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Filing date: **04/18/2022**

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

Proceeding no.	91274969
Party	Defendant Vitadreams Inc.
Correspondence address	VITADREAMS INC. 130 LEE AVENUE, UNIT 315 BROOKLYN, NY 11211 UNITED STATES Primary email: eswtrading@gmail.com Secondary email(s): jmf@sochrim.com No phone number provided
Submission	Answer and Counterclaim
Filer's name	Howard Eichenblatt
Filer's email	h@eichenblattlaw.com
Signature	/Howard Eichenblatt/
Date	04/18/2022
Attachments	Answer to Notice of Opposition and Counterclaims.pdf(142774 bytes)

Registration subject to the submission

Registration no.	6247110	Registration date	01/12/2021
Register	Principal		
Registrant	Welly Health PBC 8733 LIVINGSTON LANE EDEN PRAIRIE, MN 55347 UNITED STATES Email: hello@getwelly.com		

Goods/services subject to the submission

<p>Class 005. First Use: Apr 5, 2020 First Use In Commerce: Apr 5, 2020 All goods and services in the class are requested, namely: Pain relief medication; Analgesic Preparation, anti-pyretic and anti-inflammatory preparations; Allergy and sinus medication; Analgesic sleeping aid; Sleep-aidpreparations; All preparations containing acetaminophen; Pharmaceutical preparations, namely, allergy preparations, antihistamines; Pharmaceutical preparations, namely, anti-histaminic and decongestant agents; Antiflatulent; Preparations for prevention and treatment of motion sickness, nausea and vomiting; Pharmaceutical anti-diarrheal preparations; Pharmaceutical preparations for the treatment ofgastro-intestinal disorders; Pharmaceutical preparations to support gastro-intestinal health</p>
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Grounds for cancellation

The mark is merely descriptive	Trademark Act Sections 14(1) and 2(e)(1)
The mark is not inherently distinctive and has not acquired distinctiveness	Trademark Act Sections 14(1) and 1,2 and 45; and Section 2(f)

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

In the Matter of Application Serial No. 90/568,202
Filed: March 9, 2021
Mark: WELLYEAH

Welly Health PBC
Opposer
v.
Vitadreams Inc.
Applicant.

Opposition No. 91274969
Mark: WELLYEAH
Filing Date: March 9, 2021
Published: November 9, 2021

ANSWER TO NOTICE OF OPPOSITION AND COUNTERCLAIMS

ANSWER

Applicant Vitadreams Inc., (“Applicant”) by and through its undersigned attorneys, hereby responds based on its own knowledge and actions, to the Notice of Opposition (“Opposition”), filed by the Opposer Welly Health PBC (“Opposer”), as follows, addressing the numbered grounds for opposition *seriatim*.

1. Applicant admits the allegations in Paragraph 1.
2. Applicant lacks knowledge and information sufficient to know whether or not the allegations in Paragraph 2 are true, and upon that basis, denies the allegations contained therein.
3. Applicant states that the applications and registrations referenced in Paragraph 3 speak for themselves, and denies the allegations of Paragraph 3 to the extent they are inconsistent with them.
4. Applicant lacks knowledge and information sufficient to know whether or not the allegations in Paragraph 4 are true, and upon that basis, denies the allegations contained therein.

5. Applicant lacks knowledge and information sufficient to know whether or not the allegations in Paragraph 5 are true, and upon that basis, denies the allegations contained therein.
6. Applicant denies that its applied for mark WELLYEAH and Opposer's WELLY mark are similar in sight, sound, and overall commercial impression, although admits that the Opposer's mark is contained within Applicant's mark in its entirety.
7. Applicant admits that the goods listed in its Application include "vitamin supplements; vitamin and mineral supplements" in class 5, but denies that these goods are highly related to the goods offered by Opposer under Opposer's WELLY registrations because the goods described therein do not pertain to vitamins. Applicant similarly denies that these goods are highly related to the goods offered by Opposer under Opposer's 88732470 application because the goods described therein do not pertain to vitamins. Applicant admits that these goods are related to the goods offered by Opposer under Opposer's 90359693 application only to the extent that they include "vitamin and mineral supplements".
8. Applicant lacks knowledge and information sufficient to know whether or not the allegations in Paragraph 8 are true, and upon that basis, denies the allegations contained therein.
9. Applicant lacks knowledge and information sufficient to know whether or not the allegations in Paragraph 9 are true, and upon that basis, denies the allegations contained therein.
10. Applicant denies the allegations in Paragraph 10.
11. Applicant denies the allegations in Paragraph 11.
12. Applicant admits the allegations in Paragraph 12.
13. Applicant admits the allegations of Paragraph 13 to the extent that WELLY marks were filed prior to Applicant's mark, but denies the allegations of Paragraph 13 alleging that the Opposer is entitled to any priority over the Applicant to Applicant's WELLYEAH mark.
14. Applicant denies the allegations of Paragraph 14.

