

ESTTA Tracking number: **ESTTA311160**

Filing date: **10/13/2009**

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

Proceeding	92050415
Party	Plaintiff Myomed, Inc.
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Date	10/13/2009
Attachments	Motion for Default - Myomed - 101309 _2_.pdf (9 pages)(34766 bytes)

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

In re Registration No. 3,402,453
For the Mark: MYO-MED
Registered: March 25, 2008

Myomed, Inc.,)	Cancellation No.: 92050415
a Nebraska corporation,)	
)	
Petitioner,)	
)	
v.)	
)	
BioForce, Inc.,)	
A Utah corporation,)	
)	
Holder of record title in)	
Trademark Reg. No. 3,402,453)	
_____)	

**MOTION FOR DEFAULT JUDGMENT AND CANCELLATION OF
RESPONDENT’S MARK**

Petitioner, Myomed, Inc. (“Petitioner” or “Myomed”) files this Motion for Default Judgment, Cancellation of Respondent’s Mark, and for Registration of Petitioner’s Mark (“Motion for Judgment”), and would respectfully show the Patent and Trademark Office Before the Trademark Trial and Appeal Board (“PTO”) as follows:

I. SUMMARY OF THE MOTION

Despite repeated attempts by the Board to elicit a response, Respondent has failed to show cause why a default judgment should not be issued. This is not surprising, especially given Petitioner’s unequivocal and unchallenged priority date for its Mark. Petitioner respectfully moves the Board for entry of Default Judgment pursuant to Trial and Appeal

Board Manual of Procedure (TBMP) Rule 510.03(b), and for Cancellation of Respondent's Mark, and for Registration of Petitioner's Mark.

II. BRIEF FACTS STATEMENT

A. **Petitioner's Basis for Filing the Cancellation Proceeding; Petitioner's Mark Has Priority over the Respondents' Mark.**

1. Myomed, Inc., is a Nebraska Corporation, located at 14503 Grover St. Ste. 102, Omaha, NE 68144, and is engaged in the business of marketing, distributing, advertising and selling products under the **MYOMED. P.R.O.** title. The products bearing the **MYOMED. P.R.O.** title relate to pain relief ointment and medication goods.

2. On September 26, 2007, Myomed filed a Trademark Application with the PTO for the **MYOMED. P.R.O.** title and was assigned Serial Number 77/289,568. *See* Prosecution History for the 77/289,568 application. In addition to other disclosures (including exemplar product specimens bearing the mark), Myomed disclosed that it "is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services." *Id.* Importantly, Myomed also disclosed the following: "In International Class 005, the mark was **first used at least as early as 08/01/2005**, and **first used in commerce at least as early as 10/03/2005**, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a (n) Pain relief ointment/medication." *Id.* (emphasis added). Consistent with the PTO's procedures and applicable law, Myomed signed a declaration attesting that the disclosures made in its application are true and correct. *Id.*

3. On December 30, 2007, citing prior filing dates for application serial numbers 77/027,629 and 77/116,984, the PTO suspended Myomed's application pursuant to Serial Number 77/289,568. *Id.*

4. Trademark Reg. No. 3,402,453 (for the mark **MYO-MED**), which is serial number 77/027,629, was applied for by AG SPORTS, LLC and shows a filing date of October 23, 2006. *See* Prosecution History for application serial number 77/027,629. AG Sports LLC is the original owner of Reg. No. 3,402,453 (**MYO-MED**), and was registered as a corporation in the state of Utah on August 11, 2006. Further, in Trademark Reg. No. 3,402,453 (**MYO-MED**), shows a **First Use Date of February, 2007** and a **First Use in Commerce Date of February, 2007**. *Id.* (emphasis added). As a corporation, BioForce (Current owner, via assignment¹ from AG Sports LLC, of Reg. No. 3,402,453 (**MYO-MED**)) was registered as a corporation in the state of Utah on January 25, 2007.

