

AO 120 (Rev. 3/04)

TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court _____ at Cincinnati on the following Patents or Trademarks:

DOCKET NO. 1:08-cv-565	DATE FILED August 21, 2008	U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, CINTI
PLAINTIFF Procter & Gamble Company		DEFENDANT RNA Corporation
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1		Complaint attached.
2		
3		
4		
5		

In the above-entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY	
	<input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 <u>3,337,024</u>		
2		
3		
4		
5		

In the above-entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK JAMES BONINI	(BY) DEPUTY CLERK <i>Morgan De</i>	DATE August 21, 2008
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Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
 Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
AUG 21 2008
JAMES BONINI, Clerk
CINCINNATI, OHIO

THE PROCTER & GAMBLE
COMPANY,

Civil File No.

1:08 CV 566

J. BARRETT

Plaintiff,

v.

COMPLAINT

RNA CORPORATION,

Jury Trial Demanded

Defendant.

Plaintiff The Procter & Gamble Company ("P&G"), for its Complaint against defendant RNA Corporation, alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. P&G is an Ohio corporation with its principal place of business in Cincinnati, Ohio.
2. Defendant RNA Corporation ("RNA") is an Illinois corporation with its principal place of business in Blue Island, Illinois.
3. This is a civil action arising from defendant's misuse of P&G's trademarks and trade dress, and defendant's infringement of P&G's design patents. The claims alleged in this Complaint arise under the Lanham Act, 15 U.S.C. § 1051, *et seq.*; the Ohio Deceptive Trade Practices Act, Ohio Rev. Stat. Ann. § 4165.02; and the Patent Act, 35 U.S.C. § 271, *et seq.*
4. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over claims under Ohio law. In addition, because the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between a citizen of a state and a citizen of another state, this Court also has jurisdiction under 28 U.S.C. § 1332.

5. This Court has personal jurisdiction over defendant by virtue of its commission of tortious acts within the state of Ohio and this District, its transaction of business within the State of Ohio and this District, and its contracts to supply goods in the State of Ohio and this District. The infringing products are available for sale, and have been sold, in this District. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(b).

BACKGROUND

6. Established in 1837, P&G began as a small, family-operated soap and candle company in Cincinnati, Ohio. Today, P&G markets several hundred products to more than five billion consumers in some 140 countries, and the P&G community consists of over 100,000 employees working in almost 80 countries worldwide.

7. P&G is one of the largest and most highly regarded manufacturers and sellers of consumer goods in the United States, with a long history of selling high quality products. P&G's product line includes a wide array of products that are purchased by hundreds of millions of American consumers each year.

8. P&G manufactures and markets a variety of personal care products, including hair care products such as shampoo and conditioning products. P&G devotes substantial effort, time, and resources to designing its packaging and graphics for such products. Packaging and graphics are important elements in marketing such products, because they serve both to distinguish the product from others and to represent and convey a product's quality and value to consumers.

P&G'S INTELLECTUAL PROPERTY RIGHTS

9. In November 2001, P&G acquired the company Clairol, Inc., including the HERBAL ESSENCES brands of hair care products and all intellectual property and goodwill associated with the products. Since that time P&G has marketed a variety of personal care products under the trademark HERBAL ESSENCES, including hair care products. HERBAL

ESSENCES products are widely distributed and available in all leading channels of trade for personal care products, including supermarkets, pharmacies and mass merchandise stores.

10. In 2006, P&G introduced a new line of HERBAL ESSENCES hair care products, featuring a unique and distinctive trade dress shown on Exhibit A attached hereto (the "HERBAL ESSENCES Trade Dress"). Large amounts of time and money were expended by P&G in designing the HERBAL ESSENCES Trade Dress specifically so that products featuring the HERBAL ESSENCES Trade Dress would be readily distinguishable by consumers from competing products on store shelves.

11. Among the HERBAL ESSENCES hair care products that P&G introduced in 2006 are a HELLO HYDRATION moisturizing shampoo and a HELLO HYDRATION moisturizing conditioner, each packaged in a container that, with its contents, appears blue.

12. The HERBAL ESSENCES Trade Dress, including the HELLO HYDRATION trade dress, is unique and distinctive and consists of, among other elements, (a) a bottle with a sinuous shape featuring unexpected and asymmetrical curves; (b) the product brand name on the front label in white printing; (c) a holograph device on the top portion of a label; and (d) a vinelike or organic device on the top portion of the label.

