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Filing date: **01/25/2015**

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

Proceeding	91215024
Party	Defendant OLYMPIC SEAFOOD AS
Correspondence Address	WENDY E MILLER COOPER & DUNHAM LLP 30 ROCKEFELLER PLAZA NEW YORK, NY 10112 UNITED STATES wmiller@cooperdunham.com, tm@cooperdunham.com, rsquicciarini@cooperdunham.com, rmondon@cooperdunham.com
Submission	Motion for Summary Judgment
Filer's Name	Wendy E. Miller
Filer's e-mail	wmiller@cooperdunham.com, lsung@cooperdunham.com
Signature	/Wendy E. Miller/
Date	01/25/2015
Attachments	Motion for SJ and Memo.pdf(113855 bytes) Declaration of Wendy E. Miller.pdf(4286048 bytes)

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

U.S. App. No. : 79/125,884
Filed : September 17, 2012
Trademark : THE DIFFERENCE IS CLEAR (and design)

	X	
NEW CHAPTER, INC.,	:	
	:	
Opposer,	:	Opposition No. 91215024
	:	
v.	:	
	:	
OLYMPIC SEAFOOD AS,	:	
	:	
Applicant.	:	
	X	

MOTION BY APPLICANT FOR SUMMARY JUDGMENT

Applicant, Olympic Seafood AS, hereby moves for summary judgment pursuant to Rule 56, F.R.Civ.P., and 37 C.F.R. § 2.116(a), dismissing this opposition on the ground that there is no genuine issue of material fact on the following issues:

1. Opposer has not made continuous, substantially nonexclusive use of its asserted mark since before Applicant's effective filing date; and
2. Opposer's asserted mark is merely descriptive.

In support of this motion, Applicant relies on the accompanying Memorandum and Declaration of Wendy E. Miller.

Dated: January 25, 2015

Respectfully submitted,

By: /Wendy E. Miller/
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	:	
Applicant.	:	
	X	

MEMORANDUM IN SUPPORT OF APPLICANT'S
MOTION FOR SUMMARY JUDGMENT

Applicant, Olympic Seafood AS, hereby moves for summary judgment pursuant to Rule 56, F.R.Civ.P., and 37 C.F.R. § 2.116(a), dismissing this opposition on the ground that there is no genuine issue of material fact for trial.

Opposer does not have priority because it has not used the asserted mark THE DIFFERENCE IS CLEAR in commerce at any time, let alone since before Applicant's effective filing date. Opposer has failed to produce any evidence showing that any of its goods, dietary and nutritional supplements and vitamins, bearing its asserted mark have been sold, shipped, or distributed to anyone, at any time, in the United States.

Opposer also may not rely on its asserted mark to establish priority because Opposer's asserted mark is merely descriptive of its goods. Undisputed evidence shows that Opposer and

numerous third parties use the term “the difference is clear” to describe ingredient, qualities, characteristics and features of dietary and nutritional supplements and vitamins, specifically to indicate to consumers that the fish oil used in their supplements is clear or transparent relative to others. To the extent Opposer could identify an evidentiary dispute concerning descriptiveness (although it cannot), this third party evidence establishes that Opposer’s use of the designation is not been substantially exclusive and cannot form the basis for this opposition.

Because Opposer has failed to produce any evidence which could raise a genuine issue of material fact on these issues, there is no evidence on which the Board could sustain the opposition, and the opposition should be dismissed.

I. MATERIAL FACTS THAT ARE NOT IN DISPUTE

Applicant is the owner of U.S. Application No. 79/125,884, filed on September 17, 2012, based on Section 66(a) and claiming priority on International Registration No. 1149364, filed April 12, 2012, for a composite mark including a distinctive design feature and the words THE DIFFERENCE IS CLEAR, for the following goods (“the Olympic Seafood Application”):

Class 5: Pharmaceutical preparations, namely, processed and unprocessed krill, dried krill, krill meal, krill powder, krill extracts and krill oil sold as a component ingredient of pharmaceuticals in the nature of antioxidants, dietary supplements and nutraceuticals in the nature of dietary supplements; pharmaceutical preparations, namely, processed and unprocessed krill, dried krill, krill meal, krill powder and krill oil sold as a component ingredient of pharmaceuticals in the nature of antioxidants for pharmaceutical and nutraceutical purposes

Class 29: Meat, fish, namely, processed krill and dried krill, poultry and game; edible oils and fats, namely, krill meal, krill powder and krill oil

Opposer is the owner of U.S. Application No. 85/784,097, for the designation THE DIFFERENCE IS CLEAR, filed November 20, 2012, based on Section 1(a) and alleging first use on August 31, 2009, for “dietary and nutritional supplements; vitamins” in Class 5 (the New

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