

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

TOYOTA JIDOSHA KABUSHIKI KAISHA)  
d/b/a TOYOTA MOTOR CORPORATION, )

Opposer )

v. )

SYNGENTA PARTICIPATIONS AG )

Applicant. )

TOYOTA JIDOSHA KABUSHIKI KAISHA)  
d/b/a TOYOTA MOTOR CORPORATION, )

and )

TOYOTA MOTOR SALES, U.S.A., INC. )

Opposers )

v. )

SYNGENTA PARTICIPATIONS AG )

Applicant. )

Serial No.: 78/145,546

Filed: July 19, 2002

Mark: LEXUS

  
09-01-2006  
U.S. Patent & TMO/TM Mail Rpt Dt. #32

Serial No.: 78/185,538

Filed: Nov. 15, 2002

Mark: LEXXUS

**REPLY IN CONJUNCTION WITH APPLICANT'S MOTION**  
**TO REOPEN DISCOVERY AND TO COMPEL**

Applicant, Syngenta Participations AG, has moved to reopen the discovery period based on the lack of production to date regarding requested materials and the potential need by Applicant for additional materials due to Opposers' dilatory conduct.

Applicant, contrary to Opposers' false claims, has certainly complied with 37 CFR 2.120(e) through numerous letters to Opposers' counsel (Ex. 4-6) many of which went unanswered by Opposers' counsel.

I. Opposers' Conduct

It should be noted that in any of Opposers' responses they do not explain why they withheld discovery materials for over two (2) years and only served after the commencement of Opposers' Testimony period

Opposers' counsel glosses over the very pertinent fact that it failed to timely deliver long sought and requested discovery materials. Opposers now admit that they failed to mail this long sought material until August 4<sup>th</sup> (page 2 of Opposers' response) which was received by Applicant on August 9<sup>th</sup>. This was after the filing of Applicant's motion to compel (August 8<sup>th</sup>) but considerably well beyond the request pending for two (2) years (Ex.1 & 2) during which time this material existed (Ex.1& 2). The materials finally produced to Applicant on August 9<sup>th</sup>, after filing of this motion, have existed for at least (1) year (Ex.6). Opposers do not explain the basis for the delay in producing this long sought and previously existing survey materials which delay now prevents Applicant from seeking follow up discovery. Opposers, by their late delivery of long sought discovery materials until after their Testimony period had commenced and long after this material was in Opposers' possession, are attempting to direct the blame at Applicant for Opposers' dilatory tactics.

These materials, finally produced, from the matter of Toyota Motor Sales, et al v. Aliments Lexus Foods, Inc., et al; Civil Index # CV020013(DGT, EDNY 2002), such as survey and expert evidence has been prepared in 2005 by Opposers but none has been produced timely to Applicant (Ex.1 -6) .

Opposers have accused Applicant of dilatory conduct in their response. However, Applicant is objecting to any resetting of any of the Testimony periods, etc. except to open discovery solely to inquire of the materials which Opposers produced recently but untimely (after 2 year delay) or have improperly withheld and failed to produce. This acts such as waiting until after the Testimony period commenced reflects that any delay is caused by Opposers.

II. Other Recent Dilatory Tactics

As identified in prior motions, Applicant has sought various discovery materials from Opposers. Applicant requested Opposers to identify all witness. Opposers have failed to timely or properly produce any identification of witnesses except by letter after Opposers' Testimony period had commenced. By example:

Interrogatory No. 14: (June 04)

For each expert Applicant has retained to give testimony I this proceeding, provide the information required in Rule 26(a)(2)(B), Fed.R.Civ.P.

Interrogatory No 18 : (April 05)

Identify all witnesses Opposers intend to call as witnesses or from whom Opposers intend to obtain testimony.

(See Exhibits 1 & 2).

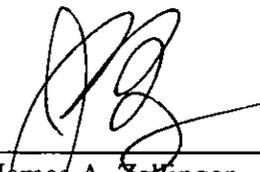
Yet the identity of witnesses, despite a nearly eighteen month delay, Opposers did not identify witness until after Opposers' Testimony period commenced and never specifically identified their experts (Ex.6).

