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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Lifestyle Productions, Inc.*

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Serial No. 85359755

Sanford Astor of Brooks Kushman PC for Lifestyle Productions, Inc.

Hélène Liwinski, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

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Before Holtzman, Taylor and Greenbaum, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Lifestyle Productions, Inc. has appealed from the final refusal to register on the Principal Register the standard character mark G-H-3 PLUS (G-H-3 disclaimed)

for goods identified as:

Cosmetics, namely, daytime skin creams, night creams, eye creams, anti-wrinkle cream, exfoliating skin creams, massage creams, hand creams, eye gel, skin cleansing preparations, skin moisturizers, beauty masks, skin toning lotions, skin soaps, hair shampoos, hair conditioners, makeup, lipsticks, perfumes, colognes, in International Class 3,

and

Pharmaceutical preparations for the treatment of insomnia, fatigue, rejuvenation of cells, arthritis, rheumatism, impotence, vitamin and mineral supplements in International Class 5.<sup>1</sup>

The examining attorney ultimately refused registration under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that applicant's mark comprises deceptive matter. In its brief, applicant withdrew the International Class 5 goods identified in the application. This appeal therefore proceeds only as to the goods identified in International Class 3.

As background for this refusal, applicant previously owned a registration for the same mark and identical goods, but the registration was cancelled for failure to file a Section 8 affidavit.<sup>2</sup> The examining attorney initially approved the application for publication after issuing an Examiner's Amendment, which deleted an unnecessary claim of acquired distinctiveness pursuant to Section 2(f), 15 U.S.C. § 1052(f), entered a disclaimer of "G-H-3", and amended the identification of goods in International Class 5 to correct a typographical error. However, the application was withdrawn from publication based on evidence of FDA Import Alert 61-01, published March 18, 2011, preventing importation of products containing "Gerovital (KH3 – GH3, Etc.)" because "Gerovital (KH3) which generally consists of some form of Procaine HCL is regarded as a new drug...." The Alert states: "These products are frequently accompanied by promotional literature or labeled as a cure all for

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<sup>1</sup> Serial No. 85359755 filed on June 29, 2011, asserting January 17, 2000 as the date of first use and first of the mark in commerce. In its brief, applicant abandoned the International Class 5 goods originally included in the application.

<sup>2</sup> The registration included the International Class 5 goods that have been deleted from the instant application.

such ailments as old age, premature graying of hair, wrinkling of skin, mental disorders, insomnia, decreased sexual vigor, rheumatism, arthritis, heart problems, depression, etc.”.

Upon review of this new evidence, the examining attorney issued a refusal based on Sections 1 and 45 of the Trademark Act, 15 U.S.C. § 1051 and 1127, because it appeared that the mark was not in lawful use in commerce. The examining attorney also required applicant to specify whether the goods contained GH3, i.e., Gerovital, as an ingredient or component, and if so, to provide proof of, or a declaration attesting to, applicant’s legal right to sell goods containing GH3.

In response, applicant submitted a declaration, signed by its owner, confirming that the “proper name” for “GH3, *i.e.*, Gerovital H3” is “procaine hydrochloride and it has been approved by the FDA and is available to be purchased from several drug companies”, and that “the products that Applicant sells do not contain any procaine hydrochloride.” September 19, 2011 Response to Office Action. Based on this response, the examining attorney issued a new refusal on the ground that the term G-H-3, appearing in applicant’s mark, is deceptive matter within the meaning of Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a).<sup>3</sup> As noted above, applicant filed an appeal when this refusal was made final.

Pursuant to Section 2(a) of the Trademark Act, registration must be refused if a mark is deceptive of a feature or an ingredient of the goods. A mark is deceptive

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<sup>3</sup> Although the examining attorney did not formally withdraw the initial refusal under Sections 1 and 45 of the Trademark Act, the refusal was not maintained in a second or final action; nor was it raised or briefed on appeal. We therefore deem this refusal to have been waived.

if (1) it contains matter that misdescribes the goods; (2) prospective purchasers would be likely to believe the misrepresentation; and (3) the misrepresentation would be likely to affect a significant portion of the relevant consumers' decisions to purchase the goods. *In re Budge Mfg. Co.*, 857 F.2d 773, 775, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988), *aff'g* 8 USPQ2d 1790 (TTAB 1987); *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1489 (Fed. Cir. 2009). *See also In re White Jasmine LLC*, 106 USPQ2d 1385 (TTAB 2013); *In re E5 LLC*, 103 USPQ2d 1578 (TTAB 2012).

