

ESTTA Tracking number: **ESTTA64878**

Filing date: **02/02/2006**

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

Proceeding	92043143
Party	Plaintiff Agrigenic Food Corporation d/b/a Biotec Foods
Correspondence Address	Robert G. Kavanaugh Agrigenic Food Corporation d/b/a Biotec Foods 5152 Bolsa Avenue, Suite 101 Huntington Beach, CA 92649  robert_kavanaugh@hotmail.com
Submission	Motion for Summary Judgment
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Date	02/02/2006
Attachments	Summary Judgment.pdf ( 8 pages )

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8 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
9 **BEFORE THE TRADEMARK TRIAL AND APPEALS BOARD**

10 In the matter of Trademark Registration No. 2,711,341  
11 Registration Date: April 29, 2003  
12 For the Mark: "FIBERZYME"

13 Agrigenic Food Corporation, d/b/a )	<b>Proceeding Number</b> <b>92043143</b>
14 Biotec Foods by Robert G. )	
15 Kavanaugh, as assignee )	
16       Petitioner )	
17       vs. )	
18 AROMATIC RESEARCH & )	
19 TECHNOLOGY, LLC )	
20 d/b/a YOUNG LIVING )	
21 ESSENTIAL OILS, a Utah )	
22 corporation )	
23       Respondent )	
24 )	
25 )	

22 **BOX: TTAB NO FEE**  
23 Commissioner for Trademarks  
24 2900 Crystal Drive  
25 Arlington, Virginia 22202-35 13

1 **Motion For Summary Judgement**

2 1. Pursuant to the Federal Rules of Civil Procedure 56(c), Petitioner, Agrigenic  
3 Food Corporation, by assignee Robert G. Kavanaugh ("Petitioner" or "Biotec")  
4 hereby moves the Trademark Trials and Appeals Board ("Board") to cancel  
5 Respondent's, Aromatic Research & Technology, LLC, d/b/a Young Living  
6 Essential Oils ("Respondent" or "Young Living") Trademark Registration No.  
7 2,711,341 for the word mark "FIBERZYME," in International Class 5 for use  
8 on dietary supplements.  
9

10  
11 2. The Petitioner's motion for summary judgment is proper because the Petitioner  
12 can clearly establish that:

13  
14 a. The Respondent's mark, as applied to its goods or services, so  
15 resembles Petitioner's previously used or registered mark or its  
16 previously used trade name as to be likely to cause confusion,  
17 mistake, or deception and Respondent's mark fails the requirements of  
18 Section 2(d) of the Act, 15 U.S.C. § 1052(d). Respondent's word  
19 mark "FIBERZYME" is identical to Petitioner word mark  
20 "FIBERZYME" and both are applied to identical goods, i.e. dietary  
21 supplements.  
22

23  
24 b. Respondent's Application for Registration for the word mark  
25 "FIBERZYME" establishes that the Respondent's mark was first used

1 in commerce on July 7, 2001. (See USPTO Application Serial  
2 Number: 76445880.)

3  
4 c. Petitioner asserts first use by no later than 1989. Additionally,  
5 Petitioner can establish a priority of use date by indisputable,  
6 Judicially Noticeable Evidence,<sup>1</sup> including but not limited to the  
7 following documents and evidence:

8  
9 i. Petitioner directs the Board to Petitioner's contemporaneously  
10 filed Request for Judicial Notice which establishes Petitioner's  
11 proprietary rights in its pleaded mark and indisputably  
12 demonstrates Petitioner's prior use over the Respondent's rights  
13 in the challenged mark: Petitioner's evidence includes the  
14 November 17<sup>th</sup>, 1999 Default Judgement issued by the United  
15 States District Court for the Central District of California in  
16 case number 99-2283. (See Request for Judicial Notice Exhibit  
17  
18 1.) The Court's November 17<sup>th</sup>, 1999 Default Judgement  
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21  
22 <sup>1</sup> See King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA  
23 1974); ("Board must consider existing registrations of subsequent-user opposer because ... [Section 2(d)  
24 provides that] an applicant can register, unless his mark is likely to cause confusion with a mark  
25 'registered in the Patent Office or \* \* \* previously used \* \* \*'..."); SCOA Industries, Inc. v. Kennedy &  
Cohen, Inc., 188 USPQ 411, 413 (TTAB 1975), appeal dismissed, 189 USPQ 15 (CCPA 1976); and  
Penguin Books Ltd. V. Eberhard, 48 USPQ2d 1280 (TTAB 1998). Cf., regarding cancellation  
proceedings, Brewski Beer Co. v. Brewski Brothers Inc., supra (in a cancellation proceeding the  
registrations of each party offset each other and petitioner must, in the first instance, establish prior  
rights); and American Standard Inc. v. AQM Corp., supra at 841 (priority must be proven in cancellation  
proceeding).

1 establishes Petitioner's priority of use because he Respondent's  
2 mark was first used in commerce on July 7, 2001.

