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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
Correspondence Address	MARK B HARRISON VENABLE LLP PO BOX 34385 WASHINGTON, DC 20043-9998 UNITED STATES
Submission	Motion for Summary Judgment
Filer's Name	Mark B. Harrison
Filer's e-mail	trademarkdocket@venable.com, jmklass@venable.com, mbharrison@venable.com, lmfuller@venable.com
Signature	/mbhjm/
Date	03/23/2015
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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 MOTION FOR SUMMARY JUDGMENT

Having concluded the required discovery conference and having served initial disclosures upon Registrant, Petitioner, HEALTHY DIRECTIONS, LLC, respectfully moves for summary judgment, pursuant to Rule 2.116 of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Procedure. This motion is supported by the accompanying Memorandum and the attached exhibits.

Respectfully submitted,



Dated: March 23, 2015

Mark Harrison
Jeremy M. Klass
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
Telephone: (202) 344-4019
Telefax: (202) 344-8300

Attorneys for Petitioner

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**PETITIONER'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

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Petitioner, HEALTHY DIRECTIONS, LLC, respectfully submits this memorandum in support of its motion for summary judgment, pursuant to Rule 2.116 of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Procedure, in its Petition for Cancellation of Registration No. 4570100 for the mark OMEGA-Q.

I. INTRODUCTION

Summary judgment is a “salutory method of disposition ‘designed to secure [the] just, speedy and inexpensive determination of every action.’” Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 4 USPQ 2d 1793, 1795 (Fed. Cir. 1987) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate in a case such as this where there is no genuine issue as to any material fact and Petitioner is entitled to judgment as a matter of law.

It is well settled that between conflicting parties, the right to use the same mark is based on the priority of appropriation. See National Chemsearch Corp. v. Chemtek Corp., 170 USPQ 110, 111 (TTAB 1971). Also, a mark is not entitled to registration if it so resembles a mark used by another as to cause confusion, mistake or deception. Id. Likelihood of confusion is based on similarity of the goods or services and similarity of the marks.

In this case, there is no material fact at issue regarding priority of use or similarity of the goods. Petitioner has superior rights in the mark. Petitioner owns U.S. Trademark Registration No. 3295413 issued September 18, 2007 from an application filed December 30, 2005 for the mark Omega Q Plus covering “Nutritional supplements.” See Petition for Cancellation ¶ 4; Certified title and status copy of Reg. No. 3295413, attached as Ex.

Petitioner, or Petitioner's predecessor-in-interest, has used its mark on its goods in the U.S. since at least as early as March 5, 2007. See Declaration of Erica Bullard, Petitioner's Senior Vice President, attached as Exhibit 2.

Registrant has admitted that it did not use the mark OMEGA-Q for the goods listed in its application for registration prior to July 4, 2011. See Registrant's Answer to ¶ 8 of the Petition for Cancellation.

With respect to the likelihood of confusion, Registrant's mark and Petitioner's marks are used in connection with the same goods. Both marks are used in connection with "nutritional supplements." The subject registration covers "nutritional supplements" and the Petitioner's registrations cover "nutritional supplements."

Finally, the marks are so similar in appearance, sound and commercial impression as to cause confusion and lead to deception as to the source or origin and/or sponsorship of Registrant's goods and/or Petitioner's goods.

II. STATEMENT OF UNDISPUTED FACTS

1. The Registrant has admitted that it did not use its trademark prior to July 4, 2011. See Registrant's Answer to ¶ 8 of the Petition for Cancellation.
2. Petitioner's relied-upon registration significantly pre-dates July 4, 2011.
3. Petitioner has used its marks on its goods in the U.S. since at least as early as March 5, 2007. See Exhibit 2 for Declaration of Erica Bullard, Petitioner's Senior Vice President.
4. Both Registrant's goods and Petitioner's goods are "nutritional supplements."
5. Registrant's goods and Petitioner's goods are identical.

6. Petitioner is the owner of U.S. Trademark Registration No. 3295413 issued September 18, 2007 from an application filed December 30, 2005 for the mark Omega Q Plus covering “Nutritional supplements.” See Petition for Cancellation ¶ 4; Certified title and status copy of Reg. No. 3295413, attached as Ex. 1.
7. Both Registrant’s mark and the Petitioner’s mark contain the identical term OMEGA Q. See: Registrant’s first unnumbered paragraph of its Answer to the Petition for Cancellation, and ¶ 4 of the Petition for Cancellation.

