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

Proceeding	91168123
Party	Defendant D'Andrea Brothers, LLC D'Andrea Brothers, LLC 5482 Wilshire Blvd. #147 Los Angeles, CA 90036
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Date	01/28/2006
Attachments	Answer (as filed).pdf ( 8 pages )

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

ISI BRANDS, INC. c/o TWINLAB  
CORPORATION,

Opposer,

v.

D'ANDREA BROTHERS, LLC,

Applicant

Opposition No. 91168123

Serial No.: 78438907

**ANSWER TO NOTICE OF OPPOSITION**

The Applicant named in the Opposition, D'Andrea Brothers, LLC, ("Applicant") answers the Notice of Opposition ("Notice") filed by Opposer, ISI Brands, Inc. c/o Twinlab Corporation, ("Opposer"), as follows, addressing the numbered grounds for opposition *seriatim*.

1. Applicant admits that D'Andrea Brothers, LLC is a limited liability company organized and existing under the laws of California, however, it should be noted for the record that Applicant's address is 6399 Wilshire Blvd., Penthouse 1, Los Angeles, CA 90048.

2. Applicant admits the allegations in paragraph number 2 of the Notice of Opposition.

3. Applicant has insufficient information to admit or deny the allegations in paragraph number 3 of the Notice, and on that basis denies each and every allegation contained therein.

4. Applicant has insufficient information to admit or deny the allegations in paragraph number 4 of the Notice, and on that basis denies each and every allegation contained therein.

5. Applicant admits that Opposer is the record owner of the trademark registrations listed on in paragraph 5 of the Notice, specifically 1388002, 1437049, 1487374, 1501862, 1508880, 1509858, 1540057, 1544159, 1583283, 1584280, 1597123, 1698746, 1655100, 1709127, 1692371, 1773392, 1781039, 1864175, 1920669, 1954899, 1954900, 2066656, 2186898, 2185075, 2188532, 2350510, 2448371, 2476268, 2293619, 2513423 and 2729521 for various marks in International Class 005 – “Pharmaceuticals”, which includes “Pharmaceutical, veterinary and sanitary preparations; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.” The USPTO provides an Explanatory Note that states: “This class includes mainly pharmaceuticals and other preparations for medical purposes. Includes, in particular:

- sanitary preparations for medical purposes and for personal hygiene;
- deodorants other than for personal use;
- cigarettes without tobacco, for medical purposes. “

Applicant specifically denies that Registration No.: 2293618 covers “nutritional supplements containing rostenedione” and denies that Registration No.: 2595723 covers “nutritional supplements”. Applicant has insufficient information to admit or deny the remaining allegations in paragraph number 5 of the Notice, and on that basis denies each and every allegation contained therein.

6. Applicant has insufficient information to admit or deny the allegations in paragraph number 6 of the Notice, and on that basis denies each and every allegation contained therein.

7. Applicant has insufficient information to admit or deny the allegations in paragraph number 7 of the Notice, and on that basis denies each and every allegation contained therein.

8. Applicant has insufficient information to admit or deny the allegations in paragraph number 8 of the Notice, and on that basis denies each and every allegation contained therein.

9. Applicant has insufficient information to admit or deny the allegations in paragraph number 9 of the Notice, and on that basis denies each and every allegation contained therein.

10. Applicant has insufficient information to admit or deny the allegations in paragraph number 10 of the Notice and on that basis denies each and every allegation contained therein.

11. Applicant denies each and every allegation set forth in paragraph number 11 of the Notice.

12. Applicant denies each and every allegation set forth in paragraph number 12 of the Notice.

13. Applicant denies each and every allegation set forth in paragraph number 13 of the Notice.

## **AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

1. The Notice of Opposition fails to state a claim upon which relief can be granted.
2. Opposer's claim for relief is barred under the doctrines of laches, waiver, acquiescence, delay and/or estoppel.
3. Opposer's claim for relief is barred under the equitable doctrine of unclean hands.
4. Opposer's Registration Nos.: 1885533 ("ANTIOXIDANT FUEL"), 2217212 ("XTRA FUEL") and 2209776 ("AMINO FUEL STACK") are invalid for nonuse of the marks in commerce under 15 U.S.C. §1058 (Section 8).
5. There is no likelihood of confusion between Opposer's "CARBO FUEL", "AMINO FUEL", "HERBA FUEL", "VITA FUEL", "GAINERS FUEL", "ANABOLIC FUEL", "ULTRA FUEL", "DIET FUEL", "CHROMIC FUEL", "OPTI FUEL", "MCT FUEL", "PHOS FUEL", "HYDRA FUEL", "POWER FUEL", "MASS FUEL", "RIPPED FUEL", "VEGE FUEL", "CREATINE FUEL", "ANTI-CATABOLIC FUEL", "GLUTAMINE FUEL", "SUPER VANADYL FUEL", "JOINT FUEL", "MEGA GLUTAMINE FUEL", "HMB FUEL", "MEGA HMB FUEL", "ALC FUEL", "CREATINE FIZZ FUEL", "CLA FUEL", "TRIPLE WHEY FUEL", "ANDRO FUEL", "STRENGTH FUEL", "ENERGY FUEL" and "FUEL PLEX" marks in connection with the goods as listed in paragraph 5 of the Notice of Opposition, and Applicant's "SOLDIER FUEL" mark in connection with the goods as listed in paragraph 2 of the Notice of Opposition.

