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

Proceeding	88877980
Applicant	Live Good Inc
Applied for Mark	GENRESTORE
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Submission	Appeal Brief
Attachments	GENRESTORE_Appeal Brief.pdf(125489 bytes ) Exhibit A.pdf(1461548 bytes ) Exhibit B_Redacted.pdf(2744311 bytes )
Appealed class	Class 005. First Use: 2018/10/22 First Use In Commerce: 2018/10/22 All goods and services in the class are appealed, namely: Dietary supplements
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD (TTAB)

Applicant : Live Good Inc  
Serial No. : 88877980                      Examiner: MAHMOUDI, MARIAM AZIZ  
Filed : April 19, 2020                      Law Office: 115  
Mark : GENRESTORE

Trademark Trial and Appeal Board  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

APPLICANT'S APPEAL BRIEF

In response to the Final Office Action dated February 13, 2021, and further in view of the Notice of Appeal filed March 11, 2021. Applicant respectfully submits the following remarks.

**I. Summary of the Rejections**

In the Final Office Action, the Applicant's application is rejected under Trademark Act Section 2(d), 15 U.S.C. §1052(d) for being confusingly similar to U.S. Trademark Registration No. 5565178 for RESTOREGEN (hereinafter the "Registered Mark").

Applicant respectfully disagrees with the Examiner's rejection based on a likelihood of confusion based on the prior registered mark.

**II. The Marks At Issue**

The Applied for Mark, GENRESTORE, designates dietary supplements.

The Registered Mark, RESTOREGEN, designates dietary supplements; natural dietary supplements for the treatment of substance and non-substance behavior cravings; natural dietary supplements for the treatment of pro-dopamine regulator.

### **III. There is No Likelihood of Confusion Between the Marks**

Applicant respectfully contends that the Applied for Mark does not have any resemblance in sound, appearance, meaning, or commercial impression to the Registered Mark.

Nor is registration of Applicant's mark likely to cause confusion, or to cause mistake, or to deceive. An examination of the relevant factors under TMEP §1207 and *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (C.C.P.A. 1973), warrants the conclusion that Applicant's Mark cannot be said to so resemble the Cited Mark that it is likely to cause confusion, or to cause mistake,

#### **A. The Marks have Different Meanings and Commercial Impressions**

The Examiner argues that the marks are similar in appearance, sound, connotation, and commercial impression. The undersigned respectfully disagrees. While both marks contain the elements “GEN” and “RESTORE,” the elements appear in a separate order. That is, GENRESTORE contains the “GEN” element first, with the “RESTORE” element second; while RESTOREGEN contains the “RESTORE” element first with the “GEN” element second. For this reason, the undersigned submits that the marks have a distinct appearance, sound, connotation, and commercial impression.

The Cited Mark refers to restoring (restore) a genetic (gen) response to prevent addictive behavior by treating pro-dopamine regulators.

The Applicant’s mark refers to generation (gen) and restore.

Applicant submits that the Registered Mark “creates a vastly different commercial impression than that of Applicant’s mark.” “[T]he reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions.” *In re Nationwide Indus.*

Inc., 6 USPQ2d 1882, 1884 (TTAB 1988), (emphasis added). See also *Bank of Am. Nat'l Trust and Sav. Assn. v. Am. Nat'l Bank of St. Joseph*, 201 USPQ 842, 845 (TTAB 1978), and cases cited therein. Cases on point include *In re Mavest, Inc.*, 130 USPQ 40 (TTAB 1961) (finding no likelihood of confusion between the marks TOWN SQUIRES and SQUIRETOWN because transposition of words creates distinctly different commercial impressions); and *In re Akzona Inc.*, 219 USPQ 94 (TTAB 1983) (finding no likelihood of confusion between SILKY TOUCH for synthetic yarns and TOUCH O' SILK for men's dress shirts, sport shirts, and pajamas because of different commercial impressions).

As such since the commercial impressions of Applicant's mark and the Registered Mark are different, the marks are not similar when compared in their entireties.

B. The Registered Mark is Weak

"In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark." *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011 (citing *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) and *McCarthy on Trademarks and Unfair Competition* § 11:83 (4th ed. 2011) ("The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.")). "[T]he strength of a mark is not a binary factor" and "varies along a spectrum from very strong to very 3 See January 8, 2016 Office Action pp. 5-13. Serial Nos. 86759729 - 7 - weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). "The weaker [the Registrant's] mark, the closer an applicant's mark

can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” Id. at 1676 (internal citations omitted). See also Palm Bay, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

Applicant submits that “the Register abounds with marks beginning with the word RESTORE (221) for Class 005 goods. As such, the Registered Mark RESTOREGEN is weak for Registrant’s identified goods. A search of the Trademark Office database shows 98 marks commencing with the word “RESTORE” in International Class 003 and 95 third-party marks containing the word “GEN” in International Class 003. Evidence of extensive registration and use by others of a term on the same or very similar services can be “powerful” evidence of weakness. See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); Juice Generation, 115 USPQ2d at 1674. Active third-party registrations may also be relevant to show that a mark or 4 See April 2, 2016 Office Action Response pp. 14-19. 5 See June 8, 2016 Request for Reconsideration pp. 2-16. Serial Nos. 86759729 - 8 - a portion of a mark is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the services. See Juice Generation, 115 USPQ2d at 1674-75. See also Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976); In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987); United Foods Inc. v. J.R. Simplot Co., 4 USPQ2d 1172, 1174 (TTAB 1987).

Furthermore, based on the dictionary definition of “restore” (to bring back into existence, use, or the like; reestablish: to restore order: to bring back to a former, original, or normal condition, as a building, statue, or painting See <https://www.dictionary.com/browse/restore>)

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