ESTTA Tracking number: **ESTTA609152**
Filing date: **06/10/2014**

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

Proceeding	92056634
Party	Defendant Sagar Shah dba Nature's Guru
Correspondence Address	KATHERINE M BASILE NOVAK DRUCE CONNOLLY BOVE + QUIGG LLP 21771 STEVEN CREEK BLVD, FIRST FLOOR CUPERTINO, CA 95014 UNITED STATES jason.garcia@novakdruce.com,trademarkdocket@novakdruce.com
Submission	Opposition/Response to Motion
Filer's Name	Jeffrey J. Morgan
Filer's e-mail	tmdocket@novakdruce.com, jeff.morgan@novakdruce.com, katy.basile@novakdruce.com
Signature	/Jeffrey J. Morgan/
Date	06/10/2014
Attachments	Registrant's Response to Petitioner's Motion for Summary Judgment and Memorandum in Support Thereof (00063642).pdf(1660133 bytes) Continued - Exhibits D-F (00063645).pdf(3884672 bytes) Declaration of Sagar Shah and Exhibits A-C (00063646).pdf(2766335 bytes)

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

GURU BEVERAGE CO.	)	Cancellation No.:	92056634
	)		
Petitioner	)	Mark:	NATURE'S GURU
v.	)		
	)	Registration No.:	4,125,408
SAGAR SHAH	)	Reg. Date:	April 10, 2012
	)		
	)		
Registrant	)		
	)		

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

Dated: June 10, 2014

/Jeffrey J. Morgan/

Katherine M. Basile
NOVAK DRUCE CONNOLLY BOVE + QUIGG LLP
21771 Steven Creek Blvd., First Floor
Cupertino, CA 95014
Phone: (408) 414-7330
Fax: (408) 996-1145

Jeffrey J. Morgan
NOVAK DRUCE CONNOLLY BOVE + QUIGG LLP
1000 Louisiana Street, 53rd Floor
Houston, Texas 77002
Phone: (713) 571-3400
Fax: (713) 456-2836

Attorneys for Registrant
Sagar Shah

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I. INTRODUCTION

Guru Beverage Company's ("Petitioner") Motion for Summary Judgment (the "Motion") fails to satisfy the threshold requirement of Fed.R.Civ. P. 56, which is to establish that there are no genuine issues of material fact regarding the controlling law under which Petitioner seeks to cancel Sagar Shah's ("Shah" or "Registrant") registration for the mark NATURE'S GURU. Petitioner's burden in this case is to demonstrate at a minimum that there are no genuine issues of material fact regarding the application of the relevant *DuPont* factors. Simply ignoring material facts that do not support Petitioner's arguments—including undisputed facts that strongly militate against a finding of likelihood of confusion between the respective marks—is not sufficient. For at least the reasons discussed below, Petitioner has failed to meet its burden of demonstrating as a matter of law that the registration of Registrant's NATURE'S GURU Mark has or will create a likelihood of confusion with Petitioner's asserted GURU and GURU ENERGY DRINK marks ("Petitioner's Marks). Both parties own issued U.S. Trademark Registrations and therefore have equal rights to use their marks. Each party enjoys the presumptions associated with the issued trademark registrations, and although not necessarily bound by the examination process, the Examining Attorney did not consider the marks similar when considered in connection with the identified goods. Accordingly, Petitioner's Motion for Summary Judgment should be denied.

II. STATEMENT OF FACTS RELEVANT TO *DUPONT* FACTOR ANALYSIS

A. The NATURE'S GURU Brand and Products

Respondent's first use of NATURE'S GURU as a trademark in connection with powdered drink mixes, including a coconut water powder product, began October 9, 2009. Declaration of Sagar Shah ("Shah Decl.") at ¶ 3. Sales and promotional efforts for the

NATURE'S GURU products began on or around October 27, 2009 and the NATURE'S GURU mark was first used in United States interstate commerce at least as early as September 30, 2010. *Id.* By January 2011, distribution of the NATURE'S GURU products into Whole Foods Markets was underway at locations throughout the United States. Shah Decl. at ¶ 4.

On August 5, 2011, Application Ser. No. 85/390,971 (the "Application") was filed in the United States Patent and Trademark Office for the mark NATURE'S GURU in connection with "powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages. Shah Decl. at ¶ 5. The Application passed through the prosecution stage without a refusal by the Examining Attorney on the basis of Section 2(d) of the Trademark Act and was published for opposition on January 24, 2012. Shah Decl. at ¶ 6. No parties opposed, including Petitioner, or filed for extensions of time to oppose the Application. *Id.*

A full line of powders and mixes for coconut water beverages (sports beverages), fruit-flavored beverages and tea-flavored beverages are offered under the NATURE'S GURU Mark, including "Instant Mangosteen Fruit" powder, "Masala Spice Chai" instant tea mix (sweetened and unsweetened), "Cardamom Chai" instant tea mix (sweetened and unsweetened), "Lemongrass Chai" instant tea mix (sweetened and unsweetened), "Ginger Chai" instant tea mix (sweetened and unsweetened), "Vanilla Chai" instant tea mix (sweetened and unsweetened), "Instant Tender Coconut Water Powder", "Coconut Water Powder with Mango", and "Coconut Water Powder with Chocolate". These products are advertised and promoted at Respondent's website at www.naturesguru.com and on Amazon.com. Shah Decl. at ¶ 7. These products are sold throughout the United States in ethnic, specialty and natural/organic retail food stores, including Whole Foods Market (WFM), HomeGoods – TJX Corporation (TJX), Amazon.com (AMZN), New Leaf Community Markets, Rainbow Cooperative Grocery, Akin's and

Chamberlin's Natural Food Markets. Shah Decl. at ¶8, and Exhibit C. The products are sold either directly to the retail stores or through regional distributors for the retail stores. *Id.* The full line of NATURE' GURU products are also sold online through Amazon.com. Shah Decl. at ¶ 9, and Exhibit D.

Each of the NATURE'S GURU products described above is designed for the consumer to add water to make a beverage. They are not sold as ready-to-drink beverages, nor are they sold in retail stores with such beverages. Shah Decl. at ¶ 10. The NATURE'S GURU coconut water powder is sold in retail stores in the store sections containing shelf stable beverages, coffees and teas, drink mixes, and coconut water products. Shah Decl. at ¶ 11. The coconut water powder product is never refrigerated like most ready-to-drink beverage products, including those of Petitioner. *Id.*

Unlike the NATURE'S GURU products, Petitioner's GURU and GURU ENERGY DRINK products are marketed and promoted as "natural energy drinks," apparently based on the presence in those products of naturally occurring caffeine, rather than electrolytes, which are typical in most sports drinks. Shah Decl. at ¶ 13, and Exhibit F. The NATURE'S GURU products, because of the presence of electrolytes from a fruit beverage, can be considered as sports drinks and are marketed as hydration replacement beverage mixes. Shah Decl. at ¶ 14 and Exhibit C and D. The NATURE'S GURU coconut powder products, however, do not contain caffeine. *Id.*

B. The GURU and GURU ENERGY DRINK Brands and Products

Although Petitioner's Motion is virtually silent with regard to its products and channels (except for a verbatim recitation of the goods registered under the GURU and GURU ENERGY DRINK marks and reliance on a presumption of identical channels of trade), a review of

Petitioner's website at www.guruenergy.com indicates that Petitioner offers caffeine based energy drinks. See Shah Decl. at ¶ 13, Exhibit F.

