

ESTTA Tracking number: **ESTTA50637**

Filing date: **10/26/2005**

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

<b>Proceeding</b>	92044880
<b>Party</b>	Plaintiff Specialty Nutrition Products, LLC Specialty Nutrition Products, LLC One South Ocean Boulevard, Suite 300 Boca Raton, FL 33432
<b>Correspondence Address</b>	Matthew H. Swyers, Esq. The Swyers Law Firm 344 Maple Avenue West, Suite 389 Vienna, VA 22180
<b>Submission</b>	Opposition to Motion to Dismiss Count 4 of Petition to Cancel
<b>Filer's Name</b>	Matthew H. Swyers
<b>Filer's e-mail</b>	mswyers@swyerslaw.com
<b>Signature</b>	/Matthew H. Swyers/
<b>Date</b>	10/26/2005
<b>Attachments</b>	Opposition to Motion to Dismiss Count 4.pdf ( 4 pages )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**The Trademark Trial and Appeal Board**

In the matter of U.S. Reg. No. 2,735,038,  
For the mark JOINT SUSTAIN,

Specialty Nutrition Products, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92044880
	:	
Jarrow Formulas, Inc.,	:	
	:	
Registrant.	:	

**PETITIONER'S OPPOSITION TO REGISTRANT'S  
MOTION TO DIMISS COUNT IV OF PETITION TO CANCEL**

COMES NOW the Petitioner, Specialty Nutrition Products, LLC (hereinafter "Petitioner"), by counsel, and files its opposition to Registrant Jarrow Formulas, Inc.'s (hereinafter "Registrant") Motion to Dismiss Pursuant to F.R.C.P. 9(b).

**I. Statement of the Case**

On August 30, 2005 Petitioner filed its Petition to Cancel U.S. Registration No. 2,735,038 for the mark JOINT SUSTAIN. On October 11, 2005 Registrant filed its Answer to Counts 1, 2, and 3 of the Petition to Cancel. On that same date, Registrant filed Registrant's Motion to Dismiss Pursuant to F.R.C.P. 9(b) requesting that the Trademark Trial and Appeal Board (hereinafter "Board") dismiss Count 4 of the Petition to Cancel for Petitioner's alleged failure to plead its allegations of fraud with sufficient particularity.

**II. Argument**

Petitioner's Petition to cancel complies with the strictures of F.R.C.P. 9(b) as it pertains to pleading allegations of fraud with particularity.

To prove fraud a petitioner must show that a registrant intentionally misrepresented a material fact with the intention of inducing the United States Patent and Trademark Office (hereinafter "Office") to grant a registration to which applicant knew he was not entitled. *Bakaert Steel Wire Corp. v. S.p.A. Officine Maccaferri Gia' Raffaele Maccaferri & Fagli*, 196 USPQ 558 (TTAB 1977). The applicable rule states:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

F.R.C.P. 9(b). As stated in Registrant's Memorandum of Law in Support of its Motion to Dismiss (hereinafter "Memorandum of Law"), "Allegations of fraud phrased in legal conclusions are insufficient since under F.R.C.P. 9(b), the pleader must state *the time, place and content of the false representation, the fact misrepresented and what was obtained as a consequence.*" Memorandum of Law at pp. 2-3 (*citing J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, § 31.84 (4<sup>th</sup> ed. 2005)(*citation omitted*)).

Applying Registrant's cited standard from its Memorandum of Law Registrant's motion must be denied.

Petitioner's Count 4 states:

Registrant utilized fraud in the procurement of registration for the terms JOINT SUSTAIN by informing the USPTO that the mark was in use as early as September 5, 2001 when the Registrant knew that such use had yet to occur.

Petition to Cancel, Count 4 at P. 2. Paragraph 8 of Petitioner's Statement of Facts states that "[o]n or about March 25, 2003, Registrant filed its Statement of Use and submitted a specimen of use with the USPTO in support of its registration efforts for the term JOIN SUSTAIN." Petition to Cancel, Statement of Facts ¶ 4 at P. 2. Paragraph 12 states that based upon Petitioner's information Registrant had not commenced use of its mark as of September 5, 2001, the date of

alleged first use in Registrant's Statement of Use. *See* Petition to Cancel, Statement of Facts ¶ 12 at P. 3.


Read in context, Petitioner's Petition to Cancel satisfies all element required by F.R.C.P. 9(b). In regard to the time of the fraud, it was perpetrated upon the USPTO at the time of the filing of the Statement of Use on or about March 25, 2003. *See* Petition to Cancel, Statement of Facts ¶ 4 at P. 2. The place of the fraud was the Statement of Use itself. *See* Petition to Cancel, Statement of Facts ¶ 4 at P. 2; ¶ 12 at P. 3. The fact that was misrepresented was that the Registrant had yet to commence use of the mark as of the filing of the Statement of Use. *See* Petition to Cancel, Count 4 at p. 2; *See* also Statement of Facts ¶ 4 at P. 2, ¶ 12 at P. 3. Finally, in regard to what the Registrant obtained as a result of its fraudulent act, it obtained the registration which is the subject of the instant Petition to Cancel. *See* Petition to Cancel, Statement of Facts ¶ 18 at p. 4.

### **III. Conclusion**

In consideration of the foregoing Petitioner respectfully requests that the instant motion to dismiss Count 4 be denied.

DATED this 26<sup>th</sup> day of October, 2005.

THE SWYERS LAW FIRM



Matthew H. Swyers, Esquire  
344 Maple Avenue West, Suite 389  
Vienna, VA 22180  
Direct (703) 585-2077  
Facsimile (270) 477-4574  
mswyers@swyerslaw.com

Attorney for Petitioner Specialty Nutrition Products, LLC

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

In the matter of U.S. Reg. No. 2,735,038,  
For the mark JOINT SUSTAIN,

Specialty Nutrition Products, LLC,

Petitioner,

vs.

Jarrow Formulas, Inc.,

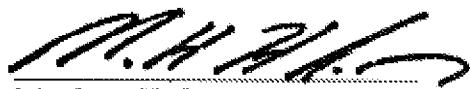
Registrant.

Cancellation No. 92044880

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon Registrant by U.S. First Class, postage prepaid, this 26<sup>th</sup> day of October, 2005, to the following:

Mark D. Giarratana, Esq.  
Alexander B. Stevens, Esq.  
McCarter & English LLP  
185 Asylum Street  
City Place I  
Hartford, CT 06103  
Counsel for Registrant Jarrow Formulas, Inc.,

  
Matthew H. Swyers