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

Proceeding	91171901
Party	Plaintiff Gakic US Trademark Ltd. Gakic US Trademark Ltd. Gakic US Trademark Ltd. 5100 Spectrum Way Mississauga, Ontario, L4W 5S2 CANADA
Correspondence Address	Howard J. Shire, Esq. Kenyon & Kenyon One Broadway New York, NY 10004 UNITED STATES tmdocketny@kenyon.com
Submission	Other Motions/Papers
Filer's Name	Justin M. Kayal
Filer's e-mail	jkayal@kenyon.com, tmdocketny@kenyon.com
Signature	/Justin M. Kayal/
Date	03/07/2007
Attachments	Rule 56(f).pdf (51 pages)(1654270 bytes)

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

-----X
GAKIC US TRADEMARK LTD., :
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 Opposer, : Opposition No. 91/171,901
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 v. :
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 ADVANCED NUTRITIONAL :
 BIOSYSTEMS, INC., :
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 Applicant :
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 :
-----X

OPPOSER’S MOTION PURSUANT TO FED.R.CIV.P 56(F)

Opposer, Gakic US Trademark Ltd., by and through its undersigned counsel of record, hereby moves the Trademark Trial and Appeal Board (the “Board”), pursuant to 37 C.F.R. § 2.127(e)(1) and FED.R.CIV.P. 56(f), for an order permitting discovery and depositions to be had and for a continuance of the time period in which to respond to Applicant’s Motion for Summary Judgment.

FACTUAL BACKGROUND

A. THE MARKS AT ISSUE

Opposer is the owner of United States Trademark Registration No. 3,006,154 for the trademark GAKIC in International Class 5 for use in connection with a variety of dietary and nutritional supplements (the “’154 Registration”). The priority date for the ’154 registration is November 14, 2001, and the GAKIC trademark was first used on August 12, 2005. On October 7, 2005, Applicant filed an application for the term G-KICK pursuant to Section 1(b)(1) based on

an intent to use in connection with “Vitamins and nutritional supplements” in International Class 5. This application was subsequently assigned Application Serial No. 78/728,625 (“the “625 Application”).

B. THE NOTICE OF OPPOSITION

On July 18, 2006, Opposer filed a Notice of Opposition against the '625 Application (the “Opposition”) (*see* Exhibit 1, Applicant’s Mot. For Summ. J.). By an Order of July 18, 2006, discovery was scheduled to close on February 5, 2007.¹ On August 21, 2006, Applicant filed its Answer to the Opposition. On January 4, 2007, Opposer served its First Request for Production of Documents to Applicant (Exhibit 1 to Declaration of Michelle Mancino Marsh in Support of Opposer’s Motion Pursuant to FED.R.CIV.P. 56(f), hereinafter referred to as “Marsh Decl.”, attached hereto as Exhibit A) and First Set of Interrogatories to Applicant (Marsh Decl., Exhibit 2). On January 29, 2007, Opposer served a Notice of 30(b)(6) Deposition on Applicant (Marsh Decl. at Exhibit 3) (Opposer’s Document Requests, Interrogatories and Notice of 30(b)(6) Deposition are collectively referred to as “Opposer’s Discovery Requests”). The deposition was scheduled for February 5, 2007. Applicant did not respond to either Opposer’s First Request for Production of Documents or First Set of Interrogatories and failed to designate a deponent or deponents for the 30(b)(6) Deposition. Applicant has also not served any discovery requests on Opposer. On February 1, 2007, Applicant filed its Motion for Summary Judgment. Opposer’s current deadline to respond to Applicant’s Motion for Summary Judgment is March 8, 2007.

¹ The Board’s order specified February 3, 2007 as the close of discovery, but February 3rd fell on a Saturday, thus, discovery effectively did not close until February 5, 2007, the next business day. FED.R.CIV.P.6(A)

C. DISCOVERY

On or about January 29, 2007, counsel to Opposer received a telephone call from counsel to Applicant. (Declaration of Justin M. Kayal in Support of Opposer's Motion Pursuant to FED.R.CIV.P. 56(f), hereinafter referred to as the "Kayal Decl.," at ¶ 4, attached hereto as Exhibit B). In that conversation, Applicant's counsel requested Opposer's consent to extend the discovery deadlines by thirty days. Kayal Decl. at ¶ 4. At no point during the conversation did Applicant's counsel offer any explanation as to why Applicant failed to serve its own discovery requests during the five months discovery had been open, or why it needed additional time to respond to Opposer's Discovery Requests. Kayal Decl. at ¶ 4.

In a telephone conversation on or about January 31, 2007, counsel for Opposer explained to Applicant's counsel that Opposer was willing to grant a 30-day extension for Applicant to respond to Opposer's Discovery Requests, as well as to extend the testimony and rebuttal periods by 30 days. Kayal Decl. at ¶ 6. Opposer's counsel further explained that Opposer was willing to reschedule its 30(b)(6) Deposition to a mutually convenient date. Kayal Decl. at ¶ 6. Opposer's counsel explained, however, that Opposer was not willing to grant Applicant an additional 30 days to serve discovery on Opposer. Kayal Decl. at ¶ 6. As indicated above, Applicant has never responded to Opposer's Discovery Requests. Kayal Decl. at ¶ 5. Applicant's counsel indicated that she would relay the offer to her client. Kayal Decl. at ¶ 6. On or about February 1, 2007, Opposer's counsel called Applicant's counsel and inquired as to whether the parties would be filing a Motion on Consent to extend the discovery deadlines pursuant to the terms discussed in the January 31 conversation. Kayal Decl., ¶ 7.

In the course of the February 1 conversation, Applicant's counsel explained that Applicant was disappointed in Opposer's unwillingness to grant Applicant additional time to

serve discovery requests on Opposer. Kayal Decl., ¶ 8. During that conversation, Applicant's counsel further explained that, in lieu of filing a motion with the consent of Opposer, or a motion for cause on its own, Applicant would file a dispositive motion of some kind thereby suspending all discovery deadlines. Kayal Decl., ¶ 9. Applicant filed its Motion for Summary Judgment that day and by an Order dated February 6, 2007, the Board suspended the proceedings pending the disposition of the motion.

ARGUMENT

I. LEGAL STANDARD FOR ORDER UNDER FED. R. CIV. P 56(F)

Under FED.R.CIV.P. 56(f), a party opposing a summary judgment motion may request a continuance so that it can conduct any discovery shown to be necessary to oppose the motion. FED.R.CIV.P. 56(f). When “the discovery is reasonably directed to ‘facts essential to justify the party’s opposition,’ in the words of Rule 56(f), such discovery must be permitted or summary judgment refused.” *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992). In overturning the Board’s grant of summary judgment as premature, the Federal Circuit in *Opryland* stated that where a party “has shown a sufficient basis for its need of additional discovery, it can not be deprived of the discovery needed to place at issue material factual questions in opposition to the motion.” *Id.* at 852. Moreover, the Board has found that “as a general rule, a motion [under Rule 56(f)] will be liberally treated. If a party has demonstrated a need for discovery which is reasonably directed to facts essential to its opposition to the motion, discovery will be permitted.” *Warner-Lambert Co. v. Breckenridge Pharmaceutical Inc.*, 1997 TTAB LEXIS 33, *2 (Oct. 9, 1997 T.T.A.B.).

