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

Proceeding	91174198
Party	Defendant Implant Innovations, Inc. Implant Innovations, Inc. 4555 Riverside Drive Palm Beach Gardens, FL 33410 ptomailchicago@jenkens.com
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DEBBIE, LLC and BICON, LLC,	§	
	§	
Opposers,	§	
	§	
v.	§	Opposition No. 91174198
	§	
IMPLANT INNOVATIONS, INC.,	§	
	§	
Applicant.	§	

APPLICANT'S REPLY TO OPPOSERS' OPPOSITION TO APPLICANT'S MOTION TO SUSPEND

Debbie, LLC and Bicon, LLC ("Opposers") have opposed Implant Innovations, Inc.'s ("Applicant") application to register the mark NANOTITE based on Opposers' claim of priority in the identical mark for the same types of goods (dental implants). Priority also is the central issue in the civil action between these same parties now proceeding in the United States District Court for the Southern District of Florida ("the Civil Action").[1] The federal district court's decision of this common issue will be binding on the Board. TBMP § 510.02(a); *Toro Co. v. Hardigg Indus., Inc.*, 187 U.S.P.Q. 689, 692 (TTAB 1975), *rev'd on other grounds*, 549 F.2d 785 (C.C.P.A. 1977); *Tokaido v. Honda Assocs. Inc.*, 179 U.S.P.Q. 861, 862 (TTAB 1973). Each party, furthermore, seeks in the Civil Action a permanent injunction banning the other from using the NANOTITE mark. Any such order entered by the district court would essentially determine the result of this Opposition. Applicant therefore asks the Board to deny Opposers' objections to Applicant's suspension request and suspend this proceeding until the Civil Action terminates.

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[1] *Implant Innovations, Inc. v. Debbie, LLC, Bicon, LLC, Bicon, Inc., and Bicon International, Inc.*, Civil Action No. 06-80913-Civ-Hurley/Hopkins (S.D. Fla.).

1. The District Court's Decision Will Determine the Outcome of the Opposition

In opposing Applicant's motion, Opposers apparently seek simultaneous, parallel adversary proceedings before the Board and the district court on the same issue: which of the parties has priority to the NANOTITE mark. After filing its motion to suspend this opposition proceeding, Applicant received permission from the district court to amend its complaint to specifically ask the court to determine Applicant's right to register the NANOTITE mark and to issue an order decreeing that the Notice of Opposition be rejected. *See* Amended Complaint ¶¶ 57-60 and p. 15 ¶ j. (Copies of the Amended Complaint and Defendants' Answer and Counterclaims are attached as Exhibits 1 and 2, respectively.)

Opposers cannot dispute that the priority issue in the Civil Action and this proceeding are identical. The Board will suspend a proceeding when "the final resolution of the civil action may be dispositive of the issues involved in [the] proceeding." *Toro*, 187 USPQ at 692; *see also General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 USPQ2d 1933, 1937 (TTAB 1992) (suspending cancellation proceeding when "[a] decision by the district court will be dispositive of the issues before the Board"); *Martin Beverage Co. v. Colita Beverage Corp.*, 169 USPQ 568, 570 (TTAB 1971) (explaining that suspension is granted after the Board "has carefully reviewed the pleadings in the civil suit to determine if the outcome thereof will have a bearing on the question of the rights of the parties in the Patent Office proceeding").

The outcome of this opposition will be determined by the district court's decision on the priority issue in the Civil Action, which the court must independently determine in any event. *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 853-54 (2d Cir. 1988) (court should not delay declaratory judgment action to await PTO ruling on application because it must independently determine the validity and priority of marks and likelihood of consumer

confusion). This proceeding should not proceed on a parallel track while the same question of priority is being decided by the district court in the Civil Action.

2. The PTO Has Already Determined the Mark's Registerability

Opposers argue that suspending this proceeding while the Civil Action proceeds will deprive the court of the benefit of the Board's expertise. Opposers ignore the fact that the question of the registerability of the NANOTITE mark has already been decided in Applicant's favor. The application to register the NANOTITE mark has been examined and approved by the Patent and Trademark Office ("PTO"). Thus, the PTO already has given the application the benefit of its expertise and determined that the mark is registerable. Questions of trademark priority, furthermore, are within the conventional competence of the courts and routinely considered by them. *American Bakeries Co. v. Pan-O-Gold Baking Co.*, 650 F. Supp. 563, 567 (D. Minn. 1986); *see also E. & J. Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 468 (E.D. Cal. 1994) (noting that federal district courts regularly adjudicate trademark matters).

3. The District Court Has Jurisdiction to Determine the Right to Registration

Opposers also contend that the district court lacks jurisdiction in the Civil Action because it does not involve a registered mark. Opposers are wrong. In the Civil Action, Applicant has asserted its rights in a number of registered marks which, in addition to NANOTITE, comprise a family of marks sharing the suffix "TITE." Those marks include OSSEOTITE (Reg. No. 1,779,584); OSSEOTITE XP (Reg. No. 2,579,395); OSSEOTITE NT (Reg. No. 2,838,519); TG OSSEOTITE (Reg. No. 2,306,137); GOLD-TITE (Reg. No. 3,053,906); and PREP-TITE (Reg. No. 3,126,311).

Furthermore, it is well-established that, in disputes such as this one, federal district courts appropriately exercise their jurisdiction to order the registration of marks when doing so will not

contravene the statutory rights of third parties. The Commissioner explored this issue in detail in *In re Fortex Indus. Inc.*, 18 USPQ2d 1224 (Comm'r Pat. & Trademarks 1990). After reviewing several cases in which courts have determined the right to registration, the Commissioner concluded that district courts have exercised jurisdiction to order registration of marks when not contravening the statutory rights of third parties to oppose registration. *Id.* at 1227. In this dispute, no entity other than these Opposers opposed the application, and the only disputed issue between the parties is priority.

Federal courts agree that, even under circumstances where they lack statutory authority to determine ultimate registerability of a mark, they have jurisdiction to "determine the controlling issue of priority." *Johnny Blastoff Inc. v. Los Angeles Rams Football Co.*, 48 USPQ2d 1385, 1394 (W.D. Wis. 1998), *aff'd*, 188 F.3d 427 (7th Cir. 1999). The district court has jurisdiction to resolve the dispute between these parties by deciding the "controlling issue of priority" and the right to registration as between Applicant and Opposers.

