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

Proceeding	91233147
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Trademark Application Serial No.:	87/047,285
Published:	November 1, 2016
Mark:	LIQUIVIDA LOUNGE
Applicant:	Liquivita, LLC
Class:	Int. 44

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GNLD INTERNATIONAL, LLC,
name changed to
NEOLIFE INTERNATIONAL, LLC,

Opposer,

V. OPPOSITION NO. 91233147

LIQUIVITA, LLC,

Applicant

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

Opposer's Responsive Brief

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Opposer's Responses to Applicant's Objections to Opposer's Evidence

Applicant's objections to Opposer's submission into evidence of web pages, printed publications and third-party registrations should be considered as waived, or should be denied by the Board.

To the extent that Applicant is objecting to the evidence on procedural grounds, the objections were not timely raised. Procedural objections should be raised in a timely fashion so that they can be cured, otherwise they should be deemed to have been waived. See TBMP 707.02(b), TBMP 707.04.

Applicant's objections should also be denied to the extent that they are merely general objections.

Applicant appears to be raising a procedural objection against the third-party registrations and internet materials provided by Opposer in its two Notices of Reliance. Applicant appears to argue that because the third-party registrations and internet materials were introduced into evidence by the Opponent as they appeared in the prosecution records of Applicant's earlier applications, that they cannot be used as evidence[1]. Applicant quotes *Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 109 USPQ 2d 1949, 1956, footnote 9, (TTAB 2014): "[T]he applications are not evidence of anything except that they were filed. TBMP Section 704.03(b)(2)." Applicant's citation of this case is misdirected. The Board in *Frito-Lay* was speaking of applications, not registrations. To the extent that the objection is to the third-

[1]Applicant's Brief, page 15, lines 16 – page 16, line 3; Applicant's Brief, page 17, line 21 – page 18, line 10

party websites and registrations introduced by Opposer, *Frito-Lay* does not support their rejection , as these are not applications. In fact, in *Frito-Lay*, the Board did cite evidence of third-party, use-based registrations, saying such evidence was probative.

Furthermore, the evidence discussed by the Board in *Frito-Lay* related to applications of third-parties, not the actual applicant. The only applications introduced by the Opponent into evidence are prior applications filed by the Applicant. The Board in *Frito-Lay* was not talking about applications or registrations filed or owned by the parties.

The application records and third-party registrations introduced into evidence by Opposer through a Notice of Reliance are self-authenticating , official documents of the Patent and Trademark Office. "A copy of an official record of the Office need not be certified to be offered in evidence." 37 CFR 2.122(e)(2). See TBMP 704.03(b)(2). See *Beneficial Franchise Co., Inc. v. Ladenburg Thalmann & Co. Inc.*, 2005 WL 2295195 (TTAB 2005) where the Board accepted the introduction of copies of Trademark Trial and Appeal Board files of three proceedings brought by the petitioner against a third party as self-authenticating, official records. The internet website publications are self-authenticating documents. "Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date of the internet materials were accessed and their source (e.g., URL) are provided." 37 CFR 2.122(e)(2). All the documents are provided with their web address and the date they were accessed. The documents can be introduced through a Notice of Reliance to show what appears on the face of those documents. Any procedural objections to this evidence should be refused.

Applicant also notes that under 37 CFR 2.122(b)(2), the statements of use made in an application or registration that are the subject of an opposition cannot be the basis for establishing a date of first use[2]. While this is true, it is irrelevant. The application records introduced into evidence by Opposer are not the

[2]Applicant's Brief, page 6, lines 15 – 17

application that is the subject of the opposition. Nor is Opposer trying to show that Applicant used the applied-for mark on a given date.

With respect to the prosecution portions of the previous applications filed by the Applicant and introduced into evidence by Opposer, they are provided to show admissions by Applicant under Federal Rules of Evidence 801(d), or, alternatively, they are official records reasonably related to the facts of this case. See TBMP 704.03(b)(2). With respect to the third-party, use-based registrations Opposer has introduced, Opposer has provided this evidence to show that third-parties registered certain marks in association with certain goods and services relevant to this case, not that those goods and/or services were or are in use.

