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

Proceeding	92061857
Party	Defendant NutraClick, LLC
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Attachments	Vemma Nutrition Company v. NutraClick, LLC - Registrant's Motion for Judgment on the Pleadings.pdf(136628 bytes )

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

Vemma Nutrition Company Petitioner,	)	
	)	
vs.	)	Cancellation No. 92061857
	)	Registration No. 4650330
NutraClick, LLC	)	
	)	
Registrant	)	

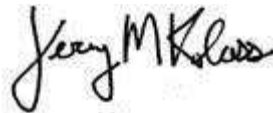
**Attorney's Reference: 108116-388714**

**REGISTRANT NUTRACLICK, LLC'S MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Registrant, NutraClick, LLC, through counsel, respectfully moves to dismiss the pending Cancellation for a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Procedure and TBMP § 504.

This motion is supported by the accompanying Memorandum.

Respectfully submitted,



Date: October 22, 2015

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Vemma Nutrition Company Petitioner,	)	
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	)	Registration No. 4650330
NutraClick, LLC	)	
	)	
Registrant	)	

**Attorney's Reference: 108116-388714**

**REGISTRANT NUTRACLICK, LLC'S MEMORANDUM IN SUPPORT OF  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Registrant, NutraClick, LLC, through counsel, respectfully submits this memorandum in support of its motion for a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Procedure and TBMP § 504.

Petitioner Vemma Nutrition Company filed an “intent to use” application to register the mark BOD-E PRO, Serial No.86/456091 on November 17, 2014, for:

**Class 5:** “Dietary and nutritional supplements; Liquid dietary supplement for use in building muscle; Protein supplement drinks; Protein drinks for use as a nutritional supplement; Meal replacement drinks and shakes for weight loss purposes; Dietary supplement beverages for cleansing and detoxifying the body; Protein supplement drinks and shakes for use as meal replacement not for medical purposes; all being supplement goods containing vitamin E;” and

**Class 32:** “Energy drinks; Non-alcoholic drinks, namely, energy shots; Sport drinks, namely, hydration drinks; Physical activity recovery drinks; Sports drinks, namely, energy, performance and recovery drinks.”

Petitioner also filed an application to register the mark





on December 8, 2014, for the identical goods as those in its

Application Serial No. Serial No. 86/456091. Use of the mark in U.S. commerce since December 1, 2014 is alleged.

The Examining Attorney, who examined both of Petitioner's applications, refused registration of each mark under Section 2(d) of the Trademark Act, citing a likelihood of confusion with Registrant's prior Registration No. 4650330 for the mark Body Pro, which is registered for "Dietary supplements; nutritional supplements; protein supplements and dietary and nutritional supplements containing protein," in Class 5.

Petitioner then initiated the instant Cancellation against Registration No. 4650330 (the "Subject Registration") for the mark Body Pro (the "Subject Mark"), covering "Dietary supplements; nutritional supplements; protein supplements and dietary and nutritional supplements containing protein." in Class 5 (the "Subject Goods"), on July 15, 2015, alleging priority and likelihood of confusion based upon two registrations

for the marks BOD-E and  ("Petitioner's Marks) owned by Petitioner: Registration No. 4477011 for the mark BOD-E; and Registration No. 4477012 for the

mark , ("Petitioner's Registrations") both for the identical goods, namely:

**Class 5:** "Supplement goods containing vitamin E, namely, Meal replacement drinks and shakes for weight loss purposes; Nutritional supplement drinks and shakes; Nutritional supplement drinks and shakes for use as meal replacement not for medical purposes; Protein supplement drinks and shakes for use as meal replacement not for medical purposes; Protein supplement shakes; Nutritional supplement beverages, namely, whey and/or vegan protein for use as a nutritional supplement in ready-to-mix powders and ready-to-drink beverages; Dietary supplement beverages for cleansing and detoxifying the body, aiding in the promotion of sleep and in the promotion of relaxation and for use in boosting energy."

(“Petitioner’s Goods”).

Registrant filed an answer and counterclaim, which alleged priority and likelihood of confusion with Petitioner’s Registrations based upon Registration Nos. 4004000 and 4338902 (“Registrant’s Registrations) for the marks BODY RUSH and BODY RUSH X (“Registrant’s Marks”):

Registration No. 4004000 for the mark BODY RUSH, covers:

**Class 5:** “Dietary supplements; nutritional supplements; vitamin supplements; mineral supplements; dietary and nutritional supplements; vitamin and mineral supplements; Meal replacement and dietary supplement drink mixes; nutritionally fortified beverages; food supplements,” and

**Class 32:** “Sports drinks.”

and

Registration No. 4338902 for the mark BODY RUSH X, covers:

**Class 5:** Dietary supplements; nutritional supplements; vitamin supplements; dietary and nutritional supplements.

(Hereinafter, the goods listed in Registrant’s Registrations shall be referred to collectively as “Registrant’s Goods”.)

Petitioner answered. In light of Petitioner’s answer, Registrant sought and received leave from the Board to file an amended answer and counterclaim, which Petitioner answered. The pleadings are now closed, and the instant motion is timely filed. *See* TBMP §504.01.

As set forth below, by Petitioner’s own allegations and admissions, Petitioner’s Marks shown in Petitioner’s Registrations are merely descriptive of Petitioner’s Goods, and Petitioner’s Registrations allege use of Petitioner’s Marks with Petitioner’s Goods for

less than four years. Thus the registrations Petitioner asserts as the basis for the instant Cancellation are subject to attack on mere descriptiveness grounds, are invalid because they are merely descriptive of Petitioner's Goods, and should be canceled.

