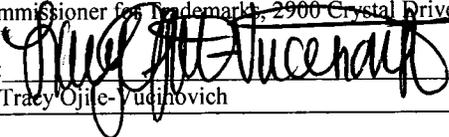


IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SMITHS MEDICAL ASD, INC.	)	
(formerly Level 1, Inc.)	)	Opposition No.
	)	
Opposer,	)	Serial No. 76/405848
	)	Mark: EQUATOR PLUS
	)	
PORTLAND ORTHOPAEDICS PTY LTD.	)	
	)	
Applicant.	)	
	)	

CERTIFICATE UNDER 37 CFR 2.197: The undersigned hereby certifies that this Notice of Opposition, as described hereinabove, is being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514, on January 7, 2004.

By:   
Tracy Ojile-Yudinovich

**NOTICE OF OPPOSITION**

Smiths Medical ASD, Inc., a Massachusetts corporation located and doing business at 160 Weymouth Street, Rockland, Massachusetts, believes that it will be damaged by the registration of the mark EQUATOR PLUS in Class 10, shown in Application Serial No. 76/405848, filed April 18, 2002 by Portland Orthopaedics Pty Lt., with a business address of Unit 3, 44 McCauley Street, Matraville, NSW 2036, Australia, and published for opposition in the Official Gazette of September 9, 2003, page TM 273, and hereby opposes registration thereof.

The grounds for opposition are as follows:

1. By the application herein opposed, Applicant is seeking to obtain, under the provision of the Trademark Act of 1946, as amended, registration upon the Principal Register of the mark EQUATOR PLUS for "surgical medical and veterinary apparatus, namely, orthopedic instruments and articles, namely, surgical prostheses for joints of the human and animal bodies,

hip, knee and shoulder prostheses; prostheses for implantation in skeletal joints; acetabular cups and acetabular cup assemblies; surgical instruments, namely, reamers, cutters and insertion tools for screwing the prosthesis shaft into humans and animals," in International Class 10.

2. Upon information and belief, Applicant filed its application to register EQUATOR PLUS on April 18, 2002 based upon an intent to use the mark in commerce and the priority of Australia Trademark Application No. 892495, dated October 18, 2001 under Section 44(d) of the Trademark Act, and has made no use of said EQUATOR PLUS mark in the United States prior to its claimed October 18, 2001 priority filing date.

3. Opposer has for many years been in the business of providing medical products used for medical fluid warming, irrigation, patient temperature management, and patient convective warming, including apparatus used in surgery to monitor and control the temperature of medical fluids and surgical patients, including convective warmers and warming blankets which circulate warm air around the surgical patient, helping to maintain core body temperature and reduce the complications associated with perioperative hypothermia.

4. Opposer is the owner of intent-to-use applications for the mark EQUATOR for "convective warming medical blankets, and parts and fittings therefor," in Class 10, Serial No. 76/262442, and for "devices for heating air and providing air flow to convective warming medical blankets, and parts and fittings therefor," in Class 11, Serial No. 76/975914, both having a filing date of May 24, 2001. The applications are pending and have not been abandoned.

5. Opposer is also the owner of a United States registration for the mark EQUATOR CONVECTIVE WARMING 1 and Design for "convective warming medical blankets, and parts and fittings therefor," in Class 10 and "devices for heating air and providing air flow to convective warming medical blankets, and parts and fittings therefor," in Class 11, Registration

No. 2,762,407, which issued September 9, 2003 and resulted from an intent-to-use application filed June 25, 2001. A copy of said registration is attached hereto.

6. Opposer enjoys substantial and exclusive goodwill and good reputation in connection with its EQUATOR and EQUATOR CONVECTIVE WARMING 1 and Design marks.

7. There is no issue of priority concerning Application Serial No. 76/405848, since Opposer has intent-to-use applications for its EQUATOR mark filed prior to Applicant's October 18, 2001 claimed priority filing date, and a registration for its EQUATOR CONVECTIVE WARMING 1 and Design mark which resulted from an intent-to-use application filed prior to Applicant's October 18, 2001 claimed priority filing date.

8. Opposer's convective warming medical blankets and devices for heating air and providing air flow to convective warming medical blankets sold under its EQUATOR and EQUATOR CONVECTIVE WARMING 1 and Design marks may be used simultaneously on the same surgical patient as the surgical medical apparatus identified in Applicant's Serial No. 76/405848, namely, orthopedic instruments and articles, namely, surgical prostheses for joints of the human and animal bodies, hip, knee and shoulder prostheses, prostheses for implantation in skeletal joints, acetabular cups and acetabular cup assemblies, surgical instruments, namely, reamers, cutters and insertion tools for screwing the prosthesis shaft into humans.

