

ESTTA Tracking number: **ESTTA545895**

Filing date: **06/28/2013**

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	CytoSport, Inc.		
Entity	Corporation	Citizenship	California
Address	4795 Industrial Way Benicia, CA 94510 UNITED STATES		

Attorney information	Eric E. Westerberg Thorpe North & WEstern, LLP 8180 South 700 East Suite 350 Sandy, UT 84070 UNITED STATES Eric.westerberg@tnw.com, kelley.warner@tnw.com, docket@tnw.com		
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Registration Subject to Cancellation

Registration No	3842462	Registration date	08/31/2010
Registrant	Evolv Health, LLC 5001 Spring Valley Road Suite 500W Dallas, TX 75244 UNITED STATES		

Goods/Services Subject to Cancellation

Class 005. First Use: 2009/07/00 First Use In Commerce: 2009/07/00 All goods and services in the class are cancelled, namely: nutritionally fortified beverages for use as ergogenic aids
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Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Petitioner as Basis for Cancellation

U.S. Application No.	85676705	Application Date	07/13/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	EVOLVE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2001/07/31 First Use In Commerce: 2001/07/31		

	Dietary and Nutritional Supplements
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U.S. Application No.	85708932	Application Date	08/21/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	EVOLVE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: meal replacement drinks and pre-mixed nutritionally fortified beverages		

Attachments	EVO2LV petition to cancel.pdf(19149 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	/Eric E. Westerberg/
Name	Eric E. Westerberg
Date	06/28/2013

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Attorneys for CytoSport, Inc.
Opposed Mark: EVO2LV
U.S. Trademark Registration Serial Number 3,842,462

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

<p>CytoSport, Inc. Petitioner, v. Evolv Health, LLC, Respondent.</p>	<p>Cancellation No. _____</p>
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PETITION FOR CANCELLATION

CytoSport, Inc. (hereinafter referred to as “Petitioner” or “CytoSport”), a corporation existing under the laws of the State of California, having a principal place of business at 4795 Industrial Way, Benicia, California 94510, believes it will be damaged by the continued registration of the mark , Registration No. 3,842,462, (hereinafter “EVO2LV” or “Respondent’s Mark”) and alleges the following:

Evolv Health's Registration

1. Upon information and belief, Evolv Health, LLC (hereinafter referred to as "Respondent"), is Delaware corporation with a principal place of business at 5001 Spring Valley Road, Dallas TX 75244.
2. Upon information and belief, Respondent owns Registration No. 3,842,462 for the mark EVO2LV, registered for use in connection with "nutritionally fortified beverages for use as ergogenic aids" in international class 005.
3. The filing date of Registration No. 3,842,462 is February 26, 2009.
4. On information and belief, Respondent's first use of the EVO2LV mark in commerce is July 2009.

CytoSport's Prior Rights

5. CytoSport is in the business of manufacturing and marketing nutritional and dietary supplement products. Among the products offered by CytoSport is a family of nutritional supplements powder mixes and ready-to drink nutritional drinks.
6. CytoSport's powdered and ready-to-drink nutritional supplement products are sold under a variety of trademarks, including, EVOLVE, and DRINK. EVOLVE.
7. CytoSport is the owner by assignment of published U.S. Trademark Application No. 85,676,705 for the mark EVOLVE for use in connection with "dietary and nutritional supplements" in international class 005.
8. CytoSport is the owner of pending U.S. Trademark Application No. 85,708,932 for the mark EVOLVE for use in connection with "meal replacement drinks and pre-mixed nutritionally fortified beverages" in international class 032.

9. CytoSport's pending Trademark Application No. 85,708,932 has been refused by the USPTO under Section 2(d) based on a likelihood of confusion with Respondent's Mark.

10. CytoSport is the owner by assignment of common law rights in the mark EVOLVE that predate Respondent's trademark rights in Respondent's mark.

11. CytoSport's common law rights in the EVOLVE mark are based on interstate use of the EVOLVE mark in commerce as early as August, 2001. EVOLVE has been used continuously since 2001 in connection with nutritional supplements, protein supplements, and meal replacement beverages.

12. CytoSport's common law rights in its EVOVLE mark predate Respondent's trademark rights in the EVO2LV mark.

13. The continued registration of Respondent's Mark is likely to damage CytoSport in that Respondent's Mark, when used on or in connection with the identified goods, so resembles CytoSport's trademarks as to be likely to cause confusion, to cause mistake, or to deceive. Such confusion is likely to falsely suggest a connection between Applicant and Cytosport.

WHEREFORE, CytoSport requests that Registration No. 85/471,207 be cancelled.

The statutory Cancellation Filing Fee of \$300.00 is included herewith. Please charge any additional fees and credit any overpayment to Deposit Account No. 20-0100.

DATED this 28th day of June, 2013.

Respectfully submitted,

/Eric E. Westerberg/
Peter M. de Jonge
Jed H. Hansen
Eric E. Westerberg
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Petition for Cancellation** was served upon the Defendant at the following by the methods indicated below:

Charles G. Zug
NELSON MULLINS RILEY & SCARBOROUGH, LLP
100 North Tryon Street, 42nd Floor
Charlotte, North Carolina 28202-4000

- Electronic Mail
- United States Mail
First Class, Postage Pre-Paid
- Overnight Delivery
- Fax Transmission

DATED this 28th day of June, 2013.

/Kelley Warner/
Kelley Warner