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

Proceeding	92052684
Party	Plaintiff Natural Supplements and Remedies, Inc., d/b/a Vitanergy
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Registration No. 3,237,960
For the mark "VITAENERGY"

_____)	
NATURAL SUPPLEMENTS AND)	
REMEDIES, INC. d/b/a VITANERGY,)	
a Florida Corporation,)	
)	
Petitioner,)	
)	
vs.)	Cancellation No. 92052684
)	
NUTRISCIENCE CORPORATION,)	
a California Corporation,)	
)	
Registrant.)	
_____)	

**PETITIONER’S REPLY IN SUPPORT OF MOTION TO STRIKE AND MOTION TO DISMISS
REGISTRANT’S THIRD COUNTERCLAIM**

COMES NOW Petitioner, Natural Supplements and Remedies, Inc., d/b/a Vitanergy (“Petitioner”) and hereby submits the following reply in support of its motion to strike Registrant’s first, second, third, ninth, and eleventh affirmative defenses; certain of Registrant’s immaterial pleadings; and to dismiss Registrant’s Third Counterclaim.

I. MOTION TO STRIKE AFFIRMATIVE DEFENSES.

Petitioner has requested that Registrant’s first affirmative defense be stricken. As previously noted, Registrant’s first affirmative defense should be deemed waived based on the Registrant’s failure to serve a Rule 12(b)(6) motion to dismiss concurrently with, or prior to, the service of its Answer. *See Motion Picture Association of America, Inc. v. Respect Sportswear, Inc.*, 83 USPQ 2d 1555 n.5 (TTAB 2007). Further, the affirmative defense is improper as Petitioner has alleged facts capable of establishing Petitioner’s standing to maintain the proceeding and a valid ground for cancellation of the registration. *See* Registrant’s Petition to Cancel ¶¶ 1-12; *see also Order of Sons*, 36 USPQ 2d at 1221-1223 (articulating the prerequisites to withstanding a motion to dismiss or failure to state a claim.) Registrant’s Response does not offer any factual

or legal basis for refuting the foregoing; instead, the Registrant simply concludes that “the Petition is not legally sufficient and Petitioner’s motion to strike Registrant’s first affirmative defense should be denied.” [D.E. 10] at 2. Registrant fails to articulate any basis for this conclusion. Thus, Registrant provides no basis for denying Petitioner’s request that Registrant’s first affirmative defense be stricken.

Similarly, the Registrant fails to articulate why the third, ninth, and eleventh affirmative defenses should not be stricken as repetitious and unnecessary. *See* §TBMP 311.02(b)(stating that defenses raised by way of a counterclaim should not also be plead as affirmative defenses). Specifically, Registrant does not deny that the ninth affirmative defense for abandonment raises the identical claim plead in its First Counterclaim or that its Second and Third Counterclaims are identical to the claims presented in its eleventh affirmative defense and prefaced on the same allegations that form the basis of its third affirmative defense. Instead, Registrant’s Response simply concludes that its affirmative defenses “function to amplify Registrant’s denial of Petitioner’s claim of likelihood of confusion”. [D.E. 10] at 3. Once again, the Registrant fails to articulate any basis for this conclusion. Further, Registrant’s Response does not address the Petitioner’s motion to strike Registrant’s second affirmative defense. Thus, Registrant provides no reason to deny Petitioner’s request that the Board strike Registrant’s second affirmative defense as an improper amplification of a denial; and that the Board should strike Registrant’s third, ninth, and eleventh affirmative defenses as duplicative and redundant of Registrant’s counterclaims.

II. MOTION TO DISMISS REGISTRANT’S THIRD COUNTERCLAIM.

Petitioner has also requested dismissal of Registrant’s Third Counterclaim because the facts alleged therein, even if proven, would not provide valid grounds for the cancellation of Petitioner’s registration. *See, e.g., William & Scott Co. v. Earl’s Restaurants Ltd.*, 30 USPQ2d 1870 (TTAB 1994) (setting forth the basis for a motion to dismiss for failure to state a claim upon which relief can be granted.) Initially, Registrant’s Response incorrectly treats Petitioner’s Motion to Dismiss as a Motion to Strike and, therefore, invokes the improper legal standard. The Petitioner’s position is not that Registrant has failed to state a cause of action; but, rather, that the Petitioner’s allegations – even if proven – would not provide a valid ground for the

cancellation of Petitioner's registration.