4. <u>Duplicative Proceedings Would Waste the Board's Resources</u>

Finally, suspending this opposition proceeding while the Civil Action continues to progress will appropriately conserve the Board's efforts and promote the interests of judicial economy. In the Civil Action, the parties already have conducted extensive expedited discovery and briefing and participated in a preliminary injunction hearing. Those efforts will be duplicated unless this proceeding is suspended. This proceeding, in contrast, has only just begun; the sole substantive filing to date is the Notice of Opposition. Staying this proceeding while the Civil Action takes its course will appropriately conserve the resources of the Board and of the parties. *See Other Telephone Co. v. Conn. Nat'l Telephone Co.*, 181 USPQ 125, 126 (TTAB

1974) (noting that "a favorable ruling by the Board on the motion to suspend would obviate the expenditure of time and money required in the taking of testimony").

CONCLUSION

This opposition proceeding should be suspended until termination of the Civil Action pursuant to 37 C.F.R. § 2.117(a) and TBMP § 510.

Respectfully Submitted,

Date: Feburary 13, 2007

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by first class mail upon the following on this 13th day of February, 2007:

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

IMPLANT INNOVATIONS, INC.,

Plaintiff,

v.

Case No. 06-80913-Civ-Hurley/Hopkins

DEBBIE, LLC, a Massachusetts Limited Liability Company; BICON, LLC, a Massachusetts Limited Liability Company; BICON, INC., a Massachusetts Domestic For Profit Corporation; and BICON INTERNATIONAL, INC., a Delaware Corporation,

JURY TRIAL DEMANDED

Defendants.
_____/

AMENDED COMPLAINT

Plaintiff Implant Innovations, Inc. ("*3i*") sues Debbie, LLC, Bicon, LLC, Bicon, Inc., and Bicon International, Inc. (collectively "Defendants") and states as follows:

The Parties

1. *3i* is a corporation organized and existing under the laws of the state of Florida, with its principal place of business at 4555 Riverside Drive, Palm Beach Gardens, Florida 33410.

2. Upon information and belief, Bicon, LLC is a limited liability company organized and existing under the laws of the State of Massachusetts, with its principal place of business at 501 Arborway, Boston, Massachusetts 02130.

3. Upon information and belief, Bicon, Inc. is a domestic for profit corporation existing under the laws of the State of Massachusetts, with its principal place of business at 501 Arborway, Boston, Massachusetts 02130.

4. Upon information and belief, Bicon International, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 501

Arborway, Boston, Massachusetts 02130. Bicon, LLC, Bicon, Inc., and Bicon International, Inc. will be referred to herein as "Bicon."

5. Upon information and belief, Debbie, LLC is a limited liability company organized and existing under the laws of the State of Massachusetts, with its principal place of business at 501 Arborway, Boston, Massachusetts 02130. Upon further information and belief, Debbie, LLC owns intellectual property rights that are licensed to Bicon.

Nature of Action

6. This is an action for false designation of origin and unfair competition and infringement of federally registered marks under the Lanham Act (15 U.S.C. §§ 1051, 1114 et seq.), and related causes of action under the laws of the State of Florida arising from the Defendants' misappropriation and use of the mark NANOTITE ("the Infringing Mark") in violation of *3i*'s rights in its famous "TITE" family of federally registered and/or common law trademarks including "OSSEOTITE," "OSSEOTITE XP," "OSSEOTITE NT," "TG OSSEOTITE," "GOLD-TITE," "PREP-TITE," and "NANOTITE."

Jurisdiction

7. This Court has jurisdiction over the subject matter and the parties under 15 U.S.C. §§ 1121, 1125(a) (actions arising under the Lanham Act), 28 U.S.C. § 1338(a) (act of Congress relating to trademarks), and 28 U.S.C. § 1332(a) (diversity of citizenship). The matter in controversy exceeds $75,000. This Court also has pendent jurisdiction pursuant to 28 U.S.C. § 1338(b).

Venue

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and/or (c).

***3i*'s Business And Use Of Its Famous OSSEOTITE Mark**

9. Since 1987, *3i* has been in the business of developing, manufacturing, and selling dental implants. *3i* offers one of implant dentistry's most comprehensive lines of implants and

abutments, augmented by a growing line of regenerative products. Tens of thousands of dental practitioners and patients worldwide have used *3i* dental products.

10. *3i* has long been recognized by members of the dental implant industry and by dental practitioners and patients throughout the world as an innovator and leader in the dental implant industry. *3i* has developed a significant amount of goodwill in connection with the dental products and services it offers.

11. *3i* first began to use the "OSSEOTITE" trademark ("the OSSEOTITE Mark") in the early 1990s and has continued and expanded upon that use up to the present time. *3i* owns a federal trademark registration for the OSSEOTITE Mark (U.S. Registration No. 1,779,584) for dental implants dating back to 1993; thus the OSSEOTITE Mark is incontestable. A true and correct copy of this registration is attached hereto as Exhibit A.

12. *3i* uses the OSSEOTITE Mark worldwide in connection with dental implants and owns trademark registrations for OSSEOTITE for dental implants in numerous countries throughout the world.

13. The dental implants used under the OSSEOTITE Mark revolutionized the dental implant industry. The groundbreaking surface technology of the OSSEOTITE products has proven to have an unprecedented capability of promoting implant-to-bone integration and reducing healing times.

14. *3i* has achieved worldwide acclaim for the dental implants and dental implant related products associated with the OSSEOTITE Mark. Since long prior to the acts complained of herein, dental professionals and patients throughout the world have recognized OSSEOTITE as a mark exclusively identifying *3i* and as a mark designating dental implant products of the highest quality originating exclusively from *3i*.