Rule 56(f) “provides nonmovants with protection from being ‘railroaded’ by premature summary judgment motions.” *Opryland*, 970 F.2d at 852 (citing *Celotex v. Catrett*, 477 U.S.

317, 326 (1986)). A nonmoving party's obligation to respond to a motion for summary judgment "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 n. 11 (1986).

II. OPPOSER SEEKS SPECIFIC AND RELEVANT INFORMATION

In its Opposition, Opposer asserts that Applicant's G-KICK mark "so resembles the GAKIC mark, as to be likely to cause confusion, or to cause mistake, or to deceive." ¶ 9 of Exhibit 1, Applicant's Mot. for Summ. J. Applicant asserts in its Motion for Summary Judgment that "as Opposer cannot establish a likelihood of confusion between the marks, the opposition must be summarily denied." Applicant's Mot. for Summ. J. at 1-2. In *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973), the Board set out a number of factors which must be considered when determining a likelihood of confusion.² As shown by the Marsh Decl., Opposer seeks discovery for the purpose of learning specific material facts which are relevant under many of these factors, and therefore essential to Opposer's response to Applicant's Motion for Summary Judgment. As further shown by the Marsh Decl., Opposer has good reason to believe that these facts exist and are in the exclusive possession of Applicant.

For instance, as shown by the Marsh Decl., Opposer seeks specific evidence demonstrating that the products and channels of trade in question are not merely "similar"

² (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use. (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing. (5) The fame of the prior mark (sales, advertising, length of use). (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark). (10) The market interface between applicant and the owner of a prior mark. (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion, i.e., whether de minimis or substantial. (13) Any other established fact probative of the effect of use.

(Applicant's blatant attempt to minimize the second and third *DuPont* factors above), but that they are, indeed, identical. (See Applicant's Mot. for Summ. J. at 5). Specifically, Opposer seeks relevant information regarding the chemical make-up, functionality and purpose(s) of Applicant's G-KICK products, the channels of trade through which Applicant's products are distributed, including the identity of specific retail establishments and websites. These facts are highly material to Opposer's ability to oppose the Motion for Summary Judgment as those two factors, namely identity of goods and channels of trade, can be pivotal to a likelihood of confusion analysis. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.") (citations omitted); *In Re. Dixie Restaurants, Inc.*, 105 F.3d 1405, 1408 (Fed. Cir. 1997) (citations omitted); *Chatam Int'l, Inc. v. UDV N. Am., Inc.*, 2000 U.S. App. LEXIS 2087, at *3-4 (Feb. 15, 2000 Fed. Cir.) (upholding the Board's finding of a likelihood of confusion in part because determination of identical channels of trade was supported by "substantial evidence"); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) (stating that "the Board need not discuss every (*DuPont*) factor, but may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods").

Additionally, there are a panoply of other facts, hereto unknown and in the possession of Applicant, that must be discovered for Opposer to respond to Applicant's motion, including without limitation, (i) the intended or target customers and distributors of Applicant's G-KICK products, in order to determine the overlap with Opposer's customers and distributors; (ii) the sales and pricing of the G-KICK product to evaluate market penetration, geographic scope of consumer exposure and sophistication of consumers; (iii) product packaging and advertising to

evaluate the similarity of the marks in appearance, sound, meaning and the commercial impression of the G-KICK mark, including any connection or association with Opposer's products; (iv) Applicant's selection and clearance of the G-KICK mark, including any intention to purposefully imitate Opposer's GAKIC mark; (v) information regarding any instances of actual confusion or initial interest confusion; and (vi) information regarding the quality of the G-KICK product.

Each of the above facts goes to refute Applicant's underlying assertion that it is entitled to summary judgment because "there is no likelihood of confusion." *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d at 1361. As shown by the Marsh Decl., Opposer seeks specific discovery related to each of these issues raised by the Applicant. In addition to the reasons set forth above, Opposer is entitled to the relevant discovery requested in the Marsh Decl. because Applicant itself has raised most, if not all, of these issues in its motion papers. *See Opryland*, 970 F.2d at 852 (finding in favor of Rule 56(f) movant in part because "The evidence sought . . . is directly related to the principal issues raised by [the party] for summary judgment adjudication"). For example, Applicant states in an unsworn document that, based solely on the price of the parties' respective goods, "this is not an impulse purchase product, and it can be assumed that a fair amount of research is done before purchase and it is unlikely that a consumer would be confused." Applicant's Mot. for Summ. J. at pg. 13. But nothing in Applicant's Application Serial No. 78/728,625 (the "'625 Application'") limits its goods to a specific price range or quality. It is therefore possible that Applicant could market, and in fact currently does market, its goods under the '625 Application for significantly less than Opposer sells its GAKIC products. *See Kohler Co. v. Baldwin Hardware Corporation*, 2007 TTAB LEXIS 3, *34 (TTAB Jan. 11 2007) ("Inasmuch as the identification of goods is not limited to expensive hardware, we

must presume that respondent's hardware encompasses hardware of all price ranges."). Thus, discovery may reveal that Applicant sells its G-KICK product at a price that encourages impulse or bargain purchasing, and thereby increases the likelihood of confusion.

Opposer must be given an opportunity to take discovery before it can respond properly to Applicant's motion. Applicant can not simply avoid its discovery obligations by filing a self-serving *ipse dixit* motion - to do so would make a mockery of the Board's discovery procedures.

III. APPLICANT'S MOTION FOR SUMMARY JUDGMENT IS PURELY FOR DELAY AND THEREFORE IMPROPER

Based on the events leading up to Opposer's Motion, it is apparent that Applicant's Motion for Summary Judgment was filed solely for the purposes of frustrating Opposer and delaying these proceedings. Rather than serve its responses to Opposer's Discovery Requests, or serve its own discovery requests on Opposer, in a timely fashion, Applicant chose to file a Motion for Summary Judgment for the sole purpose of delaying and suspending these proceedings. Opposer submits that Applicant's Motion for Summary Judgment is not motivated by a good faith belief in the merits of the assertions of that motion, but rather by a desire to stall the proceedings and temporarily escape its obligations under the discovery process. Applicant's Motion for Summary Judgment is therefore improper and should be disregarded by the Board. *See* FED.R.CIV.P. 11(b)(1) ("By presenting to the court a pleading, written motion, or other paper, an attorney . . . is certifying . . . it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). *See also* TBMP § 502.07 (FED.R.CIV.P. 11 applicable to summary judgment proceedings before the Board).

