

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

PEAK WELLNESS)	
NUTRITION, LLC)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 9:17-cv-81236
)	
)	
PEAK WELLNESS)	STRUCK TRIAL BY JURY
BIOPHARMA, INC.)	DEMAND
)	
Defendant.)	

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, Peak Wellness Nutrition, LLC (“PWN”) for its Complaint for Declaratory Judgment against Defendant Peak Wellness Biopharma, Inc. (“PWB”) states as follows:

NATURE OF ACTION

1. This Complaint seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §2201-02, to settle an actual controversy between PWN and PWB regarding trademarks used in connection with the sale of dietary and/or nutritional supplements. In particular, PWN requests that this Court enter a judgment declaring that PWN’s PEAK WELLNESS NUTRITION mark does not infringe PWB’s purported PEAK WELLNESS BIOPHARMA mark.

2. This is also an action seeking cancellation of a federal trademark registration pursuant to the Lanham Act, 15 U.S.C. §1119.

THE PARTIES

3. PWN is a limited liability company organized and existing under the laws of the State of Florida with its principal place of business at 1007 North Dixie Hwy., West Palm Beach, Florida 33401. PWN is a supplier of dietary supplements.

4. Upon information and belief, PWB is a corporation with its principal place of business at 195 Field Point Road, Greenwich, Connecticut 06830. Upon information and belief, PWB is a supplier of dietary and nutritional supplements.

JURISDICTION AND VENUE

5. The Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1338, and Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this District.

7. This Court has personal jurisdiction over PWB because it has, *inter alia*, transacted business within this District, including offering for sale and distributing dietary and nutritional supplements.

BACKGROUND

8. PWN is a seller and distributor of dietary supplements. In particular, since at least September 13, 2013, PWN has continuously offered for sale and sold dietary supplements from its website at www.peakwellnessnutrition.com under the mark PEAK WELLNESS NUTRITION.

9. From about September 13, 2013, to September 17, 2017, PWN operated its business under the name Peak Wellness Nutrition, LLC and offered for sale, promoted and sold dietary supplements under the mark PEAK WELLNESS NUTRITION without receiving any complaint that its use of the Peak Wellness name and PEAK WELLNESS NUTRITION mark violated any third party's trademarks rights or any other rights.

10. As a result of its substantial and unimpeded use of the PEAK WELLNESS NUTRITION mark, PWN has acquired goodwill in the PEAK WELLNESS NUTRITION mark and customers have come to associate the PEAK WELLNESS NUTRITION mark with PWN.

11. On September 18, 2017, over four years after PWN's adoption of the PEAK WELLNESS NUTRITION mark, counsel for PWN received a letter from counsel for PWB. A copy of the letter is attached hereto as **Exhibit A**. In the letter, PWB's counsel represented that PWB is in the business of selling and distributing dietary and nutritional supplements and has been so for over ten years,

that PWB is the owner of a federally registered trademark for PEAK WELLNESS BIOPHARMA and that PWN's use of the mark PEAK WELLNESS constitutes a violation of PWB's rights in PWB's name and the PEAK WELLNESS trademark. PWB's counsel also asked on behalf of PWB that PWN immediately cease and desist from all direct and indirect use of the Peak Wellness name and PEAK WELLNESS trademark.

COUNT I

DECLARATORY JUDGMENT

12. PWN realleges all previous paragraphs of this Complaint for Declaratory Judgment as if fully set forth herein.

13. PWN offers dietary supplements over the Internet under the mark PEAK WELLNESS NUTRITION and has done so continuously since at least September 13, 2013.

14. PWB alleges that it owns the mark PEAK WELLNESS BIOPHARMA for dietary and nutritional supplements and has used the mark for over ten years. PWB further alleges that PWN's use of the mark PEAK WELLNESS NUTRITION in connection with dietary supplements infringes PWB's rights in the mark PEAK WELLNESS BIOPHARMA for dietary and nutritional supplements and will cause consumer confusion in the marketplace.

15. PWB has demanded that PWB cease use of the PEAK WELLNESS NUTRITION mark in connection with dietary supplements.

16. Upon information and belief, PWB ceased all use of the PEAK WELLNESS BIOPHARMA mark in connection with dietary and nutritional supplements in 2011.

17. Upon information and belief, PWB's cessation of use and abandonment of the PEAK WELLNESS BIOPHARMA mark in 2011 arose from PWB's assignment to a third party of all rights in a dietary or nutritional product promoted by PWB under the mark MYO-T12 which, at the time of the assignment, was the sole dietary or nutritional supplement promoted by PWB under the PEAK WELLNESS BIOPHARMA mark.

18. Upon information and belief, following PWB's abandonment of the PEAK WELLNESS BIOPHARMA mark in 2011, PWB did not begin use of the PEAK WELLNESS BIOPHARMA mark in connection with dietary and nutritional supplements until 2016, approximately three years after PWN's first commercial use of the mark PEAK WELLNESS NUTRITION.