15. Throughout the years since OSSEOTITE's inception, hundreds of thousands of product packaging materials, labels, and the like bearing the OSSEOTITE Mark have been in circulation in association with dental implants of the highest quality. *3i* also extensively advertises and promotes the products associated with the OSSEOTITE Mark. As a result, the

OSSEOTITE Mark has come to be recognized by members of the dental implant industry throughout the United States and the world as exclusively identifying *3i*'s goods of the highest quality and originating exclusively from *3i*. Thus, at least partly through its OSSEOTITE Mark, *3i* has developed a significant amount of goodwill and a reputation for developing, manufacturing, and selling superior quality dental products.

<u>*3i*'s Expansion Of The "TITE" Family of Marks</u>

16. *3i* has expanded upon the fame and recognition of the OSSEOTITE Mark by actively adopting other marks having a "TITE" suffix ("the 'TITE' Family of Marks") in connection with dental implants and related dental products. The additional members of the "TITE" Family of Marks benefit from the extensive goodwill built up by *3i* in the OSSEOTITE Mark and, indeed, have built up extensive goodwill in their own right. *3i*'s additional members of the "TITE" Family of Marks include OSSEOTITE XP (U.S. Registration No. 2,579,395), OSSEOTITE NT (U.S. Registration No. 2,838,519), TG OSSEOTITE (U.S. Registration No. 2,306,137), GOLD-TITE (U.S. Registration No. 3,053,906), and PREP-TITE (U.S. Registration No. 3,126,311), all of which are related to dental implants and dental implant related products. A true and correct copy of each registration is attached hereto as Exhibit B. Additionally, members of the "TITE" Family of Marks have been used worldwide and all have corresponding foreign registrations.

17. Throughout the years since the inception of the "TITE" Family of Marks, hundreds of thousands of product packaging materials, labels, and the like bearing the "TITE" Family of Marks have been manufactured and used in association with dental implants and dental implant related products of the highest quality. *3i* also extensively advertises and promotes the products associated with the "TITE" Family of Marks. As a result, *3i*'s "TITE" Family of Marks has come to be recognized by members of the dental implant industry throughout the United States and the world as exclusively identifying *3i*'s goods of the highest quality originating exclusively from *3i*. Thus, at least partly through its "TITE" Family of

Marks, ***3i*** has developed a significant amount of goodwill and a reputation for developing, manufacturing, and selling superior quality dental products.

18. Moreover, as a result of the above, members of the dental implant industry have come to recognize any trademark ending with "TITE" when used in the dental implant industry as an extension of ***3i***'s famous OSSEOTITE Mark and other members of ***3i***'s "TITE" Family of Marks as designating goods and services of the highest quality originating exclusively from ***3i***.

19. As a result of the longstanding use, substantial sales, significant advertising, and promotional efforts by ***3i***, the members of the "TITE" Family of Marks has become, through widespread and favorable public acceptance and recognition, distinctive and assets of substantial value as symbols of goodwill and origin to ***3i***. The maintenance of high standards of quality and excellence for ***3i***'s goods and services has contributed to this valuable goodwill and reputation.

20. The goodwill embodied in the "TITE" Family of Marks and, consequently, ***3i***'s valuable reputation and credibility in the marketplace, depends on the integrity of the "TITE" Family of Marks as an identification exclusively of ***3i*** and not of any other source.

<u>*3i*'s Adoption, Use, and Trademark Application For The Mark "NANOTITE"</u>

21. ***3i*** has dedicated years of research to further enhancing the surface topography of dental implants. As a result of this research, ***3i*** has discovered another innovation for increasing implant-to-bone integration that involves depositing small particles on the implant surface.

22. As a further extension of ***3i***'s "TITE" Family of Marks, ***3i*** selected "NANOTITE" ("the NANOTITE Mark") to be used with dental implants, dental implant abutments and related parts and fittings having small particles deposited on their surface. In early May 2006, ***3i***, through an outside trademark searcher, conducted a search for any third-party uses of the term NANOTITE. The search indicated that NANOTITE was not being used in commerce by anyone, including the Defendants, leading ***3i*** to believe that no entity was using the NANOTITE Mark in the relevant market.

23. To secure its trademark rights in the NANOTITE Mark, *3i* filed an Intent-To-Use federal trademark application (U.S. Federal Trademark Application Serial No. 78/876,594) for the NANOTITE Mark on May 4, 2006. A true and correct copy of this application is attached hereto as Exhibit C.

24. *3i*'s application to register the NANOTITE Mark was approved by the United States Patent and Trademark Office ("USPTO") and published for opposition on November 28, 2006. Defendants Debbie, LLC and Bicon, LLC filed a Notice of Opposition against that application, Opposition No. 91174198. A true and correct copy of Defendants' Notice of Opposition is attached hereto as Exhibit D. Both the application and opposition are pending at the USPTO.

25. On or before May 24, 2006, *3i* also filed trademark applications for the NANOTITE Mark in foreign countries including Australia, European Community, Japan, Mexico, and South Korea.

26. *3i* has also begun to use the NANOTITE Mark associated with dental implants having this new and improved surface technology. The full commercial launch for this line of products is set for January 2007.

27. In anticipation of this full commercial launch, *3i* has invested considerable amounts of time, money, and effort in advertising, promoting, and marketing its dental products under the NANOTITE Mark throughout the United States and the world and in establishing the NANOTITE Mark in the minds of consumers as yet another high-quality *3i* dental implant product line. For example, the NANOTITE Mark is displayed on *3i*'s website and is being used on products associated with the NANOTITE Mark as part of a pre-commercial release. For months, the NANOTITE Mark has also been used by *3i* on printed company newsletters, educational catalogs, booth graphics, mentor product training, sales training efforts, presentations given by clinical champions, limited marketing release invitations, and trade show educational forums throughout the world. Furthermore, during an Earnings Conference Call on June 28, 2006, the Chief Executive Officer of Biomet (*3i*'s parent company), Dan Hann, referred to

"NANOTITE" as a "breakthrough surface technology incorporat[ing] a discrete crystalline deposition of nanoscale calcium phosphate, which is applied to our existing OSSEOTITE Surface substructure."

Defendants' Misappropriation of *3i*'s NANOTITE Mark

28. Bicon is *3i*'s direct competitor in the dental implant industry. Bicon advertises and sells its goods and services in areas and markets in which *3i* advertises and sells its goods and services. Additionally, the interactive website www.bicon.com, which is accessible to consumers in the State of Florida, is one of the means by which Bicon's products are offered for sale and sold. This interactive website, www.bicon.com, includes numerous references to the Infringing Mark and the associated Bicon product.

