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

Proceeding	91245529
Party	Plaintiff DSM IP Assets B.V.
Correspondence Address	DUANE M BYERS NIXON & VANDERHYE PC 901 N GLEBE RD 11TH FL, ARLINGTON, VA 22203 UNITED STATES nixonptomail@nixonvan.com, dmb@nixonvan.com 703-786-7421
Submission	Other Motions/Papers
Filer's Name	Duane M. Byers
Filer's email	nixonptomail@nixonvan.com
Signature	/dmb/
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Attachments	4662-3720 opposer cross motion for summary judgment - mhealth v hhealth.pdf(136803 bytes) 4662-3720 Byers Declaration.pdf(19632 bytes)

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

_____)	
DSM IP Assets B.V.)	
)	
Opposer)	
)	
v.)	Opposition No. 91245529
)	Application No. 87891972
HHEALTH Inc.)	
)	
Applicant)	
_____)	

**OPPOSER’S CROSS-MOTION FOR SUMMARY JUDGMENT or
MOTION FOR DISCOVERY OF APPLICANT UNDER RULE 56(d)**


Opposer, DSM IP Assets B.V., cross moves for summary judgment in view of the facts and law noted below and Opposer’s “deemed admitted” Requests for Admissions.

This case involves a likelihood of confusion, fraud, and evasion.

I. Grounds for the Opposition

Opposer Notice of Opposition asserts three grounds for the Opposition, which can be summarized as follows:

(1) There is a likelihood of confusion between Opposer’s trademark for “**dietary supplements**” in Class 5 and Applicant’s trademark for, among other things, “**Dietary and nutritional supplements**” in Class 5. The trademarks are:

 - Opposer’s trademark

 - Applicant’s trademark.

(2) Applicant's trademark application is void because Applicant's company identified in the trademark application did not exist when the application was filed. The application and its declaration were signed by "Du Ruiyong" as President of HHEALTH INC. In the application, Du Ruiyong declared that **HHEALTH INC. is a limited company (ltd.) legally organized under the laws of the United Kingdom, and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.** During prosecution of the application, the USPTO examining attorney questioned the applicant whether it was a United Kingdom company. See the USPTO Office Action dated August 24, 2018. In the "Response to Office Action" dated September 3, 2018, the applicant's president, Du Ruiyong, stated that the applicant is **"HHEALTH INC., limited liability company legally organized under the laws of United Kingdom, having an address of 8 The Green, STER, Dover, Kent,, 19901 United Kingdom."** There is no such company in the United Kingdom.

(3) Applicant committed multiple acts of fraud upon the USPTO in the application filing and during its prosecution.

II. Statement of Facts

Applicant filed its trademark application on April 25, 2018. The sole basis of the application is an "intent to use" the trademark. The application and its declaration were signed by "Du Ruiyong" as President of HHEALTH INC. In the application, Du Ruiyong declared that **HHEALTH INC. is a limited company (ltd.) legally organized under the laws of the United Kingdom, and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.** At the time the application was filed, there was no HHEALTH INC. legally

organized under the laws of the United Kingdom and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.

During prosecution of the Applicant's trademark application, the USPTO examining attorney questioned the applicant whether it was a United Kingdom company. See the USPTO Office Action dated August 24, 2018. In the "Response to Office Action" dated September 3, 2018, the applicant's president, Du Ruiyong, stated that the applicant is "**HHEALTH INC., limited liability company legally organized under the laws of United Kingdom, having an address of 8 The Green, STER, Dover, Kent., 19901 United Kingdom.**" Again, there is no and was no HHEALTH INC. legally organized under the laws of the United Kingdom and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.

After the Notice of Opposition was filed, Applicant moved to amend its application to identify a US company as the applicant. See Applicant's Motion filed at the TTAB on February 4, 2019. Significantly, applicant's Motion papers did not include any declaration from (1) the applicant's president Du Ruiyong, or (2) some other person who was filing documents at the USPTO and has the email address daisy.futianguoji@foxmail.com, or (3) Wei Li who was identified by the Applicant in the Correspondence Information in the USPTO database at the time:

"WEI LI
C/O WEI LI PO BOX521476,FLUSHING,NY,
FLUSHING,, New York 11352
718-416-5030(phone)"

On February 25, 2019, Opposer opposed Applicant's Motion to amend the application for at least these reasons:

First, applicant has not provided any declaration in support of its motion. **Du Ruiyong**, the alleged president of the applicant, has not provided any declaration, nor has his “Chinese Representative” who is mentioned in the Motion. The only declaration that exists in this matter is **Du Ruiyong’s** declaration in the originally filed U.S. trademark application on April 25, 2018. In fact, it is not clear from the applicant’s Motion whether **Du Ruiyong** actually signed the trademark application filed on April 25, 2018, and whether **Du Ruiyong** actually signed the Response to Office Action filed on September 3, 2018. Both of these signed filings by **Du Ruiyong** are the subject of the Notice of Opposition. The applicant’s Motion refers to a “Chinese Representative,” and it is not clear whether the “Chinese Representative” signed **Du Ruiyong’s** name to the U.S. trademark application filed on April 25, 2018, and whether the “Chinese Representative” signed **Du Ruiyong’s** name to the Response to Office Action filed on September 3, 2018. If the “Chinese Representative” signed either or both of those documents, then the U.S. application is void.

Second, applicant has not provided any corporate document showing its **business address**.

Third, the **United States business address** that applicant now seeks to use - without any declaration - is an address shown in the “Offshore Leaks Database” (Exhibit 1) and which is also shown to be a secondary address of a company called “A Registered Agent, Inc.” that is not accredited by the Better Business Bureau (Exhibit 2).

The U.S. trademark registration system is founded upon a system of honest and fair dealings with the U.S. Patent and Trademark Office.

Opposer submits that the Motion should be denied and that the opposition should proceed so that discovery can reveal all of the facts.

See Opposer’s Opposition Brief filed at the TTAB on February 25, 2019.

The Board issued an Order on June 14, 2019, that deferred ruling on Applicant’s attempt to amend its application and that permitted discovery to proceed.

The parties then engaged in settlement discussions. During this time, Opposer served its Initial Disclosures in September 2019. See Exhibit 1 to Byers Declaration (“Byers Dec.”).

Applicant did not serve its Initial Disclosures until January 12, 2020, and they were deficient. See Exhibit 2 to Byers Dec.

When settlement was not reached, Opposer served Interrogatories, Document Requests, and Admission Requests on the Applicant on January 13, 2020. See Exhibits 3, 4, 5 to Byers Dec.

Applicant did not substantively reply to the discovery. See Exhibits 6, 7, 8 to Byers Dec.

On February 13, 2020, Opposer's attorney sent the following email to Applicant's attorney:

Dear Scott,

Our Requests for Admissions are now deemed admitted, and any objections have been waived for our discovery requests. We also note that your client has not timely provided the information requested by our Interrogatories and Document Requests. We are disappointed and will soon be filing a Motion to Compel the information called for in our Interrogatories and Document Requests.

Kind regards,
Duane

See Exhibit 9 to Byers Dec.

The parties again undertook settlement discussions.

On the day for filing a Motion to Compel, Applicant filed its Partial Summary Judgment Motion.

III. Likelihood of Confusion

Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis:

(1) the similarities between the compared marks, and

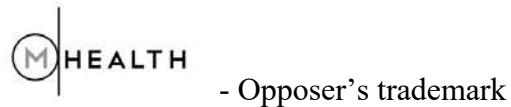
(2) the relatedness of the compared goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”).

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019).

When comparing marks, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re St. Helena Hosp.*, 774 F.3d

747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014); *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007, 169 USPQ 39, 40 (C.C.P.A. 1971)), *aff'd per curiam*, 777 F. App'x 516, 2019 BL 343921 (Fed. Cir. 2019).

In this case, the Opposer's mark and the Applicant's mark are highly similar:



The parties' goods are identical:

“dietary supplements” in Class 5 – Opposer's goods

“Dietary and nutritional supplements” in Class 5 – Applicant's goods.

There is no trade channel limitation or customer limitation in either the Opposer's application or the Applicant's application; thus, they are legally presumed to be the same.

Opposer's also notes that Applicant's Motion for partial summary judgment concedes that Opposer's trademark is valid and has priority. See pages 3-4 of Applicant's Motion.

Applicant's Motion papers referring to third party trademark filings do not include any usage information and, moreover, none of those third party trademark filings is highly similar to Opposer's trademark, as shown above, and for identical goods, channels of trade, and customers.

Finally, Opposer's “deemed admitted” Requests for Admissions confirm there is a likelihood of confusion. See Nos. 27 and 34-48 in Exhibit 5 to Byers Dec.