III. ARGUMENT

A. The Summary Judgment Standard

Federal Rule of Civil Procedure 56 governs summary judgment motions in *inter partes* proceedings before the Board Federal Rule of Civil Procedure 56. Under Rule 56, Petitioner, as the moving party, has the burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (moving party must show absence of evidence to support nonmoving party's case). For Petitioner to prevail on its motion, it must establish that there is no issue of material fact. *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.,* 782 F.2d 987, 989-90, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986). Fed.R.Civ.P. 56. The summary judgment standard is not intended as a substitute for trial,[1] and in deciding a motion for summary judgment, the Board must resolve any doubt as to whether material fact issues exist in favor of the nonmoving party and must view all inferences to be drawn from the undisputed facts in the light most favorable to the nonmoving party. *University Book Store v. University of Wisconsin Board of Regents*, 33 U.S.P.Q.2d 1385, 1389 (T.T.A.B. 1994); *Celotex,* 477 U.S. 317, 325.

B. No Likelihood of Confusion Exists Between Respondent's NATURE'S GURU Mark and Petitioner's Marks

As the United States Court of Customs and Patent Appeals observed in *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), the ultimate question of the likelihood of consumer confusion, even if labeled as a matter of law, is necessarily drawn from the probative facts in evidence. There is no litmus rule that can provide a ready guide to all

[1] If the Board agrees that there are material facts in dispute, Respondent is open to discussing ACR as a possible option for this case.

cases; and each case must be decided on its on facts. *Id.* at 1361. The Court made clear, however, that in testing for likelihood of confusion certain enumerated factors, when supported by probative evidence, must be considered. These factors include:

- The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- The similarity or dissimilarity of established, likely-to-continue trade channels;
- The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;
- The nature and extent of any actual confusion; and
- The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Id. For reasons discussed more fully below, Respondent maintains that the marks are not likely to cause confusion in terms of sight, sound or commercial impression. In addition, there is probative evidence bearing on the likelihood of confusion requiring consideration of the additional *DuPont* factors identified above. Ultimately, consideration of all relevant evidence in the circumstances of this case indicates that consumer confusion is unlikely. At a minimum, such evidence reflects genuine issues of material fact requiring that Petitioner's summary judgment motion be denied.

1. The Marks are Different in Appearance, Sound, Meaning and Commercial Impression

When the Respondent's NATURE'S GURU Mark is compared with Petitioner's GURU ENERGY DRINK and GURU marks in their entireties, the marks are not likely to cause confusion in terms of appearance, sound, meaning or commercial impression. The presence of the word GURU without more does not make the marks confusingly similar in terms of sight,

sound and meaning or commercial impression when the marks are considered in their entireties. Marks should not be dissected, but rather the total commercial impression of each mark should be considered in relation to the goods or services. *Franklin Mint Corp. v. Master Mfg. Co.*, 212 U.S.P.Q. 233 (C.C.P.A. 1981). The fundamental inquiry goes to the cumulative effect of the differences in the marks in relation to the goods or services at issue. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976). Likelihood of confusion can be avoided when the incorporated mark is combined with other features in such a way that the identity of the prior mark is lost. *Miller Brewing Co. v. Premier Beverages, Inc.* 210 U.S.P.Q. 43, 48-49 (T.T.A.B. 1981) (the Board held MILLER vs. OL'BOB MILLER'S marks not confusingly similar on beverages); *Bell Labs., Inc., v. Colonial Prods., Inc.,* 644 F. Supp. 542, 231 U.S.P.Q. 569 (S.D. Fla. 1986)(court found FINAL vs. FINAL FLIP not confusingly similar for rodenticide).

Respondent's mark is NATURE'S GURU. The definition of GURU, according to Merriam Webster's online dictionary, is "a spiritual teacher; a teacher or guide that you trust; a person who has a lot of experience in or knowledge about a particular subject." Shah Decl. at ¶ 12. When considering Respondent's mark as a whole and in connection with the goods, the possessive term "NATURE'S" conveys a specific type of "guru" and when considered in connection with the goods, suggests a teacher that is wise in Nature and things that come from Nature. This personification of a NATURE MAN is comparable to Mother Nature, Mother Earth or Father Nature, all of which, when considered in connection with the underlying goods, are for the purpose of suggesting to consumers that Respondent's products contain life-benefiting and nurturing elements. As identified in ¶ 11 of the Petition to Cancel, this meaning is further supported by the design element on Respondent's packaging, which consists of a highly stylized

whited bearded elderly gentleman sitting in a full lotus meditation position, superimposed on a floating green leaf and with the wording NATURE'S GURU connected at the man's feet.

In contrast to Respondent's mark, Petitioner has registered the marks GURU and GURU ENERGY DRINK. The addition of ENERGY DRINK not only identifies the specific goods, but as noted in definition provided on the Petitioner's website, the use of "guru" defined as "a source of inspiration and good energy" (Shah Decl. at ¶ 13, and Exhibit F). This meaning and connotation is highly suggestive, if not descriptive, when considered with the underlying goods. Comparing the commercial impression of NATURE'S GURU, which is of something wise in nature and meditation is in stark contrast to something full of energy and for the purpose of energizing a person. This difference in meaning is sufficient to create a distinctive overall commercial impression that is avoids a likelihood of confusion. *Smith v. Tobacco By-Products & Chemical Corp.*, 243 F.2d 188, 113 U.S.P.Q. 339 (C.C.P.A. 1957) (GREEN LEAF and BLACK LEAF for plant sprays have different connotations). Accordingly, the addition of the term NATURE'S to GURU changes the underlying meaning and connotation of the mark as a whole, and therefore a likelihood of confusion is avoided with GURU ENERGY DRINK.

