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

Proceeding	91224818
Party	Plaintiff Market America, Inc.
Correspondence Address	RYAN S LUFT RYAN S LUFT PLLC 5603-B WEST FRIENDLY AVE PMB #146 GREENSBORO, NC 27410 UNITED STATES ryan@luftlaw.com
Submission	Motion for Summary Judgment
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Date	05/24/2016
Attachments	FINAL_Motion for Summary Judgment.pdf(2144099 bytes) FINAL_Declaration of Ryan S Luft.pdf(162819 bytes)

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

In the matter of trademark application Serial No. 86469018

For the mark VITAMINDFUL

Published in the Official Gazette on September 15, 2015

Market America, Inc.,

Opposer,

v.

Luciano Sztulman M.D., Inc.,

Respondent.

Opposition No. 91224818

OPPOSER’S MOTION FOR SUMMARY JUDGMENT

Opposer, Market America, Inc. (“Market America”), hereby moves, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Rule 2.127(e) of the Trademark Rules of Practice, for summary judgment on the grounds that Applicant, Luciano Applicant M.D., Inc. (“Applicant”) lacked a *bona fide* intent to use the mark that is subject to this Opposition at the time that application was filed, under 15 U.S.C. § 1051(b).

Market America has concurrently filed a Motion to Amend its Notice of Opposition to assert lack of *bona fide* intent to use the VITAMINDFUL mark as an additional ground for opposition. A true and correct copy of Market America Second Amended Notice of Opposition is attached hereto as Exhibit A. For the reasons set forth below, Market America further moves for Summary Judgment because there is no genuine issue of material fact regarding Applicant’s lack of *bona fide* intent to use the VITAMINDFUL mark at the time the Application was filed.

Accordingly, the Application is void *ab initio*.

BACKGROUND

Applicant filed a trademark application assigned Application Serial No. 86469018 in the United States Patent and Trademark Office (“PTO”) on December 2, 2014 (the “Application”) to register the mark VITAMINDFUL for use in connection with “Vitamins” in International Class 005 (“VITAMINDFUL”). The Application is based on Applicant’s intent to use VITAMINDFUL.

After publication of the Application, Market America filed a Notice of Opposition against the Application (on November 12, 2015), alleging that the use and registration of the VITAMINDFUL mark is likely to cause confusion with Market America’s registered trademark, VITA-MIND, Registration No. 2944356, for “Nutritional Supplement for mental acuity and alertness,” in International Class 005. Inadvertently, during filing, a page was missing from the scanned document and the entire document did not come through, although a complete set had been served on Applicant. Market America subsequently filed an Amended Notice of Opposition on November 16, 2015 to include all pages.

Market America has since served upon Applicant a First Set of Document Requests (“Document Requests”) and a First Set of Interrogatories (“Interrogatories”) seeking, among other things, evidence relating to Applicant’s decision to adopt the VITAMINDFUL mark and regarding his *bona fide* intent to use VITAMINDFUL with the identified goods at the time he filed the Application. Applicant has served on Market America his responses to the Document Requests and Interrogatories, as well as Initial Disclosures.

In his Initial Disclosures, Applicant states that he may use the following categories of documents, among others, to support his claims and defenses:

- “Documents relating to the adoption of Applicant’s VITAMINDFUL mark”;

- “Documents relating to Applicant’s intent in adopting Applicant’s mark”; and
- “Documents relating to Applicant’s labels for Applicant’s goods.”

Nonetheless, during the course of discovery, despite Market America’s discovery requests relating to Applicant’s intent to use the VITAMINDFUL mark, Applicant failed to produce responses or documents to support a claim that he had a *bona fide* intent to use the VITAMINDFUL mark on or in connection with the goods he identified in the Application when he applied to register the VITAMINDFUL mark.

ARGUMENT

I. Legal Standard

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“*Celotex*”); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (“*Sweats Fashions*”). Market America, as the moving party, bears the burden of demonstrating the absence of any genuine dispute of material fact. *See id.* at 323; TBMP S 528.01. Applicant, as the nonmoving party, must go beyond the pleadings and set out “specific facts showing a genuine issue for trial.” *Celotex*, 477 U.S. at 323. A factual dispute is genuine only “if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the non-moving party.” *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 850 (Fed. Cir. 1992).

The Board has disposed of cases on summary judgment under extremely similar circumstances. *See Tekni-Plex, Inc. v. Selig Sealing Prods., Inc.*, 2015 WL 8966287 (T.T.A.B. 2015) (“*Tekni-Plex*”); *PRL USA Holdings, Inc. v. Young*, Opposition No. 91206846 (T.T.A.B.

2013) (“*PRL USA*”) (attached hereto as Exhibit G); *Honda Motor Co., Ltd. v. Friedrich Winkelman*, 90 U.S.P.Q.2d 1660, 2009 WL 962810 (T.T.A.B. 2009) (“*Honda Motor Co.*”); *Boston Red Sox Baseball Club LP v. Sherman*, 88 U.S.P.Q.2d 1581, 2008 WL 4149008 (T.T.A.B. 2008) (“*Boston Red Sox*”). “[O]ne way an opposer can establish its prima facie case of no bona fide intent is by proving that the applicant has no documentary evidence to support its allegation in the application of its claimed bona fide intent to use the mark in commerce as of the application filing date.” Exhibit G, *PRL USA* at 9.

As demonstrated herein, summary judgment is appropriate in this proceeding, as Applicant has all but conceded the facts necessary to find in favor of Market America on its claim for lack of *bona fide* intent to use, and no reasonable fact finder could decide this issue in Applicant’s favor.

II. There is No Genuine Issue of Material Fact Regarding Applicant's Lack of Bona Fide Intent to Use the VITAMINDFUL Mark at the Time of Filing.

In order to register a mark under Section 1(b) of the Lanham Act, an applicant must verify that he has a *bona fide* intention to use the mark in commerce at the time of the filing of the Application. *See* 15 U.S.C. § 1051(b). Whether the applicant intended to use the mark in commerce is an objective determination based on all the circumstances. *See id.*; *Boston Red Sox*, 2008 WL 4149008 at *6; *Lane Ltd. v. Jackson Int’l Trading Co.*, 33 U.S.P.Q.2d 1351, 1994 WL 740491, *6 (T.T.A.B. 1994). The absence of documentary evidence from the applicant regarding its intent to use the mark constitutes objective proof sufficient to show that the applicant lacks a *bona fide* intent to use his mark in commerce. *See Boston Red Sox*, 2008 WL 4149008 at *6 (applicant lacked *bona fide* intent to use the mark in commerce); *Honda Motor Co.*, 2009 WL 962810 at *4 (granting motion for summary judgment where there was no evidence of applicant’s *bona fide* intent).

In this instance, Applicant lacks documentary evidence of his intent to use the VITAMINDFUL mark in commerce, and, moreover, has indicated in correspondence and through

his answers to the Interrogatories that he has not had any plans to use the VITAMINDFUL mark in commerce.

Market America's Document Requests sought, among other things:

4. All Documents concerning Respondent's consideration, selection, conception, creating, or adoption of the Challenged Mark for use on or in connection with any goods or services.

5. Documents sufficient to identify all persons who were responsible for, participated in, or have information or were consulted concerning the consideration, selection, conception, creation, or adoption of the Challenged Mark for use on or in connection with any of Respondent's goods or services.

....

10. Documents sufficient to identify all goods and services actually or planned or intended to be sold, offered, or licensed by Respondent under or in connection with any Challenged Mark.

....

13. Documents sufficient to show any plans for development or expansion of the goods or services that are offered, sold, provided, or licensed in connection with the Challenged Mark.

A true and complete copy of the Document Requests, which include other requests relating to Applicant's intended use of the VITAMINDFUL mark is attached hereto as Exhibit B. (Additionally, Request No. 14 sought documents sufficient to identify channels of trade through which Applicant planned to sell goods in connection with the VITAMINDFUL mark and Request No. 15 sought documents sufficient to identify the geographic regions in the United States in which Applicant planned to sell goods in connection with the VITAMINDFUL mark).

In response to Request Nos. 5, 10, 13, 14, 15, and others, Applicant indicated that there were no responsive documents. A true and correct copy of Applicant's responses to the Document Requests is attached hereto as Exhibit C (indicating "None" for 17 out of 26 responses). These

requests specifically sought information regarding Applicant's intended use of the VITAMINDFUL mark.

