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

Proceeding	92061197
Party	Plaintiff HealthAid Limited
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re:

Mark: VITAL 3
Reg. No.: 3922987
Registered: Feb. 22, 2011

Mark: VITAL 3 JOINT SOLUTION
Reg. No.: 3973141
Registered: Jun. 07, 2011

HealthAid Limited, vs. Futurebiotics, LLC,	Petitioner, Registrant.
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FIRST AMENDED CONSOLIDATED PETITION TO CANCEL

In response to Registrant's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), Petitioner HealthAid Limited, through its attorney Christopher J. Day, files this First Amended Consolidated Petition to Cancel the above-identified registrations and alleges as follows:

Identity and Standing of Petitioner

1. Petitioner is HealthAid Limited, a company registered in England and Wales, with an address of HealthAid House, Marlborough Hill, Harrow, Middlesex, HA1 1UD, United Kingdom.
2. Petitioner sells over 400 different vitamin, mineral, herbal, nutrient formulas, skincare, bodycare items, cosmetics and aromatherapy products in over 30 countries worldwide.

3. Since at least as early as January, 1998, and long before Registrant can claim priority in its junior VITAL 3 mark, Petitioner, including its subsidiaries and related companies, has used in commerce in the United States the mark GINKGO VITAL 3 and related marks in connection with the promotion and sale of dietary and nutritional supplements.

4. On or about March 11, 2015, and in spite of Petitioner's long prior common law rights in the GINKGO VITAL 3 mark, Registrant, through its attorney, sent a demand letter to HealthAid America, Petitioner's U.S. subsidiary, citing the subject registrations and purporting to claim that Petitioner's use of a trademark containing VITAL 3 "appears to be intentional" trademark infringement and therefore demanding that Petitioner cease using Petitioner's mark.

5. On or about March 24, 2015, Registrant, through its attorney, sent a follow up correspondence again demanding that Petitioner cease use of Petitioner's senior mark, and claiming that Registrant "can register its registration with CBP and prevent future importations of the product into the United States."

6. Based on the confusing similarity of Registrant's VITAL 3 mark and Petitioner's GINKO VITAL 3 marks, 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. Accordingly, and based on Petitioner's long prior common law rights in Petitioner's GINKGO VITAL 3, Petitioner has standing to bring this action.

Registrant and Registrant's Marks

7. Upon information and belief, Registrant is a New York limited liability company named Futurebiotics, LLC with an address of 70 Commerce Drive, Hauppague, New York 11788.

8. The mark in subject registration 3922987 (the '987 Registration) is VITAL 3, and the goods are identified as "Dietary and nutritional supplements."

9. Registrant filed the application that matured into the '987 Registration on a 1(a) basis on July 8, 2010. The '987 Registration claims the mark was first used in November, 2006.

10. The '987 Registration issued on February 22, 2011; therefore this Petition is filed within the five year period specified in Trademark Act § 14(1), 15 U.S.C. § 1064(1).

11. The mark in subject registration 3973141 (the '141 Registration) is VITAL 3 JOINT SOLUTION, and the goods are identified as "Dietary and nutritional supplements."

12. Registrant filed the application that matured into the '141 Registration on a 1(a) basis on July 8, 2010. The '141 Registration claims the mark was first used in November, 2006.

13. The '141 Registration issued on June 7, 2011; therefore this Petition is filed within the five year period specified in Trademark Act § 14(1), 15 U.S.C. § 1064(1).

Grounds

14. Since at least as early as January, 1998, and well before any date that Registrant can claim priority in the marks in the subject registrations, Petitioner has used the mark GINKGO VITAL 3 as a trademark in commerce in the United States in connection with dietary and nutritional supplements.

15. Petitioner maintains a website at www.healthaidamerica.com through which Petitioner sells dietary and nutritional supplements and related products to customers throughout the United States.

16. In addition to wholesale and retail marketing through other channels that began at least as early as 1998, Petitioner has marketed GINKGO VITAL 3 to customers in the United States via its website since at least as early as 2001 and continuing through the present time.

