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

Proceeding	91252073
Party	Plaintiff Ultimate Nutrition, Inc.
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Submission	Motion for Summary Judgment **Yes**, the Filer previously made its initial disclosures pursuant to Trademark Rule 2.120(a); OR the motion for summary judgment is based on claim or issue pre-clusion, or lack of jurisdiction. The deadline for pretrial disclosures for the first testimony period as originally set or reset: **08/27/2020**
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Date	01/14/2020
Attachments	Opposer s Motion for Summary Judgment.pdf(225824 bytes) Declaration of William Wright.pdf(142533 bytes) Exhibit A to Wright Decl.pdf(289927 bytes) Exhibit B to Wright Decl.pdf(276655 bytes) Exhibit C to Wright Decl.pdf(167261 bytes) Exhibit D to Wright Decl.pdf(3571977 bytes) Exhibit E to Wright Decl.pdf(2991568 bytes) Exhibit F to Wright Decl.pdf(2477866 bytes)

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

ULTIMATE NUTRITION, INC.,	:	
Opposer,	:	**Opposition No. 91252073**
v.	:	
WACKER CHEMIE AG,	:	
Applicant.	:	

MOTION FOR SUMMARY JUDGMENT

Pursuant to 37 C.F.R. § 2.127 and Fed R. Civ. P. 56, Opposer Ultimate Nutrition, Inc., ("Opposer") by its undersigned attorneys, hereby moves for summary judgment to sustain the Opposition against Applicant Wacker Chemie AG's ("Applicant") U.S. Trademark Application Ser. No. 79251481 ("Application") for the mark FERMOPURE ("Applicant's Mark") in Classes 1, 3, and 5.

As shown below, there are no material facts in dispute and the Application should be refused as a matter of law.

PRELIMINARY STATEMENT

Opposer Ultimate Nutrition was founded in 1979 by Victor H. Rubino ("Rubino"). At the time, Rubino was one of the top amateur power lifters in the United States. Rubino knew that supplements were the key to improving his performance through increased strength and faster recovery. Since he was not satisfied with the current supplements that were available to him, Rubino launched his own company called Ultimate Nutrition.

Rubino's goal was to create high-quality, thoroughly-researched products at an affordable price for everyone. In the late 1970's and early 1980's, Ultimate Nutrition was among the first companies to sell amino acid tablets, protein powders, carbohydrate powders, and various types of fat burners. By the late 1980's and early 1990's Ultimate Nutrition launched several legendary dietary supplement products such as Sports Energizer, an electrolyte-fueled, ready-to-drink beverage. By the mid 1990's Ultimate Nutrition again was on the cutting edge as one of the first companies to sell Whey Protein supplement powder in a bottle.

Today, Ultimate Nutrition continues to excel with a wide range of dietary supplements and other products.

STATEMENT OF UNDISPUTED FACTS

Opposer is the owner of the mark FERMAPURE ("Opposer's Mark") for dietary supplements. Opposer owns incontestable U.S. Trademark Reg. No. 2818237 for Opposer's Mark. That registration is dated February 24, 2004 and is in full force and effect. Declaration of William C. Wright in Support of Opposer's Motion for Summary Judgment ("Wright Decl.") at Exhibit A.

On October 1, 2018, Applicant filed the Application for FERMAPURE covering goods in Classes 1, 3, and 5. Wright Decl. at Exhibit B.

Opposer's Mark FERMAPURE and Applicant's Mark FERMOPURE differ by only a single letter.

ARGUMENT

I. Standard for Summary Judgment

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also T.B.M.P. § 528.01. Where a motion for summary judgment is made in accordance with Rule 56, it is incumbent on the non-moving party to proffer evidence sufficient to demonstrate the existence of a genuine dispute as to a material fact. A dispute is genuine only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant. *See Sweats Fashions, Inc. v. Pannill Knitting Co*., 833 F.2d 1560, 1562, 4 USPQ2d 1793, 1795 (Fed. Cir. 1987).

II. Opposer's Mark Has Priority Over Applicant's Mark

Opposer has priority over Applicant. Opposer has been using Opposer's Mark for years before any date of priority on which Applicant may rely. Opposer's registration, Reg. No. 2818237, has become incontestable under 15 U.S.C. § 1065, and therefore the registration is conclusive evidence of the validity of the registered mark and of the registration of Opposer's Mark, of the Opposer's ownership of the mark, and of Opposer's exclusive right to use the registered mark in commerce in connection with the goods specified in the registration.

Opposer's use of Opposer's Mark has been continuous throughout the period of its registration, and Opposer continues use of Opposer's Mark through the date of this motion.

III. Applicant's Mark is Likely to Cause Confusion

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a

registered mark that it is likely consumers would be confused, mistaken, or deceived as to the source of the goods and/or services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973), commonly known as the *du Pont* factors. Two factors are considered the most important of the *du Pont* factors: (1) the similarity of the marks, and (2) the relatedness of the goods. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

A determination of likelihood of confusion is a question of law based on finding of relevant underlying facts. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d (BNA) 1201 (Fed. Cir. 2003). *See also Specialty Brands, Inc. v. Coffee Bean Distribs. Inc.*, 748 F.2d 669, 671, 223 USPQ (BNA) 1281, 1282 (Fed. Cir. 1984) ("[T]he issue of likelihood of confusion is the ultimate conclusion of law to be decided by the court.") (citations & quotations omitted); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987) (holding that in the Federal Circuit, the issue of likely confusion is one of law, not fact, on summary judgment). Here, the relevant facts are undisputed because they are based upon Applicant's sworn statements in the United States Patent and Trademark Office, including the Application and the sworn identification of goods therein. Consideration of the relevant *du Pont* factors compels the conclusion that Applicant's FERMOPURE mark is likely to cause confusion with Opposer's FERMAPURE mark.

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