

ESTTA Tracking number: **ESTTA292155**

Filing date: **06/26/2009**

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

Proceeding	91172885
Party	Defendant Hindustan Lever Limited
Correspondence Address	Robert Alpert BRYAN CAVE LLP 1290 Avenue of the Americas New York, NY 10104 UNITED STATES robert.alpert@bryancave.com joseph.villapol@bryancave.com
Submission	Motion to Amend/Amended Answer or Counterclaim
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Date	06/26/2009
Attachments	Alpert Declaration to Applicant's Second Motion for Leave to Amend Answer- Opp.No.91172885.PDF (36 pages)(1727557 bytes)

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AYUSH HERBS, INC.,	:	Opposition No. 91,172,885
	:	Serial No. 76/602,470
Opposer,	:	
	:	
- against -	:	
	:	
HINDUSTAN LEVER LTD. CO.,	:	
	:	
Applicant.	:	
-----	X	

I, ROBERT ALPERT, declare that the following is true and correct pursuant to 28 U.S.C. § 1746:

2. During the course of our preparing papers in opposition to the motion for summary judgment by the opposer herein, Ayush Herbs, Inc., we learned that the U.S. Food and Drug Administration (“FDA”) had recently issued a Warning Letter to the seller of ayurvedic products, Circle of Health, Inc., in which the FDA states that the therapeutic claims made in connection with certain products on the company’s website (www.ayurveda-herbs.com) violate the Federal Food, Drug and Cosmetic Act (“Act”). Attached as **Exhibit A** is a copy of the FDA’s warning letter, dated June 12, 2009.

3. The opposer herein has made the same types of therapeutic claims in promoting its AYUSH HERBS products. Attached as **Exhibits B, C, D and E** are pages downloaded from opposer's website (www.ayush.com) which are illustrative examples of similar therapeutic claims being made by opposer for its products (*e.g.*, Flucomune 90c; Rentone 90c; Carditone 60t; and Livit-2 500mg 90t).

4. HUL had sought discovery of opposer's compliance, if any, with governmental laws and regulations through its First Request for Production of Documents, in particular, Request Nos. 38 and 39. Copies of opposer's responses to these requests are attached as **Exhibit F**.

5. While opposer later produced documents allegedly responsive to HUL's document requests, it did so in a manner which neither designated which documents were responsive to particular requests nor which reflected the manner in which opposer regularly maintained its business records; instead, opposer produced the documents as an undifferentiated series of sequentially numbered pages. HUL had sought opposer's discovery deposition, in part, in order to pursue this area of inquiry.

6. Applicant seeks leave to add a second counterclaim for cancellation which alleges that opposer's pleaded registration is void, in whole or in part, since opposer's use of its mark is unlawful, in particular, opposer's promotion and the resulting sale of its products fail to comply with the Federal Food, Drug and Cosmetic Act. A copy of applicant's First

Amended Answer and Counterclaims, a copy of which has also been filed (together with the requisite fee), is attached as **Exhibit G**.

I declare that the foregoing is true under penalties of perjury.

Executed on June 26, 2009 in New York, New York.



ROBERT ALPERT

EXHIBIT A

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