9. Upon information and belief, Applicant's goods are offered to the same class of purchasers and users as those that purchase Opposer's goods, travel in the same channels of trade as Opposer's goods, may be used on the same patients at the same time as Opposer's goods, and are closely related to those sold by Opposer.

10. Applicant's mark EQUATOR for the goods noted in paragraph 1, above, so resembles Opposer's previously filed EQUATOR and EQUATOR CONVECTIVE WARMING 1 and Design marks, noted in paragraphs 4 and 5 above, as to be likely to cause confusion, or mistake, or deception in the trade and among purchasers as to the source of origin or sponsorship of Applicant's goods.

11. Because Applicant's mark is identical to Opposer's EQUATOR mark and the dominant word of Opposer's EQUATOR CONVECTIVE WARMING 1 and Design mark and is used on related goods, and the goods are sold in the same channels of trade to like purchasers and users, the trade and purchasing public are likely to be confused, mistaken or deceived as to the origin, sponsorship or approval of Applicant's goods marketed under Applicant's EQUATOR mark, and misled into believing that such goods are produced by or are in some way directly or indirectly associated with Opposer, to the damage of Opposer.

12. Registration of Applicant's mark shown in the opposed application will result in damage to Opposer under the provisions of Section 2(d) of the U.S. Trademark Act, 15 U.S.C. §1052(d), pursuant to the allegations stated above.

WHEREFORE, Opposer requests that the registration sought by Applicant in U.S. Trademark Application Serial No. 76/405848 be refused and that this Notice of Opposition be sustained in favor of Opposer.

Please direct all correspondence to the attention of:

Sandra Epp Ryan  
Merchant & Gould P.C.  
Box 2910  
Minneapolis, Minnesota 55402-0910  
612.332.5300

Opposer appoints Sandra Epp Ryan, Reg. No. 39, 667; John L. Beard, Reg. No. 27,612; Linda M. Byrne, Reg. No. 32,404; Kristina M. Foudray; Gregory C. Golla; Scott W. Johnston, Reg. No. 39,721; Anna W. Manville; Brent E. Routman; and Paul A. Welter, Reg. No. 20,890 of the firm of MERCHANT & GOULD P.C., its attorneys with the full power to represent the Opposer in connection with this Opposition.

Please charge the \$300.00 filing fee for this Notice of Opposition and any excess fees to the Deposit Account No. 13-2725 of Opposer's undersigned attorneys.

Respectfully submitted,

SMITHS MEDICAL ASD, INC.

By its Attorney(s),

Dated: January 7, 2003

  
\_\_\_\_\_  
Sandra Epp Ryan, Reg. No. 39,667  
Merchant & Gould P.C.  
3200 IDS Center  
80 South 8th Street  
Minneapolis, MN 55402  
612.332.5300

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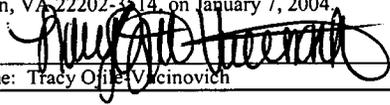
A Professional Corporation

Smiths Medical ASD, Inc. (formerly Level 1, Inc.) )  
Opposer )  
v. )  
Portland Orthopaedics Pty Ltd ) Opposition No.:  
Applicant )  
)

Mark: EQUATOR PLUS  
Serial No.: 76/405,848  
Docket Number: 13156.9USTA  
Official Gazette: September 9, 2003

Due Date: January 7, 2004  
Filing Date: April 18, 2002

CERTIFICATE UNDER 37 CFR 2.197: The undersigned hereby certifies that this Transmittal Letter and the paper, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514, on January 7, 2004.

By:   
Name: Tracy O'Neil Vucinovich

Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

Dear Commissioner:

We are transmitting herewith the attached:

- Return postcard.
- Transmittal Sheet in duplicate containing Certificate Under 37 C.F.R. 2.197
- Notice of Opposition (1 Original and 1 Copy)

Please charge any additional fees or credit overpayment to Deposit Account No. 13-2725. A duplicate copy of this sheet is enclosed.

By:   
Name: Sandra Epp Ryan  
Reg. No.: 39,667  
SER:tov

(CONTESTED MATTER)