Specifically, Registrant's Third Counterclaim is prefaced on two factual allegations. The first is that that Attorney Oliver A. Ruiz was not properly authorized to sign and file Petitioner's Renewal Declaration. As previously noted, however, the power of attorney granted to Petitioner's prior attorney had been terminated prior to Attorney Ruiz signing and filing the Petitioner's Renewal Declaration. *See* TMEP §604.02; 37 C.F.R. §2.17(g). Thus, Attorney Ruiz -- as an attorney in good standing with the Florida Bar -- was correctly presumed to possess authority to represent the previously *pro se* Petitioner and had full authority to file the renewal application. *See* TMEP §611.04; 37 C.F.R. §2.183(a). Registrant's Response inexplicably fails to address these legal rules and, in fact, relies on no case law at all. Further, Registrant has not alleged the existence of any inconsistency -- and, in fact, the record contains no inconsistency -- regarding Attorney Ruiz's authority to sign on behalf of registrant. *See* TMEP §1606.07. Thus, this allegation does not provide a basis for cancellation of the Petitioner's registration.

Registrant's Third Counterclaim is also prefaced on the purported inadequacy of the specimens submitted in connection with Petitioner's April 21, 2010 Renewal Declaration. Therefore, Registrant's Third Counterclaim -- and portions of Registrant's Second Counterclaim focusing on the adequacy of materials submitted to and inspected by an examining attorney -- constitute an improper request for the Board to "substitute its judgment for that of the examiner." *See Granny's Submarine Sandwiches v. Granny's Kitchen Inc.*, 199 USPQ 564, 567 (TTAB 1978) (the Board will not substitute its judgment for that of the examiner). Registrant's Response does not address this legal precedent but relies, instead, on the unsupported legal conclusion that "a renewal application is not reviewed by an examining attorney."

In addition, Registrant's Counterclaim is prefaced on an issue, namely, "the adequacy of the specimen to demonstrate use of the registered mark . . . that does not go to the issue of fraud." *See Paris Glove of Can. v. SBC/Sporto Corp.*, 2007 TTAB LEXIS 84, 22-25 (TTAB 2007). "[T]his is not a case in which the applicant withheld information or material from the Examining Attorney which would have been necessary for the Examining Attorney to determine whether the specimen was sufficient; nor is it a case in which

applicant is alleged to have outfoxed the Examining Attorney by fabricating a specimen..” *See This Little Piggy Wears Cotton v. Piggy Toes*, 2004 TTAB LEXIS 447, 13-14 (TTAB 2004) (emphasis added). Again, Registrant’s response ignores the foregoing precedent and fails to provide any legal basis or facts indicating that Petitioner was “not using the mark as registered and that the label attached to the registration [wa]s not currently in use.” *Torres.*, 808 F.2d. at 46 (describing the intent behind a fraudulent renewal.); *compare Morehouse Mfg. Co. v. J. Strickland and Co.*, 407 F.2d 881, 56 C.C.P.A. 946, 160 USPQ 715, 720 (CCPA 1969)(noting that nothing is to be gained from and no public purpose is served by cancelling the registration of a technically good trademark because of a minor technical defect in an affidavit.) Instead, Registrant responds by providing a series of legal conclusions unsupported by any legal citations. Given the foregoing, Petitioner states that dismissal of Registrant’s Third Counterclaim is warranted as Registrant has failed to make any factual allegations which– if true – provide valid grounds for the cancellation of Petitioner’s registration based on fraud.

III. CONCLUSION.

For the reasons discussed above, Registrant’s first affirmative defense should be stricken as (1) Registrant has waived all Rule 12(b)(6) motions and (2) Petitioner has met the requirements to withstand a motion to dismiss for failure to state a claim. In addition, the Board should strike Registrant’s second affirmative defense as an improper amplification of a denial; and, the Board should strike Registrant’s third, ninth, and eleventh affirmative defenses as they merely duplicate and repeat Registrant’s counterclaims.

Finally, Petitioner requests dismissal of Registrant’s Third Counterclaim as neither the Registrant’s allegation regarding the adequacy of Petitioner’s specimens, nor the Registrant’s allegation regarding Attorney Ruiz’s authority to sign and file Petitioner’s Renewal Declaration, provides a valid ground for cancellation of the registration based on fraudulent renewal. The Board should also strike Paragraphs 15 and 24 of the Registrant’s Second Counterclaim, as these portions of the counterclaim are predicated on immaterial allegations that do not give rise to a claim for fraud and, moreover, cannot form the basis for a cancellation proceeding.

WHEREFORE, Petitioner requests that the Board grant the instant motion and dismiss Registrant's Third Counterclaim and strike the Registrant's first, second, third, ninth, and eleventh affirmative defenses, as well as, Paragraphs 15 and 24 of Registrant's Second Counterclaim.

Respectfully submitted,

Dated: November 8, 2010

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CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing Motion to Strike Affirmative Defenses and Motion to Dismiss Third Counterclaim was filed electronically via the ESTTA, at the United States Patent and Trademark Office, Trademark Trial and Appeal Board's ESTTA electronic filing system, on November 8, 2010.

By: /Francisco J. Ferreiro/
Francisco J. Ferreiro
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 8, 2010, a true and complete copy of the foregoing Motion to Strike Affirmative Defenses and Motion to Dismiss Third Counterclaim was served by U.S. Mail on the following:

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Respectfully submitted,

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