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

Proceeding	92051528
Party	Defendant Supplement Services, LLC dba MuscleMeds
Correspondence Address	Supplement Services, LLC 10 Canfield Road Cedar Grove, NJ 07009 UNITED STATES
Submission	Answer
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Signature	/ Robert J. Schoenberg/
Date	11/09/2009
Attachments	TTAB_AnswerPetition.pdf (5 pages)(384614 bytes)

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

In the Matter of Registration No. 3,536,481
For the Mark: METHYLBURN
Date of Registration: November 25, 2008
Registrant: Supplement Services, LLC

Dymatize Enterprises, Inc., Petitioner, v. Supplement Services, LLC, d/b/a MuscleMeds, Registrant.	Cancellation No. 92051528 **REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION**

Registrant, Supplement Services, LLC, d/b/a MuscleMeds (hereinafter "Registrant" or "MuscleMeds"), a limited liability company of the State of New Jersey, having a business address of 10 Canfield Road, Cedar Grove, New Jersey 07009, hereby responds to the Petition for Cancellation of Petitioner Dymatize Enterprises, Inc. ("Dymatize" or "Petitioner"), as follows:

1. Registrant admits that on November 25, 2008, the Patent and Trademark Office issued to Registrant U.S. Registration No. 3,536,481 for METHYLBURN, as used in connection with "Dietary supplements," and said registration lists a date of first use and first use in commerce of March 1, 2008.

2. Registrant admits that U.S. Registration No. 2,629,349 is for DYMA-BURN, as used in connection with "Dietary and Nutritional Supplement," and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2.

3. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3.

4. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4.

5. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5.

6. Registrant admits that it has the exclusive right to use the METHYLBURN mark in commerce in connection with dietary supplements, and denies the remaining allegations of Paragraph 6.

7. Registrant denies the allegations of Paragraph 7.

8. Registrant denies the allegations of Paragraph 8.

9. Registrant denies the allegations of Paragraph 9 and refers to the Office Action dated June 20, 2008 issued in connection with Serial No. 77-424,563 (METHYLBURN) for its exact contents and the legal significance thereof.

10. Registrant denies the allegations of Paragraph 10 and refers to the Office Action, dated June 20, 2008, issued in connection with Serial No. 77-424,563 (METHYLBURN) for its exact contents and the legal significance thereof.

11. Registrant denies the allegations of Paragraph 11 and refers to the Response to Office Action, dated July 30, 2008, that it filed in connection with Serial No. 77-424,563 (METHYLBURN) for its exact contents and the legal significance thereof. In connection with said Response, Registrant stated, in part:

> The word "Methylburn" is a unitary mark. It is not a mere composite, but makes its own commercial impression. The product is a "lipolidic" agent. The term "lipolidic" means, literally, the destruction of fat (in nutrition, this is generally referred to as metabolizing fat). In advertising parlayance, not scientifically, lipolidic action may be discussed as "fat burning", although pyresis is not involved. Rather, the lipolidic action is a chemical action

> described in the advertisement as preventing "the manufacturing and storage of fat cells while simultaneously inducing a powerful fat metabolizing cascade". Methyl has no connection with fat. Therefore, as a unitary mark "Methylburn" can not be separated into its formatives, but must be treated as a single word. Its formatives are antagonisic [sic] and do not normally appear together in the context of these goods or otherwise.

12. Registrant denies the allegations of Paragraph 12, except to admit that the sentence "MethylBURN Extreme's FastBurn Methylated Thermogenic Matrix quickly increases the release of norepinephrine to spark thermogenic fat incineration and mobilize fatty acids" appears on the webpage located at *http://www.musclemedsrx.com/methylburnextreme.html*, and refers to that web page for its complete contents and significance.

AFFIRMATIVE DEFENSES

1. The Petition for Cancellation fails to state a claim against Registrant upon which relief can be granted. For example, Petitioner cannot adequately demonstrate a common law or statutory right to exclusive use of all "BURN" suffix marks in the field of dietary and/or nutritional supplements.

2. The Petition for Cancellation is barred by the equitable doctrine of laches.

3. The Petition for Cancellation is barred by the equitable doctrine of estoppel.

4. The Petition for Cancellation fails to demonstrate that any confusion has occurred or is likely to occur among the applicable class of consumers for the registered mark, METHYLBURN, and the cited mark, DYMA-BURN. Indeed, the presence of nearly two dozen other "BURN" suffix registered and common law marks in the field of dietary and/or nutritional supplements – all unchallenged by Petition – negates any such allegation.

5. The Petition for Cancellation is barred by the equitable doctrine of bad faith. Petitioner has filed the instant Petitioner in bad faith without proper factual or legal basis, thus seeking to obtain an undue advantage over Registrant in the marketplace for dietary and/or nutritional supplements, in violation of Fed. R. Civ. P. 11.

6. The Petition for Cancellation fails to set forth the allegations of fraud with particularity, as required by Fed. R. Civ. P. 9(b), and must be dismissed.

7. The Petition for Cancellation fails to set forth the allegations of fraud in accordance with the requirements established by the Federal Circuit in *In re Bose Corporation*, 91 USPQ2d 1938 (Fed. Cir. 2009), and must be dismissed.

WHEREFORE Registrant prays that judgment be entered in its favor and against Petitioner, dismissing with prejudice the Petition for Cancellation herein.

Respectfully submitted,

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI LLP
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Dated: November 9, 2009.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2009, the attached Registrant's Answer To Petition For Cancellation was electronically filed with the Trademark Trials and Appeals Board via ESTA, and a copy served by first-class mail upon counsel for Petitioner, Casey L. Griffith, Esq., Carstens & Cahoon, LLP, 13760 Noel Road, Suite 900, Dallas, Texas 75240.

Robert J. Schoenberg

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