

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

Bodyonics, Ltd.	)	Opposition No. 91176901
)	
Opposer,	)	OPPOSER'S MOTION FOR
	)	SUMMARY JUDGMENT;
v.	)	MEMORANDUM AND
	)	DECLARATION OF JAY
Jeffrey Lee Kaplan and Ilie Ioncescu	)	<u>H GELLER IN SUPPORT</u>
)	
Applicants)	
_____)	

07-02-2007

U.S. Patent & TMO/TM Mail Rcpt Dt. #01

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Opposer moves the Board for an Order Granting Summary Judgment in its favor on the ground that there are no genuine issues of material fact precluding Summary Judgment in its favor as follows:

1. Applicant has applied to register the name ENERGY POPPERS for energy boosting nasal spray preparations. Applicant has disclaimed the descriptive term "energy" apart from the mark as shown in the application.

2. In response to Opposer's second set of interrogatories No. 33 Applicants answered: "Poppers as utilized in "inhalation" is a generic term therefore Opposer cannot prevent fair use of the word." (See Interrogatories and Answers attached to Geller declaration).

3. In response to Opposer's First Request for Admission No. 1, Applicants answered: "We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended to be inhaled by the user." In response to Opposer's First Request for Admission No. 2, Applicants answered: "We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended for inhalation." (See Requests for Admission and Responses attached to Geller declaration).

4. In response to Opposer's Third Set of Interrogatories No. 38 and 39, Applicants responded, respectively: "We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended to be inhaled by the user" and "We admit that the

goods on which we intend to use the mark ENERGY POPPERS is intended for inhalation.”
(See Third Set of Interrogatories to Applicants and Answers attached to Geller declaration).

5. Since the word “energy” is disclaimed from the mark as descriptive (indeed, the goods are defined in terms of “energy”) and the term “poppers” is admitted by Applicants to be generic of their goods, the name ENERGY POPPERS as applied to applicants’ goods cannot function as a trademark because it is not a trademark.

Wherefore, Opposer prays that the Board grant its Motion and deny registration to Applicant. A memorandum and the Declaration of Jay H. Geller are filed in support of this Motion are filed contemporaneously with this Motion.

Dated: June 29, 2007



Jay H. Geller
Jay H. Geller, a Professional
Corporation
Attorneys for Opposer

MEMORANDUM IN SUPPORT

I. FACTUAL BACKGROUND

Applicant applied to register the name ENERGY POPPERS for energy boosting nasal spray preparations on April 15, 2006 based on a bona fide intent to use. The mark was published for Opposition on April 3, 2007. Opposer timely filed its Notice of Opposition, an Answer was timely filed and Opposer has engaged in extensive discovery.

Since the goods are intended for boosting energy, the term “energy” was obviously merely descriptive and the Applicant’s disclaimed the term as descriptive apart from the mark as shown. In the subject application, there is no indication by the Applicants that the term “POPPERS” is generic for the goods covered by the application. One can argue that in light of the admission by Applicants that the term “poppers” is generic for the goods (they admit that the term “poppers” is generic for products intended for inhalation and that their goods are intended for inhalation) the mark was fraudulently applied for in that Applicants claimed that they have the exclusive right to use the mark ENERGY POPPERS when all along they knew that the mark was incapable of registration because “energy” is descriptive and “poppers” is generic with respect to their goods. Consequently under Applicants admissions, anyone can use the name “energy poppers” to describe an inhaled product intended to affect energy.

The facts in this case bear out that Applicants are not entitled to registration of the name “energy poppers” because they admit that the mark does not function as a trademark.

ARGUMENT

15 U.S.C. 1052 provides that “no trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it(e) consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them ...” Matter that “merely describes” the goods or services on or which it is used is not registrable on the Principal Register. *In re Abcor Development Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978). Generic terms are terms that the relevant purchasing public understands primarily as the common or class name for the goods or services. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ 1807, 1811 (Fed. Cir. 2001). These terms are not registrable on the Principal Register under Sec. 2(f) or on the Supplemental Register. TMEP 1209.01(c).

In light of Applicants’ disclaimer of “energy” as descriptive of the goods in the subject application and discovery Admissions that the word “poppers” is generic for the goods, the term “energy poppers” under 15 U.S.C. 1052 is not a trademark and therefore not eligible for registration on the Principal Register.

CONCLUSION

Based upon Applicants own disclaimers and admissions is not entitled to registration of the name “energy poppers” for energy boosting nasal spray preparations.” The Board need never reach the issue of likelihood of confusion raised by Opposer in the Notice of Opposition since the subject “mark” is not a “mark” at all.

Opposer's Motion for Summary Judgment is well-founded and Opposer respectfully requests that its Motion be granted and registration refused to Applicants.