Similarly, when considering the Petitioner's mark GURU alone, it must also be considered with the identified goods, which again are the same energy drinks. GURU when used alone does not have the same meaning, connotation or commercial impression as NATURE'S GURU. Similar to the reasoning in *Hershey's Foods Corp. v. Cerreta,* 195 U.S.P.Q. 246 (T.T.A.B. 1977) (Board did not find a likelihood between KISSES and the marks A BIG KISS FOR YOU, and SEALED WITH A KISS) and *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 U.S.P.Q.2d 1459 (Fed. Cir. 1998)(no likelihood of confusion between CRISTAL and CRYSTAL CREEK given differences in meaning

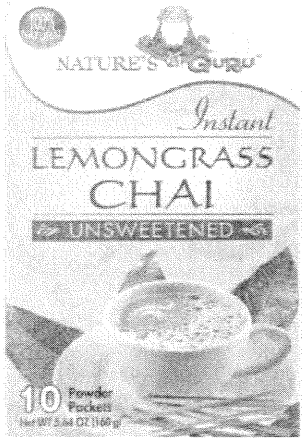
connotation, and both goods for wine), the addition of the term NATURE'S to GURU changes the underlying meaning and connotation of the mark as a whole, and therefore a likelihood of confusion also is avoided with Petitioner's GURU mark. For example, MOTHER alone has a different meaning and connation than MOTHER NATURE despite both containing MOTHER. Similarly, the unitary mark NATURE'S GURU provides a distinct commercial impression that differentiates Respondent's NATURE'S GURU mark from that of the Petitioner, GURU.

Thus the total commercial impression of the NATURE'S GURU mark is sufficiently distinctive from that of Petitioner's GURU and GURU ENERGY DRINK marks so as to avoid a likelihood of confusion, and summary judgment should therefore be denied.

2. The Marks as Used In the Marketplace and as Evidenced in The Specimens of Use of Record Show That the Marks are Dissimilar

When considering whether a likelihood of confusion exists, the determination must be made under actual market conditions. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 704 F.2d 426, 431, 218 U.S.P.Q. 16, 20 (9th Cir. 1983); *Homeowners Group., Inc. v. Home Mktg. Specialist, Inc.*, 931 F.2d 110, 1106, 18 U.S.P.Q. 1169, 1172 (6th Cir. 1985); *Electronic Data Sys. Corp. v. EDSA Micro Corp.*, 23 U.S.P.Q.2d 1460, 1645 (T.T.A.B. 1992)(the standard of likelihood of confusion is "not some theoretical possibility built on a series of imagined horrors"). This requires that the Board consider and review the practical realities existing in the commercial world as it relates the marks in question. The evidence demonstrates that the marks are used in connection with drinks used for different purposes (electrolyte replacement versus energy through extra strength caffeine), which are sold in different sections of a retail store and purchased by different buyers for the retail channel, and that marks are used in entirely different manners. Shah Decl. at ¶ 13, 14 and 15, and Exhibits C, D, and F. The differences in appearance,

sound and commercial impression between the parties' marks are highlighted in the way each party uses its respective marks as shown below:

Respondent's Mark	Petitioner's Marks
• NATURE'S GURU	• GURU • GURU ENERGY DRINK
 (as used) Shah Decl. at ¶ 7, and Exhibits C & D	(as used) Shah Decl. at ¶ 13, and Exhibit F.

The parties' marks as used in the market place create completely different commercial impressions that reinforce the distinctions in the sight, sound and meaning their respective marks as described supra at pages 7-9. Thus the practical realities existing in the commercial world as they relate to the marks in question in this proceeding necessitate a finding of no likelihood of confusion, or alternatively material facts are in dispute as to what practical realities exist in the market place.

This point is further supported by a case cited by Petitioner in the Petition to Cancel, Pages 6-7. In *Coca-Cola Company v. Clay*, 144 USPQ 606 (TTAB 1962), the Board initially found no likelihood of confusion existed between CUP-O-COLA for "cola flavored soft drink concentrate powders" and COCA-COLA or COKE for "beverages and syrups for the

manufacture of such beverages," even though it considered the marks to be identical goods because both were proven to be used to make cola beverages. However, on appeal the court reversed the Board's decision, finding that a likelihood of confusion existed between both marks primarily because evidence was introduced showing CUP-O-COLA was used in a nearly identical script to Coca-Cola's in the marketplace. *The Coca-Cola Company v. William C. Clay, Jr.,* 51 C.C.P.A. 777, 780, 324 F.2d 198, 200 (C.C.P.A. 1963). Similarly in this case, the importance of use in the marketplace should not be ignored, where the appearance, sound and meaning of the marks, and the way they are used in the marketplace, is completely different. As the court did in *Coca-Cola*, this should be treated as either a factor that supports the conclusion that no likelihood of confusion exists, or that it remains a disputed issue of material fact.

3. The Summary Judgment Record Does Not Show any Evidence of Use on the Same Goods and Petitioner has not Established the Goods are Related

Respondent's registration for NATURE'S GURU covers "powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages." The products sold under the NATURE'S GURU mark are powdered mixes for tea flavored beverages, fruit-flavored beverages and the "sports beverage" refers to the powdered coconut water product it sells (Shah Decl. at ¶ 14). Respondent accepted the wording "sports beverage" during the prosecution phase in response to an Examiner requirement. Shah Decl. at P. 6. The inclusion of "sports beverage" as entered by the Examiner was to refer to the coconut water product, which is an isotonic beverage with more potassium than a banana, and that contains five essential electrolytes that is a hydration replacement. The purpose of this drink, with regard to sports, is to hydrate and help replenish body nutrients and electrolytes that are lost in exercise. Shah Decl. at ¶ 7 and 14. NATURE'S GURU powdered coconut water product does not contain

caffeine, which is what distinguishes an energy drink (lots of caffeine) from sports drinks and other beverages which do not have an overabundance of caffeine (which GURU ENERGY DRINK does). Shah Decl. ¶13 and 14.

Petitioner's alleges that its goods encompass "sports drinks, energy drinks and soft drinks." Motion for Summary Judgment, P. 6, at ¶ 3 and 4, and argues that "Registrant's goods are powders and concentrates that would be used to make sports beverages, i.e. sports drinks of the type covered in Petitioner's registrations," going on to contend that the goods are essentially identical and that "[t]his issue was, in fact decided by the TTAB many years ago in Coca-Cola Company v. Clay, 144 USPQ 606 (TTAB 1962)." The Coca-Cola case, however, is distinguishable from the facts presented here. In the present case the comparison is not between two components (powder concentrates versus syrup concentrates) used in the making of a final product (cola beverage), but instead is the comparison of a powdered beverage mix for sports beverages, fruit-flavored beverages and tea-flavored beverages to a ready to drink energy drink. These goods are not identical and therefore Petitioner must establish that the goods are related, which it has not.

Further, despite owning the '940 and '042 Registrations for GURU and GURU ENERGY DRINK for "sports drinks, energy drinks, and soft drinks," Petitioner has not provided any evidence in the record that shows the marks GURU or GURU ENERGY DRINK are currently, or ever were, used specifically on sports drinks or soft drinks even though identified in the registrations. The record only shows use of the GURU and GURU ENERGY DRINK marks on energy drinks, yet Petitioner conveniently relies in its petition for cancellation on the overlap of "powder or concentrates used to prepare sports beverages" by Respondent, and "sports drinks" by Petitioner and the associated conclusion under TMEP §1207.01(a)(iii) to conclude that the

channels of trade are presumed to be the same and the goods available to all classes of purchaser. See Petition to Cancel P. 6-7. This simply is not enough to prove that the USPTO incorrectly issued Petitioner's registration and that a likelihood of confusion exists between Respondent's NATURE'S GURU Mark and Petitioner's GURU ENERGY DRINK and GURU marks. Even assuming that an "energy drink" could qualify as a "sports drink," Petitioner has failed to provide any evidence of such a proposition and thus it remains a disputed issue of material fact.

