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

Proceeding	92054315
Party	Plaintiff Revive Franchising LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Registration No. 3,544,234)	
)	
<u>REVIVE FRANCHISING LLC,</u>)	
)	
Petitioner,)	
)	
v.)	
)	Cancellation No. 92054315
THE FRS COMPANY,)	
)	
Registrant.)	
)	
)	
)	
_____)	

AMENDED PETITION TO CANCEL

Petitioner REVIVE FRANCHISING, LLC (“Petitioner”), a limited liability corporation duly organized and existing under the laws of the State of Colorado with its principal place of business located at 945 West Kenyon Avenue, Suite 200, Englewood, Colorado 80110 hereby petitions to cancel Registration No. 3,544,234.

To the best of Petitioner’s knowledge, the name and address of the current owner of Registration No. 3,544,234 is The FRS COMPANY (“Registrant”), 101 Lincoln Centre Drive, Suite 500, Foster City, California 94404.

The above-identified petitioner believes that it will be damaged by the above-identified registration, and hereby petitions to cancel the same.

As grounds in support of its petition, Petitioner asserts as follows:

1. On March 8, 2007, Registrant’s predecessor, Creative Concoctions LLC, filed an application under Section 1(b) to register the mark Healthy Energy for “Non-alcoholic fruit juice

beverages” in International Class 032. That application was assigned Application No. 77/126,151 (“the ‘151 application”).

2. On June 20, 2007, the United States Patent and Trademark Office (“USPTO”) issued an office action for the ‘151 application. In that office action, the examiner refused registration of Healthy Energy as merely descriptive under Section 2(e)(1).

3. On December 20, 2007, counsel for Creative Concoctions responded to the outstanding office action, arguing: “The examining attorney has reviewed the mark and considered it descriptive. However, the attorney has failed to provide any evidence that HEALTHY ENERGY is descriptive for a drink. How can Energy be healthy. The mark is suggestive that the properties in the drink are good for you and keep you active. The mark is suggestive not descriptive.”

4. On April 2, 2008, the USPTO mailed a Notice of Publication under §12(a) to counsel for Creative Concoctions.

5. On July 15, 2008, the USPTO issued a Notice of Allowance for the ‘151 application.

6. On October 31, 2008, counsel for Registrant filed a statement of use, including a declaration signed by Registrant’s CEO, Maigread Eichten, alleging a first use in commerce date of January 00, 2007 and including a specimen allegedly showing “a(n) Printout from Applicant's website which show the mark in connection the goods, and includes information necessary to order the goods in accordance with TMEP § 904.06(a).”

7. A January 1, 2007 archive of Registrant’s website, <http://www.frs.com>, reveals a previous owner, Firstline Mobility. See Exhibit A, Archive of <http://www.frs.com> dated January 1, 2007.

8. A January 26, 2007 archive of <http://www.frs.com> continues to show a webpage for Firstline Mobility. See Exhibit B, Archive of <http://www.frs.com> dated January 26, 2007.
9. WHOIS domain registration information indicates that Registrant acquired <http://www.frs.com> on February 1, 2007. See Exhibit C, WHOIS domain registration for frs.com.
10. A February 16, 2007 archive of <http://www.frs.com> indicates that the webpage then belonged to Registrant. See Exhibit D, Archive of <http://www.frs.com> dated February 16, 2007.
11. An April 12, 2007 archive of <http://www.frs.com> prominently displays a set of containers labeled “FRS® all natural antioxidant health drink”. The top of the container includes product information such as “non-carbonated” and “healthy energy”. See Exhibit E, Archive of <http://www.frs.com> dated April 12, 2007.
12. A January 26, 2007 archive of the main page of Registrant’s second website, <http://www.frsenergy.com>, now defunct, reveals little. See Exhibit F, Archive of <http://www.frsenergy.com> dated January 26, 2007.
13. A February 5, 2007 archive of the FRS Online Store, available from the “Where to get FRS” link on <http://www.frsenergy.com>, includes detailed product information. See Exhibit G, Archive of FRS Online Store dated February 5, 2007.
14. Upon information and belief, the term “healthy energy” is not used on the February 5, 2007 webpage. See Exhibit G, Archive of FRS Online Store dated February 5, 2007.
15. On the February 5, 2007 webpage, the words “Stock Change in Progress Available Feb 5th” are written over the “Ready-to-Drink” products. See Exhibit G, Archive of FRS Online Store dated February 5, 2007.

16. A January 12, 2007 Archive of the FRS Ready to Drink Beverage, located under the product menu, includes a picture of the ready-to-drink bottle. See Exhibit H, FRS Ready to Drink Beverage dated January 12, 2007.

17. The FRS Ready to Drink Beverage bottle does not appear to include the term “healthy energy”. See Exhibit H, FRS Ready to Drink Beverage dated January 12, 2007.

18. A February 24, 2007 archive of the FRS Online Store available from <http://www.frsenergy.com> shows the updated packaging for the ready-to-drink product. See Exhibit I, Archive of FRS Online Store dated February 24, 2007.

19. Selecting the ready-to-drink product provides a closer view of the product packaging, which reads “FRS all natural antioxidant health drink” or “FRS low calorie antioxidant health drink”. See Exhibit J, Archive of FRS Ready-to-Drink Beverages dated February 20, 2007.

20. A June 6, 2007 archive of <http://www.frsenergy.com> prominently displays a set of containers labeled “FRS® all natural antioxidant health drink”. The top of the container includes product information such as “non-carbonated” and “healthy energy”. See Exhibit K, Archive of <http://www.frsenergy.com> dated June 6, 2007.

21. A June 30, 2007 archive of <http://www.frsenergy.com> shows the addition of “FRS” and “healthy energy” to the website header. See Exhibit L, Archive of <http://www.frsenergy.com> dated June 30, 2007.

22. An article from the Functional Drinks Newsletter dated February 20, 2007, available on <http://www.frs.com>, shows the “FRS all natural antioxidant health drink” and “FRS low calorie antioxidant health drink” packaging. See Exhibit M, Functional Drinks article.

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