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

Maxxon Corporation,	)	Opposition No.: _____
	)	
Opposer	)	Application Serial No.: 76/261,952
	)	Filed on May 25, 2001
v.	)	Published: July 23, 2002
J & J Poured Floor Systems, Inc.,	)	
	)	
Applicant.	)	

Certificate of Mailing by "Express Mail"
I hereby certify that 2 copies of this Notice of Opposition are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 in an envelope addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on September 20, 2002

9/20/02 — Date
Signature
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Box TTAB FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

09-20-2002
U.S. Patent & TMOfc/TM Mail Rcpt. Dt. #40

NOTICE OF OPPOSITION

Maxxon Corporation ("Opposer"), a Minnesota corporation located and doing business at 920 Hamel Road Hamel, MN 55340 hereby opposes the above-referenced application Serial No. 76/261,952 by J & J Poured Floor Systems, Inc., a Georgia corporation with an address at 57 Jonesboro Rd. Fairburn, GA 30213 ("Applicant"), which was published in the *Official Gazette* on July 23, 2002.

Opposer believes it will be damaged by the registration of the mark shown in application Serial No. 76/261,952 and hereby opposes said registration on the following grounds:

1. Opposer requested and was granted the necessary extension of time to file this Notice of Opposition.

2. Since long prior to Applicant's filing of the above-referenced intent-to-use Application Serial No. 76/261,952 for the ORTECRETE mark and long before any possible use by Applicant of such mark or priority based on foreign rights, Opposer and its predecessor in

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interest have continuously used the trademark ORTECRETE on cementitious floor underlayment products sold in commerce.

3. Opposer began using the ORTECRETE mark on its products in about July 2000. Immediately prior to using the ORTECRETE mark itself, Opposer acquired by valid assignment all right, title, and interest in and to the ORTECRETE trademark for cementitious floor underlayment products from Ortecrete Corporation by a certain Assignment and Assumption Agreement dated July 26, 2000.

4. Based on Opposer's acquisition of all right, title, and interest in and to the ORTECRETE mark for cementitious floor underlayment products from Ortecrete Corporation, Opposer stepped into the shoes of Ortecrete Corporation for purposes of establishing priority for the ORTECRETE trademark for such products. Thus, Opposer acquired Ortecrete Corporation's date of first use of the ORTECRETE mark of at least as early as January 1, 1995.

5. Applicant has filed trademark Application Serial No. 76/261,952 based on its intent to use the mark. The filing date for this application is May 25, 2001. To Opposer's knowledge, Applicant has never used the ORTECRETE mark as its own trademark nor has it any basis to claim priority based on a foreign application.

6. Applicant is a distributor of Opposer's ORTECRETE cementitious floor underlayment product. Opposer has sold its ORTECRETE product to Applicant, since about July 2000.

7. Applicant's alleged ORTECRETE mark in Application Serial No. 76/261,952 is identical to Opposer's ORTECRETE mark in appearance, sound, meaning, and overall impression and is associated in Applicant's application with identical cementitious floor underlayments products.

8. Opposer currently has pending before the United States Patent and Trademark Office Application Serial No. 78/124,259 for the mark ORTECRETE for goods described as "cementitious floor underlayments", which application has a filing date of April 25, 2002 and an alleged date of first use of January 1, 1995.

9. In an Office Action dated September 9, 2002, the United States Patent and Trademark Office has cited Applicant's Application Serial No. 76/261,952 against Opposer's Application Serial No. 78/124,259, asserting that Opposer's mark may be refused registration if Applicant's application matures into a registration.

10. Given Opposer's extensive prior use of the ORTECRETE mark, it is highly likely that consumers associate ORTECRETE cementitious floor underlayment products with Opposer, not with Applicant, who is merely a distributor of cementitious floor underlayment products manufactured and branded with the ORTECRETE mark by Opposer.

11. Opposer's use of ORTECRETE for cementitious floor underlayments has priority over Applicant. On information and belief, Applicant has never used the mark whereas Opposer's effective date of first use, acquired from Ortecrete Corporation by valid assignment, is January 1, 1995. Even Opposer's own first use of the ORTECRETE mark of July 2000 after acquiring the ORTECRETE mark from Ortecrete Corporation predates Applicant's filing date of May 25, 2001.

12. As a distributor of Opposer's ORTECRETE cementitious floor underlayments, Applicant must have known that, as between Applicant and Opposer, Opposer had the right to use in commerce the ORTECRETE mark for cementitious floor underlayments. Despite this knowledge, Applicant filed its own application for the identical ORTECRETE mark. Applicant's knowledge of Opposer's rights, brings into question the truth of its sworn statement supporting its intent-to-use application that to the best of its knowledge and belief no other person,

firm, corporation, or association had the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive.

13. Opposer is likely to be damaged by registration of the term ORTECRETE used in connection with "cementitious floor underlayments" in that such use and registration would likely create confusion in the marketplace with respect to Applicant's well established, prior use and rights in and to the identical ORTECRETE mark for identical products and, if Applicant's application is allowed to register would prevent Applicant from obtaining a federal registration for its prior use of the ORTECRETE mark.

14. Based on the foregoing, Opposer believes that Applicant is not entitled to federal registration of its alleged mark ORTECRETE because Applicant's use of the mark would create a likelihood of confusion with Opposer's senior use of the mark, and because Applicant's knowledge of Opposer's prior rights to the ORTECRETE mark for cementitious floor underlayments invalidates its sworn application to register the ORTECRETE mark.

For the foregoing reasons, Opposer respectfully requests that registration of the ORTECRETE mark in Applicant's Application Serial No. 76/261,952 be denied in all classes and that Opposer be granted such other and further relief as is deemed just and proper.

Respectfully submitted,

Dated: 9/20/2002

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Fredrikson
& BYRON

20 September 2002

Commissioner for Trademarks
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TRADEMARK TRIAL AND APPEAL BOARD
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Re: Maxxon Corporation v. J & J Poured Floor Systems, Inc.
Application No. 76/261,952
Published: July 23, 2002

Dear Sir:

Enclosed is Maxxon Corporation ("Opposer's) Notice of Opposition. Enclosed also is a check in the amount of $300 to cover the required filing fee.

If any further fees are due in connection with the above-referenced request, they may be charged to Deposit Account No. 06-1910.

Respectfully submitted,

Scott Sullivan

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SPS/mt/2702955
Enclosures

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