4. There is Evidence of Record That the Respective Goods Travel in Different Channels of Trade

Respondent specifically disputes Petitioner's contention that there are no disputed material facts regarding whether the respective goods will travel in the same channels of trade. Where likelihood of confusion is asserted by a Petitioner with respect to a registered mark, the issue must be resolved based not only on a comparison of the involved marks, but also a consideration of the goods named in the Respondent's registration and Petitioner's registration, and, even in the absence of specific limitations in the registrations, *on consideration of the normal and usual channels of trade and methods of distribution*. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43, 216 U.S.P.Q. 937 (Fed. Cir. 1983) (emphasis added). While it may be the Board's practice in the absence of specific limitations in the registration to presume that goods flow to all channels, Respondent respectfully submits that the Board should not simply dismiss or disregard probative evidence of "established, likely-to-continue trade channels" *given that DuPont indicates that this factor, when supported by probative evidence, must be considered*. See *In re DuPont* 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973)(emphasis added). Petitioner summarily concludes in its Motion that the respective registrations are not limited to specific channels of trade and therefore the goods are considered to travel in all the normal

channels of trade to all consumers. Motion at P. 7. This is not the case and issues of material fact remain as to the normal and usual channels of trade and methods of distribution.

The "channels of trade" factor "is very significant in illuminating what actually happens in the marketplace, and, where other factors are not particularly prohibitive, is of special importance." *Homeowners Grp.,* 931 F.2d 1100, 1110. Respondent's goods are powder and concentrates used in preparation of sports beverages, fruit flavored beverages and tea-flavored beverages. Shah Decl. at ¶ 5 and 7. Respondent's products are sold with the following categories in retail markets: shelf stable beverages, coffee and teas, drink mixes, or coconut water products. Shah Decl. at ¶ 11. Respondent's products are never refrigerated. Shah Decl. at ¶ 11. As a result, Respondent's products would be located in different aisles than the Petitioner's products if they are sold in the same stores. *Id.* Assuming that the products are sold in the same stores, there is no "per se" rule that all products are related goods by virtue of their capability of being sold in the same food markets. *Hi-Country Foods Corp., v. Hi Country Beef Jerky,* 4 U.S.P.Q.2d 1169, 1171-72 (T.T.A.B. 1987). The same reasoning applies to shopping malls, *Morgan Creek Products, Inc. v. Foria Int'l Inc.,* 91 U.S.P.Q.2d 1134, 1142 (T.T.A.B. 2009) ("since malls sell a wide variety of items, the position would essentially give [the complainant] a right in gross, something that the trademark law prohibits") and on the Internet, *Entrepreneur Media v. Smith,* 279 F.3d 1135, 2262, 61 U.S.P.Q.2d 1705, 1717 (9th Cir. 2002). Indeed, such different locations in the store, or in the home as well, are sufficient to conclude that the products are not the same or similar in concluding that no likelihood of confusion exists. *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 14 U.S.P.Q.2d 1577, 1599 (S.D. Ohio 1990) (despite use of identical marks, HEARTWISE, for microwavable meat and hot breakfast foods versus breakfast cereals, were distinguishable despite both being for breakfast and found in same

supermarkets); *Slimmery Int'l, Inc. v. Stauffer-Meiji, Inc.*, 6 USPQ2d 1671, 1678 (E.D. Mo. 1987) (noting also the different "storage and siting requirements of the products in the stores, and, importantly, in the consumer's home).

In light of the foregoing, Respondent contends that there is probative evidence in the record that Respondent's NATURE'S GURU products, which are sold in powdered form, and Petitioner's GURU and GURU ENERGY DRINK products are sold in different established and likely-to-continue channels of trade. At a minimum, the evidence of record demonstrates that there are material disputed facts regarding this *DuPont* factor, which the Board should not disregard or dismiss at this phase of the proceedings in view of the applicable summary judgment standard.

5. The Relevant Goods are Purchased by Consumers Who Exercise Care in Their Purchases and are Therefore Not Likely to be Confused

Once the relevant public has been identified, the next step in considering whether there is a likelihood of confusion is considering the reasonably prudent purchaser for the products of interest. *See* Restatement (Third) of Unfair Competition §20 cmt. 1995. Petitioner did not provide any evidence or information relating to the relevant class of consumer that might purchase its product. Respondent's purchasers, however, are careful in their purchase of the NATURE'S GURU product both because of its nature as an electrolyte replacement and also in light of the fact that the NATURE'S GURU goods are in powdered or concentrate form which requires knowledge of how to use such products. Respondent markets its NATURE'S GURU products to ethnic, specialty, and natural/organic food retailers in throughout the U.S. Shah Decl. at ¶ 8. Respondent's products must be mixed with water before use. *Id.* at ¶ 10. This makes them less likely to be subject to instant-use purchases. Further, the goods also are health-related and therefore require a closer review by the purchaser, combined with the premise that

they will need to prepare the end product themselves. *Stouffer Corp. v. Health Valley Natural Foods, Inc.*, 1 U.S.P.Q.2d 1900, 1902, 1986 WL 83342 (T.T.A.B.1987), aff'd, 831 F.2d 306, 1987 WL 44470 (Fed.Cir.1987) (finding that for health or diet related products there is a special class of consumer that will closely review product packaging and therefore less likely to be confused). Accordingly, it may reasonably be inferred that such purchasers will make their choice after thoughtful consideration and are unlikely to be confused as to source. *See also In re Joseph Nuzzolo*, 2001 WL 58240 at 2 (T.T.A.B. 2001) (concluding that purchasers exercising care, such as in art appraisal services, are more likely to notice subtle nuisances between marks and source).

Based on the foregoing, Respondent submits that this factor weighs in Respondent's favor or there is at least a genuine issue of act as to the sophistication level of consumers and therefore summary judgment is not appropriate.

6. There is No Evidence of Actual Confusion Despite Concurrent Use of the Marks for Over Four Years

Although evidence of actual confusion is not required, the lack of actual confusion when the marks have coexisted in the market place can lead to an inference that no likelihood of confusion exists. *Smith*, 243 F.2d 188, 190. Respondent has been using the NATURE'S GURU Mark in connection with powdered drink mixes, including a coconut water powder since as early as October 9, 2009. Shah Decl. at ¶ 3. Although Petitioner's and Respondent's products have been simultaneously offered in the retail market place for many years, there is no evidence of actual confusion among consumers. Shah Decl. at ¶ 15. No actual confusion between marks that are concurrently in use is probative on the issue of likelihood of confusion and is therefore an issue of genuine fact and leads to an inference that there is no likelihood of confusion. *Id.*. In this regard, Respondent has been using the mark NATURE'S GURU for over four years, and

nearly four years have passed since Mr. Shah filed his U.S. Trademark application for NATURE's GURU. Shah Decl. at ¶ 5. Since the launch of the NATURE'S GURU brand, Respondent is unaware of any instances of actual confusion (Shah Decl. at ¶ 15) and Petitioner has offered no evidence or even a claim of any such confusion. Under these circumstances, the lack of any such confusion requires a finding that no likelihood of confusion exists between the marks at issue and this factor weighs in Respondent's favor in the likelihood of confusion analysis.

