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

Proceeding	92051510
Party	Defendant Probiohealth, LLC
Correspondence Address	Probiohealth, LLC 350 S. Beverly Drive, Suite 170 Beverly Hills, CO 90212 UNITED STATES
Submission	Answer
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Date	11/06/2009
Attachments	Answer to Petition to Cancel 11-6-09.pdf (7 pages)(275968 bytes)

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

CHR. HANSEN A/S, CHR. HANSEN, INC.,)	
)	Cancellation No. 92051510
Petitioners,)	
)	Mark: PROBIOPET
v.)	
)	Registration No.:2,890,107
PROBIOHEALTH, LLC,)	
)	
Registrant.)	
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ANSWER TO PETITION TO CANCEL

By and for its Answer to the Petition to Cancel filed by Chr. Hansen A/S, Chr. Hansen, Inc. (collectively, "Petitioners") Registrant ProBioHealth, LLC ("Registrant") responds as follows, the paragraph numbers herein corresponding to those of the Petition to Cancel.

INTRODUCTORY PARAGRAPH: *Petitioner, Chr. Hansen NS, a Denmark corporation with a business address of 10-12 Boge Alle, Horsholm, DK-2970, Denmark, and Petitioner, Chr. Hansen, Inc., a Wisconsin corporation with a business address of 9015 West Maple Street, Milwaukee, WI 53214 (collectively "Petitioners"), believe that they will be damaged by the continued registration of the mark PROBIOPET as depicted in Registration No. 2,890,107, registered on September 28, 2004, to registrant ProBioHealth, LLC ("Registrant"), a Delaware limited liability company with the address of 350 S. Beverly Drive, Suite 170, Beverly Hills, CA 9021, and hereby petition the Board to cancel the same .*

ANSWER: Registrant admits that U.S. Trademark Registration No. 2,890,107 for the mark "PROBIOPET" was registered on September 28, 2004 to the Registrant. Registrant denies that Petitioners will be damaged by the subject Registration. Registrant is without

information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

1. *Since at least as early as October 2, 1974 Petitioner, Chr. Hansen A/S, or its predecessors in interest, has adopted, used and continue to use (in some cases through a licensee) the trademark PROBIOS (along with variations of this mark) in conjunction with a wide range of animal care products. Since at least as early as January 17, 1979, Petitioner, Chr. Hansen A/S, or its predecessors in interest, has adopted, used and continue to use (in some cases through a licensee) the trademark PROBIOCIN in conjunction with a wide range of animal care products.*

ANSWER: Registrant is without information or belief concerning the allegations of this paragraph and, on that basis, denies the same.

2. *On June 1, 1978, Petitioner Chr. Hansen A/S, or its predecessors in interest, filed a trademark application with the United States Patent and Trademark Office to register the mark PROBIOS for animal feed supplements in International Class 005. The application was assigned Serial Number 73/172,707, registered on February 26, 1980, and assigned Registration Number 1,131,165. A printout from the United States Patent and Trademark Office trademarks database, showing the current status and title of this registration is attached as Exhibit A.*

ANSWER: Registrant admits that printouts of what Petitioners purport to be a copy of U.S. Registration No. 1,131,165 for PROBIOS is attached as Exhibit A to the Petition to Cancel, and avers that the document speaks for itself. Registrant is without information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

3. *On August 21, 1979, Petitioner Chr. Hansen A/S, or its predecessors in interest, filed a trademark application with the United States Patent and Trademark Office to register the*

mark PROBIOCIN for feed supplements in International Class 005. The application was assigned Serial Number 73/228,455, registered on January 12, 1982, and assigned Registration Number 1,185,389. A printout from the United States Patent and Trademark Office trademarks database, showing the current status and title of this registration is attached as Exhibit B.

ANSWER: Registrant admits that printouts of what Petitioners purport to be a copy of U.S. Registration No. 1,185,389 for PROBIOCIN is attached as Exhibit B to the Petition to Cancel, and avers that the document speaks for itself. Registrant is without information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

4. *Petitioners are entities related to one another, specifically, Chr. Hansen Holding A/S is the parent organization of both Chr. Hansen, Inc. and Chr. Hansen A/S.*

ANSWER: Registrant is without information or belief concerning the allegations of this paragraph and, on that basis, denies the same.

