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

Proceeding	92061980
Party	Defendant Living Fuel, Inc.
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Attachments	RESP - to Herbal Powers motion for summary judgment.pdf(93539 bytes)

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

IN THE MATTER OF REGISTRATION NO. 2894898

HERBAL POWERS CORP.

Petitioner,

CANCELLATION NO. 92061980

vs.

LIVING FUEL, INC.,

Respondent.

**LIVING FUEL, INC.'S RESPONSE TO HERBAL POWERS CORP.'S
MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S COUNT III**

On May 26, 2016, Petitioner filed its Motion for Summary Judgment on Petition to Cancel Count III. On May 31, 2016, the Trademark Trial and Appeal Board ("TTAB") entered its order on Petitioner's previous Motion for Summary Judgment, denying that motion. The TTAB also, sua sponte, struck Petitioner's claim of abandonment and fraud, Count III. Accordingly, Petitioner's Motion for Summary Judgment is moot and has no procedural or legal foundation. Accordingly the Motion should be summarily denied.

Fed. R. Civ. P. 56 allows a party to bring a claim for summary judgment on any of its grounds for relief. The Rule assumes that the motion can only be brought on valid claims.

The TTAB's May 31, 2016 order removed any basis for the Petitioner's Motion for Summary Judgment as it dismissed Count III. The Petitioner's motion is therefore moot, and no response to the substantive arguments is required by the Respondent.

Nonetheless, as the TTAB noted, the Petitioner's claim was facially deficient in that the Petitioner's claims "fail to constitute fraud inasmuch as the identification of goods at issue – 'nutritional supplements' – is sufficiently definite for purposes of registration and because there

is nothing fraudulent in providing an identification of goods that includes a broad product term....” TTAB Order, pages 5-6.

It should also be noted that fraud must be plead with specificity. The Petitioner’s count for fraud is facially vague and insufficient as noted by the TTAB.

WHEREFORE, Petitioner’s Motion for Summary Judgment on Count III has no legal basis, no procedural basis and must be summarily denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 27, 2016 I electronically filed the foregoing with the United States Patent and Trademark Office utilizing the Electronic System for TTAB.

I further certify that I mailed the foregoing document by first-class mail to: J. Mark Pohl, Pharmaceutical Patent Attorneys, LLC, 55 Madison Avenue, 4th Floor, Morristown, NJ 07960.

/s/ Dominick J. Graziano
Attorney