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

Proceeding	91224043
Party	Defendant BYODYNE, LLC
Correspondence Address	CORY STENZEL 2113 SE Williams Dr Gresham, OR 97080-5103 stenzelz@gmail.com
Submission	Motion for Summary Judgment
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Signature	/Cory Stenzel/
Date	10/05/2015
Attachments	TTAB.pdf(602047 bytes)

36 supplements; Nutritional supplement in the nature of a nutrient-dense, protein-based
37 drink mix; Nutritional supplements; Nutritional supplements in the form of powders,
38 capsules, liquids, syrups; Powdered nutritional supplement concentrate; Powdered
39 nutritional supplement drink mix; Protein dietary supplements; Protein supplement
40 shakes; Protein supplements; Vitamin supplements; Weight management supplements;
41 Whey protein supplements.

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43 Petitioner established the website domain, www.byodyne.com, on March 3rd, 2015 with
44 the intent of establishing a site for e-commerce. Petitioner registered the mark with the
45 Corporate Division of Oregon Secretary of State on June 17th, 2015 (Registry
46 #1122029-99). Petitioner began initiating accounts and ordering raw ingredients in
47 preparation of production using the mark on June 24th, 2015. Petitioner initiated a
48 financial account (dba as BYODYNE) on June 29th, 2015. Petitioner intended to file the
49 USPTO Allegation of Use once the mark was classified as 'unopposed.'

50
51 Petitioner manufactures dietary supplements designed to improve athletic performance.
52 Petitioner sources raw materials from domestic and foreign suppliers. Petitioner's
53 products conform to Current Good Manufacturing Practices (CGMPs) for proper design,
54 monitoring, and control of manufacturing processes and facilities as required by the
55 Food and Drug Administration (FDA)¹. CGMPs are intended to improve dietary
56 supplement safety by establishing regulations in which ensures adherence to certain
57 quality standards. Furthermore, Petitioner's company's products are manufactured in a
58 facility that adheres to the National Sanitary Foundation International (NSF) standard.
59 NSF certification involves additional regulations for testing and auditing of the
60 manufacturing of dietary supplements. NSF is a third-party regulator and isn't a
61 requirement for dietary supplement manufacturing and/or distribution².

62
63 After conducting a search of the USPTO's Trademark Electronic Search System (TESS)
64 as well as a diligent state-to-state business directory search for the term BYODYNE and
65 its synonyms, Petitioner filed with the USPTO on March 2nd, 2015. Petitioner believed
66 the name was sufficiently dissimilar from any other entity or entities within the same

67 class that there would be no risk of a consumer mistaking Petitioner's mark with that of
68 another's.

69
70 The Petitioner's company's direction is defined in the "About Us" section of the
71 Petitioner's website (<http://www.byodyne.com/pages/about-us>). The following is a copy
72 of that statement: "Founded in 2014, our company headquarters are located in the
73 beautiful Pacific Northwest. Byodyne was the result of increasing frustration with the
74 state of the supplement market. As we are supplement consumers ourselves, we began
75 researching each ingredient manufacturers were putting in their bottles. To our surprise,
76 we discovered there was either no research supporting the effectiveness of a particular
77 ingredient or more commonly, the amount of the ingredient was way too low to produce
78 the benefits shown by the studies. Furthermore, nearly every manufacturer was using
79 artificial sweeteners and dyes!

80 We became so motivated to produce products that contained effective ingredients at the
81 doses necessary to produce results, we decided to mortgage our homes to start a
82 brand-new company.

83
84 Byodyne was born. The name "Byodyne" is a derivative of the Latin and Greek terms;
85 bio meaning "life" and dyne meaning "force."

86
87 We spent 3 years of research and development designing our first product release. This
88 signature line was formulated based on compiling hundreds of scientific research
89 articles and beta-testing sample batch after sample batch. We are extremely proud of
90 what we've accomplished and the products we're offering to you! By the time we settled
91 on our final formulations, we had received unanimous praise and excitement from all of
92 our product testers.

93
94 All of our products are produced in compliance with the Food and Drug Administration's
95 (FDA) Current Good Manufacturing Processes (CGMPs) and manufactured in facilities
96 that meet or exceed the National Sanitation Foundation International (NSF) standards.
97 NSF is accredited by the Occupational Safety and Health Administration (OSHA), the

98 Standards Council of Canada (SCC), the American National Standards Institute (ANSI),
99 and the International Accreditation Service (IAS). Even the scoops we use are
100 manufactured in a facility that has received Food Safety Management System
101 Certification (FSSC 22000)."