IV. CONCLUSION

For at least the reasons set forth above, Petitioner has failed to meet its burden of demonstrating as a matter of law that Respondent's continued registration of the NATURE'S GURU Mark will create a likelihood of confusion with Petitioner's GURU or GURU ENERGY DRINK marks. Accordingly, Petitioner's Motion for Summary Judgment should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REGISTRANT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** was sent by U.S. First Class Mail, postage prepaid, to the following on this 10 day of June, 2014:

Mark B. Harrison
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004

/Jeffrey J. Morgan/
Jeffrey J. Morgan

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

GURU BEVERAGE CO.	)	Cancellation No.:	92056634
	)		
Petitioner	)	Mark:	NATURE'S GURU
v.	)		
	)	Registration No.:	4,125,408
SAGAR SHAH	)	Reg. Date:	April 10, 2012
	)		
	)		
Registrant	)		
	)		

The attached are Exhibits D-F in support of Declaration of Sagar Shah for Registrant's Response to Petitioner's Motion for Summary Judgment and Memorandum in Support Thereof.

EXHIBIT D

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Best Selling Products from Nature's Guru

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Nature's Guru Chai produces a warm, invigorating feeling that has an energizing effect on your mind and body. We blend fresh black tea leaves and perfectly harmonize it with a robust bouquet of authentic spices from India. Balanced with just the right sweetness, our Chai mix delivers a robust experience that satisfies even the most discerning tea connoisseur. Nature's Guru Chai is more than just a tea-it's an indulgent sensory experience.

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Chai for Chi!

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guru

guru

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gu·ru *noun* \'gr-(,)ü, 'gü-(,)rü *also* gə-'rü\

: a religious teacher and spiritual guide in Hinduism

: a teacher or guide that you trust

: a person who has a lot of experience in or knowledge about a particular subject

plural **gurus**

Full Definition of GURU

Cite! Like

1 : a personal religious teacher and spiritual guide in Hinduism

2 a : a teacher and especially intellectual guide in matters of fundamental concern

b : one who is an acknowledged leader or chief proponent

c : a person with knowledge or expertise : EXPERT

See guru defined for English-language learners »
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Examples of GURU

- He has been a *guru* to many young writers.
- She's a self-proclaimed financial *guru*.

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TOP 10 LISTS

- Fitness *gurus* call it the hottest new exercise trend of the year.

Origin of GURU

ultimately from Sanskrit *guru,* from *guru,* adjective, heavy, venerable — more at GRIEVE

First Known Use: 1613

Related to GURU

Synonyms

ace, adept, artist, authority, cognoscente, connoisseur, crackerjack (*also* crackajack), dab [*chiefly British*], dab hand [*chiefly British*], fiend, geek, expert, hand, hotshot, maestro, master, maven (*also* mavin), meister, past master, proficient, scholar, shark, sharp, virtuoso, whiz, wizard

Antonyms

amateur, inexpert, nonexpert

Related Words

pro, professional; consultant, hired gun, specialist; addict, aficionado (*also* afficionado), buff, devotee, enthusiast, fan; craftsman, journeyman; all-rounder [*British*], jack-of-all-trades, Renaissance man; mistress

Near Antonyms

apprentice, beginner, neophyte, novice; dabbler, dilettante; layman, nonprofessional

more

Other Religion (Eastern and Other) Terms

Zen, antinomian, avatar, gnosticism, illuminati, ineffable, karma, koan, mantra

Rhymes with GURU

accrue, achoo, adieu, ado, Agnew, aircrew, airscrew, anew, askew, babu, Baku, bamboo, battu, battue, bayou, bedew, beshrew, bestrew, bijou...
[+] more

guru *noun* *(Concise Encyclopedia)*

In HINDUISM, a personal spiritual teacher. In ancient India,

The Dangerous Creation of "Limelight," & More
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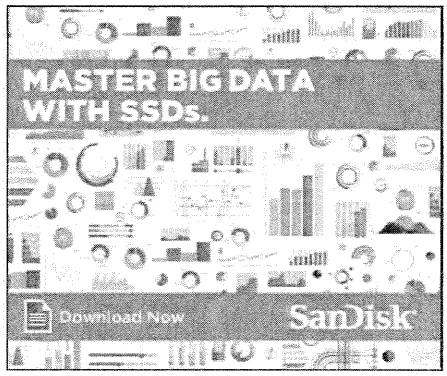

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knowledge of the VEDAS was transmitted through oral teaching from guru to pupil. The rise of the BHAKTI movement further increased the importance of gurus, who were often looked on as living embodiments of spiritual truth and were identified with the deity. They prescribed spiritual disciplines to their devotees, who followed their dictates in a tradition of willing service and obedience. Men or women may be gurus, though generally only men have established lineages. *See also* GURU.

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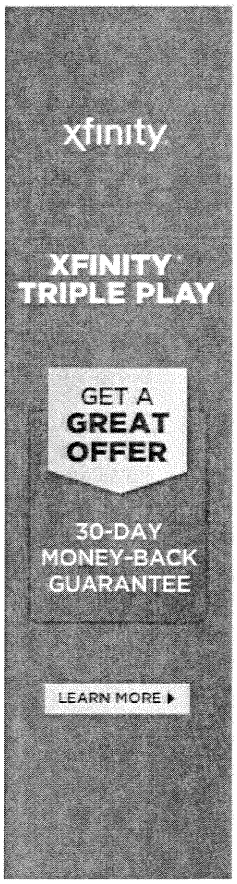

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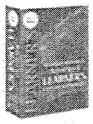

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EXHIBIT F

GURU

• GOOD ENERGY • PRODUCTS • COMMUNITY • SHOP •

EN

WE BELIEVE IN GOOD ENERGY

Energy should not come at the expense of health.
That's why GURU is crafted with natural and organic ingredients.

STRONG AND EFFECTIVE

GURU's authentic preparation of infused and brewed botanicals results in a 100% use of naturally occurring caffeine in every can, making it strong and effective.
You will never find any synthetic caffeine in our products.

botanically
INFUSED & BREWED

ONLY GOOD STUFF

We care about every detail in our recipe. That's why we make sure to always select the best ingredients.

