

ESTTA Tracking number: **ESTTA544384**

Filing date: **06/21/2013**

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
Submission	Applicants Request for Remand and Amendment
Attachments	11530808.PDF(129743 bytes) 11530693.PDF(1631039 bytes)
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' REQUEST TO REMAND FOR ADDITIONAL EVIDENCE
UNDER 37 CFR § 2.142(D) AND TBMP § 1207.02**

Introduction

Agricultural Omega Solutions, LLC and Omega Valley Farmers, LLC ("Applicants") have appealed from the Examining Attorney's final refusal to register the above-identified mark dated October 24, 2012, respectfully requesting that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision.

Applicants' Trademark

Applicants seeks 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 also 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, construed as being limited to just omega-3 fatty acids, or to the “three types of omega-3 fatty acids,” because it also references omega-6 fatty acids.

In view of this reference in the final Office Action, and the major emphasis placed on omega-3 fatty acids by the Examining Attorney in issuing a final refusal to register, Applicants believe that there is good cause to supplement the record on this appeal.

Applicant's Request and "Good Cause"

During the preparation of Applicants' Main Brief under TBMP § 1203.01, Applicants have developed additional evidence that they believe should be considered by the Examining Attorney, which supplements the Examining Attorney's reference to other omega-type fatty acids in the final Office Action. That evidence has not been previously presented to or considered by the Examining Attorney, nor is it cumulative.

In an effort to establish a first ground for good cause, counsel for Applicants contacted the Examining Attorney by telephone on June 20, 2013 to determine if the Examining Attorney would be agreeable to a remand to consider the three (3) additional exhibits. The Examining Attorney refused.

However, the Applicants are of the opinion that a second, and more compelling, reason for a remand exists. Specifically, Applicants believe that the Examining Attorney "opened the door" to supplementation of the record by making direct reference to omega-6 fatty acids via reference to an excerpt from the Applicants' own website. Thus, although the Examining Attorney has focused exclusively on omega-3 fatty acids in the Office Action (thus effectively and unduly restricting Applicants' use of the number "3" in the mark), the Examining Attorney himself referenced omega-6 fatty acids.

Applicants wish to make of record the fact that a complete analysis of the world of fatty acids includes omega-3, omega-6, omega-7 and omega-9 fatty acids, which impacts the position taken in the final Office Action. The three (3) additional exhibits proposed by the Applicants identify the other types of fatty acids and supplement the record, but not cumulatively. To ignore the existence of omega-7 and omega-9 fatty acids in the analysis of the THE 3 OMEGAS mark places undue emphasis on omega-3 fatty acids to the prejudice of the Applicants. In short, since

the Examining Attorney opened the door to mention omega-6 fatty acids, Applicants feel it only fair to mention the other fatty acid types that are recognized in the world of fatty acids. Focusing on only omega-3 fatty acids in the rejection analysis places undue emphasis on the number “3” in the composite mark, which mark should be considered as a unit and not improperly dissected.

Lastly, the Applicants respectfully submit that a denial of this request will unduly prejudice the Applicants. 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).

Conclusion

Applicants respectfully request that, because the present appeal is at its early stages and because the Examining Attorney opened the door by referencing another, but not all, omega fatty acids used in food products with which the current mark is to be used, review of the additional evidence by the Examining Attorney may be determinative of this matter and a remand to the Examining Attorney is respectfully requested.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.