III. Conclusion

Wherefore, Opposer's untimely response constitutes sufficient grounds for this Board to issue an order compelling Opposer to fully and completely respond to Applicant's discovery requests. Opposers' conduct also should permit Applicant to reopen discovery that is limited to follow up requests relating to the long withheld materials.

Respectfully submitted,

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

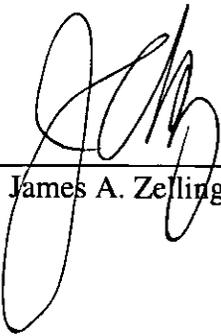
  
James A. Zellinger  
Syngenta Crop Protection, Inc.  
410 Swing Road  
Greensboro, North Carolina 27409

(336) 632-7835  
fax (336) 632-2012  
ATTORNEY FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPLICANT'S REPLY IN CONJUNCTION WITH APPLICANT'S MOTION TO COMPEL AND REOPEN DISCOVERY was served on counsel for Opposers this the 30th day of Aug. 2006, via first class mail, postage prepaid to:

David J. Kera  
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
1940 Duke Street  
Alexandria, VA 22314



---

James A. Zellinger

EXHIBIT I



## GENERAL OBJECTIONS

Opposers object to the Definitions and Instructions forming a part of Applicant's Third Set of Interrogatories and to each individual interrogatory as overly broad, harassing, unduly burdensome and as imposing greater obligations than those required by the Federal Rules of Civil Procedure and the Trademark Rules of Practice in that the burden or expense of the proposed discovery outweighs its likely benefit taking into account the importance of the proposed discovery in resolving the issues.

Opposers reserve their right to object to each individual interrogatory to the extent it seeks information that is proprietary and confidential and to provide such responsive, non-privileged information or documents only after a Stipulated Protective Order is entered by the Board.

Opposers further object to Applicant's Definitions and Instructions and to each individual interrogatory to the extent they seek information that is protected by the attorney-client privilege or the work-product doctrine. Such information will not be produced.

## OBJECTIONS AND ANSWERS

### INTERROGATORY NO. 15:

Identify all documents that constitute, relate to, or refer to any formal or informal investigation or consumer survey, including, but not limited to research, surveys, tests, or studies of any kind, regardless of whether prepared for or in anticipation of litigation, that Opposers have conducted, undertaken, instituted with consultants or experts, participated in or have knowledge of, and that pertain to the issues of confusion, likelihood of confusion, or the distinctiveness, regarding the use of the mark by either Opposers, Applicant, or any third party.

### ANSWER:

Opposers object to the use of the phrase "formal or informal investigation or consumer survey, including, but not limited to research, surveys, tests, or studies of any kind" as vague and

ambiguous. Opposers further object on the basis that the information sought constitutes confidential and proprietary information that will not be produced prior to the entry of a suitable protective order by the Board. Opposers further object to this interrogatory as irrelevant to claims or defenses related to an issue of likelihood of confusion of any party in this proceeding and as not reasonably calculated to lead to the discovery of admissible evidence.

Opposers further object to this interrogatory as overly broad, unduly burdensome and harassing. To the extent not otherwise objected to, Opposers will provide only that information in their possession which is sufficient to meet the needs of the interrogatory. To the extent that the interrogatory seeks information regarding use of the mark by Applicant or any third-party, Opposers object to the interrogatory as calling for information outside of Opposers' custody, possession or control.

Subject to the forgoing objections, Opposers refer Applicant to the business records produced in response to Applicant's First Request for Production of Documents from which this information may be derived or ascertained pursuant to Fed.R.Civ.P. 33(d). To the extent responsive information exists that is subject to the attorney-client privilege or that constitutes attorney work product, this information will not be provided.

