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

Proceeding	92066320
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 4,286,987

Mark: GERMAN CREATINE

Owner: Research Sports Nutrition, LLC; Nutrition Distribution, LLC

Fitness Labs Nutrition Corporation, a)	
California Corporation,)	Cancellation No. 92066320
)	
Petitioner,)	
)	
v.)	
)	
Research Sports Nutrition, LLC, an)	
Arizona Limited Liability Company,)	
and)	
Nutrition Distribution, LLC, an)	
Arizona Limited Liability Company)	
)	
)	
Registrants.)	
)	

**PETITIONER FITNESS LABS NUTRITION CORPORATION'S
REPLY IN SUPPORT OF SUMMARY JUDGMENT
AND OPPOSITION TO REGISTRANT'S CROSS-MOTION FOR SUMMARY
JUDGMENT**

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PRELIMINARY STATEMENT

In its motion for summary judgment filed on September 17, 2018 (TTABVue 18, “Br.”), Petitioner Fitness Labs Nutrition Corporation (“Petitioner”) established a *prima facie* case for the grant of summary judgment over Registrants Research Sports Nutrition, LLC and Nutrition Distribution, LLC (“Registrant”). Petitioner showed that it met the two prongs for cancellation of U.S. TM Reg. No. 4286987 (the “’987 Registration”) under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d): namely, 1) likelihood of confusion between Petitioner’s mark and Registrant’s mark, and 2) Petitioner’s priority.

On October 16, 2018, Registrant filed a cross-motion for summary judgment and opposition to Petitioner’s motion. *See* TTABVue 25 (“Opp.”)¹. Registrant does not challenge either of the prongs necessary for the grant of summary judgment under Section 2(d) of the Lanham Act, conceding those points. Instead, Registrant relies upon the affirmative defense of laches. But Registrant misinterprets the law of the Trademark Trial and Appeal Board and the Lanham Act itself. First, Registrant argues that binding precedent that has stood the test of time since before the founding of the Federal Circuit should be ignored, and that the Board should instead follow the law of one of the dozen regional circuits in order to establish “unitary” federal law. Second, Registrant argues for the application of sections of the Lanham Act that the Act itself **specifically excludes** from application to supplemental registrations, a position for which no authority is cited. Neither of these arguments passes muster; and both are legal error.

Petitioner’s case for summary judgment has been conceded but for Registrant’s laches defense; and Registrant’s laches defense fails as a matter of law. As such, summary judgment should be granted in Petitioner’s favor, and the ’987 Registration should be cancelled.

¹ Registrant has not included page numbers in its brief, and as such, page numbers referred to herein are based on the title page of TTABVue 25 being page 1.

ARGUMENT

I. PROCEDURAL LEGAL STANDARDS

A. Binding Precedent

In Board proceedings, “[w]hile parties may cite relevant cases from any jurisdiction, the Board relies primarily on precedent from the U.S. Court of Appeals for the Federal Circuit (‘Federal Circuit’), not only because the Federal Circuit is the Board’s primary reviewing court, but also because its cases address registration issues more specifically.” TBMP § 801.03.

Decisions of the Federal Circuit and CCPA are “binding precedent” on the Board. *See, e.g., In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1743 (TTAB 2016); *NSM Resources Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014). Additionally, the Trademark Trial and Appeal Board “consider[s] precedential decisions [of the TTAB] as binding upon the TTAB.” TMEP § 705.05.

Under Federal Circuit law, “a later panel [of the Federal Circuit] is bound by the determinations of a prior panel, unless relieved of that obligation by an *en banc* order of the [Federal Circuit] or a decision of the Supreme Court.” *Deckers Corp. v. U.S.*, 752 F.3d 949, 959 (Fed. Cir. 2014). The Federal Circuit has “adopted the case law of the CCPA as [its] binding precedent.” *Id.* at 964 (*citing South Corp. v. U.S.*, 215 USPQ 657 (Fed. Cir. 1982)). Panels of the Federal Circuit “are bound by prior CCPA decisions unless and until those CCPA decisions are overturned *en banc* or through Supreme Court intervention, just as [Federal Circuit panels] are bound by other panel decisions of [the Federal Circuit].” *Deckers Corp.*, 752 F.3d at 964.