III. ARGUMENT

A. Petitioner’s Motion for Summary Judgment Should Be Granted When, As Here, There Is No Issue of Material Fact for Trial.

Summary judgment is appropriate to dispose of trademark cases “where no genuine issue of material fact remains and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result.” Societe Des Produits Marnier Lapostolle v. Distillerie Moccia S.R.L., 10 USPQ 2d 1241, 1244 (TTAB 1989); see also Sweats Fashions, 4 USPQ 2d at 1795.

Summary judgment is appropriate and warranted where the moving party demonstrates that there is no genuine issue of material fact regarding a particular contention and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Flatley v. Trump, 11 USPQ 2d 1284, 1287 (TTAB 1989). Upon a motion for summary judgment, the moving party must inform the Board of the basis for its motion and identify the evidence demonstrating the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 256 (1986). The

burden then shifts to the non-moving party to set forth “[s]pecific facts showing that there is a genuine issue for trial.” Anderson, 477 U.S. at 248-49; Fed. R. Civ. P. 56(e). A mere “scintilla” of evidence in support of the non-moving party’s position is not enough to defeat a moving party’s summary judgment motion; rather, when viewed in the light most favorable to the non-moving party, the evidence must be sufficient for a reasonable jury to find in favor of that party. See Anderson, 477 U.S. at 252.

As described below, Petitioner has demonstrated that there is no genuine issue of material fact. Registrant, as the non-moving party, will not be able to establish that there is a genuine issue of material fact for trial. Therefore, Petitioner is entitled to summary judgment as a matter of law.

B. Both the Facts and Law Support Granting this Motion for Summary Judgment and Refusing the Application for Registration.

Pursuant to the Lanham Act, a mark is not entitled to registration, if the mark for which registration is sought (1) “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned” and (2) is likely to cause “confusion, or to cause mistake, or to deceive.” 15 U.S.C. §1052(d).

It is a fundamental principle of United States Trademark law that, “as between conflicting claimants, the rights to use the same mark is based on priority of appropriation.” National Chemsearch Corp. v. Chemtek Corp., 170 USPQ 110, 111 (TTAB 1971). In this case, it is undisputed that Petitioner has prior rights in its Omega Q Plus mark.

Because there is no issue of fact as to priority of use, the issue of priority of use is ripe for summary adjudication.

1. Registrant's Use and Registration of the Mark OMEGA-Q Is Likely To Cause Confusion

The Federal Circuit has established that likelihood of confusion is an issue of law. See In re Shell Oil Co., 992 F.2d 1204, 1206 (Fed. Cir. 1993); Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd., 227 USPQ 541, 542 (Fed. Cir. 1985). Accordingly, disputes regarding a likelihood of confusion may be resolved on a motion for summary judgment. See Sweats Fashions, 4 USPQ 2d at 1797.

A likelihood of confusion analysis entails determining “whether there is a likelihood of confusion as to the source of the goods because of the marks used thereon.” In re Rexel, Inc., 223 USPQ 830, 831 (TTAB 1984).

The principal considerations relevant to the issue of a likelihood of confusion are listed in In re E.I. DuPont deNemours & Co., 476 F.2d 1357, 1361 (CCPA 1973). See Opryland USA, Inc. v. Great American Music Show, 970 F.2d 847, 850 (Fed. Cir. 1992). Not all the listed factors are relevant in each case. See DuPont, 476 F.2d at 1361; see also Opryland, 970 F.2d at 850; Kellogg Co. v. Pack'em Enterprises, Inc., 951 F.2d 330 (Fed. Cir. 1991). Relevant factors with respect to the marks here at issue include (1) “similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use”; (2) “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” See DuPont, 476 F.2d at 1361.

Here, there is no dispute as to the substantially identical nature of the Petitioner's and Registrant's goods. The nature and scope of goods is determined on the basis of the

goods set forth in the application or registration. See, e.g., Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); Paula Payne Products Co. v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973); see also TMEP § 1207.01(a)(iii).

