin World, Inc. :

Opposer, :

vs. : **Opposition No.: 91/174,466**

First Quality Hygienic, Inc. : **("Action No. 1")**

Applicant. :

---X

In the Matter of Trademark Application

Applicant : First Quality Hygienic, Inc.
Serial No. : 78/854,326
Filed : April 5, 2006
Mark : **FEMTEX CROWN JEWEL**
Int'l Class : 5
For : Feminine hygiene products, namely tampons and feminine cleansing cloth
Published : November 21, 2006

---X

Vitamin World, Inc., :

Opposer, :

vs. : **Opposition No.: 91/174,465**

First Quality Hygienic, Inc., : **("Action No. 2")**

Applicant. :

---X

OPPOSER'S ANSWERS AND OBJECTIONS TO APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER

Opposer, Vitamin World, Inc. ("Opposer" or "Vitamin World"), by its attorneys, Jaspan Schlesinger Hoffman LLP, pursuant to Fed. R. Civ. P. 33, 37 C.F.R. § 2.120, and Rule 2.120 of the Trademark Rules of Practice, as and for its answers and objections to the First Set of Interrogatories ("Interrogatories") of the applicant, First Quality Hygienic, Inc. ("Applicant") in the above-captioned Action Nos. 1 and 2, states as follows:

GENERAL OBJECTIONS

A. Opposer objects to the Interrogatories to the extent that they are otherwise not subject to discovery under, and/or seek to impose a greater burden upon, Opposer as to the manner in which information is requested to be provided than the manner required under the Federal Rules of Civil Procedure or the Trademark Rules of Practice.

B. Opposer objects to those Interrogatories that seek information exempt from disclosure to the extent they demand information protected from disclosure by the attorney-client privilege; or information that constitutes the work product of attorneys for Opposer or which otherwise reflects the mental impressions, conclusions, opinions or legal theories of those attorneys or their agents; or information or materials that have been compiled in anticipation of litigation or for trial or on behalf of Opposer or its attorneys.

C. Opposer objects to these Interrogatories to the extent that they require Opposer to identify documents, or to summarize information in documents, which have or will be produced by Opposer or which are or have been in Applicant's possession.

D. Opposer answers these Interrogatories without conceding the relevancy or materiality of the subject matter of an interrogatory, and without prejudice to any objections to the competency and admissibility of any information provided.

E. Opposer objects to the Interrogatories to the extent that they seek information that contains, relates or inciudes the confidential information of Opposer, including confidential and/or proprietary business and commercial information.

F. Opposer objects to the Interrogatories to the extent that they seek information not within Opposer's possession, custody or control.

G. By providing any information in response to any interrogatory, Opposer shall not be deemed to have waived any privilege, right or objection on the part of Opposer with respect to any such information. In the event that privileged information is inadvertently produced by Opposer, such production is not and shall not be deemed or construed as a waiver of any privilege, right or objection on the part of Opposer.

H. Opposer does not waive or intend to waive, but rather intends to preserve and hereby preserves (i) all rights to object, on any ground, to the use of any of these objections, answers, and/or information produced in response to the Interrogatories, in any subsequent proceedings in this or any other case, action or proceeding and (ii) all rights to object on any ground to any request for further responses to the Interrogatories or any other request.

I. Opposer reserves the right to amend and supplement its answers to these Interrogatories as, if and when additional information responsive to the Interrogatories is made available to it.

ANSWERS AND OBJECTIONS TO INTERROGATORIES

1. Identify and state:

(a) Opposer's principal business, including without limitation, a description of its functions and activities as a retail, wholesale, or manufacturing operation and the products and services offered thereby, and any mail order services and printed

materials (including catalogs) offered in connection therewith.

(b) The identity of all sales agents or representatives responsible for or otherwise engaged in the distribution, promotion, marketing or sale of goods or services offered under Opposer's Mark; and

(c) The identity of the person responsible for advertising or promotion of goods and services offered under Opposer's Mark.

ANSWER: Opposer objects to this interrogatory on the grounds that it is vague, ambiguous, overly broad, and unduly burdensome. Subject to those objections and the General Objections, Opposer, Vitamin World, Inc. ("Vitamin World"), located at 4320 Veterans Memorial Highway, Holbrook, New York 11741, is a wholly-owned subsidiary of NBTY, Inc., whose principal place of business is located at 90 Orville Drive, Bohemia, New York 11716. NBTY is a leading vertically integrated manufacturer, marketer and distributor of a broad line of high-quality, value-priced vitamins, minerals, dietary and nutritional supplements in the United States and throughout the world. NBTY markets tens of thousands of products under the company's brands and utilizes several distribution channels for those products. In general, North America retail sales of NBTY products include Vitamin World retail stores in the United States.

In addition, on or about February 15, 1997, Bio-Nutritional Formulas, Inc. ("Bio-Nutritional") began using in commerce the FEM-GEST mark. At that time, Bio-Nutritional was a subsidiary of Nutrition Warehouse. In or about November 1999, Bio-Nutritional filed for U.S. trademark registration of the FEMGEST mark. At or about the same time period, NBTY acquired the assets of Nutrition Warehouse, which included all right, title, and interest in the FEM-GEST and FEMGEST marks, by virtue of the merger of

Bio-Nutritional with and into Nutrition Warehouse Acquisition Corp. After acquiring the FEMGEST mark, NBTY assigned all right, title and interest in the FEMGEST mark to its wholly-owned subsidiary, Vitamin World. Vitamin World owns the FEMTEST mark and Home Health, a division of American Health, Inc. (another wholly-owned subsidiary of NBTY), produces and distributes products bearing the FEMGEST mark. In or about February 2005, the United States Patent and Trademark Office ("PTO") recorded the assignment of the FEMGEST mark to Vitamin World.

Moreover, persons with knowledge of the marketing, sale and distribution of goods offered under the FEMGEST mark include Dorie Greenblatt, Director of Marketing and Advertising for American Health, Inc. and Home Health. Ms. Greenblatt may also have knowledge of advertising and promotion of Opposer's FEMGEST products. In addition, James P. Flaherty, Senior Vice President-Marketing and Advertising for NBTY, may also have knowledge about advertising and promotion of Opposer's FEMGEST products.

4. With respect to each type of product or service offered under Opposer's Mark, state:

(i) the date of first use; and

(ii) whether such use has been continuous without interruption to the present, and, if not, the date(s) of non-use.