Dated: June 29, 2007

Respectfully submitted,



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I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Jeffrey Lee Kaplan and Ilie Ioncescu at P.O.B. 11106, Ft. Lauderdale, FL 33339 on June 29, 2007.



Jay H. Geller

DECLARATION OF JAY H. GELLER

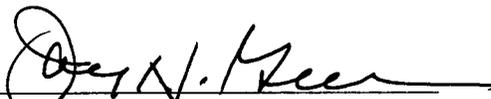
Jay H. Geller under penalty of perjury of the laws of the United States, declares and states as follows:

1. I am the attorney for the Opposer in this matter. If called as witness I would and could testify to the following of my personal knowledge.

2. On May 31, 2007, I served Opposer's Second of Written Interrogatories to Applicant on Applicants (Ex. A attached). On June 4, 2007, Applicants served their response to Second Set of Written Interrogatories on Opposer (Ex. B attached). On June 12, 2007, Opposer served its First Set of Requests for Admission to Applicant (Ex. C attached) and its Third Set of Written Interrogatories to Applicant on June 12, 2007 (Ex. D attached). On June 18, 2007, Applicants served their Response to First Set of Requests for Admissions to Applicant (Ex. E attached) and Response to Third Set of Written Interrogatories (Ex. F attached).

3. Exhibits A through F attached are true and accurate copies of the discovery that I prepared and served on Applicants and that was received by me from the Applicants.

Dated: June 29, 2007


Jay H. Geller

Examp. 1

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

Bodyonics, Ltd.	)	Opposition No. 91176901
)	
Opposer,)	
)	
v.	)	OPPOSER'S SECOND SET OF
	)	WRITTEN INTERROGATORIES
Jeffrey Lee Kaplan and	)	<u>TO APPLICANT</u>
Ilie Ioncescu,)	
)	
Applicants)	
_____)	

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, and Rule 2.120 of the Trademark Rules of Practice, Opposer propounds the following interrogatories to Applicants to be answered no later than thirty days after their receipt.

As used herein, the term "document" refers to written, printed, typed and visually or aurally reproduced material of any kind, whether or not privileged, and includes, but is not limited to, letters, notes, memoranda, books, records, minutes, bills, contracts, agreements, orders, receipts, drawings or sketches, advertising or promotional literature, cables or telegrams, tape or other recordings (audio and video), reports, labels and packaging.

To "identify" a document means to provide a brief description of the document sufficient to support a request for production, including the general nature of the subject matter, the date, identification of the author and recipient, if any, and if the document embodies an agreement, the parties to such an agreement. In answer to those interrogatories requiring the identification of any document or documents, such document or documents may be

produced for inspection and copying by you along with the answers to these Interrogatories in lieu of identification. Included in the definition of "identify" is the present whereabouts of the document, and the identity of the person by name and address having possession, custody and control of the document.

As used herein, the term "you" refers to the applicants collectively.

To identify a "person" means to state the person's name and business address and, in the case of a natural person, his or her home address and occupation or job title.

31. State in detail the facts that you claim support your second affirmative defense set forth in Paragraph 9 of your answer to the Notice of Opposition.

32. State in detail the facts that you claim support your second affirmative defense set forth in Paragraph 10 of your answer to the Notice of Opposition.

33. State in detail the facts that you claim support your third affirmative defense set forth in Paragraph 11 of your answer to the Notice of Opposition.

34. State each and every fact that supports your contention in your response to Interrogatory 23.

35. State each and every fact that supports your contention in your response to Interrogatory 24.

36. State each and every fact that supports your contention in your response to Interrogatory 25 and identify each and every label to which you refer in that answer.

37. Identify each and every use of the term "POPPERS" referred to in your response to Interrogatory No. 26.

Dated: May 31, 2007.

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I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Ilie Ioncescu and Jeffrey Kaplan at P.O.B. 11106, Ft. Lauderdale, FL 33339 on May 31, 2007.

01

Jay H. Geller

RESPONSE TO SECOND SET OF WRITTEN INTERROGATORIES

31. Opposer has not submitted any evidence of a likelihood confusion since Applicants mark is not in use in commerce.

32. Opposer has abandoned it's use of the mark "POPPERS" as evidenced by its own labels on its current product line and has discontinued the only product and label that once utilized the mark "POPPERS" as a trademark. Opposer has acquiesced to many third party usage of the generic word POPPERS such as VEGAS POPPERS and PLASMA VOL POWER POPPERS.

33. POPPERS as utilized in "inhalation" is a generic term therefore Opposer cannot prevent fair use of the word.

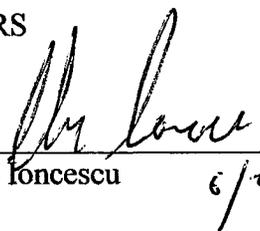
34. Opposer has abandoned it's use of the mark "POPPERS" as evidenced by its own labels on its current product line and has discontinued the only product and label that once utilized the mark "POPPERS" as a trademark.