13. The distinctiveness and appeal of the HERBAL ESSENCES Trade Dress has resulted in substantial industry recognition. The industry publication CPC Packaging, for example, named the HERBAL ESSENCES Trade Dress a winner of its 2007 Editor's Choice Awards.

14. The distinctive features included in the P&G Trade Dress serve the purpose of identifying and distinguishing the HERBAL ESSENCES line of personal care products from the products of other sellers.

15. The HERBAL ESSENCES Trade Dress is an inherently distinctive symbol of great consumer goodwill. As a result of both its inherent distinctiveness and the extensive sales and marketing of products packaged in the HERBAL ESSENCES Trade Dress, consumers associate such trade dress with P&G and view that trade dress as designating the source of P&G's HERBAL ESSENCES line of products.

16. The HERBAL ESSENCES Trade Dress has achieved secondary meaning.

17. The HERBAL ESSENCES Trade Dress is not functional.

18. P&G is the owner of federal trademark Registration No. 3,337,074 for the circular logo prominently depicted on HERBAL ESSENCES hair care products (the "Herbal Essences Logo"). The registration is based upon a first use in commerce on June 30, 2006 and covers "hair care preparations." The Herbal Essences Logo is valid, subsisting and enforceable, and it has become a strong trademark symbolizing great consumer goodwill. A copy of the certificate of registration is attached hereto as Exhibit B.

19. The Herbal Essences Logo is consistently used in connection with HERBAL ESSENCES hair care products. It is an inherently distinctive symbol of great consumer goodwill. As a result of both its inherent distinctiveness and the extensive sales and marketing of products packaged in the HERBAL ESSENCES Trade Dress, consumers associate the Herbal Essences Logo with P&G and view the trademark as designating the source of P&G's HERBAL ESSENCES line of products.

20. P&G is the owner of U.S. Patent No. D562,139 ("139 patent"), issued on February 19, 2008, claiming "the ornamental design for a container, as shown and described." A copy of the '139 patent is attached hereto as Exhibit C. The '139 patent is valid and enforceable.

21. P&G is the owner of U.S. Patent No. D562,140 (“‘140 patent”), issued on February 19, 2008, claiming “the ornamental design for a container, as shown and described.” A copy of the ‘140 patent is attached hereto as Exhibit D. The ‘140 patent is valid and enforceable.

22. P&G is the owner of U.S. Patent No. D569,730 (“‘730 patent”), issued on May 27, 2008, claiming “the ornamental design for a container, as shown and described.” A copy of the ‘730 patent is attached hereto as Exhibit E. The ‘730 patent is valid and enforceable.

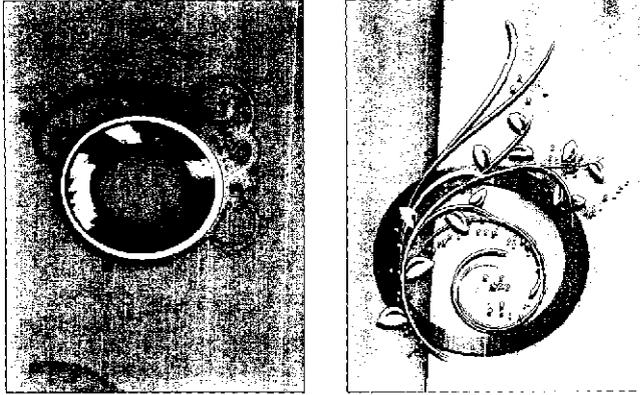
23. P&G is the owner of U.S. Patent No. D573,884 (“‘884 patent”), issued on July 29, 2008, claiming “the ornamental design for a container, as shown and described.” A copy of the ‘884 patent is attached hereto as Exhibit F. The ‘884 patent is valid and enforceable.

**RNA’S INFRINGEMENT OF P&G’S HERBAL ESSENCES TRADEMARKS
AND TRADE DRESS**

24. Defendant RNA describes itself as a “cosmetic contract manufacturer and filler.”

25. In response to P&G’s introduction of its new line-up of HERBAL ESSENCES shampoos and conditioners in 2006 featuring the distinctive Herbal Essences Trade Dress, and fully aware of P&G’s trademarks and HERBAL ESSENCES Trade Dress, RNA began selling shampoo and conditioner products labeled HYDRATING HERBAL SHAMPOO and HYDRATING HERBAL CONDITIONER, intended to mimic P&G’s HERBAL ESSENCES Trade Dress and the specific features, including the blue color, of P&G’s HELLO HYDRATION shampoos and conditioners. RNA’s HYDRATING HERBAL SHAMPOO and HYDRATING HERBAL CONDITIONER products have been marketed and sold under the packaging shown on Exhibit G attached hereto.

