

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

-----X
TARGET BRANDS, INC.,

78/825,602

Opposition No. 91175637

Opposer,

-against-

**APPLICANT'S OPPOSITION TO
OPPOSER'S MOTION FOR
SUMMARY JUDGMENT**

NEW AGE COSMETICS, INC.,

Applicant.

-----X



01-21-2009

U.S. Patent & Trademark Trial and Appeal Board

Applicant New Age Cosmetics, Inc. (hereinafter New Age) by and through its attorney, hereby opposes Opposer Target Brands Inc.'s (hereinafter Target) motion for summary judgment.

A. STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. 56(c). The substantive law governing the case identifies the facts that are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is warranted only if "the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Id.* In reviewing the evidence, the Court resolves "all factual ambiguities and [credit] all inferences, including those relating to credibility," in favor of the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating that the pleadings and evidence, taken together, reveal no disputed material facts. Celotex Corp. v. Catrett, 477 U.S.

317, 323 (1986).

B. OPPOSER IS NOT ENTITLED TO SUMMARY JUDGMENT.

1. Target Does Not Have Priority of Right .

Under 15 U.S.C. Section 1052(d), no trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it consists of ... a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Here the goods of the Applicant are cosmetics, namely lotions, creams, powders, pomade, fade creams, soaps, toners, astringents, and cleaners for face and body (Applicant's Rule 56 Statement No. 11), which are distinguishable from opposer's goods which are handbags, clothing, women's hosiery, wallets, and a variety of apparel (Applicant's Rule 56 Statement Nos. 1, 2, 3,6, and 7). However, with respect to the Merona mark on handbags, because a third party, Merona Industries, Inc. also has and uses the same mark on the same goods (Barango Affirmation: Ex. 1, and 4 at 15), the mark has been deemed abandoned, as it loses its significance as an indication of origin. 15 U.S.C. Section 1127.

Moreover there are no instances of confusion, mistake, nor deception. (Barango Affirmation: Ex. 3 at 6).

In addition, on October 27, 2008, Opposer filed an Application to register the instant mark in connection with cosmetic in International class 3. (Barango Affirmation: Ex. 2), although Applicant has priority rights in the mark from the filing date of its application. Zirco Corp. v. American Tel. And Tel. Co. 21 U.S.P.Q. 2d 1542 (T.T.A.B. 1991). Section 7(c) of the Trademark Act (15 U.S.C. 1057(C), as amended.

Therefore, Target does not have priority of right to the mark.

2. The Merona Mark That Is The Subject of The Application Is Not Confusingly Similar to Target's Merona Mark.

The factors considered under In re E. I. du Pont de Nemours & Co., 476 F. 2d 1357, 177

U.S.P.Q. 563 (CCPA 1973) are issues of fact. Here, the goods of the Applicant are cosmetics, namely lotions, creams, powders, pomade, fade creams, soaps, toners, astringents, and cleaners for face and body (Applicant's Rule 56 Statement No. 11), which are distinguishable from opposer's goods which are handbags, clothing, women's hosiery, wallets, and a variety of apparel (Applicant's Rule 56 Statement Nos. 1, 2, 3,6, and 7). Moreover there are no instances of confusion, mistake, nor deception. (Barango Affirmation: Ex. 3 at 6), and Applicant's application is for words only, and so contrary to Opposer's assertion, Applicant's mark cannot be in anyway identical to any mark of the Opposer, by comparing. There is no evidence in the record to support Opposer's claims of similarity, relatedness, any incentive for Applicant, or that Applicant's goods are sold in the same channel as any of Opposer's goods. Applicant's mark is for noncompeting goods. (Barango Affirmation: Ex. 4 at 14.)

Moreover, if Opposer's argument had merit, Opposer would not have to file an Application to register the instant mark in connection with cosmetics in International class 3. Applicant intends to oppose that application, as a matter of right.

Therefore the Merona Mark that is the subject of the application is not confusingly similar to Opposer's Merona mark.

