

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: April 21, 2008

Opposition No. 91171901

Gakic US Trademark Ltd.

v.

Advanced Nutritional
Biosystems, Inc.

Before Hohein, Rogers, and Cataldo,
Administrative Trademark Judges.

By the Board:

Advanced Nutritional Biosystems, Inc. ("applicant") seeks to register the mark G-KICK in standard character format for "vitamins and nutritional supplements" in International Class 5.¹

Gakic US Trademark Ltd. ("opposer") has filed a notice of opposition to registration of applicant's G-KICK mark. As grounds for opposition, opposer alleges that applicant's

¹Application Serial No. 78728625, filed on October 7, 2005, based on an allegation of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

mark, when used on the identified goods, so resembles opposer's previously used and registered mark GAKIC for "dietic substances, namely, dietary and nutritional supplements enhancing muscle performance and recovery from fatigue in humans and animals; oral and intravenous dietary and nutritional supplements, namely, pills and liquid substances" ² as to be likely to cause confusion, mistake or to deceive.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

On February 1, 2007, applicant filed a motion for summary judgment with respect to opposer's claim of likelihood of confusion. In response, opposer filed a motion on March 7, 2007 under Fed. R. Civ. P. 56(f) for continued discovery, asserting that without additional information it cannot adequately respond to applicant's motion for summary judgment. Applicant filed a timely response to opposer's Rule 56(f) motion.

Turning first to applicant's motion for summary judgment, applicant argues that the mark in opposer's pleaded registration, GAKIC, and applicant's proposed G-KICK mark are so dissimilar in sound and appearance that

²Registration No. 3006154, issued October 11, 2005, claiming first use and first use in commerce since August 12, 2005.

confusion as to source is unlikely.³ In addition, applicant contends that opposer uses its pleaded mark in conjunction with its brand name MUSCLETECH and applicant uses its G-KICK mark in conjunction with its brand name SCITECH NUTRITION. Thus, applicant concludes that when the marks are viewed side by side the commercial impressions of the marks are so different that it would be unlikely for consumers to be confused as to the source of the parties' products. Furthermore, applicant argues the KICK/KIC suffix employed by both opposer and applicant in their respective marks is weak in light of the existence of third-party uses of the KICK/KIC suffix in marks for goods similar to those offered by both opposer and applicant. In view thereof, applicant argues that opposer's mark should be afforded a limited scope of protection. Finally, applicant contends that since opposer has not claimed any actual confusion between the parties' respective marks and applicant is unaware of any actual confusion, confusion as to source is unlikely.

A motion for summary judgment is a pretrial device, intended to save the time and expense of a full trial when a

³The Board notes that, solely for purposes of its motion for summary judgment, applicant has acknowledged that the parties' respective goods are similar and travel in similar channels of trade. See p. 5 of applicant's motion for summary judgment. Additionally, the Board notes that applicant does not contest opposer's priority.

party is able to demonstrate that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); TBMP § 528.01 (2d ed. rev. 2004). To prevail on its motion, applicant must establish that there is no genuine issue of material fact in dispute, thus leaving the case to be resolved as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The Board may not resolve issues of material fact, but can only ascertain whether genuine disputes exist regarding such issues. The Board views the evidence in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA, supra*.

Although opposer has filed a Rule 56(f) motion, and not a substantive response to applicant's motion for summary judgment, the Board's inquiry is not circumscribed thereby. After a careful review of the record, we find that applicant's evidence does not demonstrate that the parties' respective marks are so dissimilar in sound and appearance, as well as in commercial impression, such that confusion as

to source is not likely. Accordingly, applicant has failed to carry its burden of establishing that no genuine issues of material fact exist as to applicant's argument that the parties' respective marks are so dissimilar that confusion is unlikely as a matter of law. Rather, genuine issues of material fact do exist, at a minimum, as to the similarities/dissimilarities between the parties' marks.

Accordingly, applicant's motion for summary judgment is denied.⁴ Opposer's motion for Rule 56(f) continued discovery is consequently deemed moot and will not be given further consideration.

Proceedings herein are resumed.

The parties are allowed until THIRTY DAYS from the mailing date of this order to serve responses to any outstanding discovery requests.

Discovery and trial dates are reset as follows:

DISCOVERY TO CLOSE:	5/30/08
Thirty-day testimony period for party in position of plaintiff to close:	8/28/08

⁴The parties should note that the evidence submitted in connection with a motion for summary judgment or opposition thereto is of record only for purposes of consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983). Additionally, the issues for trial are not limited to those identified by the Board in explaining the denial of this motion for summary judgment.

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Thirty-day testimony period for party in
position of defendant to close: **10/27/08**

Fifteen-day rebuttal testimony
period to close: **12/11/08**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NEWS FROM THE TTAB:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:
<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31,

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2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>