### **DISCUSSION**

“A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice.” TBMP § 504.02. “For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true . . . . Id.”

The facts alleged by Petitioner in its pleadings establish that Petitioner's Registrations, upon which the instant Cancellation is based, are merely descriptive, based on Petitioner's own allegations and admissions contained within the pleadings.

Petitioner has alleged “The words “BODY” and “BOD-E” are phonetically the same.” *See* Paragraph 22 of the Petition for Cancellation.

Petitioner has also admitted it has alleged that “The words “BODY” and “BOD-E” are phonetically the same.” *See* Paragraph 45 of Petitioner's Answer to Respondent's Counterclaim Petition for Cancellation.

In Paragraph 45 of Registrant's Amended Answer and Counterclaim, Registrant alleged that the goods identified in Petitioner's Registrations overlap with or are substantially related to the goods identified in Registrant's Registrations.

Petitioner admitted these allegations with respect to Class 5 goods only. *See* Paragraph 45 of Petitioner's Answer to Respondent's Amended Counterclaim Petition for Cancellation.

In Paragraph 28 of the Petition for Cancellation, Petitioner alleged that “The goods identified in the [Subject Registration] overlap with, or are substantially the same as, the goods identified in [Petitioner’s Registrations].”

In Paragraph 54 of Registrant’s Amended Answer and Counterclaim, Registrant alleged that Petitioner has admitted with respect to the goods in Class 5, the goods identified Petitioner’s Registrations “overlap with or are substantially related to” Registrant’s Registrations.

Petitioner admitted these allegations. *See* Paragraph 54 of Petitioner’s Answer to Respondent’s Amended Counterclaim Petition for Cancellation.

In Paragraph 56 of Registrant’s Amended Answer and Counterclaim, Registrant alleged that Petitioner has alleged in Paragraph 27 of the Petition for Cancellation that “The goods identified in the registration of [the Subject Mark, Body Pro] are identical to the goods offered by Petitioner under the BOD-E® trademarks.”

Petitioner admitted these allegations with respect to Registrant’s Subject Registration for the mark Body Pro. *See* Paragraph 56 of Petitioner’s Answer to Respondent’s Amended Counterclaim Petition for Cancellation.

Petitioner alleged that “[t]he word BODY in [Registrant’s] marks describes a feature, function or characteristic of [Registrant’s] goods.” *See* Paragraph 51 of Petitioner’s Answer to Respondent’s Counterclaim Petition for Cancellation.

Because Petitioner has alleged that “The words “BODY” and “BOD-E” are “phonetically the same” and because Petitioner has alleged that that “[t]he goods identified in [the Subject Registration] are identical to the goods offered by Petitioner under the BOD-E® trademarks” and because Petitioner has alleged that “The word

BODY in [Registrant's Body Pro, BODY RUSH and BODY RUSH X marks] describes a feature, function or characteristic of [Registrant's] goods" the word BOD-E in Petitioner's Marks therefore must also describe a feature, function or characteristic of Petitioner's Goods. Petitioner has therefore admitted that Petitioner's Marks in Petitioner's Registrations are merely descriptive.

Further, in Paragraph 60 of Registrant's Amended Answer and Counterclaim, Registrant alleged that Petitioner has alleged use in commerce of Petitioner's Marks shown in Petitioner's Registrations since January 3, 2012, i.e., for less than 4 years.

Petitioner admitted these allegations. *See* Paragraph 60 of Petitioner's Answer to Respondent's Amended Counterclaim Petition for Cancellation.

Since Petitioner admits that Petitioner's Marks have been used in U.S. commerce for less than four years, Petitioner admits that Petitioner's Registrations are not incontestable, and thus are subject to attack on mere descriptiveness grounds. *See* TBMP §307.02(a). Since Petitioner has admitted that Petitioner's Marks in Petitioner's Registrations are merely descriptive and are not incontestable, Petitioner's Registrations should be canceled and judgment entered for Registrant.

### **CONCLUSION**

"A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law."

TBMP §504.02. "For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Fed. R. Civ. P.



8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false.” Id. “A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.” Id.

With regard to the mere descriptiveness of Petitioner’s Registrations, there are no genuine issues of material fact to be resolved, and Registrant is entitled to judgment, on the substantive merits of the controversy, as a matter of law. *See Id.* Petitioner’s own well-pleaded allegations and admissions prove that the marks in its asserted registrations, which form Petitioner’s sole basis for this Cancellation, are merely descriptive. Therefore, Petitioner’s Registrations should be canceled on mere descriptiveness grounds and judgment on the pleadings should be entered in Registrant’s favor.

Since there is no genuine issue of material fact to be resolved regarding the validity of Petitioner’s Registrations, Registrant is entitled to judgment, on the substantive merits of the controversy, as a matter of law. *See TBMP §504.02.*

**WHEREFORE**, for the reasons stated above, Petitioner’s Registrations should be canceled and the Petition for Cancellation should be dismissed.

Respectfully submitted,



Dated: October 22, 2015

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**CERTIFICATE OF SERVICE**

The undersigned, attorney for Registrant, hereby certifies this 22<sup>nd</sup> day of October 2015 that he served, by first class mail, postage prepaid, and via email, a copy of the foregoing

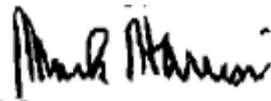
REGISTRANT NUTRACLICK, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

and

REGISTRANT NUTRACLICK, LLC'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

upon

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**Mark B. Harrison**