It is the examining attorney's position that (1) consumers would understand the term G-H-3 in the context of the identified cosmetics products to refer to the substance GH3, known *inter alia* as Gerovital, Gerovital H3 (with and without hyphens), procaine and procaine hydrochloride (procaine HCl), and the goods do not contain this substance; (2) because GH3 is included as an ingredient in dietary supplements and cosmetics, prospective purchasers likely would believe the misdescription; and (3) because GH3 has been widely touted as having numerous health and anti-aging benefits, the misrepresentation would be likely to materially affect prospective purchasers' decisions to purchase the goods.

It is applicant's position, however, that the mark G-H-3 PLUS is not deceptive because the public is aware that products containing the term GH3 absent the word Gerovital in the product name are "purely cosmetics, vitamins and/or supplements" and do not contain procaine, a substance that physicians legally use to treat patients. In other words, applicant argues that its mark cannot

be deceptive even though it includes the term G-H-3, because it does not also include the term Gerovital.

There is no question that the term G-H-3, which applicant has disclaimed, misdescribes the goods for which applicant seeks registration. While Gerovital H3 generally is referred to as “GH3”, without hyphens, the record shows that consumers are familiar with variations of the term, and that GH3, Gerovital and Gerovital H3 (with and without hyphens) often are used interchangeably, whether or not procaine is identified as a main ingredient. For example:

- FDA Import Alert 61-01, mentioned above, seeks to bar admission into the United States of “[a]ll products offered for entry as Gerovital, GH3, KH3, Zell H3, GH3, GH3 Cream, etc.” because “Gerovital (KH3) which generally consists of some form of Procaine HCl is regarded as a new drug...”;

- Tierra Mega Nutrients International identifies “Gerovital H-3, the anti-aging vitAminic serum” as the “primary ingredient of GH3 Wrinkle Crème”, and the label prominently displays the term “GH-3” <realgh3.com>;

- Achilles Natural Health Mart Company sells “Gerovital H3 (GH3) Procaine LCL Injectable” in tablet form and warns consumers to “beware of the confusion created by companies selling those sugar coated GH3 pills” <gh3.org>;

- The product information sheet for “Gerovital-H3 Injectables” in ampoule form and “GH3-Pro – generic Gerovital H3” in tablet form, sold by Biogenesis, states: “Also known as GH3 or KH3: Gerovital-H3’s principal ingredient is procaine”, and includes testimonials from “James South MA Oregon” and “S.T., Florida” <biogenesis.co.za>;

- On the “Gerovital U.S.A. site”, Millennium Health sells “GH3 Gerovital H3 Procaine Hcl Advanced Formula” and

asks “Can we really grow younger with Gerovital H3?” <realgerovital.co.uk>; and

- The Rainbow’s End advertises “GH3-Maximum” tablets by Healthy Habits as “a natural version of the time-tested world-renowned Gerovital H3 (GH3)” <coralcalciumnow.net>.

General descriptions of the substance also refer to variations of GH3,

Gerovital H3 and procaine interchangeably:

- “The brand names may vary, yet Procaine, Gerovital and GH3 all refer to the same drug, just marketed differently, but all relying and basing their effectiveness on research and development done by professor Ana Aslan to combat aging” <ageless.co.za>;

- “GH3 is simply the local anesthetic procaine hydrochloride... to which has been added buffering agents and other chemicals to create a hybrid drug (Gerovital H3)” <gerovital-gerovital.com>; and

- The entry for “Gerovital” from <Wikipedia.org><sup>4</sup> refers to “Gerovital H3 (or procaine hydrochloride and products known as GH3 and other variants which may or may not be identical to Gerovital H3)” as a “controversial preparation developed during the 1950s and promoted by its advocates as an effective anti-aging treatment...” The “procaine product called Gerovital H3 (often called G.H.3 for short)” is banned by the FDA, and the “main active ingredient” is identified as “the well known [sic] local anesthetic procaine hydrochloride (often referred to by the old brand name, *Novocaine*).”

With regard to the FDA ban, the entry states “[t]his order was rescinded for GEROVITAL Cosmetics Lines, not containing procaine.”

The above-referenced declaration from applicant’s owner confirms that the cosmetics products identified in the application do not contain the substance GH3.

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<sup>4</sup> Articles from the online Wikipedia encyclopedia may be used to support a refusal or requirement, provided that, as here, an applicant has an opportunity to rebut such evidence. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007).

Moreover, we find that G-H-3 and GH3 do not differ in any meaningful way, and that the term PLUS does not indicate that the goods do not contain GH3. Applicant does not argue otherwise. Accordingly, the first prong of the test has been satisfied.