**INTERROGATORY NO. 16:**

Identify all documents that indicate or may indicate that Opposers are in the agricultural or crop protection business, or market agricultural or crop protection products to consumers.

**ANSWER:**

None.

**INTERROGATORY NO. 17:**

Identify all documents that demonstrate or indicate that any of Opposers' products are sold in the same retail or wholesale locations, or proximity to any location where agricultural or crop protection products are sold.

**ANSWER:**

Opposers do not sell any agricultural or crop protection products and are unable to answer this interrogatory about whether any of Opposers' products are sold in locations that are proximate to any locations where agricultural or crop protection products are sold on the basis that Opposer do not know where Applicant or any other company sells agricultural or crop protection products.

**INTERROGATORY NO. 18:**

Identify all witnesses Opposers intend to call as witnesses or from whom Opposers intend to obtain testimony.

**ANSWER:**

Opposers object to this interrogatory on the basis that they are not required to disclose the entirety of their proposed evidence in support of their case during discovery. Specifically, the Board has held that a party is not required to provide detailed evidence, such as a witness list, in response to discovery requests. *See, e.g., Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002).

Respectfully submitted,

TOYOTA JIDOSHA KABUSHIKI KAISHA  
D/B/A TOYOTA MOTOR CORPORATION AND  
TOYOTA MOTOR SALES, U.S.A., INC.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on \_\_\_\_\_

Toyota Motor Sales, U.S.A., Inc.

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

Name: \_\_\_\_\_

Toyota Motor Corporation

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

Name: \_\_\_\_\_

As to objections:

By: David J. Kera

David J. Kera  
Amy Sullivan Cahill  
OBLON, SPIVAK, McCLELLAND,  
MAIER & NEUSTADT, P.C.  
1940 Duke Street  
Alexandria, Virginia 22314  
(703) 413-3000  
Fax: (703) 413-2220  
Attorneys for Opposer

Date: May 6, 2005

{I:\ATTY\DJK\213-238096US-INTOBJ3.DOC}

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **OPPOSERS' OBJECTIONS AND ANSWERS TO APPLICANT'S THIRD SET OF INTERROGATORIES** was served on counsel for Applicant, this 6<sup>th</sup> day of May, 2005, by sending same via U.S. Mail, postage prepaid to:

James A. Zellinger  
Syngenta Crop Protection Inc.  
410 Swing Road  
Greensboro, North Carolina 27409

D. Jean Barrett

EXHIBIT 2



## DEFINITIONS

As used in these interrogatories:

“Applicant” or “Defendant” shall mean Syngenta Crop Protection, Inc., Syngenta Participations A.G., its predecessors in interest, and any present or former officer, director, employee, agent, attorney or other representative acting on their behalf.

“Opposer” or “Plaintiff” shall mean Toyota Jidosha Kabushiki Kaisha d/b/a Toyota Motor Corporation.

“Mark” or “Trademark” unless otherwise identified means the marks ‘LEXUS’ or ‘LEXXUS’, any similarity thereto, and any use including use with other marks or terms, or in conjunction with other words or terms.

“Document” or “documents” shall mean the original and any copy of any copy of any writing or record in the custody, possession or control of Toyota or Opposer or known to it, whether printed, recorded, reproduced by any process, or written or produced by hand, and whether or not claimed to be privileged or exempt from production for any reason. Any comment or notation appearing on any document and not a part of the original text is to be considered a separate document.

“Person”, or “persons”, “entity”, or “entities” shall mean and include, in the plural as well as the singular, natural persons, proprietorships, corporations, governments, governmental agencies, associations and other organizations and entities, including all representatives of such persons.

“Packaging” shall mean any and all containers, labels, wrappings, descriptions, instructions, and all other materials transferred with the referenced goods during sale or distribution of the goods which are not part and parcel of the goods, whether or not said materials are visible during transfer of the goods.

“Oral communication” means and refers to any face-to-face conversation, meeting, conference, telephone conversation and telephone conference.

“Subject matter of this action” means and refers to the existence, consequences to the parties or third parties, rights adjudicated and conduct or status of this action.