ANSWER: Subject to the General Objections, upon information and belief, Opposer's predecessor in interest, Bio-Nutritional, first used and first used in commerce the FEM-GEST mark on or about February 15, 1997, in connection with topical transdermal creams. Upon acquiring the FEM-GEST mark in or about November 1999, Opposer continued commercial use of the mark, including as a natural, transdermal progesterone cream for women, and applied for U.S. trademark registration of the FEMGEST mark in or about December 1999. Such use has been continuous to the present. Upon information and belief, Opposer began using its FEMGEST mark with its Breast Assure Complex

product in or about 2001 and such use ceased in or about 2005.

VERIFICATION

STATE OF NEW YORK)
)ss.:
COUNTY OF SUFFOLK)

WILLIAM D. DOHERTY, being duly sworn, deposes and says:

I am the Senior Vice President – Merchandising of Opposer, Vitamin World, Inc. ("Opposer"), a wholly-owned subsidiary of NBTY, Inc. I have read the within Opposer's Answers and Objections to Applicant's First Set of Interrogatories and know the contents thereof; that the same is true to my knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true based on the books and records maintained by Opposer and its related companies and conversations with employees and representatives of Opposer and its related companies.

W Doherty

WILLIAM D. DOHERTY
Senior Vice President-Merchandising,
Vitamin World, Inc., a wholly-owned
subsidiary of NBTY, Inc.

Sworn to before me this

14 day of March, 2007.

Lee Grosskreuz Hechtel

NOTARY PUBLIC

LEE GROSSKREUZ HECHTEL
Notary Public, State of New York
No. 02GR6068815
Qualified in Suffolk County
Commission Expires January 14, 2010

EXHIBIT "B"

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA120029**

Filing date: **01/17/2007**

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

Proceeding	91174465
Party	Defendant First Quality Hygienic, Inc. First Quality Hygienic, Inc. Suite 500 80 Cuttermill Road Great Neck, NY 11021
Correspondence Address	MAX VERN AMSTER, ROTHSTEIN & EBENSTEIN LLP 90 PARK AVE NEW YORK, NY 10016-1301
Submission	Answer
Filer's Name	Holly Pekowsky
Filer's e-mail	ptodocket@arelaw.com
Signature	/Holly Pekowsky/
Date	01/17/2007
Attachments	Answer and Affirmative Defenses - FEMTEX CROWN JEWEL.pdf (6 pages)(244286 bytes)

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

VITAMIN WORLD, INC., Opposer, v. FIRST QUALITY HYGIENIC, INC., Applicant.	Opposition No. 91174465 Application Serial No. 78/854,326 Filing Date: April 5, 2006 Publication Date: November 21, 2006 Trademark: FEMTEX CROWN JEWEL

ANSWER AND AFFIRMATIVE DEFENSES

Applicant First Quality Hygienic, Inc. ("Applicant"), through its attorneys Amster, Rothstein & Ebenstein LLP, answers the Notice of Opposition filed by Opposer Vitamin World, Inc. ("Opposer"), as follows:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Notice of Opposition, and, accordingly, denies the same.

2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Notice of Opposition, and, accordingly, denies the same.

3. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the first two sentences of Paragraph 3 of the Notice of Opposition, and, accordingly, denies the same. Applicant denies the remaining allegations in Paragraph 3 of the Notice of Opposition.

4. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Notice of Opposition, and, accordingly, denies the same. Applicant affirmatively states that it has continuously used its mark FEMTEX in connection with tampons since at least as early as March, 1992, which is nearly five years prior to Opposer's purported first use of FEMGEST in February, 1997.

5. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the first two sentences of Paragraph 5 of the Notice of Opposition, and, accordingly, denies the same. Applicant denies the remaining allegations in Paragraph 5 of the Notice of Opposition.

6. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Notice of Opposition, and, accordingly, denies the same.

7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Notice of Opposition, and, accordingly, denies the same.

8. With respect to Paragraph 8 of the Notice of Opposition, to the extent Opposer seeks to imply that Applicant's FEMTEX CROWN JEWEL Mark and Opposer's FEMGEST Mark are confusingly similar, and/or that Opposer's purported use of its FEMGEST Mark in connection with medicated topical transdermal creams for application to irritated or itchy skin provides it with priority over Applicant's FEMTEX CROWN JEWEL Mark, Applicant denies the same. Applicant otherwise lacks knowledge or

information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the Notice of Opposition, and, accordingly, denies the same.

9. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations contained in Paragraph 10 of the Notice of Opposition.

11. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Notice of Opposition, and, accordingly, denies the same.

12. Applicant denies the allegations contained in Paragraph 12 of the Notice of Opposition.

13. Applicant denies the allegations contained in Paragraph 13 of the Notice of Opposition.

14. Applicant denies the allegations contained in Paragraph 14 of the Notice of Opposition.

15. Applicant affirmatively states that this is not a proper statement to include as an allegation in the Notice of Opposition.

AFFIRMATIVE DEFENSES

1. Applicant is entitled to use the mark FEMTEX CROWN JEWEL as applied to feminine hygiene products, namely tampons and feminine cleansing cloth based upon Applicant's longstanding use of FEMTEX in connection with tampons, which use commenced several years before Opposer began using the mark FEMGEST in connection

with medicated topical transdermal creams for application to irritated or itchy skin or any other goods.

2. There is no likelihood of confusion between Applicant's mark FEMTEX CROWN JEWEL as applied to feminine hygiene products, namely tampons and feminine cleansing cloth and Opposer's FEMGEST Mark, since the marks are sufficiently distinguishable to avoid confusion.

3. There is no likelihood of confusion between Applicant's mark FEMTEX CROWN JEWEL as applied to feminine hygiene products, namely tampons and feminine cleansing cloth and Opposer's FEMGEST Mark, since, upon information and belief, Opposer's FEMGEST mark is weak and only entitled to a very narrow scope of protection.

4. The Notice of Opposition fails to state a claim upon which relief can be granted.

5. Opposer has not alleged that its FEMGEST Mark is famous as required for a claim of dilution.

6. Upon information and belief, Opposer's FEMGEST mark is not famous as required for dilution.

WHEREFORE, Applicant requests that this Opposition be denied and that registration be granted.