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Rue Chambord
Boulevard de l'Acadie
L'Acadie Blvd
Rue Gilford
Rue Clark
Rue Jeanne-Mance
Rue Saint-Urbain
Boul. Saint-Laurent
Boul. Chambord
Parc-Extension
Parc Jean-Drapeau
Lacordaire Blvd
Pie-IX Blvd
Rue Fabre
Rue Iberville
Rue Saint-Denis
Rue Bélanger
Rue Jarry
Rue Fleury
Rue Gilford
Rue Rachel
Rue Sherbrooke
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Rue Sainte-Catherine
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Rue Bridgeland
Rue Dandurand
Rue Jean-Talon
Rue Beaubien
Rue Bélair
Rue Lajeunesse
Rue Saint-Denis
Rue Fabre
Rue Iberville
Rue Saint-Urbain
Rue Saint-Hubert
Rue Saint-Denis

GURU Energy Drink

8oz
24 PACK / $48.99

QTY 0

12oz
24 PACK / $62.99

QTY 0

GURU Energy Drink Lite

8oz
24 PACK / $48.99

QTY 0

12oz
24 PACK / $62.99

QTY 0

CHECK OUT

gu-ru /ˈgoŏroō/

Noun:
1. A mentor, a teacher, one who helps you move forward.
2. A source of inspiration and good energy.

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

GURU BEVERAGE CO.	)	Cancellation No.:	92056634
	)		
Petitioner	)	Mark:	NATURE'S GURU
v.	)		
	)	Registration No.:	4,125,408
SAGAR SHAH	)	Reg. Date:	April 10, 2012
	)		
	)		
Registrant	)		
	)		

DECLARATION OF SAGAR SHAH

The undersigned, Sagar Shah, DBA Nature's Guru, on his own personal knowledge declares and states as follows:

1. I am the owner and founder of Nature's Guru, which I operate as a sole proprietor and under the business name Nature's Guru.

2. I am the owner of U.S. Trademark Registration No. 4125408 for the mark NATURE'S GURU. I make this Declaration in support of Registrant's Response to Petitioner's Motion for Summary Judgment and Memorandum in Support Thereof.

3. My first use of NATURE'S GURU as a trademark in connection with powdered drink mixes, including a coconut water powder product began October 9, 2009. I began promoting and soliciting orders for the NATURE'S GURU products on October 27, 2009 and obtained my domain name for www.naturesguru.com on that same date. I began using the mark in U.S. commerce at least as early as September 30, 2010.

4. I started working with a distributor in November 2010 to begin placement of the NATURE'S GURU products into Whole Foods Market locations in the U.S., which was approved at least as early as January 2011.

5. On August 5, 2011, Application Ser. Number 85/390,971 (the "Application") was filed in the United States Patent and Trademark Office for the mark NATURE'S GURU in connection with "Powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages." The Application issued as U.S. Registration No. 4125408 on April 10, 2012. The registration is valid and subsisting. Attached as Exhibits A and B are true and correct copies of the U.S. Registration No. 4125408 and TARR Printout for the mark.

6. During the examination process, my attorney was informed by the Examining Attorney on December 2, 2011 that after searching the USPTO's database of registered and pending marks she had found no conflicting marks that would bar registration under Trademark Act Section 2(d). The Examining Attorney entered an Examiner's amendment on that same day to amend the goods, and the application was published for opposition on January 24, 2014. No requests for extension of time to oppose or oppositions were filed against the Application.

7. The NATURE'S GURU line of products includes "Instant Mangosteen Fruit" powder, "Masala Spice Chai" instant tea mix (sweetened and unsweetened), "Cardamom Chai" instant tea mix (sweetened and unsweetened), "Lemongrass Chai" instant tea mix (sweetened and unsweetened), "Ginger Chai" instant tea mix (sweetened and unsweetened), "Vanilla Chai" instant tea mix (sweetened and unsweetened), "Instant Tender Coconut Water Powder", "Coconut Water Powder with Mango", and "Coconut Water Powder with Chocolate". These products are advertised at my website located at www.naturesguru.com and on Amazon.com.

Attached as Exhibits C and D are true and correct copies of the Nature's Guru website (www.natureguru.com) and on the Amazon website.

8. The full range of NATURE'S GURU products are sold throughout the United States in ethnic, specialty and natural/organic retail food stores, including Whole Foods Market (WFM), HomeGoods – TJX Corporation (TJX), Amazon.com (AMZN), New Leaf Community Markets, Rainbow Cooperative Grocery, Akin's and Chamberlin's Natural Food Markets to name a few. The products are sold either directly to the retail stores or through multiple regional and national distributors which in turn service the retail stores. Outside of retail, NATURE'S GURU products are also supplied to various food services accounts, such as restaurants, caterer's and wedding planners.

9. The full range of NATURE'S GURU products are also featured and sold online through Amazon.com's national grocery section.

10. The NATURE'S GURU products are designed for the consumer to add water to make a beverage—they are not sold as, or in retail stores with, ready to drink beverages.

11. The NATURE'S GURU coconut water powder product is sold with the following retail market product categories: shelf stable beverages, coffees and teas, drink mixes, and coconut water products. The coconut water powder product is never refrigerated like most beverage brands, including Petitioner's GURU products.

12. According to the Merriam Webster's online dictionary, the definition of GURU is "a religious teacher and spiritual guide in Hinduism; a teacher or guide that you trust; a person has a lot of experience or knowledge about a particular subject." Attached as Exhibit E is a true and correct copy of a printout taken from Merriam Webster's online dictionary.

13. Petitioner's products are marketed as "natural energy drinks" and as "organic." The natural energy claim apparently is based on the presence of naturally occurring caffeine. Attached as Exhibit F is a true and correct copy of printouts taken from Petitioner's website at www.guruenergy.com.

14. The NATURE'S GURU coconut powder product, however, can be considered a sports drink due to presence of electrolytes from a fruit beverage and does not contain caffeine. Further, the NATURE'S GURU coconut powder product is marketed as a hydration replacement beverage mix.

15. Both Petitioner and Respondent's products are sold in the same brick—and-mortar stores and online retailers (i.e Whole Foods Markets, Amazon.com). Each also share similar food distributors (Nature's Best and UNFI: United Natural Foods Inc.). Both are in different categories, however, have different product buyers, and use different item codes. Although Petitioner's products and the NATURE'S GURU products have coexisted in the retail market place for many years, I am not aware of any instances of actual confusion where consumers were confused as to the source of the respective products. I have not, for example, received any misdirected inquiries or orders where consumers were seeking Petitioner's products instead of NATURE'S GURU products.

Executed June 10, 2014 at Cerritos, California. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Sagar Shah

Sagar Shah

{00063508.5 }

EXHIBIT A

United States of America

United States Patent and Trademark Office

NATURE'S GURU

Reg. No. 4,125,408

Registered Apr. 10, 2012

Int. Cl.: 32

TRADEMARK

PRINCIPAL REGISTER

SAGAR SHAH (UNITED STATES INDIVIDUAL), DBA NATURE'S GURU
19416 AMHURST COURT
CERRITOS, CA 90703

FOR: POWDER AND CONCENTRATES USED IN THE PREPARATION OF SPORTS BEVERAGES, FRUIT-FLAVORED BEVERAGES AND TEA-FLAVORED BEVERAGES, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 10-9-2009; IN COMMERCE 9-30-2010.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-390,971, FILED 8-5-2011.