“Third party” means and refers to any person, business or other entity not a party to the present lawsuit.

#### General Instructions

In multi-part interrogatories, the separate parts of such interrogatories are to be read in the context of the entire interrogatory but each part is to be answered separately.

A request to identify a person or entity shall be satisfied by providing the following information with respect to each said person or entity:

1. Said person's or entity's full name;
2. Said person's or entity's business address;
3. Said person's or entity's occupation;
4. Said person's or entity's employer;
5. Said person's or entity's citizenship.

If the person or entity identified is a corporation, further providing the following:

6. The date of incorporation of said corporation;
7. The state in which said corporation was incorporated;
8. The address of said corporation's principal office;
9. The name and address of each officer of said corporation;
10. The principal business of said corporation. If the identity identified is a

partnership, further provide the following:

11. The date the partnership was organized;
12. The name under which the partnership does business;

13. The name and address of each partner;

14. Whether a certificate for doing business under a fictitious name was filed and, if so, the date and place each certificate was filed;

15. The principal business of said partnership.

A request to identify documents shall be satisfied by providing the following information with respect to each said document:

1. The type of said document;

2. The title of said document with sufficient particularity to enable identification of same;

3. The date thereof;

4. The date the document was executed, if different from the date it bears;

5. The name and address or, if unknown, last known address and telephone of each person to whom the document was addressed;

6. The name and address or, if unknown, last known address and telephone of each person who signed the document or over whose name it was issued;

7. The name and address or, if unknown, last known address and telephone number of each person who has possession or control of the document, or a copy thereof;

8. Whether you will voluntarily make the document available to applicant herein for inspection and copying (you may submit a copy of each such document with your answers to these interrogatories in lieu of identifying such documents).

Documents for which identification is sought which will not be produced by Opposer to Applicant for inspection and copying, pursuant to a request under Rule 34 of the Federal Rules of Civil Procedure, shall be identified fully in the manner set forth above; and if any document will not be produced because of a claim of privilege or work product, Opposer shall also state the basis for such claim. As to documents which will

be produced by Defendant to Plaintiff for inspection and copying pursuant to a request under Rule 34, Opposer only need provide sufficient identification to allow Applicant to frame a request for such documents with reasonable particularity.

A request to identify and describe oral communications shall be satisfied by providing the following information with respect to each communication:

1. The name and address or, if unknown, last known address and telephone number of each such person participating in such communications;
2. The name and address or, if unknown, last known address and telephone number of each such person present when said communication was made;
3. The place where such communication occurred;
4. The date of said communication;
5. The substance of what was said by each person who participated in said oral communication;
6. If any writing has been made that records, summarizes, reflects, relates or refers to the sum and substance of such communication or any part thereof, describe each writing in accordance with the instructions provided herein;
7. If any mechanical, magnetic or electrical recording has been made out of the communication, the name and address or, if unknown, last known address and telephone number of the person who has possession or control of the same, and state whether the recording is still in existence;
8. Describe each recording in accordance with the instructions provided herein; and
9. A request for identification of a person shall be satisfied by identifying the person in accordance with the instructions provided herein.

If, after exercising due diligence to obtain the information requested, you cannot, or will not, answer any interrogatories fully and completely, whether because a privilege or otherwise, please:

- 1) State that your answer is complete;
- 2) Specify which part or parts of the interrogatory to which you are unable, or unwilling to respond;
- 3) State the facts and/or grounds upon which you rely to support your contention that you are unable and/or should not be compelled to answer completely;
- 4) State fully and completely the part or parts of the interrogatory to which you are able to respond;
- 5) State any information, knowledge or belief you have concerning the unanswered part or parts of such interrogatory.

This subparagraph (5) only, is not applicable to interrogatories not answered due to a claim of privilege.

Opposer's responses to the following interrogatories are to be promptly supplemented in accordance with the requirements of Rule 26 (e) of the Federal Rules of Civil Procedure.