Respectfully submitted,

AMSTER, ROTHSTEIN & EBENSTEIN LLP
Attorneys for Applicant
90 Park Avenue
New York, New York 10016
(212) 336-8000

Dated: New York, New York
January 11, 2007

By: _____
Kenneth P. George
Holly Pekowsky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for Applicant First Quality Hygienic, Inc. in the above-captioned opposition proceeding and that on the date which appears below, caused copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES to be served on the attorneys for Opposer Vitamin World, Inc. by first class mail by causing a copy thereof to be placed in a depository under the care and custody of the United States Postal Service, in the State of New York, postage pre-paid, in wrappers addressed as follows:

Scott B Fisher, Esq.
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530

Holly Pekowsky

Dated: New York, New York
January 11, 2007

359804.1

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov
ESTTA Tracking number: **ESTTA120026**
Filing date: **01/17/2007**

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

Proceeding	91174466
Party	Defendant First Quality Hygienic, Inc. First Quality Hygienic, Inc. Suite 500 80 Cuttermill Road Great Neck, NY 11021
Correspondence Address	MAX VERN AMSTER, ROTHSTEIN & EBENSTEIN LLP 90 PARK AVE NEW YORK, NY 10016-1301
Submission	Answer
Filer's Name	Holly Pekowsky
Filer's e-mail	ptodocket@arelaw.com
Signature	/Holly Pekowsky/
Date	01/17/2007
Attachments	Answer and Affirmative Defenses - FEMTEX.pdf (5 pages)(236722 bytes)

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

VITAMIN WORLD, INC., Opposer, v. FIRST QUALITY HYGIENIC, INC., Applicant.	Opposition No. 91174466 Application Serial No. 78/704,010 Filing Date: August 31, 2005 Publication Date: November 14, 2006 Trademark: FEMTEX

ANSWER AND AFFIRMATIVE DEFENSES

Applicant First Quality Hygienic, Inc. ("Applicant"), through its attorneys Amster, Rothstein & Ebenstein LLP, answers the Notice of Opposition filed by Opposer Vitamin World, Inc. ("Opposer"), as follows:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Notice of Opposition, and, accordingly, denies the same.

2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Notice of Opposition, and, accordingly, denies the same.

3. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the first two sentences of Paragraph 3 of the Notice of Opposition, and, accordingly, denies the same. Applicant denies the remaining allegations in Paragraph 3 of the Notice of Opposition.

4. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Notice of Opposition, and, accordingly, denies the same. Applicant affirmatively states that it has continuously used its mark FEMTEX in connection with tampons since at least as early as March, 1992, which is nearly five years prior to Opposer's purported first use of FEMGEST in February, 1997.

5. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the first two sentences of Paragraph 5 of the Notice of Opposition, and, accordingly, denies the same. Applicant denies the remaining allegations in Paragraph 5 of the Notice of Opposition.

6. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Notice of Opposition, and, accordingly, denies the same.

7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Notice of Opposition, and, accordingly, denies the same.

8. With respect to Paragraph 8 of the Notice of Opposition, to the extent Opposer seeks to imply that Applicant's FEMTEX Mark and Opposer's FEMGEST Mark are confusingly similar, and/or that Opposer's purported use of its FEMGEST Mark in connection with medicated topical transdermal creams for application to irritated or itchy skin provides it with priority over Applicant's FEMTEX Mark, Applicant denies the same. Applicant otherwise lacks knowledge or information sufficient to form a belief as

to the truth of the allegations contained in Paragraph 8 of the Notice of Opposition, and, accordingly, denies the same.

9. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations contained in Paragraph 10 of the Notice of Opposition.

11. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Notice of Opposition, and, accordingly, denies the same.

12. Applicant denies the allegations contained in Paragraph 12 of the Notice of Opposition.

13. Applicant denies the allegations contained in Paragraph 13 of the Notice of Opposition.

14. Applicant denies the allegations contained in Paragraph 14 of the Notice of Opposition.

15. Applicant affirmatively states that this is not a proper statement to include as an allegation in the Notice of Opposition.

AFFIRMATIVE DEFENSES

1. Applicant is entitled to use the mark FEMTEX as applied to sanitary products, namely, feminine hygiene cleansing cloths based upon Applicant's longstanding use of FEMTEX in connection with tampons, which use commenced several years before Opposer began using the mark FEMGEST in connection with medicated topical transdermal creams for application to irritated or itchy skin or any other goods.

2. There is no likelihood of confusion between Applicant's mark FEMTEX as applied to sanitary products, namely, feminine hygiene cleansing cloths and Opposer's FEMGEST Mark, since the marks are sufficiently distinguishable to avoid confusion.

3. There is no likelihood of confusion between Applicant's mark FEMTEX as applied to sanitary products, namely, feminine hygiene cleansing cloths and Opposer's FEMGEST Mark, since, upon information and belief, Opposer's FEMGEST mark is weak and only entitled to a very narrow scope of protection.

4. The Notice of Opposition fails to state a claim upon which relief can be granted.

5. Opposer has not alleged that its FEMGEST Mark is famous as required for a claim of dilution.

6. Upon information and belief, Opposer's FEMGEST mark is not famous as required for dilution.

WHEREFORE, Applicant requests that this Opposition be denied and that registration be granted.

Respectfully submitted,

AMSTER, ROTHSTEIN & EBENSTEIN LLP
Attorneys for Applicant
90 Park Avenue
New York, New York 10016
(212) 336-8000

Dated: New York, New York
January 17, 2007

By: _____
Kenneth P. George
Holly Pekowsky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for Applicant First Quality Hygienic, Inc. in the above-captioned opposition proceeding and that on the date which appears below, caused copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES to be served on the attorneys for Opposer Vitamin World, Inc. by first class mail by causing a copy thereof to be placed in a depository under the care and custody of the United States Postal Service, in the State of New York, postage pre-paid, in wrappers addressed as follows:

Scott B Fisher, Esq.
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530

Holly Pekowsky

Dated: New York, New York
January 17, 2007

359576.1

EXHIBIT "C"

TTAB has been canceling registrations for fraud

Focus of Trademark Trial and Appeal Board is overly broad claims.

By Jennifer Lee Taylor
and Lindsay Traylor Braunig
SPECIAL TO THE NATIONAL LAW JOURNAL

UNTIL RECENTLY, trademark applicants and registrants have not been subjected to serious fraud inquiries. But a recent spate of Trademark Trial and Appeal Board (TTAB) decisions indicates that change is afoot, and trademark applicants and registrants should beware. A finding of fraud by the board causes more than just embarrassment; it also results in cancellation of the registration.