To the extent that Applicant is arguing that the evidence is not relevant, Applicant's argument is not supported by the law. Third-party, use-based registrations, printed publications and web pages can be indicative of whether the goods of Registrant and the services of Applicant are of a type which would be viewed as emanating from a single source. While there are limitations on internet evidence, evidence obtained from the internet may be used to support a determination under Trademark Act Section 2(d) that goods and services are related. See e.g. *In re G.B.I. Tile & Stone, Inc*. 92 USPQ2d 1363, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.* 84 USPQ2d 1660 (TTAB 2007).

Applicant also argues that some of third-party registrations cited by Opposer are so extensive in their definitions of goods and services that they are of little probative value that such goods and services would be related[3]. The general proposition stated by Opposer and cited in *In re Princeton Tectonics, Inc.* 95 USPQ2d 1509, 1511 (TTAB 2010) is correct, but the application of this rule is in error. The definition of goods in cited third-party registrations must be so extensive and diversified and the list so exhaustive that numerous relations between the goods and services can be made. An example of this would be where a large conglomerate may be the source of goods and services in a wide variety of fields and endeavors

[3]Applicant's Brief, page 16, lines 20 – 22 and Applicant's Brief, page 17, lines 11 – 17

and chooses to use a single mark in association with its diverse array of products and services. Registrations for house marks typically can have such extensive definition of goods, but not necessarily. None of the third-party registrations cited by Opposer has an overly extensive definition of goods. The Applicant has not provided any evidence to suggest that the third-party registrations might be house marks, or even describes the extent of the goods listed in the registrations. The Applicant merely asserts that three of the cited third-party registrations could be house marks. While a house mark registration may cover an extensive list of unrelated goods, such is not always the case. The definitions in all of the third-party registrations are all relatively short and relate to health and wellness. The goods and services in all of the third-party registrations are both commercially and technically related. The evidence has probative value.

Finally, Applicant argues that this evidence relating to third-parties constitutes hearsay and should be struck from the record. Applicant asserts that the Opposer is offering the evidence for the truth of the matters asserted therein. Applicant does not support this assertion with any evidence or explanation. Opposer has offered the evidence for what it shows on its face or as an admission by the Applicant.

As noted in TMBP 704.04 and TBMP 708, self-authenticating exhibits are probative for what they show on their face. See *7-Eleven, Inc. v. Lawrence I. Wechsler,* 83 USPQ2d 1715, note 2, 2007 WL 1431084 (TTAB 2007). Opposer has provided the third-party registrations and publications to show that consumers have been exposed to advertising and publications that suggest the goods and services are related, and that third parties have registered marks at one time or another that cover both goods similar to Opposer's goods and services that are similar to Applicant's services. Applicant notes that some of the registrations have been cancelled since they were registered[4]. This does not mean that these use-based registrations never existed.

[4]Applicant's Brief, page 17, lines 9 – 11

Further, Applicant has not provided any evidence to counter this evidence of the relatedness of the goods. It should also to be noted that Applicant has not provided any rebuttal evidence to the website evidence provided by Opposer. As noted in TBMP 704.08(b), the non-offering party may rebut the probative value of such documents by showing that significant changes have been made from what was submitted.

Opposer respectfully requests that the Board deny all of Opposer's objections to the evidence.

Opposer's Response to Applicant's Arguments

Applicant argues that the Board is not bound by either the prior decision of the Board or the decision of prior examiners[5]. Opposer certainly agrees that the Board is not bound by the decisions of examiners. However, Applicant's prior applications, the statements Applicant made in those prior applications, and the decisions of the Board and the previous examiners are relevant to this case.

The factual differences between applicant's previous applications, and the present application are few. Some of the factual differences are not relevant to an opposition proceeding, such as the fact that Applicant has not filed a claim of use in the present application.

The definition of services in the prior applications started out the same as Applicant's current definition of services. Applicant did amend the prior applications to eliminate certain services such as "vitamin therapy" from their definitions, but left these services in the present application. Opposer believes that the broader definition in the present application makes it more likely that that Applicant's mark is more likely to be confused with Opposer's mark.

[5]Applicant's Brief, page 11, line 24 – page 12, line 14

Opposer would have been harmed if the Trademark Office allowed Applicant to register its previous marks, and Opposer will be harmed if the Trademark Office allows the Applicant to register its current mark.

