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

Proceeding	91220321
Party	Defendant Primal Nutrition, Inc.
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Submission	Answer
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Date	03/03/2015
Attachments	Answer to Notice of Opposition.pdf(229689 bytes)

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

IN THE MATTER OF TRADEMARK SERIAL NO. 86/150,072
PUBLISHED ON December 23, 2014

PRIMAL KITCHEN LLC,	)	
	)	
Opposer,	)	
	)	
v.	)	**Opposition No.: 91220321**
	)	
PRIMAL NUTRITION, INC.,	)	
	)	
Applicant.	)	
	)	
	)	

ANSWER TO NOTICE OF OPPOSITION

Primal Nutrition, Inc. by and through its counsel, hereby answers the Notice of Opposition of Primal Kitchen dated January 19, 2015, as follows. Each of the following paragraphs in the answer correspond to the paragraph numbers in the Notice of Opposition.

1. Primal Nutrition admits the allegation that a mark PRIMAL KITCHEN is pending U.S. Trademark Serial No. 86/390,627 and is without sufficient information to admit or deny the remaining allegations of paragraph 1.

2. Primal Nutrition admits the allegations of paragraph 2.

3. Primal Nutrition admits the allegations of paragraph 3.

4. In answering paragraph 4, Primal Nutrition admits that it filed U.S. Trademark Serial No. 86/150,072 on a 1(b) basis and denies the remaining allegations of the paragraph.

5. Primal Nutrition denies the allegations of paragraph 5.

6. Primal Nutrition denies the allegations of paragraph 6.

7. Primal Nutrition denies the allegations of paragraph 7.

8. Primal Nutrition denies the allegations of paragraph 8.

9. Primal Nutrition denies the allegations of paragraph 9.

10. Primal Nutrition denies the allegations of paragraph 10.

11. Primal Nutrition denies the allegations of paragraph 11.

With regard to the prayer for relief, Primal Nutrition denies that Primal Kitchen is entitled to the relief requested. Primal Nutrition denies each of the allegations in the prayer for relief.

AFFIRMATIVE DEFENSES

Primal Nutrition asserts that the following defenses are at issue or will be at issue after an opportunity to conduct discovery:

First Affirmative Defense – Laches

1. Primal Kitchen's claim is barred by laches in that Primal Kitchen's delay in asserting its rights has caused injury or prejudice to Primal Nutrition.

Second Affirmative Defense – Estoppel

2. Primal Kitchen's claim is barred by the doctrine of estoppel. Primal Kitchen is estopped through actual estoppel by acts of Primal Kitchen upon which Primal Nutrition relied to its detriment. Last spring, at least as early as May 2014, Primal Nutrition transmitted a proposed agreement to Primal Kitchen for its consideration providing a workable solution for coexistence and concurrent use of the mark PRIMAL KITCHEN by the parties in their respective markets and trade channels. On around July 2014, Primal Kitchen sent Primal Nutrition a revised version of the agreement and Primal Nutrition promptly responded with proposed revisions that same

month. At all times, Primal Nutrition thought that Primal Kitchen was willing to coexist. After July 2014, Primal Kitchen took no action, and no agreement was executed by the parties. Primal Nutrition relied upon this inaction to its detriment and continued to proceed with its business plan in developing, marketing, and selling the goods and services outlined in its application. Its products are currently for sale at its primalkitchen.com and primalbluebrint.com websites. Primal Kitchen was insincere in its prior negotiations and Primal Nutrition unknowingly relied on Primal Kitchen's failure to respond as an indication that it would take no further action with respect to the PRIMAL KITCHEN mark.

Third Affirmative Defense – Unclean Hands

3. Primal Kitchen's claim is barred by the doctrine of unclean hands due to inequitable acts that directly relate to the subject matter of this action. For example, Primal Kitchen took no action in response to the ongoing negotiations the parties had and then unexpectedly filed the instant Notice of Opposition seeking cancellation of the mark when it knew that the mark was pending since December 2013, knew of Primal Nutrition's rights in the PRIMAL KITCHEN mark and primalkitchen.com domain that date back to March 2012, and knew that Primal Nutrition was seeking an amicable resolution for the parties to coexist in their respective markets. Also, Primal Kitchen has rebuffed Primal Nutrition's current efforts to resolve this matter and has acted in bad faith regarding this matter.

Fourth Affirmative Defense – Acquiescence

4. Primal Kitchen's claim is barred since acts or omissions by Primal Kitchen implied Primal Kitchen's acquiescence in Primal Nutrition's activities.

Fifth Affirmative Defense – No Likelihood of Confusion

5. Primal Kitchen's claim is barred since there is no likelihood of confusion as the parties' respective marks and their uses are not confusingly similar. The parties' marks are used in entirely different channels of trade. For example, the instant application concerns pre-packaged food products in International Classes 5, 29, and 30, including, among others, meal replacements, sauces, snack foods, condiments, sauces, marinades, and toppings. By contrast, Primal Kitchen's mark concerns retail store services in International Class 35 featuring cooking and food preparation products. The parties markets and trade channels do not overlap and consumer confusion is unlikely.

Sixth Affirmative Defense – No Secondary Meaning

6. Primal Kitchen's claim is barred since Primal Kitchen's alleged mark is not inherently distinctive and purchasers do not associate the mark with Primal Kitchen alone.

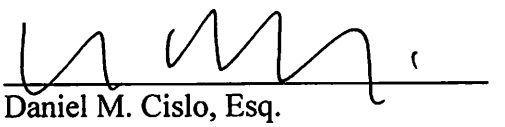
Eighth Affirmative Defense – Priority

7. Primal Kitchen's claim is barred since Primal Nutrition has priority of use of the mark over Primal Kitchen as to the mark at issue. Specifically, Primal Nutrition purchased the rights in and to the PRIMAL KITCHEN mark and domain names with a priority date at least as early as March 2012 from a third party, Christopher Moreno, who has used the mark continuously since that date in connection with at least food products and restaurant and catering services.

Respectfully submitted,

CISLO & THOMAS LLP

Dated: March 3, 2015



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Attorneys for Primal Nutrition, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer to Notice of Opposition was served upon the attorney for Primal Kitchen, by first class mail, postage prepaid, to

Erin Bray, Esq.
Trademark Lawyer Firm, PLLC
455 E. Eisenhower Pkwy, Suite 360
Ann Arbor, MI 48108

with a copy by electronic mail to erin@trademarklawyerfirm.com, on the date given below.

Dated: March 3, 2015

Daniel M. Cislo, Esq.
Kristin B. Kosinski, Esq.

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on the date shown below.

Dated: March 3, 2015

Daniel M. Cislo, Esq.
Kristin B. Kosinski, Esq.

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