Thus far, the TTAB's cancellations of fraudulent registrations have concerned overly broad use claims. In order to register a trademark, an applicant must certify that the mark is being used in commerce and submit a specimen showing such use. This can be done in a use-based application or in a statement of use after the U.S. Patent and Trademark Office (PTO) allows an intent-to-use application. Additionally, registrants must file § 8 affidavits six years after registration, and every 10 years when renewing the registration, confirming the continued use of the mark on the specific goods or services for which the mark is registered. Each of these documents includes an oath as to the accuracy of the filing and a dire warning against "willful false statements." The TTAB has recently given teeth to this oath by holding that overly broad use claims are "willful false statements," resulting in cancelled registrations.

The TTAB's recent rulings mean that fraud claims have become a powerful potential defense in any inter parte proceeding before the TTAB, causing trademark owners to examine their own registrations carefully before initiating such proceedings. For example, an applicant whose application is being opposed may file a counterclaim, asserting that the opposer's registration was fraudulently obtained because the opposer's mark was not used in connection with all of the goods and/or services for which it is registered. (Fraud must be affirmatively alleged in a cancellation counterclaim, and the allegations must be specific. See *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 78 U.S.P.Q.2d (BNA) 1696, 1697 (T.T.A.B. 2006).)

Recent rulings mean fraud claims may be powerful defense.

To constitute fraud on the PTO, a statement must be false, made knowingly and a material misrepresentation. *Standard Knitting Ltd. v. Toyota Jidosha K.K.*, 77 U.S.P.Q.2d (BNA) 1917, 1926 (T.T.A.B. 2006). "Fraud must be proven with clear and convincing evidence." Id. In TTAB fraud cases, the issues of falsity and material misrepresentation are rarely disputed. See, e.g., id. at 1926-27. Rather, the question of knowledge, or intent, takes center stage in TTAB fraud cases.

TRADEMARK

Objective showing of intent

Trademark owners, of course, loudly dispute that they intended to commit fraud. Nevertheless, the TTAB routinely finds the requisite intent whenever it determines that a mark has not been used on goods or services for which it was registered because the TTAB requires only the objective manifestation of intent, rather than proof of specific intent. (Similar fraud cases have yet to be brought in a federal court, so whether a federal court would apply the same standard remains an open question.) This requirement for objective manifestation of intent can be met by showing that a reasonable person would have known, or a reasonable inquiry would have revealed, that the mark was not used on all of the listed goods. See *Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q.2d (BNA) 1205, 1210 (T.T.A.B. 2003) ("Respondent's knowledge that its mark was not in use on stents—or its reckless disregard for the truth—is all that is required to establish intent to commit fraud in the procurement of a registration").

Such a finding of intent to commit fraud is a death knell for the registration, notwithstanding the trademark owner's protestations of inadvertence, lack of knowledge or mistake, or the trademark owner's willingness to amend its registration to delete the extra goods and services. Several factors make false statements of use particularly fertile ground for finding such an objective manifestation of intent. (Although several of these factors concern the statement of use document itself, the board has drawn no distinctions between statements of use and declarations of continued use made after registration. See *Jimlar Corp. v. Montrexport S.P.A.*, 2004 T.T.A.B. Lexis 333, at *22 (not citable as precedent).)

First, in all of the cases to date, the list of goods has been relatively simple and nontechnical in nature. For example, a short list of two or three items, or even a long list of simple items like clothing, does not pose comprehension challenges for the average person. The suggestion that the signatory did not understand the list of goods appears to exasperate the TTAB. See, e.g., id. (the goods listed were not "highly technical" or "otherwise confusing").

Second, the statement of use has very clear language: "[t]he owner is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance." If this is not correct, the form has a space where the applicant is to state what should be deleted from the application. Given the unambiguous wording—"all" and "is using" having straightforward and well understood meanings—the TTAB has demonstrated little patience with the argument that the signatory did not understand the statement of use. See, e.g., *Hurley Int'l LLC v. Volta*, Opposition

Jennifer Lee Taylor is a partner in the San Francisco office of Morrison & Foerster focusing on intellectual property litigation and counseling. Lindsay Traylor Braunig is an associate in that office.

No. 91158304 (T.T.A.B. Jan. 23, 2007) ("The fact that applicants allegedly misunderstood a clear and unambiguous requirement for an application based on use, were not represented by legal counsel, and were suffering health problems does not change our finding of fraud herein."); *J.E.M. Int'l Inc. v. Happy Rompers Creations Corp.*, 74 U.S.P.Q.2d (BNA) 1526, 1530 (T.T.A.B. 2005) (not citable as precedent) ("Statement of Use form is not complicated, and the term 'all' has a commonly understood meaning").

Third, the oath accompanying the statement of use and the declaration of continued use is weighty: "The undersigned, being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both,... and that such willful false statements and the like may jeopardize the validity of this document, declares that...all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true." The TTAB often comments on the "solemnity" that should attend the signing of any document with such a warning, observing that "[s]tatements made with such degree of solemnity clearly are—or should be—investigated thoroughly prior to signature and submission." *Medinol*, 67 U.S.P.Q.2d (BNA) at 1209.

Duty to know what one signs

Similarly, the TTAB ascribes to signatories a duty to know what they are signing, easily dismissing arguments that signatories did not know what was covered by the statement of use because they did not have the application in front of them when they signed the statement of use. See *Tequila Cazadores S.A. de C.V. v. Tequila Centinela S.A. de C.V.*, 2004 T.T.A.B. Lexis 109, at *12 (Feb. 24, 2004) (not citable as precedent); *Medinol*, 67 U.S.P.Q.2d (BNA) at 1210 ("the President/CEO who signed the document was clearly in a position to know (or to inquire) as to the truth of the statements therein"). To sign a document that clearly warns of the consequences of false statements without personally inquiring into the accuracy of the statements made is, in the board's view, a "reckless disregard for the truth." See *Tequila Cazadores*, 2004 T.T.A.B. Lexis 109, at *12; *Hawaiian Moon Inc. v. Rodney Doo*, 2004 T.T.A.B. Lexis 274, at *11-*12 (April 29, 2004) (not citable as precedent).

These three factors—the simplicity of the goods/services, the simplicity of the document's statements and the dire warning regarding false statements—come together to allow the TTAB to find an objective manifestation of intent from the circumstances, because no reasonable or good-faith explanation justifies making a false statement when the facts are both straightforward and within the applicant's or registrant's control, and questions of law are virtually nonexistent. In the TTAB's view, signing a false statement of use under such circumstances is either the product of intentional fraud or recklessness with respect to one's duty to reasonably investigate the veracity of the statements made, and neither explanation suffices to avoid a finding of intent.

