

**To:** Omega Alpha Pharmaceuticals Inc. ([ghansen@hh-iplaw.com](mailto:ghansen@hh-iplaw.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 77486429 - OMEGA ALPHA - OAPH 200 TMU - EXAMINER BRIEF  
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**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**APPLICATION SERIAL NO.**

77486429

**MARK:** OMEGA ALPHA

**\*77486429\***

**CORRESPONDENT ADDRESS:**

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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** Omega Alpha  
Pharmaceuticals Inc.

**CORRESPONDENT'S**

**REFERENCE/DOCKET NO:**

OAPH 200 TMU

**CORRESPONDENT E-MAIL ADDRESS:**

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# EXAMINING ATTORNEY'S APPEAL BRIEF

## I. INTRODUCTION

This is an appeal from the Trademark Examining Attorney's final refusal to register applicant's mark, **OMEGA ALPHA and Design** for "**a list of 102 different types of dietary, nutritional, and herbal supplements,**" on the grounds that the applied-for mark consists of or includes deceptive matter in relation to the identified goods under Trademark Act §2(a), 15 U.S.C. §1052(a).<sup>[1]</sup>

## II. FACTS

On May 29, 2008, applicant, Omega Alpha Pharmaceuticals Inc. (hereinafter "applicant"), filed an application to register the mark Omega Alpha and Design, under §1(a) of the Act, 15 U.S.C. §1051(a), on the Principal Register for "**a list of 102 different types of dietary, nutritional, and herbal supplements.**"

On October 15, 2008, examining attorney refused registration of the proposed mark, **OMEGA ALPHA and Design**, on the grounds of procedural informalities concerning the identification of goods being unacceptable, the requirement of applicant's certificate of foreign registration, applicant clarifying its intent to maintain both the §§1(b) and 44(e) filing basis, and a claim of ownership of a prior registration.

Applicant in its response filed April 15, 2009, amended its identification of goods, and stated that it would submit a copy of its certificate of foreign registration once it was issued.

On June 4, 2009, examining attorney issued a suspension letter pending receipt of a true copy, a photocopy, a certification, or a certified copy of a foreign registration from applicant's country of origin. Also, examining attorney maintained and continued the procedural requirements for an acceptable identification of goods, and a claim of ownership of the prior registration. Thereafter, on December 9, 2009, examining attorney issued a suspension inquiry letter inquiring as to the status of the foreign registration of the proposed mark, and notifying applicant that the procedural informalities were maintained and continued.

On April 8, 2010, applicant submitted a true copy of a foreign registration from applicant's country of origin along with an English translation. Also, applicant amended its identification of goods.

Next on May 5, 2010, examining attorney accepted applicant's amended identification of goods, and a true copy of a foreign registration from applicant's country of origin along with its English translation. However, applicant did not respond to the claim of ownership of the prior registration. Thus, a Final Refusal for registration was issued requiring applicant to respond to the claim of ownership of the prior registration.

On May 7, 2010, applicant filed a Request for Reconsideration claiming ownership of prior registration U.S.

Registration No. 3111385.

Upon further consideration of the proposed mark, examining attorney issued an office action on July 7, 2010, on the grounds that the applied-for mark **OMEGA ALPHA and Design** consisted of or included deceptive matter in relation to the identified goods under Trademark Act §2(a), 15 U.S.C. §1052(a). In support of the refusal, examining attorney provided internet evidence demonstrating that the wording **OMEGA** in relation to dietary, nutritional, and/or herbal supplements is (1) an ingredient that is important to a significant portion of the relevant consumers' purchasing decision, and (2) Omegas such as omega-3, omega-6, and omega-9 have specific health benefits and efficacy that affects consumers' decision to purchase the goods listed in the application. Also, the identification of goods was deemed to still be unacceptable. *See* evidence attached to Office Action dated 7/10/10.

Applicant responded to the office action on January 6, 2011, arguing against the substantive refusal. Specifically, alleging that (1) the term **Omega** is the 24th letter of the Greek alphabet; (2) consumers would view the proposed mark **Omega Alpha** as denoting or meaning "from the end to the beginning" based on the Greek letter meaning; (3) there exists registered marks encompassing the term **OMEGA** and **ALPHA**; and (4) examining attorney had not provided sufficient evidence to support the §2(a) refusal. Also, applicant amended the identification of goods.

The herein application was reassigned to this examining attorney, who on May 22, 2011, issued a Final Refusal under Trademark Act §2(a), 15 U.S.C. §1052(a). Examining attorney acknowledged (1) that the term **OMEGA** is the last or 24th letter of the Greek alphabet, and **ALPHA** is the 1st letter of the Greek alphabet; and (2) the term **OMEGA** is defined as "End," and the term **ALPHA** is defined as "Beginning." Also, examining attorney accepted applicant's amended identification of goods. However, examining attorney maintained that the refusal was appropriate because the term **OMEGA** in applicant's mark would be viewed by the relevant purchasing consumer as denoting **OMEGA** in relation to fatty acids (3, 6, and/or 9) which provides health benefits in relation to dietary, nutritional, and/or herbal supplements. *See* evidence attached to Final Refusal dated 5/22/11.

