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

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| Proceeding | 91168906 |
| Party | Defendant<br>Brain Matters Inc.<br>Brain Matters Inc.<br>201 University Boulevard, Suite 200<br>Denver, CO 80206 |
| Correspondence Address | Thomas P. Howard<br>Thomas P. Howard, LLC<br>245 Century Circle, Suite 206<br>Louisville, CO 80027 |
| Submission | Answer |
| Filer's Name | Thomas P. Howard |
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| Signature | /Thomas P. Howard/ |
| Date | 03/09/2006 |
| Attachments | Answer.pdf ( 7 pages ) |

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

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| The American Academy of Neurology | ) | Opposition No. 91168906 |
| | ) | |
| Opposer | ) | Mark: BRAIN MATTERS |
| | ) | |
| v. | ) | Serial No. 78/321,810 |
| | ) | |
| Brain Matters, Inc. | ) | Filing Date: 10/31/2003 |
| | ) | |
| Applicant. | ) | Published: 12/20/2005 |

**ANSWER**

Applicant and Respondent Brain Matters, Inc., by and through its counsel Thomas P. Howard, Esq. of Thomas P. Howard, LLC, answers the Notice of Opposition ("Notice of Opposition" or "Opposition") filed by the American Academy of Neurology ("Opposer") on January 30, 2006 as follows:

With regards to the unnumbered paragraph of introduction provided in the Opposition, Applicant denies that Opposer is or will be damaged by the registration of Applicant's Mark BRAIN MATTERS shown in trademark application Serial No. 78/321,810, filed on October 31, 2003 and published in the Official Gazette on December 20, 2005.

1. In response to Paragraph 1 of the Notice of Opposition, Applicant admits that it seeks to register on the Principal Register the designation BRAIN MATTERS, Serial No. 78/321,810, as a trademark for the following services: "Medical services, namely, brain imaging services, brain diagnostic services," in International Class 44.

2. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 2 of the Notice of Opposition and, therefore, denies the allegations of this paragraph in their entirety.

3. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 3 of the Notice of Opposition and, therefore, denies the allegations of this Paragraph in their entirety.

4. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 4 of the Notice of Opposition and, therefore, denies the allegations of this Paragraph in their entirety.

5. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 5 of the Notice of Opposition and, therefore, denies the allegations of this Paragraph in their entirety.

6. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 6 of the Notice of Opposition and, therefore, denies the allegations of this Paragraph in their entirety.

7. Applicant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 7 of the Notice of Opposition and, therefore, denies the allegations of this Paragraph in their entirety.

8. Applicant denies the allegations in Paragraph 8 of the Notice of Opposition.

9. Applicant denies the allegations in Paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations in Paragraph 10 of the Notice of Opposition.

11. Applicant denies the allegations in Paragraph 11 of the Notice of Opposition.

12. Applicant denies the allegations in Paragraph 12 of the Notice of Opposition.

13. Applicant denies the allegations in Paragraph 13 of the Notice of Opposition.

## AFFIRMATIVE DEFENSES

1. The Notice of Opposition fails to state a claim for which relief can be granted as there is no likelihood of confusion between the marks due to the fact that the parties' respective channels of trade and classes of customers are entirely unrelated, and will remain unrelated. Applicant is a service provider that provides retail medical services for patients referred by professionals. Opposer, on the other hand, is not a medical service provider, much less a provider of brain imaging services. Opposer provides no medical services to patients, nor does it advertise the provision of medical services, nor does it maintain physical location(s) for the provision of medical services. Rather, Opposer operates an Internet site that provides information to laypeople regarding neurological function. The parties operate in entirely different channels of trade and service groups with entirely different needs.

2. The Notice of Opposition fails to state a claim for which relief can be granted as there is no likelihood of confusion between the marks due to the fact that the trademarks are wholly unrelated as they appear in the marketplace. Applicant provides SPECT imaging services to patients with specific medical needs, at physical locations, in order to aid medical professionals in conducting diagnostic testing. Opposer operates an Internet site that provides general information to the public regarding common neurological disorders. Opposer sells and/or markets no medically-related services. The marks are entirely unrelated as used in the marketplace, for which reason there is no likelihood of confusion.

3. The Notice of Opposition fails to state a claim upon which any relief can be granted to the Opposer as there is no likelihood of confusion due to the fact that the THE BRAIN MATTERS trademark claimed by Opposer is a narrowly defined, suggestive designation entitled to the lowest level of protection. Similar marks using the words "THE BRAIN" or "MATTERS" are currently being used on multiple other goods and services marketed within the field of medicine.

4. The Notice of Opposition fails to state a claim upon which any relief can be granted to the Opposer as there is no likelihood of confusion due to the fact that neither party is likely to compete with the other in the foreseeable future. Opposer constitutes a nonprofit entity operating a non-commercial web site for the purpose of providing public information. Opposer lacks any "product line" of SPECT imaging services at all, and is plainly not planning to compete with Applicant now or in the future.

5. The Notice of Opposition fails to state a claim upon which any relief can be granted to the Opposer as no likelihood of confusion exists due to the fact that no evidence of consumer confusion has arisen despite over 28 months of active use of the BRAIN MATTERS trademark by Applicant.

6. The Notice of Opposition fails to state a claim for which relief can be granted due to the fact that Opposer's rights to the THE BRAIN MATTERS mark are narrowly registered as "Providing information in the field of neurology via the Internet." A trademark registrant may not reach beyond the

description of the mark in an attempt to monopolize a field. Opposer is now attempting to claim statutory rights over the completely different field of use claimed by Applicant, that of "Medical services, namely, brain imaging services, brain diagnostic services." Opposer has no legal or factual basis for its claimed opposition.

7. No damage or injury has resulted, or will result, or can result to Opposer from the registration of Applicant's mark. This is particularly the case as Opposer does not earn revenue from its Internet site or from the use of its mark.

8. Opposer is barred by the doctrine of latches.

9. Opposer is barred by the doctrines of acquiescence and estoppel.

10. Applicant will assert any and all other valid defenses which may be developed through discovery and/or the testimony periods in this opposition proceeding.

WHEREFORE, Applicant prays:

1. That Opposer's Opposition be dismissed with prejudice in all respects;

2. That Applicant's application be permitted to proceed to registration at an early date; and

3. That any such further relief be granted Applicant as may be deemed reasonable and appropriate.

Dated: March 9, 2006

Respectfully submitted,

/Thomas P. Howard/

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