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

Proceeding	91209287
Party	Plaintiff Health Crave, LLC
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Attachments	20130610 Motion to Lift Suspension and for Dismissal of Opposition FINAL.pdf(36591 bytes) 20130529 Consent to Use and Register Agreement SIGNED.pdf(555083 bytes)

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

Health Crave, LLC	§	Opposition No. 91209287
Petitioner	§	Application No. 85/698,123
	§	
	§	Mark: HEALTHCRAVINGS
	§	Int'l Class: 44, 45
v.	§	
	§	Filed: August 8, 2012
Geraldine V. Rouette	§	Published: January 15, 2013
Respondent	§	

MOTION TO LIFT SUSPENSION AND FOR DISMISSAL OF OPPOSITION

Petitioner Health Crave, L.L.C, by and through undersigned counsel and pursuant to 37 CFR §2.127, moves for a dismissal of the above referenced opposition. This opposition was originally filed on February 13, 2013, based on prior-filed pending applications found and a likelihood of confusion with that mark(s). On May 24, 2013, parties entered into an agreement allowing consent of use and registration of the marks, copy attached.

A consent agreement that is not merely a “naked” consent typically details reasons why no likelihood of confusion exists and/or arrangements undertaken by the parties to avoid confusing the public. TMEP 1207.01(d)(viii). Additionally, in *In re E. I du Pont de Nemours & Co.*, 476 F.2d 1357, 1363, 177 USPQ 563, 568 (C.C.P.A. 1973), the Court of Customs and Patent Appeals stated as follows:

[W]hen those most familiar with use in the marketplace and most interested in precluding confusion enter agreements designed to avoid it, the scales of evidence are clearly tilted. It is at least difficult to maintain a subjective view that confusion will occur when those directly concerned say it won't. A mere assumption that confusion is likely will rarely prevail against uncontroverted evidence from those on the firing line that it is not. By virtue of this Agreement, the parties have

agreed to and acknowledge that their respective goods differ and, as a result, consumer confusion will not result. Additionally, the Parties note that, if necessary, they will work together to ensure that confusion is avoided.

The Court of Appeals for the Federal Circuit has made it clear that consent agreements should be accorded great weight, and that an Examiner should not substitute his/her judgment concerning a likelihood of confusion for the judgment of the actual parties. See *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 6 USPQ2d 1305 (Fed. Cir. 1988); *Bongrain International (American) Corp. v. Delice de France Inc.*, 811 F.2d 1479, 1 USPQ2d 1775 (Fed. Cir. 1987); and *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985).

In light of the above, the Examiner should give great weight to the attached Consent Agreement as it is a carefully executed document. The sole intent of the Agreement is to avoid likelihood of confusion between the Parties' respective marks. As per the provisions outlined in the Agreement, Respondent consents to Applicant's registration. Accordingly, Applicant hereby respectfully requests that the Examiner's refusal to register be withdrawn.

In order to refuse registration under Section 2(d), there must be shown more than a mere possibility of confusion; instead, there must be demonstrated a probability, or likelihood, of confusion. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting from *Witco Chemical Company, Inc. v. Whitfield Chemical Company, Inc.*, 418 F.2d 1403, 164 USPQ 43 (CCPA 1969) as follows:

"We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." See also, *Triumph Machinery Company v. Kentmaster*

Manufacturing Company Inc., 1 USPQ2d 1826 (TTAB 1987). The Trademark Act does not speak in terms of remote possibilities of confusion, but rather, the likelihood of such confusion occurring in the marketplace.

As the Court of Customs and Patent Appeals stated in the duPont case, there is no litmus test for assessing confusion.

[T]rademark law must necessarily be flexible responding to particular circumstances disclosed by particular fact situations thereby making a hard and fast rule in these cases anathema to its concept and application. That is, this is contrary to the principle of trademark law that each case must be decided on the basis of all relevant facts which include the marks and the goods as well as the marketing environment in which in which a purchaser normally encounters them and the experience generated as a result of their use in the marketplace providing such use has been of sufficient length and depth to make an impact in the market. *Interstate Brands Corporation v. Celestial Seasonings, Inc.* 196 USPQ 321, 324 (TTAB 1977).

