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

Proceeding	92054617
Party	Defendant Y.Z.Y., Inc.
Correspondence Address	RICHARD S ROSS ATTORNEY AT LAW 4801 SOUTH UNIVERSITY DRIVE, SUITE 237 FT LAUDERDALE, FL 33328-3836 UNITED STATES prodp@ix.netcom.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	RICHARD S. ROSS, ESQ.
Filer's e-mail	prodp@ix.netcom.com
Signature	/RICHARD S. ROSS, ESQ./
Date	02/12/2013
Attachments	1.PDF (18 pages)(1534730 bytes)

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

In the matter of trademark Registration No. 3,504,398
for the mark BIO CLAIRE registered September 23, 2008.

NOUVELLE PARFUMERIE GANDOUR,

Petitioner,

v. Cancellation No. 92054617

Y.Z.Y., INC.

Respondent.

/

RESPONDENT Y.Z.Y., INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW, the Respondent, Y.Z.Y., INC. ("YZY"), by and through its undersigned counsel, and pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, who respectfully moves the Board to dismiss the petition for lack of subject matter jurisdiction. Specifically, the Petitioner, Nouvelle Parfumerie Gandour ("Gandour"), has not lawfully used the subject mark, BIO CLAIRE, in the United States sufficient to confer standing. Because lack of standing is a defect in subject matter jurisdiction, the motion should be granted.[1]

FACTUAL BACKGROUND

Gandour alleges that YZY's registration for BIO CLAIRE should be cancelled due

[1]On January 29, 2013, the parties held a telephone conference with the interlocutory attorney, Mr. Yong Oh (Richard) Kim, regarding Gandour's motion to strike YZY's affirmative defenses. On February 8, 2013, the Board issued a written order on the conference. DE 17. In the order, the Board noted that Respondent requested leave to amend its affirmative defense of lack of standing to one asserting lack of subject matter jurisdiction. The Board denied the request and stated that "standing in a Board proceeding is not a question of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1)...." *Id.* at n.1. Nonetheless, the Board permitted Respondent an opportunity to brief the issue. This motion to dismiss is that brief.

to a likelihood of confusion under 15 U.S.C. §1052(d), Pet. ¶10, and because the registration was obtained through fraud. *Id.* ¶8. *See* 15 U.S.C. §1064(3). Gandour does not allege prior use of YZY's mark BIO CLAIRE in the United States. Rather, that asserts that it is a foreign manufacturer of lightening body cream sold under the mark BIO CLAIRE, and that it sold this product to YZY in the United States beginning 2002. *Id.* ¶¶2, 3. Gandour relies upon YZY's non-exclusive distribution in the United States of the BIO CLAIRE lightening cream manufactured by it to support Gandour's petition. *Id.* ¶3.[2]

Gandour's petition was filed October 7, 2011. However, prior thereto, at least as early as 2010, YZY gave Gandour actual notice that its lightening cream product was detained by the United States Food and Drug Administration ("FDA"). Exhibit 1. YZY explained to Gandour that the FDA had determined that its lightening cream goods shipped to YZY in the United States under the BIO CLAIRE trademark was adulterated or misbranded in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.*, Act 501(a)(4)(B) (21 U.S.C. §351); 505(a) (21 U.S.C. §355); and 801(a)(3) (21 U.S.C. §381). Exhibit 2. More specifically, the FDA found that Gandour's lightening cream, among other skin lightening products shipped to YZY in the United States, violated United States federal law in that they were unapproved new drugs, and/or contained unapproved color additives. The FDA concluded that the skin lightening goods, "if intended to affect the structure of the human body, [were] considered a drug," and required an approved new drug application. *Id.* The FDA also detained the skin lightening goods because they contained

[2]The Board previously denied YZY's motion to dismiss for failure to state a claim based upon lack of standing. At the telephonic hearing, n. 1, *supra*, Mr. Kim emphasized that the Board's ruling was limited in that the Board determined that standing was sufficient to "bring the proceeding," DE 11, p. 2, but that the ultimate burden of proof on the issue of standing remains with Gandour. *See also* DE 17, p. 3.

unapproved color additives. *See id.*, Huile BIO CLAIRE 200 ml. Thus, Gandour had actual knowledge, prior to the time that it filed the present proceeding, that its use of YZY's BIO CLAIRE mark in the United States was unlawful for the skin lightening cream it sold to YZY. Despite this actual knowledge, and the lack of any prior lawful use of the mark BIO CLAIRE in the United States, Gandour initiated this matter.

