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

Proceeding	91171901
Party	Defendant Advanced Nutritional Biosystems, Inc. Advanced Nutritional Biosystems, Inc. Suite 401 8034 Sunport Drive Orlando, FL 32809 dsigalow@addmg.com
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Gakic US Trademark Ltd.,

Opposer,

vs.

Advanced Nutritional Biosystems, Inc.,

Applicant.

_____/

Opposition No: 91171901
Application No. 78/728625
Mark: **G-KICK**

APPLICANT'S RESPONSE TO OPPOSER'S MOTION PURSUANT TO FED.R.CIV.P. 56(F)

Applicant, ADVANCED NUTRITIONAL BIOSYSTEMS, INC., by and through its undersigned attorneys hereby responds in opposition to Opposer, GAKIC US TRADEMARK LTD's, Motion Pursuant to Fed.R.Civ.P. 56(f). In support of this response, Applicant would show the Board the following:

INTRODUCTION

Opposer's motion requests a continuance to conduct discovery, and summarily requests that the Board dismiss Applicant's Motion for Summary Judgment and to compel discovery. Applicant filed its Motion for Summary Judgment to save the Board's and the parties' time and resources. Opposer's implication otherwise is disingenuous. This proceeding involves the simple matter of comparing two marks based on their appearance, sound, use, meaning and commercial impression to determine whether there would be a likelihood of confusion. Applicant already acknowledged that the goods and services upon which the respective marks are used are similar and that the goods are distributed in similar trade channels. These factors have been conceded and

there is no reason to waste the parties' and the Board's time proving up and considering any issues other than the similarity of the respective marks.

LEGAL STANDARD FOR A CONTINUANCE

A party may seek leave to conduct discovery if it demonstrates "a need for discovery that is reasonably directed to obtaining facts essential to its opposition to the motion." TBMP § 528.06. The discovery must be "limited to that which the nonmoving party must have in order to oppose the motion for summary judgment." *Id.*; T. Jeffrey Quinn, *TIPS FROM THE TTAB: Discovery Safeguards in Motions for Summary Judgmnet: No Fishing Allowed*, 80 Trademark Rep. 413 (1990).

THE DISCOVERY SOUGHT BY THE OPPOSER IS NOT REQUIRED TO RESPOND TO THE MOTION FOR SUMMARY JUDGMENT

Opposer claims that it needs to conduct various discovery before it can respond to the Applicant's Motion for Summary Judgment. This is not the case. Opposer has sufficient information to respond to the Motion for Summary Judgment and the Board has sufficient information to rule thereon. Opposer argues there are several "material facts" on which it requires discovery. Each of those alleged material facts are refuted below.

1. **The identity of goods**

Opposer seeks to know the identity of the goods upon which Applicant's mark will be used. Applicant's application provides a description of the goods and services, as required.

2. **The channels of trade**

Opposer claims that it needs to how close the channels of trade for the respective goods actually are. Applicant has already acknowledged that the goods and

services upon which the respective marks are used are the same and that the goods are distributed in similar trade channels. This factor is conceded and there is no reason to waste the parties' and the Board's time proving up and considering this issue.

3. Customers to be targeted

Opposer argues that it needs to know the customers to be targeted so that it can determine whether there is overlap. Again, Applicant has already acknowledged that the channels and customers are the same. This issue was not raised in Applicant's Motion for Summary Judgment and Opposer does not need to respond thereto.

4. Sales and pricing of the product

Opposer argues that it needs this information to evaluate market penetration, geographic scope and consumer sophistication. First, the price of Applicant's product is listed on Applicant's website, (www.scitecnutrition.com), and is therefore readily available. Second, this issue is not raised in Applicant's Motion for Summary Judgment and Opposer does not need to respond thereto.

5. Product packaging

Opposer claims that it needs this information to evaluate the similarity of sound, meaning, appearance and commercial impression. Again, this information is readily available by looking at the mark as applied for and the information freely available on Applicant's website. Therefore, this determination can easily be made with the information that is already available, or which can be placed into evidence before the Board by the Opposer.

6. Applicant's intention

Opposer claims that it needs to know Applicant's intention in choosing its mark. This however, is not relevant to the likelihood of confusion analysis that is required within Applicant's Motion for Summary Judgment.

7. Instances of actual confusion

Applicant is unaware of any instances of actual confusion. If Opposer is so aware, it can bring forth its own evidence; discovery on this point is therefore unnecessary.

8. Product quality

As with the issue of Applicant's intent, this alleged fact is not relevant to the likelihood of confusion analysis that the Motion for Summary Judgment requests the Board conduct; any discovery on this issue is therefore unnecessary.

CONCLUSION

The issues before the Trademark Trial and Appeal Board in this opposition are particularly well-suited for a summary judgment in favor of the Applicant. The Board can certainly conduct the likelihood analysis with the evidence before it. The Opposer does not need to conduct further discovery; it can easily respond to the simple allegations of Applicant's Motion for Summary Judgment. Indeed, further discovery and "litigation in this case not only would put the parties to unnecessary expense, but also, equally importantly, would be a waste of judicial resources." *Pure Gold, Inc.*, 739 F.2d at 627.

Therefore, the Applicant respectfully requests that the Board deny Opposer's motion for a continuance, and order the Opposer to respond to the Motion for Summary

Judgment. Opposer has had sufficient time to review the simple issues comprising the comparison of the respective marks and to prepare an appropriate response to the Motion for Summary Judgment.

Dated: March 27, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of March, 2006, a true and correct copy of the foregoing **RESPONSE TO OPPOSER'S MOTION PURSUANT TO FED.R.CIV.P. 56(F)** was served on the Opposer by first class mail, postage prepaid, in an envelope addressed as follows:

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