The totality of the facts confirms that there is a likelihood of confusion.

IV. Applicant's Trademark Application is Void

Applicant's trademark application and its declaration were signed by "Du Ruiyong" as President of HHEALTH INC. In the application, Du Ruiyong declared that **HHEALTH INC. is a limited company (ltd.) legally organized under the laws of the United Kingdom, and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.** At the time the application was filed, there was no HHEALTH INC. legally organized under the laws of the United Kingdom and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.

These facts render the application void because the application was not filed in the name of an actual company.

V. Applicant Has Committed Multiple Acts of Fraud on the USPTO

Applicant's trademark application and its declaration were signed by "Du Ruiyong" as President of HHEALTH INC. In the application, Du Ruiyong declared that **HHEALTH INC. is a limited company (ltd.) legally organized under the laws of the United Kingdom, and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.** At the time the application was filed, there was no HHEALTH INC. legally organized under the laws of the United Kingdom and having an address of 8 The Green, STER, Dover, Kent, 19901 United Kingdom.

To date, Applicant has not confirmed that "Du Ruiyong" actually signed the application.

During prosecution of the Applicant's trademark application, the USPTO examining attorney questioned the applicant whether it was a United Kingdom company. See the USPTO

Office Action dated August 24, 2018. In the “Response to Office Action” dated September 3, 2018, the Applicant’s president, Du Ruiyong, stated that the applicant is "**HHEALTH INC., limited liability company legally organized under the laws of United Kingdom, having an address of 8 The Green,STER,Dover, Kent,, 19901 United Kingdom.**"

To date, Applicant has not confirmed that “Du Ruiyong” actually signed the “Response to Office Action” dated September 3, 2018.

All of the above facts constitute fraud.

Finally, Opposer’s “deemed admitted” Requests for Admissions confirm that fraud has been committed. See No. 49 in Exhibit 5 to Byers Dec.

VI. Conclusion

Opposer requests summary judgment in its favor and denial of Applicant’s motion for partial summary judgment.

If summary judgment in Opposer’s favor is not granted, then Opposer requests a sixty (60) day period for Opposer to conduct discovery of Applicant under Rule 56(d) of the Federal Rules of Civil Procedure.

Date: April 27, 2020 Respectfully submitted,

/Duane M. Byers/
Duane M. Byers
NIXON & VANDERHYE, P.C.
901 North Glebe Road, 11th Floor
Arlington, Virginia 22203-1808
703-786-7421 phone

Authorized e-mail:
NIXONPTOMAIL@NIXONVAN.COM

ATTORNEYS FOR OPPOSER,
DSM IP Assets B.V.

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing will be served on Applicant's U.S. attorney of record M. Scott Alprin on this date by email to: trademarks@alprinlaw.com.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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DSM IP Assets B.V.)	
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v.)	Opposition No. 91245529
)	Application No. 87891972
HHEALTH Inc.)	
)	
Applicant)	
_____)	

**DECLARATION OF DUANE M. BYERS
IN SUPPORT OF OPPOSER’S MOTION FOR SUMMARY JUDGMENT**

I, Duane M. Byers, hereby declare and state:

1. I am counsel for Opposer DSM IP Assets B.V..
2. I make this declaration based on personal knowledge and am competent to testify on the matters stated below.
3. Attached as Exhibit 1 is DSM’s Initial Disclosures.
4. Attached as Exhibit 2 is Applicant’s Initial Disclosures.
5. Attached as Exhibit 3 is DSM’s Interrogatories.
6. Attached as Exhibit 4 is DSM’s Document Requests.
7. Attached as Exhibit 5 is DSM’s Admission Requests.
8. Attached as Exhibit 6 is Applicant’s Responses to Interrogatories.
9. Attached as Exhibit 7 is Applicant’s Responses to Document Requests.
10. Attached as Exhibit 8 is Applicant’s Responses to Admission Requests.
11. Attached as Exhibit 9 is Byers’ email of 2-13-20.

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge and belief.

Date: April 27, 2020 Respectfully submitted,

/Duane M. Byers/
Duane M. Byers
NIXON & VANDERHYE, P.C.
901 North Glebe Road, 11th Floor
Arlington, Virginia 22203-1808
703-786-7421 phone

Authorized e-mail:
NIXONPTOMAIL@NIXONVAN.COM

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing will be served on Applicant's U.S. attorney of record M. Scott Alprin on this date by email to: trademarks@alprinlaw.com.