We turn next to the question of whether prospective purchasers are likely to believe that the misdescription actually describes the goods. In making this determination, we acknowledge that most of the products in the record that use the term GH3 in the product name also use the word Gerovital in the product name, and display the words Gerovital and/or procaine either on the label or in the accompanying product description.<sup>5</sup> However, in all instances, the term GH3 is displayed quite prominently; in some cases, the word Gerovital also is displayed prominently, and sometimes the words Gerovital and/or procaine appear at the bottom of the label in much smaller font, or buried in the product description, making those words far less noticeable than the prominent term GH3. Further, and directly contrary to applicant's argument, Tierra Mega Nutrients International sells "Original Formula GH3 Gerovital" and "GH3 Wrinkle Crème" with "Gerovital H-3" identified as "the primary ingredient" but no reference to procaine on the labels or product descriptions <realgh3.com>, and the Millennium Health product ordering

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<sup>5</sup> With its January 6, 2012 Response to Office action, applicant submitted a printout from the <gardavita.com> website advertising a "G.H.3." supplement, and a printout, discussed above, from the <coralcalciumnow.net> website advertising a "GH3 Maximum" supplement. Neither supplement includes the word Gerovital in the product name, and neither lists procaine as an ingredient.

page lists “GH3 Formula Anti-wrinkle/moisturizing Cream (50g) with Procaine HCl” but no reference to Gerovital <millenniumh.com>.<sup>6</sup>

Given the interchangeable nomenclature of GH3, Gerovital H3 and procaine (and variations thereof), discussed above, and given that the substance commonly is found in health and wellness products, we find unpersuasive applicant’s argument that consumers will believe that its cosmetics products, sold under the G-H-3 PLUS mark, are purely cosmetic and contain no procaine because the mark does not also contain the word Gerovital. *See E5*, 103 USPQ2d at 1580 (because copper is a common ingredient in dietary supplements, consumers are likely to understand “CU” in applicant’s mark, in the context of dietary supplements, to refer to the chemical element copper, even though virtually all of the evidence showed “CU” next to the word “copper” and applicant’s mark did not include the word “copper”). Thus, the second prong of the test has been satisfied.

We now consider whether the misdescription is likely to affect a significant portion of the relevant consumers’ decisions to purchase the goods. The FDA Import Alert states that products containing GH3 are marketed as “... a cure all for such ailments as old age, premature graying of hair, wrinkling of skin, mental disorders,” and the record confirms such marketing tactics. For example:

- gerovital.com advertises itself as “The original and premier source for the world’s fastest anti-ageing [sic] formula”, guaranteeing “significant improvements in your

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<sup>6</sup> The product description on the first page of this website prominently displays the word Gerovital. However, the words “GH3 Formula” appear in banner form on the label of the product, which is displayed next to the description, and the reference to “Procaine HCl complex” appears at the bottom of the label, in much smaller font. The word Gerovital is not on the product label.

health, looks and youthfulness” and encourages consumers to “Order Gerovital GH3 Gold® and you’ll discover ageing [sic] is not inevitable, nor irreversible!” <gerovital.com>;

•Tierra Mega Nutrients International refers to GH3 as “the world-famous anti-aging formula discovered by Romanian gerontologist Dr. Ana Aslan, and given to tens of thousands in the form of shots and pills since the mid-1960’s at her Spa in Bucharest” and claims that GH3 recently “has been found to have a definite cortisol-inhibiting effect, which may help to explain its apparent rejuvenative effects experiences by so many over the past 50 years.”

This company also identifies “the original Romanian formula, Gerovital H-3, the anti-aging vitAminic serum” as the “primary ingredient of GH3 Wrinkle Crème”, claiming the product is “designed to erase fine lines, shrink pores, fade dark circles and stimulate circulation, but at a more concentrated level. In addition, the wrinkle cream in effect is tightening the skin, therefore diminishing the signs of aging” <realgh3.com>;

•Achilles Natural Health Mart Company touts GH3 as “the MOST-TRUSTED Anti-Aging THERAPY of choice of the RICH & FAMOUS in over 70 countries ... Add years to your life and life to your years” <gh3.org>;

•In answer to the query “Gerovital: is antiaging [sic] Possible With GH3?” Millennium Health claims “The promise of prolonged youth and the testimonials of thousands of patients have carried the word of a seemingly miraculous treatment far beyond the borders of ... Rumania.” ... “Pilgrimages for antiaging [sic] therapy by notables including French President Charles De Gaulle, U.S. President John F. Kennedy ... Actresses ... and actors ... traveled to the Otopeni Clinic ... where Dr. Aslan does her research with GH3” <gerovital-gerovital.com>; and

•Millennium Health advertises “GH3 Gerovital wrinkle/moisturizing Crème with finely balanced Procaine Hcl” as a product that “Visibly slows the aging process.