CONCLUSION

For all the foregoing reasons, and because it is for the improper purpose of frustrating Opposer and delaying these proceedings, Opposer respectfully requests that the Board dismiss Applicant's Motion for Summary Judgment and compel Applicant to satisfy its outstanding discovery obligations. In the event that the Board elects to consider Applicant's Motion for Summary Judgment, and for the reasons set forth in the attached Marsh Decl., Opposer respectfully requests that the Board permit Opposer to pursue the discovery it seeks and that the Board further adjust the deadline for Opposer to respond to Applicant's Motion for Summary Judgment as appropriate. In the event the Board denies this motion, Opposer respectfully requests that the Board order Opposer's time to respond to be thirty-five days after the date of the Order.

Respectfully submitted,

Dated: March 7, 2007

By:

KENYON & KENYON LLP



Howard J. Shire
Michelle Mancino Marsh
Justin M. Kayal
One Broadway
New York, New York 10004
(212) 425-7200

Attorneys for Opposer
GAKIC US Trademark Ltd.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing OPPOSER'S MOTION PURSUANT TO FED. R. CIV. P 56(F) was served by first class mail, postage prepaid, on this 7, day of March 2007 to:

David L. Sigalow, Esq.
Allen, Dyer, Doppelt, Milbrath & Gil
255 S. Orange Avenue
Suite 1401
Orlando, FL 32801-3460
Phone Number: 407-841-2330
Fax Number: 407-841-2343

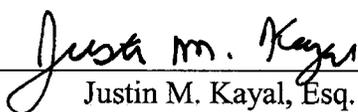

Justin M. Kayal, Esq.

EXHIBIT A

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

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GAKIC US TRADEMARK LTD.,	:	
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Opposer,	:	Opposition No. 91/171,901
	:	
v.	:	
	:	
ADVANCED NUTRITIONAL	:	
BIOSYSTEMS, INC.,	:	
	:	
Applicant	:	
	:	
-----X	:	

**DECLARATION OF MICHELLE MANCINO MARSH IN SUPPORT OF
OPPOSER’S MOTION PURSUANT TO FED.R.CIV.P. 56(F)**

I, Michelle Mancino Marsh, hereby declare:

1. I make this Declaration in support of Opposer’s Motion Pursuant to FED.R.CIV.P. 56(f). I am a partner with the law firm of Kenyon & Kenyon LLP, counsel of record to Opposer, Gakic US Trademark Ltd., in this matter. I make this Declaration on personal knowledge pursuant to FED.R.CIV.P. 56(f), in conjunction with 28 U.S.C. § 1746, to set forth the discovery required by Opposer in order to respond to Applicant’s Motion for Summary Judgment.

2. As stated fully in the accompanying Motion Pursuant to FED.R.CIV.P. 56(f), Opposer has sought discovery of numerous facts which are necessary before Opposer can respond to Applicant’s Motion for Summary Judgment. Each area of discovery sought, the

specific allegation it would refute or prove, and the corresponding request or requests are set forth below. The information sought is in the exclusive possession of Applicant.

3. In an apparent effort to underemphasize two significant *DuPont* factors in the likelihood of confusion analysis, Applicant alleges only that the “goods and services are similar and that the goods are distributed in similar channels of trade.” Applicant’s Mot. for Summ. J. at pg. 5. Opposer has sought the discovery of material facts showing that, well beyond being merely “similar,” the nature of the parties’ respective goods, and the channels of trade through which they are distributed are, in fact, identical.

4. With regard to the nature of Applicant’s goods, Opposer seeks to discover information regarding the chemical make-up, functionality and purpose of the goods. Opposer’s relevant discovery requests in this regard are Document Requests 4, 5, 9, 11, and 12 (*see* Exhibit 1 attached hereto), Interrogatory 6 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topic 5 (*see* Exhibit 3 attached hereto).

5. With regard to the channels of trade through which Applicant’s products are distributed, Opposer seeks to discover information regarding the specific retail establishments, including websites, where Applicant’s products are sold. Opposer further seeks to discover the manner in which Applicant distributes its products to retail establishments as another possible area where confusion may arise. Opposer’s relevant discovery requests on this issue are Document Requests 6, 28 and 32 (*see* Exhibit 1 attached hereto), Interrogatories 3 and 5 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 7 and 8 (*see* Exhibit 3 attached hereto).

6. Opposer also seeks relevant discovery regarding the quality of Applicant's G-KICK products. An assessment of the quality is necessary to Opposer's ability to oppose Applicant's Motion for Summary Judgment. Specifically, if the quality of the parties respective products is found to be relatively similar, this factor will increase the likelihood of confusion. If, on the other hand, the quality of Applicant's G-KICK product is found to be markedly below Opposer's GAKIC product, this factor may cause the Board to view the assertions in the Motion for Summary Judgment more critically based on the resulting potential for serious damage to Opposer and the consuming public. Namely, if there is a chance that some consumers may be confused between G-KICK and GAKIC, and a simultaneous chance that some of those consumers could be harmed by Applicant's G-KICK product, the potential damage to Opposer would be extreme. Opposer's relevant discovery requests in this regard are Document Requests 4, 5 and 9 (*see* Exhibit 1 attached hereto), Interrogatory 6 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topic 5 (*see* Exhibit 3 attached hereto).

7. With respect to the target purchasers of the goods in question, Applicant states that "the purchasers are bodybuilders and fitness interested people." Applicant's Mot. for Summ. J. at pg. 13. Opposer seeks specific discovery for the purpose of determining the level of overlap between purchasers for the two products. Opposer has a reasonable belief that this discovery will indicate that the parties' products are marketed to the identical group of consumers. Facts indicating that the parties' products are directed to the identical consumer group would be material to the Board's summary judgment determination. Opposer's relevant discovery requests in this regard are Document Requests 12, 21, 23, 25, 27, and 32 (*see* Exhibit 1 attached hereto), Interrogatories 2, 8 and 9 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 9, 10 and 17 (*see* Exhibit 3 attached hereto).

8. Applicant states that, based solely on the price of the parties' respective goods, "this is not an impulse purchase product, and it can be assumed that a fair amount of research is done before purchase and it is unlikely that a consumer would be confused." Applicant's Mot. for Summ. J. at pg. 13. But nothing in Applicant's Application Serial No. 78/728,625 (the "'625 Application") limits its goods to a specific price range or quality. Thus, Opposer's discovery requests regarding Applicant's sales and pricing for its G-KICK product is necessary to evaluate whether Applicant's pricing encourages impulse purchasing. Opposer's relevant discovery requests in this regard are Document Requests 6, 13, 16, and 27 (*see* Exhibit 1 attached hereto), Interrogatories 1, 2, 3, and 8 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 7 and 17 (*see* Exhibit 3 attached hereto).