29. Defendants' use of the Infringing Mark to promote Bicon's products was and is without *3i*'s consent.

30. On information and belief, Bicon is advertising, offering for sale, selling, and/or promoting dental implant products under the NANOTITE Mark to the same or similar class of purchasers to whom *3i* offers and sells its dental implant products and through the same or similar channels of trade that *3i* uses in advertising, offering for sale, selling, and/or promoting its products and services to the relevant public.

31. Upon information and belief, Defendants did not use the word "NANOTITE" on printed advertising prior to May 4, 2006.

32. Upon information and belief, the word "NANOTITE" was not used on Bicon's www.bicon.com website prior to May 4, 2006.

33. Upon information and belief, the word NANOTITE was not used in Bicon's "Product Catalog 2006" that is available for download on the www.bicon.com website.

34. Upon information and belief, Bicon filed a Section 510(k) approval for a new implant product with the Food and Drug Administration (FDA). In its FDA application, Bicon

used the trademark "Biconite" for this new implant product. In November 2004, the FDA approved of the sale of Bicon's new "Biconite" product.

35. Upon information and belief, the Defendants chose to discard the mark "Biconite" in 2006. Of the innumerable marks that Defendants could have selected, Defendants selected "NANOTITE," at least in part to capitalize on the goodwill associated with *3i*'s "TITE" Family of Marks.

36. Debbie, LLC filed U.S. Federal Trademark Application Serial No. 76/665,445 for NANOTITE ("the Infringing Mark") on August 31, 2006 for "dental implants, abutments for dental implants." In the application, Debbie, LLC alleged that Bicon's first use in commerce date is May 2, 2006, which is two days prior to *3i*'s May 4, 2006 filing date for the NANOTITE Mark.

37. Upon information and belief, Debbie, LLC owns intellectual property rights that are licensed to Bicon.

38. The www.bicon.com website displays press releases for new products associated with Bicon. For example, the "Bicon Bulletin" link on the website shows several press releases for products including the Bicon 5.0 x. 6.0 mm Short Implant, SynthoGraft™, Brevis™ Overdenture System and the like. Surprisingly, however, no press release was posted in connection with Bicon's alleged early May 2006 commercial release of Bicon's implant product associated with NANOTITE.

39. The Bicon Bulletin dated February 2006 (on the www.bicon.com website), which precedes Bicon's alleged early May 2006 commercial release of the new Bicon product associated with NANOTITE, does not mention "NANOTITE" or a new Bicon implant product.

40. The Bicon Bulletin dated July 2006 (on the www.bicon.com website), which follows Bicon's alleged early May 2006 commercial release of the new Bicon implant product associated with NANOTITE, does not mention "NANOTITE" or a new Bicon implant product.

41. Prior to attending a trade show on September 18, 2006, *3i* and its hundreds of salespersons throughout the United States were completely unaware that Defendants had any

interest in the Infringing Mark. *3i*'s representative were, thus, surprised to find that Bicon's booth graphics and literature included the Infringing Mark at the trade show on September 18, 2006.

42. On September 19, 2006, the same search for third-party uses of the term NANOTITE previously performed for *3i* in early May 2006 (see Paragraph 22 above) was updated. The updated search revealed the use of the term "NANOTITE" on the www.bicon.com website.

43. Although Bicon's www.bicon.com website presently includes the term "NANOTITE," the website was updated to include the Infringing Mark after Defendants became aware of *3i*'s selection of the NANOTITE Mark for *3i*'s new product.

COUNT ONE
INFRINGEMENT OF FEDERALLY REGISTERED MARKS
UNDER 15 U.S.C. § 1114(1)

44. *3i* hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

45. As a result of the public acceptance of *3i*'s products associated with the "TITE" Family of Marks, Bicon's products are likely to be purchased by consumers in the belief that they are legitimate products offered by, connected with, or sponsored by, *3i*.

46. *3i* has no control over the quality of the products provided by Bicon. Because of the likely confusion as to the source of Defendants' Infringing Mark caused by Bicon's unauthorized use thereof, *3i*'s valuable goodwill in the "TITE" Family of Marks is being harmed.

47. By using the Infringing Mark in connection with their dental implant products, Defendants have misappropriated and are misappropriating the goodwill associated with the *3i* "TITE" Family of Marks, leaving such goodwill in the control of Defendants and making *3i* accountable for any acts perpetrated by Defendants which may disparage the goodwill that *3i* has developed in the "TITE" Family of Marks.

48. Purchasers are likely to request and/or purchase Bicon's products which are being advertised, offered for sale, sold, and/or promoted under the Infringing Mark believing that they are *3i*'s products, thereby resulting in a loss of sales to *3i*. Defendants have been and are likely being unjustly enriched by their unauthorized and illegal activities.

49. The above-described conduct of Defendants in advertising, offering for sale, selling, and/or promoting in interstate commerce unauthorized dental implant products under the Infringing Mark is likely to cause confusion, to cause mistake, or to deceive purchasers as to whether Bicon's products originate with, are sponsored by, are offered with the approval of, or offered under, *3i*'s supervision or control. Such unauthorized uses infringe *3i*'s exclusive rights in the "TITE" Family of Marks for dental implants or dental implant related products and constitute infringement of the "TITE" Family of Marks and their federal registrations under 15 U.S.C. § 1114(1).

50. Defendants' unauthorized use in commerce of the Infringing Mark has enabled and is likely to enable Defendants to earn substantial profits to which it is not in equity or good conscience entitled, and has unjustly enriched and is likely to unjustly enrich Defendants at *3i*'s expense, all to Defendants' profit and *3i*'s damage.

51. The goodwill and reputation of *3i*'s business under the "TITE" Family of Marks is of tremendous value. Defendants' aforesaid conduct has caused and will continue to cause substantial actual damages and irreparable injury to *3i*, *3i*'s trade reputation, and the goodwill associated with the *3i*'s "TITE" Family of Marks. *3i* has no adequate remedy at law and will continue to be irreparably injured unless and until the Court enjoins Defendants' conduct.