The TTAB's recent fraud cases seem motivated by a desire to deter such behavior in the future, and by a frustration with the lack of respect being accorded the PTO when documents are signed with barely a cursory review. The PTO relies on the accuracy of such statements in determining the scope of rights that it initially grants. See *Tequila Cazadores*, 2004 T.T.A.B. Lexis 109, at *13 n.3. It does not require a specimen to be submitted showing use of the mark on every good listed in the statement on use; rather, a specimen showing use on any good suffices to demonstrate use for all goods claimed in that class. Id. Moreover, the PTO relies on the accuracy of such statements in maintaining registrations after they are issued. For example, a trademark is deemed incontestable five years after registration when the registrant files a § 15 affidavit alleging continuous use of the mark. Once a mark is deemed incontestable, several bases for challenging the validity of the mark are extinguished. 15 U.S.C. 1065. Thus, the integrity of the trademark registration system depends on true statements by applicants and registrants. When the TTAB finds what it considers to be flagrant disrespect for the integrity of the system, it employs the harsh remedy of cancellation.

Three factors allow TTAB to find showing of fraudulent intent.

Although it has not yet done so, the TTAB could easily extend its jurisprudence to cancel overly broad registrations issued to foreign entities. Foreign entities may register their marks without claiming or showing use of them in the

SEE 'CANCELLATIONS' PAGE S4

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TRACEY I. BATT—New Jersey Volunteer Lawyers for the Arts

STEVEN C. BENNETT—partner, Jones Day, New York

SCOTT K. BROWN—Lewis and Roca, Phoenix

WILLIAM A. CHAMBERLAIN—associate dean, Northwestern School of Law

THE DISASSOCIATE—associate (anonymous), large law firm

AMY J. MCMASTER—associate, Venable, Washington

ELLISEN S. TURNER—associate, Irell & Manella, Los Angeles

LISA M. YERRACE—associate, Calfee, Halter & Griswold, Cleveland

'Interstate commerce' is crux of fraud analysis

'CANCELLATIONS' FROM PAGE S3

United States, but such registrations must contain a signed claim of a bona fide intent to use the mark in commerce. One can envision a day when the TTAB finds the requisite intent to commit fraud when it reviews a claim that an applicant had a bona fide intent to use its mark in connection with a ridiculously long list of disparate goods (such as computer software and hardware, eyeglasses and fire extinguishing apparatus, all in Class 9).

The 'Maid to Order' decision

On the other hand, the TTAB has indicated that there are some limits to its recent decisions. In *Maids to Order of Ohio Inc. v. Maid-to-Order Inc.*, 78 U.S.P.Q.2d (BNA) 1899 (2006), the TTAB considered whether the registrant had committed fraud in its statement of use by stating that its mark, "Maid to Order," was used "in commerce," i.e., in interstate commerce. The registrant was a cleaning business located in Chicago that had billed out-of-state clients for services performed in Chicago, and whose employees had on occasion crossed state lines to provide cleaning services under the "Maid to Order" mark. The evidence at summary judgment indicated that the registrant had believed at the time of registration (and continued to believe) that this level of contact with out-of-state entities or people constituted use of the mark in interstate commerce.

Without making a finding with respect to whether the registrant's mark was, in fact, being used in interstate commerce, the TTAB declined to find an intent to defraud the PTO, even assuming that the mark was not used in interstate commerce. The TTAB implicitly recognized the relatively sophisticated analysis required to determine whether an activity constitutes interstate commerce, and determined that the interstate contacts relied on by the registrant "serve to establish that [the signatory] had a good faith belief that [Maid-to-Order Inc.] had used/was using the mark MAID TO ORDER in interstate commerce." Id. When a mark is clearly not in use in commerce—such as when the mark is not used at all in the United States—the analysis required is not nuanced and the TTAB will reject as unreasonable an applicant's assertion of misunderstanding the meaning of "use in commerce." *Hurley Int'l,* Opposition No. 91158304.

When there is some ambiguity, TTAB might not find fraud.

The *Maid to Order* case suggests that the TTAB is not ready to find fraud every time a trademark owner makes a misstatement, and that it might be more flexible if the trademark owner had good reason to be confused. NLJ

The pro 'What's

In case about us phrase in 'Bost fair use analysis

By Steven M. Weinberg
SPECIAL TO THE NATIONAL LAW JO

FEW ISSUES IN trademar ing law can compete in i this: whether a competit other's trademark in adve ucts or services. With the sumer attention growir aggressive as the numbe of products and service proliferate, and the mean for advertising and pro moting them expanding a alarming rate, the import and their recognition by c the surrounding legal issu been more significant.

At the center of the what is referred to as the trine of "fair use." This ph from the copyright law, r

Steven M. Weinberg is a Angeles' Greenberg Glusk man & Machtinger, wher transactional and litigati property, entertainment, a technology law. He is a j professor of trademark la Law School and editor i Trademark Reporter.

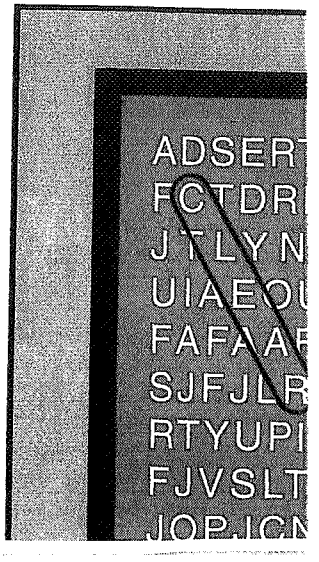

EXHIBIT "D"

United States Patent and Trademark Office

Trademarks > Trademark Electronic Search System(Tess)

TESS was last updated on Sat May 12 04:19:21 EDT 2007

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Record 1 out of 1

Typed Drawing

Word Mark	**NEW-SKIN SCAR THERAPY**
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: topical gel for the treatment of scars. FIRST USE: 20040130. FIRST USE IN COMMERCE: 20040130
Mark Drawing Code	(1) TYPED DRAWING
Design Search Code	
Serial Number	78320921
Filing Date	October 30, 2003
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	March 29, 2005
Registration Number	2963180
Registration Date	June 21, 2005
Owner	(REGISTRANT) Medtech Products, Inc. CORPORATION DELAWARE 90 North Broadway Irvington NEW YORK 10533
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	MICHELINE KELLY JOHNSON,
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SCAR THERAPY" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Asked Questions:

1. What is a scar?
Scars are the physiological healing result of any trauma to the skin where the dermis (deep layer) of the skin has been injured. A scar naturally occurs to bind the edges of a wound together.

2. What is the difference between hypertrophic and keloid scars?
Both hypertrophic and keloid scars are thick, raised and usually discolored. Keloid scars usually extend beyond the edges of the original wound while hypertrophic scars do not.