9. Additionally, Opposer needs financial information regarding the sales and advertising of Applicant's G-KICK mark to illustrate, among other points, the level of market penetration by Applicant and the geographic scope of consumer exposure to the G-KICK mark thus complementing any evidence related to incidences of actual confusion. *See infra*, at ¶ 14.

10. Applicant's Motion for Summary Judgment is completely devoid of any indication as to how it allegedly conceived of the G-KICK mark or its intent in adopting the mark. Opposer seeks discovery relating to this topic. Opposer has a reasonable belief that such discovery will reveal that, at the very least, Applicant was aware of Opposer's GAKIC mark at time it filed the '625 Application. Based on the parties' respective marks, as well as the nature of the underlying goods, Opposer further believes that it is highly likely that discovery will demonstrate that Applicant was influenced by this awareness at the time it allegedly conceived of and adopted its G-KICK mark. Such facts are material to the Board's summary judgment determination and essential to Opposer's opposition to Applicant's Motion for Summary

Judgment. Opposer's relevant discovery requests in this regard are Document Requests 3, 34, 35, 37, 38, 41, and 42 (*see* Exhibit 1 attached hereto), Interrogatories 4, 13, 14, and 15 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topic 3 (*see* Exhibit 3 attached hereto).

11. Information regarding the similarity of the marks in appearance, sound, meaning, and commercial impression of GAKIC compared to G-KICK is also of paramount importance to Opposer's opposition to Applicant's Motion for Summary Judgment. Such information is also highly material to the Board's determination of a likelihood of confusion. Opposer served discovery requests which seek information regarding the appearance, sound, meaning and commercial impression of Applicant's G-KICK mark, specifically whether the G-KICK mark was chosen and adopted by Applicant to be visually and aurally similar to Opposer's GAKIC mark, notwithstanding their arguments to the contrary. Opposer's relevant discovery requests in this regard are Document Requests 3, 38 and 50 (*see* Exhibit 1 attached hereto), Interrogatory 3 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topic 4 (*see* Exhibit 3 attached hereto).

12. With respect to commercial impression, Applicant summarily states that the two marks make different commercial impressions. Applicant's Mot. for Summ. J. at pg. 4, 6. Opposer seeks specific facts which will show that the two marks are seen as highly similar in the minds of consumers. For instance, Opposer's discovery requests seek facts specifically related to the marketing of Applicant's products, including any purposeful connection with Opposer's products. Opposer has a reasonable belief that such facts will indicate that, contrary to Applicant's assertions, GAKIC and G-KICK make highly and confusingly similar commercial impressions. Such information would be highly material to the Board's summary judgment determination and is critical to Opposer's opposition to Applicant's Motion for Summary Judgment. Opposer's relevant discovery requests in this regard are Document Requests 34, 35,

37, 38, and 50 (*see* Exhibit 1 attached hereto), Interrogatories 14 and 15 (*see* Exhibit 2 attached hereto) and Deposition Topics 4, 9, 17, and 19.

13. Similarly, samples of the product packaging and advertising on which the G-KICK mark is used are also necessary for Opposer to respond to Applicant's Motion for Summary Judgment. In particular, Applicant states that it makes prominent use of its own brand name SCITECH NUTRITION in connection with its G-KICK product. Applicant's Mot. for Summ. J. at pg. 10. Opposer must be able to evaluate the veracity of those statements by reviewing Applicant's full line of product packaging, labels and advertising materials. Opposer's relevant discovery requests in this regard are Document Requests 4, 5, 8, and 12 (*see* Exhibit 1 attached hereto), Interrogatories 1 and 6 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 4 and 5 (*see* Exhibit 3 attached hereto).

14. Instances of actual confusion, as well as information indicating the potential for confusion or initial interest confusion between GAKIC and G-KICK are highly material to the Board's summary judgment determination. Applicant summarily states without reference to any sworn declaration that it is unaware of any actual confusion but makes no mention of other forms of confusion, such as initial interest confusion. Applicant's Mot. for Summ. J. at pg. 16. However, Opposer is entitled to test the veracity of Applicant's conclusory statements and seeks discovery regarding Applicant's efforts to determine if confusion has occurred, and/or the potential for confusion. Opposer's relevant discovery requests in this regard are Document Requests 4, 6, 8, 13, 16, 17, 27, 43, 44, and 46 (*see* Exhibit 1 attached hereto), Interrogatories 1, 3, 8, 10, 11, and 12 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 4, 5, 7, 8, 9, and 19 (*see* Exhibit 3 attached hereto).

15. Applicant claims in its Motion for Summary Judgment that “GAKIC is an acronym for “glycine-l-arginine-alpha-ketoisocaproic,” the main active ingredient in Opposer’s GAKIC product. Applicant further claims that “it is well known and well promoted that GAKIC is ‘glycine-l-arginine-alpha-ketoisocaproic acid calcium’....” Applicant’s Mot. for Summ. J. at pg. 9. Applicant also states that GAKIC “is descriptive and is not a particularly strong mark.” Applicant’s Mot. for Summ. J. at pg. 4. In order to counter these assertions in its opposition to the Motion for Summary Judgment, Opposer seeks relevant discovery relating to the products, publications and promotional materials Applicant believes supports these assertions. These products, publications and promotional materials include those emanating from both third parties and the Applicant itself. Opposer’s relevant discovery requests in this regard are Document Requests 7, 10, 14, 19, 21, 22, 24, 26, 29, 30, 31, 33, 36, 45, 49, 51, and 52 (*see* Exhibit 1 attached hereto), Interrogatory 7 (*see* Exhibit 2 attached hereto), and 30(b)(6) Deposition Topics 6, 11, 13, 14, 15, 16, 18, 20, 21, and 22 (*see* Exhibit 3 attached hereto).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 7th day of March, 2007



Michelle Mancino Marsh

TAB 1

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

-----X	:	
GAKIC US TRADEMARK LTD.,	:	
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Opposer,	:	Opposition No. 91/171901
	:	
v.	:	
	:	
ADVANCED NUTRITIONAL	:	
BIOSYSTEMS, INC.	:	
	:	
Applicant	:	
	:	
-----X	:	

**OPPOSER'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS TO APPLICANT**

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 34 of the Federal Rules of Civil Procedure, Opposer, Gakic US Trademark Ltd. ("Opposer"), requests that Applicant, Advanced Nutritional Biosystems, Inc. ("Applicant"), produce for inspection and copying at the Offices of Kenyon & Kenyon, One Broadway, New York, New York, 10004, or such other location as shall be mutually agreed upon by counsel for the parties, the following documents and things within thirty (30) days of service hereof.