19. Upon information and belief, PWB's second adoption and period use of the PEAK WELLNESS BIOPHARMA mark began when PWB initiated distribution of a product under the mark DOC'S WHEY. As such, PWB

effectively abandoned the PEAK WELLNESS BIOPHARMA mark for approximately five years.

20. Because PWB ceased use of the PEAK WELLNESS BIOPHARMA mark in 2011 and did not resume use until 2016, its date of first use of the mark for determining PWB's priority in the mark is sometime in 2016.

21. Because PWN has made substantial and continuous use of the PEAK WELLNESS NUTRITION mark since at least September 13, 2013, its rights in the PEAK WELLNESS NUTRITION mark pre-date any valid rights PWB may have in the PEAK WELLNESS BIOPHARMA mark.

22. Because of PWB's demand, PWN is under an imminent apprehension of litigation for its continued use of the PEAK WELLNESS NUTRITION mark in connection with dietary supplements. PWN has no other existing, speedy, adequate or proper remedy other than a declaration and determination of the parties' rights as prayed for herein.

**COUNT II
CANCELLATION OF TRADEMARK
REGISTRATIONS UNDER 15 U.S.C. §1119**

23. PWN realleges all previous paragraphs of this Complaint as if fully set forth herein.

24. On October 12, 2010, the USPTO issued to PWB U.S. Trademark Registration No. 3,861,667 for PEAK WELLNESS BIOPHARMA for dietary and nutritional supplements (“the ‘667 registration”).

25. On October 12, 2016, PWB filed with the USPTO a Declaration of Incontestability of a Mark under Section 15 (“Section 15 Affidavit”) for the ‘667 registration, the Declaration including the following statement:

For International Class 005, the owner, has continuously used the mark in commerce for five (5) consecutive years after the date of registration, or the date of publication under 12(c), and is still using the mark in commerce on or in connection with all goods or services listed in the existing registration for this class: Dietary and nutritional supplements. Also[sic] there has been no final decision adverse to the owner’s claim of ownership of such mark for those goods or services, or to the owner’s right to register the same or to keep the same on the register; and, there is no proceeding involving said rights and not disposed of in either the U.S. Patent Trademark Office or the courts.

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

26. When PWB submitted the Section 15 Affidavit, its statement that PWB had continuously used the PEAK WELLNESS BIOPHARMA mark in commerce for five (5) consecutive years after the date of registration was false, and PWB knew its declaration was false.

27. Upon information and belief, PWB ceased all use of the PEAK WELLNESS BIOPHARMA mark in connection with dietary and nutritional supplements in 2011.

28. Upon information and belief, PWB did not resume use of the PEAK WELLNESS BIOPHARMA mark in connection with dietary and nutritional supplements until 2016.

29. Since PWB had not used the PEAK WELLNESS BIOPHARMA mark during a period beginning in 2011 and ending in 2016, its declaration that PWB had continuously used the PEAK WELLNESS BIOPHARMA mark in commerce for five (5) consecutive years after the date of registration in the Section 15 Affidavit was false.

30. As a result of PWB's willful misrepresentation and false declaration to the USPTO, PWB procured a Notice of Acknowledgment under Section 15 from the USPTO for the '667 registration.

31. If PWB is permitted to retain the '667 registration, PWN will be damaged.

32. By reason of the foregoing facts, U.S. Trademark Registration No. 3,861,667 for PEAK WELLNESS BIOPHARMA for dietary and nutritional supplements should be cancelled pursuant to the Lanham Act, 15 U.S.C. §1119.

PRAYER FOR RELIEF

WHEREFORE, PWN respectfully prays that:

1. The Court enter a judgment that PWN by its use of the PEAK WELLNESS NUTRITION mark, has not infringed and does not infringe or violate any purported right of PWB in its alleged PEAK WELLNESS BIOPHARMA mark.

2. The Court enter a judgment that PWN's use of the PEAK WELLNESS NUTRITION mark is lawful.

3. The Court enter a judgment that PWN's rights in and priority to the PEAK WELLNESS NUTRITION mark for dietary supplements pre-date and are superior to any purported rights PWB has in the mark PEAK WELLNESS BIOPHARMA for dietary or nutritional supplement.

4. The court declare that PWB procured the Notice of Acknowledgment under Section 15 from the USPTO for U.S. Registration No. 3,861,667 through fraud and order the USPTO to cancel U.S. Registration No. 3,861,667 pursuant to 15 U.S.C. §1119.

5. The Court enter a judgment that this is an exceptional case and award PWN its full costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

6. The Court award such other relief that the Court deems just and proper.

PWN DEMANDS TRIAL BY STRUCK JURY

PWN hereby demands a trial by jury of all issues in this case.

