

ESTTA Tracking number: **ESTTA670471**

Filing date: **05/04/2015**

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

Proceeding	92061197
Party	Defendant Futurebiotics, LLC
Correspondence Address	FUTUREBIOTICS LLC 70 COMMERCE DRIVE HAUPPAGUE, NY 11788 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Jay Geller
Filer's e-mail	jhgeller@aol.com
Signature	/jhgeller/
Date	05/04/2015
Attachments	Vital3MotionDismiss.pdf(245022 bytes)

determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of the plaintiff's well pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim. Whenever the sufficiency of any complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought.

In this case, the Petition to Cancel sets forth no grounds on which relief can be granted in that Petitioner fails to allege any affirmative facts that support its claim that there is a likelihood of confusion between Respondent's marks and Petitioner's unregistered, alleged common law mark. The sole basis for the Petition to Cancel is a letter sent by Respondent's counsel to Petitioner alleging that Petitioner's use of a mark was confusingly similar to Respondent's marks. In the Petition to Cancel, Petitioner does not affirmatively alleged that Respondent's marks are, in fact, confusingly similar to Petitioner's unregistered, alleged common law mark. All Petitioner alleges is that because Respondent's letter alleges a likelihood of confusion that is a sufficient basis for Petitioner to allege a likelihood of confusion.

In order for the Petition to state a claim upon which relief can be granted, Petitioner must allege affirmative that there is a likelihood of confusion in the marketplace and provide at least some factual background for that claim. Petitioner claims that based on the demands and threats of Registrant, Petitioner has a real interest in this case, that is, a legitimate personal interest in the outcome of the proceeding and a reasonable basis for its belief in damage. In fact, this is not the case. By letter dated April 30, 2015 (Ex. A attached) respondent withdrew the claim of infringement. Thus, there is no basis alleged for likelihood of confusion and, therefore, there is not cause of action stated

upon which relief can be granted. Even if the letter withdrawing the claim of infringement had not been sent to Petitioner, there was still no basis for the Petition to Cancel.

Petitioner does not allege that any action has been taken against it by Respondent. In fact, none has. The claim of infringement has been withdrawn. Prior to the filing the Petition to Cancel there was no “case” and, therefore, there was, and is, no case in which Petitioner would have a legitimate personal interest. The only case is this Petition to Cancel which is totally unrelated to the letter that appears to serve as the basis for this Petition to Cancel. Petitioner lacked standing to bring this case in the first place and lacks standing now.

In the Petition to Cancel, Registrant relies solely on a letter not attached to the Petition as a basis for its Petition. It states that based on the allegations of infringement raised by Registrant, and upon information and belief, Registrant's registrations create a likelihood of confusion with Petitioner's mark within the meaning of Section 2(d) of the Lanham Act. Petitioner asserts no independent basis for likelihood of confusion and does not assert that, in fact, there is a likelihood of confusion between Respondent's marks and Petitioner's mark. Irrespective of this, in light of the withdrawal of the allegation of infringement, there is no cause of action upon which relief can be granted.

Petitioner has the burden of proof that there is, in fact, a likelihood of confusion and not based upon the assertion of the Respondent is a letter that is outside the scope of this proceeding. As noted above, no letter is attached to the Petition. However, the letter attached to this Motion as Exhibit A makes clear that there is no pending claim of infringement by Respondent against Petition and there is no cause of action here upon which relief can be granted.

CONCLUSION

Based upon the foregoing, Respondent submit that the Petition to Cancel fails to state a claim upon which relief can be granted and the Petition should be dismissed with prejudice.

Dated: May 4, 2015

Respectfully submitted,

/jhgeller/
Jay H. Geller
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, a true a correct copy of the foregoing MOTION TO DISMISS was served via first class mail, postage prepaid upon Petitioner at:

Mr. Christopher J. Day
Law Office of Christopher Day
9977 North 90th Street, Suite 155
Scottsdale, AZ 85258

and by email to chris@daylawfirm.com.

/jhgeller/
Jay H. Geller

LAW OFFICES OF
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May 4, 2015

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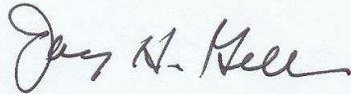
Re: VITAL 3 Trademark Matter

Dear Mr. Day:

With respect to the prior claimed infringement of Futurebiotics' trademarks by your client, that claim is hereby withdrawn. We will be filing a Motion to Dismiss the Petition to Cancel for Failure to State a Cause of Action Upon Which Relief Can Be Granted on the grounds that the basis stated in the Petition for cancelling the registrations no longer exists. Please be aware that irrespective of the withdrawal of the claimed infringement, we believe that the Petition to Cancel is subject to a Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief Can Be Granted for other reasons as well.

I plan to file the Motion to Dismiss on Monday, May 4, 2015. If you wish to withdraw the Petition to Cancel before that time, you have my consent to do so if consent is needed. Prior to filing a responsive document, a Petition to Cancel can be dismissed without prejudice.

Very truly yours,



Jay H. Geller

JHG:mk
Via email: chris@daylawfirm.com
and first class mail

EXHIBIT A