DEFINITIONS

For the purposes of this documentary request, the definitions set forth in Opposer's concurrently served "Opposer's First Set of Interrogatories to Applicant" are hereby incorporated by reference as if fully set forth herein, except as changed herein. Reference to a particular interrogatory herein refers to the corresponding interrogatory from "Opposer's First Set of Interrogatories to Applicant."

INSTRUCTIONS

All documents shall be segregated and identified by the number of the request to which they are primarily responsive.

For each document requested herein sought to be withheld under a claim of privilege, or other objection, provide the following information:

1. identify the nature of the privilege, e.g. work product, which is being claimed;
2. the place, approximate date, and manner of recordation or preparation of the document;
3. the name and title of the sender and the name and title of each recipient of the document;
4. the name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document;
5. the name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization;

6. a statement of the basis upon which the claim of privilege is asserted and whether or not the subject matter of the contents of the document is limited to legal advice or information provided for the purpose of securing legal advice;
7. the number of the request herein to which the document is responsive;
8. a brief description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the attorney with the information requested in subsections (2) through (8).

DOCUMENTS REQUESTED

1. All documents identified by Applicant in response to “Opposer’s First Set of Interrogatories to Applicant” which are not otherwise covered by these requests.
2. All documents concerning any topic of inquiry contained in “Opposer’s First Set of Interrogatories to Applicant.”
3. All documents concerning the conception, creation and adoption of G-KICK.
4. All documents concerning any use by Applicant of the term G-KICK, whether alone or in combination with other terms, trademarks, service marks, or names, in connection with each product ever sold or offered for sale by Applicant, as well as any and all accompanying product packaging, labels, tags, product literature and/or instruction manuals.
5. Representative samples of all Products sold by Applicant which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium, as well as all labels, tags, product packaging, product literature and/or instruction manuals.

6. Purchase orders, invoices, communications, and/or other documents purchasing, ordering, or commissioning any of Applicant's Products which contain the term G-KICK.
7. Purchase orders, invoices, communications, and/or other documents purchasing, ordering, or commissioning any of Applicant's Products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
8. All documents concerning Applicant's present, past and intended use of the term G-KICK on letterhead, signs, invoices, labels, tags, and product packaging.
9. All documents concerning the formulation, manufacture and distribution of Applicant's Products which make use of the term G-KICK.
10. All documents concerning the formulation, manufacture and distribution of Applicant's Products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
11. All documents concerning the purpose of Applicant's Products.
12. All documents concerning the intended use of Applicant's Products.
13. All documents concerning the sales, marketing and promotion of Applicant's Products which make use of the term G-KICK.
14. All documents concerning the sales, marketing and promotion of Applicant's Products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

15. All documents concerning any application for registration, or registration, by Applicant for the term G-KICK, whether alone or in combination with other elements, or any mark similar thereto, for any goods or services:

- (a) in the United States Patent and Trademark Office; and
- (b) in any state or states of the United States.

16. Documents sufficient to show total sales, by year, in terms of revenue, gross profits, and net profits, whether such sales were made directly by Applicant, a licensee of Applicant, or other third party, by volume and dollar amount, for each good or service sold, or offered for sale by Applicant which makes use of the term G-KICK.

17. All documents concerning any civil action, or proceeding in the United States Patent and Trademark Office, filed by or against Applicant, concerning its use of or application to register the term G-KICK, including without limitation:

- (a) Copies of all pleadings and documents submitted in support or in defense of any such action or proceeding; and
- (b) Copies of any settlement agreement, coexistence agreement, final judgment, or consent decree.

18. All documents concerning any use of the term G-KICK by any third party in any manner.

19. All documents concerning any use of the term GAKIC by any third party in any manner.

20. All documents concerning use by any third party of a term which Applicant considers to be similar to GAKIC.

21. All advertisements, promotional items, brochures, leaflets, or flyers in Applicant's possession in which any term which Applicant considers to be similar to GAKIC is used by any third party.

22. All documents concerning glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

23. Representative samples of advertisements, promotional items, brochures, leaflets, or flyers printed, disseminated, or commissioned by Applicant in which the term G-KICK has appeared.

24. Representative samples of advertisements, promotional items, brochures, leaflets, or flyers printed, disseminated, or commissioned by Applicant for Applicant's Products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

25. Copies of each television commercial, video presentation, or radio script prepared or commissioned by Applicant, regardless of whether the television commercial, video presentation, or radio script was actually released, aired or used, in which the term G-KICK has appeared, currently appears, or will appear.

26. Copies of each television commercial, video presentation, or radio script prepared or commissioned by Applicant, regardless of whether the television commercial, video presentation, or radio script was actually released, aired or used, for Applicant's Products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

27. Documents sufficient to show Applicant's annual expenditures on efforts to advertise, market, or otherwise promote, through any form of media, including, but not limited to, print, television, radio, trade shows and the Internet, any of its goods and services sold or offered for sale which make use of the term G-KICK.

28. All documents concerning the channels of trade utilized by Applicant, including, but not limited to, the Internet, retail establishments, buying agents, individuals, or corporations, in selling or offering for sale Applicant's goods or services which make use of the term G-KICK.

29. Documents concerning third party products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

30. All advertisements, promotional items, brochures, leaflets, or flyers for any third party products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

31. Documents concerning any advertisements for third party products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

32. All documents concerning any participation or appearance by Applicant, or any licensee of Applicant, at trade shows where goods or services sold or offered for sale which make use of the term G-KICK were displayed, including, but not limited to, photographs of each exhibit, booth, table, and the like and samples of all flyers, advertisements, mailers, and any other promotional materials, whether distributed or not, created by or for Applicant for use at said trade shows.

33. All documents concerning any participation or appearance by Applicant, or any licensee of Applicant, at trade shows where goods or services sold or offered for sale containing glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium were displayed, including, but not limited to, photographs of each exhibit, booth, table, and the like and samples of all flyers, advertisements, mailers, and any other promotional materials, whether distributed or not, created by or for Applicant for use at said trade shows.

34. All documents concerning any investigation of the marketplace conducted by or on behalf of Applicant with respect to the term G-KICK or Applicant's products which make use of the term G-KICK.

35. All documents concerning any investigation of the marketplace conducted by or on behalf of Applicant with respect to the term GAKIC or Opposer's products which make use of the term GAKIC.

36. All documents concerning any investigation of the marketplace conducted by or for Applicant with respect to products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

37. All documents concerning any surveys, consumer research, marketing studies, consumer recognition studies and/or consumer opinion polls conducted by or on behalf of Applicant in connection with Opposer's GAKIC trademark.

38. All documents concerning any surveys, consumer research, marketing studies, consumer recognition studies and/or consumer opinion polls conducted by or on behalf of Applicant in connection with Applicant's G-KICK trademark.

