ESTTA Tracking number: **ESTTA1078757**

Filing date: **08/31/2020**

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

Proceeding	91263782
Party	Defendant JHO INTELLECTUAL PROPERTY HOLDINGS LLC
Correspondence Address	FRANK MASSABKI VITAL PHARMACEUTICALS, INC. 1600 NORTH PARK DRIVE WESTON, FL 33326 UNITED STATES Primary Email: trademarks@vpxsports.com Secondary Email(s): gideon.eckhouse@vpxsports.com No phone number provided.
Submission	Answer and Counterclaim
Filer's Name	Gideon Eckhouse
Filer's email	trademarks@bangenergy.com, gideon.eckhouse@bangenergy.com
Signature	/Gideon Eckhouse/
Date	08/31/2020
Attachments	Answer for 8 KETO opposition.pdf(117106 bytes)

Registration Subject to the filing

Registration No.	2964802	Registration date	07/05/2005
Registrant	LONZA CONSUMER HEALTH INC. 5451 INDUSTRIAL WAY BENICIA, CA 94510 UNITED STATES		

Goods/Services Subject to the filing

Class 001. First Use: 1998/09/23 First Use In Commerce: 1998/09/23 All goods and services in the class are requested, namely: Derivatives of Dehydroepiandrosterone (DHEA) used as an ingredient in the manufacture of dietary supplements
Class 005. First Use: 1998/06/17 First Use In Commerce: 1998/06/17 All goods and services in the class are requested, namely: Derivatives of Dehydroepiandrosterone (DHEA) used as an integral component of dietary supplements

Grounds for Cancellation

The mark is or has become generic	Trademark Act Sections 14(3), or Section 23 if on Supplemental Register

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

	) Opposition No. 91263782
LONZA CONSUMER HEALTH INC.,	**)**
	)
Opposer,	**) Serial No.: 88/779062**
	) Mark: 8 KETO
v.	**)**
JHO INTELLECTUAL PROPERTY HOLDING, LLC,	**)**
	)
Applicant.	**)**
	)

ANSWER TO NOTICE OF OPPOSITION

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir,

Applicant, JHO Intellectual Property Holdings, LLC, by and through its undersigned counsel, hereby answers Opposer, Lonza Consumer Health Inc.'s, Notice of Opposition dated July 22, 2020 as follows:

1. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1, and therefore denies those allegations.
2. Applicant admits its name and corporate identity listed in Paragraph 2. However, Applicant's correct address is: 1600 N. Park Drive; Weston, FL 33326, as listed in the subject application.
3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3, and therefore denies those allegations.
4. Applicant admits that Opposer is the listed owner of the marks in the table in Paragraph 4. However, Applicant is without knowledge or information to form a belief as to the validity of

the marks and/or their incontestability and therefore denies the remaining allegations of Paragraph 4.

5. Applicant does not have sufficient knowledge or belief with regard to Opposer's use of the marks. Therefore, Applicant denies the allegations of Paragraph 5.
6. Applicant admits the allegations of Paragraph 6.
7. Applicant denies the allegations of Paragraph 7.
8. Applicant denies the allegations of Paragraph 8.
9. Applicant repeats the respective admissions and denials related to Paragraphs 1-8.
10. Applicant denies the allegations of Paragraph 10.

AFFIRMATIVE DEFENSES

In addition to the allegations in the numbered paragraphs above, Applicant provides the following affirmative defenses:

I. **No Likelihood of Confusion**

11. In order to establish a likelihood of confusion, Opposer must show similarities between the goods listed in one or more of the marks cited in their Notice of Opposition and the mark that is the subject of this opposition. Opposer must also show similarity in the marks themselves. Such similarity must be sufficient that a relevant consumer would mistakenly assume that the goods associated with opposer's marks emanate from the same source as the goods associated with Opposer's marks. In this case, both the '783 registration and the '189 registration disclaim "7 KETO". Since the only common term in each mark is "KETO," there can be no likelihood of confusion with regard to the '783 registration and the '189 registration.

12. With regard to the remaining '802 registration, there is no likelihood of confusion due to the analysis of the marks themselves. The only term that is common to the '802 registration and to Applicant's mark is the term "KETO."
13. When a term is commonly used in marks with particular types of goods, and to describe those goods, that term is generic and therefore a weak indicator of source. Such weak indicators of source are not entitled to a broad scope of protection. The scope of protection of a mark that includes a weak term is often restricted to only the other terms in the mark. The term "KETO" appears in a large number of registered trademarks directed toward supplements in International Class 005. Therefore, "KETO" is a weak indicator of source. Since "KETO" is a weak indicator of source, and since "KETO" is the only common term between the '802 registration and the subject mark, the registrations cited in the Notice of Opposition cannot be held to include a scope that includes the mark subject to this opposition.
14. In addition, "KETO" is a generic term when used with supplements. The term "KETO" refers to a ketogenic diet, i.e., a diet designed to effectively burn fat. "KETO" is generic for supplements that are designed to aid fat metabolism. This generic term cannot be the basis for a likelihood of confusion. Accordingly, there is no likelihood of confusion between any of the cited registrations and the subject mark.

II. **Equitable Defenses**

15. Applicant claims the equitable defenses of unclean hands, laches, estoppel, acquiescence, fraud, each of which are sufficient to overcome the instant opposition.

COUNTERCLAIMS

16. Applicant repeats and realleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.
17. The term "KETO," which is common to every registration cited in the Notice of Opposition, is not a term coined by Opposer. Rather, the term "KETO" is a generic term to denote foods or supplements that can be used in a ketogenic diet.
18. Since the relevant goods for this Opposition are supplements, "KETO" is generic for the goods related to the cited marks.
19. For the foregoing reasons, Applicant believes that it will be damaged by the continued registration of the cited registrations and therefore prays for amendment of the '802 registration to disclaim the term "KETO."

Dated this 31st day of August, 2020

By: 

Gideon B. Eckhouse
Chief IP Counsel
Vital Pharmaceuticals, Inc.
1600 N. Park Drive
Weston, FL 33326

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Answer to Notice of Opposition has been served on Lawrence J. Crain by forwarding said copy on August 31, 2020, via electronic mail to:
LAWRENCE J. CRAIN
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Dated this 31st day of August, 2020

By: 

Gideon B. Eckhouse
Chief IP Counsel
Vital Pharmaceuticals, Inc.
1600 N. Park Drive
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