LEGAL ARGUMENT

"Lack of standing is a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). *Accord Hill v. Vanderbilt Capital Advisors, LLC*, Case No. 11-2213 (10th Cir. Dec. 27, 2012). "It is fundamental that a petitioner, to succeed must allege and prove not only the elements of the cause of action upon which it relies but also its standing to be heard on the question." *Geraghty Dyno-Tuned Products, Inc. v. Clayton Manufacturing Company*, 190 USPQ 508, 512 (TTAB 1976)(standing rejected where petitioner, asserting fraud and likelihood of confusion, based its priority upon an unlawfully used mark). "Because standing is jurisdictional, lack of standing precludes a ruling on the merits." *Media Technologies Licensing, LLC. v. Upper Deck*, 334 F.3d 1366, 1370, 67 USPQ2d 1374 (Fed. Cir. 2003). *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1031, 213 USPQ 185 (CCPA 1982)(standing is a threshold question permitting the pleader to be in court)(concurrence by Markey, Ch. J.). *See also* TBMP §101.03(the Board follows precedential opinions from the Court of Appeals for the Federal Circuit, and the Court of Customs and Patent Appeals, among others.). Where there is no standing, the proceeding should be dismissed, regardless of its stage. *See Melwani v. Allegiance Corp.*, 97 USPQ2d 1537 (TTAB 2010). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (holding that standing is an aspect of the case or controversy requirement, which

must be satisfied "at all stages of review").

"The Patent and Trademark Office (PTO) views the Lanham Act requirement of 'use in commerce' as reading 'lawful use in commerce.'" *McCarthy on Trademarks*, §19:124, 4th ed., p. 19-363 (2010). "When the sale or transportation of any product for which registration of a trademark is sought is regulated under an Act of Congress, the Patent and Trademark Office may make appropriate inquiry as to compliance with such Act for the sole purpose of determining lawfulness of the commerce recited in the application." 37 C.F.R. §2.69; TMEP §907. By analogy to Rule 2.69, there is no common law right of use given to a petitioner who uses a mark illegally. *See Creagri, Inc. v. Usana Health Sciences, Inc.*, 474 F. 3d 626 (9th Cir. 2007).

The Board has previously held that use of a mark would be deemed unlawful if it were noncompliant with a law as determined by a court or appropriate governmental agency, or if it were a clear *per se* violation of law. *Kellogg Co., v. New Generation Foods, Inc.*, 6 USPQ2d 2045 (TTAB 1988). *Accord General Mills, Inc. v. Health Valley Foods*, 24 USPQ2d 1270 (TTAB 1992). Here, the "appropriate governmental agency," the FDA, has determined that Gandour's skin lightening goods branded under YZY's BIO CLAIRE mark are unlawful as unapproved new drugs, and because they contain unapproved additives. *See* Exhibit 2. YZY had no knowledge that Gandour's lightening cream was illegal. As soon as it found out, YZY advised Gandour of the FDA's determination, and then, as permitted by the FDA, YZY shipped the goods back to Gandour. *See* Exhibit 1. Accordingly, YZY has shown, by clear and convincing evidence, that Gandour can claim no common law right of lawful use of YZY's BIO CLAIRE mark based upon its shipments of illegal skin lightening drugs to YZY in the United States.

Additionally, the goods Gandour sold under the BIO CLAIRE mark are also a *per se*

violation of federal law. The goods at issue are unapproved new drugs that are to be applied topically for human use. Gandour's violations are serious and material. In essence, the goods are illegal drugs, transhipped into the United States, that could cause physical harm to consumers. Selling or transporting illegal drugs are considered a *per se* violation of federal law. *See McCarthy, supra.* It would be "unthinkable" to allow Gandour to claim common law rights to BIO CLAIRE in the United States based upon goods that violate federal law. *See General Mills* at 1274.

