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## I. OPPOSER'S REPLY BRIEF

Pursuant to Trademark Rule 2.128, Opposer, Novo Nordisk A/S ("Opposer"), submits this reply to Innoject, Inc.'s ("Applicant") trial brief. Applicant does not contest Opposer's standing to bring the opposition or priority with respect to the goods recited in Opposer's pleaded registrations. Thus, the only issue in dispute is likelihood of confusion.

### A. Opposer Has Carried its Burden of Proving Likelihood of Confusion By a Preponderance of the Evidence

Opposer has asserted that Applicant's INNOJECT mark for "medical syringes" so resembles Opposer's previously registered INNOLET and INNOVO marks also for "medical disposable hypodermic syringes" and "syringes for injecting insulin," respectively, as to be likely to cause confusion, mistake, or deception under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

In support of its position, Opposer has made of record the registrations for its INNOLET and INNOVO marks pursuant to a Notice of Reliance under 37 C.F.R. § 2.122(d)(2). The two pleaded registrations are valid and subsisting. Opposer also submitted a Notice of Reliance under 37 CFR § 2.120(j)(3)(i) on certain of Applicant's Responses to Opposer's First Set of Interrogatories. In addition, Opposer submitted with its main brief copies of dictionary definitions for the relevant terms "parenteral" and "insulin."

Applicant has taken no testimony and has offered no evidence. Instead, Applicant devotes much of its brief to the argument that the evidence submitted by Opposer is insufficient in "quantity or quality" to prove a likelihood of confusion. To the contrary, however, Opposer's evidence is clearly sufficient to prove a likelihood of

confusion by a preponderance of the evidence in this case. Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d (Fed. Cir. 2000); Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

It is well established that an Opposer is entitled, if it wishes, to rely upon the prima facie case established by proof of its ownership of subsisting registrations alone as its total case. Herman Miller, Inc. v. Lane Co., Inc., 221 USPQ 922, 924 (TTAB 1984). "There is no requirement for proffering additional evidence." Id., citing Hollister v. Downey, 565 F.2d 1208, 196 USPQ 118 (CCPA 1977). This type of evidence alone has been held sufficient to prove standing to oppose, ownership of the marks, validity of the registrations, and the right to exclusive use of the marks for the identified goods where, as here, the marks and the underlying goods are so similar. Id.

In fact, Opposer has relied upon additional evidence to prove its case, including Notices of Reliance on certain of Applicant's Responses to Opposer's First Set of Interrogatories, and copies of dictionary definitions for the relevant words "parenteral" and "insulin." Although Applicant has also challenged Opposer's dictionary evidence as "improper," the Board has routinely taken judicial notice of dictionary definitions that are submitted on brief and relevant to the issue of likelihood of confusion. See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594 (TTAB 1982), aff'd, 701 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In short, there is no need to go beyond Opposer's registrations of record and the other evidence submitted by Opposer because of the substantial similarities between the parties' marks and Applicant's broad identification of goods in this case.

**B. Applicant Improperly Narrows the Scope of the Parties' Identification of Goods, Channels of Trade, and Class of Purchasers**

Applicant, in its trial brief, argues that the parties' goods are unrelated because they have purportedly different channels of trade and classes of customers.

(Applicant's Br. p. 4). Although Applicant acknowledges the general rule that the scope of the goods in question is defined by the identification of goods in the application and registrations, Applicant nonetheless argues that the goods are unrelated because of the different "actual uses" and "channels of trade" of the goods. Applicant maintains that the only evidence of "actual use" of the goods is set forth in Applicant's discovery responses cited in Opposer's Notice of Reliance. According to Applicant, the classes of customers for Applicant's products are "those persons requiring self-administered automatic injection of particular drugs." (Id.)

In making these arguments, Applicant has improperly narrowed the scope of the its identification of goods. Applicant ignores settled law that the determination of similarity or relationship between the goods of the parties must be made on the basis of the identification in the application and the registrations. See In re Continental Graphics Corp., 52 USPQ2d 1374, 1377 (TTAB 1999). It is irrelevant that the goods may be of a particular nature in fact or that the goods are sold in certain trade channels to a certain type of customer if the application and registrations are not restricted as to those factors. See Octocom Systems, Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 943, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990). Further, Applicant's interrogatory responses do not "amend" or limit the identification of goods in the subject application.<sup>1</sup>

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<sup>1</sup> Opposer objects to Applicant's argument regarding the scope of the identification of goods to the extent that Applicant seeks to "amend" its application at this late stage of the proceeding.

Applicant's INNOJECT application reads: "medical syringes" in International Class 10. Opposer's INNOLET mark is registered for "medical hypodermic syringes" in International Class 10, and its INNOVO mark is registered for "syringes for injecting insulin" in International Class 10. As set forth in the application, Applicant's identification of goods is broadly defined and contains no limitations on the nature or type of medical syringe, the potential applications for the product, the type of medications or pharmaceuticals that may be injected by the syringe, the therapeutic or treatment indications, the channels of trade, or the type of consumers or users.