With respect to the similarity of the appearance of the marks and their commercial impression, Applicant notes that the letters "I" and "V" in the middle of the word LIQUIVIDA in its composite mark appear in bold lettering. Applicant argues that this formatting when considered with the word "LOUNGE" creates a particular commercial impression: "when the overall impression of the mark is considered, inclusive of the bold letter IV, the overall commercial impression of the mark is one of provider of *IV lounge services*."[6] First, it should be noted that there is no evidentiary support for this argument. Second, "IV lounge services" is not a common phrase, and Applicant does not provide any evidence of what the phrase "IV lounge services" might mean. The phrase "IV lounge services" is not found in Applicant's definition of services. The phrase is not defined in any way by any evidence provided by Applicant.

In making this argument, Applicant appears to be assuming that consumer will read the bold "I" and "V" as an abbreviation for intravenous.

Even if consumers were to assume that the bold letters "I" and "V" in the mark connote "intravenous", Applicant still does not provide any explanation or evidence to support what consumers would consider "intravenous lounge services". There is no evidence to suggest consumers have any expectations or associations with the word "intravenous" in this context, let alone with the phrase "intravenous lounge services".

While it is true that Applicant's definition of services lists a number of specific services described as being "intravenous" under the general headings of "medical hydration clinic services" and "medical mobile hydration clinic services", most of its other services listed are not described with such particularity

[6]Applicant's Brief, Page 11, lines 22 – 24, emphasis added

or described as being "intravenous". Applicant's registration broadly lists "medical services", "medical testing for diagnostic treatment", and "providing medical information in the field of health and wellness." Applicant's definition of its services also includes more specific health and wellness services such as "massage therapy", "supplemental oxygen therapy" and "vitamin therapy". Unlike its "hydration clinic services," Applicant does not list specific types of these services. None of these general services, or the even more specific services, are described with the word "intravenous". Applicant's definition of its services is not limited to any particular channels of trade. Nor is there a requirement in the definition that all of its services be available to any given customer at any given time.

Absent evidence to the contrary, it would be improper to assume that consumers will be aware of Applicant's so-called intravenous services. If consumers are not aware of Applicant's intravenous services, there is no reason to think that they would see the bolded letters "I" and "V" in the middle of the word LIQUIVIDA as standing for the word "intravenous."

Also, Applicant uses a very simple font where the capital "I" is represented as a simple vertical line. The reasonably prudent purchaser may not even notice that the "I" is bolded. Even if they did, they may perceive the bolded "I" and "V" as drawing a demarcation between the word parts LIQUI and VIDA to emphasize the compound nature of the world.

Applicant also argues that evidence of its advertising is relevant to show that the letters "I" and "V" stand out. Applicant argues that in its advertising it has used the letters in a different color from the other letters of its mark[7]. This argument is improper. In an opposition proceeding, the comparison to be made is between Opposer's mark and the drawing of the mark shown in Applicant's application. The Applicant has not claimed color as a feature of its mark. Furthermore, the cited registration is in standard

[7]Applicant's Brief, page 13, lines 9 – 11.

character form[8] and as such Opposer may depict its mark in any font, style, size or color. *In re Vitera Inc.,* 671 F. 3d 1358, 101 USPQ2d 1905 (Fed. Circ. 2012).

With respect to Applicant's argument that there have been no known instances of actual confusion with its previous marks, it is Applicant who placed the evidence of its use of its prior marks in evidence, and it is Applicant who asserts that this evidence is relevant. It is also to be noted that when Applicant speaks of this evidence and makes this argument, Applicant does not make any citations to the evidence. Nor does Applicant cite any cases for the proposition that evidence of confusion concerning marks different from the applied-for mark can be relevant to an analysis of actual confusion.

Applicant does not want to admit the similarity between its previously applied-for marks and the present mark at issue, but if this evidence of use of prior marks by Applicant is relevant to the issue of actual confusion in these proceedings, those marks would have to make similar commercial impressions on a consumer as Applicant's current mark. Consumers would have to see Applicant's previous marks and Applicant's current marks as essentially the same mark.

With respect to Applicant's argument that the marks should be pronounced in certain ways on the basis that VIDA is a Spanish word and that VITE has French origins, as with many of its other arguments, Applicant does not provide any cases to support its argument. As noted in its Initial Brief, Applicant's and Opposer's marks are compound marks and as such there is no way to know how they would be pronounced by the ordinary consumer. See TMEP 1207.01(b)(iv).