Also, examining attorney stated for the record that applicant did not present evidence demonstrating that the consumers would perceive the meaning of the proposed mark, **Omega Alpha**, as meaning "from the end to the beginning."

On November 18, 2011, applicant filed a Notice of Appeal of the examiner's final refusal to the Trademark Trial and Appeal Board (hereinafter the "Board"). Thereafter, on January 18, 2012, the brief was forwarded to the examining attorney in accordance with Trademark Rule 2.142(b).

For the reasons to follow, the examining attorney requests that the Board **AFFIRM** the refusal under §2(a) of the

Trademark Act.

### III. ISSUE ON APPEAL

Whether the proposed mark, **OMEGA ALPHA**, in particular the term **OMEGA**, as used in connection with dietary, nutritional, and/or herbal supplements, is deceptive under Trademark Act §2(a), 15 U.S.C. §1052(a), when the supplements do not encompass omega fatty acids, and as such should be refused registration.

### IV. ARGUMENT

THE PROPOSED MARK OMEGA ALPHA, IN PARTICULAR THE TERM OMEGA, SHOULD BE REFUSED REGISTRATION BECAUSE (1) THE GOODS DO NOT CONTAIN OMEGA FATTY ACIDS, WHICH ARE KNOWN TO HAVE SPECIFIC HEALTH BENEFITS, (2) PURCHASERS ARE LIKELY TO BELIEVE THAT THE MISDESCRIPTION ACTUALLY DESCRIBES THE GOODS, AND (3) THE MISDESCRIPTION IS LIKELY TO AFFECT A SIGNIFICANT PORTION OF THE RELEVANT CONSUMERS' DECISION TO PURCHASE THE GOODS BASED ON THE HEALTH BENEFITS.

**A. The applied for mark, OMEGA ALPHA, particularly the term OMEGA misdescribes the character, quality, function, composition, or use of the dietary, nutritional, and/or herbal supplement goods.**

In making the determination of whether a mark is deceptive under Trademark Act §2(a) the following criteria must be met:

- (1) The applied-for mark consists of or contains a term that misdescribes the character, quality, function, composition, or use of the goods and/or services;
- (2) Prospective purchasers are likely to believe that the misdescription actually describes the goods and/or services; and
- (3) The misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase the goods and/or services.

*See In re Budge*, 857 F.2d at 775, 8 USPQ2d at 1260; *In re ALP of S. Beach Inc.*, 79 USPQ2d at 1010; TMEP §1203.02(b); *see also In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1353, 1356, 90 USPQ2d 1489, 1492-93, 1495 (Fed. Cir. 2009) (holding that the test for materiality incorporates a requirement that a “significant portion of the relevant consumers be deceived”).

Examining attorney maintains that the term OMEGA as used within the dietary, nutritional, and/or herbal supplements industry denotes supplements containing omega fatty acids as a material ingredient. Here, applicant's mark encompasses the term OMEGA, but not all of its goods encompass omega fatty acids. Specifically, applicant's identification of goods that is of record appears to only reference three (3) goods on the list of 102 goods that appears to encompass omega fatty acids, specifically:

(32) Herbal supplements for the treatment of immune disorders, neural imbalances, joint problems, cancer, inflammation, kidney function, Acquired Immune Deficiency Syndrome and cardiovascular disease; Herbal supplements containing Essential Fatty Acids, namely, a combination of Borage Oil, Flax Oil, and Fish Oil; (34) Herbal supplements to provide immune support and greater resistance to cold and flu infection; Herbal supplements to help prevent Alzheimer's disease, arthritis, auto-immune diseases, cancer, depression, diabetes, heart disease, hyperactivity, and ulcers; Herbal supplements to increase energy level and ability to concentrate; Herbal supplements to help avoid premature births, low birth weight and pregnancy complications; Herbal supplements to support healthy sexual function; Herbal supplements for use with Attention Deficit Hyperactivity Disorder type disorders and to improve mental activity; Herbal supplements containing a combination of Fish Oil and Vitamin E (D-Alpha Tocopherol) (35) Herbal supplements for use as an anti-inflammatory agent to lessen symptoms of migraine headaches, premenstrual syndrome, endometriosis, rheumatoid arthritis, multiple sclerosis, lupus, scleroderma and other autoimmune disorders; Herbal supplements to help regulate and strengthen the immune system; Herbal supplements to prevent cancer; Herbal supplements to soothe irritable bowel disorders; Herbal supplements to lower cholesterol and triglycerides; Herbal supplements to increase the body's response to insulin; Herbal supplements containing a combination of Flax Seed Oil and Vitamin E.

Since all of the goods do not encompass omega fatty acids, such omission misdescribes the character, quality, function, composition, or use of the dietary, nutritional, and/or herbal supplements.

**B. Prospective purchasers are likely to believe that the misdescription actually describes the goods, namely, dietary, nutritional, and/or herbal supplements encompassing omega fatty acids. Also, the misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase the goods.**

The second and third prongs of the test will be addressed together because of the logical nexus they have, and both are necessary to find that the proposed mark is deceptive. In the herein case, examining attorney

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