In response to the twenty-six Document Requests, Applicant's counsel produced only eight pages, all of which clearly came directly from counsel's files, as opposed to Applicant's files. A true and correct copy of Applicant's document production is attached hereto as Exhibit D. These documents relate solely to Applicant's counsel's trademark clearance search (which, incidentally, cite Market America's registered trademark as a barrier to registration), and none to Applicant's intent to use the VITAMINDFUL mark in U.S. commerce. Applicant's lack of documentary evidence supports a finding of no *bona fide* intent. See *Future Ads LLC v. Anderson*, 2014 WL 1649331, *9 (T.T.A.B. 2014).

Subsequent to his receipt of a cease and desist notice from Market America, but before Market America filed the instant proceeding, Applicant spoke directly with counsel for Market America, and sent a follow up e-mail to Market America, in which he indicated explicitly: "I have no position at this point in time about what to do with the mark 'Vitamindful'" and "I have no intention to use the mark at all, ie, not promoting it, and will remove the Youtube [*sic*] videos thank you for reminding me about it." Declaration of Ryan S. Luft ("Luft Dec."), dated May 25, 2016, Attachment A. More recently, in an e-mail to his counsel, copying Market America, Applicant stated: "I may change my mind later on and partner with someone to sell Vitamindful, or whatever." Luft Dec., Attachment B.

Applicant's own words, his lack of production of documentary evidence in response to the Document Requests, and his meager answers to the Interrogatories, which indicate only an "[i]ntent to produce multivitamins" and an "[i]ntent to use", all provide objective proof that Applicant has no evidence in connection with his purported intent to use the VITAMINDFUL

mark. It is not sufficient that Applicant's intent at the time of filing was merely to reserve a right in the mark to do something with it in the future. *See* Exhibit G, *PRL USA* at 3; *Tekni-Plex*, 2015 WL 8966287 at *2 (applicant's *bona fide* intent to use the mark must reflect an intention that is firm, and not merely to reserve a right in a mark); *Future Ads*, 2014 WL 1649331 at *6 (applicant was merely attempting to reserve a general right in the mark for potential use on some undetermined goods at some indefinite time in the future). A true and correct copy of the Interrogatories is attached hereto at Exhibit E; Applicant's responses to the Interrogatories are attached hereto as Exhibit F.

The facts as established by Applicant's discovery responses in this matter indicate that:

1. Applicant has engaged in no business activities in connection with the VITAMINDFUL mark, other than to engage his trademark counsel to conduct a trademark search and file the Application and to purchase a domain name;
2. Applicant has engaged in no business development or planning in connection with the VITAMINDFUL mark;
3. Applicant has not identified any products on which he intends to use the VITAMINDFUL mark;
4. Applicant has provided no advertising or promotional materials regarding the VITAMINDFUL mark; and
5. Applicant has no documents that would support his alleged *bona fide* intent to use the VITAMINDFUL mark in commerce at the time the Application was filed (or at present).

The above facts demonstrate a *prima facie* case that Applicant lacked a *bona fide* intent to use the VITAMINDFUL mark as of the filing date of the Application by establishing that there is an absence of any documentary evidence on Applicant's part regarding such intent. *See Tekni-Plex*, 2015 WL 8966287 at *4. This case is remarkably similar to the *Tekni-Plex* case:

Here, Applicant has not proffered evidence to demonstrate that it ever had a *bona fide* intention to use the marks EDGEPULL and EDGEPEEL on or in connection with the products it identified in its applications. Applicant has not come forward with evidence indicating, for example, current business plans, ongoing discussions, or promotional activities to corroborate its claim of a *bona fide* intent to use either EDGEPULL or EDGEPEEL in commerce. In sum, Applicant has produced no evidence supporting or confirming the *bona fide* intent to use the mark in commerce which it asserted in its two involved applications.

Id.; *see also* Exhibit G, *PRL USA* at 14 (“Because there is no documentary evidence of applicant’s *bona fide* intent to use applicant’s mark in commerce to identify his goods at the time he filed his application, and applicant has not come forth with any evidence to explain his lack of documentary evidence, the Board cannot conclude that applicant had a *bona fide* intent to use his mark at the time of filing the application.”).

Summary judgment may be granted in Market America’s favor once it shows an absence of evidence to support Applicant’s case. *See Sweats Designs*, 833 F.2d at 1563. In this case, the absence of such evidence has been all but conceded by Applicant. Market America respectfully asserts that it has established that there is no genuine dispute of material fact as to Applicant’s lack of *bona fide* intent to use the VITAMINDFUL mark as of the filing date of the Application.

CONCLUSION

For the foregoing reasons, Market America requests that the Trademark Trial and Appeal Board grant its Motion for Summary Judgment, sustain Market America's opposition to the VITAMINDFUL mark, and refuse to register the VITAMINDFUL mark on the grounds that the Application was void *ab initio* for lack of *bona fide* intent to use the VITAMINDFUL mark in commerce at the time of filing of the Application.

Dated: May 24, 2016

Respectfully submitted,



Ryan S. Luft

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Motion for Summary Judgment was served upon Luciano Sztulman M.D., Inc., through its counsel of record, by U.S. mail on May 24, 2016 at the following address:

ROBERT SALTER, ESQ.
SALTER & MICHAELSON
321 SOUTH MAIN ST SUITE 500
PROVIDENCE, RI 02903



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EXHIBIT A

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

In the matter of trademark application Serial No. 86469018

For the mark VITAMINDFUL

Published in the Official Gazette on September 15, 2015

Market America, Inc.,

Opposer,

v.

Luciano Sztulman M.D., Inc.,

Applicant.

SECOND AMENDED NOTICE OF OPPOSITION

The above-identified opposer (“Market America”) believes that it will be damaged by registration of the mark shown in the above-identified application, and hereby opposes the same.

The grounds for opposition are as follows:

COUNT ONE: LIKELIHOOD OF CONFUSION

1. The applicant, Luciano Sztulman M.D., Inc. (“Applicant”) filed a trademark application assigned Application Serial No. 86469018 in the United States Patent and Trademark Office (“PTO”) on December 2, 2014 (the “Application”) to register the mark VITAMINDFUL for use in connection with “Vitamins” in International Class 005 (“Applicant’s Mark”).

2. The Application is based on Applicant’s intent to use the mark. On information and belief, at the time Applicant filed the Application, Applicant did not have actual use of Applicant’s Mark as a trademark with the goods and services identified above.

3. The Application was published for opposition in the *Official Gazette* on September 15, 2015. Market America obtained an extension of time to oppose the Application to November 14, 2015. Thus, this Opposition is timely filed with respect to the Application.

4. Market America is now and has for over ten years been engaged in the development, marketing, advertising, distribution, and sale of dietary supplements bearing the VITA-MIND® trademark, and various other products and services related or complementary thereto.

5. Since at least August 1, 2002, Market America has used the trademark VITA-MIND in connection with dietary supplements and various other products and services related or complementary thereto, and owns a trademark registration for and common law rights to the VITA-MIND trademark.

6. Market America's VITA-MIND trademark was registered with the Patent & Trademark Office on April 26, 2002, Registration No. 2944356, for "Nutritional Supplement for mental acuity and alertness."

7. Through Market America's long, extensive, and continuous use of the VITA-MIND trademark, the VITA-MIND trademark is and has become a valuable asset of Market America, identifying its dietary supplements and various other products and services related or complementary thereto, and distinguishes Market America's products and services from the products and services of others. The public has come to recognize the VITA-MIND trademark as being uniquely associated with Market America.

8. The VITA-MIND trademark has been used continuously in interstate commerce on and in connection with Market America's dietary supplements and various other products and

services related or complementary thereto since long before the filing date of the Application to register VITAMINDFUL.

9. Applicant's Mark, VITAMINDFUL, so resembles Market America's trademark, VITA-MIND, as to be likely, when applied to the goods and services of the Application, to cause confusion, mistake, or deception among purchasers, users, and the public, thereby damaging Market America. Indeed, Applicant's Mark, VITAMINDFUL is confusingly similar in sound and appearance to Market America's trademark, VITA-MIND, and indeed, Applicant's Mark incorporates Market America's trademark, adding only "FUL" to the end.

10. The goods and services for which Applicant indicates its intent to use the VITAMINDFUL mark are identical or substantially similar to, used for the same or similar purposes, and/or will be advertised and promoted to and directed at the same trade channels, the same purchasers, and/or are or will be used in the same environment as Market America's products and related goods and services.