39. All reports, memoranda, notes, correspondence, communications, or other documents relating to, bearing upon, commenting on, concerning, or discussing the retention or possible retention of expert witnesses for use by Applicant in connection with this proceeding.

40. All reports, memoranda, notes, correspondence, communications, or other documents concerning the opinion of any experts consulted or retained by Applicant, or by any person or persons acting for or on Applicant's behalf, in connection with this proceeding.

41. All documents concerning Applicant's knowledge of Opposer's use, application, and registration for its GAKIC trademark.

42. All documents concerning the first time Applicant obtained knowledge or information about Opposer's GAKIC trademark.

43. All documents, communications, or inquires received by Applicant regarding questions or confusion as to the existence of an affiliation, partnership or connection of any kind between Applicant and Opposer, or between the GAKIC and G-KICK products.

44. All documents concerning any inquiry or comments by any person, whether by publication, letter, telephone, email, or any other form, regarding Opposer's GAKIC trademark.

45. All documents concerning any inquiry or unsolicited comments by any member of the media or the public, whether by publication, letter, telephone, email, or any other form, regarding Applicant's products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

46. All documents concerning any instances of actual confusion as to the existence of an affiliation, connection, partnership or relationship between Applicant and Opposer or between the GAKIC and G-KICK products.

47. Copies of any and all statements or opinions of any person regarding the instant proceeding.

48. All documents embodying, explaining, or discussing Applicant's document retention policy.

49. All documents concerning any third party products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

50. All search reports or other investigation materials regarding any search or investigation conducted by or on behalf of Applicant concerning the term G-KICK.

51. All documents which Applicant alleges support the affirmative defense asserted in paragraph 11 of Applicant's Answer to the Notice of Opposition.

52. All documents which Applicant alleges support the affirmative defense asserted in paragraph 12 of Applicant's Answer to the Notice of Opposition.

53. All documents which Applicant alleges support the affirmative defense asserted in paragraph 13 of Applicant's Answer to the Notice of Opposition.

54. All documents which Applicant alleges support the affirmative defense asserted in paragraph 14 of Applicant's Answer to the Notice of Opposition.

55. All documents which Applicant alleges support the affirmative defense asserted in paragraph 15 of Applicant's Answer to the Notice of Opposition.

56. All documents which Applicant alleges support the affirmative defense asserted in paragraph 16 of Applicant's Answer to the Notice of Opposition.

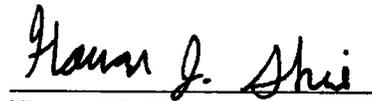
57. All documents which Applicant alleges support the affirmative defense asserted in paragraph 17 of Applicant's Answer to the Notice of Opposition.

Respectfully submitted,

KENYON & KENYON LLP

Dated: January 4, 2006

By:



Howard J. Shire
Justin M. Kayal
One Broadway
New York, New York 10004
(212) 425-7200

Attorneys for Opposer
GAKIC US Trademark Ltd.

CERTIFICATE OF SERVICE

it is hereby certified that a copy of the foregoing OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO APPLICANT was served by first class mail, postage prepaid, on this 4, day of January 2007 to:

David L. Sigalow, Esq.
Allen, Dyer, Doppelt, Milbrath & Gil
255 S. Orange Avenue
Suite 1401
Orlando, FL 32801-3460
Phone Number: 407-841-2330
Fax Number: 407-841-2343


Justin M. Kayal, Esq.

TAB 2

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

-----X	:	
GAKIC US TRADEMARK LTD.,	:	
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Opposer,	:	Opposition No. 91/171,901
	:	
v.	:	
	:	
ADVANCED NUTRITIONAL	:	
BIOSYSTEMS, INC.	:	
	:	
Applicant	:	
	:	
-----X		

OPPOSER’S FIRST SET OF INTERROGATORIES TO APPLICANT

Pursuant to Rule 2.120(d)(1) of the Trademark Rules of Practice and Rule 33 of the Federal Rules of Civil Procedure, Opposer, Gakic US Trademark Ltd. (“Opposer”), requests that Applicant, Advanced Nutritional Biosystems, Inc. (“Applicant”) answer the following interrogatories fully and separately in writing and under oath within thirty (30) days of service hereof.

DEFINITIONS

As used herein:

1. The term “Applicant” collectively refers to Advanced Nutritional Biosystems, Inc., its affiliates, partnerships or other related entities as well as any predecessor, parent, subsidiary, licensor, licensee, officer, director, partner, attorney, or other person in privity with either. In any instance where an interrogatory answer differs as between Applicant and any predecessor, parent, subsidiary, licensor, licensee, officer, director, partner, attorney, or other person in privity with Applicant, or is applicable only to one of them, the answer shall so state, setting forth such difference and stating separately all information applicable to Applicant and all information applicable to any other party.
2. The term “Opposer” refers to Gakic US Trademark Ltd.
3. The term “Notice of Opposition” or “Opposition” refers to the Notice of Opposition filed by Opposer in connection with Opposition No. 91/171,901.
4. “G-KICK” refers to the alleged mark covered by Applicant’s Application Serial No. 78/728,625 in International Class 5, filed on October 7, 2005, which is the subject of Opposition No. 91/171,901.
5. “GAKIC” refers to Opposer’s trademark as partially evidenced by Registration No. 3,006,154 unless otherwise stated or unless obvious from the context of the interrogatory.
6. The term “Applicant’s Products” or “Products” or “Product” means each or all products ever sold or offered for sale, or intended to be sold or offered for sale, by or with the

authorization of Applicant, which bear or have borne the term G-KICK, in any manner, as well as the packaging and instructions accompanying that product.

7. The term “sold,” as used in these definitions and interrogatories, means goods or services paid for, transferred, rendered, or provided free of charge.

8. The terms “communication,” “writing,” and “document” are used in their customary broad sense as described in Federal Rule of Civil Procedure 34 and include, but are not limited to, copies of orders, acknowledgements thereof, contracts, invoices, bills, receipts, checks, books, records, reports, financial statements, letters, telegrams, notes, memoranda, calculations, diaries, worksheets, drafts, advertisements, and other tangible things, including originals and copies, whether typed, handwritten, or on tape, computer disc, some other recording or in electronic format, from whatever source, and any material underlying, supporting, or used in the preparation of any of such document or documents.

9. The term “identify,” when used in reference to a natural person, means to:

- (a) state his or her full name;
- (b) state his or her present or last-known address;
- (c) state his or her present or last-known employer or business affiliation; and
- (d) state his or her occupation and business position held and the length of time in such position.

10. The term “identify,” when used in reference to a corporation, partnership, or other business entity, means to:

- (a) state its full name;
- (b) state its present or last-known principal place of business;
- (c) state the nature of its business;
- (d) in the case of a corporation, set forth its State of incorporation;
- (e) state the identity of persons having knowledge of the matter with respect to which the company is named; and
- (f) state the identity of the executive officer or officers of the company.