JENNY PARK, EXAMINING ATTORNEY

David J. Kappos

Director of the United States Patent and Trademark Office

REQUIREMENTS TO MAINTAIN YOUR FEDERAL TRADEMARK REGISTRATION

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years*
What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.* *See* 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*
What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

EXHIBIT B

Currently, the Trademark Status and Documents Retrieval (TSDR) system is not properly displaying certain documents uploaded between May 27, 2014 and May 30, 2014. The USPTO is currently working to resolve this issue. We apologize for any inconvenience. Please contact TEAS@uspto.gov with any questions.

STATUS DOCUMENTS Back to Search Print

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Mark: NATURE'S GURU

NATURE'S GURU

US Serial Number: 85390971 **Application Filing Date:** Aug. 05, 2011

US Registration Number: 4125408 **Registration Date:** Apr. 10, 2012

Register: Principal

Mark Type: Trademark

Status: A cancellation proceeding is pending at the Trademark Trial and Appeal Board. For further information, se Trial and Appeal Board web page.

Status Date: Jan. 08, 2013

Publication Date: Jan. 24, 2012

Mark Information

Collapse All

Mark Literal Elements: NATURE'S GURU

Standard Character Claim: Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type: 4 - STANDARD CHARACTER MARK

Goods and Services

Note:
The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [..] indicate deleted goods/services;
- Double parenthesis ((..)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-fl

International Class(es): 032 - Primary Class **U.S Class(es):** 045, 046, 048

Class Status: ACTIVE

Basis: 1(a)

First Use: Oct. 09, 2009 **Use in Commerce:** Sep. 30, 2010

Basis Information (Case Level)

Filed Use: Yes **Currently Use:** Yes Am

Filed ITU:	No	Currently ITU:	No	An
Filed 44D:	No	Currently 44D:	No	Am
Filed 44E:	No	Currently 44E:	No	Am
Filed 66A:	No	Currently 66A:	No	
Filed No Basis:	No	Currently No Basis:	No	

Current Owner(s) Information

Owner Name: Sagar Shah

DBA, AKA, Formerly: DBA Nature's Guru

Owner Address: 19416 Amhurst Court
Cerritos, CALIFORNIA 90703
UNITED STATES

Legal Entity Type: INDIVIDUAL

Citizenship: UNITED STATES

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Sheetal S Patel

Docket Number: 1155.0002

Attorney Primary Email Address: spatel@leonardpatel.com

Attorney Email Authorized: No

Correspondent

Correspondent Name/Address: KATHERINE M BASILE
LEONARDPATEL PC
22952 Mill Creek Drive
Laguna Hills, CALIFORNIA 92653
UNITED STATES

Phone: 949-535-1036

Fax: 949-242-9711

Correspondent e-mail: trademarks@leonardpatel.com

Correspondent e-mail Authorized: Yes

Domestic Representative

Domestic Representative Name: Sheetal S Patel

Phone: 9497244521

Fax: 9492429711

Domestic Representative e-mail: spatel@leonardpatel.com

Domestic Representative e-mail Authorized: Yes

Prosecution History

Date	Description	Proceeding Number
Jan. 21, 2014	TEAS CHANGE OF CORRESPONDENCE RECEIVED	

Jan. 08, 2013	CANCELLATION INSTITUTED NO. 999999	56634
Apr. 10, 2012	REGISTERED-PRINCIPAL REGISTER	
Jan. 24, 2012	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	
Jan. 24, 2012	PUBLISHED FOR OPPOSITION	
Jan. 04, 2012	NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED	
Dec. 21, 2011	LAW OFFICE PUBLICATION REVIEW COMPLETED	68552
Dec. 21, 2011	ASSIGNED TO LIE	68552
Dec. 02, 2011	APPROVED FOR PUB - PRINCIPAL REGISTER	
Dec. 02, 2011	EXAMINER'S AMENDMENT ENTERED	88888
Dec. 02, 2011	NOTIFICATION OF EXAMINERS AMENDMENT E-MAILED	6328
Dec. 02, 2011	EXAMINERS AMENDMENT E-MAILED	6328
Dec. 02, 2011	EXAMINERS AMENDMENT -WRITTEN	81848
Nov. 29, 2011	ASSIGNED TO EXAMINER	81848
Aug. 10, 2011	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Aug. 09, 2011	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information - None