17. The Internet Archive, a third party 501(c)(3) entity maintains a historical database of certain internet web pages. The Internet Archive's Wayback Machine (the "Wayback Machine") archived pages from Petitioner's healthaidamerica.com website on November 28, 1999 at 3:48:11pm. The following page from the Wayback Machine (attached as **Exhibit A**) demonstrates that GINKGO VITAL 3 was listed as one of Petitioner's products on Petitioner's website at least as early as November 28, 1999:

<http://web.archive.org/web/19991128154811/http://www.healthaidamerica.com/health/products.html>

18. The Wayback Machine archived pages from Petitioner's healthaidamerica.com website on March 7, 2005 at 5:16:01pm. The following page from the Wayback Machine (attached as **Exhibit B**) demonstrates that GINKGO VITAL 3 was listed as one of Petitioner's products on Petitioner's website as of March 7, 2005:

<http://web.archive.org/web/20050307171601/http://www.healthaidamerica.com/ProductsGinkgoVital3.html>

19. The Wayback Machine archived pages from Petitioner's healthaidamerica.com website on February 12, 2008 at 2:36:19am. The following page from the Wayback Machine (attached as **Exhibit C**) demonstrates that GINKGO VITAL 3 was listed as one of Petitioner's products on Petitioner's website as of February 12, 2008:

<http://web.archive.org/web/20080212023619/http://www.healthaidamerica.com>

20. Petitioner's use in commerce of the GINKGO VITAL 3 trademark for dietary and nutritional supplements has been continuous and without interruption from the date of first sale through the present time.

21. Petitioner's use of the GINKGO VITAL 3 mark in commerce predates Registrant's filing date by more than eleven (11) years, and predates Registrant's claimed dates of first use by more than eight (8) years.

22. But for the deletion of the descriptive term "Ginko," Registrant's VITAL 3 mark is identical to Petitioner's GINKO VITAL 3 mark. Similarly, Registrant's VITAL 3 JOINT SOLUTION appropriates the entire distinctive portion of Petitioner's GINKO VITAL 3 mark and merely adds the descriptive/generic term "joint solution." Accordingly, the marks are highly similar.

23. Registrant's identified goods, namely "Dietary and nutritional supplements" are identical to Petitioner's goods, namely "dietary and nutritional supplements." Accordingly, the goods of Registrant and Petitioner are identical and move in the same channels of trade, including on-line website distribution.

24. Based on the confusing similarity of Registrant's VITAL 3 mark and Petitioner's GINKO VITAL 3 marks, Registrant's registration and use of the mark in the '987 Registration creates a likelihood of confusion with Petitioner's GINKGO VITAL 3 mark within the meaning of Section 2(d) of the Lanham Act.

25. More specifically, Registrant's VITAL 3 mark in the '987 Registration so resembles the GINKO VITAL 3 mark previously used in the United States by Petitioner and not abandoned, as to be likely, when used on or in connection with the goods or services of the Registrant, to cause confusion, or to cause mistake, or to deceive.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this First Amended Consolidated Petition to Cancel has been served upon all parties, at their following address of record by First Class Mail on May 18, 2015:

Jay H. Geller, Esq.
12100 Wilshire Boulevard, Suite 1250
Los Angeles, CA 90025-7129

/Christopher J. Day/

Christopher J. Day

Exhibit A

INTERNET ARCHIVE
WayBackMachine

[5 captures](#)
28 Nov 99 - 5 Feb 01

OCT NOV **NOV**
1998 1999 20

HealthAid America Products

Sibergin[®]

Ginkgo Vital 3[™]

Koregin[®]

Royal 3[™]

Tang Royal Jelly[®]

-HOME-

[contact us](#) | [home](#) | [company](#)

Exhibit B

INTERNET ARCHIVE
WayBackMachine

17 captures
7 Mar 05 - 26 Mar 07

http://www.healthaidamerica.com/ProductsGinkgoVital3.html

Go

FEB MAR AP
7
2004 2005 2006

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HealthAid
A M E R I C A

"Dedicated to Quality."

GINKGO VITAL 3™
WITH SIBERIAN ELEUTHERO
AND GINSENG



PRODUCT

NUTRITION INFO



[CLICK IMAGE TO
ENLARGE]

Men and women of all ages have come to appreciate the benefits of both Ginkgo, Siberian Eleuthero and Ginseng, the most researched and proven-effective herbs in the world. Now, HealthAid America, known for its advanced, health – enhancing supplements, introduces their unique, high potency formula from England – Ginkgo plus Siberian Eleuthero and Korean Panax Ginseng – **GINKO VITAL 3™**

**ENHANCES PHYSICAL ENDURANCE
& MENTAL CLARITY***

Why choose **GINKGO VITAL 3™**?