11. The term “identify,” when used in reference to a document, means to:

- (a) state the date, author, recipient, and type of document (e.g. invoice, delivery receipt, etc.) or some other means of distinguishing the document;
- (b) state the identity of each person who prepared the document;
- (c) state the identity of each person who received the document;
- (d) state the present location of the document;
- (e) state the manner and dates of distribution and publication of the document, if any; and
- (f) state the identity of each person having possession, custody, or

control of the document.

12. The phrase “describe in detail” means that Applicant is requested to state with specificity each and every fact, ultimate fact, particular circumstance, incident, act, omission, detail, event, and date, and to identify each and every document, as herein defined, relating thereto or in any way whatsoever concerning the matters inquired of.

13. The use of the singular form of any word includes the plural form and vice versa.

14. The conjunctive shall be understood to include the disjunctive and vice versa.

INSTRUCTIONS

In answering each Interrogatory:

1. Identify each document and each oral communication which forms the basis, in whole or in part, for the answer given or which corroborates or negates the answer given or the substance of which is given, and either annex true copies of each such document or offer to make the same available for inspection and copying. The unexplained failure to annex a true copy of such document or to offer to make the same available for inspection and copying shall constitute a representation that such document does not exist.

2. In lieu of identifying a document or tangible thing, Applicant’s production of a copy or photograph thereof or production of the document or thing for inspection and copying by Opposer’s counsel (pursuant to the request for production) shall be deemed sufficient unless such further identification of each such document or thing is requested. The particular interrogatory to which the document is responsive must be designated for each document produced.

3. If a document which corroborates or negates an answer given, or the substance of

which is given, is not in the possession of or available to Applicant, supply a copy thereof, identified as required by Definition 11 above, within ten (10) days after such document comes into the possession of or becomes available to Applicant, or offer to make same available for inspection and copying.

4. If a document has been destroyed or is alleged to have been destroyed, state the date of and the reason for its destruction, and identify each person having knowledge of the document's destruction and each person responsible for the document's destruction.

5. State whether the information furnished is within the personal knowledge of the individual signing the interrogatory answers, and, if not, identify each person to whom the information is a matter of personal knowledge, if known.

6. With respect to each answer or document that Applicant contends is privileged or otherwise excludable from discovery, provide the information required by Fed. R. Civ. P. 26(b)(5) and, in addition, state the basis for the privilege or other grounds for exclusion, as well as the name and address of the author, the date of the privileged information, the general subject matter, the name and address of every recipient of the original or any copy of the document, the name and address of each person who now has the original or any copy, and the identification and location of the files where the original and each such copy are normally kept.

7. When producing any document or thing in partial or full response to any of the Interrogatories, reference the Interrogatory or Interrogatories to which the document or thing is responsive.

8. These interrogatories are continuing in character and with respect to any

information hereinafter becoming known or any document hereinafter coming to the attention of Applicant, Applicant is requested to supply the same pursuant to the provisions of Federal Rule of Civil Procedure 26(e).

INTERROGATORIES

1. For each of Applicant's Products, state:
 - (a) the date the Product was first sold or offered for sale anywhere in interstate commerce;
 - (b) the manner in which Applicant uses, or intends to use, the term G-KICK in connection with the Products;
 - (c) the period or periods (specifying dates) during which each such Product was sold, promoted, marketed or distributed by or under the authority of Applicant; and
 - (d) total sales, by year, in terms of units and revenue, whether such sales were made directly by Applicant or under the authority of Applicant.
2. Identify the person most knowledgeable about the advertising and promotion of Applicant's Products.
3. Identify the person most knowledgeable about sales of Applicant's Products.
4. Identify the person most knowledgeable about Applicant's conception, creation and adoption of G-KICK.

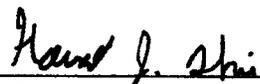
5. Describe all channels of trade through which Applicant's Products are distributed from Applicant on through to the ultimate purchasers or users of such Products.
6. Describe the intended use of Applicant's Products.
7. Identify any third party products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
8. State, by year, the total cost of advertising, marketing and promoting Applicant's Products through any and all form of media, including, but not limited to, print, television, radio, trade shows, and the Internet.
9. Identify each publication or media outlet, including any television station, radio station, or Internet website, in which any advertisement or promotion for Applicant's Products appears or has appeared.
10. Identify and describe the circumstances and resolution of any inquiry, question, comment, concern or belief, expressed by any person, as to the source or origin of any of Applicant's Products or any products sold in connection with the term G-KICK.
11. Identify and describe the circumstances and resolution of any instances of confusion by any person as to the source or origin of any of Applicant's Products or any products sold in connection with the term G-KICK.
12. Identify and describe the circumstances and resolution of any complaint, protest, objection, or comment directed to Applicant by any third party relating to Applicant's Products, or to Applicant's use of G-KICK.

13. State when and how Applicant first became aware of Opposer's GAKIC trademark.
14. State whether Applicant, or anyone acting on Applicant's behalf, ever conducted an investigation, including without limitation a trademark search, regarding the availability of G-KICK, and, if so, provide the particulars of same.
15. State whether Applicant has ever sought or received the opinion of an attorney regarding the availability of G-KICK, and if so identify the attorney, when the opinion was rendered, and the substance of the opinion.
16. State the entire factual basis for Applicant's assertion of the affirmative defenses in paragraphs 11-17 of Applicant's Answer to the Notice of Opposition.
- 17.

Respectfully submitted,

KENYON & KENYON LLP

Dated: January 4, 2007

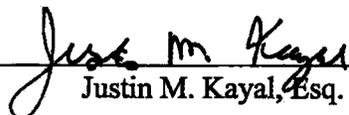
By: 
Howard J. Shire
Justin M. Kayal
One Broadway
New York, New York 10004
(212) 425-7200

Attorneys for Opposer
Gakic US Trademark Ltd.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT was served by first class mail, postage prepaid, on this 4, day of January 2007 to:

David L. Sigalow, Esq.
Allen, Dyer, Doppelt, Milbrath & Gil
255 S. Orange Avenue
Suite 1401
Orlando, FL 32801-3460
Phone Number: 407-841-2330
Fax Number: 407-841-2343


Justin M. Kayal, Esq.