Whether a likelihood of confusion exists between two marks is determined on a case-by-case basis, aided by the application of the factors set out in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. (BNA) 563, 567 (C.C.P.A. 1973).

The DuPont factors are as follows: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods described in the application or registration of the mark, or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and the buyers to whom sales are made; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between the applicant and the owner of a prior mark; (11) the extent to which the applicant has a right to exclude others from use

of its mark on its goods; (12) the extent of potential confusion; and (13) any other established fact probative of the effect of use. See *id.*

In considering the evidence of record on these factors, we keep in mind that “the fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Applicant disagrees with the examining attorney that a similarity of Applicant's and Respondent's services supports a finding of likelihood of confusion. Petitioner accepts the agreement of Respondent Rouette to amend and limit her services to the following:

"providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient's specific set of symptoms, medical profile and medical record analysis and patient benefit information concerning organic and holistic products and services (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship, help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45)."

Petitioner's applications are as follows:

- a) Application No. 85/727,984 for HEALTHCRAVE for medical services; providing wellness services, namely, weight loss programs offered at a wellness center, filed on September 13, 2012 and is currently in use as of July 31, 2011;
- b) Application No. 85/725,499 for HEALTHCRAVE MEDICAL CENTERS design for medical services; providing wellness services, namely, weight loss programs offered at a wellness center, filed on September 11, 2012 and is currently in use as of July 31, 2011.

Respondent has consented to the use and registration of these services by Petitioner/Applicant. The parties' marks are different and their services are different. The parties acknowledge and agree that there is no likelihood of confusion between their marks. In light of the above, Applicant asserts that confusion is not likely to result, and requests that the refusal to register be withdrawn.

With this amendment and the consent to use and register agreement, the Applicant respectfully requests that the Trademark Office allow its application and withdraw the refusal to register. No additional publication of the mark should be required.

WHEREFORE, for the foregoing reasons, Applicant requests that the Board dismiss the opposition and allow Applicant's application to proceed to registration.

Dated: June 27, 2013.

Respectfully submitted,

/s/ Charles W. Hanor
Charles W. Hanor
Hanor Law Firm PC
750 Rittiman Road
San Antonio, TX 78209
(210) 829-2002 Direct
(210) 829-2001 Fax

Attorney for Applicant Health Crave, LLC

CERTIFICATE OF SERVICE

This is to certify that on June 27, 2013, a true and correct copy of the above and foregoing MOTION TO LIFT SUSPENSION AND FOR DISMISSAL OF OPPOSITION was served via First Class Mail to:

Melissa Howard
Fears | Nachawati, PLLC
Attorney for Applicant
4925 Greenville Avenue #715
Dallas, Texas 75206
Telephone: 214.461.6216
Email: mhoward@fnlawfirm.com

/s/ Charles W. Hanor

Charles W. Hanor

CONSENT TO USE AND REGISTER AGREEMENT

This Consent to Use and Register Agreement is made by and between Health Crave, LLC, a Texas Limited Liability Company, having an address of 21 Spurs Lane, Suite 320, San Antonio, Texas 78240 (“Health Crave”) and Geraldine V. Rouette, an individual, having an address of 14629 SW 104 Street, Suite 195, Miami, Florida 33186 (“Rouette”).

WHEREAS, Health Crave, LLC is the owner of the following pending applications:

Application No. 85/727,984 for HEALTHCRAVE for medical services; providing wellness services, namely, weight loss programs offered at a wellness center, filed on September 13, 2012 and is currently in use as of July 31, 2011;

Application No. 85/725,499 for HEALTHCRAVE MEDICAL CENTERS design for medical services; providing wellness services, namely, weight loss programs offered at a wellness center, filed on September 11, 2012 and is currently in use as of July 31, 2011.

WHEREAS, Geraldine V. Rouette is the owner of the following pending application:

Application No. 85/698,123 for HEALTHCRAVINGS for providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient’s specific set of symptoms, medical profile and medical record analysis and patient benefit information concerning organic and holistic products and services; providing an internet website for medical professionals and medical patients featuring medical information from remote locations via devices that feed information to the website that is processed, exchanged and accessed in real-time by users (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate

services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship, help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45), filed on May 31, 2010 and is currently not in use.