B. Affirmative Defenses In The Summary Judgment Context

A party raising an affirmative defense to a cancellation, such as laches, has the burden of proof. *See, e.g., Ava Ruha Corp. dba Mother's Market & Kitchen v. Mother's Nutritional Center, Inc.*, 113 USPQ2d 1575, 1580 (TTAB 2015) (“*Ava Ruha*”). As such, to win summary judgment based on a laches defense, Registrant must show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law” that laches bars cancellation of the '987 Registration. *See Fed. R. Civ. P. 56(c), T.B.M.P § 528.01*. Summary judgment is appropriate where “the essential facts necessary to decision of the issue can be adequately developed by less costly procedures as contemplated by the FRCP rules here involved, with a net benefit to society.” *Exxon Corp. v. National Foodline Corp.*, 198 USPQ 407, 408 (CCPA 1978) (*quoted in Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 222 USPQ 741, 743 (Fed. Cir. 1984)). The purpose of summary judgment proceedings is to promote judicial economy, and avoid an unnecessary trial where, as here, more evidence than is already available could not reasonably be expected to change the result in the case. *See University Book Store v. University of Wisc. Bd. of Regents*, 33 USPQ2d 1385 (TTAB 1994); *see also TBMP § 528.01*.

C. Waiver In The Summary Judgment Context

Arguments not raised in a timely manner are deemed to be waived. *Kyocera Wireless Corp. v. Int'l Trade Com'n.*, 545 F.3d 1340, 1352 (Fed. Cir. 2008). Defenses not argued in a brief are considered to be waived. *Central Garden & Pet Co. v. Doskocil Mfg. Co., Inc.*, 108 USPQ2d 1134, 1136 n. 4, n. 7 (TTAB 2013) (*citing General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1588 n. 1 (TTAB 2011)); *see also Alcatraz Media, Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (grounds not argued in

brief deemed waived) (*aff'd*, 565 F. App'x 900 (Fed. Cir. 2014, memorandum)); *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n. 4 (TTAB 2005) (grounds not pursued on brief deemed waived). “When the moving party has supported its motion with sufficient evidence that, if unopposed, indicates there is no genuine dispute of material fact, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial.” Opp. at 7 (*quoting Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009)).

II. PETITIONER HAS PROVEN LIKELIHOOD OF CONFUSION AND PRIORITY

In its opening brief, Petitioner argued that in the present case, there is no genuine dispute of material fact regarding likelihood of confusion (Br. at 10) or priority (Br. at 11-18). First, Registrant has admitted not only a likelihood of confusion, but *inevitability* of confusion. *Id.*; *see also* Donaldson Decl. (TTABVue 19) § 12, Ex. I at Interrogatory 24. Registrant does not challenge likelihood of confusion in its opposition brief, and as such has conceded this point.

Petitioner also argued in its opening brief that it has priority over Registrant. Br. at 11-18. Again, Registrant does not challenge Petitioner’s arguments on this point, noting instead only that “laches may bar a cancellation even if the purported senior user is held to have priority.” Opp. at 9. As such, Petitioner’s priority has been conceded and any arguments against Petitioner’s priority have been waived. In any event, as described in Petitioner’s opening brief, no reasonable jury could find for Registrant on the issue of priority.²

² In footnote 8 of its opposition, Registrant mischaracterizes Petitioner’s alternative argument from pages 17 and 18 of its opening brief as an argument that the ’987 Registration should be cancelled because it lacks distinctiveness. Petitioner’s alternative argument is no such thing, but is instead an argument regarding an alternative ground on which Petitioner’s priority could be found. Petitioner properly pleads priority in the Petition to Cancel (TTABVue 1), such as in

Registrant's own cited authority, *Enbridge*, stands for the proposition that once a party has made out a *prima facie* case as Petitioner did in its motion, "the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact." Opp. at 7 (citation omitted). The burden to challenge Petitioner on likelihood of confusion and/or priority shifted to Registrant after Petitioner filed the motion, and Registrant has chosen not to respond on either point. As such, should Registrant's laches defense fail as a matter of law or because no reasonable juror could find for Registrant, then Petitioner's motion should be granted and the '987 Registration should be cancelled.