TAB 3

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

-----X	:	
GAKIC US TRADEMARK LTD.,	:	
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Opposer,	:	Opposition No. 91/171,901
	:	
v.	:	
	:	
ADVANCED NUTRITIONAL	:	
BIOSYSTEMS, INC.	:	
	:	
Applicant	:	
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**OPPOSER’S NOTICE OF 30(b)(6) DEPOSITION OF
APPLICANT ADVANCED NUTRITIONAL BIOSYSTEMS, INC.**

PLEASE TAKE NOTICE THAT, pursuant to the provisions of Rule 30(b)(6) of the Federal Rules of Civil Procedure, Opposer Gakic US Trademark Ltd., (“Opposer”) will take the deposition of Applicant Advanced Nutritional Biosystems, Inc., (“Applicant”) at 9:00 am at the offices of Kenyon & Kenyon LLP, One Broadway, New York, New York 10004 on February 5, 2007, or at such other time and location as is agreed to by the parties, and continuing thereafter until completed, before a notary public or other officer duly authorized to administer oaths. All depositions will be transcribed stenographically and/or recorded on videotape, and will continue from day to day until completed, or will be continued, at the election of Opposer, to such other dates as may be mutually agreed upon by the parties.

In accordance with Rule 30(b)(6) of the Federal Rules of Civil Procedure, Applicant is hereby notified of its obligation to designate one or more officers, directors, or managing agents,

or other persons who consent to testify on its behalf with respect to the matters and topics set forth below in the attached Schedule A. The person(s) so designated shall be required to testify as to each of those matters known or reasonably available to Applicant.

You are invited to attend and cross-examine.

Respectfully submitted,

KENYON & KENYON LLP

Dated: January 29, 2007

By: Howard J. Shire
Howard J. Shire
Justin M. Kayal
One Broadway
New York, New York 10004
(212) 425-7200

Attorneys for Opposer
GAKIC US Trademark Ltd.

SCHEDULE A

1. The corporate structure of Applicant, including the identity of Applicant's officers, directors and employees.
2. United States Trademark Application Serial No. 78/728,625 for the mark G-KICK.
3. Applicant's conception, creation and adoption of G-KICK.
4. Applicant's use, whether present, past or intended, of G-KICK, including, without limitation, use on product packaging, marketing materials, letterhead, corporate signage, invoices, labels, and tags.
5. Applicant's products which make use of G-KICK, including, without limitation, the formulation, manufacture, sales, marketing, and distribution of such products.
6. Applicant's products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium, including, without limitation, the formulation, manufacture, sales, marketing, and distribution of such products.
7. Applicant's sales of products which make use of G-KICK.
8. The distribution of Applicant's G-KICK products.
9. The customers to whom Applicant markets or intends to market its G-KICK products.
10. The intended, understood or anticipated customer use of Applicant's G-KICK products.
11. The intended, understood or anticipated customer use of Applicant's products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.

12. Use of G-KICK by any third party in any manner.
13. Use of GAKIC by any third party in any manner.
14. Any third party products which contain L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
15. The brand names of any third party products which contain L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
16. The advertising and promotion of any third party products which contain L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
17. The advertising, promotion and marketing of Applicant's products which make use of G-KICK.
18. The advertising, promotion and marketing of Applicant's products which contain glycine and L-arginine monohydrochloride salt of alphaketoiso-caproic acid calcium.
19. Instances of actual confusion between Applicant's G-KICK products and the products of any other party.
20. The entire basis for Applicant's claim that GAKIC is generic.
21. The entire basis for Applicant's claim that GAKIC is descriptive.
22. The factual basis for the allegations set forth in paragraphs 13-16 of Applicant's Answer to the Notice of Opposition.

EXHIBIT B

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

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GAKIC US TRADEMARK LTD.,	:	
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Opposer,	:	Opposition No. 91/171,901
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v.	:	
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ADVANCED NUTRITIONAL	:	
BIOSYSTEMS, INC.,	:	
	:	
Applicant	:	
	:	
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**DECLARATION OF JUSTIN M. KAYAL IN SUPPORT OF OPPOSER’S
MOTION PURSUANT TO FED.R.CIV.P. 56(F)**

I, Justin M. Kayal, hereby declare:

1. I make this Declaration in support of Opposer’s Motion Pursuant to FED.R.CIV.P. 56(f). I am an associate at the firm of Kenyon & Kenyon LLP, counsel of record to Opposer, Gakic US Trademark Ltd. (“Gakic”), in this matter. I make this Declaration on personal knowledge pursuant to FED.R.CIV.P. 56(f) in conjunction with 28 U.S.C. § 1746.

2. On January 4, 2007, Opposer served Opposer’s First Request for Production of Documents to Applicant and Opposer’s First Set of Interrogatories to Applicant on Applicant. On January 29, 2007, Opposer served Opposer’s Notice of 30(b)(6) Deposition of Applicant on Applicant (collectively, “Opposer’s Discovery Requests”). Opposer’s 30(b)(6) Deposition was scheduled for February 5, 2007.

3. Pursuant to the Board's Order of July 18, 2006, the discovery period in the captioned matter was set to close Saturday, February 3, 2007. Pursuant to FED.R.CIV.P. 6(a), therefore, the close of the discovery period was Monday, February 5, 2007.

4. On or about January 29, 2007, I received a telephone call from Meaghan P. Hemmings of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., counsel to Applicant. In that conversation, Ms. Hemmings requested Opposer's consent to extend the discovery deadlines by 30 days. At no point during the conversation did Ms. Hemmings offer any explanation as to why Applicant failed to serve its own discovery requests during the five months discovery had been open, or needed additional time to respond to Opposer's Discovery Requests. I explained that I would check with my client regarding the request.

5. As of January 29, 2007, Applicant had not served any discovery requests on Opposer and had not responded to Opposer's Discovery Requests. This remains the case as of the date of this Declaration.

6. On or about January 31, 2007, I called Ms. Hemmings and explained that Opposer was willing to grant a 30-day extension for Applicant to respond to Opposer's Discovery Requests, as well as to extend the testimony and rebuttal periods by 30 days. I also explained that Opposer was willing to reschedule its 30(b)(6) Deposition to a mutually convenient date. I explained, however, that Opposer was not willing to grant any additional time for Applicant to serve discovery requests. Ms. Hemmings explained that she would relay the offer to her client.

7. On or about February 1, 2007, I called Ms. Hemmings and inquired as to whether the parties would be filing a Motion on Consent to extend the discovery deadlines as set out in paragraph 6 herein.

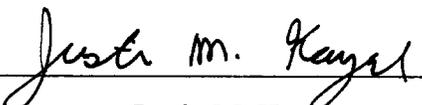
8. In the course of the February 1 conversation, Ms. Hemmings explained that the Applicant was disappointed in Opposer's unwillingness to grant Applicant additional time to serve discovery requests.

9. Ms. Hemmings further explained that, in lieu of filing a motion with the consent of Opposer, or a motion for good cause on its own, Applicant would simply file a dispositive motion of some kind thereby suspending all discovery deadlines.

10. By an Order of February 6, 2007, and as a result of Applicant's filing its Motion for Summary Judgment, the Board suspended the captioned proceedings.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 7th day of March, 2007


Justin M. Kayal