3. Applicant Can As A Matter of Law Sustain its Affirmative Defenses.

From Applicant's argument in 1 and 2 above, that Target does not have priority of right, and that Applicant's Merona Mark is not confusingly similar to Target's Merona Mark, Applicant can as a matter of law sustain its affirmative defenses that there is no likelihood of confusion, mistake or deception, inter alia, Applicant's mark is for noncompeting goods, and inter alia the Merona mark had been used by a third party, Merona Industries, Inc. (Barango Affirmation: Ex. 1.) Moreover, it is well settled that if an original user revives the use of a mark which has been abandoned, it is essential to its validity that the rights of another have not intervened. In such situations, the newcomer is considered the owner of the mark, and the original user an infringer. Brower v. Boulton, 53 Fed. 389 (C.C.S.D.N.Y. 1892) aff'd, 58 Fed. 888 (2d Cir. 1893).

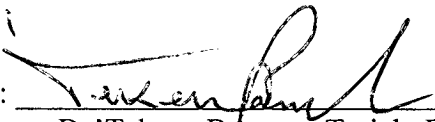
Therefore Applicant can as a matter of law sustain its affirmative defenses.

CONCLUSION

Accordingly, it is respectfully submitted that Opposer's motion for summary judgment be denied in its entirety.

Dated: January 12, 2009
Brooklyn, New York

Respectfully submitted,

By: 
Da'Tekena Barango-Tariah, Esq.
25 Bond Street,
Second Floor,
Brooklyn, New York 11201
Telephone: (718) 625 4200
Facsimile: (718) 625 2586

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

-----X
TARGET BRANDS, INC.,

Opposer,

Opposition No. 91175637

-against-

**RULE 56 STATEMENT IN
SUPPORT OF OPPOSITION
TO SUMMARY JUDGMENT
MOTION**

NEW AGE COSMETICS, INC.,

Applicant.

-----X

Pursuant to the Federal Rule of Civil Procedure 56, Applicant New Age Cosmetics, Inc. (hereinafter New Age) through its attorney Da'Tekena Barango-Tariah, Esq. hereby responds to Opposer Target Brands, Inc.'s (hereinafter Target) Rule 56 statement. Applicant also herein submits additional material facts as to which Applicant contends that there exists a genuine issue to be tried.

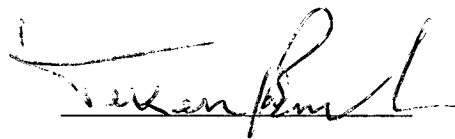
1. New Age does not dispute that Target is the owner of United States Registration No. 2,099,493, registered September 28, 1997, for the mark MERONA for use in connection with handbags.
2. New Age does not dispute that Target is the owner of United States Registration No. 2,667,625, registered January 21, 2003, for the mark MERONA for use in connection with clothing.
3. New Age does not dispute that Target is the owner of United States Registration No. 2,685,944, registered February 11, 2003, for the mark MERONA for use in connection with women's hosiery.
4. New Age does not dispute that Target is the owner of United States Registration No. 2,896,145, registered October 19, 2004, for the mark MERONA for use in connection with handbags.

5. New Age does not dispute that Target licenses the MERONA mark in 1, 2, 3, and 4, above for use by Target's parent, Target Corporation.
6. New Age does not dispute that Target Corporation operates, among other things, a chain of Target discount department stores, now numbering nearly 1,600 stores in 48 states. Nor does New Age dispute that Target Corporation's retail outlets in the United States offer for sale a wide variety of apparel, handbags and wallets, under the MERONA mark, although New Age disputes that the MERONA mark is Target Corporation's house brand.
7. New Age does not dispute that at least as early as April 1, 1991, Target Corporation began using the mark MERONA in connection with apparel and has since that time used the MERONA mark in connection with goods including a variety of apparel, hosiery, handbags, and wallets.
8. New Age does not dispute that MERONA goods have over the years frequently been featured in Target Corporation's weekly Sunday newspaper inserts. Neither does New Age dispute that during the periods 2003 through 2006 approximately 50,000,000 such circulars were distributed each week.
9. New Age does not dispute that Target Corporation's records reflect that, between February 2006 and January 2007, Target Corporation sold approximately \$1,047,477,449 in goods under the MERONA mark.
10. New Age does not dispute that MERONA goods including apparel and handbags have also over the years appeared in advertising in national periodicals.
11. New Age does not dispute that it filed the Subject Application to register the mark MERONA in connection with cosmetics namely, lotions, creams, powders, pomade, fade creams, soap, toners, astringents, cleaners for face and body, within International Class 3, although not on February 2, 2006, but on February 22, 2006.
12. New Age does not dispute that it claims in the Subject Application a first use date of April 4, 2005.
13. Neither Target nor Target Corporation owns a United States trademark MERONA in connection with cosmetics.