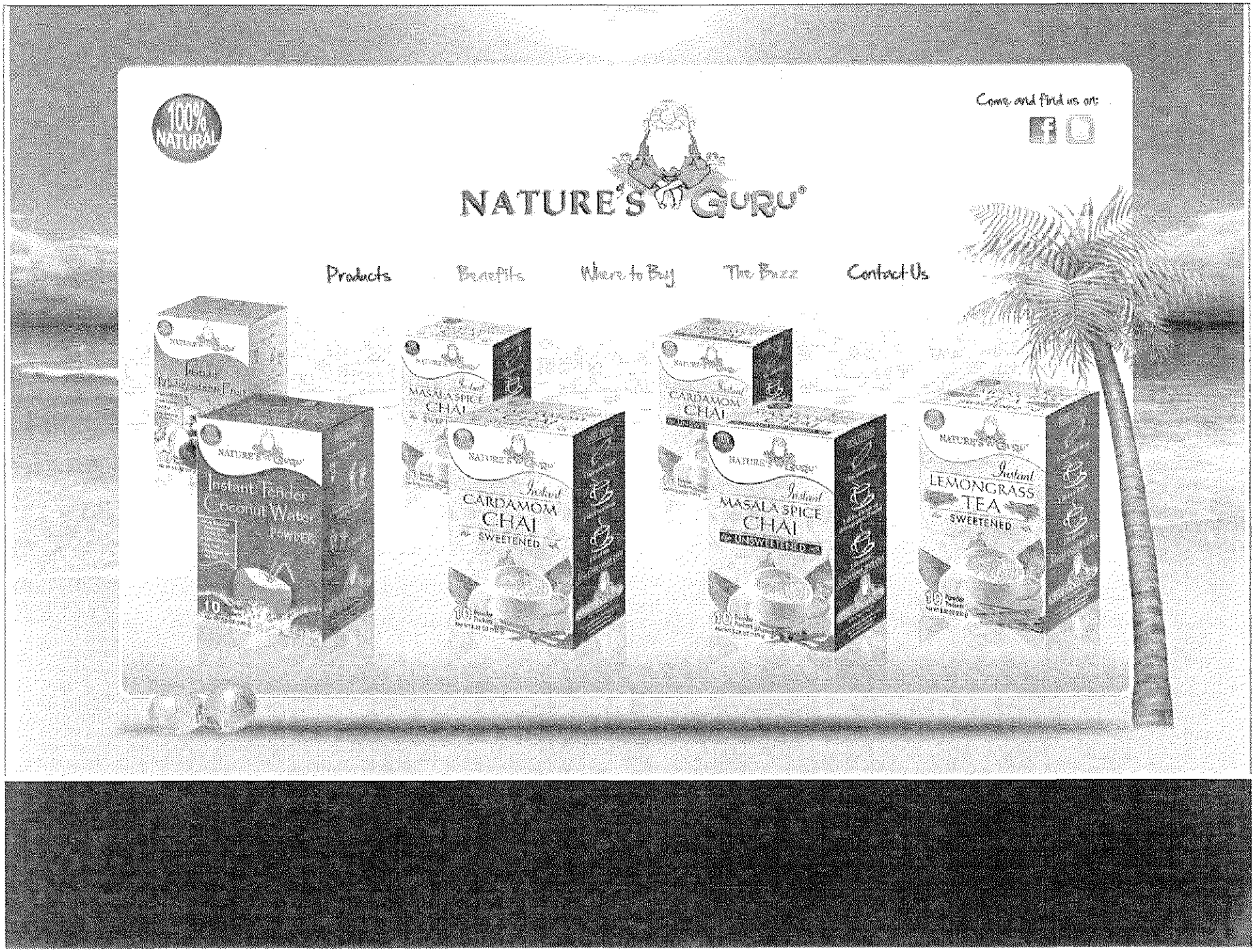
File Location

Current Location: PUBLICATION AND ISSUE SECTION **Date in Location:** Apr. 10, 2012

Assignment Abstract Of Title Information - Click to Load

Proceedings - Click to Load

EXHIBIT C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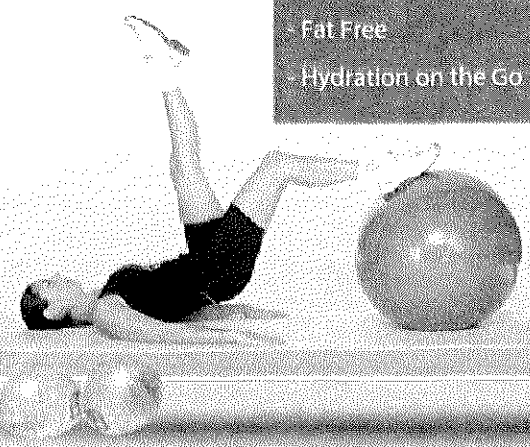

Coconut Water is an isotonic beverage.

It has more potassium than a banana and over 15 times more than sports drinks – to prevent muscle cramps and promote quicker recovery.

Drink Coconut Water before, during, or after workout for the natural hydration you need for optimal performance and recovery.

Coconut water is the clear liquid inside young coconuts (fruits of the coconut palm), not to be confused with coconut milk. As the fruit matures, the coconut water gradually is replaced by the coconut meat and air. A very young coconut has very little meat, and the meat is very tender, almost a gel. Coconut water has long been a popular drink in the tropics, especially in Tropical Asia, where it is available fresh or bottled. It is naturally fat-free and low in food energy (16.7 calories or 70 kilojoules per 100 grams).

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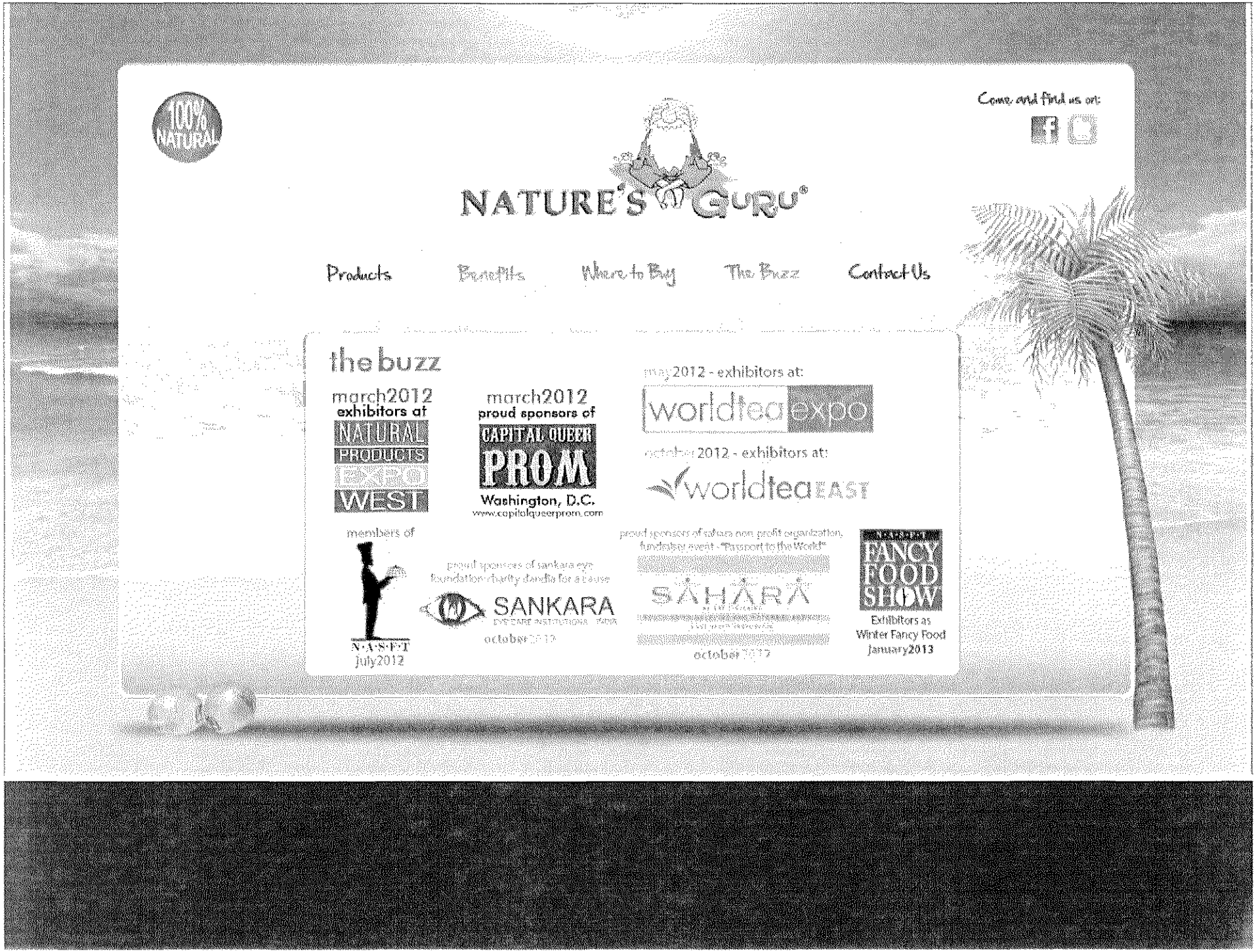
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