III. REGISTRANT'S ONLY DEFENSE, LACHES, DOES NOT APPLY

Petitioner does not dispute Registrant's assertions that summary judgment on the issue of laches is appropriate, "because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures as contemplated by the FRCP rules here involved, with a net benefit to society." *Exxon Corp. v. National Foodline Corp.*, 198 USPQ 407, 408 (CCPA 1978) (quoted in *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 222 USPQ 741, 743 (Fed. Cir. 1984)). No further evidence with regard to laches is needed: as a matter of law, the laches defense does not apply here for multiple reasons.

paragraph 3 thereof where both priority of use and acquired distinctiveness are pled. In any event, Registrant has conceded Petitioner's priority, and as such the issue is moot. Nevertheless, should the Board wish to rely on Petitioner's alternative ground for priority and find Registrant's argument persuasive, Registrant requests leave to amend its pleading under Fed. R. Civ. P 15 in order to amplify and clarify the Section 2(d) ground. *See, e.g.*, TBMP § 507.02(a); *Commodore Electronics Ltd. V. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1505-06 (TTAB 1993) (no undue delay in view of pending motion for summary judgment and discovery was still open when motion was filed).

A. Laches Does Not Apply Because Confusion Is Inevitable

Under both Federal Circuit and TTAB precedent, laches is not a defense when confusion is inevitable. “[T]he equitable defense of laches, [even if] established in this case, cannot serve as a bar against the petition for cancellation based on likelihood of confusion when confusion is, in fact, inevitable. In that event, any injury to the respondent is outweighed by the public’s interest in preventing confusion.” *TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1418-19 (TTAB 2018) (pertaining to advertising for trailers) (citing, e.g., *Ultra-White Co. v. Johnson Chem. Indus., Inc.*, 175 USPQ 166, 167 (CCPA 1972) (“*Ultra-White*”) (pertaining to laundry whitener) (“This is not a case wherein a likelihood of purchaser confusion or mistake is reasonably in doubt, and evidence of laches . . . may be considered as a factor in resolving that doubt. Rather, it appears to us that confusion or mistake here is not only likely but inevitable . . . In such a situation, notwithstanding the equities between the parties and the equitable principles of § 1069, the public interest expressed in § 1052 is the dominant consideration.”)). *See also Ava Ruha*, 113 USPQ2d at 1580 (“Even when a laches defense has been proven, it will not serve as a bar against a petition for cancellation on a likelihood of confusion ground when confusion is inevitable.” (citations omitted)); *Hornby v. TJX Cos.*, 87 USPQ2d 1411, 1419, n. 9 (TTAB 2008) (laches does not apply “when confusion is inevitable, because any injury to the defendant caused by the plaintiff’s delay is outweighed by the public’s interest in preventing confusion” (citation omitted)). “It is well established that laches will not be considered and applied where the marks of the parties are identical and the goods or services are the same or essentially the same.” *Turner v. Hops Grill & Bar, Inc.*, 42 USPQ2d 1310, 1313 (TTAB 1999) (citation omitted). *See also Teledyne Techs., Inc. v. Western Skyways, Inc.*, 208 Fed. Appx. 886, 890 (Fed. Cir. 2006)

(“Where there is inevitable confusion, however, the court should decline to apply laches to protect the public interest.” (*citing Ultra-White*)).

Registrant has admitted *inevitability* of confusion. Br. at 10; Donaldson Decl. (TTABVue 19) § 12, Ex. I at Interrogatory 24; *c.f. Opp.*, generally (challenging the applicability of the inevitable confusion doctrine, but not the fact that confusion here is inevitable). As such, as a matter of law laches cannot apply in the present case.

Registrant’s calls to apply out of circuit law should fail, not only because Registrant’s arguments regarding inevitable confusion doctrine are inconsistent with precedent that binds the Board and Federal Circuit (*supra* at 2), but also because those arguments are logically inconsistent.³ First, Registrant’s arguments are logically inconsistent in that they call for “unitary” federal law, but require the analysis of **state** statutes of limitations and **regional circuit** laches tests. Second, the Second Circuit case cited by Registrant as supposedly ignoring the “inevitable confusion” doctrine actually does not even discuss that doctrine, but instead simply notes that “public health and safety concerns may well overwhelm other considerations in the applications of laches.” *Conopco, Inc. v. Campbell Soup Co.*, 40 USPQ2d 1042, 1047 (2d Cir. 1996). Third, and perhaps most importantly, while Registrant calls for the application of Ninth Circuit law to establish “unitary” federal law, other than its misleading citation to Second Circuit law it has failed to point to a single other circuit that applies the Ninth Circuit standard. Indeed, examination of inevitable confusion doctrine in numerous other regional circuits does not show adoption of the exception adopted by the Ninth Circuit. *See, e.g., TNT N. Am., Inc. v. Magic Touch GmbH*, 43 USPQ2d 1912 (7th Cir. 1997) (pertaining to paper products); *Sara Lee Corp. v.*

³ Notably, it was Registrant that filed a dismissal of its trademark infringement case against Petitioner in the Central District of California. Br. at 7.