Based upon Applicant's broad identification of goods, the Board should conclude that Opposer's "medical disposable hypodermic syringes" and "syringes for injecting insulin" are encompassed within Applicant's "medical syringes." That is, Applicant's "medical syringes" may encompass disposable hypodermic syringes and may be used for injecting insulin, like Opposer's medical syringes. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); In re Continental Graphics Corporation, 52 USPQ2d at 1374; In re Elbaum, 211 USPQ 639 (TTAB 1981).

**C. Opposer's INNOLET and INNOVO Marks Are Strong and Entitled to a Broad Scope of Protection**

Applicant does not dispute the fact that Opposer's INNOLET and INNOVO marks are coined and arbitrary terms that are distinctive in relation to the identified goods. Applicant argues, however, that this factor is "neutral" in a likelihood of confusion analysis. (Applicant's Br. p. 4). But Applicant is wrong. It is basic, fundamental trademark law that coined and arbitrary marks are considered inherently strong and entitled to the broadest scope of protection. See e.g., In re Opus One, 60 USPQ2d

1812 (TTAB 2001) (the strong and arbitrary character of the OPUS ONE mark results in a broad scope of protection for the mark); In re Wilson, 57 USPQ2d 1863 (TTAB 2001) (PINE CONE for canned fruits and vegetables is an arbitrary and strong mark entitled to a broad scope of protection); see also Sure-Fit Products Co. v. Saltzson Drapery Co., 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (“It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak [like the descriptive terms SURE-FIT and RITE-FIT], he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights.”); 2 J. Thomas McCarthy, McCarthy on Trademark and Unfair Competition, §§ 11:4 and 11:73 (4<sup>th</sup> ed. 2000). Indeed, several leading authorities and courts have held that the likelihood of confusion of a “strong” mark with similar marks will be more readily inferred. See McCarthy §§ 11:4 and 11:11 (fanciful marks “may be given an expansive scope of judicial protection into different product or geographical markets and as to more variations of format”), and cases cited therein.

**D. The Parties’ Marks are Similar in Appearance, Sound, and Connotation**

Applicant argues that Opposer has not provided any evidence concerning the similarities in the connotation or sound of the involved marks. However, Applicant does not deny that both Opposer’s marks and Applicant’s mark share the same first four letters “INNO.” Further, Applicant does not contest the fact that Applicant’s INNOJECT mark and Opposer’s INNOLET mark share the same end letters “E” and “T.” Nor does Applicant deny that the only differences between INNOLET and INNOJECT are two letters buried in the middle of the marks. The points of similarity between the marks are

obvious and apparent from the face of the marks. Further, the substantial similarities in the appearance and lettering of the marks naturally results in a similar pronunciation and connotation.

**E. Other Du Pont Factors Weigh In Favor of Opposer**

Finally, Applicant maintains that other Du Pont factors, such as the absence of actual confusion, favor Applicant. In particular, Applicant argues that it has “testified that there has been no actual confusion,” despite Applicant’s alleged entry into a collaboration agreement with a pharmaceutical company and its operation of a web site. (Applicant’s Br. p. 5.) However, Applicant has filed an intent-to-use application, and thus the absence of evidence bearing on this issue is to be expected. See Uncle Ben’s Inc. v. Stubenberg International Inc., 47 USQP2d 1310, 1312 (TTAB 1998). Moreover, the mere fact that Applicant has allegedly entered into a “collaboration agreement” or operates a web site does not establish that Applicant’s goods are available for sale, that consumers have been exposed to Applicant’s mark on the involved goods, or that there has been an opportunity for “actual confusion” to arise. Accordingly, the factor relating to actual confusion is, at most, neutral in this case.

**II. CONCLUSION**

For the reasons set forth above, Opposer respectfully requests that the Board sustain the opposition and refuse registration for the mark INNOJECT shown in Application Serial No. 78/059,125.

Respectfully submitted,



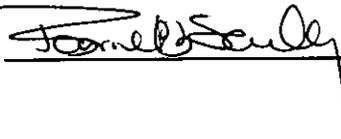
David M. Kelly  
Linda K. McLeod  
FINNEGAN, HENDERSON,  
FARABOW,  
GARRETT & DUNNER, L.L.P.  
1300 I Street, N.W.  
Washington, D.C. 20005-3315  
(202) 408-4000

Attorneys for Opposer,  
NOVO NORDISK A/S

**CERTIFICATE OF SERVICE**

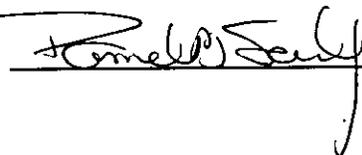
I hereby certify that on November 6, 2003, a true and correct copy of the foregoing Reply Brief for Opposer was served by United States First Class Mail, postage prepaid to Applicant at the following addresses:

John A. Thomas  
Glast, Phillips & Murray  
2200 One Galleria Tower  
13355 Noel Road, L.B.J. 48  
Dallas, Texas 75240-1518

By:  \_\_\_\_\_

**CERTIFICATE OF MAILING UNDER 37 C.F.R. §1.8**

I hereby certify that the foregoing REPLY BRIEF FOR OPPOSER is being deposited with the U.S. Postal Service under 37 C.F.R. §1.8 with sufficient postage as first class mail on November 6, 2003 and is addressed to the Commissioner for Trademarks, BOX TTAB NO FEE, 2900 Crystal Drive, Arlington, Virginia 22202-3513.

By:  \_\_\_\_\_