102

103

LEGAL BENCHMARK

104

105 To curtail the proliferation of litigation, the Supreme Court expanded Rule 56 of the
106 Federal Rules of Civil Procedure in 1986. *Celotex Corp. v. Catrett, Matsushita Electric*
107 *Corp. v. Zenith Radio, and Anderson v. Libery Lobby*. These cases serve to highlight
108 the Supreme Courts opinion to deny parties access to excess litigation when there is no
109 genuine issues of material fact(s). Moving party is then entitled to judgment as a matter
110 of law (Federal Rules of Civil Procedure, Rule 56(c)(1)(b)).

111

112 A salutary method of disposition is most prudent in cases where additional evidence
113 would reasonably be expected not to influence the outcome and thus, trial would be
114 unnecessary (TBMP § 528.01, Notes 1-17). The Trademark Trial and Appeal Board
115 (TTAB) is amenable disposing of cases on summary judgment when appropriate (TBMP
116 § 528.01, Note 4).

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ARGUEMENT IN FAVOR OF SUMMARY JUDGEMENT

119 The likelihood of confusion between marks is the manner in which the "relevant public"
120 erroneously believes the goods or services belonging to two separate marks originate
121 from the same entity³. A mark registered prior to the establishment of the disputed mark
122 is often referred to as the "senior" mark and the latter, as the "junior" mark. The test to
123 determine the risk for likelihood of confusion is multifaceted. All circumstances in which
124 the marks are to be used need to be carefully weighed for relevancy prior to a
125 determination being made. Additionally, the senior mark generally is granted an
126 additional level of consideration for its established distinction and/or reputation with
127 respect to its goods and services. The assessment of risk is generally viewed globally
128 with respect to all factors relevant to the circumstances of the case. More specifically, a

129 likelihood for confusion exists when the conditions of the junior mark is identical or with
130 a high degree of similarity with the goods and services of the senior mark. These
131 conditions are seen as cumulative and if not satisfied, a likelihood of confusion cannot
132 occur (CTMR, Article 8(1)(b)).

133
134 During a determination of risk, the definition of "relevant public" must be established.
135 While the average consumer is reasonably informed they generally view the trademark
136 as a whole and less it's parts⁴. Therefore the context of relevant public for this case
137 rests in the category of goods and services provided by the senior and junior mark
138 holders. Additionally, a the degree of specialization of the product (i.e. surgical
139 instruments) must be considered compared to mass produced ones (i.e. socks) when
140 assessing relevant public.

141
142 According to the Demeter-USA's website, the registrants mark, "BIODYNAMIC" has an
143 ascribed meaning statement: "*The first Farm Standard was written in Germany in 1928*
144 *following Rudolf Steiner's Agriculture Course. Its purpose was to codify what Steiner*
145 *had presented in his lectures and ensure its adherence through a strict certification*
146 *program. The Farm Standard is historically significant because it dates back to the*
147 *beginning of the modern sustainable farming movement, and captures key agronomic*
148 *principles not comprehensively addressed within any other agriculture certification*
149 *system. Here in the United States, it provides the legal definition of "Biodynamic"*
150 *through the certification mark.*" ([http://www.demeter-usa.org/learn-more/biodynamic-](http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp)
151 [farm-standard.asp](http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp)).

152
153 Demeter-USA's website further states, "*Sections of the Farm Standard include*
154 *necessary elements of the farm organism, soil fertility management, crop protection,*
155 *greenhouse management, animal welfare, and the use of the preparations. Biological*
156 *diversity within the farm landscape is emphasized, and requires that a minimum of ten*
157 *percent of the total farm acreage be set-aside as a biodiversity preserve. That may*
158 *include but is not limited to forests, wetlands, riparian corridors, and intentionally planted*
159 *insectaries. Diversity in crop rotation and perennial planting is required: no annual crop*

160 *can be planted in the same field for more than two years in succession. Bare tillage*
161 *year round is prohibited so land needs to maintain adequate green cover."*
162 (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>)

163
164 When assessing the likelihood of confusion for the relevant public, the test looks at the
165 whole as well as individual parts. Here, the Registrant protects its trademark by
166 defining a farm as: "*necessary elements of the farm organism, soil fertility management,*
167 *crop protection, greenhouse management, animal welfare.*" As well as setting aside a
168 minimum of 10% of farm acreage to be dedicated as a biodiversity reserve. The
169 Petitioner however, does not intend, purport, or ever reference farming, biodiversity, soil
170 fertility management, crops, or animal welfare, nor does the Petitioner at any time
171 reference any standard, practice, or certification involving organic farming principals
172 during the course of business manufacturing and distributing dietary supplements for
173 athletes. It would be reasonable based on this to believe the relevant public would not
174 be at risk for a likelihood of confusing the goods and services of the Petitioner's and
175 Registrant's respective companies.

