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

Proceeding	92060342
Party	Plaintiff Healthy Directions, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HEALTHY DIRECTIONS, LLC.)
)
 Petitioner,)
)
 v.)
)
CELEBRUS, LLC DBA ARIIX)
)
 Registrant.)
_____)

Cancellation No. 92060342
Registration No. 4570100
OMEGA-Q

Attorney's Reference: 49864-374418

**PETITIONER'S REPLY BRIEF IN RESPONSE TO REGISTRANT'S BRIEF IN
OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

Petitioner respectfully requests that the Board consider this Reply Brief because Registrant's Brief in Opposition to Petitioner's Motion for Summary Judgment ("Registrant's Brief") improperly raises an unpleaded defense. In addition, the evidence contained within Registrant's Brief is irrelevant and inadmissible.

Registrant's Brief Raises an Unpleaded Defense

Registrant's Brief raises for the first time the defense that no likelihood of confusion exists between the parties' marks because "[t]he marks, in short, are descriptive, and therefore weak." Registrant's Brief, p. 5. Registrant did not previously raise this defense as part of its Answer or as part of the several Affirmative Defenses raised in its Answer.

"A party may not defend against a motion for summary judgment by asserting the existence of genuine disputes of material fact as to an unpleaded claim or defense."

TBMP 5.2807(b), citing "*Blansett Pharmacal Co. v. Carmrick Laboratories Inc.*, 25

USPQ2d 1473, 1477 (TTAB 1992) (may not assert unpleaded Morehouse defense); *Perma Ceram Enterprises Inc. v. Preco Industries Ltd.*, 23 USPQ2d 1134, 1135 n.2 (TTAB 1992) (no consideration given to three unpleaded grounds asserted by opposer in response to applicant's motion for summary judgment).

Petitioner's cancellation action is based on priority and likelihood of confusion. Registrant has not previously raised dilution or weakness of Petitioner's registration in its Answer and Affirmative Defenses and may not raise such issues now in order to avoid a ruling on summary judgment.

Registrant's Brief Contains Only Irrelevant and Inadmissible Evidence

Even if the Board permits Registrant's to raise an unpleaded defense, Registrant's evidence, which consists entirely of an affidavit from Registrant's CEO ("Registrant's Affidavit"), is both irrelevant and inadmissible.

Affidavits are a type of permissible evidence in support of, or in opposition to, a motion for summary judgment, "provided that they (1) are made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein." TBMP §528.05.

The sole evidence Registrant submitted in support of Registrant's Brief contains an affidavit containing 10 total numbered paragraphs, plus exhibits, from the Registrant's CEO, Jeffrey Yates ("Yates Declaration"). The Yates Declaration contains numerous statements that are made "on [Mr. Yates'] information and belief," and *not* upon his personal knowledge. See Yates Declaration at ¶ 5 – 6, ¶8 – 10. Paragraphs 1 through 4 of the Yates Declaration simply establish that Mr. Yates is the Registrant's CEO and that

he has a general familiarity with the products Registrant sells under the OMEGA-Q trademark.

In other words, except for a few brief statements where Mr. Yates identifies himself as Registrant's CEO, the Yates Declaration contains no statements that are in fact based upon his personal knowledge except for Paragraph 7, which simply alleges that a likelihood of confusion between the parties' marks is impossible.

The Yates Declaration also includes printouts from Internet websites purporting to support the contention that, "on information and belief," Customers understand that there are many products bearing the marks 'omega' and 'q,' and that there exists "a crowded market of products including the marks 'omega' and 'q'." See Declaration of Jeffery Yates, ¶ 10 and accompanying exhibits to same. Such Internet evidence is inadmissible in the context of a likelihood of confusion analysis, especially when not submitted in connection with statements of personal knowledge of their existence. Registrant has at best merely located websites which purport to sell products similar to nutritional supplements, and has submitted no evidence that such products actually exist or their true nature, or whether such products are available in the United States.

Finally, Petitioner notes that Registrant has submitted no third-party registrations whatsoever in support of its position that Petitioner's mark exists in a field so crowded that likelihood of confusion with Petitioner's mark is impossible.

Conclusion

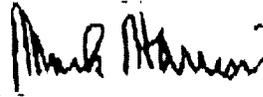
In view of the foregoing, Petitioner respectfully requests that the Yates Declaration be struck in its entirety from the record and that it not be considered by the Board as part of Registrant's Brief.

In the alternative, if the Board determines that the Yates Declaration raises any doubt as to a material fact, Petitioner requests time to further explore that issue and supplement this Reply Brief prior to the Board's ruling on the summary judgment motion.

Petitioner has demonstrated that there is no genuine issue of material fact and Registrant, as the non-moving party, will not be able to establish that there is a genuine issue of material fact for trial.

For the reasons set forth above, Petitioner respectfully requests that summary judgment be entered in its favor, and that Registration No. 4,125,408 be cancelled.

Respectfully submitted,



Dated: May 19, 2015

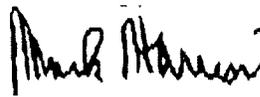
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CERTIFICATE OF SERVICE

The undersigned, attorney for Petitioner, hereby certifies that a true and complete copy of foregoing PETITIONER'S REPLY BRIEF IN RESPONSE TO REGISTRANT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT has been served on this 19th day of May 2015 via U.S. Mail, first class, postage prepaid, to the address of record for Registrant:

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