3. What is New-Skin® Scar Therapy™?
New-Skin® Scar Therapy™ is the new, easy, quick and effective way to make embarrassing scars less visible. It is a pleasant to use silicone gel that is clear, odorless, non-irritating and can be worn under makeup. Recommended by physicians for years, New-Skin® Scar Therapy™ helps make hypertrophic and keloid scars appear flatter and closer to your skin's natural color.

4. Why should I use New-Skin® Scar Therapy™ versus other scar treatment products?
Some brands require the application of 3-4 thick coats per day while New-Skin® Scar Therapy™ gel only requires 2 applications per day. With New-Skin®, results can be expected in as little as 6 weeks versus 3-6 months for other scar products. Unlike other brands that can contain onion extract which has a strong odor, New-Skin® Scar Therapy™ is odorless. Most scar treatment pads and strips must be worn continuously for 12-24 hours, are uncomfortable, can cause itching, are expensive to use and look unappealing. New-Skin® is an easy-to-use, non-irritating, clear, economical silicone gel. It can also be worn under makeup.

5. How does New-Skin® Scar Therapy™ work?
Silicone products have been used by Doctors for several years to reduce the appearance and intensity of scars. The use of silicone in modifying the appearance of scars has been very successful and well-documented. However, many of these products are made from sheets of silicone which many people dislike for many various reasons (see question 4 above). New-Skin® Scar Therapy™ offers the benefits of silicone sheet technology in the convenience of a gel.

6. On what types of scars can I use New-Skin® Scar Therapy™?
When applied as directed, New-Skin® Scar Therapy™ can be used on new and existing keloid and hypertrophic scars resulting from surgery, injury, burns, acne and stretch marks.

7. How long will it take to make my scar less visible?
While results vary from person to person, New-Skin® Scar Therapy™ could show results as early as six weeks (or sooner) when used as directed. However, prolonged use will maximize the benefits of the product. It should be applied twice a day - in the morning and at night. Reapplication may be necessary if the area is washed.

8. How much New-Skin® Scar Therapy™ do I need for my scar? How long will a tube last?
For a two inch scar, a 0.5 oz. tube of New-Skin® Scar Therapy™ should last about 12 weeks with twice a day applications.

9. How old can my scar be to use New-Skin® Scar Therapy™ successfully?
While New-Skin® Scar Therapy™ will work on new and existing scars, best results are possible with scars that are less than two years old since scars actively heal for about two years.

10. Is New-Skin® Scar Therapy™ safe for use on children?
New-Skin® Scar Therapy™ can be safely used on children and can be worn 24 hours a day. It washes off with soap and water and can be reapplied as soon as the skin is dry.

11. Can New-Skin® Scar Therapy™ be used on the face?
New-Skin® Scar Therapy™ is safe for use on the face but should not be put in contact with the eyes or mucous membranes.

12. Can I wear make-up over New-Skin® Scar Therapy™?
Yes, make-up can be worn after application of New-Skin® Scar Therapy™ once it has fully dried.

13. Are there any side effects associated with New-Skin® Scar Therapy™?
There are no known side effects associated with New-Skin® Scar Therapy™

14. What are the usage instructions?
· Wash the affected area and pat dry.
· Gently massage a thin coat over the affected area twice daily – (morning & night)
· Wipe away the excess with a tissue until the area is completely dry.
· Once fully dry, cosmetics can be applied over New-Skin® Scar Therapy™ gel
· This product is safe to use on children.
· The recommended minimum duration of use is 6 weeks.
· Further benefits may result from extended use.

15. What are the cautions on the package?
Avoid direct contact with eyes, mucous membranes and open wounds. If redness or irritation occurs, discontinue use and consult your physician. Keep out of the reach of children. Do not use on broken skin. May stain clothing if not completely dry.

16. Can New-Skin® Scar Therapy™ be used on stretch marks?
Yes

17. Does New-Skin® Scar Therapy™ contain gluten, animal by products, or latex?
No

18. Can New-Skin® Scar Therapy™ be used under make-up?
Yes

19. Does New-Skin® Scar Therapy™ wash off with soap and water?
Yes

20. Will New-Skin® Scar Therapy™ clog my pores?
The product is clear, non greasy and nonocclusive. Non occlusive means that it will not occlude or clog pores. Dimethicone (in varying viscosities) is used in Gel Deodorants and in thousands of facial skin care products. It is considered non-comedogenic which means that they will not clog pores and will not cause whiteheads, blackheads or pimples (comodomes).

21. What is Dimethicone?
Dimethicone is a form of silicone. The product is 100% Dimethicone. Silicone products have been used by Doctors for several years to reduce the appearance and intensity of scars. The use of silicone in modifying the appearance of scars has been very successful and well-documented. However, many of these products are made from sheets of silicone which many people dislike for many various reasons. Most scar treatment pads and strips must be worn continuously for 12-24 hours, are uncomfortable, can cause itching, are expensive to use and look unappealing. New-Skin® is an easy-to-use, non-irritating, clear, economical silicone gel. It can also be worn under makeup. New-Skin® Scar Therapy™ offers the benefits of silicone sheet technology in the convenience of a gel.

22. What is the difference between hypertrophic and keloid scars?
Keloid scars usually extend beyond the edges of the original wound while hypertrophic scars do not. Both types are thick, raised and usually discolored.

23. Why would I prefer New Skin Scar Therapy™ over similar products?
New-Skin® Scar Therapy™ is an easy-to-use, non-irritating, clear, economical silicone gel. New-Skin® Scar Therapy™ gel only requires 2 applications per day. Most scar treatment pads and strips must be worn continuously for 12-24 hours, are sticky and uncomfortable, can cause itching, are expensive to use and look unappealing. With New-Skin®, results can be expected in as little as 6 weeks versus 3-6 months for other scar products. New-Skin® Scar Therapy™ is odorless unlike other brands that contain onion extract which has a strong odor

Therapy™ is odorless unlike other brands that contain onion extract which has a strong odor.