14. Neither Target nor Target Corporation uses the MERONA trademark in connection with cosmetics namely, lotions, creams, powders, pomade, fade creams, soap, toners, astringents, cleaners for face and body.
15. Neither Target nor Target Corporation owns a United States trademark MERONA in connection with goods within International Class 3.
16. A third party, Merona Industries, Inc., as at September 23, 1997, had the trademark MERONA in connection with handbags, with a First Use date April 15, 1991. (Barango Affirmation: Ex. 1).
17. On October 27, 2008, Target Corporation filed an Application to register the mark MERONA in connection with cosmetics, within International Class 3. (Barango Affirmation: Ex. 2).

Dated: Brooklyn, New York

January 12, 2009

A handwritten signature in black ink, appearing to read "Da'Tekena Barango-Tariah", written over a horizontal line.

Da'Tekena Barango-Tariah

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

-----X
TARGET BRANDS, INC.,

Opposer,

Opposition No. 91175637

-against-

**AFFIRMATION OF
DA'TEKENA BARANGO-TARIAH**

NEW AGE COSMETICS, INC.,

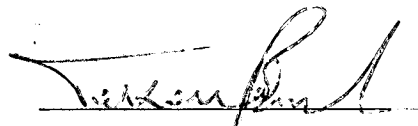
Applicant.

-----X
I, DA'TEKENA BARANGO-TARIAH, an attorney admitted to practice in New York and before this Court, affirm as follows:

1. I am the principal of the law firm of Da'Tekena Barango-Tariah, counsel for New Age Cosmetics, Inc., in the above-captioned proceeding.
2. Attached as **Exhibit 1** is a true and correct copy of a United States Patent and Trademark Office, Trademark Electronic Search System, Record 10 out of 19, printed on January 12, 2009.
3. Attached as **Exhibit 2** is a true and correct copy of a United States Patent and Trademark Office, Trademark Electronic Search System, Record 2 out of 19, printed on January 12, 2009.
4. Attached as **Exhibit 3** is a true and correct copy of Applicant's Response to Opposer's Interrogatories, dated July 2, 2008. The document was produced by Applicant in discovery.
5. Attached as **Exhibit 4** is a true and correct copy of Applicant's Answer to Notice of Opposition, dated October 26, 2007.

Dated: Brooklyn, New York

January 12, 2009



Da'Tekena Barango-Tariah



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Typed Drawing

Word Mark	MERONA
Goods and Services	IC 018. US 001 002 003 022 041. G & S: handbags. FIRST USE: 19910415. FIRST USE IN COMMERCE: 19910415
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	75188317
Filing Date	October 28, 1996
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 1, 1997
Registration Number	2099493
Registration Date	September 23, 1997
Owner	(REGISTRANT) Merona Industries, Inc. CORPORATION DELAWARE 222 Piedmont Avenue Atlanta GEORGIA 30308
	(LAST LISTED OWNER) Target Brands, Inc. CORPORATION MINNESOTA TPS 3165 1000 Nicollet Mall Mineapolis MINNESOTA 55403
Assignment Recorded	ASSIGNMENT RECORDED
Prior Registrations	1382441;1636966;1727283;1771523;1907285;AND OTHERS
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20080310.
Renewal	1ST RENEWAL 20080310