11. As a result of the similarity of the parties' trademarks, the similarity of the goods and services associated with the trademarks, the similarity of trade channels and environment, and the strength of Market America's VITA-MIND trademark, Applicant's registration and use of the Applicant's Mark would likely create confusion, mistake, or deception in the minds of prospective purchasers as to the origin or source of the goods and services.

12. Prospective purchasers are likely to mistakenly believe that Applicant's goods and services are sponsored by, authorized, endorsed, affiliated with, or otherwise approved by Market America because Applicant's VITAMINDFUL mark is confusingly similar to Market America's VITA-MIND trademark.

13. If Applicant is permitted to registered its VITAMINDFUL mark for the goods and services described in the Application, Market America will suffer damage or injury by, among other things, the resulting confusion of prospective purchasers due to the similarity of the goods and services associated with the trademarks, and the similarity of trade channels and environment; and the resultant dilution through blurring, tarnishing, and/or the lessening of the capacity of Market America's VITA-MIND trademark to identify and distinguish its goods bearing the VITA-MIND trademark.

14. For the foregoing reasons, the registration sought by Applicant is contrary to the provisions of Section 2 of the Lanham Act, and Market America believes that it would be damaged thereby.

COUNT TWO: LACK OF *BONA FIDE* INTENT

15. Market America re-alleges and incorporates the allegations contained in the prior paragraphs of the Second Amended Notice of Opposition as if fully set forth herein.

16. During discovery of this matter, Applicant failed to produce documentary or other evidence of its *bona fide* intent to use Applicant's Mark in commerce at the time of filing the Application, or any time thereafter.

17. Upon information and belief, at the time Applicant filed the Application, he lacked a *bona fide* intent to use Applicant's Mark in U.S. commerce in connection with the goods identified in the Application, as required by 15 U.S.C. § 1051(b).

18. Accordingly, Applicant should be precluded from registering Applicant's Mark for the additional reason that Applicant lacked a *bona fide* intent to use the mark in U.S. commerce in connection with the goods identified in the application at the time of filing, as required by Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b)

19. WHEREFORE, Market America respectfully requests that registration of Applicant's Mark be refused, and that this Opposition be sustained in favor of Market America.

Dated: May 24, 2016

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Ryan S. Luft". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

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N.C. Bar No. 35717
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Market America, Inc.'s Second Amended Notice of Opposition was served upon Luciano Sztulman M.D., Inc., through its counsel of record, by U.S. mail on May 24, 2016 at the following address:

ROBERT SALTER, ESQ.
SALTER & MICHAELSON
321 SOUTH MAIN ST SUITE 500
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EXHIBIT B

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

In the matter of trademark application Serial No. 86469018

For the mark VITAMINDFUL

Published in the Official Gazette on September 15, 2015

Market America, Inc.,
Opposer,

v.

Luciano Sztulman M.D., Inc.,
Respondent.

Opposition No. 91224818

**OPPOSER MARKET AMERICA, INC.'S FIRST SET OF DOCUMENT REQUESTS
TO RESPONDENT LUCIANO SZTULMAN M.D., INC.**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Market America, Inc. (“Market America”) hereby requests that Respondent, Luciano Sztulman M.D., Inc. (“Respondent”) respond to the following requests for the production of documents by providing written responses thereto and producing for inspection and copying the documents requested herein at the offices of Market America’s attorneys, Ryan S. Luft, PLLC, Attn: Ryan S. Luft, Esq., 5603-B West Friendly Ave., PMB 146, Greensboro, North Carolina 27410, within thirty (30) days of service of this request.

DEFINITIONS

1. “Market America” means Market America, Inc., the opposer in the above-captioned proceeding.

2. "Respondent", "you," or "your" means Luciano Sztulman M.D., Inc., its subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which it may be a party, and/or each of the foregoing entities' employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at any time during the relevant time period specified herein.

3. "Challenged Mark" means the mark that is the subject of U.S. Trademark Application Serial No. 86469018 and this proceeding.

4. "Document" is synonymous in meaning and equal in scope to its usage in FRCP 34(a)(1)(A). The term "document" refers to any document now or at any time in Respondent's possession, custody, or control. A person is deemed in control of a document if the person has any ownership, possession, or custody of the document, or the right to secure the document or a copy thereof from any person or public or private entity having physical possession thereof.

5. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

6. "Concerning" means consisting of, referring to, relating to, reflecting, or being in any way logically or factually connected with the matter discussed.

7. "Mark" means any word, name, symbol, or device or any combination thereof.

8. A reference to a "person" includes an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association, or other entity and includes all of that person's principals, employees, agents, attorneys, consultants, and other representatives.

9. The terms "and" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the request all responses that might otherwise fall outside

the scope of this request.

10. The terms “all,” “any,” or “each” encompass any and all of the matter discussed.
11. The use of singular form includes plural, and *vice versa*.
12. The use of present tense includes past tense, and *vice versa*.

INSTRUCTIONS

1. All documents are to be produced as they are kept in the usual course of business with any identifying labels, file markings, or similar identifying features, or shall be organized and labeled to correspond to the categories requested herein. If there are no documents in response to a particular request or if you withhold any responsive documents or categories of documents based on any objections, you shall state so in writing.

2. Electronically stored information (ESI) must be produced in its original native format with its accompanying metadata. For example:

- (a) documents created using Microsoft Word must be produced as .doc files; and
- (b) e-mails must be produced in a form that readily supports import into standard email client programs (e.g., .msg or .pst files).

3. These requests call for the production of all responsive documents in your possession, custody, or control, or in the possession, custody, or control of your employees, predecessors, successors, parents, subsidiaries, divisions, affiliates, partners, joint venturers, brokers, accountants, financial advisors, representatives, and agents or other persons acting on your behalf, without regard to the physical location of such documents.

4. In responding to these requests, include documents obtained on your behalf by your counsel, employees, agents, or any other persons acting on your behalf. If your response is that the documents are not within your possession or custody, describe in detail the unsuccessful efforts

you made to locate each such document. If your response is that documents are not under your control, identify who has the control and the location of the documents.

5. If any document was, but no longer is, in your possession, subject to your control, or in existence, include a statement:

- (a) identifying the document;
- (b) describing where the document is now;
- (c) identifying who has control of the document;
- (d) describing how the document became lost or destroyed or was transferred; and
- (e) identifying each of those persons responsible for or having knowledge of the loss, destruction, or transfer of this document from your possession, custody, or control.

6. Each request contemplates production of all documents in their entirety. If a portion of a document is responsive to one or more requests, the document shall be produced in its entirety.

7. If any document is withheld in whole or in part for any reason including, without limitation, a claim of privilege or other protection from disclosure such as the work product doctrine, business confidentiality, or trade secret protection, set forth separately with respect to each such document:

- (a) the ground of privilege or protection claimed;
- (b) each and every basis under which the document is withheld;
- (c) the type of document;
- (d) its general subject matter;
- (e) the document's date; and
- (f) other information sufficient to enable a full assessment of the applicability of the privilege or protection claims, as required by FRCP 26(b)(5) and TBMP § 406.04(c).

8. To the extent you assert that a document contains information that should be protected from disclosure (based on the attorney-client privilege, work product doctrine, or another protection) and non-privileged information, the non-privileged portions of the document must be produced. For each such document, indicate the portion of the document withheld by stamping the words "MATERIAL REDACTED" on the document in an appropriate location that does not obscure the remaining text.

9. Unless otherwise stated herein, all document requests apply to activities in or in connection with the United States.

10. For the convenience of the Board and the parties, each document request should be quoted in full immediately preceding the response.

11. These requests are continuing, and your response to these requests must be promptly supplemented when appropriate or necessary in accordance with Federal Rule of Civil Procedure 26(e) and TBMP 408.03.

DOCUMENT REQUESTS

1. All Documents identified in Respondent's initial disclosures in this proceeding.
2. All Documents identified in response to Market America's First Set of Interrogatories to Respondent Luciano Sztulman M.D., Inc., dated February 24, 2016.
3. All Documents relied upon by Respondent in drafting its Answer in this proceeding.
4. All Documents concerning Respondent's consideration, selection, conception, creation, or adoption of the Challenged Mark for use on or in connection with any goods or services.
5. Documents sufficient to identify all persons who were responsible for, participated in, or have information or were consulted concerning the consideration, selection, conception, creation, or adoption of the Challenged Mark for use on or in connection with any of Respondent's goods or services.
6. Documents sufficient to show the circumstances of Respondent's first use of the

Challenged Mark anywhere in the United States, including, but not limited to, the time, place, and manner of such use.