DATED this 9th day of November, 2017.

Respectfully submitted,

s/ Irene S. Motles

Irene S. Motles (Fla. Bar Number: 124444)

imotles@maynardcooper.com

Maynard, Cooper & Gale, P.C.

2400 Regions/Harbert Plaza

1901 6th Avenue, North

Birmingham, AL 35203-2618

Phone: 205.254.1000

Fax: 205.254.1999

Attorney for Plaintiff

Peak Wellness Nutrition, LLC



Daniel Z. Shapiro (1949-2001)
Deborah D. Shapiro
Jonathan M. Shapiro
Sarah H. Shapiro

VIA PDF EMAIL

September 18, 2017

C. Brandon Browning
Maynard, Cooper & Gale, PC
1901 Sixth Avenue North, Suite 2400
Birmingham, Alabama 35203

***Re: Trademark Infringement – Peak Wellness, Inc. and
Peak Wellness Nutrition, LLC***

Dear Attorney Browning:

I am counsel to Peak Wellness, Inc. (“Peak Wellness”), which has been in the business of selling and distributing dietary and nutritional supplements for over ten years. Peak Wellness is also the owner of the federally registered trademark PEAK WELLNESS BIOPHARMA. Peak Wellness has been using its PEAK WELLNESS BIOPHARMA mark since 2009 in connection with its goods and services, and in 2010 the mark was placed on the principal register of the United States Patent and Trademark Office (“USPTO”).

It recently has come to my client’s attention, through the complaints of consumers, that your client, Peak Wellness Nutrition, LLC, is using Peak Wellness’ company name as well as its PEAK WELLNESS trademark in connection with products that are similar or closely related to those of Peak Wellness. Such unauthorized use constitutes a violation of Peak Wellness’ rights in its name and trademark and it has and is likely to continue to cause substantial confusion, mistake, or deception as to the affiliation or connection of your client’s products with those of Peak Wellness. Additionally, your client’s use of the PEAK WELLNESS mark is likely to dilute the distinctiveness of my client’s trademark.

I have also discovered that, on behalf of your client, you applied for the mark PEAK WELLNESS NUTRITION with the USPTO, and that such mark was refused by the USPTO due to the likelihood of confusion with my client’s prior registered PEAK WELLNESS BIOPHARMA mark.

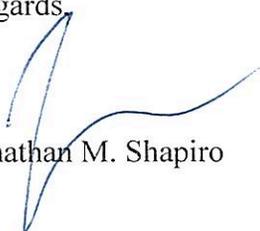
Therefore, on behalf of Peak Wellness, I request that your client immediately cease and desist from all direct and indirect use of the Peak Wellness name and PEAK WELLNESS trademark, destroy any printed materials or product labels using or incorporating the Peak Wellness name and PEAK WELLNESS trademark, abandon its efforts to obtain the PEAK WELLNESS NUTRITION mark with the USPTO or any similar trademarks in the future, and

send me confirmation that such request has been complied with. If you need time to phase out such use, I am sure my client will be amenable to such a discussion.

Please indicate your agreement to the foregoing by September 25, 2017. I appreciate your client's anticipated cooperation.

If I do not receive your written agreement to cease and desist, I have been authorized to take all necessary steps, including appropriate legal action, to protect the rights and interests of my client.

Regards,


Jonathan M. Shapiro

CIVIL COVER SHEET

JS 44 (Rev. 06/17) FLSD Revised 06/01/2017

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS Peak Wellness Nutrition, LLC DEFENDANTS Peak Wellness Biopharma, Inc.

(b) County of Residence of First Listed Plaintiff Palm Beach County, Florida County of Residence of First Listed Defendant (EXCEPT IN U.S. PLAINTIFF CASES) (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number) Irene Motles; 1901 Sixth Avenue North, Suite 2400; Birmingham, AL 35203; 205-254-1860

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only) III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Form with checkboxes for U.S. Government Plaintiff/Defendant, Federal Question, Diversity, Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF/DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions

Large grid of checkboxes for categories: CONTRACT, REAL PROPERTY, PERSONAL INJURY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only) 1 Original Proceeding, 2 Removed from State Court, 3 Re-filed, 4 Reinstated or Reopened, 5 Transferred from another district, 6 Multidistrict Litigation Transfer, 7 Appeal to District Judge from Magistrate Judgment, 8 Multidistrict Litigation - Direct File, 9 Remanded from Appellate Court.

VI. RELATED/ RE-FILED CASE(S) (See instructions): a) Re-filed Case YES NO b) Related Cases YES NO JUDGE: DOCKET NUMBER:

VII. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1331; declaration of non-infringement LENGTH OF TRIAL via 3 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE DATE November 9, 2017 SIGNATURE OF ATTORNEY OF RECORD Irene S. Motles