COUNT TWO
FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)

52. *3i* hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

53. *3i* has no control over the nature and quality of the line of products manufactured and sold by Bicon. Any failure, neglect or default by Bicon in providing such product will

reflect adversely on *3i* as the believed source of origin thereof, hampering efforts by *3i* to continue to protect its outstanding reputation for high quality, high precision products, resulting in loss of sales thereof and the considerable expenditures to promote its products under the NANOTITE Mark, all to the irreparable harm of *3i*.

54. The above-described conduct of Defendants in advertising, offering for sale, selling, and/or promoting in interstate commerce unauthorized dental implant products under the Infringing Mark is likely to cause confusion, to cause mistake, or to deceive purchasers as to whether Bicon's products originate with, are sponsored by, are offered with the approval of, or offered under, *3i*'s supervision or control. Such unauthorized uses of the Infringing Mark constitute a false designation of origin under 15 U.S.C. § 1125(a), which is likely to deceive customers and prospective customers into believing that Defendants' line of products is that of *3i* and, as a consequence, are likely to divert customers away from *3i*.

55. Defendants' unauthorized use in commerce of the Infringing Mark has enabled and is likely to enable Defendants to earn substantial profits to which it is not in equity or good conscience entitled and has unjustly enriched and is likely to unjustly enrich Defendants at *3i*'s expense, all to Defendants' profit and *3i*'s damage.

56. Defendants' false designation of origin will continue unless enjoined by this court.

COUNT THREE
<u>*3i*'S RIGHT TO REGISTRATION</u>

57. *3i* hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

58. This Court has the power, pursuant to 15 U.S.C. § 1119 and 28 U.S.C. § 2201, to determine parties' rights to registration of trademarks, and to certify decrees and orders relating thereto to the Director of the USPTO, who shall make appropriate entry upon the records of the USPTO and shall be controlled thereby.

59. In their Notice of Opposition filed against *3i*'s application to register the NANOTITE Mark, Defendants allege that they have priority over *3i*, and that the application should be refused under 15 U.S.C. § 1052(d).

60. On information and belief, Defendants made no bona fide use of NANOTITE as a mark in the ordinary course of trade prior to May 4, 2006, the filing date of *3i*'s application to register the NANOTITE Mark. Thus, *3i* has priority in the NANOTITE Mark over Defendants, *3i*'s application should not be refused under 15 U.S.C. § 1052(d), and Defendants' Notice of Opposition should be rejected.

COUNT FOUR
COMMON LAW TRADEMARK INFRINGEMENT

61. *3i* hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

62. In addition to the federal registrations owned by *3i* as set forth in paragraphs 11 and 16 hereof, *3i* owns and uses the NANOTITE trademark in various forms and styles in connection with the manufacture and sale of dental implants, dental implant abutments and parts and fittings therefor, which trademark has not, as yet, been registered in the United States Patent and Trademark Office.

63. *3i* owns and enjoys common law rights in Florida and throughout the United States in and to the trademark NANOTITE for the dental implants, dental implant abutments and related parts and fittings set forth above, which rights are superior to any right that Defendants may claim in and to said trademark in any form or style with respect to the manufacture and sale of such dental implants or dental implant related products.

64. The use of the trademark NANOTITE in connection with the manufacture and sale of Bicon's dental implants which, upon information and belief, now includes dental implants in the State of Florida and elsewhere throughout the United Sates, is likely to cause confusion as to the source of Bicon's products in that purchasers thereof will be likely to associate or have associated such products with and as originating with *3i*, all to the detriment of *3i*.

65. Defendants' infringement will continue unless enjoined by this Court.

COUNT FIVE
VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT (FDUTPA)

66. This count alleges unfair methods of competition and unfair and deceptive acts and practices in the conduct of Defendants' trade in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), FLA. STAT. § 501.201 et seq.

67. ***3i*** hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

68. The foregoing acts of Defendants constitute unfair competition, palming off, unjust enrichment, and misappropriation of ***3i***'s NANOTITE Mark and the "TITE" Family of Marks in that such acts permit and will continue to permit Defendants to use and benefit from the goodwill and reputation earned by ***3i*** to obtain a ready customer acceptance for goods advertised, offered for sale, sold, and/or promoted by Defendants and to give to Bicon's products a saleability that they would not otherwise have, all at ***3i***'s expense.

69. By committing the acts herein alleged, Defendants have been guilty of unfair methods of competition and unfair and deceptive acts and practices in the conduct of its trade within the State of Florida in violation of FDUTPA causing ***3i*** damages and loss of profits. Defendants' unlawful conduct will continue to damage ***3i*** unless enjoined by this court, and ***3i*** has no adequate remedy at law.

COUNT SIX
UNFAIR COMPETITION

70. ***3i*** hereby realleges and incorporates herein the allegations of Paragraphs 1-43, inclusive.

71. By committing the acts herein alleged, Defendants have been guilty of unfair competition, deceptive advertising and unfair trade practices, in violation of the Florida common law of unfair competition causing ***3i*** damages and loss of profits. Defendants' unlawful conduct will continue to damage ***3i*** unless enjoined by this Court, and ***3i*** has no adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, *3i* prays for a judgment that:

a) Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from using in connection with the goods and services of Defendant, the mark "NANOTITE," and any other mark that is confusingly similar to *3i*'s NANOTITE trademark;

b) Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from using in connection with the goods and services of Defendant, any member of the "TITE" Family of Marks, and any other mark that is confusingly similar to any member of *3i*'s "TITE" Family of Marks;

c) Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from using the trade name "NANOTITE," and any other trade name that is confusingly similar to *3i*'s NANOTITE trademark;

d) Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from using any member of the "TITE" Family of Marks as a trade name or any trade name that is confusingly similar to any member of *3i*'s "TITE" Family of Marks;

e) Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants, be required to deliver to the Court for destruction, or show proof of destruction of, any and all products, labels, signs, prints, packages, wrappers, receptacles, and advertisements in possession or control of Defendants which use the mark NANOTITE, any

member of the "TITE" Family of Marks, or any mark confusingly similar thereto;

f) Defendants be ordered to file with this Court and to serve on *3i*, within thirty days after the entry and service on Defendants of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendants complied with the injunction;

g) *3i* recover all damages in an amount greater than $75,000 it sustained as a result of the activities of Defendants;

h) An accounting be directed to determine the profits of Defendants resulting from their activities and that such profits be paid over to *3i*, increased as the Court finds just under the circumstances of this case;

i) *3i* recover its reasonable attorneys' fees and its costs of this action and prejudgment and post judgment interests;

j) the Court issue an order certified to the Director of the USPTO decreeing that *3i* has the right to register the NANOTITE Mark and that Defendants' Notice of Opposition be rejected; and

k) *3i* recover such other relief as this Court deems appropriate.