EXHIBIT "E"

Trademarks > Trademark Electronic Search System(Tess)

TESS was last updated on Sat May 12 04:19:21 EDT 2007

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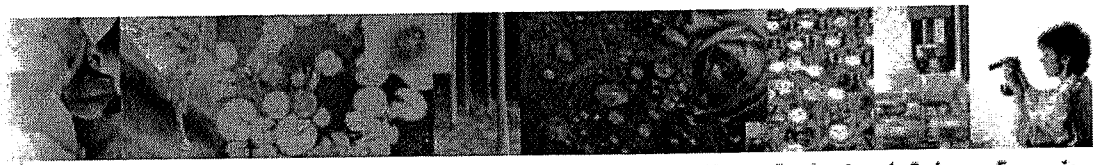
Record 1 out of 1

Typed Drawing

Word Mark	**NEURAGEL**
Goods and Services	IC 003. US 001 004 006 050 051 052. G & S: non-medicated topical pain reliever for nerve damage caused by shingles, diabetes, injury and related causes
Mark Drawing Code	(1) TYPED DRAWING
Design Search Code	
Serial Number	78311552
Filing Date	October 9, 2003
Current Filing Basis	44E
Original Filing Basis	1A
Published for Opposition	December 20, 2005
Supplemental Register Date	July 21, 2004
Registration Number	3105857
Registration Date	June 20, 2006
Owner	(REGISTRANT) Origin BioMedicinals Inc. CORPORATION CANADA Suite 520 5162 Duke Street Halifax, Nova Scotia CANADA B3J 1N7 (LAST LISTED OWNER) ORIGIN BIOMED INC. CORPORATION 5162 DUKE STREET SUITE 520 HALIFAX, NOVA SCOTIA CANADA B3J 1N7
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	FAY O'BRIEN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Origin BioMed



Products from Origin

- Neuragen
- NeuraGEL
- HerpeStat
- HerpeStat Lip Shield
- CanTea
- Green Tea Acne Cream
- Green Tea Skin Cream
- SWAT Cream
- Origin Wart Clear

Search this Site

Search

New home of MedPress and NeuroHelp: Carrying on the important work of John Senneff. Please continue to use **MedPress** and **NeuroHelp** for orders, and call Origin for questions and inquiries.

Distributors
Careers at Origin

NeuraGEL™
Transdermal Gel

For Discomfort Associated with Shingles and Other Chronic Nerve Damage*

Order NeuraGEL Online

NeuraGEL is for topical application to the skin, consisting of a skin penetration enhancing proprietary oil blend and associated essential botanical oils together with a safe gelling agent. NeuraGEL contains the same ingredients as Neuragen®, but many people find the gel format easier to apply to the site of pain. Available in an 6g (0.2 oz.) jar.

Neuragen is recommended for first-time users, since it has a slightly higher concentration of active ingredients.

NeuraGEL does not have harmful side effects and may promote healing. It does not numb the area of application and can be applied repeatedly. Please refer to the information on Neuragen for additional information on the active ingredients and scientific background.

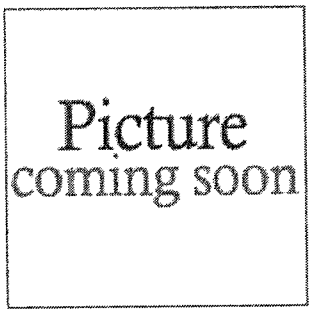
* The products mentioned above are not intended to diagnose, treat, cure or prevent any disease. For medical advice, always consult your health care professional.

Lifestyle and Health

At Aviva, the two go hand-in-hand.

Origin BioMed - NeuraGEL

FOR YOUR BODY > Pain Relief



For Discomfort Associated with Shingles and Other Chronic Nerve Damage. NeuraGEL is for topical application to the skin, consisting of a skin penetration enhancing proprietary oil blend and associated essential botanical oils together with a safe gelling agent. NeuraGEL contains the same ingredients as Neuragen, but many people find the gel format easier to apply to the site of pain. Available in an 6g (0.2 oz.) jar. Neuragen is recommended for first-time users, since it has a slightly higher concentration of active ingredients. NeuraGEL does not have harmful side effects and may promote healing. It does not numb the area of application and can be applied repeatedly.

Info: 6 g

Item no. 851877000439

Price/ea:
Reg Price: $24.99

Qty: 1 Add to Cart

Ingredients: Purified oil extracts from geranium, lavender, bergamot, eucalyptus, tea tree, beeswax, sorbitan monopalmitate.

Suggested Usage: Unless otherwise directed by a health practitioner, apply a small amount to affected area and massage, no more than 3-5 daily.

Warnings: For topical use only. Avoid eye contact. Do not use on broken skin. Discontinue use if skin irritation develops. may stain some fabrics or finishes.

Notes: Not tested on animals.

Shipping and Handling:
Canada: $7.50 CAD - For more infomation, please read our shipping policies.
USA: $8.50 CAD (~$7.41 USD) - For more infomation, please read our shipping policies.
Outside North America: $8.50 - For more information, please read our shipping policies

Change Currency USD CAD

Email this product to a friend

EXHIBIT "F"

United States Patent and Trademark Office

Trademarks > Trademark Electronic Search System(Tess)

TESS was last updated on Sat May 12 04:19:21 EDT 2007

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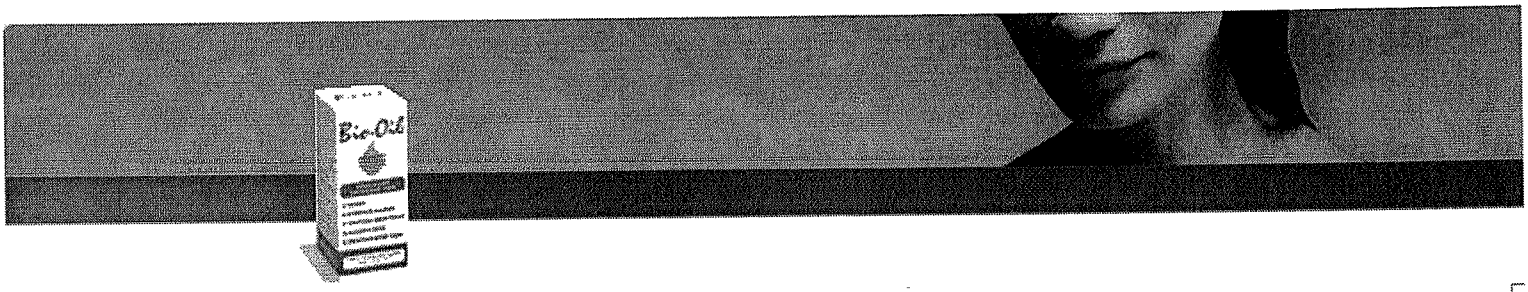
Start List At: OR Jump to record: **Record 1 out of 4**