Kayser-Roth Corp.,⁴ 38 USPQ2d 1449 (4th Cir. 1996) (pertaining to hosiery products);
SunAmerica Corp. v. Sun Life Assurance Co. of Can., 38 USPQ2d 1065 (11th Cir. 1996)
(pertaining to insurance products and services). Thus, adoption of the Ninth Circuit exception to inevitable confusion doctrine, as urged by Registrant, would actually have the **opposite** effect of that given by Registrant as a justification: it would split the Federal Circuit from the majority of regional circuits. Registrant's arguments for application of Ninth Circuit law should also fail for these reasons.

B. The "Delay" Requirement For Laches Has Not Been Met

Even if, *arguendo*, Registrant's laches claim were not barred by the inevitable confusion doctrine, Registrant cannot meet the other requirements for a laches defense. "In order to prevail on the affirmative defense of laches, Respondent is required 'to establish that there was undue or unreasonable delay [by Petitioner] in asserting its rights, and prejudice to [Respondent] resulting from the delay.'" *Ava Ruha*, 113 USPQ2d at 1580 (*quoting Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France*, 58 USPQ2d 1460, 1462 (Fed. Cir. 2001)).

The first factor, "delay," is "a calculation of the length of the delay between the time when a petitioner first has notice of a defendant and its mark and the time when petitioner files the petition for cancellation." *Ava Ruha*, 113 USPQ2d at 1580. Knowledge can be either actual or constructive.

As a threshold matter, Registrant does not argue that the "delay" factor is met through actual knowledge here, because it cannot. It is undisputed that Petitioner did not have knowledge

⁴ Laches "is sparingly applied where, as here, a plaintiff seeks only equitable relief." *Sara Lee Corp. v. Kayser-Roth Corp.*, 38 USPQ2d 1449, 1452 (4th Cir. 1996). This is a related, but distinct, ground for refusing Registrant's laches defense. *See generally id.* (citations omitted).

of Registrant, Registrant's use of the phrase GERMAN CREATINE, or the '987 Registration until Petitioner received a cease and desist letter from Registrant in August of 2016. *See* Br. at 6; McFarland Decl. (TTABVue 21) ¶ 20; *c.f.* Opp. at 10-11 (arguing only constructive knowledge).

Registrant instead argues that “the petitioner has constructive knowledge or should have known about potential causes of action when the trademark registration is issued, regardless of whether the petitioner had actual knowledge of the registration or the registrant's existence.” Opp. at 10-11. But as noted in the cases cited by Registrant for this proposition, this rule applies to marks registered on the **principal** register. *See Pinkette Clothing, Inc. v. Cosmetic Warriors, Ltd.*, 894 F.3d 1015, 1020; 127 USPQ2d 1315 (9th Cir. 2018) (“There was no opposition to Pinkette's application, and Pinkette's LUSH mark was registered in July 2010, thereby putting CWL on constructive notice of Pinkette's claim to ownership. *See* 15 U.S.C. § 1072 (‘Registration of a mark on the **principal** register . . . shall be constructive notice of the registrant's claim of ownership thereof.’)” (emphasis added)); *E-Systems, Inc. v. Monitek, Inc.*, 222 USPQ 115, 117 (citing 15 U.S.C. § 1072).

But 15 U.S.C. § 1072 is inapplicable in the present case. Under 15 U.S.C. § 1094, “registrations on the supplemental register” are specifically **excluded** from the constructive knowledge provisions of 15 U.S.C. § 1072. The '987 Registration is on the supplemental register, **not** the principal register.⁵

“[T]here are key differences between registrations on the Supplemental Register, like the one involved in this proceeding, and those on the Principal Register. These differences have

⁵ Similarly, Registrant's statements on page 4 of its opposition that “the USPTA [sic] completed its review of Registrant's application for the –‘German Creatine’ [sic] mark on or about December 29, 2012 after publication and receiving no opposition” is also legally incorrect. Applications for registration on the supplemental register do not publish, and are not subject to opposition. *See, e.g.*, TMEP § 301.02.