CONCLUSION

Because the petition does not assert that Gandour has lawfully used the BIO CLAIRE mark in the United States whatsoever, it has no standing to seek cancellation of YZY's registration. *See Geraghty Dyno-Tuned Products, Inc., supra.* Accordingly, YZY should be permitted to amend its affirmative defense to assert lack of subject matter jurisdiction,[3] and the petition should be dismissed for lack thereof.[4]

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[3] "Pleadings in a cancellation proceeding may be amended in the same manner and to the same extent as in a civil action in a United States district court." 37 C.F.R. §2.115. *See also Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)("[Fed.R.Civ.P.] 15(a) declares that leave to amend 'shall be freely given when justice so requires' (citation omitted); this mandate is to be heeded.").

[4]Respectfully, dismissal should be with prejudice because Gandour cannot prove that it made prior lawful use of the BIO CLAIRE mark sufficient under Section 2(d) of the Act, or that it is lawfully using YZY's BIO CLAIRE mark in the United States, sufficient to establish fraud. *See Geraghty Dyno-Tuned Products,* Inc. 190 USPQ at 512.

Respectfully submitted,

/s/Richard S. Ross, Esq.
RICHARD S. ROSS, ESQ.
Attorney for Respondent
Atrium Centre
4801 South University Drive, Suite 237
Ft. Lauderdale, Florida 33328
Tel (954) 252-9110
Fax (954) 252-9192
E mail prodp@ix.netcom.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by first class regular mail on this 12th day of February, 2013, to counsel for the Petitioner as follows:

Scott R. Austin, Esq.
GORDON & REES LLP
200 S. Biscayne Bld., Suite 4300
Miami, Florida 33131
saustin@gordonrees.com

Justin H. Aida, Esq.
GORDON & REES LLP
2211 Michelson Drive, Suite 400
Irvine, CA 92612
jaida@gordonrees.com

/s/Richard S. Ross, Esq.
Richard S. Ross, Esq.

EXHIBIT 1

Eva

From: Eva [eva@yzyinc.com]
Sent: Thursday, June 03, 2010 2:22 PM
To: 'GHANDOUR GHANDOUR'
Cc: 'Shimon Bouskila'
Subject: RE: RETURN OF 3 BIO CLAIRE CONTAINERS
Importance: High

Dear Mr. Ghandour:

Sorry, but it is too late. It appears there is no time left to make changes before the deadline.

Eva Rodriguez, Controller
YZY Inc.

From: GHANDOUR GHANDOUR [mailto:ghandourg@yahoo.com]
Sent: Thursday, June 03, 2010 1:03 PM
To: Eva
Subject: Re: RETURN OF 3 BIO CLAIRE CONTAINERS

Dear Eva,

Please regroup all creams + oils if possible in 02 containers
that will go to South Africa and the rest to Nigeria.

Regards
Mr Ghandour

From: Eva <eva@yzyinc.com>
To: GHANDOUR GHANDOUR <ghandourg@yahoo.com>
Cc: Shimon Bouskila <Shimonb@yzyinc.com>
Sent: Thu, June 3, 2010 5:06:19 PM
Subject: FW: RETURN OF 3 BIO CLAIRE CONTAINERS

Dear Mr. Ghandour:

We can not wait any longer for instructions, since we must schedule the inspectors **NOW.** We can not take any risk with USCustoms/FDA.

We must proceed with the shipment to Yvory Coast consigned to Gandour as advised previously.

Eva Rodriguez, Controller

YZY Inc.

From: Eva [mailto:eva@yzyinc.com]
Sent: Thursday, June 03, 2010 9:30 AM
To: 'GHANDOUR GHANDOUR'
Cc: 'Shimon Bouskila'
Subject: FW: RETURN OF 3 BIO CLAIRE CONTAINERS

Dear Mr. Ghandour:

We did not receive any instructions yet. Please let us know urgently. Thank you,

Eva Rodriguez, Controller

YZY Inc.

From: Eva [mailto:eva@yzyinc.com]
Sent: Wednesday, June 02, 2010 2:42 PM
To: 'GHANDOUR GHANDOUR'
Cc: 'Shimon Bouskila'
Subject: RE: RETURN OF 3 BIO CLAIRE CONTAINERS
Importance: High

Dear Mr. Ghandour:

We must get your instructions urgently. There is a deadline with USCUSTOMS/FDA to export these containers.

