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

Proceeding	92046695
Party	Defendant BODY DYNAMICS, INC.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE TRADEMARK TRIAL AND APPEAL BOARD

206 Macopin Corp., (Petitioner),	)	
v.	)	Cancellation No. 92046695
	)	Reg. No. 2,968,646
Body Dynamics, Inc., (Registrant).	)	

Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

REGISTRANT'S BRIEF IN OPPOSITION TO CANCELLATION

Registrant is the owner of U.S. Trademark Registration 2,968,646 for the DRINKER'S BUDDY® mark for use in connection with dietary supplements. The application was filed on November 11, 2003 as an intent-to-use ("ITU") based application and Registrant's ITU application subsequently matured into a duly issued registration on July 12, 2005. The filing of Registrant's ITU application for the DRINKER'S BUDDY® mark and its subsequent registration provides Registrant with a constructive use of the mark, conferring a right of priority, nationwide in effect, as of the filing date of the application. *See* 15 U.S.C. § 1057 (c). As such, Registrant's priority date is November 11, 2003.

Petitioner's brief in support of cancellation of Registrant's DRINKER'S BUDDY® mark incorrectly makes several statements regarding the record of this cancellation proceeding. First, Petitioner incorrectly states that Registrant's priority date is December 11, 2003. As set forth above, Registrant's ITU based application was filed on November 11, 2003, thereby providing Registrant with a constructive use and priority

date of November 11, 2003. *See* 15 U.S.C. § 1057 (c). Second, and most importantly, there is absolutely no evidence of record whatsoever that supports Petitioner's alleged first use date of March 1, 2002.

PETITIONER CANNOT RELY ON ITS APPLICATION TO ESTABLISH PRIOR USE

At the outset, it is important to note that Petitioner submitted absolutely no evidence to support an alleged first use date that predates Registrant's priority date during the testimony period. **In fact, Petitioner did not submit any evidence at all to the Board during the testimony period.** Instead, Petitioner has erroneously attempted to rely solely upon its alleged date of first use in its pending application. A copy of Petitioner's pending application is not even of record in the present proceeding as a copy of the application was not submitted by Petitioner during the testimony period. Again, Petitioner did not submit any evidence at all to the Board during its relevant testimony period. Petitioner ignores the fact that it has the burden of proof in the present proceeding and not Registrant.

According to the U.S. Trademark Rules of Practice (the "Rules"), it is clear that in an *inter partes* proceeding a Petitioner cannot rely upon an allegation of use in an application to support an alleged date of first use. In that regard, Section 2.122(b)(2) of the Rules states the following:

> (2) **The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.** Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony. [emphasis added]

See 37 C.F.R. § 2.122(b)(2). As such, clearly Petitioner cannot rely upon its allegation of use in its application in connection with this cancellation proceeding. The allegation of use in a pending application does not constitute evidence of use and is entitled to absolutely no weight in the present proceeding. Such allegations of use must be established by competent evidence and clearly none exists in the present proceeding.

According to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), while the file of a particular application may be of record in a Board *inter partes* proceeding, by operation of 37 C.F.R. § 2.122(b) the allegations made, and documents and other things filed, in the application are not evidence in the proceeding on behalf of the applicant. *See* TBMP, Chapter 700, pages 700-58 to 700-60. Allegations must be established by competent evidence, properly adduced at trial, and the documents and other things in an application file are not evidence, in an *inter partes* proceeding, on behalf of the applicant unless they are identified and introduced in evidence as exhibits during the testimony period. Id. This is because the adverse party, Registrant in this case, has a right to confront and cross-examine the person making the allegations, and to question the authenticity of the specimens, documents, exhibits, and so forth.

As set forth in the Rules, a date of use of a mark must be established by competent evidence. Petitioner's alleged date of first use of its DRINKERS PAL mark contained in its application for registration is entitled to absolutely no evidentiary value. As such, contrary to Petitioner's brief, there is no evidence of record in the present proceeding to support Petitioner's alleged priority date. Petitioner did not submit any evidence during the testimony period to support a date of first use, let alone a date of first use that predates Registrant's priority date.

PETITIONER CAN ONLY RELY ON ITS FILING DATE

In the absence of competent proof of use, the filing date of the application, rather than the dates of use alleged in the application, is treated as the earliest use date on which an applicant may rely in this type of proceeding. See e.g. *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 U.S.P.Q. 2d 1464, 1467 (TTAB 1993); *H.L Bouton Company, Inc. v. Parmelee Industries, Inc.*, 220 U.S.P.Q. 79, 80 (TTAB 1983). Petitioner's application for registration of the DRINKERS PAL mark was filed on March 2, 2004. As such, the earliest date on which Petitioner may rely is March 2, 2004.

A registration on the Principal Register is prima facie evidence of use of the registered mark, dating back to the date of filing of the application. See 35 U.S.C. § 1057(c); *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960 (C.C.P.A. 1965); *Rolley, Inc. v. Younghusband*, 204 F.2d 209 (9th Cir. 1953). Registrant's ITU application for the DRINKER'S BUDDY mark was filed on November 11, 2003. As such, the earliest date on which Registrant may rely is November 11, 2003. Registrant's priority date clearly predates Petitioner's priority date by almost four (4) months.

CONCLUSION

Simply put, Petitioner 1) failed to introduce any evidence, let alone competent evidence, to establish prior use during the testimony period; 2) failed to follow the proper Rules; 3) has ignored prior legal precedent; and 4) has failed to heed the useful materials regarding evidence and the proper way to introduce evidence set forth in the TBMP. Petitioner submitted absolutely no evidence to the Board in support of its position during the testimony period. Since the record is devoid of any evidence to the contrary,

Petitioner can only rely on the filing date of its application, which is almost four (4) months after the filing date of Registrant's mark.

To that end, Registrant's mark should not be cancelled and the final rejection of Petitioner's application should be sustained.

Respectfully submitted,

/Dean E. McConnell/
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CERTIFICATE OF SERVICE

I, Dean E. McConnell, do hereby CERTIFY that a true and correct copy of the foregoing has been furnished by first class U.S. Mail on this 10th day of March 2008, to:

Michael E. Dockins
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Perrysburg, OH 43551

March 10, 2008

/Dean E. McConnell/
Dean E. McConnell

CERTIFICATE OF TRANSMISSION

I, Dean E. McConnell, do hereby CERTIFY that this correspondence is being electronically filed with the Trademark Trial and Appeal Board via ESTTA on this 10th day of March 2008.

March 10, 2008

/Dean E. McConnell/
Dean E. McConnell