GINKO VITAL 3™ works best. Its unique combination formula is based on numerous European research studies demonstrating the unparalleled synergistic effect of Ginkgo combined with Siberian Eleuthero and Ginseng to increase mental clarity and enhance physical strength and endurance.

HIGHLY POTENT DIETRY SUPPLEMENT

GINKO VITAL 3™ contains the highest quality, naturally grown, standardized herbal extracts:

- **100 mg HealthAid® Ginkgo (50:1)**
24 mg Ginkgo Flavone – Glycosides & 6 mg Terpine Lactones
Ginkgo, a natural antioxidant, is the most widely medically prescribed herbal supplement in Europe. Known to enhance

- **250 mg Sibergin® Siberian Eleuthero (5:1)**
Sibergin® Siberian Eleuthero is a superior adaptogen known to enhance the body's ability to cope with both mental and physical stress.
- **150 mg Koregin® Panax Ginseng (5:1)**
Koregin® Panax Ginseng, the most famous herb of the far east, is proven to enhance physical strength and endurance. It also improves oxygen utilization in the body and brain.

GINKGO VITAL 3™ is cost effective

The potency of Ginkgo, Siberian Eleuthero and Korean Panax Ginseng in each one-a-day capsule of **GINKGO VITAL 3™** is even greater than the potency of most single herb Ginkgo, Siberian Eleuthero and Ginseng supplements.

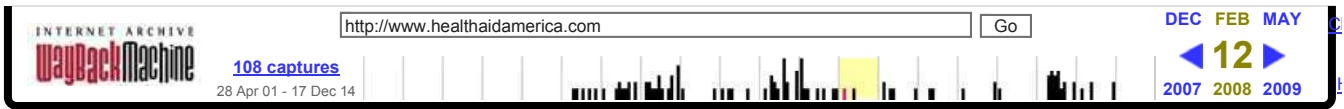


[CLICK IMAGE TO ENLARGE]

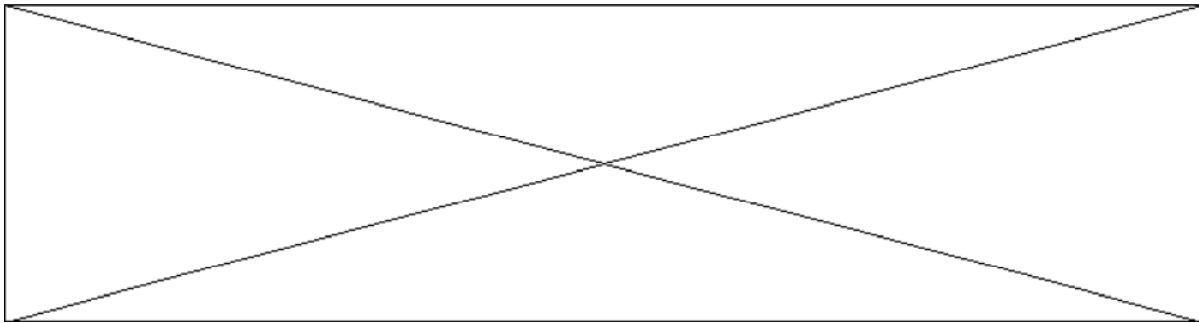
UNIQUE SYNERGISTIC EFFECT!

*Disclaimer: These statements have not been evaluated by the food and drug administration. This product is not intended to diagnose, treat, cure or prevent any disease.

Exhibit C



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-



What's New



The Health Aid America Philosophy
 To provide a range of products that are carefully researched and nutritionally balanced and which help to supplement the many and varied dietary needs of the whole community.

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Featured Products



Sibergin®

A classic adaptogen, helping the body achieve a natural balance between vitality and tranquility, boosting energy and relieving stress.*

[Learn More](#)



Ginko Vital 3™

Increases mental clarity and enhances

INTERNET ARCHIVE
WayBack Machine
108 captures
28 Apr 01 - 17 Dec 14

http://www.healthaidamerica.com physical strength and endurance.*
[Learn More](#)

DEC FEB MAY
12
2007 2008 2009



Koregin[®]

Today's scientific research confirms Ginseng's reputation as a holistic tonic which boosts energy and stimulates vitality.*

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2-Day Detox

A quick and easy detoxification program* containing 13 carefully selected herbs, specifically aimed to flush-away toxins and support the body's natural elimination systems.

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*Disclaimer: These statements have not been evaluated by the food and drug administration. These products are not intended to diagnose, treat, cure or prevent any disease