The goods identified by Registrant in its subject registration are “nutritional supplements.”

The goods identified in Petitioner’s pleaded registration are “nutritional supplements.”

The goods are identical.

It is also undisputed that Registrant’s goods and Petitioner’s goods will travel in the same channels of trade. Neither the subject registration nor Petitioner’s registration are limited to specific channels of trade; therefore, each are considered to travel in all the normal channels of trade and are available to all class of purchasers. See TMEP §1207.01(a)(iii) (“If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and are available to all classes of purchasers”).

Having established that the goods of the parties are identical, and that the Petitioner has prior trademark rights, the only remaining issue is the similarity of the marks. This is a question of law that can be decided by the Board on summary judgment.

2. The Marks Are Confusingly Similar in Appearance, Sound, Connotation and Commercial Impression

The test of likelihood of confusion is whether the marks are so similar that there is either a likelihood of confusion between the goods or a likelihood of confusion as to the source of the goods, and not whether the marks can be distinguished when subjected to a side-by-side comparison. See TMEP § 1207.01(b). "The emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks." See id.; Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

When marks are used on virtually identical goods or services, "the degree of similarity necessary to support a likelihood of confusion declines." Century 21 Real Estate v. Century Life of America, 970 F.2d 874, 877 (Fed. Cir. 1992); see also MCCARTHY ON TRADEMARKS, § 23:20.50 ("Where the goods and services are directly competitive, the degree of similarity required to prove likelihood of confusion is less than in the case of dissimilar products"). As discussed above, here, the marks are used in connection with identical goods; therefore, the degree of similarity of the marks necessary to support a finding of likelihood of confusion is less.

Registrant's mark OMEGA-Q is virtually identical to Petitioner's Omega Q Plus marks in appearance, sound, connotation and commercial impression. The hyphen in Registrant's mark and the "Plus" in Petitioner's mark do nothing to deter from the similarity of the marks, and if anything give the implication that the Registrant's product is a subset or variety of the Petitioner's products. There is a general rule that a trademark user may not appropriate another's entire mark and avoid likelihood of confusion therewith by merely adding descriptive or otherwise subordinate matter to it. In re Rexel,

223 U.S.P.Q. 830, 831 (TTAB 1984); see also, TMEP § 1207.01(b)(iii). “[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” See Rexel, 223 U.S.P.Q. at 831.

Likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting a house mark, other distinctive matter, or a term that is descriptive or suggestive of the named goods or services; if the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. *See. e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 USPQ2d 1157, 1161 (Fed. Cir. Mar. 26, 2014) (affirming TTAB’s finding that applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks).

The dominant portion of both marks is clearly the term OMEGA Q. Although this term is disclaimed in Petitioner’s registration, for purposes of a likelihood of confusion analysis,

“[a] disclaimer does not remove the disclaimed matter from the mark. The mark must still be regarded as a whole, including the disclaimed matter, in evaluating similarity to other marks.” *See In re Nat’l Data Corp.*, 753 F.2d 1056, 1059, 224 USPQ 749, 751 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984); *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983); *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (C.C.P.A. 1965); *In re MCI Commc’ns Corp.*, 21 USPQ2d 1534, 1538-39 (Comm’r Pats. 1991).

See TMEP §1213.10.

“Even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services.” See TMEP §1207.01(b)(ix), citing King

Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 1401 182 USPQ 108, 109 (C.C.P.A. 1974).

With respect to the inclusion of the term PLUS in the Petitioner's OMEGA Q PLUS mark, the word "PLUS" is defined as "a useful or valuable quality" or "being extra, additional, supplementary, supernumerary or supplemental" or "falling high in a specified range" or "greater than that specified" or "possessing a specified quality to a high degree" See excerpts from Webster's Revised Unabridged Dictionary and Merriam-Webster online dictionary attached hereto as Exhibit 3. Therefore, in comparing the marks, the commercial impression is that both the OMEGA-Q and OMEGA Q PLUS products emanate from a common source, and that the OMEGA Q PLUS mark identifies a product that has something extra over and above the product offered under the OMEGA-Q mark.