5. Application serial number 77/116,984 was filed on February 27, 2007 by Bioforce and sought to register "**Myomed**" as a trademark. *See* Prosecution History for serial number 77/116,984. Notably, the application is silent as to priority dates related to first use in commerce and other related information. *Id.*

6. While the PTO suspended Myomed's application for **MYOMED. P.R.O.**, Serial No.: 77/289,568 based on the earlier *filing* dates of the foregoing Bioforce marks, Myomed adopted and used the mark described in Paragraphs 1-2 above (*i.e.*, **MYOMED. P.R.O.**, Serial No.: 77/289,568) in connection with advertising, distributing, marketing and selling the Myomed products, **MYOMED P.R.O.** at an earlier date. Myomed first adopted and used the mark **MYOMED P.R.O.** at least as early as August 1, 2005 (First

¹ *See* Assignment 1 to Registration number 3402453.

Used in Commerce Date at least as early as October 3, 2005); thereby substantially predating the Respondent's application. Myomed shows on Application No. 77/289,568 that its first use date was August 1, 2005 and that its first use in commerce date was October 3, 2005. Furthermore, Application No. 77/289,568 is filed in International Class 5 and registered as **MYOMED P.R.O.** for "*Pain Relief Medication.*" Finally, Myomed was registered with the state of Nebraska as a corporation on October 3, 2005. As a filed corporate business entity, Myomed precedes the Respondents' corporate registration by nearly sixteen months and the original registration owner's corporate registration by over 10 months.

7. Consistent therewith, Myomed filed this Petition to Cancel the **MYOMED** mark owned by Bioforce, the Respondent (this action) and a Notice of Opposition to the **Myomed** mark, also owned by Bioforce.²

8. The Respondents' mark (and goods and services use) is virtually identical to Myomed's Mark, **MYOMED P.R.O.** Since the adoption and first use of the **MYOMED P.R.O.** Mark, Myomed has made substantial and continuous use of the **MYOMED P.R.O.** Mark in interstate commerce on and in connection with the development, creation, advertisement, promotion, distribution, and sale of its product in the marketplace.

9. The **MYOMED P.R.O.** Marks are, and since their first use have been, applied to Myomed's products. The Myomed products bearing the **MYOMED P.R.O.** Marks are now, and have been, advertised, promoted, and widely shipped, distributed, and sold in interstate commerce. **The MYOMED P.R.O.** Mark is strong, well known,

² The Notice of Opposition was given the following docket number: 91188333 (the serial number for the Myomed application is 77116984).

and of substantial value to Myomed. In the mind of the trade and of the public, the **MYOMED P.R.O.** Mark is identified with Myomed's products, goods, and services and distinguishes them from the products, goods, and services of others.

10. The Respondent's mark **MYO-MED** so resembles Myomed's previously used and applied for **MYOMED P.R.O.** Mark that, when used in connection with the Respondent's goods and services, it causes confusion, mistake, or deception, which has resulted in injury to Myomed and the public.

11. Myomed has been damaged by Registration No. 3,402,453 (**MYO-MED**) currently owned by the Respondent because such registration supports and assists the Respondent in the confusing, misleading, and deceptive use of their **MYO-MED** mark and would give the current owner the color or exclusive statutory rights to such designation in violation of Myomed's superior rights.

12. On January 9, 2009, the Petitioner initiated this cancellation proceeding in order to challenge the Respondent's Mark.

B. Petitioner and Respondent Stipulate to a Stay In Attempts to Resolve the Dispute; No Resolution is Reached, the Cancellation Proceeding is Reinstated, and Bioforce's Lawyer Withdraws.

13. In connection with these proceedings, and prior to the Respondent filing an answer or response in this case (or in the Opposition Proceeding), the parties agreed to meet and attempt to resolve the dispute. To that end, on February 10, 2009, the parties (through Bioforce's lawyers) filed a Motion for Suspension for Settlement With Consent, which provided that "[t]he parties are actively engaged in negotiations for the settlement of this matter. BioForce, Inc. requests that this proceeding be suspended for 90 days to

allow the parties to continue their settlement efforts.” *See* Dkt. No. 4. The Board granted the parties’ request that same day. *See* Dkt. No. 5.

14. Then, on May 15, 2009, the parties (again, through Bioforce’s lawyers) filed a Motion for Suspension for Settlement With Consent, which provided that “[t]he parties are actively engaged in negotiations for the settlement of this matter. BioForce, Inc. requests that this proceeding be suspended for 30 days to allow the parties to continue their settlement efforts.” *See* Dkt. No. 6. The Board granted the parties’ request that same day. *See* Dkt. No. 7.

