

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

csg/kk

Mailed: April 16, 2014

Opposition No. 91212623

New Health Nut Inc. aka Health Nut

v.

Health Nut Café, LLC

Concurrent Use No. 94002599

Health Nut Café, LLC
(Serial No. 85683949)

v.

New Health Nut Inc. aka Health Nut

By the Trademark Trial and Appeal Board:

Pursuant to a settlement agreement, the parties filed in Opposition No. 91212623, consented motions "to dismiss the opposition proceeding and to institute a concurrent use proceeding involving the parties listed above."

Opposition No. 91212623

In Opposition No. 91212623 the parties New Health Nut Inc. aka Health Nut and Health Nut Café LLC seek to amend Health Nut Café, LLC's involved application, Serial No. 85683949, to an application for concurrent use with New Health Nut Inc. aka Health Nut being cited as an exception to Health Nut Café, LLC's claim of exclusive right to use

its mark in commerce, and to dismiss the opposition in favor of a concurrent use proceeding.

New Health Nut Inc. aka Health Nut and Health Nut Café, LLC's joint motion to amend and dismiss is granted. Health Nut Café, LLC's application Serial No. 85683949 is amended to one for a concurrent use registration, claiming use in the geographic area specified, and Opposition No. 91212623 is dismissed.

A concurrent use proceeding, namely, Concurrent Use No. 94002599 is hereby instituted.

The applicant in application Serial No. 85683949 has applied for a concurrent use registration for the trademark or service mark set forth below.

Applicant:	Health Nut Café, LLC
Applicant's mark:	HEALTH NUT CAFE (Serial No. 85683949)
Filing dates:	July 23, 2012
Territory of Use:	the geographic area of comprised of Oklahoma, and the contiguous states of Colorado, Kansas, New Mexico, Texas, Arkansas and Missouri
Services:	Restaurant and café services
Attorney:	Drew T. Palmer Crowe & Dunlevy

In its application, the applicant (plaintiff in this proceeding) has recited as an exception to its allegation of exclusive use of said mark, use by you of an identical or very similar mark. **The applicant is required to serve on you a copy of its application, including**

the specimens of use and mark drawing, within ten (10) days of the notice instituting this proceeding. See Trademark Rule 2.99(d)(1), 37 C.F.R. §2.99(d)(1) Pending receipt of the service copy, the contents of the application file may be viewed via the following USPTO web site: <http://tportal.uspto.gov/external/portal/tow> .

Your mark, goods or services, and territory of use, *as acknowledged in* the referenced application, are set out below in a summary of details of the application.¹

Your mark : HEALTH NUT

Your goods or services: Restaurant and café services;
Take-out restaurant services

Your territory of use: the geographic area comprised of the entire United States except Oklahoma, and the contiguous states of Colorado, Kansas, New Mexico, Texas, Arkansas and Missouri

A concurrent use proceeding is hereby instituted under the provisions of Section 2(d) of the Trademark Act of 1946.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, of the Code of Federal Regulations ("Trademark Rules"). **The Trademark Rules may be viewed at the USPTO's trademarks webpage: <http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage (<http://www.uspto.gov/web/offices/dcom/ttab/>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).**

Trademark Rule 2.99, under which this notice is given, provides that:

An answer to the notice is not required in the case of an applicant or registrant whose application or registration is specified in the application to register as concurrent user in the application, but a statement, if desired, may be filed within forty days after the

¹ The Board notes that excepted user New Health Nut Inc. aka Health Nut is the owner of application Serial Nos. 85935889 and 85925834 (currently in suspended status) for registration on the Supplemental Register. Both marks include concurrent use statements; however applications for registration on the Supplemental Register are not subject to concurrent use proceedings. See TBMP Section 1105 (Applications and Registrations No Subject to Proceeding) (3d ed. rev.2 2013). In addition, excepted user is the owner of 85925810, an unrestricted application for the mark HEALTH NUT for “restaurant and café services; Take out restaurant services” in International Class 43 for registration on the Principal Register. That application is currently in suspended status. If amended to one for concurrent use, this application could be added to this proceeding once the application clears the opposition period.

mailing of the notice; in the case of any other party specified as a concurrent user in the application, an answer must be filed within forty days after the mailing of the notice.

You are allowed until forty days from the mailing date of this order to file an answer in accordance with Trademark Rule 2.99. (See Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) If filed, the answer should be directed to the allegations relating to concurrent use recited in the plaintiff's application identified herein. **Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVUE system at the following web address: <http://ttabvue.uspto.gov/ttabvue/>.**

However, it is noted that most concurrent use proceedings result in a negotiated settlement and the parties are encouraged to promptly begin discussion of settlement. If the parties choose to begin settlement talks prior to the due date for the answer, they may stipulate to a suspension to accommodate settlement talks.

Defendant's answer and any other filing made by any party must include proof of service. See Trademark Rule 2.119.

If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies. See Trademark Rule 2.119(b)(6). It is best if the parties make such an agreement in writing.

If an answer is not filed, then the proceeding may be handled as in a case of default, and you will be precluded from claiming any right in your mark greater than that acknowledged by plaintiff in its concurrent use application. See Trademark Rule 2.99(d)(3).

You must advise the Trademark Trial and Appeal Board of any relevant applications or registrations, other than that of plaintiff already referenced herein, which should be included in this concurrent use proceeding. Your response, if any, should be in writing and should accompany your answer.

Trademark Rule 2.126 pertains to the form of submissions. Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at <http://estta.uspto.gov>.

Deadlines and periods for conferencing, disclosures, discovery and testimony are set as indicated below:

Time to Answer	5/26/2014
Deadline for Discovery Conference	6/25/2014
Discovery Opens	6/25/2014
Initial Disclosures Due	7/25/2014
Expert Disclosures Due	11/22/2014
Discovery Closes	12/22/2014
Plaintiff's Pretrial Disclosures	2/5/2015
Plaintiff's 30-day Trial Period Ends	3/22/2015
Defendant's Pretrial Disclosures	4/6/2015
Defendant's 30-day Trial Period Ends	5/21/2015
Plaintiff's Rebuttal Disclosures	6/5/2015
Plaintiff's 15-day Rebuttal Period Ends	7/5/2015

As noted in the schedule of dates for this case, the parties are required to have a conference, during which they are expected to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case. See Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of whether the Board's Accelerated Case Resolution (ACR) process may be a more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. See Trademark Rule 2.120(a)(2). The request for Board participation must be made through ESTTA or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVUE record for this case at

<http://ttabvue.uspto.gov/ttabvue/>. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: <http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. See Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking (72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

The Board allows parties to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters that may arise during this case. In addition, the assigned interlocutory attorney has discretion to require the parties to participate in a telephone conference to resolve matters of concern to the Board. See TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. See TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.