Stimulates your skin to rejuvenate itself, self repair [sic] and renewal to protect skin from free-radical damage.”

A testimonial by Dr. Paul Yutsis, M.D. USA refers to the product and the GH3 Gerovital H3 Procaine Hcl Advanced Formula supplement, advertised on the same web page, as follows:

“GH3 is a major step forward in the field of anti aging [sic]. The metabolites of procaine have enormous impact on restoring key areas in the body. GH3 has deservedly earned a strong reputation among the older population – it enhances joint mobility and arterial health, improves mental acuity while chasing the blues away, and also rejuvenates the skin. It’s what you can call an all-body formula for postponing the signs of aging.”  
<realgerovital.co.uk>.

The evidence shows that the substance known as GH3, Gerovital H3, and/or procaine HCl, is widely advertised as having numerous anti-aging health benefits, and that its presence or absence as an ingredient would be relevant to the decision of consumers to purchase applicant’s cosmetics products. *See E5*, 103 USPQ2d at 1584. Thus, the third prong of the test has been satisfied.

Applicant’s cancelled registration for the same mark and identical goods, which apparently was granted despite the existence of an FDA ban since the early 1980s, and an expired third-party registration<sup>7</sup> for the mark GH3X for “food supplements, medicated skin care preparations, dandruff shampoo and analgesic balms”, cannot justify registration of the current application. A cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. *See In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007); *In re Hunter Publishing Company*, 204 USPQ 957, 963 (TTAB 1979) (cancellation

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<sup>7</sup> Registration No. 2056899.

“destroys the Section [7(b)] presumptions and makes the question of registrability ‘a new ball game’ which must be predicated on current thought.”). Further, the determination of another examining attorney regarding a previously registered mark is not dispositive of the case before us. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Shapely, Inc.*, 231 USPQ 72, 75 (TTAB 1986).

Applicant also submitted a declaration from its owner stating that in the many years that applicant has sold the identified goods under the G-H-3 PLUS mark, applicant has received no consumer inquiries as to whether products contain procaine, and therefore “the customers know they are buying vitamin and mineral supplement products”.<sup>8</sup> However, due to consumers’ exposure to the interchangeable terms GH3, Gerovital H3 and procaine, in variation, and the wide-ranging health claims attributed to the substance, we can easily draw the opposite conclusion, i.e., that consumers simply assume that applicant’s cosmetics products contain procaine. The declaration therefore has little probative value.

Finally, with its brief, applicant submitted a Supplemental Declaration supporting a claim of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act based on more than five-year’s use of the mark in commerce. As mentioned above, the examining attorney deleted applicant’s original 2(f) claim as unnecessary before approving the application for publication in the first instance. Although the examining attorney did not object to the Supplemental Declaration, she did not address it in her brief. We therefore do not treat the Supplemental

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<sup>8</sup> Attached to January 6, 2012 Response to Office action.

Declaration as properly of record, and have given it no further consideration. Trademark Rule 2.142(d).<sup>9</sup> In any event, consideration of that evidence would not have altered our determination. Section 2(a) is an absolute bar to registration on either the Principal or Supplemental Register, and cannot be overcome by a claim of acquired distinctiveness. See TMEP § 1203.02(c) (explaining difference between refusals under Section 2(a) and Section 2(e)(1)).

In sum, after reviewing the evidence of record, we find that all three prongs of the deceptiveness test have been satisfied: (1) consumers would understand the term G-H-3 in the context of applicant's identified cosmetics products to refer to GH3, Gerovital H3 and/or procaine HCl (and variations thereof), and the goods do not contain this substance; (2) due to the inclusion of GH3 as an ingredient in dietary supplements and cosmetics products, consumers likely will believe that the applicant's cosmetics products, sold under the G-H-3 PLUS mark, actually contain GH3; and (3) due to the widely touted purported health benefits of GH3, the misrepresentation will materially affect the decisions of consumers whether to purchase the goods. See *E5*, 103 USPQ2d at 1584. We therefore conclude that the mark G-H-3 PLUS is deceptive for "cosmetics, namely, daytime skin creams, night creams, eye creams, anti-wrinkle cream, exfoliating skin creams, massage creams, hand creams, eye gel, skin cleansing preparations, skin moisturizers, beauty masks, skin toning lotions, skin soaps, hair shampoos, hair conditioners, makeup, lipsticks, perfumes, colognes."

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<sup>9</sup> If applicant wished to have new evidence examined after appeal, applicant should have requested remand. We note that remand is granted in only limited circumstances. See TBMP §1207.02 (2013).

Serial No. 85359755

Decision: The refusal to register under Section 2(a) of the Trademark Act is affirmed.