## INTERROGATORIES

### Interrogatory No. 9

State the date Opposer selected Opposer's mark for use in connection with Opposer's Products.

### Interrogatory No. 10

Identify (by name, job title, and relationship to Opposer) the person(s) who first conceived of Opposer's Mark.

Interrogatory No. 11

State whether Opposer had knowledge of earlier use or registration of any Lexus or Lexxus Marks prior to Opposer's selection, first use, or filing for Federal registration of Opposer's Mark.

Interrogatory No. 12

Identify any agreements (such as assignments, licenses, authorizations, permissions, or consents) entered into by Opposer regarding Opposer's Mark(s).

Interrogatory No. 13

Identify the types of customers with whom Opposer does or intends to do business in connection with Opposer's Mark and the types of ultimate consumers to whom Opposer offers or intends to offer for sale Opposer's Products.

Interrogatory No. 14

For each expert Opposer has retained to give testimony in this proceeding, provide the information required in Rule 26(a)(2)(B), Fed.R.Civ.P.

Respectfully submitted,  
Applicant,

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

James A. Zellinger  
Attorney for Applicant  
Syngenta Crop Protection Inc.  
410 Swing Rd.  
Greensboro, N.C. 27409

CERTIFICATE OF SERVICE

I, JAMES A. ZELLINGER, do hereby certify that I have mailed a copy of the above and foregoing Applicant's First Set of Interrogatories to Opposer's attorney of record as listed below by placing a copy of same in the U. S. Mail, properly addressed and postage prepaid, to:

David J. Kera  
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
1940 Duke Street  
Alexandria, VA 22314

on this the \_\_\_ day of June, 2004.

---

James A. Zellinger

EXHIBIT 3



James A. Zellinger  
Trademark Counsel

Syngenta Crop Protection, Inc.  
410 Swing Road  
Greensboro, NC 27409

Tel 336-632-7835  
Fax 336-632-2012  
e-mail:  
jim.zellinger@syngenta.com

July 14, 2006  
**SECOND REQUEST July 25, 2006**

David J. Kera  
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
1940 Duke Street  
Alexandria, VA 22314

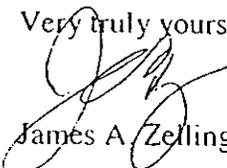
Re: *Toyota Jidosha Kabushiki Kaisha v/a Toyota Motor Corporation, and Toyota Motor Sales, U.S.A., Inc., v. Syngenta Participations AG.*  
*Consolidated Opposition Nos: 157,206 & 159,578*

Dear Mr. Kera:

I understand the EDNY case has been resolved and settled as of June 8, 2006. Thus, production of the previously requested information is long overdue.

The written "memorandum of agreement" or written understanding entered into on January 20, 2006, between your client and Aliments Foods is also both relevant and discoverable. It also falls under Applicant's discovery requests and must be produced. Please provide to me immediately along with all survey materials from said proceedings, as also previously requested.

This letter is an attempt to comply with 37 CFR Sec. 2.120(e).

Very truly yours,  
  
James A. Zellinger

JAZ/sk

EXHIBIT 4

James A. Zellinger  
Trademark Counsel

Syngenta Crop Protection, Inc.  
410 Swing Road  
Greensboro, NC 27409

Tel 336-632-7835  
Fax 336-632-2012  
e-mail:  
jim.zellinger@syngenta.com

February 10, 2006

David J. Kera  
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
1940 Duke Street  
Alexandria, VA 22314

Re: *Toyota Jidosha Kabushiki Kaisha t/a Toyota Motor Corporation, and Toyota Motor Sales, U.S.A., Inc., v. Syngenta Participations AG.*  
*Consolidated Opposition Nos: 157,206 & 159,578*

Dear Mr. Kera:

I am in receipt of your e-mail of February 6, 2006.

The written "memorandum of agreement" or written understanding entered into on January 20, 2006, between your client and Aliments Foods is both relevant and discoverable. It clearly falls under Applicant's discovery requests.