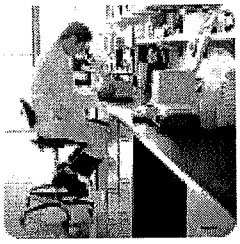
Bio-Oil

Word Mark	**BIO-OIL**
Goods and Services	IC 003. US 001 004 006 050 051 052. G & S: Essential oils for personal use, cosmetics. FIRST USE: 20030900. FIRST USE IN COMMERCE: 20030900
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.15.08 - Raindrop (a single drop); Single drop (rain, tear, etc.); Teardrop (a single drop)
Serial Number	76294838
Filing Date	August 2, 2001
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	July 23, 2002
Registration Number	3029619
Registration Date	December 13, 2005
Owner	(REGISTRANT) GENEVA LABORATORIES LIMITED COMPANY BR.VIRGIN ISLANDS Van Nijenrodeweg 978 Amsterdam NETHERLANDS 1081 ET
Attorney of Record	Oliver P. Howes, Jr.
Description of Mark	The mark consists of horizontal lines forming the shape of a drop, with the stylized words "Bio-Oil" above the design. The lines in the mark are a feature of the mark and do not indicate color.
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead	

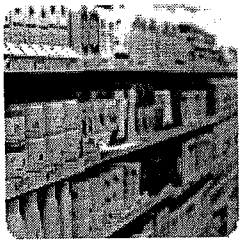
Indicator LIVE



Bio-Oil® is a specialist skincare product that helps improve the appearance of scars, stretch marks and uneven skin tone. Its advanced formulation, which contains the breakthrough ingredient PurCellin Oil™, also makes it highly effective for numerous other skin concerns, including aging skin and dehydrated skin.



Clinical trial results
More...



No.1 selling skincare product in pharmacies in the UK, Australia, New Zealand and South Africa
More...

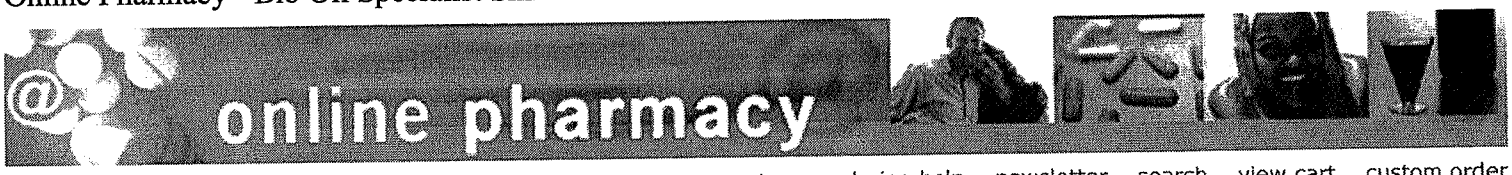
Professional recommendations
More...

John L Knowlton
Leading Cosmetic Scientist
More...

Global a
Mc

Bio-Oil® is a product of Union-Swiss | Successfully treating skin since 1954

Terms and conditions



Product Range

- Acne Treatments
- Anti Smoking Aids
- Antihistamines & Allergies
- Arthritis & Muscular Pain
- Cold Sores
- Complete Eye Care
- Complete Foot Care
- Contraception
- Coughs, Colds & Flu
- First Aid
- Hairloss Treatments
- Health Care in General
- Oral Health Care
- Pain Management
- Pregnancy Testing
- Scalp Care
- Sports Injuries
- Vitamins & Dietary Supplements
- Women's Health
- Cameras & Accessories
- Comvita Products
- Prescription Meds
- Worm Treatments
- Skin Treatments
- Gifts

sitemap

Bio-Oil

(Contains the breakthrough ingredient PurCellin Oil)

Bio-Oil is a specialist skincare oil for the face and body, specifically formulated to help reduce the appearance of s stretch marks and uneven skin tone. Bio-Oil's unique combination of ingredients are highly effective for ageing ski provide significant relief from the discomfort associated with dry, itchy and flaky skin.

Bio-Oil successfully overcame this problem through the inclusion of the breakthrough ingredient PurCellin Oil™. PurCellin Oil™ dramatically improves the consistency of the mix, making the oil light and non-greasy, thereby ens the most effective absorption of the key beneficial ingredients.

Bio-Oil contains Vitamin A and Vitamin E, Calendula, Lavender and Rosemary oils, and Chamomile extract. Bio-C contains no preservatives and is suitable for all ages and skin types.

Bio-Oil is a "dry" oil which is non-greasy and non-staining.

Dosage

Scars	Bio-Oil helps to reduce the appearance of all scars (both new and old) by improving the condition of skin with scar tissue. Bio-Oil helps alleviate the discomfort frequently associated with scars, such as tightness and itchiness, as well as relieving the dryness.
Stretch Marks	Bio-Oil helps keep the skin as elastic as possible, thereby helping to prevent stretch marks from developing during periods of rapid change in body size such as pregnancy, adolescence and weight loss. Bio-Oil also helps reduce the appearance of existing stretch marks.
Uneven skin tone	Bio-Oil helps to reduce the appearance of uneven skin tone and promote an even skin tone.
Ageing skin	Bio-Oil helps to smooth, firm and nourish ageing and wrinkled skin.
Dehydrated skin	Bio-Oil provides intensive lubrication, helping to relieve discomfort and improving the appearance of the affected area.

Caution

Bio-Oil is for External use only. Do not use Bio-Oil on broken skin

If you think that **BIO-OIL** maybe unsuitable for your condition then please see our other Skin Treatments items. Us links below. Alternative if you are unsure about treatment seek the advice of our pharmacist at:
info@onlinepharmacy.co.nz

Imedeen	**Batrafen**	**Batrafen**	**Skincalm-0.5%**
Benhex	**Egocort**	**Ecreme**	**Pevaryl**
VeinAway	**Micanol**	**Hydrocortisone**	**Eventone**
Fade-Away	**Dermabrite**		

Product Name			**Add to Cart**
Bio-Oil (1 x 125ml)	**NZ** $40.00	**US** $27.20	add
Bio-Oil (1 x 200ml)	**NZ** $60.00	**US** $40.80	add

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO APPLICANT'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER WITH COUNTERCLAIM WITH SUPPORTING DECLARATION AND EXHIBITS** was served on Applicant by mailing a copy thereof, via First Class Mail, to Holly Pekowsky, Esq., Amster Rothstein & Ebenstein LLP, 90 Park Avenue, New York, New York, 10036, as attorneys for Applicant, First Quality Hygienic, Inc., on May 14, 2007.

Dated: Garden City, New York
May 14, 2007

Phyllis Koch

SBF/D548083/M048735