7. Documents sufficient to show the circumstances of Respondent's first use of the Challenged Mark in United States commerce, including, but not limited to, the time, place, and manner of such use.

8. All Documents concerning United States Trademark Application Serial No. 91224818, including, but not limited to, all Documents concerning the decision to file the application and copies of all documents submitted to or received from the United States Patent and Trademark Office in connection with the application.

9. All Documents concerning any state trademark registrations sought or obtained by Respondent for the Challenged Mark, including, but not limited to, copies of all documents submitted to or received from any state trademark registration agency.

10. Documents sufficient to identify all goods and services actually or planned or intended to be sold, offered, or licensed by Respondent under or in connection with any Challenged Mark.

11. Documents sufficient to identify all words, terms, phrases, and other designations used by Respondent to categorize, describe, or define the goods and services actually or intended to be sold, offered, or licensed by Respondent under or in connection with the Challenged Mark.

12. All Documents concerning any assessment, evaluation or consideration by Respondent of how to categorize, describe, or define the goods and services actually or planned or intended to be sold, offered, provided, or licensed under or in connection with the Challenged Mark.

13. Documents sufficient to show any plans for development or expansion of the goods or services that are offered, sold, provided, or licensed in connection with the Challenged Mark.

14. Documents sufficient to identify all channels of trade through which Respondent advertises, promotes, distributes, sells, offers, or licenses, or plans to advertise, promote, distribute, sell, offer, or license, any goods or services under or in connection with the Challenged Mark, including, but not limited to, documents identifying the distributors, retail, or other business outlets that offer or will offer Respondent's goods or services in connection with the Challenged Mark.

15. Documents sufficient to identify the geographic regions in the United States in which Respondent has or has caused to be advertised, promoted, distributed, sold, offered, or licensed, or plans or intends to advertise, promote, distribute, sell, offer, or license, any goods or services under or in connection with the Challenged Mark.

16. Documents sufficient to show each visual, oral, and other manner in which Respondent has presented or authorized the presentation of the Challenged Mark, including, but not limited to, all pronunciations of and typestyles, fonts, typefaces, designs, shapes, graphics, and colors used for or in connection with the Challenged Mark.

17. Representative samples of each type of advertisement and promotional material (e.g., print, radio, television, brochures, catalogues, flyers, press releases, website pages, website banners, in-store displays, point-of-sale promotional items) that has displayed or that will display the Challenged Mark, including documents sufficient to show every manner of presentation of the Challenged Mark in each type of advertisement or promotional material.

18. Representative samples of all tags, labels, signs, and packaging that have displayed or that will display the Challenged Mark, including documents sufficient to show every manner of presentation of the Challenged Mark in such materials.

19. All newspaper, magazine, newsletter, trade journal, website, and other media coverage, in any form or medium (print, electronic, or other), concerning any Challenged Mark, whether or not authored by any official member of the press.

20. Documents sufficient to identify all persons actually or intended to be employed, retained, or engaged by Respondent to advertise or promote the Challenged Mark or any goods or services under or in connection with the Challenged Mark.

21. Documents sufficient to identify the target purchasers or potential purchasers of goods or services actually or planned or intended to be sold, offered, distributed, or licensed by Respondent under or in connection with the Challenged Mark.

22. All Documents concerning or identifying any person to or with whom Respondent has marketed, sold, offered, distributed, or licensed, or intends to market, sell, offer, distribute or license any goods or services under or in connection with any Challenged Mark.

23. All Documents concerning any observations, perceptions, impressions, or inquiries of any person as to whether the goods or services actually or planned to be sold, offered, provided, or licensed by or on behalf of Respondent under or in connection with the Challenged Mark are produced, sponsored, or endorsed by, or in any manner associated or affiliated with, Market America or any goods or services offered under or in connection with any trademark of Market America.

24. Documents sufficient to identify all third parties that did, do or will manufacture, sell, offer, distribute or license goods or services under or in connection with the Challenged Mark.

25. Documents sufficient to show all third party marks of which Respondent is aware that resemble or are similar to the Challenged Mark or any trademark of Market America and that are used or registered in connection with vitamins or dietary or nutritional supplements.

26. To the extent not produced in response to the foregoing requests, all Documents that support or refute Respondent's defense of this proceeding, including, but not limited to, any Documents that support or refute any factual allegations or legal theories or conclusions Respondent has presented or relied on or intends to present or rely on in connection with such defense.

Dated: February 24, 2016

Respectfully submitted,



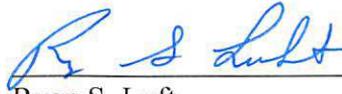
Ryan S. Luft

RYAN S. LUFT, PLLC
5603-B West Friendly Ave., PMB #146
Greensboro, North Carolina 27410
Telephone: (336) 638-1789
Facsimile: (336) 464-2599
Email: ryan@luftlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Market America, Inc.'s First Set of Document Requests was served upon Luciano Sztulman M.D., Inc., through its counsel of record, by U.S. mail on February 24, 2016 at the following address:

ROBERT SALTER, ESQ.
SALTER & MICHAELSON
321 SOUTH MAIN ST SUITE 500
PROVIDENCE, RI 02903



Ryan S. Luft

RYAN S. LUFT, PLLC
5603-B West Friendly Ave., PMB #146
Greensboro, North Carolina 27410
Telephone: (336) 638-1789
Facsimile: (336) 464-2599
Email: ryan@luftlaw.com

EXHIBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before the Trademark Trial and Appeal Board

Market America, Inc.,	:	
Opposer,	:	Opposition #91224818
vs.	:	TM: VITAMINDFUL
Luciano Sztulman M.D.,Inc.,	:	Serial #86/469018
Applicant.	:	

**APPLICANT’S RESPONSES TO OPPOSER’S FIRST SET OF DOCUMENT
REQUESTS**

1. Being produced. The file wrapper of Applicant’s instant application and other co-existing registrations having the word VITAMIN therein is available in TESS federal trademark database.
2. Being produced.
3. Being produced.
4. Produced in response to #1 above.
5. None.
6. N/A
7. N/A
8. Produced in response to #1 above.
9. None
10. None.
11. None
12. None
13. None.
14. None.
15. None.
16. None
17. None.
18. None.
19. None.
20. None.

- 21. None.
- 22. None.
- 23. None.
- 24. None.
- 25. Produced in response to #1 above.
- 26. Produced in response to #1 above.

Dated: May 5, 2016

Respectfully submitted,



Robert S. Salter

SALTER & MICHAELSON
321 South Main Street
Providence, RI 02903-7128
Tel : 401.421.3141
Fax : 401.861.1953
email : rsalter@saltermichaelson.com

CERTIFICATE OF SERVICE

This will hereby certify that a copy of the foregoing APPLICANT'S RESPONSES TO OPPOSER'S FIRST SET OF DOCUMENT REQUESTS has been served on Opposer's attorney on the fifth day of May, 2016, by transmitting a copy thereof to Ryan S. Luft, via email at ryan@luftlaw.com.



Certifier

EXHIBIT D

C 7005223 C

Robert S. Salter, Esq.

From: obgynne <obgynne@yahoo.com>
Sent: Tuesday, December 02, 2014 12:30 PM
To: Robert S. Salter, Esq.
Subject: Re: Trademark Search: VITAMINDFUL

go ahead please

Luciano Sztulman MD, FACS, FACOG
Eastside Obstetrics and Gynecology
Medical Director, Skinsational Liposculpture, Providence Hair Restoration
One Randall Square, Suite 401, Providence, RI 02904
Tel (401) 521-1006 Fax (401) 521-1009
Please visit: www.skisationalri.com - www.hairtransplantri.com - www.beautyispower.us

This communication is for discussion purposes only and does not create any obligation to negotiate or enter into a binding agreement.

From: "Robert S. Salter, Esq." <rsalter@saltermichaelson.com>
To: 'obgynne' <obgynne@yahoo.com>
Sent: Tuesday, December 2, 2014 12:27 PM
Subject: Trademark Search: VITAMINDFUL

Dear Luciano- Attached are the results of the above-identified search.

