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Filing date: **07/12/2018**

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

Petition for Cancellation

Notice is hereby given that the following party has filed a petition to cancel the registration indicated below.

Petitioner Information

Name	Floratech Botanicals, LLC		
Entity	Limited Liability Company	Citizenship	ARIZONA
Address	291 E El Prado Court Chandler, AZ 85225 UNITED STATES		

Attorney information	Adam R. Stephenson IPTechLaw 8350 E Raintree Dr. Ste 245 Scottsdale, AZ 85260 UNITED STATES Email: adam@iptech.law, ipdocket@iptech.law Phone: 4802646075		
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Registration Subject to Cancellation

Registration No.	5514845	Registration date	07/10/2018
Registrant	Envisionate 1834 W Snow Spring Dr Lehi, UT 84043 UNITED STATES Email: pperkin1@alumni.nd.edu		

Goods/Services Subject to Cancellation


Class 005. First Use: 2018/03/18 First Use In Commerce: 2018/03/18 All goods and services in the class are subject to cancellation, namely: Cold sore treatment preparations

Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act Sections 14(1) and 2(d)
The mark is merely descriptive	Trademark Act Sections 14(1) and 2(e)(1)

Mark Cited by Petitioner as Basis for Cancellation

U.S. Registration No.	5237084	Application Date	12/07/2016
Registration Date	07/04/2017	Foreign Priority Date	NONE
Word Mark	BLISTER BALM		

Design Mark	
Description of Mark	The mark consists of two seeds coupled together back to back with two leaves extending between the two seeds all adjacent the stylized words "BLISTER BALM" where the "T" of "BLISTER balm" is elongated and extends toward the two seeds.
Goods/Services	Class 005. First use: First Use: 2016/10/00 First Use In Commerce: 2016/11/08 Cold sore treatment preparations; Medicated balms for treatment of lips; Medicated lip balm

Attachments	87261136#TMSN.png(bytes) Cancellation Petition.pdf(53755 bytes) Exhibit1.pdf(1743024 bytes)
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Signature	/Adam Stephenson/
Name	Adam R. Stephenson
Date	07/12/2018

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

Floratech Botanicals, LLC,
An Arizona Limited Liability Company.

v.

Envisionate PSJ LLC,
A Utah Limited Liability Company.

In the Matter of Registration No. 5514845

For the mark: **BLISTER BOMB**

Date registered: July 10, 2018

Cancellation No. _____

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313

PETITION FOR CANCELLATION

Floratech Botanicals, LLC (herein “Petitioner”), an Arizona Limited Liability Company, having a principal place of business located at 291 E El Prado Court, Chandler, Arizona, by its attorneys, believes that it is damaged by the registration of the mark shown in Registration No. 5514845, registered on July 10, 2018, for the words BLISTER BOMB (hereinafter “the Registration”), owned by Envisionate PSJ LLC, a Utah Limited Liability Company (hereinafter “Respondent”) with a mailing address of 1834 Snow Springs Dr, Lehi, UT 84043, and hereby petitions for cancellation of the same. The grounds for cancellation are as follows:

1. Respondent has obtained under the provisions of the Lanham Act, registration on the Principal Register of the mark BLISTER BOMB on July 10, 2018, for: “Cold sore treatment preparations.” The mark was filed on April 11, 2017.

2. Petitioner has obtained under the provisions of the Lanham Act, registration on the Principal Register for the trademark (U.S Trademark Reg. No. 5237084, see Exhibit 1, hereinafter BLISTER BALM):



The mark was registered on July 4, 2017 for “Cold Sore treatment preparations; Medicated balms for treatment of lips; Medicated lip balm.” The Petitioner disclaimed the words “Blister Balm” in the mark as they are merely descriptive of the products used with the mark. The application for the trademark was filed on Dec. 7, 2016.

3. The Examining Attorney for the mark BLISTER BOMB failed to consider U.S. Trademark Reg. No. 5237084 in registering the mark BLISTER BOMB.

Count 1: Likelihood of Confusion

Petitioner alleges that that it has prior rights both under common law and resulting from the BLISTER BALM registration and the use of Respondent's Registration for BLISTER BOMB is likely to cause confusion under Section 2(d) of the Lanham Act.

Petitioner herewith repeats and realleges paragraphs 1-3 above as fully as set forth herein.

4. Lanham Act §2(d) prohibits registration of a mark that gives rise to a likelihood of confusion with a federally registered mark or a previously used mark or trade name. “No trademark ... shall be refused registration ... unless it ... (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade

name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion...” Lanham Act, § 2(d). Section 2(d) includes three essential elements. First, the plaintiff (Petitioner) must have a proprietary right in the mark being asserted. Second, the Petitioner must have priority over the defendant (Respondent). Third, the Petitioner must prove that Respondent’s use of its mark in connection with defendant’s goods or services gives rise to a likelihood of confusion.

