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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	Reply Brief - Vemma Nutrition Company v. NutraClick, LLC.pdf(123870 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 REPLY BRIEF IN RESPONSE TO
PETITIONER'S OBJECTION TO MOTION FOR JUDGMENT ON THE PLEADINGS**

Registrant respectfully requests that the Board grant its Motion for Judgment on the Pleadings (“Registrant’s Motion”), as Petitioner’s objection (“Objection”) does not adequately address or rebut the pivotal issue, raised in Registrant’s Motion, namely, that Petitioner’s pleadings assert the mere descriptiveness of Petitioner’s Marks covered in Petitioner’s Registrations. Petitioner essentially argues that “BODY” is descriptive when applied to Registrant’s Class 5 goods, but not as applied to its own virtually identical Class 5 goods. Petitioner cannot have it both ways.

Petitioner also argues in its Objection that the Board may not rule on issues of mere descriptiveness at the pleadings stage because mere descriptiveness is a question of fact. Petitioner cites no authority for this proposition. However, since Petitioner has pleaded facts alleging the mere descriptiveness of its own marks, Petitioner has admitted any questions of material fact, and the Board may now rule as a matter of law.

Registrant seeks cancelation of Petitioner's Registrations on mere descriptiveness grounds, and a dismissal of this action, which is based upon Petitioner's rights in Petitioner's Marks contained within Petitioner's Registrations, with prejudice.

Petitioner's Pleadings Admit the Descriptiveness of Petitioner's Marks

Petitioner has alleged that:

- a) The word BODY describes a feature, function or characteristic of the goods listed in Class 5 of Registrant's Registrations.
- b) The words "BODY" and "BOD-E" are phonetically identical; and
- c) The Class 5 goods identified Petitioner's Registrations overlap with or are substantially related to the goods in the Petitioner's Registrations.

Therefore, it follows that Petitioner's pleadings allege that its own BOD-E-formative marks themselves (i.e., Petitioner's Marks) are merely descriptive of the goods covered in its asserted registrations (i.e., Registrant's Registrations).

Petitioner states in its Objection that:

"Just because BODY may be descriptive in Respondent's BODY RUSH mark it does not mean that the word BODY (or BOD-E) is descriptive in every case." Objection at p. 3.

Petitioner argues that the term BODY in Registrant's Registrations is merely descriptive for the virtually the same goods covered by Petitioner's Registrations for the marks BOD-E and



. In other words, Petitioner argues that BODY is descriptive for Registrant but not for itself, even though Petitioner alleges the parties' marks are functionally identical and cover functionally identical goods. Petitioner cannot have it both ways.

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 and in Registrant's Motion for Judgment on the Pleadings, Petitioner's Registrations should be canceled and the Petition for Cancellation should be dismissed with prejudice.

Respectfully submitted,



Dated: November 10, 2015

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CERTIFICATE OF SERVICE

The undersigned, attorney for Registrant, hereby certifies this 10th day of November 2015 that he served, by first class mail, postage prepaid, and via email, a copy of the foregoing

REPLY BRIEF IN RESPONSE TO PETITIONER'S OBJECTION TO MOTION FOR JUDGMENT ON THE PLEADINGS

upon

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A handwritten signature in black ink that reads "Jeremy M. Klass". The signature is written in a cursive style and is positioned to the left of a vertical line.

Jeremy M. Klass