

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Baxley

Mailed: January 29, 2016

Cancellation No. 92061862

Cyanotech Corp.

v.

Nutrex Research, Inc.

Concurrent Use No. 94002616

Cyanotech Corp.

v.

Nutrex nv

v.

Nutrex Research, Inc.

v.

Monique Loppe

Andrew P. Baxley, Interlocutory Attorney:

Because the above-captioned proceedings involve overlapping parties and common questions of law or fact, the Board hereby orders their consolidation. *See* Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); TBMP § 511 (2015). The consolidated cases may be presented on the same record and briefs. *See Helene Curtis*

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Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989); *Hilson Research Inc. v. Society for Human Resource Management*, 26 USPQ2d 1423 (TTAB 1993).

The Board file will be maintained in Cancellation No. 92061862 as the "parent" case. As a general rule, from this point onward, only a single copy of any submission should be filed herein. That copy, however, should include all of the consolidated proceeding numbers in the caption thereof.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleading; a copy of the decision shall be placed in each proceeding file.

In addition to being involved in the above-captioned concurrent use proceeding, Nutrex nv's Registration Nos. 3798632 and 3849395 were the subject of Cancellation no. 92061883, styled *Cyanotech Corporation v. Nutrex nv*. In an October 22, 2015 order in that proceeding, the Board granted Cyanotech Corporation's motion (filed September 2, 2015) for default judgment as conceded and entered judgment by default in that proceeding.¹ On November 13, 2015, Nutrex nv's registrations were cancelled. Notwithstanding such cancellation, Nutrex nv remains a party in the above-captioned cancellation proceeding.

On January 29, 2016, the Board attorney assigned to these proceedings convened a telephone conference between Cyanotech Corporation's ("Cyanotech") attorney, George E. Darby, and Nutrex Research, Inc.'s ("Research") attorney Ava K. Doppelt

¹ The pleaded claims in that proceeding include abandonment. See Trademark Act Section 45, 15 U.S.C. § 1127.

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after Mr. Darby had telephoned the Board attorney indicating that Cyanotech and Research were parties to the above-captioned proceedings and that they had reached an agreement to settle the cancellation proceeding. In such conference, the Board attorney determined that, in the interest of judicial economy, it was appropriate to suspend the above-captioned proceedings so that the parties can attempt to resolve both proceedings all at once. *See generally* TBMP Chapter 1100.

The notices of ineffective service of Cyanotech's involved applications on Monique Loppe ("Loppe") that Cyanotech filed on December 16, 2014, December 18, 2014, and January 7, 2015 are noted. Because Loppe does not own an application or registration,² the proceeding cannot go forward unless and until Cyanotech furnishes the correct address for Loppe.³ *See* TBMP § 1106.05. In view of the foregoing, the stipulations to extend time to answer (filed December 17, 2014 and December 29, 2014) are moot. Consideration of Cyanotech's motion (filed April 27, 2015) to delete Nutrex nv as a party to this proceeding is deferred.⁴

² USPTO records indicate that Loppe owned Registration No. 3204937, issued February 6, 2007, under Trademark Act Section 44(e), 15 U.S.C. § 1126(e), based on French Registration No. 023145915, with a claim of priority under Trademark Act Section 44(d), 15 U.S.C. § 1126(d), for the mark NUTRIX in typed form for "Nutritional and dietary food supplements; nutritionally fortified beverages; food for medically restricted diets, excluding breakfast cereals, fruit-derived snack foods, and yogurt" in International Class 5 and "Protein and soy protein for use as a food additive in food products other than breakfast cereals, fruit-derived snack foods, and yogurt" in International Class 29. Registration No. 3204937 was cancelled on September 13, 2013 under Trademark Act Section 8, 15 U.S.C. § 1058.

³ Alternatively, if, upon further investigation, Cyanotech learns that Loppe has abandoned her use of her mark in commerce regulatable by Congress, Cyanotech may file a motion to amend its application to delete reference to that user. *See* TBMP §§ 1104 and 1106.05.

⁴ Trademark Act Section 45, 15 U.S.C. § 1127, states in relevant part as follows:

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Proceedings herein are suspended until ninety days from the mailing date set forth in this order to allow the parties to continue negotiations and to take appropriate steps so that the concurrent use proceeding can go forward.

The term “use in commerce” means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce.

...

A mark shall be deemed to be ‘abandoned’ ... [w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment.

Trademark rights are territorial; that is, foreign use of a mark creates no rights in that mark in the United States. *See Johnson & Johnson v. Salve S.A.*, 183 USPQ 375, 376 (TTAB 1974).