We need the consignee address and which port in South Africa? CapeTown, PortElizabeth or Durban?

Await your reply early tomorrow. Thank you,

Eva Rodriguez, Controller

YZY Inc.

From: GHANDOUR GHANDOUR [mailto:ghandourg@yahoo.com]
Sent: Wednesday, June 02, 2010 1:32 PM
To: Eva
Subject: Re: RETURN OF 3 BIO CLAIRE CONTAINERS

Dear Eva,

Noted your information for the 3TC. However we are to send to our customer is south africa. You need to load the marchandise according to our instruction wich will be transmeted tomorrow.

Regards
Mr GHANDOUR

From: Eva <eva@yzyinc.com>
To: GHANDOUR GHANDOUR <ghandourg@yahoo.com>; Gandour <gandour@afnet.net>; zalzale@afnet.net
Cc: EdFandino@acustomsbrokerage.com; Shimon Bouskila <Shimonb@yzyinc.com>; ELI@YZYINC.COM; John Tominelli <jtominelli@secargousa.com>
Sent: Wed, June 2, 2010 3:25:57 PM
Subject: RETURN OF 3 BIO CLAIRE CONTAINERS

To this date, there has been no authorization to export the subject to the Port Everglades Free Zone.

As previously advised, the 3 containers will be returned to the shipper as follows:

Vessel CMA CGM Chateau SIF V-PG520WDEL

ETD June 14 Port of Miami

ETA July 16 Port Abidjan

The containers will be loaded in our warehouse on June 8

Eva Rodriguez, Controller

YZY Inc.

Eva

From: GHANDOUR GHANDOUR [ghandourg@yahoo.com]
Sent: Monday, May 03, 2010 11:13 AM
To: shimonb@yzyinc.com
Cc: jtominelli@secargousa.com; eva yzy eva

Dear Shimon,

Please be informed that Mister John Tominelli of SOUTHEASTERN INTERNATIONAL SERVICES.INC, will contact you to get delivery of the three containers of the Bio Claire

NOUVELLE PARFUMERIE GANDOUR gave mister Tominelli the authorization to transport this marchandise from your warehouse to the free zone for further exportation. Please call me on my mobile to authentify my instructions.(+225 05 11 76 76)

Mister John Tominelli cellular is 305 775 1990.

We remain

G .Ghandour

Managing Director of NPG-CI

(954) 523-3856 - FAX
(954) 523 3855 - PHONE

EXHIBIT 2

United States Food and Drug Administration

Florida District Office

Notice of FDA Action

Entry Number: MH9-0080686-9

Notice Number: 2
February 25, 2010

Importer:
Y Z Y Inc
6300 Nw 72nd Ave

Miami, FL 33166

>

Port of Entry: 5201, Miami, FL
Carrier: HAPAG LLOYD A G;
Date Received: February 13, 2010
Arrival Date: February 17, 2010

Filer of Record: A Customs Brokerage, Inc., Doral, FL 33166-3333
Consignee: Y Z Y Inc, Miami, FL 33166

<

HOLD DESIGNATED

Documents Required and Notify FDA of Availability

Summary of Current Status of Individual Lines

	Line ACS/FDA	Product Description	Quantity	Current Status
*	001/001	CREME BIO CLAIRE100 GRS	63000 NO	Detained 02-24-2010
*	001/002	CREME BIO CLAIRE 300 GRS	49200 NO	Detained 02-24-2010
*	001/003	HUILE BIO CLAIRE 200 ML	7776 NO	Detained 02-24-2010
*	001/004	HUILE BIO CLAIRE 60 ML	18000 NO	Detained 02-24-2010
*	001/005	LAIT BIO CLAIRE 200 ML	33000 NO	Detained 02-24-2010
*	001/006	LAIT BIO CLAIRE 350 ML	18360 NO	Detained 02-24-2010
*	001/007	TUBE BIO CLAIRE 30 GRS	12000 NO	Detained 02-24-2010

* = Status change since the previous notice. Read carefully the sections which follow for important information regarding these lines.

@ = Consignee ID

FDA will not request redelivery for examination or sampling, if the products not released by FDA are moved, following USCS conditional release to a location within the local metropolitan area or to a location approved by the FDA office at the number below.