26. RNA’s use of a circular image confusingly similar to the Herbal Essences Logo is intentional. Their confusing similarity is illustrated by the comparative images depicted here:



27. RNA's packaging is intentionally confusingly similar to the HERBAL ESSENCES Trade Dress, as is illustrated by the comparative packaging depicted here:



28. RNA's mimicry of the Herbal Essences Logo and the HERBAL ESSENCES Trade Dress was intended to cause, and does cause, likely confusion with P&G's trademarks and

trade dress. Its mimicry damages the great and valuable goodwill inherent in the Herbal Essences Logo and the HERBAL ESSENCES Trade Dress.

29. Defendant's HYDRATING HERBAL SHAMPOO and HYDRATING HERBAL CONDITIONER packaging infringes both the Herbal Essences Logo and the distinctive elements of the HERBAL ESSENCES Trade Dress listed in paragraph 12.

30. RNA includes in its packaging inconspicuous, small-print notices stating that "THIS PRODUCT IS NOT DISTRIBUTED BY PROCTOR [sic] AND GAMBLE" and "COMPARE to Herbal Essences Shampoo®." Such inconspicuous notices are not intended to prevent, and do not prevent, confusion with P&G's products.

31. RNA's infringement as been willful, intentional, and deliberate, conducted with the intention of trading on the goodwill and reputation of P&G.

32. RNA's actions have had and will continue to have a substantial and adverse impact upon interstate commerce.

FIRST CLAIM FOR RELIEF
Federal Trademark Infringement
Lanham Act § 32, 15 U.S.C. § 1114

33. P&G restates and realleges paragraphs 1 through 32.

34. P&G is the owner of the registered Herbal Essences Logo.

35. RNA's use of a circular image confusingly similar to the Herbal Essences Logo is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of RNA with P&G, or as to the origin, sponsorship, or approval of RNA's goods, services, or commercial activities by P&G. Among other types of confusion created by RNA, its actions create initial interest confusion on the part of consumers. RNA's use of a circular image confusingly similar to the Herbal Essences Logo constitutes trademark infringement under the Lanham Act § 32, 15 U.S.C. § 1114.

36. RNA's infringement has caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined. P&G has no adequate remedy at law.

37. RNA has profited from its infringement of P&G's trademark rights and will continue to profit from it. RNA's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

SECOND CLAIM FOR RELIEF
Federal Unfair Competition (Trademark)
Lanham Act § 43(a), 15 U.S.C. § 1125(a)

38. P&G restates and realleges paragraphs 1 through 37.

39. P&G is the owner of common law trademark rights in the Herbal Essences Logo.

40. RNA's use of a circular image confusingly similar to the Herbal Essences Logo is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of RNA with P&G, or as to the origin, sponsorship, or approval of RNA's goods, services, or commercial activities by P&G. Among other types of confusion created by RNA, its actions create initial interest confusion on the part of consumers. Such actions constitute unfair competition, false designation of origin, and palming off in violation of the Lanham Act § 43(a), 15 U.S.C. § 1125(a).

41. RNA's actions have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined. P&G has no adequate remedy at law.

42. RNA has profited from its infringement of P&G's trade dress rights and will continue to profit from it. RNA's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

THIRD CLAIM FOR RELIEF
Federal Unfair Competition (Trade Dress)
Lanham Act § 43(a), 15 U.S.C. § 1125(a)

43. P&G restates and realleges paragraphs 1 through 42.

44. P&G is the owner of trade dress rights in the packaging of its HERBAL ESSENCES product line, including its HELLO HYDRATION shampoos and conditioners.

45. RNA's use of trade dress confusingly similar to P&G's HERBAL ESSENCES Trade Dress on its HYDRATING HERBAL SHAMPOO and HYDRATING HERBAL CONDITIONERS product line is likely to cause confusion, or to cause mistake, or to deceive as to affiliation, connection, or association of RNA with P&G, or as to the origin, sponsorship, or approval of RNA's goods, services, or commercial activities by P&G. Among other types of confusion created by RNA, its actions create initial interest confusion on the part of consumers. Such actions constitute unfair competition, false designation of origin, and palming off in violation of the Lanham Act § 43(a), 15 U.S.C. § 1125(a).