JURY TRIAL DEMANDED

3i demands a jury trial of all issues so triable.

Respectfully Submitted,

REEDER & REEDER P.A.

Date: January 18th, 2007

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ATTORNEYS FOR PLAINTIFF

Certificate of Service

I hereby certify that on January 18th, 2007, I electronically filed the foregoing Amended Complaint with the Clerk of the Court using CM/ECF. I also certify that the foregoing Amended Complaint is being served this day via the transmission of Notices of Electronic Filing generated by CM/ECF on the counsel of record for Defendants listed on the attached Service List.

s/ L. Martin Reeder, Jr.
L. Martin Reeder, Jr.
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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

IMPLANT INNOVATIONS, INC., Plaintiff, v. DEBBIE, LLC, BICON, LLC, BICON, INC., AND BICON INTERNATIONAL, INC., Defendants.	Civil Action No. 06-CV-80913 CIV-Hurley

DEFENDANTS' ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM

Through the undersigned counsel, Defendants Debbie, LLC, Bicon, LLC, Bicon, Inc., and Bicon International, Inc. ("Defendants") submit their Answer to Implant Innovations, Inc.'s ("Plaintiff") Amended Complaint for Trademark Infringement, False Designation of Origin, Common Law Trademark Infringement, Violation of the Florida Deceptive and Unfair Trade Practices Act, and Unfair Competition (the "Amended Complaint") as set forth below. The Answer paragraphs are numbered to correspond to the numbered paragraphs of the Amended Complaint. Except as expressly admitted below, Defendants deny the allegations and characterizations in the Amended Complaint.

The first paragraph of the Amended Complaint is an introductory paragraph to which no responsive pleading is required. To the extent a response is deemed necessary, Defendants deny that Plaintiff is entitled to any relief.

1. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1 of the Amended Complaint and, therefore, deny the same.

2. Defendants admit the allegations contained in Paragraph 2 of the Amended Complaint.

3. Defendants admit the allegations contained in Paragraph 3 of the Amended Complaint.

4. Defendants admit the allegations contained in Paragraph 4 of the Amended Complaint.

5. Defendants admit the allegations contained in the first sentence of Paragraph 5 of the Amended Complaint. Defendant Debbie, LLC owns intellectual property used by Bicon, LLC with the authority of Debbie, LLC.

6. Defendants admit that Plaintiff filed suit for false designation of origin and unfair competition and infringement of federally registered marks, and related causes of action under the laws of the State of Florida. Defendants deny that they have misappropriated any of the Plaintiff's purported rights.

7. Defendants admit the allegations of Paragraph 7 of the Amended Complaint.

8. Defendants admit the allegations of Paragraph 8 of the Amended Complaint.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 9 of the Amended Complaint and, therefore, deny the same.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 10 of the Amended Complaint and, therefore, deny the same.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 11 of the Amended Complaint and, therefore, deny the same.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 12 of the Amended Complaint and, therefore, deny the same.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 13 of the Amended Complaint and, therefore, deny the same.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 14 of the Amended Complaint and, therefore, deny the same.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 15 of the Amended Complaint and, therefore, deny the same.

16. Defendants deny that Plaintiff possesses trademark rights in a so-called 'TITE' Family of Marks. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 16 of the Amended Complaint and, therefore, deny the same.

17. Defendants deny that the so-called 'TITE' Family of Marks has come to be recognized by members of the dental implant indutry as exclusively identifying Plaintiff's goods. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 17 of the Amended Complaint and, therefore, deny the same.

18. Defendants deny the allegations contained in Paragraph 18 of the Amended Complaint.

19. Defendants deny that the so-called 'TITE' Family of Marks has become distinctive, is a symbol of goodwill, and indicates origin to Plaintiff. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 19 of the Amended Complaint and, therefore, deny the same.

20. Defendants deny the allegations contained in Paragraph 20 of the Amended Complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 21 of the Amended Complaint and, therefore, deny the same.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 22 of the Amended Complaint and, therefore, deny the same.

23. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 23 of the Amended Complaint and, therefore, deny the same.

24. Defendants admit the allegations contained in Paragraph 24 of the Amended Complaint.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 25 of the Amended Complaint and, therefore, deny the same.

26. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 26 of the Amended Complaint and, therefore, deny the same.

27. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 27 of the Amended Complaint and, therefore, deny the same.

28. Defendants deny that the www.bicon.com website includes references to any trademark that infringes a purported right of Plaintiff. Defendants admit the remaining allegations contained in Paragraph 28 of the Amended Complaint.

29. Defendants deny that they have used a trademark that infringes any purported right of Plaintiff. Defendants admit that they did not obtain Plaintiff's consent before adopting and using the NANOTITE trademark in connection with Defendants' dental implants.

30. Defendants admit the allegations contained in Paragraph 30 of the Amended Complaint.

31. Defendants deny the allegations contained in Paragraph 31 of the Amended Complaint.

32. Defendants admit the allegations contained in Paragraph 32 of the Amended Complaint.

33. Defendants admit the allegations contained in Paragraph 33 of the Amended Complaint.

34. Defendants admit the allegations contained in Paragraph 34 of the Amended Complaint.

35. Defendants deny the allegations contained in Paragraph 35 of the Amended Complaint.

36. Defendants admit the allegations contained in Paragraph 36 of the Amended Complaint.

37. Defendants admit that Debbie, LLC owns intellectual property used by the related company Bicon, LLC with the authority of Debbie, LLC.