Live/Dead Indicator LIVE

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MERONA

Word Mark **MERONA**

Goods and Services IC 003. US 001 004 006 050 051 052. G & S: Cosmetics; personal care products, namely, perfume, cologne, fragrances, aftershave gels, aftershave lotion, antiperspirant, skin and face astringents, bath beads, bath flakes, bath oil, bath salts, bath foam, body glitter, body mist, body oil, body lotion, body scrub, body wash, bubble bath, cologne, body cream, face cream, essential oils for personal use, exfoliating preparations for the skin, eye gels, eye masks, face masks, face scrub, non-medicated foot soaks, face toners, fragrant body splash, fragrant body mist, hair conditioner, hair glitter, hair rinses, hair conditioners, hair shampoo, hair spray, hair styling gel, hair styling mousse, hand lotion, face lotion, lip balm, massage cream, massage lotion, massage oil, nail polish, nail polish remover, non-medicated face cleanser, oil blotting sheets for the skin, body powder, shaving cream, shaving gel, shower cream, shower gel, skin bronzing cream, body soap, face soap, hand soap, sun block for the body, sun block for the face, suntan lotion for the body, suntan lotion for the face, sunless tanning lotion, talcum powder, potpourri, incense, sachets

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 77601117

Filing Date October 27, 2008

Current Filing Basis 1B

Original Filing Basis 1B
Owner (APPLICANT) Target Brands, Inc. CORPORATION MINNESOTA TPS-3165 1000 Nicollet Mall
Minneapolis MINNESOTA 55403
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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

TARGET BRANDS, INC.,

Opposer,

Opposition No. 91175637

v.

NEW AGE COSMETICS, INC.

Applicant.

APPLICANT'S RESPONSE TO OPPOSER'S INTERROGATORIES

1. Describe in detail the process by which the Subject Mark was chosen for use, including in the description identification of all individuals involved in the creation, selection and/or adoption of the Subject Mark, identification of other or alternative marks considered as a part of the process, a description of any trademark investigation undertaken in connection with the selection and/or adoption of the Subject Mark, and a description of the reason(s) that the Subject Mark was chosen.

Response: The Mark was chosen at random, there was no process of selection nor an investigation upon selection. It was chosen by Chima Mbadugha, only.

2. Identify each and every service or good on which, or in connection with which, you are using, have used, or intend to use the Subject Mark in the United States, and for any service or good in connection with which you have commenced use of the Subject Mark in the United States, state the date of first use of the Subject Mark in commerce that Congress can regulate in connection with that service or good and describe in detail the basis for fixing that date of first use.

Response: The Mark has been used for cosmetics, namely cream. It will be used for lotion, powder, pomade, soaps, toners, astringents, and face and body cleansers. The date of first use is April 4, 2005, the date the cream was sold across a state line, from the state of California.

3. Identify each person you intend or expect to call as a witness during the testimony

period(s) in this proceeding, and describe in detail the substance of each such person's expected testimony.

Response: Chima Mbadugha, whose testimony would be related to the choosing and use of the Mark.

4. Identify each document or thing you intend or expect to offer into evidence during the testimony period in this proceeding.

Response: Document Nos. NAC 0001- 0015.

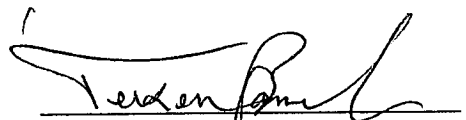
5. For each person you have retained or specially employed to provide expert testimony in the case, provide the information required under Fed. R. Civ. P. 26(a)(2)(B).

Response: No person has been retained nor specially employed to provide expert testimony in this case.

6. Describe in detail any instances of confusion, mistake or deception with respect to the origin, sponsorship or approval of the Subject Mark or your goods and/or services under the Subject Mark, or between the Subject Mark or your goods and/or services and Opposer's Mark or goods and/or services under Opposer's Mark, or to any relationship between you and Opposer.

