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

Proceeding	92057854
Party	Defendant Nutramarks, Inc.
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Submission	Motion to Suspend for Civil Action
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Date	05/02/2014
Attachments	Renewed Motion to Suspend Proceedings.pdf(14052 bytes) Exh A.pdf(1378207 bytes) Exh B.pdf(209303 bytes)

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

Bayer HealthCare LLC,)	Registration No.: 4,184,983
)	
Petitioner,)	Mark: ALKAMAX
)	
v.)	Cancellation No.: 92057854
)	
NutraMarks, Inc.,)	
)	
Registrant.)	

**RENEWED MOTION TO SUSPEND PROCEEDINGS IN VIEW OF PENDING CIVIL
ACTION PURSUANT TO TRADEMARK RULE 2.117(A)**

Registrant NutraMarks, Inc. (“NutraMarks”) moves pursuant to Trademark Rules 2.117(a) and 2.127(a), and TBMP § 510.02(a) for suspension of the instant cancellation proceeding pending determination of a related federal civil action. This motion is identical to the motion previously filed, except that Registrant inadvertently omitted the Complaint in the underlying action, which is now attached.

NutraMarks and Petitioner Bayer HealthCare LLC (“Bayer”) are involved in litigation in the United States District Court for the District of Utah, entitled Nutraceutical Corporation et al. v. Bayer Healthcare LLC, Civil Action No. 2:13-cv-00955-TC (the “Federal Action”). Because NutraMarks is concerned with both maintaining its registration and its real-world use of the same mark, it filed a Declaratory Judgment Complaint in order to resolve with certainty its rights to use its registered mark ALKAMAX. See Complaint for Declaratory Judgment filed on October 17, 2013 (filed herewith as Exhibit A). Bayer filed its Answer to the Complaint and Counterclaim on April 9, 2014 (filed herewith as Exhibit B). The Federal Action involves the same parties, the same mark, and the same issues as those involved in the instant opposition

proceedings, that is, whether a likelihood of confusion exists between NutraMarks' ALKAMAX mark and Bayer's asserted ALKA-SELTZER marks. In addition, in the Federal Action NutraMarks seeks an Order "enjoin[ing Bayer] and restrain[ing it] permanently from interfering with [NutraMarks'] use or registration of the ALKAMAX mark...and from opposing or otherwise objecting or seeking to cancel any of [NutraMarks'] federal registrations or applications for ALKAMAX based upon an alleged likelihood of confusion with ALKA-SELTZER." See Complaint (Ex. A) at "Prayer for Relief."

Where the parties to a proceeding before the Board are involved in a civil action, the final determination of which will have a bearing on the proceeding before the Board, the TTAB proceedings should be suspended until final determination of the civil action. See 37 C.F.R. § 2.117(a); *The Other Telephone Company v. Connecticut National Telephone Company, Inc.*, 181 U.S.P.Q. 125, 127 (T.T.A.B., Feb. 11, 1974); *Miller v. B&H Foods, Inc.*, 209 U.S.P.Q. 357, 359 (T.T.A.B. Jan. 5, 1981) ("[U]nder normal circumstances, where, as here, the civil action between the parties may be dispositive or have a direct bearing on the issues in a proceeding before the Board, it is the practice to suspend the proceeding before the Board to await the outcome of the civil action and to determine its effect on the issues in the action in the Patent and Trademark Office."); see also *The Toro Company v. Hardigg Industries, Inc.*, 187 U.S.P.Q. 689, 692 (T.T.A.B. August 19, 1975) (granting motion to suspend based on a civil action seeking an injunction: "Thus there can be no doubt but that the final resolution of the civil action may be dispositive of the issues involved in this proceeding").

Here, the determination of the issues in the Federal Action will not only "have a bearing on," but will be dispositive of these proceedings, so suspension is proper. See *id.* ("[W]hile the decision of the Federal District Court would be binding upon the Patent and Trademark Office, a

decision by the Board would not be binding or res judicata as to the issues before the court”). Suspension will also avoid the unnecessary expenditure of both the Board’s and each of the parties’ resources in litigating the same issue in two forums and will avoid the potential for inconsistent results.

For the above reasons, NutraMarks respectfully requests that the Board grant this Motion and suspend the above-captioned opposition proceedings pending the final disposition of the Federal Action.

Dated: May 2, 2014.

/s/ Timothy S. Getzoff

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** Colorado Admission Pending; admitted
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**ATTORNEYS FOR PETITIONER
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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I served a copy of the above Renewed Motion to Suspend Proceedings in View of Pending Civil Action Pursuant to Trademark Rule 2.117(a) to the following in the manner indicated below:

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