38. Defendants admit the first two sentences of Paragraph 38 of the Amended Complaint. Defendants deny the remaining allegations contained in Paragraph 38 of the Amended Complaint.

39. Defendants admit the allegations contained in Paragraph 39 of the Amended Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the Amended Complaint.

41. Defendants deny that they have used a trademark that infringes upon any purported rights of the Plaintiff. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 41 of the Amended Complaint and, therefore, deny the same.

42. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 42 of the Amended Complaint and, therefore, deny the same.

43. Defendants admit that the www.bicon.com website presently includes Bicon's NANOTITE trademark. Defendants deny the remaining allegations contained in Paragraph 43 of the Amended Complaint.

COUNT ONE
INFRINGEMENT OF FEDERALLY REGISTERED MARKS
UNDER 15 U.S.C. § 1114(1)

44. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

45. Defendants deny the allegations contained in Paragraph 45 of the Amended Complaint.

46. Defendants admit that Plaintiff has no control over the quality of products provided by Defendants. Defendants deny the remaining allegations contained in Paragraph 46 of the Amended Complaint.

47. Defendants deny the allegations contained in Paragraph 47 of the Amended Complaint.

48. Defendants deny the allegations contained in Paragraph 48 of the Amended Complaint.

49. Defendants deny the allegations contained in Paragraph 49 of the Amended Complaint.

50. Defendants deny the allegations contained in Paragraph 50 of the Amended Complaint.

51. Defendants deny the allegations contained in Paragraph 51 of the Amended Complaint.

COUNT TWO
FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 (a)

52. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

53. Defendants admit that Plaintiff has no control over the quality of products provided by Defendants. Defendants deny the remaining allegations contained in Paragraph 53 of the Amended Complaint.

54. Defendants deny the allegations contained in Paragraph 54 of the Amended Complaint.

55. Defendants deny the allegations contained in Paragraph 55 of the Amended Complaint.

56. Defendants deny that Plaintiff has any claim against Defendants for false designation of origin.

COUNT THREE
3i's RIGHT TO REGISTRATION

57. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

58. Defendants deny the allegation contained in Paragraph 58 and are filing concurrently herewith Defendants' Motion to Dismiss Count Three of Plaintiff's Amended Complaint.

59. Defendants admit the allegations contained in Paragraph 59 of Plaintiff's Amended Complaint.

60. Defendants deny the allegations contained in Paragraph 60 of Plaintiff's Amended Complaint.

COUNT FOUR
COMMON LAW TRADEMARK INFRINGEMENT

61. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

62. Defendants admit that the trademark NANOTITE has not, as yet, been registered in the United States Patent and Trademark Office. Defendants admit that Plaintiff has made use of the term NANOTITE subsequent to Defendants' prior use of Defendants' trademark NANOTITE. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 62 of the Amended Complaint and, therefore, deny the same.

63. Defendants deny the allegations contained in Paragraph 63 of the Amended Complaint.

64. Defendants deny the allegations contained in Paragraph 64 of the Amended Complaint.

65. Defendants deny they have infringed any purported right of Plaintiff.

COUNT FIVE
VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

66. Defendants admit the allegation contained in Paragraph 66 of the Amended Complaint but deny any wrongdoing on the part of Defendants.

67. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

68. Defendants deny the allegations contained in Paragraph 68 of the Amended Complaint.

69. Defendants deny the allegations contained in Paragraph 69 of the Amended Complaint.

COUNT SIX
UNFAIR COMPETITION

70. Defendants re-allege and incorporate herein by reference the allegations of Paragraphs 1-43 of this Answer as set forth above.

71. Defendants deny the allegations contained in Paragraph 71 of the Amended Complaint.

AFFIRMATIVE DEFENSES

1. The Amended Complaint fails to state a claim upon which relief can be granted.

2. Plaintiff does not possess trademark rights in the NANOTITE trademark.

3. Plaintiff does not possess trademark rights in a 'TITE' Family of Marks.

4. Defendants commenced trademark use of the NANOTITE trademark before Plaintiff began use of the NANOTITE trademark.

5. Defendants commenced trademark use of the NANOTITE trademark before any priority date on which Plaintiff may rely.

6. Defendants have priority over Plaintiff.

7. Plaintiff has engaged in unclean hands.

8. There is no trademark registration involved in this case.

9. This Court does not have jurisdiction to decide Plaintiff's right to register its NANOTITE application.

COUNTERCLAIM

Defendants Bicon, LLC and Debbie, LLC ("Counterclaim-Plaintiffs" or "Bicon") make the following Counterclaim against Implant Innovations, Inc. ("Counterclaim-Defendant" or "3i"):

THE PARTIES

1. Counterclaim-Plaintiff Bicon, LLC is a Massachusetts limited liability company with a place of business at 501 Arborway, Boston, MA 02130.

2. Counterclaim-Plaintiff Debbie, LLC is a Massachusetts limited liability company with a place of business at 501 Arborway, Boston, MA 02130. Debbie, LLC owns the intellectual property, including trademarks, used by Bicon, LLC with the authority of Debbie, LLC.

3. On information and belief, Counterclaim-Defendant 3i is a Florida corporation with a place of business at 4555 Riverside Drive, Palm Beach Gardens, Florida 33410.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this counterclaim pursuant to 15 U.S.C. § 1121 (action arising under the Federal Trademark Act), 28 U.S.C. §§ 1331 (federal question), 1338(a) (Act of Congress relating to trademarks), and 1338(b) (pendent jurisdiction). This Court also has jurisdiction under 28 U.S.C. § 1332, as the amount in controversy exceeds seventy-five thousand dollars, and the parties are citizens of different states.

5. Venue is proper in this district pursuant to 28 U.S.C. §1391 (b) and (c) as the acts alleged herein have substantially occurred within this District and the claims asserted substantially arise in this District.

6. On September 29, 2006, 3i filed a Complaint in this Court alleging that Defendants and two other entities have infringed the rights 3i purports to have in the NANOTITE mark for dental implants.

Bicon Has Priority in the NANOTITE Trademark

7. Counterclaim-Plaintiff Bicon adopted and used the NANOTITE mark for dental implants prior to any purported use of the mark by Plaintiff.