5. *On June 28, 2002, Registrant filed an intent-to-use application for the mark PROBIOPET, which was assigned Serial Number 78/140,062. The application was registered on September 28, 2004, and assigned Registration Number 2,890,170. Registrant claims a first use in commerce date of March 2003, over 28 years after Petitioner Chr. Hansen A/S's, or its predecessor in interest's, first use of the PROBIOS mark and over 24 years after Petitioner Chr. Hansen A/S's, or its predecessor in interest's, first use of the PROBIOCIN mark.*

ANSWER: Registrant admits that it filed an intent-to-use application for the mark PROBIOPET and that the application was assigned Serial Number 78/140,062. Applicant also admits that the mark was first used in commerce at least as early as March 2003 and was registered on September 28, 2004, with the Registration Number 2,890,170. Registrant

is without information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

6. *Registrant's mark so resembles Petitioner Chr. Hansen A/S's, or its predecessor in interest's, previously used and registered PROBIOS and PROBIOCIN marks that when applied to the goods set forth in Registrant's registration, it is likely to or will cause confusion, mistake, or deception within the meaning of Section 2(d) of the Trademark Act, all to the damage of Petitioners. Because there exists a likelihood of confusion between Registrant's PROBIOPET registration and Petitioners' senior rights in the PROBIOS and PROBIOCIN registrations, cancellation of Registration Number 2,890,107 is proper under 15 U.S.C. § 1064. Failure to cancel Registration Number 2,890,107 would be inconsistent with Petitioners' senior rights in the PROBIOS and PROBIOCIN marks. Petitioners and the public are and will continue to be damaged by the PROBIOPET mark.*

ANSWER: Registrant denies the allegations of this paragraph.

AFFIRMATIVE DEFENSES

1. Petitioners fail to state a claim upon which relief can be granted.
2. Petitioners own no rights in the subject PROBIOPET mark in the United States that are enforceable against Registrant.
3. The terms "probio" and "probiotics" are generic and, to the extent that Petitioners seek to claim any rights based on their use of these terms, such claims are unenforceable.
4. Petitioners are asserting and seeking to obtain broad exclusive rights in the use and registration of the designation or root word "probio" alone and/or in combination with other letters. Petitioners are not entitled to such broad exclusive rights, either by virtue of their claimed registrations or under the common law.

5. Petitioners own no rights in the designation or root word “probio” that are enforceable against Registrant’s mark used on or in connection with the goods recited in the instant registration.
6. There is no likelihood of confusion between Petitioners’ claimed marks and Registrant’s challenged mark and registration.
7. Registrant’s PROBIOPET mark has been used in commerce for at least five (5) consecutive years after its registration in association with the goods and services listed therein and a Combined Declaration of Use and Incontestability has been filed with the Patent and Trademark Office.
8. Registrant’s PROBIOPET mark, when used in connection with the goods recited in the instant registration, is not likely to cause confusion with Petitioners’ alleged marks.
9. Numerous trademarks and service marks containing the designation or root word “probio” have been registered and used by third parties on goods and services, and used with the knowledge and acquiescence of Petitioners. As a result of such uses and registrations, the alleged marks asserted in the Petition to Cancel are entitled to only a limited scope of protection that does not extend to Registrant’s mark and associated goods.
10. Given the foregoing, Petitioners have not and will not be damaged by Registrant’s continued use of its PROBIOPET mark.
11. Consumers and the trade have come to associate Registrant’s family of PROBIO* and PROBIO* marks with Registrant by virtue of Registrant’s long and continuous use and promotion of said marks, and Registrant’s significant sales of products under said marks, including veterinary products.
12. Petitioner’s demands and recovery sought are barred by acquiescence and waiver because Petitioner knew or should have known, long prior to its filing of the instant Petition to Cancel that Registrant was using and had registered this mark and numerous variants of the PROBIO* family of trademarks and trade name, including the Registrant’s trade name,

ProBioHealth, and the marks that are the subject of the registrations identified below, and
Petitioner permitted their use and registration to continue, without objection.

Serial Number	Reg. Number	Word Mark	Status
78549261	3035821	PROBIORIS	LIVE
78242694	3234136	PROBIOMEGA	LIVE
78242678	3104629	PROBIOLIVE	LIVE
78242669	3261784	PROBIOSOY	LIVE

13. Petitioner's demands are barred by laches and equitable estoppel.

WHEREFORE, Registrant respectfully requests that the Petition to Cancel be dismissed and
denied and that Registration No. 2,890,107 remain.

DATED this 6 day of November 2009.

Respectfully submitted,

K&L GATES LLP

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Certificate of Mailing

I certify that I caused to be mailed by U.S. Mail, postage prepaid, the foregoing Answer to Petition to Cancel upon the counsel of record for Petitioner at the following address, this the 6 day of November 2009, and that an electronic copy of said Answer was transmitted to Petitioner pursuant to the Board's electronic service system.

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/Sara N. Kerrane/