

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

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Mailed: October 16, 2013

Cancellation No. **92056801**

NutriLife International, Inc.

v.

Andrew Bert Foti

Yong Oh (Richard) Kim, Interlocutory Attorney:

On October 10, 2013, the Board held a telephone conference with counsel for each party to discuss the parties' stipulation (filed July 23, 2013) to proceed under the Board's Accelerated Case Resolution ("ACR") procedure. David Madden, Esq., of Mersenne Law LLC appeared on behalf of petitioner and Isabel Torres-Sastre, Esq., of McConnell Valdes LLC appeared on behalf of respondent. The above signed Board attorney participated in the conference.

By way of background, on February 19, 2013, petitioner served and filed a petition to cancel respondent's Registration No. 3815143¹ on the ground of priority and likelihood of confusion. Petitioner has pleaded common law

¹ For NUTRALIFE in standard characters for "cooking strainers; cookware, namely, pots and pans; cookware, namely, steamers; frying pans; pans; skillets" in International Class 21 based on an underlying application filed on September 15, 2008, and asserting a date of first use anywhere and in commerce of November 20, 2008.

use of NUTRI LIFE INTERNATIONAL without and with a design as shown in its application Serial Nos. 85428504² and 85428546³ which have been refused registration based on the involved registration and currently suspended pending disposition of this cancellation proceeding.

As a preliminary matter, the Board noted that the putative "answer" filed by respondent on April 1, 2013, is argumentative and more in the nature of a brief on the case than a responsive pleading to the petition to cancel. As such, it does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Trademark Rule 2.116(a). Accordingly, the Board ordered respondent to serve and file an amended answer that comports with the requirements of Fed. R. Civ. P. 8(b) no later than November 8, 2013.

The Board then requested a status of discovery taken thus far to which the parties responded that only initial disclosures have been served by the parties and that based

² Filed September 21, 2011, for "cookware, namely, stainless-steel skillets, saucepans, stock pots, griddles and slicers" in International Class 21 and "retail services by direct solicitation by sales agents in the field of cookware and water filtration products" in International Class 35, and asserting a date of first use anywhere and in commerce of October 7, 2002. INTERNATIONAL has been disclaimed.

³ Filed September 21, 2011, for "retail services by direct solicitation by sales agents in the field of cookware and water filtration products" in International Class 35, and asserting a date of first use anywhere and in commerce of October 7, 2002. INTERNATIONAL has been disclaimed.

thereon, the parties determined that they may benefit from the efficiencies afforded by the ACR procedure.

During the conference, the Board and the parties discussed petitioner's claim and determined that this proceeding turns on the question of priority. As such, the parties stipulated that there is a likelihood of confusion between their marks and that discovery would be limited to the issue of priority of use. The parties further stipulated to limit the methods of discovery to interrogatories, document requests and requests for admissions and agreed to forego discovery depositions. Petitioner, noting that it would be amenable to a concurrent use of the marks, agreed to stipulate that respondent has priority of use in Puerto Rico.

In view of these stipulations, the Board determined that this proceeding would benefit from the savings in time and expense afforded by the ACR procedure and granted the parties' request to proceed under ACR. After some discussion and guidance from the Board, the parties agreed to proceed under the cross-summary judgment model and agreed to treat the briefs and accompanying evidence as the final briefs and records in this proceeding. *See, e.g., Freeman v. National Association of Realtors*, 64 USPQ2d 1700 (TTAB 2002); *Miller Brewing Co. v. Coy Int'l Corp.*, 230 USPQ 675 (TTAB 1986). In furtherance thereof, the parties stipulated

that the Board may resolve any genuine disputes of material fact that may be presented by the record or which may be discovered by the panel considering the case at final hearing.

The parties declined to agree to any further stipulations, whether factual or procedural, at this time but agreed to revisit the question of additional stipulations upon completion of discovery. In that regard, the parties agreed to propound their respective discovery requests by October 18, 2013, with responses due in accordance with Trademark Rule 2.120.

As to the briefing schedule, the parties chose to brief their respective positions serially rather than concurrently, beginning with petitioner's motion for summary judgment. In view thereof, this case will proceed under the following schedule:

Deadline to Propound Discovery	10/18/2013
Amended Answer Due	11/8/2013
Petitioner's ACR Motion Due	12/20/2013
Respondent's Response and Cross-Motion Due	1/19/2014
Petitioner's Reply and Response to Cross-Motion Due	2/18/2014
Respondent's Reply Due	3/5/2014

The Board will render a final decision in accordance with the evidentiary burden at trial, that is, by a preponderance of the evidence. *Cf., Gasser Chair Co., Inc. v. Infanti Chair Mfg Corp.*, 60 F.3d 770, 34 USPQ2d 1822,

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1824 (Fed. Cir. 1995) (in addition to proving elements of claim by preponderance of the evidence, a party moving for summary judgment must also establish no genuine issue of material fact as to those elements). The Board will endeavor to issue a decision on the merits within fifty days of completion of briefing and, as noted during the conference, the decision will be judicially reviewable under Trademark Rule 2.145.

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