This letter is an attempt to comply with 37 CFR Sec. 2.120(e).

Very truly yours,

James A. Zellinger

JAZ/sk

EXHIBIT 5

James A. Zellinger  
Trademark Counsel

Syngenta Crop Protection, Inc.  
410 Swing Road  
Greensboro, NC 27409

Tel 336-632-7835  
Fax 336-632-2012  
e-mail: jim.zellinger@syngenta.com

May 5, 2005

David J. Kera  
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
1940 Duke Street  
Alexandria, VA 22314

Re: *Toyota Jidosha Kabushiki Kaisha t/a Toyota Motor Corporation, and Toyota Motor Sales, U.S.A., Inc., v. Syngenta Participations AG.*  
*Opposition No: 157,206*  
*Your Ref. 238096US-213-21*

Dear Mr. Kera:

I am in receipt of Opposers' responses to Applicant's 3<sup>rd</sup> Set of Interrogatories as well as Opposers' supplemental responses to Applicant's production of document requests.

Please note that these responses fail to respond to Applicant's requests and the instructions included with said requests. Documents being withheld, for whatever reason such as lack of protective order or attorney-client privilege, must be identified if they exist regardless of whether they are produced. Please submit immediately responses which correct this deficiency.

Very truly yours,

James A. Zellinger

JAZ/sk

EXHIBIT 6

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

TOYOTA JIDOSHA KABUSHIKI KAISHA	)	
d/b/a TOYOTA MOTOR CORPORATION,	)	
	)	
Opposer	)	Serial No.: 78/145,546
	)	
v.	)	Filed: July 19, 2002
	)	
SYNGENTA PARTICIPATIONS AG	)	Mark: LEXUS
	)	
Applicant.	)	

TOYOTA JIDOSHA KABUSHIKI KAISHA	)	
d/b/a TOYOTA MOTOR CORPORATION,	)	
	)	
and	)	
	)	
TOYOTA MOTOR SALES, U.S.A., INC.	)	
	)	
Opposers	)	Serial No.: 78/185,538
	)	
v.	)	Filed: Nov. 15, 2002
	)	
SYNGENTA PARTICIPATIONS AG	)	Mark: LEXXUS
	)	
Applicant.	)	

**AFFIDAVIT**

James A. Zellinger, being duly sworn, deposes and states as follows:

1. I am counsel for Applicant and represent Applicant in the above captioned matter. Opposer has not complied with 37 CFR 2.120(e) by failing to reasonably discuss Opposers' request with Applicant's counsel. Opposers' counsel failed to contact or attempt to contact Applicant's counsel to discuss Opposers' request. I did not receive any telephone messages or calls from Opposers' counsel.
2. During the last two (2) years, I have made over a dozen attempts through correspondence and discovery requests for survey and settlement information concerning this and other litigation involving Opposers and their mark. I received few responses to my requests.

3. I have also specifically requested information regarding the matter of Toyota Motor Sales, et al v. Aliments Lexus Foods, Inc., et al; Civil Index # CV020013(DGT, EDNY 2002), such as survey and expert evidence, some of which has existed for over a year but had not been produced prior to Applicant's motion to compel. Some of these materials have existed and been in the possession of Opposers for over two (2) years.

4. Only after filing of the motion herein to compel production did Applicant receive materials related to survey information but not settlement materials.

5. I received the attached letter from Opposers' counsel (Ex.2 ) indicating that a settlement had not yet been reached in the matter of Toyota Motor Sales, et al v. Aliments Lexus Foods, Inc., et al; Civil Index # CV020013(DGT, EDNY 2002).

This statement is made freely and voluntarily and under the penalty of perjury.

  
James A. Zellinger  
Attorney for Applicant  
Syngenta Crop Protection, Inc.  
410 Swing Rd.  
Greensboro, N.C. 27410

<sup>22nd</sup>  
SWORN to before me this day of Aug., 2006

  
Notary