Of interest is Reg. # 2944356 for the mark VITA-MIND used in connection with nutritional supplements for mental acuity and alertness. Based on the existence of this prior registration I could not guarantee that we could successfully obtain registration for your proposed use of VITAMINDFUL in connection with vitamins. I would estimate fifty percent (50%) chance of successfully obtaining registration. Let me know if you would like us to file an application in an attempt to obtain registration.

Sincerely,
Robert S. Salter, Esq
rsalter@saltermichaelson.com
SALTER & MICHAELSON
The Heritage Building
321 South Main Street
Providence, RI. 02903-7128
401.421.3141 Fax: 401.861.1953

This e-mail message and any attachments may contain confidential or privileged information. If you are not the intended recipient, please notify me immediately by replying to this message, and destroy all copies of this message and attachments.

From: obgynne [mailto:obgynne@yahoo.com]
Sent: Monday, December 01, 2014 3:10 PM
To: Robert Salter
Subject: Re: Trademark



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VITAMINDOCTOR

Word Mark VITAMINDOCTOR
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Vitamin and mineral preparations for medical use. FIRST USE: 20060511. FIRST USE IN COMMERCE: 20071207
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Serial Number 78881073
Filing Date May 11, 2006
Current Basis 1A
Original Filing Basis 1B
Published for Opposition July 24, 2007
Registration Number 3442762
Registration Date June 3, 2008
Owner (REGISTRANT) Marshall, Richard Keith INDIVIDUAL UNITED STATES 420 Primrose Drive Greensburg PENNSYLVANIA 15601
Attorney of Record LEE R. GOLDEN
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE



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Word Mark	VITAMINDEAL
Goods and Services	IC 035. US 100 101 102. G & S: On-line retail store services featuring vitamins, food supplements, mineral supplements, herbal supplements, homeopathic supplements, nutritional supplements, appetite suppressants, meal replacement shakes, nutritional bars, cosmetics, fragrance, perfumes, colognes, pet food, pet supplies, pet accessories, body jewelry, lingerie, and consumer computer hardware products. FIRST USE: 20090120. FIRST USE IN COMMERCE: 20090120
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.05.04 - Sun with rays but neither partially exposed nor with facial features
Trademark Search Facility Classification Code	NOTATION-SYMBOLS Notation Symbols such as Non-Latin characters,punctuation and mathematical signs,zodiac signs,prescription marks SHAPES-ASTRO Astronomical shapes consisting of celestial bodies, globes and geographical maps SHAPES-BAR-BANDS Designs with bar, bands or lines SHAPES-CIRCLE Circle figures or designs including semi-circles and incomplete circles SHAPES-MISC Miscellaneous shaped designs
Serial Number	77489199
Filing Date	June 2, 2008
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	October 28, 2008 3693638

**Registration
Number**

**Registration
Date** October 6, 2009

Owner (REGISTRANT) Jumbohut Inc. DBA VitaminDeal CORPORATION CALIFORNIA 1142 S. Diamond
Bar Blvd. Diamond Bar CALIFORNIA 91765

**Description of
Mark** Color is not claimed as a feature of the mark. The mark consists of the mark consists of the word
"VitaminDeal" with a symbolize glowing sun to the left of the word.

Type of Mark SERVICE MARK

Register PRINCIPAL

**Live/Dead
Indicator** LIVE

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Typed Drawing

Word Mark	VITA MINDER
Goods and Services	IC 021. US 002. G & S: CONTAINERS FOR VITAMINS. FIRST USE: 19751201. FIRST USE IN COMMERCE: 19751201
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	73102434
Filing Date	October 7, 1976
Current Basis	1A
Original Filing Basis	1A
Registration Number	1080388
Registration Date	December 27, 1977
Owner	(REGISTRANT) KIRSTINE-HENDRICKS DBA VITAMINDER COMPANY CORPORATION CALIFORNIA 311 OTTERSON DRIVE, SUITE 10 CHICO CALIFORNIA 95928 (LAST LISTED OWNER) FIT & FRESH, INC. CORPORATION INDIANA 201 W. 103RD STREET, STE. 200 INDIANAPOLIS INDIANA 46290
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Raymond M. Mehler
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20080105.
Renewal	2ND RENEWAL 20080105
Live/Dead Indicator	LIVE



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Typed Drawing

Word Mark	VITAMINDE
Goods and Services	IC 005. US 018. G & S: VITAMIN AND MINERAL SUPPLEMENT FOR DRY FEED FOR LIVESTOCK, POULTRY, AND DEER. FIRST USE: 19661122. FIRST USE IN COMMERCE: 19661201
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	73196976
Filing Date	December 15, 1978
Current Basis	1A
Original Filing Basis	1A
Registration Number	1134430
Registration Date	May 6, 1980
Owner	(REGISTRANT) FLINT RIVER MILLS, INC. CORPORATION FLORIDA P. O. BOX 280 BAINBRIDGE GEORGIA 39818
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	BRIAN M. DAVIS
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20090912.
Renewal	2ND RENEWAL 20090912
Live/Dead Indicator	LIVE



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Record 1 out of 1

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VITAMINID

Word Mark	VITAMINID
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Vitamins, minerals, and dietary supplements. FIRST USE: 20090901. FIRST USE IN COMMERCE: 20090901
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Trademark Search Facility Classification Code	LETS-2 ID Two letters or combinations of multiples of two letters
Serial Number	77852191
Filing Date	October 19, 2009
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	March 2, 2010
Registration Number	3790222
Registration Date	May 18, 2010
Owner	(REGISTRANT) Pharmavite LLC LIMITED LIABILITY COMPANY CALIFORNIA P.O. Box 9606 Mission Hills CALIFORNIA 913469606
Attorney of Record	Stanley W. Sokoloff

Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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EXHIBIT E

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

In the matter of trademark application Serial No. 86469018

For the mark VITAMINDFUL

Published in the Official Gazette on September 15, 2015

Market America, Inc.,

Opposer,

v.

Luciano Sztulman M.D., Inc.,

Respondent.

Opposition No. 91224818

**OPPOSER MARKET AMERICA, INC.'S FIRST SET OF INTERROGATORIES
TO RESPONDENT LUCIANO SZTULMAN M.D., INC.**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Opposer, Market America, Inc., hereby requests that Respondent, Luciano Sztulman M.D., Inc., serve upon the undersigned attorneys at 5603-B West Friendly Ave., PMB 146, Greensboro, North Carolina 27410 answers, under oath, to each of the following interrogatories within thirty (30) days of service of these interrogatories.

DEFINITIONS

1. "Market America" means Market America, Inc., the opposer in the above-captioned proceeding.

2. "Respondent", "you," or "your" means Luciano Sztulman M.D., Inc., its subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which it may be a party, and/or each of the foregoing entities' employees, agents,

officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at any time during the relevant time period specified herein.

3. “Challenged Mark” means the mark that is the subject of U.S. Trademark Application Serial No. 86469018 and this proceeding.

4. “Concerning” means consisting of, referring to, relating to, reflecting, concerning, or being in any way logically or factually connected with the matter discussed.

5. “Communication” means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

6. “Date” means the exact day, month, and year if ascertainable, or, if not, the best available approximation (including relationship to other events).

7. “Describe” means set forth fully and unambiguously every fact relevant to the subject of the interrogatory, of which you (including your agents and representatives) have knowledge or information.

8. “Document” is synonymous in meaning and equal in scope to its usage in FRCP 34(a)(1)(A). The term “document” refers to any document now or at any time in Respondent’s possession, custody, or control. A person is deemed in control of a document if the person has any ownership, possession, or custody of the document, or the right to secure the document or a copy thereof from any person or public or private entity having physical possession thereof.

9. “Identify” with respect to a person who is an individual means to state that person’s full name, present or last known address, and current or last known place of employment.

10. “Identify” with respect to a person that is not an individual means to state its: full name, legal form, date of organization, state of incorporation or organization or other business or license authority, present or last known address and telephone number, and the identity of its chief

executive officer, partners, or persons in equivalent positions.

11. “Identify” with respect to a document means to give, to the extent known, the (a) type of document; (b) general subject matter; (c) date of the document; and (d) author(s), addressee(s) and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Rule 33 of the Federal Rules of Civil Procedure.

12. “Identify” with respect to communications means to give, to the extent known, (a) a description of the substance of the communication; (b) the form of the communication (e.g., telephone, facsimile, email, etc.); (c) the identity of each person that was a party to and/or present at the time of the communication, as well as the full name, present or last known address, and the current or last known place of employment of each person; (d) the identity of the person whom you contend initiated the communication; and (e) the time, date, and place of the communication.