46. RNA's actions have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined. P&G has no adequate remedy at law.

47. RNA has profited from its infringement of P&G's trade dress rights and will continue to profit from it. RNA's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

FOURTH CLAIM FOR RELIEF
Violation of Ohio Deceptive Trade Practices Act

48. P&G restates and realleges paragraphs 1 through 47.

49. RNA's actions in Ohio constitute willful and knowing deceptive trade practices in violation of Ohio Rev. Stat. § 4165.02(A)(2),(3).

50. RNA's actions in Ohio have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined. P&G has no adequate remedy at law.

51. RNA has profited from its infringement of P&G's trade dress and trademark rights in Ohio and will continue to profit from it. RNA's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

52. RNA has willfully and maliciously engaged in the described deceptive trade practices, knowing its actions to be deceptive.

FIFTH CLAIM FOR RELIEF
Design Patent Infringement
35 U.S.C. § 271

53. P&G restates and realleges paragraphs 1 through 52.

54. P&G is the owner of the '139, '140, '730, and '884 patents.

55. RNA has infringed and continues to infringe the '139, '140, '730, and '884 patents by offering to sell and selling in the United States its HYDRATING HERBAL SHAMPOO AND HYDRATING HERBAL CONDITIONER products, the packaging for which is covered by the '139, '140, '730, and '884 patents.

56. RNA's actions have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined. P&G has no adequate remedy at law.

57. RNA has profited from its infringement of P&G's design patent rights and will continue to profit from it. RNA's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

58. RNA has willfully engaged in infringement of P&G's design patent rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiff The Procter & Gamble Company requests that the Court enter judgment:

(a) In favor of P&G and against defendant on all P&G's claims;

(b) Preliminarily and permanently enjoining and restraining RNA, its officers, agents, subsidiaries, servants, partners, employees, attorneys and all others in active concert or participation with it, from the manufacture, distribution, offering for sale, sale, advertising and/or promotion in the United States of personal care products using the circular image depicted in Exhibit B hereto or bearing any other mark confusingly similar to the Herbal Essences Logo;

(c) Preliminarily and permanently enjoining and restraining RNA, its officers, agents, subsidiaries, servants, partners, employees, attorneys and all others in active concert or participation with it, from the manufacture, distribution, offering for sale, sale, advertising and/or promotion in the United States of personal care products bearing the trade dress depicted in Exhibit G hereto or bearing any other trade dress confusingly similar to the trade dress that is confusingly similar to P&G's HERBAL ESSENCES Trade Dress;

(d) Preliminarily and permanently enjoining and restraining RNA, its officers, agents, subsidiaries, servants, partners, employees, attorneys and all others in active concert or participation with it, from the manufacture, distribution, offering for sale, sale, advertising and/or promotion in the United States of products in packaging that infringes P&G's design patent rights;

(e) Requiring RNA to deliver up for destruction all labels, signs, prints, packaging, wrappers, and advertising or promotional materials in its possession or within its custody or control and any screens, films, software, files, molds, and any other items tangible or intangible used to produce such materials that bear any trade dress, package design, or designation in violation of P&G's rights;

(f) Requiring Defendant to notify its customers in writing that they are not to sell products bearing the HERBAL ESSENCES Trade Dress or infringing P&G's design patent rights, and that said customers are to impound or return all such products to RNA;

(g) Requiring defendant to account for and pay over to P&G defendant's profits and all damages sustained by P&G;

(f) Increasing the amount of damages and/or profits awarded P&G as appropriate pursuant to 15 U.S.C. § 1117(a); 35 U.S.C. §§ 284 and 289; and Ohio Rev. Stat. § 2315.21;

(g) Awarding P&G reasonable attorney fees, costs, expenses, and interest pursuant to 15 U.S.C. § 1117(a), 35 U.S.C. § 285 and other applicable law, including Ohio Rev. Stat. § 4165.03(A)(2)(B); and

(h) Awarding P&G such other relief as the Court may deem just and proper.

DINSMORE & SHOHL LLP

Dated: August 21, 2008

By: /s/ Mark A. Vander Laan
Mark A. Vander Laan (#0013297)
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202
Telephone: (513) 977-8238
Facsimile: (513) 977-8141
E-Mail: mark.vanderlaan@dinslaw.com

DORSEY & WHITNEY LLP
Peter M. Lancaster (MN #0159840)
Mariah Reynolds (MN # 0387386)
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

Bruce R. Ewing (BE-0724)
250 Park Avenue
New York, New York 10177
Telephone: (212) 415-9206

Attorneys for Plaintiff