

ESTTA Tracking number: **ESTTA1356810**Filing date: **05/06/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	92078349
Party	Plaintiff Judith Gurley Plastic Surgery, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE  
THE TRADEMARK TRIAL AND APPEAL BOARD**

**Judith Gurley Plastic Surgery, LLC**

**Petitioner**

**v.**

**David J. Witchell Salon & Spa, Inc.,**

**Registrant**

**Cancellation No. 92078349**

**PETITIONER'S REPLY BRIEF**

COMES NOW Petitioner, by and through counsel, and hereby submits its reply brief in further support of granting Cancellation No. 92078349 on the ground that Registrant's Registration No. 5,845,907 will cause Petitioner to be damaged.

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Petitioner, by and through counsel, hereby moves for cancellation of Registration No. 5,845,907 due to likelihood of confusion and states as follows:

### **RESPONSIVE ARGUMENT**

Petitioner has established priority and that its NO ONE WILL KNOW...EVERYONE WILL NOTICE trademark is confusingly similar to Registrant's EVERYONE WILL NOTICE BUT NO ONE WILL KNOW trademark.

Petitioner has established priority and confusingly similarity between its mark and Registrant's mark for purposes of this cancellation. In fact, Registrant's only argument in its response is that Petitioner's trademark fails to function as a trademark.

Petitioner's NO ONE WILL KNOW...EVERYONE WILL NOTICE mark functions as a trademark.

Every application must be examined for compliance with the statutes setting forth the requirements for registration. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) ("The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement..."). Here, the Examining Attorney did not reject Petitioner's application under 15 U.S.C. §1051, 1052, or 1127 for failure to function as a trademark. The only rejection Petitioner received was under 15 U.S.C. §1052(d) likelihood of confusion with Registrant's mark. (1 TTABVUE; See Application Serial No. 88/304473). Additionally, Petitioner has provided evidence that Petitioner began using the Mark at least as early as 2007<sup>1</sup> and has continuously used the Mark to date. See 21 TTABVUE and 22 TTABVUE.

Despite the fact that the Examining Attorney did not find that Petitioner's mark fails to

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<sup>1</sup> Petitioner claimed a first use date of **at least as early as 2007** but also provided evidence in this matter that its use dates back to 2002. See 21 TTABVUE 6-7.

function as a trademark, Registrant attempts to argue the Petitioner's mark is so widely used in "Registrant's format" that it fails to identify source.

According to the Board in *Kohler Co. v. Baldwin Hardware Corp.* :

Although we have given some weight to the evidence of third-party use, the weight is limited given the absence of any corroborating facts bearing on the extent of such use.

That is to say, there are no specifics regarding the sales or promotional efforts

surrounding the third-party marks. *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d

1100, 1112 (TTAB 2007)

Additionally, this is not a case of "widespread use" where the mark is too commonly used by too many third parties in a variety of forms for it to identify the source of Petitioner's services.

*In re Wal-Mart*, 129 USPQ2d 1148, 1153 (TTAB 2019) (widespread third party use of a phrase

"makes it less likely that the public will perceive it as identifying a single commercial source and

less likely that it will be recognized by purchasers as a trademark" [Mark involved "Investing in

American Jobs"]); *D.C. One Wholesaler, Inc. v. Jonathan E. Chien*, 120 USPQ2d 1710, 1716

(TTAB 2016) (due to "ubiquity" of , "it does not create the commercial impression of a source

indicator, even when displayed on a hangtag or label" [Mark involved "I Love -heart design-

DC"]); *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013)(quoting *In re Eagle Crest Inc.*, 96

USPQ2d 1227, 1229 (TTAB 2010)("The more commonly a phrase is used, the less likely that

the public will use it to identify only one source and the less likely that it will be recognized by

purchasers as a trademark.")[Mark involved :No more RINO'S").

Here, **over half** of the evidence supplied by Registrant's counsel as proof of extensive third-party use shows **only one** third party's (Juvederm) use of the phrase "provides a smooth, natural look and feel so everyone will notice (but no one will know)"<sup>2</sup> for an injectable gel filler by

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<sup>2</sup> In fact, 24 TTABUE Exhibits 30 at pgs 286-289 and 44 at pgs 362-365 do not show any use of Juvederm's phrase in 2007 and Exhibits 1 at pgs 11-19 & 45 at pgs 366-375 are the same Juvederm brochure dated 2017.

Juvederm and **none** of it shows use prior to Petitioner's first use of 2002 or even Petitioner's at least as early use of 2007. See 24 TTABVUE Exhibits

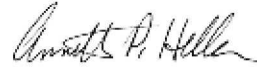
1,3,7,12,15,17,18,19,20,21,22,24,25,26,29,30,34,37,38,39,40,41,42,43,44,45,47,48,50,54,58,59,60,61,72,73,74,75,76,78,79,80,81,83,84,85,86,87,88). Additionally, Allergan/Juvederm is not a party to this cancellation.

Furthermore, several exhibits are hard-pressed to find usage of Petitioner's mark and even more don't *show any use* of Petitioner's mark at all. (See 24 TTABVUE Exhibits 56 at pg 523, 77 at pg 639, 89 at pg 732). Additionally, numerous exhibits are merely repetitive, and in some instances produced more than two times. (See 24 TTABVUE Exhibits 9&52; 7&50; 6&49; 3,47&62; 2&46; 1&45; 3&48; and 27,28,65&66). In short, Registrant has failed to establish the Petitioner's mark is so widespread that it fails to function as a trademark. Thus, it cannot be concluded that consumers have become conditioned to recognize that several other entities use Petitioner's mark NO ONE WILL NOTICE...EVERYONE WILL KNOW for medical services, plastic surgery services, or cosmetic and plastic surgery services that Petitioner's mark fails to function as a trademark. *Kohler Co. v. Baldwin*, 82 USPQ2d at 1112 (citing *Carl Karcher Enterprises, Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995)).

## CONCLUSION

For the above reasons Petitioner's mark function as a trademark, has priority, and has shown there is a likelihood of confusion and, therefore, prays the Board grant Cancellation No. 92078349 cancelling U.S. Registration No. 5,845,907 pursuant to 15 U.S.C. §1064.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Annette P. Heller, attorney for Petitioner, hereby certify that a copy of this document was served on counsel of record, Frank J. Bonini, Jr. via email to [fbonini@boninilaw.com](mailto:fbonini@boninilaw.com) this 6<sup>th</sup> day of May, 2024.

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Annette P. Heller, Attorney for Petitioner