13. The term “mark” means any word, name, symbol, or device (including any key word or metatag) or any combination thereof.

14. The term “person” means any natural person or any legal entity, including, but not limited to, any business or governmental entity, organization, or association.

15. The terms “and” and “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the interrogatory all responses that might otherwise fall outside the scope of this interrogatory.

16. The terms “all,” “any,” or “each” encompass any and all of the matter discussed.

17. The use of singular form includes plural, and vice versa.

18. The use of present tense includes past tense, and vice versa.

19. The masculine form shall also be construed to include the feminine and vice versa.

INSTRUCTIONS

1. Answers to these interrogatories shall be served upon the undersigned attorneys at 5603-B West Friendly Ave., PMB 146, Greensboro, North Carolina 27410 within thirty (30) days of service of these interrogatories.

2. Each interrogatory is to be answered fully based on information in your possession, custody, or control, or in the possession, custody, or control of your representatives, agents, or attorneys.

3. If you object to any interrogatory or any portion of an interrogatory on the ground that the answer reflects or would reveal the substance of a privileged communication, identify:

- (a) the nature of the privilege claimed;
- (b) the person who made the communication, whether oral or in writing;
- (c) if the communication was oral, all persons present while the communication was made;
- (d) if the communication was written, the author, addressees, and any other recipients;
- (e) the relationship of the author of the communication to each recipient;
- (f) the relationship of the persons present to the person who made the communication;
- (g) the date and place of the communication; and
- (h) the general subject matter of the communication.

4. Unless otherwise stated herein, these interrogatories apply to activities in or in connection with the United States.

5. If you respond to an interrogatory by reference to documents pursuant to Federal Rule of Civil Procedure 33(d), identify the documents with specificity, including by identifying the applicable Bates Number range to the extent the documents are produced in response to document requests in this proceeding.

6. For the convenience of the Board and the parties, each interrogatory should be quoted in full immediately preceding the response.

7. These interrogatories are continuing in nature. If you receive or otherwise become aware of information responsive to any interrogatory after you have served your answers to these interrogatories, you must promptly supplement your answers to these interrogatories to provide such information, as required by Federal Rule of Civil Procedure 26(e) and TBMP § 408.03.

INTERROGATORIES

1. Describe in detail the facts and circumstances concerning your conception, creation, selection, and adoption of the Challenged Mark.

2. Identify all persons who were or are, responsible for or participated in, the conception, creation, selection, or adoption of the Challenged Mark.

3. Identify each trademark search, investigation, or any other inquiry conducted by or for Respondent concerning the availability to use or register the Challenged Mark.

4. Identify each person involved in the review of any trademark search, investigation, or other inquiry conducted by or for Respondent concerning the availability to use or register the Challenged Mark.

5. Identify by jurisdiction and registration or serial number any and all federal and state trademark registration(s) and application(s), whether current (including pending) or dead, for the Challenged Mark or any mark that resembles or incorporates the Challenged Mark in whole or in part.

6. Identify all goods and services that Respondent has offered for sale, sold, or provided under or in connection with the Challenged Mark in the United States.

7. For each good or service that you have offered, sold, or provided under or in connection with the Challenged Mark, state the date ranges of actual and planned use of the Challenged Mark in connection with the good or service, including the specific date of first use or intended first use of the mark for each good or service.

8. Describe the nature of any advertisements, promotional materials, and marketing materials (for example, newspaper advertisements, magazine advertisements, internet websites, television commercials, brochures), including by identifying the specific media in which Respondent is using, has used, or plans to use the Challenged Mark.

9. Identify all persons who were or are, responsible for or participated in, the marketing or advertising of any goods or services offered for sale, sold, or intended to be offered for sale or sold by or for Respondent under or in connection with the Challenged Mark.

10. Identify all website(s) displaying the Challenged Mark that are owned, operated, or controlled by Respondent, and all persons who were or are, responsible for or participated in, the creation and development of each website.

11. Describe all market research conducted by or on behalf of Respondent concerning the Challenged Mark or any goods or services marketed or proposed to be marketed under the Challenged Mark, including the results of such research.

12. Describe all channels of trade in the United States through which Respondent has offered for sale, sold, or intends to offer for sale or sell goods or services under or in connection with the Challenged Mark.

13. Describe all classes and/or types of customers (for example, age, gender, socioeconomic group) that comprise the intended market for goods or services offered for sale, sold, or intended to be offered for sale or sold under or in connection with the Challenged Mark.

14. Identify the geographic regions in the United States in which Respondent has or has caused to be advertised, promoted, marketed, displayed, distributed, offered for sale, or sold,

or plans or intends to advertise, promote, market, display, distribute, offer for sale, or sell, either directly or through others, any goods or services under or in connection with the Challenged Mark.

15. Identify by name and location all trade shows in the United States where goods or services under the Challenged Mark have been displayed, promoted, or sold.

16. Identify and describe all expenditures incurred by you in connection with the development, production, distribution, promotion, advertisement, and sale of any goods or services under the Challenged Mark, including by identifying the nature and amount of each expenditure.

17. Identify all persons that furnished information for the responses to these interrogatories, designating the number of each interrogatory for which such persons furnished information.

Dated: February 24, 2016

Respectfully submitted,



Ryan S. Luft

RYAN S. LUFT, PLLC
5603-B West Friendly Ave., PMB #146
Greensboro, North Carolina 27410
Telephone: (336) 638-1789
Facsimile: (336) 464-2599
Email: ryan@luftlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Market America, Inc.'s First Set of Interrogatories was served upon Luciano Sztulman M.D., Inc., through its counsel of record, by U.S. mail on February 26, 2016 at the following address:

ROBERT SALTER, ESQ.
SALTER & MICHAELSON
321 SOUTH MAIN ST SUITE 500
PROVIDENCE, RI 02903



Ryan S. Luft

RYAN S. LUFT, PLLC
5603-B West Friendly Ave., PMB #146
Greensboro, North Carolina 27410
Telephone: (336) 638-1789
Facsimile: (336) 464-2599
Email: ryan@luftlaw.com

EXHIBIT F

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before the Trademark Trial and Appeal Board
Opposition# 91224818
Serial No. 86469018

Market America, Inc.

Opposer,

vs.

Luciano Sztulman M.D., Inc.

Applicant,

Mark VITAMINDFUL
International Class : 005

Applicant's Answers to Opposer's Interrogatories

1. Develop a vitamin. The name was selected at random.
2. Dr. Luciano Sztulman.
3. Preliminary trademark search dated December 2, 2014.
4. Robert Salter, Esq. attorney for applicant.
5. The instant application Serial No. 86469018.
6. Intent to produce multivitamins.
7. Intent to use.
8. Intended marketing through the Internet is on hold pending the outcome of the instant Opposition Procedure.
9. Dr. Luciano Sztulman.
10. www.vitamindful.com; Dr. Luciano Sztulman

Opposition #91224818

11. Medical books, magazine and newspaper articles, Internet searching.
12. Internet, website and online sales.
13. Men and Women.
14. Worldwide.
15. None as of yet.
16. Attorney's fees and Domain name fees.
17. Dr. Luciano Sztulman 1-2 and 6-17. Robert Salter 3-5.

Respectfully submitted,
SALTER & MICHAELSON
ATTORNEYS FOR APPLICANT

By: 
Robert Salter

Dated: April 6, 2016
321 South Main Street
Providence, RI 02903
Tel : 401/421-3141
Fax : 401/861-1953
email : rsalter@saltermichaelson.com

CERTIFICATE OF SERVICE

This will hereby certify that a copy of the foregoing Answers to Interrogatories has been served on Opposer by e-mail to Ryan S. Luft, PLLC. attorney for Opposer, at Market America, Inc., 5603-B West Friendly Ave., PMB #146 Greensboro, North Carolina 27410, on the 7th day of April, 2016.



Certifier

EXHIBIT G

THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

COHEN

Mailed: October 16, 2013

Opposition No. 91206846

PRL USA Holdings, Inc.

v.

Rich C. Young

**Before Cataldo, Taylor, and Masiello,
Administrative Trademark Judges.**

By the Board:

Rich C. Young ("applicant") seeks to register the mark IRISH POLO CLUB USA and design depicted below ("applicant's mark"):



for "shirts" in International Class 25.¹

PRL USA Holdings, Inc. ("opposer") filed its notice of opposition to the registration of applicant's mark on the

¹ Application Serial No. 85477199 was filed November 19, 2011 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based on an assertion of a bona fide intent to use the mark in commerce.

grounds of likelihood of confusion and dilution.² Applicant submitted its answer,³ generally denying the allegations of the notice of opposition.