AFFIRMATIVE DEFENSES

Lack of Damages

Opposer has not been damaged, and cannot be damaged by the eventual registration of the WELLYEAH mark. Opposer has no reasonable belief in damages resulting from the pendency and eventual registration of the WELLYEAH mark. Accordingly, Opposer has no standing to oppose.

No Likelihood of Confusion

Opposer lacks rights in any mark which is likely to be confused with Applicant's mark. First, Opposer has no registered mark for which the goods of vitamin and mineral supplements are claimed as they are claimed in Applicant's mark.

Opposer states that Opposer's mark is contained within Applicant's mark in its entirety, but this alone in no manner evinces a likelihood of confusion, particularly since the letters that form "WELLY" is divided between two separate words in the Applicant's mark – namely, "WELL" and "YEAH", which in the least eviscerates the inclusion of the mark in half. The Applicant's mark and the Opposer's marks should each be compared as a whole rather than apply an unnatural emphasis on one word and merely the first letter of a second word. That the commercial impressions made by the marks are different is immediately apparent since the marks have different meanings, connotations, and sounds. Indeed, the Examining Attorney at the United States Patent and Trademark Office responsible for handling the Applicant's application cited no prior pending trademark registrations or applications which would bar registration of the application – a fact which merits weight in this proceeding.

Setting aside the immediate interpretation that "Welly" is a modification of "well", which is clearly merely descriptive as applied to the various *wellness* products identified in their class descriptions and therefore not entitled to trademark rights, a second interpretation is that "Welly" is the common, well-known nickname for "Wellington". In converse, "Well Yeah" is a typical playful rejoinder to what are perceived as overly obvious statements, although it could also be interpreted as an affirmation based on its rhyming with "Hell Yeah". Regardless of the interpretations, the meanings of the marks are grossly different.

Opposer's Marks are Invalid

“Welly” is a modification of “well”, which is merely descriptive as applied to the various wellness products identified in Opposer’s class descriptions and therefore are not entitled to trademark rights. Unlike Applicant’s mark, “Welly” distinctly lacks any trademarkable content beyond this meager modification of “well”, which is insufficient for trademark protection.

Further “well” is weak as a source indicator. Opposer is not the first or the only entity to use the word “well” on or in connection with wellness goods and therefore consumers are unlikely to recall the WELLY marks when they see the word “well” on wellness products. As a sampling of the vast but unsurprising ubiquity of the word:

1. PREGWELL, Reg. 6661514, for IC005. Vitamins; Vitamin supplements.
2. MULTIWELL, Reg. 6661513, for IC005. Vitamins; Vitamin supplements; Multi-vitamin preparations.
3. EYEWELL, Reg. 6661398, for IC005. Vitamin preparations; vitamin supplements; mixed vitamin preparations; multi-vitamin preparations.
4. JOINTWELL. Reg. 6661397, for IC005. Vitamins, Vitamin supplements.
5. TREEWELL. Reg. 6663380, for IC032. ...vitamins...
6. LOVE YOURSELF WELL. Reg. 6642736, for IC005. Vitamin supplements; dietary supplements; nutritional supplements.
7. VICWELL. Reg. 6529072, for IC005. ... Vitamins and vitamin preparations.
8. NAILWELL, Reg. 6604158, for IC005. Vitamins.
9. BONEWELL, Reg. 6604157, for IC005. Vitamins, Vitamin Supplements; Vitamin tablets.
10. PAINWELL, Reg. 6604153, for IC005. Vitamins; Vitamin supplements; Vitamins and vitamin preparations; Multi-vitamin preparations.
11. BITEWELL, Reg. 6579591, for IC005. On-line retail store services featuring subscription boxes containing foods and beverages, vitamins and supplements, and other consumable wellness products...
12. BRAINWELL, Reg. 6557029, for IC005. Vitamins; Vitamin supplements; Vitamins and vitamin preparations.
13. FEELING WELL, Reg. 6461592, for IC005. ... Vitamin and mineral supplements.
14. JOINWELL, Reg. 6448456, for IC005. Disinfectants; Adhesive bands for medical purposes.... Vitamin supplement patches; Vitamin preparations; Vitamin supplements.
15. WELLWEE, Reg. 6287308, for IC005. Dietary and nutritional supplements; vitamin supplements.

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