8. Bicon began actual trademark use of the NANOTITE mark in the ordinary course of trade before Counterclaim-Defendant 3i filed its intent to use trademark application for NANOTITE on May 4, 2006 and before any actual use of the mark by 3i.

9. Bicon adopted the NANOTITE trademark in March 2006 when it conducted a clearance search for NANOTITE as a brand name for a new Bicon dental implant product. Upon learning that the mark was clear, Bicon thereafter directed its medical packaging contractor to begin packaging the new Bicon implants in packaging bearing the NANOTITE trademark.

10. Bicon first offered NANOTITE branded dental implants for sale to customers worldwide by making them available for sale online via its e-commerce store on May 1, 2006.

11. On May 2, 2006, Bicon received an order for NANOTITE dental implants from a Massachusetts dental practice, the Implant Dentistry Centre ("IDC"). Ten implants, in packaging bearing the NANOTITE mark, were conveyed from Bicon to IDC on May 2, 2006.

12. Since Bicon's first offering for sale of the NANOTITE dental implant on May 1, 2006, Bicon has engaged in continuous commercial activity under the mark, including by shipping implants packaged in materials bearing the NANOTITE mark to dental professionals throughout the United States and internationally.

13. To date, Bicon has shipped over 270 NANOTITE branded implants within the United States and over 200 NANOTITE branded implants internationally, generating revenue of approximately $47,000.

14. Bicon has invested in excess of $180,000 developing and promoting the NANOTITE brand.

Counterclaim-Defendant's Unlawful Use Of The NANOTITE Mark

15. 3i is a competitor to Bicon in the dental implant industry.

16. Bicon first learned that 3i intended to use the identical mark NANOTITE in connection with 3i's own dental implant product on August 28, 2006. By that date, Bicon had already shipped ninety-five NANOTITE implants across the U.S.

17. Although 3i filed an intent to use ("ITU") trademark application to register NANOTITE with the United States Patent and Trademark Office on May 4, 2006, upon information and belief, 3i's actual use of the NANOTITE mark did not commence until late September 2006 when it first shipped dental implants with labels bearing the NANOTITE mark.

18. As soon as 3i's ITU application for the NANOTITE trademark was ripe for opposition, Bicon filed an opposition against 3i's application with the United States Patent and Trademark Office's Trademark Trial and Appeal Board asserting Bicon's prior use of the NANOTITE trademark before 3i's ITU application filing date as the basis for the opposition.

19. Rather than answer Bicon's Notice of Opposition, 3i moved to suspend the opposition proceeding currently pending before the United States Patent and Trademark Office's Trademark Trial and Appeal Board. Bicon opposed 3i's motion to suspend the opposition proceeding.

Count I: Federal Unfair Competition, False Designation of Origin and False Description

20. Bicon incorporates by reference the allegations contained in paragraphs 6 through 19 of the Counterclaim as fully set forth herein.

21. 3i's unlawful use in commerce of the mark NANOTITE constitutes unfair competition, false designation of origin, false advertising, and false or misleading descriptions of fact that wrongly and falsely designate the goods sold by 3i as originating with, or as being sponsored or approved by, or otherwise connected with Bicon, in violation of Section 43(a) of the United States Trademark Act of 1946, as amended, 15 U.S.C. § 1125(a).

22. The aforesaid actions of 3i have caused, and unless enjoined, will continue to cause monetary damage and injury for which there is no adequate remedy at law.

Count II: Common Law Unfair Competition

23. Bicon incorporates by reference the allegations contained in paragraphs 6 through 19 of the Counterclaim as fully set forth herein.

24. 3i's unlawful use in commerce of the mark NANOTITE without Bicon's consent constitutes unfair competition under the common law of Florida.

25. The aforesaid actions of 3i have caused, and, unless enjoined, will continue to cause monetary damage and injury for which there is no adequate remedy at law.

Count III: Violation of Violation Of The Florida Deceptive And Unfair Trade Practices Act

26. Bicon incorporates by reference the allegations contained in paragraphs 6 through 17 of the Counterclaim as fully set forth herein.

27. 3i's unlawful use in commerce of the mark NANOTITE without Bicon's consent constitutes an unfair method of competition, an unconscionable act or practice, and/or an unfair

or deceptive act or practice in the conduct of trade or commerce in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), FLA. STAT. § 501.201, *et seq*. which have cause monetary damage to Bicon.

28. The aforesaid actions of 3i have caused, and, unless enjoined, will continue to cause monetary damage and injury for which there is no adequate remedy at law.

Prayer for Relief

Wherefore, Bicon prays as follows:

A. That 3i take nothing by reason of its Amended Complaint;

B. That the Court enter judgment against 3i and that 3i's Complaint be dismissed with prejudice;

C. That this Court find that that 3i has engaged in federal unfair competition in violation of 15 U.S.C. § 1125(a).

D. That this Court find that 3i has engaged in common law unfair competition under the common law of Florida.

E. That this Court find that 3i has violated the FDUTPA, FLA. STAT. § 501.201, *et seq*.

F. That 3i and its officers, agents, servants, employees, and attorneys and those in active concert and participation with it and who receive actual notice of the Order be permanently enjoined from using the mark NANOTITE in any manner, including in connection with the sale, offering for sale, promotion, advertising, or manufacture of dental implants, or any other mark confusingly similar to NANOTITE in such manner;

G. That 3i be directed to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the

NANOTITE mark or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, pursuant to 15 U.S.C. § 1118.

H. That 3i be directed to pay damages in the nature of 3i's profits, Bicon's damages, and the costs of this action.

I. That 3i be directed to pay Bicon's reasonable attorney fees.

J. That Bicon be awarded all interest allowed by law; and

K. That Bicon be awarded whatever further relief this Court deems just and proper.

JURY DEMAND

Bicon hereby demands a trial by jury of all issues so triable.

DATED the 5th of February, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 5, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Stephanie Reed Traband
Stephanie Reed Traband

SERVICE LIST
Implant Innovations, Inc. v. Debbie, LLC et al
Case No. 06-CV-80913 CIV-Hurley/Hopkins

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