

ESTTA Tracking number: **ESTTA508184**

Filing date: **11/29/2012**

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

**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Optimum Health Distributing, Inc.		
Entity	Corporation	Citizenship	California
Address	15556 Dupont Avenue Chino, CA 91710 UNITED STATES		

Attorney information	Ceclia R. Dickson The Webb Law Firm One Gateway Center 420 Ft. Duquesne Blvd., Suite 1200 Pittsburgh, PA 15222 UNITED STATES trademarks@webblaw.com Phone:412-471-8815
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**Registration Subject to Cancellation**

Registration No	3471731	Registration date	07/22/2008
Registrant	Exclusive Supplements, Inc. 3000 Casteel Drive Coraopolis, PA 15108 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 005. First Use: 2006/01/05 First Use In Commerce: 2006/01/05 All goods and services in the class are cancelled, namely: Dietary and nutritional supplements
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**Grounds for Cancellation**

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Abandonment	Trademark Act section 14

Related Proceedings	Exclusive Supplements, Inc v. Baher Abdelgawad et al., US District Court for the Western District of Pennsylvania (Civ. A. No. 5:12-cv-01652-CB)
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Attachments	123677.pdf ( 6 pages )(191099 bytes )
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**Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/crd/
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Name	Cecilia R. Dickson
Date	11/29/2012



2. Respondent was incorporated in 2005. Respondent is a co-packer, distributor, and reseller of dietary supplements and related products.

3. Respondent is listed as the registered owner of the above-captioned mark. Upon information and belief, Respondent caused to be filed U.S. Application Serial No. 77/348,038, with the United States Patent and Trademark Office (“USPTO”) on December 10, 2007, which application matured into the above-captioned registration.

4. Upon information and belief, Respondent electronically filed, as part of that application, a specimen purportedly evidencing use of the above-captioned mark in commerce.

5. Respondent identified the owner of the mark in the application as “Exclusive Supplements, Inc.”

6. The specimen of use submitted to the USPTO depicts Petitioner’s product, not Respondent’s product.

7. At the time it was submitted, Respondent knew that the specimen of use depicted Petitioner’s product.

8. Petitioner has used the mark DEplete RAPID WEIGHT LOSS (stylized) in the dietary supplements industry since at least as early as January 5, 2006 and continuously since that time.

9. Petitioner used that mark with the full and knowing consent of Respondent.

10. Respondent never independently used the mark in relation to any product, although, on information and belief, Respondent has purchased complete, final products bearing

the DEplete RAPID WEIGHT LOSS (stylized) mark from Petitioner and resold those products to retailers.

11. On November 8, 2012, Respondent filed suit against Petitioner, among others, in the U.S. District Court for the Western District of Pennsylvania, alleging claims based on trademark infringement, and has asserted the above-referenced trademark registration against Petitioner (Civ. A. No. 5:12-cv-01652-CB).

12. On November 14, 2012, Respondent moved for preliminary injunctive relief in the litigation proceeding pending before the Western District of Pennsylvania.

13. In both the Complaint and Motion for Preliminary Injunction, Respondent now takes the position that Petitioner was not entitled to use the above-captioned mark, and that Respondent is the proper owner of the above-captioned registration.

**The Registered Mark Should Be Cancelled Because It Was Fraudulently Obtained**

14. Petitioner incorporates the allegations set forth in paragraphs 1 through 13 above by reference as if fully set forth herein.

15. As part of its application process, Respondent identified itself as the owner of the trademark, even though Respondent never did and never has used the above-captioned mark in relation to a product in the dietary supplements field.

16. As part of its application process, Respondent submitted a specimen of use in commerce that consisted of a product photograph. The product depicted in that specimen of use is a product manufactured, sold, and distributed exclusively by Petitioner.

17. Petitioner has used the above-captioned mark on its products since at least as early as January 5, 2006 and continuously through the present day.

18. Respondent has failed to provide specimens of use sufficient to establish use in commerce as required by the Trademark Act.

19. Upon information and belief, at all times relevant, Respondent's representations were materially false and made with the intent to deceive the Trademark Office.

20. Upon information and belief, the Trademark Office relied upon these representations in issuing the registration. Without these false representations, this registration would not have issued.

21. United States Trademark Registration No. 3,471,731 for DEplete RAPID WEIGHT LOSS (stylized) should be cancelled because both the allegations of ownership and the specimen of use in interstate commerce submitted by Respondent are false, and thus, the registration was fraudulently obtained.

**The Registered Mark Should Be Cancelled For Abandonment**

22. Petitioner incorporates the allegations set forth in paragraphs 1 through 21 above by reference as if fully set forth herein.

23. United States Trademark Registration No. 3,471,731 for DEplete RAPID WEIGHT LOSS (stylized) should be cancelled because Respondent has never used the mark in interstate commerce sufficient to justify a registration.

24. Further, Respondent was fully aware of Petitioner's use of the mark since the filing of its application.

25. Accordingly, Respondent has failed to enforce any purported rights against a third party user and thus the registration should be cancelled.

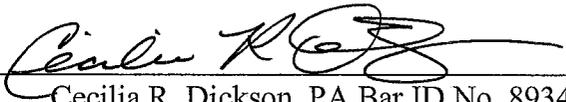
26. For all of the foregoing reasons, Petitioner is being harmed in that it is the user of the mark and has been the user of the mark and Respondent is nonetheless asserting a

false ownership interest in and to the mark, and attempting to preclude Petitioner from the legitimate use of the mark.

WHEREFORE, Petitioner prays that United States Registration No. 3,471,731 in International Class 5 be cancelled.

Respectfully submitted,

Dated: 11/29/2012

By   
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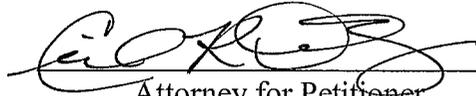
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **PETITION TO CANCEL TRADEMARK REGISTRATION** was served via first class mail and email where email address is listed below on this 29<sup>th</sup> day of November, 2012 upon the following:

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