15. On June 17, 2009, after the parties were unable to reach a resolution, Bioforce filed a Stipulated Motion to Extend Time to Answer Petition to Cancel, which the Petitioner agreed to in order to allow Bioforce to prepare an answer to the claims raised by the Petitioner. *See* Dkt. No. 8. The Board granted Bioforce’s request on June 20, 2009. *See* Dkt. No. 10.

16. Abruptly, on June 29, 2009, counsel for Bioforce filed a Notice of Withdrawal of Counsel. *See* Dkt. No. 11. Included in the Notice of Withdrawal of Counsel was a signed statement from Bioforce’s President, Wayne Beckstead, consenting to the withdrawal. *Id.*

17. On July 6, 2009, the Board denied the Notice to Withdrawal of Counsel without prejudice due to filing defects contained in the notice. *See* Dkt. No. 12. The Board gave Bioforce thirty days to cure the filing. *Id.*

18. On July 13, 2009, Bioforce filed a Motion to Withdraw as Counsel and attempted to cure the previous denial of the Notice to Withdrawal of Counsel by noting that the basis for the withdrawal was due to Bioforce’s failure to honor an agreement to

pay a retainer in advance of the performance of legal services. *See* Dkt. No. 13. In addition, the Motion to Withdraw as Counsel attempted to cure the other deficiencies noted in the Board’s denial of the Notice of Withdrawal of Counsel. *Id.*

19. On July 21, 2009, the Board granted the Motion to Withdraw as Counsel and then, again, suspended the proceedings for an additional thirty days and ordered that “Respondent is allowed until thirty days from the mailing date set forth in this order to file a submission with the Board in which it either appoints new counsel or states that respondent has chosen to represent itself. If respondent files no response, the Board may issue an order to show cause why default judgment should not be entered against respondent based on respondent’s apparent loss of interest in the case.” *See* Dkt. No. 14.

20. On September 5, 2009 (well past the thirty day deadline for the Respondent to respond) the Board entered an order to “show cause why default judgment should not be entered against respondent based on respondent’s apparent loss of interest in this case.” *See* Dkt. No. 15.

III. ARGUMENT AND AUTHORITIES

20. Aside from the Respondent’s express and unequivocal abandonment of its mark, as provided herein, Petitioner’s **MYOMED P.R.O.** Mark has unequivocally established priority over the Respondents’ marks and is, under applicable authorities, entitled to registration of its mark. “Trademark rights are generally based on priority of use not priority of filing.” *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 503 (7th Cir. 1992). The date of first use in commerce establishes rights to the mark. *Id.* Neither of Respondents’ marks can establish an earlier priority date than Petitioner’s mark. Moreover, Respondent has not, and indeed, cannot, provide any evidence or argument

that the Petitioner's priority dates, as established in the prosecution history, are anything other than legitimate.

21. It is respectfully submitted that a Default Judgment should be entered against the Respondent. Trial and Appeal Board Manual of Procedure (TBMP) 510.03(b) provides:

If the party fails, during the time allowed, to either appoint new counsel (and inform the Board thereof) or file a paper stating that it desires to represent itself, the Board may issue an order noting that the party appears to have lost interest in the case, and allowing the party time in which to show cause why default judgment should not be entered against it. If the party, in turn, files a response indicating that it has not lost interest in the case, default judgment will not be entered against it. If the party fails to file a response to the show cause order, default judgment may be entered against it.³

22. Respondent has been given every opportunity to show either a continued or renewed interest in this case and has failed to show cause why a default judgment should not be issued. Petitioner respectfully submits that a default judgment is required in order to resolve this matter. Petitioner further submits that such a result will be in the interests of justice and consistent with applicable trademark law; the Petitioner's Mark has priority over the Respondent's Mark. Therefore, Petitioner moves the Board for entry Default Judgment, Cancellation of Respondent's Mark, and for Registration of Petitioner's Mark.

³ TBMP 510.03(b).

Dated: October 13, 2009

Respectfully submitted,

Myomed, Inc.

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Petitioner