With respect to Applicant's argument that the word part VITE in Opposer's registration for LIQUI-VITE can connote speed as well as liveliness, Opposer's goods are vitamins[9] and thus it seems much more likely that consumers familiar with the goods would associate VITE with being alive and the essential nutrients required for life than they would with speed.

[8]Opposer's Exhibit C
[9]Opposer's Exhibit C

With respect to the relatedness of Applicant's services and Opposer's goods, Applicant declares that "multivitamin dietary food supplements cannot, by definition, be used in hydration services."[10] As with the phrase "intravenous lounge services", the phrases "hydration services" and "multivitamin dietary supplements" are not common phrases. Applicant has not provided evidence to suggest what these phrases means to anyone, let alone a reasonably prudent consumer. Furthermore, Applicant's own definition of its services describes "intravenous vitamin and amino infusion therapy" as a subset of "medical hydration clinic services". Rather than supporting Applicant's argument, Applicant's evidence stands for the proposition that vitamins can be part of a therapy providing hydration to a user.

Applicant then goes on to argue that the third-party registrations cited by Opposer to show the relatedness of the Opposer's goods and Applicant's services are only relevant, if they meet two tests. First, they must specifically refer to "multivitamin dietary food supplements", and second, they must refer to only one of Applicant's many services, namely "vitamin therapy."[11] Applicant seems to be suggesting a new rule that third-party registrations are only relevant if they contain the exact same language of the cited registration, and they refer to the most closely related service or product in Applicant's definition of its services or goods. No such rule exists.

Applicant's entire definition of services is relevant to the analysis. Applicant appears to cite *In re Princeton, Inc.* 95 USPQ23 1509, 1511 (TTAB 2010) for the proposition that if there is some diversity to Applicant's services, then there is less likelihood that there will be overlap between Opposer's goods and Applicant's services[12]. Applicant is mischaracterizing *In re Princeton,* which relates to the probative value of third-party registrations with wide-ranging definitions of goods and/or services. In fact, in an opposition proceeding, the exact opposite of Applicant's assertion is the rule. If Applicant's definition of its services is broad, then the likelihood that the services of Applicant will overlap with the goods of Opposer is greater.

[10]Applicant's Brief, Page 15, lines 9 - 12
[11]Applicant's Brief, page 16, lines 4 – 8
[12]Applicant's Brief, Page 16, lines 20 – 22

In arguing that Applicant's services are not related to Opposer's goods, Applicant appears to cite *In re Coors Brewing Co.*, 343 F. 3d 1340, 1345, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) to support the proposition that Opposer has not provided sufficient examples of third-party registrations that show the goods and services are related[13]. However, *In re Coors* relates to particular fact situation not present here. *In re Coors* applies to situations where the prior registration is for restaurant services selling food and beverages and the applied-for goods are a food or beverage product which could be sold in such a restaurant. *In re Coors* relies heavily on *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234 (CCPA 1982) which set forth the proposition that a party in order to establish a likelihood of confusion must show something more than similar or even identical marks are used for food products and restaurant services. *In re Coors* said that substantial evidence of relatedness needs to be shown. Applicant has not shown why the higher standard of *In re Coors* should be applied here.

The goods of Opposer and the services of Applicant are commercially and technically related.

With respect to Applicant's argument regarding trade channels, Applicant, once again, makes assertions that are not supported by the evidence. Applicant states, "On the other hand, Opposer testified that its product is sold 'through individual distributors who sell to consumers' i.e. Opposer does not sell its product in brick and mortar locations."[14] Applicant seems to think that individual distributors are somehow barred by law from selling, or unable to sell, their wares in brick and mortar locations. It is as if there was a rule that only corporations may operate stores in brick and mortar locations. Opposer is unaware of any such law or limitation on individual distributors. Not surprisingly Applicant does not provide a case, citation or evidence to support this argument.

