

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

coggins

Mailed: March 11, 2010

Cancellation No. 92051897

Dr. Paul Nash

v.

Naturade Operating Corp.

By the Board:

On December 18, 2009, petitioner filed a petition to cancel Registration No. 2915763.<sup>1</sup> As a result of petitioner's filing, and by way of the Board's December 24, 2009, order, Cancellation proceeding No. 92051897 was instituted and a date for respondent's answer was set. Respondent filed a timely answer, and on March 4, 2010, petitioner telephoned the Board and requested Board participation in the mandatory discovery conference between

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<sup>1</sup> Registration No. 2915763 was registered on the Principal Register on January 4, 2005, for the mark DIET LEAN (in typed form) for "[d]ietary supplements, nutritional supplements and protein supplements in tablet, capsule, powder, liquid and bar form for weight loss and weight management; meal replacement and meal supplement drinks, drink mixes, powders and bars for weight loss and weight management."

the parties.<sup>2</sup> In preparation for the conference, the Board reviewed the petition to cancel and determined that the petition does not include proof of service on the owner of record for the registration.<sup>3</sup>

Trademark Rule 2.111(a) provides, in part, that a petition must include proof of service on the owner of record for the registration. Trademark Rule 2.111(b) provides, in part, that a petitioner must serve a copy of the petition on the owner of record for the registration and must include with the petition to cancel proof of such service. Therefore, under Trademark Rules 2.111(a) and (b), a cancellation is commenced only when two conditions are fulfilled: (1) petitioner makes sufficient efforts to serve the petition to cancel and (2) the Board is notified of the service at the time the petition to cancel is filed. See *Springfield Inc. v. XD*, 86 USPQ2d 1063 (TTAB 2008) (opposer notified Board of service via ESTTA filing but failed to serve a copy of the notice on applicant at any time during the proceeding; case dismissed as nullity); *Schott AG v. L'Wren Scott*, 88 USPQ2d 1862 (TTAB 2008) (opposer failed to

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<sup>2</sup> The deadline for the discovery conference was March 4, 2010. Board participation should have been requested at least ten days prior to the deadline for the conference. Trademark Rule 2.120(a)(2). Notwithstanding petitioner's delay in requesting Board participation, the Board exercised its discretion and agreed to participate in a conference with the parties.

<sup>3</sup> In fact, there is no indication of any service at all.

include a certificate of service with the notices of opposition, filed via first class mail, and did not dispute its failure to actually forward service copies to applicant; case dismissed as nullity); and *Equine Touch Foundation Inc. v. Equinology Inc.*, 91 USPQ2d 1943 (TTAB 2009) (petitioner failed initially to serve a copy of the petition on respondent, but moved to amend the petition to correct the failure shortly thereafter and within five years from the date of the registration of the mark where the ground for cancellation was required to be filed within five years from the date of the registration of the mark; filing date of petition changed to date of amendment).

In his December 18, 2009, filing, petitioner failed to include proof of service of the petition on respondent. Moreover, there is no indication in the record that petitioner ever served the petition on respondent. In view thereof, although the Board instituted this proceeding on December 24, 2009, petitioner clearly is not entitled to the December 18th filing date because petitioner failed to comply with the service obligations on that date. Accordingly, the petition is dismissed as a nullity.

If petitioner contemplates re-filing the petition to cancel with the proper service requirements, petitioner should not the following information. Trademark Rule 2.111(b) also provides, in part, that a petition to cancel

may be filed at any time in the case of registrations on the Supplemental Register or under the Act of 1920, or registrations under the Act of 1881 or the Act of 1905 which have not been published under section 12(c) of the Act, or on any ground specified in section 14(3) or (5) of the Act; but, in all other cases, the petition to cancel must be filed within five years from the date of registration of the mark under the Act or from the date of publication under section 12(c) of the Act. The Board notes that the petition to cancel filed on December 18, 2009, alleges a ground of priority and likelihood of confusion. Inasmuch as Registration No. 2915763 was registered on January 4, 2005, any ground of priority and likelihood of confusion brought against Registration No. 2915763 must have been perfected on or before January 5, 2010. In the instant case, if petitioner were to re-file his petition to cancel and meet the service requirements of Trademark Rule 2.111, the ground of priority and likelihood of confusion would be time-barred. See Section 14 of the Trademark Act, 15 U.S.C. §1064. See also TBMP §307.02 (2d ed. rev. 2004).

While Patent and Trademark Rule 11.14 permits a petitioner to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services

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of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

As noted hereinabove, the petition is dismissed as a nullity for failure to comply with the service requirements of Trademark Rule 2.111. Petitioner's filing fee will be refunded in due course.