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April 29, 2005

This Opinion is Not  
Citable as Precedent  
of the TTAB

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

International Flora Technologies, Ltd.<sup>1</sup>  
v.  
Desert Whale Jojoba Company, Inc.

Opposition No. 91157402  
to application Serial No. 76438508  
filed on August 7, 2002

Douglas W. Gilmore of Noblitt & Gilmore, LLC and Kristofer E. Halvorson of The Halvorson Law Firm for International Flora Technologies, LLC.<sup>2</sup>

Dale F. Regelman of Law Office of Dale F. Regelman, P.C. for Desert Whale Jojoba Company, Inc.

Before Quinn, Walters and Rogers,  
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Desert Whale Jojoba Company, Inc. [applicant] has  
applied to register JOJOBASOMES as a mark on the Principal

<sup>1</sup> The notice of opposition was filed in the name of International Flora Technologies, LLC, but the Board's institution order modified the LLC designation to Ltd. Subsequent filings by opposer have also used the designation Ltd. Because it appears the LLC designation was used in error, we have amended the caption to show the designation Ltd.

<sup>2</sup> New counsel was appointed by opposer after the case had been submitted for decision on the briefs.

**Opposition No. 91157402**

Register for goods identified as "skin soaps, essential oils for personal use, cosmetics, and hair lotions," in Class 3. International Flora Technologies, Ltd. [opposer] filed a timely notice of opposition relying on its ownership of registrations for the marks METASOMES, FLORASOMES, JOJOBeads, and JOJOBUTTER; on its use of each of these registered marks prior to applicant's first use of its applied-for mark; and alleging, in essence, that applicant's mark will be viewed as a combination of elements of opposer's registered marks and consumers will therefore be confused, because the parties' goods and services are substantially the same and are marketed to a common customer base.

Applicant denied, expressly or effectively, each of the allegations of the notice of opposition, but for the allegations relating to applicant's name and address and the filing of applicant's application. In short, applicant did not admit any of the elements of what is clearly a claim by opposer under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

Nothing further was submitted to the Board by either party, until opposer filed its brief and certain accompanying exhibits. These were submitted within the time set by the Board for opposer to file its brief.

Applicant, within the time for filing its responsive brief, concurrently filed an objection to or, in the alternative, motion to strike, each of opposer's exhibits, as well as a brief. The latter argues both that the opposition should be dismissed because opposer has not properly made of record any evidence to support its case and cannot, therefore, bear its burden of proof, and that, if opposer's untimely and/or improper evidence is not stricken, then the opposition should be dismissed on its merits. Opposer, in a reply brief, argued against striking its evidence and dismissal of the case.

Had opposer properly established, in any one of various ways, its ownership of, and the current status of, its pleaded registrations, that would have been sufficient to establish opposer's standing and to remove priority as an issue to be proved. See TBMP Section 704.03(b)(1)(A) (2d ed. rev. 2004), for an explanation of the various ways in which an opposer can ensure that its pleaded registrations are entered into or considered to be part of the record; see King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974), and Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995), for the proposition that priority of use of a mark need not be proved when a pleaded registration for that mark is properly made of record.

Opposer's pleading did not make its registrations of record in the manner prescribed by Trademark Rule 2.122(d), 37 C.F.R. § 2.122(d). Nor did the answer admit opposer's ownership of the registrations and their continuing validity. Thus, proper introduction of the registrations was a matter to be completed at trial.

Opposer did not introduce any evidence whatsoever during its assigned testimony period. Applicant is entirely correct not only in objecting to opposer's submission of various items of evidence with opposer's brief, but also in explaining the bases for its objections.

First, as applicant has noted, opposer's submissions were not made during its testimony period. See Trademark Rule 2.122(d)(2) regarding the time for filing pleaded registrations by notice of reliance and Trademark Rule 2.121(a)(1) regarding the time for taking testimony of a witness.<sup>3</sup> See also, TBMP Section 704.05(b) (2d ed. rev. 2004) and authorities discussed therein regarding impropriety of attaching as exhibits to briefs materials that were not previously introduced in evidence in the proper manner and at the proper time.

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<sup>3</sup> While the transcript of testimony of a witness may be served on adverse parties and be submitted to the Board after the close of the party's testimony period, the party must notice and take testimony during its assigned testimony period.

Second, even if opposer were permitted under the rules to submit with its brief certified copies of its pleaded registrations, showing that they are valid and owned by opposer, opposer has not done so. Rather, opposer has merely submitted printouts of information regarding its pleaded registrations, retrieved from a USPTO database. Although opposer has asked in its reply brief that the Board take judicial notice of its registrations, we deny this request. It is well-settled that the Board does not take judicial notice of USPTO records. See Beech Aircraft Corp. v. Lightning Aircraft Co., 1 USPQ2d 1290, 1293 (TTAB 1986)(Board refused to take judicial notice of petitioner's pleaded, and rejected, application for purposes of establishing petitioner's standing); and Wright Line Inc. v. Data Safe Services Corp., 229 USPQ 769, 770 n.5 (TTAB 1985)("Board does not take judicial notice either of applications (or registrations) which reside in the Office, or of papers which may appear therein").

Third, even if opposer were permitted to submit testimony and accompanying exhibits with its brief, testimony may not be submitted in the form of an affidavit or declaration absent a written stipulation of the parties. See Trademark Rule 2.123(b), 37 C.F.R. § 2.123(b), and authorities collected in TBMP Section 703.01(b) n. 32 (2d ed. rev. 2004).

Finally, opposer has at least inferred that we should take judicial notice as "a matter of public record" of opposer's "tremendous reputation in the field of botanically derived goods." This subject is not, however, a fit subject for judicial notice. See Bristol-Myers Company v. Texize Chemicals, Inc., 168 USPQ 670, 671 (TTAB 1971)(In a case in which opposer took no testimony, Board refused to take judicial notice that both opposer and applicant were large, diversified corporations and of various other facts relative to their respective operations).

We sustain applicant's objections to each of the exhibits submitted with opposer's brief and grant the motion to strike them. As opposer has not obtained any admissions of assertions made in its notice of opposition and has not made any evidence properly of record, we grant applicant's motion to dismiss for failure of opposer to bear its burden of proof as plaintiff.

Decision: The opposition is dismissed.