WHEREAS, Health Crave and Rouette respective marks when considered in their entireties in connection with their services are not likely to be confused;

WHEREAS, neither Health Crave nor Rouette is aware of any instances of confusion, mistake or deception between their respective marks;

WHEREAS, neither Health Crave nor Rouette believes that there is a likelihood of confusion between their respective marks as used for their respective services, and through their respective channels of trade; and

WHEREAS, both Health Crave and Rouette are desirous of resolving this matter amicably, believe it is in their respective best interests to agree to use their respective marks to avoid any likelihood of confusion, and consequently have negotiated a settlement, the terms, provisions, and conditions of which are fully set forth in this Consent to Use and Register Agreement;

NOW, THEREFORE, in consideration of the mutual promises and representations contained herein, the parties hereto agree as follows:

1. Health Crave does not object to the registration of Rouette's HEALTHCRAVINGS mark in the above identified application in any trademark office including, but not limited to, the United States Patent and Trademark Office for Rouette's services identified below;

2. Health Crave does not object and consents to the use of Rouette's HEALTHCRAVINGS mark for "providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient's specific set of symptoms, medical profile and medical record analysis and patient benefit information concerning organic and holistic products and services (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship, help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45)";

3. Health Crave agrees to take no adverse action in any trademark office including, but not limited to, the United States Patent and Trademark Office, in the courts, or otherwise against Rouette's mark shown in the above identified application of Rouette for "providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient's specific set of symptoms, medical profile and medical record analysis and patient benefit information concerning organic and holistic products and services (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship,

help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45)”;

4. Health Crave does not object to the registration of Rouette’s mark in the above identified application in any trademark office including, but not limited to, the United States Patent and Trademark Office, for HEALTHCRAVINGS for “providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient’s specific set of symptoms, medical profile and medical record analysis and patient benefit information concerning organic and holistic products and services (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship, help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45)”;

5. Health Crave agrees to take no adverse action in any trademark office including, but not limited to, the United States Patent and Trademark Office, in the courts, or otherwise against Rouette’s marks shown in the above identified application and for any application for HEALTHCRAVINGS for providing an interactive holistic web site featuring health information and patient initiated, patient authorized, fee-for-service, holistic approach distance healing sessions based on the patient’s specific set of symptoms, medical profile and medical record

analysis and patient benefit information concerning organic and holistic products and services (Int. Class 44); providing patient advocate and case management services, namely, coordinating the procurement and administration of medication; providing patient advocate services to hospital patients and patients in long term care facilities; providing patient advocate services to people with limb-loss; providing personal support services for families of patients with life threatening disorders, namely, companionship, help with medical forms, emotional counseling and emotional support; providing personal support services for patients and families of patients, namely, emotional counseling and emotional support (Int. Class 45);

6. Rouette does not object to the registration of Health Crave's marks in the above identified applications in any trademark office including, but not limited to, the United States Patent and Trademark Office for Health Crave's services identified in the applications and identified herein;

7. Rouette does not object and consents to the use and registration by Health Crave of its above identified marks for HEALTHCRAVE for "medical services; providing wellness services, namely, weight loss programs offered at a wellness center" and HEALTHCRAVE MEDICAL CENTERS design for "medical services; providing wellness services, namely, weight loss programs offered at a wellness center";

8. Rouette does not object and consents to the use and registration by Health Crave of its above identified marks for Health Crave's marks for the above identified services:

a) Provision of health care and medical services by health care professionals via the Internet or telecommunication networks;

b) Provision of medical services by health care professionals via the internet or telecommunication networks;

c) Providing an internet website for medical professionals and medical patients featuring medical information from remote locations via electronic patient monitoring devices that feed information to the web site that can be accessed in real-time by medical professionals for purposes of monitoring and diagnosing medical conditions;

d) Consulting services in the field of medical care;

e) Medical assistance services in the nature of medical information provided to medical professionals from remote locations via the Internet and global computer networks through the use of archived medical images and a data storage and retrieval system;

f) Medical imaging services;

g) Medical radiology services;

h) Medical screening services in the field of Primary Care, Dermatology, Vascular Services, Weight Loss, Anti Aging, Plastic Surgery Massage Therapy, Rehabilitation, Psychological Counseling, Migraine Treatment;

i) Medical services;