All products in this entry not listed above may proceed without FDA examination. This notice does not constitute assurance the products involved comply with provisions of the Food, Drug, and Cosmetic Act or other related acts,

and does not preclude action should the products later be found violative.

Please provide documentation concerning all products in this entry to the FDA office below. Include the USCS document (e.g. CF-3461 or CF-7501) and commercial invoice for these products, annotated to show the ACS/FDA line numbers sent electronically.

Also, advise FDA upon actual availability, and include date, location, and warehouse control number, where applicable, for all lines in this entry.

DETENTION

The following products are subject to refusal pursuant to the Federal Food Drug and Cosmetic Act (FD&CA), Public Health Service Act (PHSA),or other related acts in that they appear to be adulterated, misbranded or otherwise in violation as indicated below:

Line ACS/FDA	Product Description	Respond By
001/001	CREME BIO CLAIRE100 GRS	March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" complete elimination of cutaneous defects" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/002	CREME BIO CLAIRE 300 GRS	March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" ensures complete elimination of cutaneous defects" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/003	HUILE BIO CLAIRE 200 ML	March 16, 2010

FD&CA Section 501(a)(4)(B), 801(a)(3); ADULTERATION
The article appears to be a color additive for the purposes of coloring only in or on drugs or devices, and is unsafe within the meaning of Section 721(a). INGREDIENTS IN LABEL STATE TO CONTAIN CI 15985 AND CI 19140, APPEARS TO BE UNAPPROVED COLOR ADDITIVES.

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" makes your complexion clear" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/004	HUILE BIO CLAIRE 60 ML	March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" makes your complexion clear and even" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/005	LAIT BIO CLAIRE 200 ML	March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" ensures complete elimination of cutaneous defects" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/006	LAIT BIO CLAIRE 350 ML	March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES

TO" ensures complete elimination of cutaneous defects" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

001/007 TUBE BIO CLAIRE 30 GRS March 16, 2010

FD&CA Section 505(a), 801(a)(3); UNAPPROVED NEW DRUG
The article appears to be a new drug without an approved new drug application. PRODUCT LABEL STATES TO" stimulates the lightening process, makes your complexion clear and even" AS PER FD&C ACT IF INTENDED TO AFFECT THE STRUCTURE OF THE HUMAN BODY, PRODUCT IS CONSIDERED A DRUG.

Please direct your response to:

Lidia C. Diaz, Compliance Officer (Region/District)
U.S. Food and Drug Administration
6601 NW 25th Street, Rm 241
Miami, FL 33122

(305) 526-2800 ext. 932
(305) 526-7483 (FAX)
LIDIA.DIAZ@FDA.HHS.GOV

You have the right to provide oral or written testimony, to the Food & Drug Administration, regarding the admissibility of the article(s) or the manner in which the article(s) can be brought into compliance. This testimony must be provided to FDA on or before the dates shown above.

Notice Prepared For: The District Director, U.S. Food and Drug Administration
Notice Prepared By: LDC

U.S. Food & Drug Administration

Import Refusal Report

- 1

FDA Home 3

Refusal Details as Recorded in OASIS by FDA for Refusal MH9-0080686-9/1/7

Manufacturer FEI	3005221966
Manufacturer Name	Nouvelle Parfumerie Gandour
Manufacturer Address line 1	Zone Industrielle Youpougon 01 Bp 4387
Manufacturer Address line 2	
Manufacturer's City	Abidjan
Manufacturer Province/State	
Manufacturer Country/Area	Ivory Coast
Product Code	66VCJ99
Importer's Product Description	TUBE BIO CLAIRE 30 GRS
Refusal Date	22-Mar-2010
FDA District	FLA-DO
Entry/doc/line/sfx	MH9-0080686-9/1/7
FDA Sample Analysis	No
FDA Record of Private Lab Sample Analysis	No

Charge(s)

Violation Code	Section	Charge Statement
UNAPPROVED	505(a), 801(a)(3); UNAPPROVED NEW DRUG	The article appears to be a new drug without an approved new drug application.

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Page Last Updated: 04/24/2009

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Silver Spring, MD 20993
Ph. 1-888-INFO-FDA (1-888-463-6332)
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