176
177 Demeter-USA's website further states, "*The Farm Standard instructs that the foundation*
178 *of the fertility system, and strategies for disease, insect, and weed control, must*
179 *originate from the farm itself. Fertility is generated via the integration of livestock,*
180 *compost and green manure, nutrient catch crops, and careful crop rotation. Disease*
181 *and insect control are addressed through botanical species diversity, predator habitat,*
182 *balanced crop nutrition, and attention to light penetration and airflow. Weed control*
183 *emphasizes prevention, including timing of planting, mulching, and identifying and*
184 *avoiding the spread of invasive weed species."* ([http://www.demeter-usa.org/learn-](http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp)
185 [more/biodynamic-farm-standard.asp](http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp))

186
187 Here, the Registrant protects its trademark by promoting the Farm Standard by means
188 of a, "*...fertility system, and strategies for disease, insect, and weed control...*". The
189 Petitioner however, does not intend, purport, or ever reference a fertility system or
190 strategies for disease, insect, or weed control, nor does the Petitioner ever at any time

191 reference species diversity, predator habitat, balanced crop nutrition, and attention to
192 light penetration and airflow during the course of business manufacturing and
193 distributing dietary supplements for athletes. It would be reasonable based on this to
194 believe the relevant public would not be at risk for a likelihood of confusing the goods
195 and services of the Petitioner's and Registrant's respective companies.

196
197 Demeter-USA's website further states, "*The use of the preparations is a requirement of*
198 *the Farm Standard. There are nine in all, made from herbs, mineral substances and*
199 *animal manures, that are utilized in field sprays and compost inoculants applied in*
200 *minute doses, much like homeopathic remedies are for humans. Timely applications*
201 *revitalize the soil and stimulate root growth, enhance the development of*
202 *microorganisms and humus formation, and aid in photosynthetic activity.*"
203 (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>).

204
205 Here, the Registrant protects its trademark by establishing the application of nine
206 preparations as required by the "Farm Standard" that include, herbs, mineral
207 substances and animal manures. The Petitioner however, does not intend, purport, or
208 ever reference the process of stimulating root growth through the use of herbs, mineral
209 substances, and animal manures, nor does the Petitioner ever at any time reference the
210 development of microorganisms, humus formation, or photosynthetic activity during the
211 course of business manufacturing and distributing dietary supplements for athletes. It
212 would be reasonable based on this to believe the relevant public would not be at risk for
213 a likelihood of confusing the goods and services of the Petitioner's and Registrant's
214 respective companies.

215
216 Finally, Demeter-USA's website further states, "*The crops resulting from a certified*
217 *Biodynamic farm are themselves certified (for example Biodynamic tomatoes), but in*
218 *order to produce a certified processed product (for example pasta sauce) the product*
219 *must be produced in accordance with the Demeter Biodynamic® Processing Standard.*
220 *There are fourteen different processing standard categories (compared to one for the*
221 *entire National Organic Program), including wine, cheese, olive oil, dairy and body*

222 care. The Processing Standard is very important because it guarantees an unbroken
 223 chain of accountability from the farm to the finished product, and delivers a product that
 224 allows for the integrity and purity of the agricultural ingredients to define it."
 225 (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>)
 226

227 Here, the Registrant asserts its protected trademark by defining the Biodynamic farming
 228 certification. The Petitioner however, does not intend, purport, or ever reference the
 229 Demeter Biodynamic Processing Standard, nor does the Petitioner ever at any time
 230 reference or display this certification as illustrated:



<http://www.demeter-usa.org/media/>

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239 Further, this certification, when used on finished product labels appears as such:

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 A product label for a supplement. The label is yellow and contains the following information:

Supplement Facts		
Serving Size: 1.5 tsp (3g)		
Servings Per Container: about 151		
	Amount per serving	%Daily Value
Calories	5	
Total Carbohydrate	1 g	<1%**
Organic Yerba Mate (leaf and stem) (Contains ~40 mg Caffeine)	3 g	†

**Percent Daily Values are based on a 2,000 calorie diet
 †Daily Value not established.

Other Ingredients: None. Naturally Gluten-Free

Distributed by:
 Guayakí Sustainable Rainforest Products, Inc.
 6782 Sebastopol Ave. Suite 100

 The label also features several certification logos:

- NON GMO Project VERIFIED
- fair for life
- Certified CCOF Organic
- KSA KOSHER
- Certified (B) Corporation
- USDA ORGANIC
- DEMETER CERTIFIED BIODYNAMIC