j) Medical services in the field of Primary Care, Dermatology, Vascular Services, Weight Loss, Anti Aging, Plastic Surgery Massage Therapy, Rehabilitation, Psychological Counseling, Migraine Treatment;

k) Medical services, namely, in vitro fertilization;

l) Medical services, namely Primary Care, Dermatology, Vascular Services, Weight Loss, Anti Aging, Plastic Surgery, Massage Therapy, Rehabilitation, Psychological Counseling, Migraine Treatment;

m) Medical services, namely, pre-employment drug screening;

n) Medical skin care services;

o) Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies;

p) Medical testing services, namely, fitness evaluation;

q) Concierge Medicine;

r) Medical, physical rehabilitation and physical therapy services;

s) Providing an on-line, patient-initiated, patient-authorized, fee-for-service, medical profile and medical record analysis service designed to provide patients with custom tailored information about the range of possible diagnoses and therapies associated with a defined set of symptoms;

t) Providing medical information, consultancy and advisory services;

u) Providing on-line medical record analysis services designed to provide patients with custom tailored information about the range of possible diagnoses and therapies associated with a defined set of symptoms;

v) Provision of health care and medical services by health care professionals via the Internet or telecommunication networks;

w) Provision of medical services by health care professionals via the internet or telecommunication networks.

9. Rouette agrees to take no adverse action in any trademark office including, but not limited to, the United States Patent and Trademark Office, in the courts, or otherwise against Health Crave's marks shown in the above identified applications of Health Crave and applications for Health Crave's marks for the above identified services;

10. Rouette agrees that it will not object to the registration of HEALTHCRAVE for "medical services; providing wellness services, namely, weight loss programs offered at a

wellness center” and HEALTHCRAVE MEDICAL CENTERS design for “medical services; providing wellness services, namely, weight loss programs offered at a wellness center” and Health Crave’s marks for the above identified services.

11. Rouette agrees not to use the marks HEALTHCRAVE and HEALTHCRAVE MEDICAL CENTERS design for any of the services of Health Crave identified above;

12. Rouette agrees to take no adverse action in any trademark office including, but not limited to, the United States Patent and Trademark Office, in the courts, or otherwise against Health Crave’s marks shown in the above identified applications and for any applications for Health Crave’s marks for the above identified services;

13. The parties agree to concurrent submission in any trademark office including, but not limited to, the United States Patent and Trademark Office, of this consent to the registration of the Health Crave applications by Health Crave;

14. This Consent to Use and Register Agreement shall inure to the benefit of and be binding upon the parties hereto, their licensees, successors, assigns, subsidiaries, affiliates, directors, officers, employees, attorneys, agents and representatives;

15. This Consent to Use and Register Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations, and discussions whether oral or written, of the parties, and there are no representations or other agreements between the parties in connection with the subject matter hereof except as specifically set forth herein. No supplement, modification, waiver, or termination of this Consent to Use and Register Agreement shall be binding unless executed in writing by the party to be bound thereby;

16. No waiver by any party of any breach of this Consent to Use and Register Agreement shall be deemed to be a waiver of any other then existing or subsequent breach, nor shall any such waiver by any party be deemed to be a continuing waiver. No delay or omission by any party in exercising any right hereunder, at law, or in equity, or otherwise, shall impair any such right, or be construed as a waiver thereof, or any acquiescence therein, nor shall any single or partial exercise of any right preclude other or further exercise thereof, or the exercise of any other right.

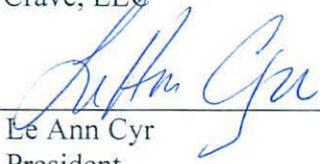
17. The provisions of this Consent to Use and Register Agreement are severable, and if any provision shall be held illegal, invalid or unenforceable, such holdings shall not affect the legality, validity or enforceability of any other provision. Any such illegal, invalid or unenforceable provision shall be deemed stricken from this Consent to Use and Register Agreement as if it had never been contained herein, but all other provisions shall continue in full force and effect.

18. This Consent Agreement shall be executed in two or more counterparts, and each counterpart shall be deemed an original thereof.

Effective this 24 day of May, 2013.

Health Crave, LLC

By: _____


Le Ann Cyr
President

Geraldine V. Rouette

By: *Geraldine V. Rouette*
Geraldine V. Rouette