In an equally strange fashion, Applicant argues that because Applicant's mark contains the word "LOUNGE" this somehow means that Applicant's services must be provided in lounges: "Applicant's services by definition, must be provided in a physical location – the lounges that are identified by its

[13]Applicant's Brief, Page 17, lines 15 – 17
[14]Applicant's Brief, page 18, line 19 - page 19, line 1

mark."[15] In making such a statement Applicant is apparently ignoring its own definition of services. One of the services listed in the Application is "mobile medical hydration clinic services." If the services are mobile this suggests that the services are not limited to any particular location, and can be brought to the consumer. In making this argument, Applicant is once again ignoring the rule that absent any limitations on the channels of trade in the definition of services, it will be assumed that none exist. See *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F2d 937, 942, 16 USPQ2d 1783 (Fed. Circ. 1990).

With respect to Applicant's arguments regarding the consumers and the level of care they would use in the marketplace for Applicant's services and Opposer's products, Applicant falls into this same mistaken understanding of the law discussed immediately above[16]. Applicant attempts to place limitations on the consumers for both Opposer's listed goods and Applicant listed services. Applicant's argument about the consumers for Oppposer's goods is not supported by the evidence. Applicant's arguments about its consumers is just a naked assertion and is irrelevant, since there are no limitations in its definition.

With respect to Applicant's arguments regarding actual confusion, Applicant makes a number of illogical and mischaracterizing assertions. For example, Applicant states that "Opposer also attempts to use the fact that Applicant licenses its mark to state that Applicant is in the licensing business and not the business of providing the services listed under the mark."[17] In its responses to interrogatories placed in evidence, Applicant said its only activity under the mark was the licensing of the mark[18]. It is Applicant who said they are not in the business of providing the services under the mark.

Applicant then goes on to suggest that Opposer's argument is that Applicant is not the owner of the mark, because the only use of the mark must be occurring through licensees[19]. Despite what Applicant says, Opposer understands that the actions of properly licensed third-parties inures to the benefit of the owner, even if the owner does not make use of the mark itself. While Applicant has not shown that any

[15]Applicant's Brief, page 19, lines 1 -2
[16]Applicant's Brief, page 19, lines 4 – 19
[17]Applicant's Brief, page 20, lines 6 – 8
[18]Opposer's Second Notice of Reliance – Exhibit R, pages 1 and 2
[19]Applicant's Brief, page 20, lines 8 – 15

properly licensed entities have made use of the mark, Opposer is not arguing that Applicant may be in the process of losing its mark through naked licensing. Opposer placed Applicant's interrogatory answers about its licensing activities under the mark in evidence because Applicant's answers shed light on Applicant's actual activities under its mark.

Applicant's attorney also mischaracterizes Applicant's declaratory statement about when Applicant learned of Opposer's goods[20]. Applicant also continues to compound its mistaken understanding of the law by suggesting that materials Applicant provided to Opposer during discovery can have probative value without being properly introduced[21]. Applicant also appears to forget that Mr. Newman's declarations about the services he provides is vague and lacks relevance, because Mr. Newman does not identify the marks with which the services were provided. Without any evidence to support this argument, Applicant appears to suggest that this defect could be cured if Mr. Newman provided services in multiple locations.[22]

Applicant concludes its argument with respect to actual confusion by saying, "Through several declarations, Applicant has properly introduced evidence of thousands of consumers, as well as evidence of its advertising activities..."[23] Applicant's arguments are just as vague as the evidence it has submitted. Applicant's declarations were deliberately vague about what services were provided under what marks, and so is Applicant's argument. We do not know where consumers of services associated with Applicant's mark are located. We do not know under what marks they received services, and we do not know what services they received. Nor do we know what marks and services were advertised.

Applicant has in no way shown that the reported lack of actual confusion is relevant.

Opposer requests that the Board refuse to register Applicant's mark LIQUIVIDA LOUNGE.

[20]Applicant's Brief, page 21. See the Declaration of Samael Tejada, page 1, paragraph 5 introduced by Applicant
[21]Applicant's Brief, page 21, lines 6 – 8.
[22]Applicant's Brief, page 21, lines 10 – 13

[23]Applicant's Brief at page 21, lines 20 – 21

Dated: January 4, 2019

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of this paper and its attached appendices has been served upon the Applicant at their address of record (listed below) by Email on this date of January 4, 2019:

mrichter@RichterTrademarks.com

By: /Charles R. Cypher/

Charles R. Cypher

Appendix - Table of Cases