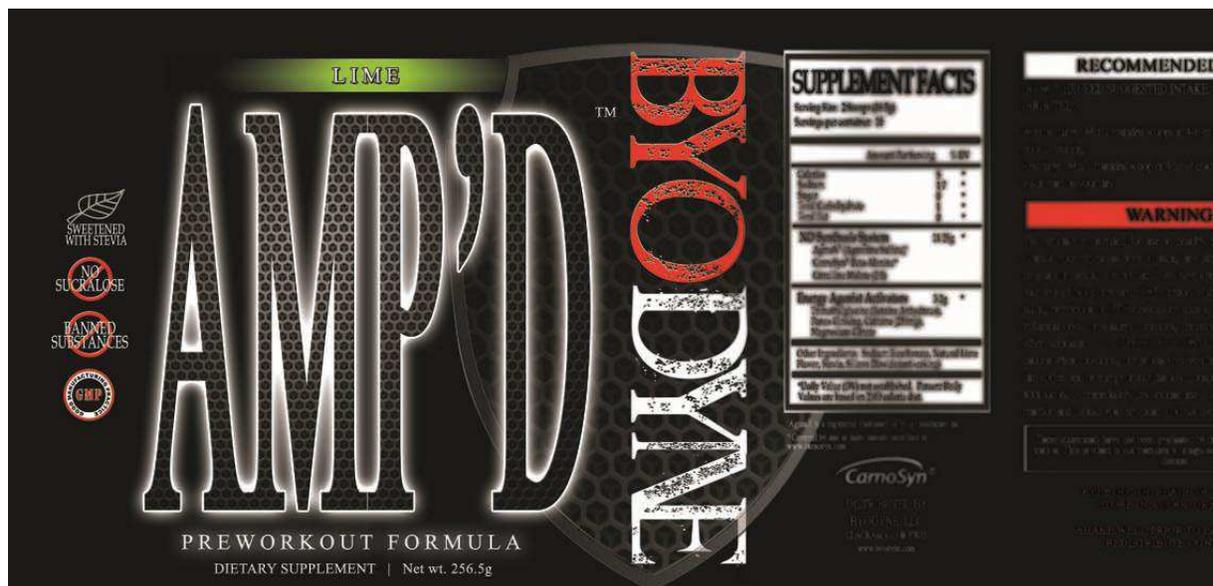
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256 The mark illustrated in the above two samples as used in commerce, displays the name
 257 DEMETER most prominently followed by an artistic design atop the word CERTIFIED
 258 with the mark BIODYNAMIC being the least emphasized element of the label. When
 259 used upon a label in commerce, the Demeter Association, Inc. mark "Biodynamic" is
 260 affixed on the back of the label and intermingled among other certification marks. On
 261 the final label, the word BIODYNAMIC is in association with the words "loose leaf" and

262 "Born from a vibrant ecosystem." The word "biodynamic" is affixed below the
263 manufacturer, Guayaki, and the product's name, "Yerba Mate."

264
265 In contrast, the Petitioner's mark upon the below sample label is displayed as such:



277
278 The Petitioner's mark is prominently displayed on the front in large, bi-color, bold
279 textured lettering and juxtaposed to the product name also in bright bold color with
280 textured lettering. It would be reasonable based on the immediately observable and
281 significant differences in the look and placement to believe the relevant public would
282 not be at risk for a likelihood of confusing the goods and services of the Petitioner's and
283 Registrant's respective companies.

284
285 According to the Demeter Association, Inc website, they are "*not-for-profit incorporated*
286 *in 1985 with the mission to enable people to farm successfully, in accordance with*
287 *Biodynamic® practices and principles. Demeter's vision is to heal the planet through*
288 *agriculture.*" (<http://www.demeter-usa.org/about-demeter/>). The Petitioner's company,
289 Byodyne, is a for-profit company manufacturing dietary supplements for end
290 consumers.

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292 **CONCLUSION**

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Based on the evidence stated herein to include the Registrant's mark is respective to a certification and not a product, it is not reasonable to believe the Petitioner's and Registrant's respective companies would possess the same customer base and therefore there is no risk for a likelihood of confusion between the two marks.

For the above reasons, Petitioner's Motion for Summary Judgment should be granted.

Respectfully Submitted,



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REFERENCES

1. <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/Manufacturing/ucm169105.htm>
2. <http://www.nsf.org/about-nsf/>
3. *Becker v. Harman Int'l indus.* (2010)
4. *Aceites del Sur-Coosur v. Koipe* (2009)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this correspondence was electronically filed with the Trademark Trial and Appeal Board on October 5th, 2015.

I HEREBY CERTIFY that a true and complete copy of the foregoing Petitioner's Motion of Summary Judgment has been served on the attorney for the Registrant, Mr. Paul W. Reidl (CA Bar No. 155221), at 241 Eagle Trace Drive, Half Moon Bay, CA 94019 by electronic email to paul@reidllaw.com with his approval.



Signed: _____

Date: 10/5/15

By: Cory Stenzel, Founder
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