ramifications when calculating unreasonable delay in bringing a cancellation proceeding . . . although the issuance of a registration on the Supplemental Register is published in the Official Gazette, this does not give constructive notice of a claim of rights in the mark . . . Simply put, although both Supplemental and Principal registrations are published in the Official Gazette, constructive notice by way of registration only attaches to registrations on the Principal Register.” *TPI Holdings, Inc. v. TrailerTrader.com, LLC*, 126 USPQ2d 1409, 1413-14 (TTAB 2018) (*citing* 15 U.S.C. §§ 1072, 1094; *quoting* *Loma Linda Food Co. v. Thompson & Taylor Spice Co.*, 126 USPQ 261, 263 (“It is evident . . . that the Lanham Act does not contemplate that [] registrations on the supplemental register . . . shall constitute constructive notice of the registrant’s claim of ownership.”)). Thus, in a case involving a supplemental registration such as the ‘987 Registration, delay is calculated from the date of **actual** knowledge. *See, e.g., TPI Holdings*, 126 USPQ2d 1414 (“the date that laches begins to run in this proceeding is” the date that “counsel for Petitioner received notification of the registration’s issuance”—i.e., the first date of actual knowledge).

Petitioner had no knowledge of Registrant, Registrant’s use of the GERMAN CREATINE phrase, or the ‘987 Registration until August of 2016. Registrant filed the present action less than a year later, in June of 2017. TTABVue 1. There was no unreasonable delay.

C. Registrant’s Other Laches Arguments Fail

Numerous others of Registrant’s arguments regarding laches also fail, or at the very least fail to meet the summary judgment standard. For instance, Registrant argues the importance of a comparison of units sold only for resale, as opposed to total units sold. *Opp.* at 12-13. But Petitioner also has a large number of resale units sold, and “[i]t is well established that the Board

may not read limitations,” such as trade channel limitations, “into an unrestricted registration or application.” *In re i.a.symbolic, llc*, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (*citing SquirtCo v. Tomy Corp.*, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation here, and nothing in the inherent nature of SquirtCo's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The board, thus, improperly read limitations into the registration.”). Many of Registrant’s arguments regarding other supposed laches factors fail for a similar reliance on resale units only; and its arguments regarding its own “good faith” are hard to believe given Petitioner’s ownership of the domain name <www.germancreative.com> since 2001. Br. at 15-16. Registrant also chooses to ignore Petitioner’s vast evidence of advertising, expenditures, and public recognition, as well as Petitioner’s use in commerce of well over a dozen years. Br. at 13-16. In sum, even if Registrant’s laches defense were not barred by law under the inevitable confusion doctrine or because of the lack of delay by Petitioner, Registrant has still failed to meet its burden.

IV. THE BOARD SHOULD ENTER SUMMARY JUDGMENT FOR PETITIONER

Neither likelihood of confusion nor priority is in dispute. Registrant has conceded that a likelihood of confusion exists and that Petitioner has priority. Petitioner has thus made out a *prima facie* case for summary judgment. Registrant’s only defense to summary judgment, laches, is unavailable under the law. Further, even if the Board were to follow the law of a regional circuit, Registrant’s laches defense still fails—at least because the constructive knowledge provisions of the Lanham Act are unavailable to supplemental registrations and because Petitioner did not have actual knowledge until under a year before filing the petition in this action. No reasonable juror could find for Registrant. As such, Petitioner submits that good

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grounds exist for granting its motion for summary judgment and denying Registrant's cross-motion, and such action is hereby requested.

Respectfully submitted,

KOPPEL PATRICK HEYBL & PHILPOTT

November 14, 2018

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Reg. No. 4,286,987
Cancellation No. 92066320

CERTIFICATE OF ESTTA FILING

I, Corey A. Donaldson, hereby certify that on November 14, 2018, this memorandum is being electronically filed with the U.S. Patent and Trademark Office Trademark Trial and Appeal Board, PO Box 1451, Alexandria, VA 22313, via ESTTA.

/Corey A. Donaldson/
COREY A. DONALDSON
Attorney for Petitioner

Reg. No. 4,286,987
Cancellation No. 92066320

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **PETITIONER FITNESS LABS NUTRITION CORPORATION'S REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO REGISTRANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** has been served on Tauler Smith LLP, counsel for Registrant Research Sports Nutrition, LLC, by email on November 14, 2018, to:

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