- 3  
4 ii. Furthermore, Petitioner asserts that the District Court's  
5 November 17<sup>th</sup>, 1999 Judgement confers registration or  
6 equivalent rights for Petitioner's mark "Fiberzyme" on dietary  
7 supplements pursuant to 15 U.S.C. §1119.  
8  
9 iii. Additionally, Petitioner's contemporaneously filed Request for  
10 Judicial Notice includes a State of Hawaii First Circuit Court  
11 Order transferring rights from Petitioner's predecessor-in-  
12 interest to Petitioner on September 7<sup>th</sup>, 1997. (See Request for  
13 Judicial Notice Exhibit 3.3.) The Hawaii Court's Order  
14 establishes the Petitioner's priority of use because the  
15 Respondent's mark was first used in commerce on July 7,  
16 2001.<sup>1</sup>  
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18  
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21  
22 <sup>1</sup> See *Larami Corp. v. Talk To Me Programs Inc.*, 36 USPQ2d 1840 (TTAB 1995) (owner of an intent-to-  
23 use application may rely on its application filing date as a constructive use date for purposes of priority);  
24 and *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991). See  
25 also *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (if the underlying  
application filing date of petitioner's pleaded registration was earlier than the filing date of respondent's  
underlying application, petitioner could take its chances and elect to make of record simply a copy of its  
registration as proof of first use as of the filing date of the underlying application); *American Standard  
Inc. v. AQM Corporation*, 208 USPQ 840, 842 (TTAB 1980); and *Gor-Ray Limited v. Garay & Co., Inc.*,  
167 USPQ 694 (TTAB 1970) (a cancellation petitioner is entitled to rely on the filing date of its pleaded  
registration as prima facie evidence of its first use of the mark).

1                   iv. Finally, Petitioner’s prior abandoned application Serial Number  
2                   75102584 establishes Petitioner’s proprietary prior use as of at  
3                   least May 10<sup>th</sup>, 1996, prior to any date of first use on which  
4                   respondent can rely.  
5

6 3. Trademark Registration No. 2,711,341 for the word mark “FIBERZYME,” in  
7 International Class 5 for use on dietary supplements must be cancelled because  
8 the Respondent’s mark is identical to the Petitioner’s mark and both marks are  
9 used on identical goods: i.e. dietary supplements. Furthermore, Petitioner’s  
10 application for registration has been initially denied pursuant Section 2(d) of  
11 the Act, 15 U.S.C. § 1052(d) and the Office Action cites Respondent’s  
12 Trademark Registration No. 2,711,341 as the basis for denial. (See Petitioner’s  
13 USPTO Application Serial Number 78391126 for the mark “Fiberzyme” and  
14 See the associated Office Action on TEAS.) Petitioner asserts that a likelihood  
15 of confusion between the Petitioner’s mark and the Respondent’s mark has  
16 therefore been established.  
17  
18  
19

20 4. According to the Respondent’s application for registration, the Respondent  
21 first used its “FIBERZYME” mark in commerce on July 7, 2001.  
22 Respondent’s later use of its “FIBERZYME” mark in commerce is legally  
23 insufficient to defend against cancellation of the registration. The Petitioner  
24  
25

1 has provided the Board with evidence which establishes his clear priority of  
2 use of the "FIBERZYME" mark.

3  
4 5. No material issue of fact remains to be resolved as to Petitioner's propriety  
5 rights and the priority of use over its word mark "FIBERZYME," in  
6 International Class 5 for use on dietary supplements, and therefore, the  
7 Respondent's registration should be cancelled.  
8

9  
10 Conclusion

11 6. Unless this motion is adjudged untimely,<sup>1</sup> the Petitioner is entitled to a  
12 Cancellation of Trademark Registration No. 2,711,341 for the word mark  
13 "FIBERZYME," in International Class 5 for use on dietary supplements as a  
14 matter of law, and respectfully requests that the Board cancel the Respondent's  
15 registration.  
16

17 Dated this 2nd<sup>th</sup> day of February, 2006

18  
19 By: /ROBERT G. KAVANAUGH/  
20 Robert G. Kavanaugh, Pro SE  
21 As Assignee For Petitioner Agrigenic  
22 Food Corporation

23  
24 <sup>1</sup> In Petitioner's separately filed opposition to Respondent's Motion to Dismiss, the Petitioner has  
25 requested that the Board expand the Petitioner's time to close until February 3, 2006. The Petitioner  
asserts reliance on Respondent's bad faith representations regarding settlement negotiations and  
agreements. The Respondent is not substantially prejudiced by the Board's granting the additional time  
so that the Petitioner may close by February 3rd, 2006 instead of January 30th, 2006.

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12 In the matter of Trademark Registration No. 2,711,341  
13 Registration Date: April 29, 2003  
14 For the Mark: "FIBERZYME"

15 I, the undersigned, certify and declare that I am over the age of 18 years, employed  
16 in the County of Orange, State of California. On February 2th, 2006, I served a  
17 true copy of **Motion for Summary Judgement**, pursuant to 37 C.F.R. §2.119 by  
18 depositing it in the United States Mail in a sealed envelope with the priority mail,  
19 first-class postage thereon fully prepaid with delivery confirmation tracking number  
20 () to the following:

21 John C Stringham  
22 Workman Nydegger  
23 60 East South Temple, 1000 Eagle Gate Twr  
24 Salt Lake City, UT 84111  
25 jstringham@wnlaw.com

Place of Mailing:  
Arise Direct Marketing, Inc.  
5152 Bolsa Avenue STE 101  
Huntington Beach, CA 92649-1047  
County of Orange, California



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Executed on this 2nd day of February, 2006 at Huntington Beach, County of  
Orange, California

I hereby certify under the penalty of perjury that the foregoing is true and correct.

/ROBERT G. KAVANAUGH/  
Robert G. Kavanaugh, President