Response: There are no instances of confusion, mistake nor deception with respect to the origin, sponsorship or approval of the Subject Mark nor any goods and/or services under the Subject Mark, nor between the Subject Mark or any goods and/or services and the Opposer's Mark or goods and/or services under Opposer's Mark, or to any relationship between the Applicant and Opposer.

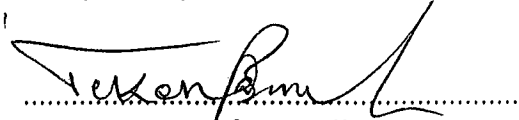
Dated: July 2, 2008


Da'Tekena Barango-Tariah, Esq.
25 Bond Street,
Second Floor,
Brooklyn, NY 11201
Tel.: (718) 625-4200
Fax: (718) 625-2586

**Attorney for Applicant
New Age Cosmetics, Inc.**

Certificate of Service

I hereby certify that a copy of the foregoing APPLICANT'S RESPONSE TO OPPOSER'S INTERROGATORIES was mailed first-class mail, postage prepaid, Timothy J. Cruz, Esq., Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402, attorney for Opposer, this 2nd day of July, 2008.

A handwritten signature in black ink, appearing to read "Da'Tekena Barango-Tariah", is written over a horizontal dotted line.

Attorney for Applicant
Da'Tekena Barango-Tariah, Esq.

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

_____)	
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)	
v.)	
)	
NEW AGE COSMETICS, INC.,)	
)	
Applicant.)	
_____)	

BOX TTAB
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Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION

Applicant, NEW AGE COSMETICS, INC., for their answer to the Notice of Opposition filed by TARGET BRANDS, INC., against application for registration of NEW AGE COSMETICS, INC.'s trademark MERONA, Serial No. 78/820,602, filed February 22, 2006 and published in the Official Gazette of October 17, 2006, pleads and avers as follows:

1. Answering paragraph 1 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.
2. Answering paragraph 2 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.
3. Answering paragraph 3 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.
4. Answering paragraph 4 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.
5. Answering paragraph 5 of the Notice of Opposition, Applicant is without sufficient

information to form a belief therein, and thus, denies the allegations contained therein.

6. Answering paragraph 6 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.

7. Answering paragraph 7 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.

8. Answering paragraph 8 of the Notice of Opposition, Applicant is without sufficient information to form a belief therein, and thus, denies the allegations contained therein.

9. Answering paragraph 9 of the Notice of Opposition, Applicant admits the allegation thereof.

10. Answering paragraph 10 of the Notice of Opposition, Applicant admits the allegation thereof.

11. Answering paragraph 11 of the Notice of Opposition, Applicant denies each every allegation contained therein.

12. Answering paragraph 12 of the Notice of Opposition, Applicant denies each every allegation contained therein..

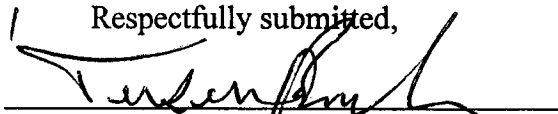
13. Answering paragraph 13 of the Notice of Opposition, Applicant denies each every allegation contained therein.

14. Applicant further affirmatively alleges that there is no likelihood of confusion, mistake or deception because, inter alia, Applicant's mark is for noncompeting goods.

15. Applicant further affirmatively alleges that there is no likelihood of confusion, mistake or deception because, inter alia, MERONA, upon information and belief, has been used and registered by third party in the category Opposer's goods.

In view of the foregoing, Applicant contends that this opposition is groundless and baseless in fact; that Opposer has not shown wherein it will be, or is likely to be, damaged by the registration of Applicant's trademark; that Applicant's trademark is manifestly distinct from any alleged marks of the Opposer or any designation of the Opposer and Applicant prays that this Opposition be dismissed and that Applicant be granted registration of his trademark.

Respectfully submitted,



Attorney for Applicant
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Date: 10/26/07