6. Opposer's claims must fail because Applicant's "SOLDIER FUEL" mark creates a separate and distinct commercial impression apart from Opposer's "CARBO FUEL", "AMINO FUEL", "HERBA FUEL", "VITA FUEL", "GAINERS FUEL", "ANABOLIC FUEL", "ULTRA FUEL", "DIET FUEL", "CHROMIC FUEL", "OPTI FUEL", "MCT FUEL", "PHOS FUEL", "HYDRA FUEL", "POWER FUEL", "MASS FUEL", "RIPPED FUEL", "VEGE FUEL", "CREATINE FUEL", "ANTI-CATABOLIC FUEL", "GLUTAMINE FUEL", "SUPER VANADYL FUEL", "JOINT FUEL", "MEGA GLUTAMINE FUEL", "HMB FUEL", "MEGA HMB FUEL", "ALC FUEL", "CREATINE FIZZ FUEL", "CLA FUEL", "TRIPLE WHEY FUEL", "ANDRO FUEL", "STRENGTH FUEL", "ENERGY FUEL" and "FUEL PLEX" marks.

7. Opposer's claims must fail because Applicant's goods are not sufficiently related to the goods of the Opposer in any manner and/or conditions surrounding the marketing of their respective goods are not such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that the respective goods originate from the same source thereof.

8. Opposer's claims must fail because Opposer's "CARBO FUEL", "AMINO FUEL", "HERBA FUEL", "VITA FUEL", "GAINERS FUEL", "ANABOLIC FUEL", "DIET FUEL", "CHROMIC FUEL", "MCT FUEL", "PHOS FUEL", "VEGE FUEL", "CREATINE FUEL", "ANTI-CATABOLIC FUEL", "GLUTAMINE FUEL", "SUPER VANADYL FUEL", "MEGA GLUTAMINE FUEL", "HMB FUEL", "MEGA HMB FUEL", "ALC FUEL", "CLA FUEL", "TRIPLE WHEY FUEL", "ANDRO FUEL", "STRENGTH FUEL" and "ENERGY FUEL" marks are merely descriptive, have not acquired secondary meaning and are not famous.

9. Third-party use of similar marks on similar goods shows that Opposer's "CARBO FUEL", "AMINO FUEL", "HERBA FUEL", "VITA FUEL", "GAINERS FUEL", "ANABOLIC FUEL", "ULTRA FUEL", "DIET FUEL", "CHROMIC FUEL", "OPTI FUEL", "MCT FUEL", "PHOS FUEL", "HYDRA FUEL", "POWER FUEL", "MASS FUEL", "RIPPED FUEL", "VEGE FUEL", "CREATINE FUEL", "ANTI-CATABOLIC FUEL", "GLUTAMINE FUEL", "SUPER VANADYL FUEL", "JOINT FUEL", "MEGA GLUTAMINE FUEL", "HMB FUEL", "MEGA HMB FUEL", "ALC FUEL", "CREATINE FIZZ FUEL", "CLA FUEL", "TRIPLE WHEY FUEL", "ANDRO FUEL", "STRENGTH FUEL", "ENERGY FUEL" and "FUEL PLEX" marks are relatively weak and entitled, at best, to only a narrow scope of protection.

Respectfully submitted,

Buchalter Nemer, A Professional Corporation

Dated: January 27, 2006

By

A handwritten signature in black ink, appearing to read "Sandra P. Thompson", written over a horizontal line.

**Sandra P. Thompson, PhD**

**USPTO Reg. No.: 46,264**

Attorney for Applicant

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**CERTIFICATE OF SERVICE**

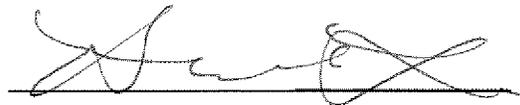
I Branda Lee, hereby certify that a copy of the foregoing:

**ANSWER TO NOTICE OF OPPOSITION**

was served by first-class mail, postage prepaid, on January 27, 2006, upon the attorney for Opposer to:

Chester Rothstein  
Amster, Rothstein & Ebenstein LLP  
90 Park Avenue  
New York, NY 10016  
Phone: 212-336-8000  
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and sent to the United States Patent and Trademark Office on January 27, 2006 electronically via the Internet according to Section 311.01 (c) of the TBMP.

A handwritten signature in black ink, appearing to read 'Branda Lee', is written over a horizontal line.

Branda Lee