This case now comes up on the following motions:

1. Opposer's motion to amend its notice of opposition (filed July 8, 2013) to add a claim that applicant's application is void *ab initio* based on a lack of bona fide intent to use; and
2. Opposer's motion for summary judgment based on its claim of no bona fide intent to use (filed July 8, 2013).

Each motion has been fully briefed. The Board will consider each motion in turn.

Motion to amend

Opposer seeks to amend the notice of opposition to add a claim of lack of bona fide intent to use the mark in commerce. Applicant has opposed the motion.

² In support of these grounds opposer has claimed ownership of numerous registrations containing, *inter alia*, POLO, POLO RALPH

LAUREN and/or the design  and alleges that it uses "American iconography, including the words, 'USA' and 'America,'" in connection with its marks.

³ On November 11, 2012, applicant filed an "answer" in Opposition No. 91206846. To the extent that the November 11, 2012 "answer" does not comply with Fed. R. Civ. P. 8(b)(1), applicant's "answer" is treated as a general denial of all allegations of the notice of opposition. See Fed. R. Civ. P. 8(b)(3).

Amendments to pleadings in *inter partes* proceedings before the Board are governed by Fed. R. Civ. P. 15, which is made applicable to Board proceedings by Trademark Rule 2.116(a). See also TBMP § 507.01. Fed. R. Civ. P. 15(a) governs amendments before trial. Pursuant to Fed. R. Civ. P. 15(a)(2), where, as here, a party may not amend its pleading as a matter of course,

...a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

The Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties. See TBMP § 507.02.

The timing of the motion for leave to amend plays a large role in the Board's determination of whether the adverse party would be prejudiced by allowance of the proposed amendment. See, e.g., *United States Olympic Committee v. O-M Bread Inc.*, 26 USPQ2d 1221, 1222 (TTAB 1993) (applicant not prejudiced because proceeding still in pre-trial phase); *Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 USPQ2d 1316, 1318 (TTAB 1992) (motion to amend filed prior to opening of petitioner's

testimony period permitted); *Caron Corp. v. Helena Rubenstein, Inc.*, 193 USPQ 113 (TTAB 1976) (neither party had yet taken testimony); *Mack Trucks, Inc. v. Monroe Auto Equip. Co.*, 182 USPQ 511, 512 (TTAB 1974) (applicant would not be unduly prejudiced since no testimony has yet been taken); TBMP § 507.02(a). For example, the Board generally will grant such motions when the proceedings are still in the pre-trial stage. See, e.g., *Cool-Ray, Inc. v. Eye Care, Inc.*, 183 USPQ 618, 621 (TTAB 1974).

On review of the parties' arguments,⁴ the Board finds no evidence of undue delay by opposer in filing its motion to amend its pleading. Opposer alleges its motion is predicated on information learned during discovery, and there are no allegations that opposer unduly delayed filing its motion after learning the information in discovery.

Additionally, it appears unlikely that applicant will be prejudiced by allowance of the amendment. Trial has not yet begun and additional discovery does not appear to be necessary since neither party has requested additional

⁴ In applicant's response to opposer's motion to amend its notice of opposition, applicant appears to also move to amend some of his discovery responses. The parties have a duty to correct or supplement their discovery responses. See Fed. R. Civ. P. 26(e). To the extent applicant's request may be deemed a motion to amend his discovery responses, the motion is unnecessary. Applicant is under a duty to correct or supplement his discovery responses and may do so under his own initiative.

discovery. Indeed, opposer is seeking summary judgment on the additional ground of lack of bona fide intent to use in the amended pleading.

In view of the foregoing, opposer's motion to amend is hereby **GRANTED**. The amended notice of opposition included in opposer's motion shall be treated as opposer's operative pleading in this case.

Motion for Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. The Board may not resolve disputes of material fact; it may only ascertain whether such disputes are present. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

When the moving party has supported its motion with sufficient evidence which, if unopposed, indicates there is no genuine dispute of material fact, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009). The non-moving party, however, may not rest on the mere allegations of its pleadings and assertions, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. Consequently, factual assertions without evidentiary support are insufficient to defend against a motion for summary judgment. See *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1739 (TTAB 2001); and *S & L Acquisition Co. v. Helene Arpels Inc.*, 9 USPQ2d 1221, 1225 (TTAB 1987). For purposes of this motion, we deem all new allegations in the amended notice of opposition to be denied and a matter of dispute, unless the parties' submissions on this motion resolve such dispute by means of sufficient evidence.

We turn first to the issue of standing, a threshold issue that must be proven by a plaintiff in every *inter partes* case. See *Ritchie v. Simpson*, 170 F.3d 1092, 50

USPQ2d 1023 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987). The Board finds that there is no genuine dispute of material fact concerning opposer's standing. Opposer submitted a status and title copy of its pleaded registrations with its amended notice of opposition which sufficiently establishes its standing to bring this proceeding. See *Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1709 (TTAB 2011); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1408 (TTAB 2010). Moreover, applicant has not disputed opposer's standing.

Trademark Act Section 1(b), 15 U.S.C. Section 1051(b), states that "a person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" may apply for registration of the mark. An applicant's bona fide intent to use a mark must reflect an intention that is firm, though it may be contingent on the outcome of an event (that is, market research or product testing) and must reflect an intention to use the mark "in the ordinary course of trade, ... and not ... merely to reserve a right in a mark.'" *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993) (quoting Trademark Act Section 45, 15 U.S.C. Section 1127, and citing Senate Judiciary Comm. Rep. on S.

1883, S. Rep. No. 515, 100th Cong., 2d Sess. 24-25 (1988)).

A determination of whether an applicant has a bona fide intention to use the mark in commerce is an objective determination based on all the circumstances. *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008); see also *Aktieselskabet AF 12. November 2001 v. Fame Jeans Inc.*, 86 USPQ2d 1527, 1537-38 (D.C. Cir. 2008) ("Here, Congress made clear that a 'bona fide intent to use' also involves an objective standard by specifying there must be 'circumstances showing . . . good faith.' Thus, an opposer may defeat a trademark application for lack of bona fide intent by proving the applicant did not actually intend to use the mark in commerce or by proving the circumstances at the time of filing did not demonstrate that intent."). In determining the sufficiency of documentary evidence demonstrating bona fide intent, the Board has held that the Trademark Act does not expressly impose "any specific requirement as to the contemporaneousness of an applicant's documentary evidence corroborating its claim of bona fide intention. Rather, the focus is on the entirety of the circumstances, as revealed by the evidence of record." *Lane Ltd. v. Jackson International Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994).

As a general rule, the factual question of intent is unsuited to disposition on summary judgment. See *Copelands' Enterprises, Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 USPQ2d 1295 (Fed. Cir. 1991). Nonetheless, one way an opposer can establish its prima facie case of no bona fide intent is by proving that applicant has no documentary evidence to support its allegation in the application of its claimed bona fide intent to use the mark in commerce as of the application filing date. *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1727 (TTAB 2010). Where there is no evidence of an applicant's bona fide intent to use the mark at issue on the claimed goods or services, entry of summary judgment on a claim that the applicant had no bona fide intent to use the mark in commerce when he filed his involved application may be warranted. See *Honda Motor Co. v. Winkelmann*, 90 USPQ2d 1660 (TTAB 2009).

In support of its motion for summary judgment, opposer has submitted copies of its discovery requests and applicant's discovery responses. Opposer alleges, *inter alia*, that based on applicant's discovery responses, applicant did not have the required bona fide intent to use his mark at the time of filing his application. Specifically, opposer refers to applicant's responses to

interrogatories nos. 1, 3, 5-6, and 8-9.⁵ Those interrogatories ask, in general, that applicant identify, *inter alia*, the products to be sold under applicant's mark, applicant's general revenue and/or goods sold (without regard to whether the revenue or goods are in association with applicant's mark) in past years, and any market research conducted with respect to applicant's mark.

Applicant's response to each of these interrogatories is that he is in an "intention to use status" and that he does not have "any business planning yet." Opposer also

⁵ Those interrogatories are:

Interrogatory 1: Identify all Products offered or intended to be offered for sale by Applicant bearing Applicant's Mark.