In fact, Petitioner has offered dietary and nutritional supplement type products under trademarks that are comprised of both a trademark and that same trademark followed by the word PLUS (See Exhibit 2 and the printouts attached thereto). Examples are:

1. FORWARD and FORWARD PLUS
2. SEANOL and SEANOL LONGEVITY PLUS
3. TRIVERATROL GOLD and TRIVERATROL PLUS
4. ZEMBRIGHT MOOD and ZEMBRIGHT MOOD PLUS

Given the specific similarity of meanings and commercial impressions of Registrant's mark and Petitioner's mark, as well as the similarity in sound and sight, it is respectfully submitted that confusion as to source of the goods (which are identical) is

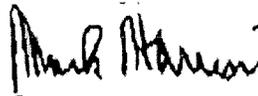
likely. Moreover, when considering the imperfect recollection of the average customer faced with similar marks used in connection with identical goods in the same channels of trade, those customers are likely to be confused and deceived as to the source or origin and/or sponsorship of Registrant's goods and/or Petitioner's goods. See e.g., TMEP § 1207.01(b).

IV. CONCLUSION

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. 4570100 be cancelled.

Respectfully submitted,



Date: March 23, 2015

By: _____

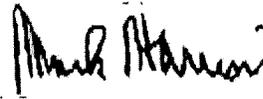
Mark Harrison
Jeremy M. Klass
Venable LLP
P.O. Box 34385
Washington, D.C. 20043
Telephone: (202) 344-4000
Facsimile (202) 344-8300

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned, attorney for Petitioner, hereby certifies that a true and complete copy of foregoing PETITIONER'S MOTION FOR SUMMARY JUDGMENT and PETITIONER'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT have been served on this 23rd day of March, 2015 via U.S. Mail, first class, postage prepaid, to the address of record for Registrant:

Tyler B. Jones, Esq.
Celebrus, LLC, DBA ARIIX
563 West 500 South, Suite 340
Bountiful, UTAH 84010

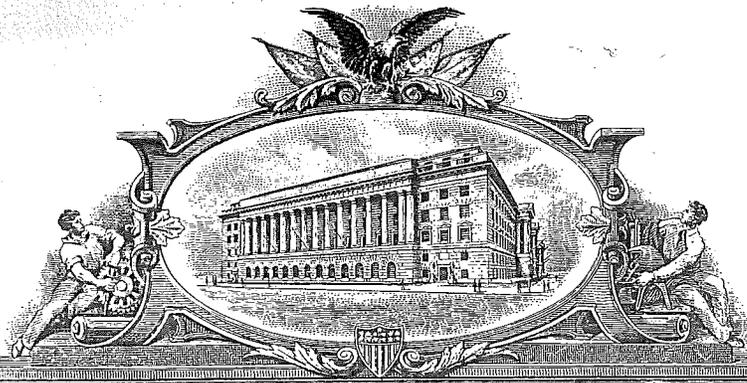


Mark B. Harrison
Venable LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
Tel.: (202) 344-4019
Fax: (202) 344-8300

EXHIBIT 1

Certified title and status copy of US Reg. No. 3295413

7515289



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

January 26, 2015

THE ATTACHED U.S. TRADEMARK REGISTRATION 3,295,413 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

**REGISTERED FOR A TERM OF 10 YEARS FROM *September 18, 2007*
SECTION 8 & 15**

SAID RECORDS SHOW TITLE TO BE IN:

HEALTHY DIRECTIONS, LLC

A LIMITED LIABILITY COMPANY OF DELAWARE

By Authority of the

**Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office**

P. SWAIN

Certifying Officer



Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

Reg. No. 3,295,413

United States Patent and Trademark Office

Registered Sep. 18, 2007

TRADEMARK
PRINCIPAL REGISTER

Omega Q Plus

TISHCON CORP. (NEW YORK CORPORATION)
30 NEW YORK AVENUE
WESTBURY, NY 11590

FOR: NUTRITIONAL SUPPLEMENTS, IN CLASS
5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 3-5-2007; IN COMMERCE 3-5-2007.

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

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "OMEGA Q", APART FROM THE
MARK AS SHOWN.

SN 78-783,312, FILED 12-30-2005.

JEAN IM, EXAMINING ATTORNEY

EXHIBIT 2

Declaration of Erica Bullard, Petitioner's Senior Vice President