35. Opposer has abandoned it's use of the mark "POPPERS" as evidenced by its own labels on its current product line and has discontinued the only product and label that once utilized the mark "POPPERS" as a trademark.

36. Opposer has abandoned it's use of the mark "POPPERS" as evidenced by its own labels on its current product line and has discontinued the only product and label that once utilized the mark "POPPERS" as a trademark. EG; Pinnacle Alpha Dopa Growth Poppers, eg: Pinnacle Andro 150 Poppers

37. VEGAS POPPERS, PLASMA VOL POWER POPPERS

Signed: 
Jeffrey Kaplan 6/2/07

Signed: 
Ilie Ionescu 6/2/07

I hereby certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Jay Geller. A Professional Corp. W. Tower Suite 4000 2425 W. Olympic Bl. Santa Monica CA 90404

EX. B

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

Bodyonics, Ltd.	)	Opposition No. 91176901
)	
Opposer,)	
)	
v.	)	OPPOSER'S FIRST SET OF
	)	REQUESTS FOR ADMISSION
Jeffrey Lee Kaplan and	)	<u>TO APPLICANT</u>
Ilie Ioncescu,)	
)	
Applicants)	

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, and Rule 2.120 of the Trademark Rules of Practice, Opposer propounds the following Requests for Admissions to Applicants to be answered no later than thirty days after their receipt.

REQUEST NO. 1: Do you admit that the goods on which you intend to use the mark ENERGY POPPERS is intended to be inhaled by the user?

REQUEST NO. 2: Do you admit that the goods on which you intend to use the mark ENERGY POPPERS are intended for inhalation?

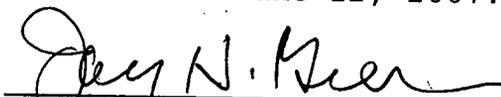
Dated: June 12, 2007.



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I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Ilie Ioncescu and Jeffrey Kaplan at P.O.B. 11106, Ft. Lauderdale, FL 33339 on June 12, 2007.

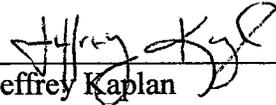
EX.C


Jay H. Geller

RESPONSE TO FIRST SET OF REQUESTS FOR ADMISSION TO APPLICANT

Request No. 1: We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended to be inhaled by the user.

Request No. 2: We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended for inhalation.

Signed: 
Jeffrey Kaplan
6/18/07

Signed: 
Ilie Ioncescu
6/18/07

I hereby certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Jay Geller. A Professional Corp. W. Tower Suite 4000 2425 W. Olympic Bl. Santa Monica CA 90404

Papers

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

Bodyonics, Ltd.	)	Opposition No. 91176901
)	
Opposer,)	
)	
v.	)	OPPOSER'S THIRD SET OF
	)	WRITTEN INTERROGATORIES
Jeffrey Lee Kaplan and	)	<u>TO APPLICANT</u>
Ilie Ioncescu,)	
)	
Applicants)	
_____)	

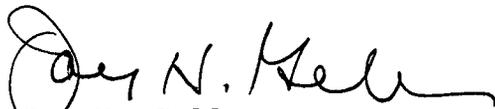
Pursuant to Rule 33 of the Federal Rules of Civil Procedure, and Rule 2.120 of the Trademark Rules of Practice, Opposer propounds the following interrogatories to Applicants to be answered no later than thirty days after their receipt.

38. If your response to Request for Admissions No. 1 is anything other than an unqualified affirmative response, state in detail what you contend the true facts to be.

39. If your response to Request for Admissions No. 2 is anything other than an unqualified affirmative response, state in detail what you contend the true facts to be.

40. State the name and address of each person who participated in the preparation of the responses to these interrogatories.

Dated: June 12, 2007.

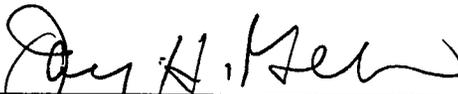


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EX. E P. 1

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Jay H. Geller

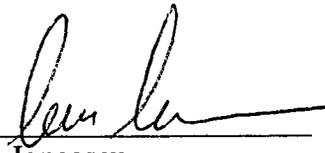
RESPONSE TO THIRD SET OF WRITTEN INTERROGATORIES

38. We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended to be inhaled by the user.

39. We admit that the goods on which we intend to use the mark ENERGY POPPERS is intended for inhalation.

40. Jeffery Kaplan and Ilie Ioncescu- POB 11106 Ft Laud Fl. 33339

Signed: 
Jeffrey Kaplan
6/18/07

Signed: 
Ilie Ioncescu
6/18/07

I hereby certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Jay Geller. A Professional Corp. W. Tower Suite 4000 2425 W. Olympic Bl. Santa Monica CA 90404