Interrogatory No. 3: Identify all Persons responsible for inventing, creating, manufacturing, designing, and/or revising any Products that bear or will bear Applicant's Mark.

Interrogatory No. 5: Identify Applicant's total revenues from the sale and/or licensing of goods in 2011 and 2012.

Interrogatory No. 6: Identify the goods manufactured, sold and/or distributed by Applicant in 2011 and 2012.

Interrogatory No. 8: Identify all market research relating to Applicant's Mark or any product and/or service marketed or proposed to be marketed under Applicant's Mark.

Interrogatory No. 9: Identify all Persons with whom Applicant has entered or intends to enter into a license, contract or other agreement, including but not limited to coexistence agreements, regarding use of Applicant's Mark.

refers to applicant's lack of document production in response to document requests 2-4, and 6-8⁶ wherein opposer asks applicant, *inter alia*, to produce documents regarding his agreements, proposals or negotiations to sell and/or license his products under applicant's mark, manufacturing of goods with applicant's mark, and the types of product lines to be sold under applicant's mark. Applicant responds to those document requests by indicating no documents exist

⁶Those document requests are:

Document Request No. 2: All Documents that relate to the creation, selection, adoption and/or development of Applicant's Mark.

Document Request No. 3: All Documents concerning agreements, proposals or negotiations with any Person to license, produce, sell, offer for sale and/or distribute products bearing Applicant's Mark.

Document Request No. 4: All Documents concerning the manufacturing and/or planned manufacturing, including orders and/or samples, of Products that bear or will bear Applicant's Mark.

Document Request No. 6: All Documents concerning: (a) searches performed with respect to all trademarks considered for products bearing Applicant's Mark, and (b) opinions of counsel rendered regarding these marks.

Document Request No. 7: Documents sufficient to identify each different product and/or product line sold or intended to be sold by Applicant under Applicant's Mark.

Document Request No. 8: Documents sufficient to identify the scope and operation of Applicant's business, including but not limited to Documents showing total revenues and sales for the past three years and Documents showing distributors, manufacturers, and retailers with which Applicant does business.

apparently because he is in an "intention to use status" and does not "have any business planning yet" or that he does not "have business activities yet."

Opposer argues that these responses are evidence that applicant "has engaged in no relevant business activities or planning beyond his initial Application"; that applicant is not involved in any manufacturing, sale, licensing or distribution of any goods whatsoever; and that, therefore, applicant's application is void *ab initio* because applicant lacked the requisite bona fide intent to use applicant's mark at the time the application was filed.

In response to the motion for summary judgment, applicant argues, *inter alia*, that his interrogatory responses and lack of document production are a result of being in an "intention to use status" and not yet being open for business; that if the "Board approve[s] [applicant's mark for registration] . . . Applicant will made [sic] the Tee shirts, Polo shirts with [applicant's mark and] . . . will distribute through EBay and Amazon systems throughout [the] whole U.S.A."; that he will have all the documentary evidence required such as "business activities, business planning, identify or conceive which the mark intent to use [sic]" after the Board approves applicant's mark; and that therefore, his discovery

responses demonstrate his bona fide intent to use applicant's mark.

The record demonstrates that applicant has no documentary evidence of business plans, marketing or promotional activities, nor any discussions with manufacturers or licensees which could substantiate his claim of a bona fide intent to use applicant's mark in commerce as of the filing date of the application. *Cf. Lane Ltd. v. Jackson*, 33 USPQ2d 1351. Applicant has failed to produce any evidence of any current business, whether related to the goods listed in applicant's application or otherwise. His response to the motion for summary judgment does not include any objective evidence of "circumstances showing... good faith," and does not support a finding that his intent to use is bona fide.

The Board has "repeatedly found a lack of bona fide intent to use a mark by individuals who lack the demonstrated capacity to produce the goods identified in the application." *Swatch AG (Swatch SA) (Swatch Ltd.) v. M.Z. Berger & Co., Inc.*, ___ USPQ2d ___, (TTAB, Opposition No. 91187092, September 30, 2013); *see L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434 (TTAB 2012); *Saul Zaentz Co.*, 95 USPQ2d at 1726-27; *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1643 (TTAB 2007).

On this record, and upon careful consideration of the parties' arguments and the evidence submitted, we find that applicant's intent at the time he filed his application was "merely to reserve a right in the mark" in case it was later approved for registration by the USPTO; and that applicant would only at some unspecified future time begin developing a business. This is not a bona fide intent to use the mark in commerce as defined by Section 45 of the Trademark Act on the identified goods. See *Swatch AG v. M.Z. Berger*, ___ USPQ2d ___ (TTAB 2013). Applicant's mere statements of intent to use applicant's mark and his denial that he lacked a bona fide intent is not adequate evidence of a bona fide intent to use a mark. See *Saul Zaentz Co.*, 95 USPQ2d at 1726-27. Because there is no documentary evidence of applicant's bona fide intent to use applicant's mark in commerce to identify his goods at the time he filed his application, and applicant has not come forth with any evidence to explain his lack of documentary evidence, the Board cannot conclude that applicant had a bona fide intent to use his mark at the time of filing the application.

In view thereof, opposer has established that there is no genuine dispute of material fact as to applicant's lack of bona fide intent to use applicant's mark as of the filing date of the application. Accordingly, opposer's motion for

Opposition No. 91206846

summary judgment is **granted** on its claim of no bona fide intent to use the mark in commerce. The opposition is sustained under Trademark Act Section 1(b) and application Serial No. 85477199 is refused registration.

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

In the matter of trademark application Serial No. 86469018

For the mark VITAMINDFUL

Published in the Official Gazette on September 15, 2015

Market America, Inc.,

Opposer,

v.

Luciano Sztulman M.D., Inc.,

Respondent.

Opposition No. 91224818

DECLARATION OF RYAN S. LUFT, ESQ.

RYAN S. LUFT, pursuant to 28 U.S.C. § 1746 and Trademark Rule 2.20, does hereby declare as follows:

1. On November 4, 2015, I received an e-mail from Dr. Luciano Sztulman. A true and correct copy of that e-mail is attached hereto as Exhibit A.

2. On May 10, 2016, Dr. Sztulman copied me (and others) on an e-mail to his counsel. A true and correct copy of that e-mail is attached hereto as Exhibit B.

The undersigned, being duly warned that willful false statement and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of the declaration to which it pertains, declares that he is properly authorized to execute this declaration on behalf of the Opposer, Market America, Inc.; that all statement made of his own knowledge are true; and all statements made on information and belief are believed to be true.

EXECUTED ON MAY 24, 2016 AT GREENSBORO, NORTH CAROLINA



Ryan S. Luft

Re: FW: Trademark: VITAMINDFUL

1 message

obgynne <obgynne@yahoo.com>
Reply-To: obgynne <obgynne@yahoo.com>
To: Ryan Luft <ryan@luftlaw.com>
Cc: "jmorris@marketamerica.com" <jmorris@marketamerica.com>

Wed, Nov 4, 2015 at 5:46 PM

Mr. Luft,

This is the conclusion of our conversation:

1. I asked you to have the owner of the company contact me.
2. I have no position at this point in time about what to do with the mark "Vitamindful" and you will extend your proceedings (apologize for the incorrect terminology) so we continue to converse.
3. I have no intention to use the mark at all, ie, not promoting it, and will remove the Youtube videos - thank you for reminding me about it.
4. My goal is not to dispute anything, but to make \$, so I need to speak with the CEO of your company to discuss possible options as I would entertain an association with a viable company in a Vitamindful venture

If you need more clarification, please advise.

Respectfully submitted,

Luciano Sztulman MD, FACS, FACOG

One Randall Square, Suite 401, Providence, RI 02904

Tel (401) 521-1006 Fax (401) 521-1009

Please visit: www.skinsationalri.com - www.hairtransplantri.com - www.beautyispower.us

This communication is for discussion purposes only and does not create any obligation to negotiate or enter into a binding agreement.

Re: Opposition #91224818 VITAMINDFUL

obgynne@yahoo.com <obgynne@yahoo.com>

Tue, May 10, 2016 at 5:24 PM

To: Ryan Luft <ryan@luftlaw.com>

Cc: "Robert S. Salter, Esq." <rsalter@saltermichaelson.com>, Gretel Kelly <gkelly@saltermichaelson.com>

Robert:

Go on with the proceedings to protect Vitamindful. I may change my mind later on and partner with someone to sell Vitamindful, or whatever.

Cheers.

Luciano