Element 1

5. The Petitioner obtained a Federal Registration for U.S. Trademark Reg. No. 5237084. The Petitioner acknowledges that it disclaimed the words “Blister Balm.” While the Applicant does not claim proprietary rights in the words “Blister Balm,” it does claim rights to be free to use the words “Blister Balm” in its existing BLISTER BALM mark without having an opponent obtain a registration for the words “Blister Balm” or any confusingly similar mark. Indeed, this is the very reason the Petitioner left the words “Blister Balm” in the BLISTER BALM mark, to ensure that there would not be a later registration of a confusingly similar mark that could in any way restrict their use of the words “Blister Balm.”

Element 2

6. The Petitioner has Priority over the Defendant. The Petitioner first filed its application for the ‘084 mark on Dec. 7, 2016 and first used the mark in October of 2016. The Respondent filed its application for the BLISTER BOMB mark on April 11, 2017 and allegedly first used the mark in March of 2018.

Element 3

7. In *In re E.I. DuPontDeNemours & Co.*, the court enumerated 13 factors to be considered when determining whether a likelihood of confusion exists. 476 F.2d 1357 1361, 177 USPQ 563, 567 (CCPA 1973). The first two factors are generally considered the most important. *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098 1103, 192 USPQ

24, 29 (CCPA 1976) (Rich, J.) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.") When evaluating BLISTER BOMB and BLISTER BALM, it is apparent that there exists a likelihood of confusion for at least the following reasons.

8. **Factor 1: The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.** The appearance of BLISTER BOMB and BLISTER BALM are visually very similar. Both marks include the leading word “blister” and the second word of each mark starts with a “b,” includes four letters, and has an “m” near the end of the word. The only visual difference between the two marks is “alm” vs. “omb.” Not only are the marks likely to be confused on a visual basis, they are almost certainly to be confused when evaluating the sound of the mark. The two marks sound essentially identical. The only arguable difference is between “bomb” and “balm,” however, the two words are commonly pronounced identically in American English. This one factor alone could give rise to a likelihood of confusion. This is clearly seen when looking at the wide popularity of speech recognition systems. If a user were to request ALEXA® or GOOGLE® to “order Blister Balm,” the voice recognition software could not distinguish between Blister Bomb and Blister Balm.

9. **Factor 2: The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.** Both BLISTER BALM and BLISTER BOMB are used for “cold sore treatment preparations.” Not only do the marks sound identical to one another, they are both used on identical goods. While these first two factors are sufficient to show that there exists a likelihood of confusion between the marks, still other factors reinforce this likelihood of confusion.

10. **Factor 3: The similarity or dissimilarity of established, likely-to-continue trade channels.** Both products appear to primarily be sold online, meaning that the trade channels are essentially identical.

11. **Factor 4: The conditions under which and the buyers to whom sales are made, i.e. "impulse purchasing" vs. careful, sophisticated purchasing.** Cold sore treatments are generally sold from around \$5-\$20. Due to the low cost of the item, purchasing would unlikely be carried out carefully or in a sophisticated manner, and individuals using ALEXA® or GOOGLE® to “order Blister Balm,” could wind up getting either product, as the ordering process does not require a visual inspection of the verbal order.

12. **Factor 12: The extent of potential confusion, i.e., whether *de minimis* or substantial.** To reiterate, two products which are both cold sore treatments sold online using two marks that sound identical and look nearly identical—such a situation is highly probable to result in consumer confusion.

13. Continued registration of the BLISTER BOMB mark will result in damage to the Petitioner as it will result in a likelihood of confusion with Petitioner’s BLISTER BALM mark. Further, continued registration of the BLISTER BOMB mark will result in damage to the petitioner as it will prevent the Petitioner from registering the words “Blister Balm” on the Principal Register after extensive and exclusive use. Finally, continued registration of the mark will result in damage to the Petitioner as it will limit the Petitioner’s use of the BLISTER BALM mark and common law usage of the words “Blister Balm.”

Count 2: Descriptiveness

Petitioner alleges that the registered mark BLISTER BOMB is merely descriptive, without secondary meaning, and therefore should be cancelled under Section 2(e)(1) of the Lanham act.

Petitioner herewith repeats and realleges paragraphs 1-3 above as fully set forth herein.

14. Absent secondary meaning, a trademark should be refused registration on the principal register if “when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them.” Lanham Act § 2(e)(1). “[T]he law would

not secure to any person the exclusive use of a trademark consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade.... Other like goods, equal to them in all respects, may be manufactured or dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public.” *Estate of P.D. Beckwith, Inc., v. Commissioner of Patents*, 252 U.S. 538, 543, 40 S. Ct. 414 (1920). As the Federal Circuit has emphasized, “[a] mark is merely descriptive if it immediately conveys to one seeing **or hearing it** knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used; whereas, a mark is suggestive if imagination, thought, or perception is required to reach a conclusion on the nature of the goods or services.” *Application of Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 525, 205 U.S.P.Q. 505 (C.C.P.A. 1980), emphasis added.

