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

Proceeding	85518756
Applicant	OMEGA VALLEY FARMERS, LLC
Applied for Mark	THE 3 OMEGAS
Correspondence Address	JOSEPH S. HEINO DAVIS & KUELTHAU, S.C. 111 E KILBOURN AVE STE 1400 MILWAUKEE, WI 53202-6613 UNITED STATES jheino@dkattorneys.com
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Filer's Name	Patrick M. Bergin
Filer's e-mail	pbergin@dkattorneys.com
Signature	/Patrick M. Bergin/
Date	06/21/2013

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

_____ )	
In re Application of )	
Agricultural Omega Solutions, LLC and )	Law Office 109
Omega Valley Farmers, LLC )	
)	Trademark Attorney:
Serial No. 85/518,756 )	
)	David Collier, Esq.
Filed: January 18, 2012 )	
)	
Trademark: THE 3 OMEGAS )	
_____ )	

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

**APPLICANTS' MAIN BRIEF  
UNDER TMBP § 1203.01**

**Introduction**

Agricultural Omega Solutions, LLC and Omega Valley Farmers, LLC (“Applicants”) hereby appeal from the Examining Attorney’s final refusal to register the above-identified mark dated October 24, 2012, and respectfully requests the Trademark Trial and Appeal Board (“TTAB”) to reverse the Examining Attorney’s decision.

**Applicants’ Trademark**

Applicants seek registration on the Principal Register of their mark:

THE 3 OMEGAS

for “meat, namely, beef and pork; fish; poultry and game; eggs; and dairy products, namely, milk, buttermilk, non-alcoholic egg nog, half and half, whipping cream, yogurt, butter, sour cream, dry buttermilk powder, dry milk powder, cheese, cream cheese, and cottage cheese; all of the foregoing containing omega acids” in Int’l Class 29; for “ice cream, ice milk and frozen

yogurt; flour; all of the foregoing containing omega acids” in Int’l Class 30; and for “animal feed containing omega acids” in Int’l Class 31 (“Applicants’ Mark”).

### **The Rejection**

The Examining Attorney refused registration of Applicant’s Mark contending that the mark as applied to the goods is “merely descriptive.” Office Action dated October 24, 2012.

In that final Office Action, the Examining Attorney expounded his position contending the “there are three types of omega-3 fatty acids, specifically, ALA, EPA and DHA.” Indeed, the final Office Action is replete with references to the “omega-3” fatty acids and appears to be hopelessly entrenched with the notion that only “omega-3” fatty acids are relevant and that there are “three types of omega-3” fatty acids. However, the final Office Action states, in part, the following:

Furthermore, according to the applicant’s (sic) website, “Agricultural Omega Solutions LLC (AgO3) supports financially strong, farm supply co-ops located in the Med-West with its core services providing specialty custom feed supply. Technologies increase the Omega 3 fatty acid content of the targeted animals daily ration which increase the Omega 3 content of the animal products for human consumption. *The technology and application of the process naturally balance the Omega 6 to Omega 3* (emphasis added).

Applicants respectfully submit that this is a tacit confirmation that the mark THE 3 OMEGAS is not, and cannot be, referring in a limiting way to just omega-3 fatty acids, or to the “three types of omega-3 fatty acids,” because it also references omega-6 fatty acids.

Applicants further submit that the world of fatty acids is not limited to omega-3 and omega-6 fatty acids. Indeed, there are also omega-7 and omega-9 fatty acids, as evidenced by the attached Exhibits D, E and F.<sup>1</sup> Each exhibit will be discussed in Applicants’ argument presented below.

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<sup>1</sup> Exhibits A1-A37, B1-B13 and C1-C23 are already of record in this matter, those exhibits having been filed with Applicants’ response to the first Office Action.

## Argument

### **I. Applicant's Mark Is A Composite Mark That Must Be Considered In Its Entirety**

Applicants respectfully submit that the THE 3 OMEGAS mark is a "composite" mark. Accordingly, the Examining Attorney cannot depart from the rule that marks should be considered in their entireties and not improperly dissected. *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 167 U.S.P.Q. 272 (C.C.P.A. 1970). As the U.S. Supreme Court has stated: "The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail." *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252U.S. 538, 545-46 (1920). Thus, it is the impression which the mark as a whole creates on the average reasonably prudent buyer and not the parts thereof which is important.

In the first Office Action, dated May 1, 2013, identifiers were proposed by the Examining Attorney to add the phrase "...all of the aforementioned goods are made in significant part of omega acids (emphasis added)." In Applicants' view, this identifier phrase went too far and was misleading. Accordingly, Applicants responded, instead, by adding the phrase "...all of the foregoing containing omega acids."<sup>2</sup>

Applicants then went one step further by disclaiming the word "OMEGA" apart from the mark as shown. Now, it is apparently the Examining Attorney's position that, because Applicants have disclaimed the descriptive word "OMEGA," the word "OMEGA" is the dominant portion of the mark sought to be registered and that it is the only word of the mark that is capable of distinguishing Applicants' goods in commerce. Applicants respectfully traverse that position and the attempt to minimize the impact of the number "3" in the mark and the word "THE." This position also overlooks the fact that the mark "THE 3 OMEGAS" is a unitary term (which is a composite mark) and it is the unit which creates the commercial impression upon

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<sup>2</sup> The proposed amended identifiers were subsequently accepted in the final Office Action.

potential customers. Such customers neither know nor care whether or not a part of a mark is disclaimed. Disclaimers have no effect upon purchasers. Purchasers do not know about "disclaimers," "dominant portions" or "distinguishing features." They are impressed by the mark as they see it or hear it, and they do not ordinarily stop to analyze it. *Ex Parte Maya De Mexico*, 103 U.S.P.Q. (BNA) 158, 1954 WL 5556 (Comm'r Pat. & Trademarks 1954); *Supply Mfg. Co. v. King Trimmings, Inc.*, 220 F. Supp. 947, 139 U.S.P.Q. (BNA) 163 (S.D. N.Y. 1963).

## **2. The Applicants' Mark, in its Entirety, does not Merely Describe Applicants' Goods**

To be "merely" descriptive, the term must be "only" descriptive, i.e., the term serves no purpose other than to describe the goods or services. *In re Quick-Print Copy Shop, Inc.*, 205 U.S.P.Q. 505 (C.C.P.A. 1980). If a mark suggests, however, a number of possible uses or characteristics of the goods or services, including one that is descriptive, the mark is not merely descriptive. *In re National Tea Co.*, 144 U.S.P.Q. 286, 287 (T.T.A.B. 1965) (NO BONES ABOUT IT not merely descriptive of ham).

There is but a thin line between the two types of marks (descriptive versus suggestive); where there is doubt whether a mark is descriptive or suggestive, that doubt should be resolved in favor of the applicant. *In re Bel Paese Sales Co.*, 1 U.S.P.Q.2d 1233, 1986 WL 83304 (T.T.A.B. 1986).

Applicants' Mark is, at most, suggestive of Applicants' goods. While it may be stated that the word "OMEGA" conveys characteristics of the goods, the number "3" placed in front of the word "OMEGA" and the word "THE" placed in front of the number "3," is distinctive as applied to the goods, thus rendering the mark not descriptive, but suggestive.

The final Office Action attempts to unduly narrow the mark to use with goods containing only omega-3 fatty acids. As stated earlier, both the first and the final Office Actions seem hopelessly entrenched in the notion that the goods with which the Applicants' Mark is used relate only to

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