Descriptiveness of BLISTER BOMB

15. As indicated by the Respondent’s trademark registration, BLISTER BOMB is to be used in conjunction with “cold sore preparation treatments.” Specifically, BLISTER BOMB is to be used with a balm which is applied to cold sores, a type of blister, to eliminate the blisters. As pronounced in American English, “bomb” is a near phonetic equivalent, and is often treated as a phonetic equivalent, to “balm.” In hearing the mark BLISTER BOMB, essential qualities of the goods are immediately conveyed-i.e. it is a balm used to treat blisters. Indeed, this is the very reason Petitioner disclaimed the words “Blister Balm” in U.S. Trademark Reg. No. 5237084. The variation in spelling between “bomb” and “balm” is insufficient to make the mark suggestive as the test the Federal Circuit has laid forth is whether the mark is descriptive upon seeing it **or hearing it**. This same rationale is what prohibits misspellings of descriptive marks (See TMEP 1209.03(j)) from being registered as non-descriptive. Though a misspelling of a mark may visually appear different from a word descriptive of the good or service associated with the mark, because the misspelling is a phonetic equivalent it will not turn a descriptive mark into a non-descriptive mark.

Likelihood of Confusion between BLISTER BOMB and BLISTER BALM as Evidence of Descriptiveness

16. It has long been held that absent existing secondary meaning of a descriptive mark, others may use the language of the descriptive mark which describes their good before the public. See *Estate of P.D. Beckwith, Inc., v. Commissioner of Patents*. By allowing the continued Registration of BLISTER BOMB, the rights of others to use the descriptive term “blister balm,” are wrongfully restricted. Under the Lanham Act, any person who uses a mark that is confusingly similar to the registered mark shall be liable in a civil action. Because BLISTER BOMB and BLISTER BALM are confusingly similar marks, Petitioners rights in the mark BLISTER BALM may be restricted contrary to the instruction from the Supreme Court. The likelihood of confusion is further evidence that BLISTER BOMB is merely descriptive the same way BLISTER BALM is. Indeed, if this were not the case then a registrant with a mark confusingly similar to a descriptive mark would be able to prevent others from using the descriptive language. This runs completely contrary to the established law stretching over at least the past 100 years.

17. There exists a likelihood of confusion between the BLISTER BALM mark and the BLISTER BOMB mark for at least the reasons stated in count 1.

18. Continued registration of the mark shown in the Registration will result in damage to the Petitioner as it will result in a likelihood of confusion with Petitioner’s BLISTER BALM mark. Further, continued registration of the mark will result in damage to the Petitioner as it will prevent the Petitioner from registering the words “Blister Balm” on the principal register after extensive and exclusive use. Finally, continued registration of the mark will result in damage to the Petitioner as it will limit the Petitioner’s use of the BLISTER BALM mark and the common law usage of the words “Blister Balm.”

WHEREFORE, in view of Counts 1 and 2, the Petitioner prays that its Petition for Cancellation be sustained and that the Registration for the trademark set forth therein be cancelled. Please direct all correspondence to the attention of:

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Dated: 7/11/2018

Respectfully submitted,
/s/ Adam R. Stephenson
Adam R. Stephenson, LTD.
Attorney for Petitioner,
Floratech Botanicals, LLC.

United States of America

United States Patent and Trademark Office

Blister 
Balm

Reg. No. 5,237,084

Registered Jul. 04, 2017

Int. Cl.: 5

Trademark

Principal Register

FLORATECH BOTANICALS, LLC (ARIZONA LIMITED LIABILITY COMPANY)
291 E El Prado Ct.
Chandler, AZ 85225

CLASS 5: Cold sore treatment preparations; Medicated balms for treatment of lips;
Medicated lip balm

FIRST USE 10-00-2016; IN COMMERCE 11-8-2016

The mark consists of two seeds coupled together back to back with two leaves extending between the two seeds all adjacent the stylized words "BLISTER BALM" where the "T" of "BLISTER balm" is elongated and extends toward the two seeds.

No claim is made to the exclusive right to use the following apart from the mark as shown:
"BLISTER BALM"

SER. NO. 87-261,136, FILED 12-07-2016
JACQUELINE WIL ABRAMS, EXAMINING ATTORNEY



Joseph Matol

Performing the Functions and Duties of the
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

REQUIREMENTS TO MAINTAIN YOUR FEDERAL TRADEMARK REGISTRATION

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years*

What and When to File:

- **First Filing Deadline:** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.
- **Second Filing Deadline:** You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

- You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the United States Patent and Trademark Office (USPTO). The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

NOTE: A courtesy e-mail reminder of USPTO maintenance filing deadlines will be sent to trademark owners/holders who authorize e-mail communication and maintain a current e-mail address with the USPTO. To ensure that e-mail is authorized and your address is current, please use the Trademark Electronic Application System (TEAS) Correspondence Address and Change of Owner Address Forms available at <http://www.uspto.gov>.