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

Proceeding	91176901
Party	Plaintiff Bodyonics, Ltd.
Correspondence Address	Jay H. Geller West Tower, Suite 4000 2425 West Olympic Blvd, Suite 4000 Santa Monica, CA 90404 UNITED STATES jhgeller@aol.com
Submission	Motion to Amend Pleading/Amended Pleading
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Date	08/13/2007
Attachments	MotiontoAmend.pdf (4 pages)(506376 bytes)

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

Bodyonics, Ltd.

Opposer,

v.

Jeffrey Lee Kaplan and Ilie Ioncescu,

Applicant

Opposition No. 91176901

OPPOSER'S MOTION TO AMEND
NOTICE OF OPPOSITION TO CONFORM
TO EVIDENCE ADDUCED DURING
DISCOVERY AND TO SUPORT MOTION
FOR SUMMARY JUDGMENT

Opposer moved for Summary Judgment against Applicant on the ground that Applicant's mark was merely descriptive and/or generic and therefore incapable of functioning as a trademark. This ground was not raised in the Notice of Opposition and was made based upon responses of the Applicant to discovery served by Opposer. Under Rule 15 of the Federal Rules of Civil Procedure and TBMP 528.07, an unpleaded cause of action can be heard contemporaneously with a Motion to Amend. Opposer files this Motion to Amend to make the record clear in spite of the fact that no Opposition was timely filed to the Motion for Summary Judgment.

As grounds for this Motion, Opposer submits that amendments to pleadings are liberally allowed, especially when necessary to conform to evidence adduced in discovery or at trial. Based upon the evidence adduced in discovery, the Applicant admitted that its mark is merely descriptive and/or generic and Opposer seeks leave to Amend the Notice of Opposition to add this additional ground for Opposition. A proposed Amended Notice of Opposition is attached hereto.

Dated: August 13, 2007.



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MEMORANDUM IN SUPPORT

Under both the Federal Rules of Civil Procedure and the Rules of the Board, amendments are freely allowed to conform to the evidence adduced in discovery or at trial. While Applicant did not file an Opposition to Opposer's Motion for Summary Judgment on the ground that Applicant's discovery responses demonstrated that its mark is merely descriptive and/or generic, Applicant did obliquely raise the issue in its own Motion for Summary Judgment. To keep a clean record here, Opposer files this Motion to Amend to conform to evidence adduced during discovery from Applicant. The Motion is well founded and should be granted.

A proposed First Amended Notice of Opposition is attached hereto and Opposer requests that it be filed by the Board so that there is no question that Opposer's Motion for Summary Judgment on the ground of merely descriptive/genericness can be heard without any extraneous procedural issues clouding the Board's action.

Dated: August 13, 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 August 13, 2007.



Jay H. Geller

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Opposition No. 91176901
AMENDED NOTICE OF OPPOSITION

Serial No. 78862294
ENERGY POPPERS

Bodyonics, Ltd., Farmingdale, NY hereby opposes registration of the trademark, ENERGY POPPERS, published in the Official Gazette of April 3, 2007. The following allegations are submitted in support of this Notice of Opposition:

1. Opposer is a Delaware corporation, with its principal place of business in Farmingdale, NY.
2. Applicant, Jeffrey Lee Kaplan is, upon information and belief, a United States citizen residing in Fort Lauderdale, FL. Applicant, Ilie Ioncescu is, upon information and belief, a Romanian citizen residing in Ft. Lauderdale, FL.
3. Applicant has applied for serial number 78862294 for the trademark ENERGY POPPERS on April 15, 2006 in International Class 5 claiming a bona fide intent to use for energy boosting nasal spray preparations.
4. Opposer has at least since 1999 used the trademark POPPERS in interstate commerce in the United States with respect to goods in International Classes 5, particularly dietary and nutritional supplements. Opposer is the owner of United States trademark registration 2447342 for POPPERS which registration has become incontestable. Opposer is also the owner of Serial Number 78775704 for the trademark MUSCLE POPPERS for dietary supplements which is the subject of a Notice of Allowance issued on November 21, 2006 and has not been abandoned.
5. Applicant's mark wholly incorporates Opposer's trademark POPPERS, and the marks are

virtually identical with the exception that the word "ENERGY" is disclaimed as descriptive.

6. The goods upon which applicant intends to use its mark ENERGY POPPERS are closely related and/or identical to those goods upon which Opposer uses its mark POPPERS.

7. The likelihood of confusion in the marketplace exists between Opposer's trademark when applied to the goods of the respective parties, and applicant's trademark.

8. Applicant's mark ENERGY POPPERS is merely descriptive and/or generic and is, therefore, incapable of functioning as a trademark and cannot be registered on either the Supplemental or Principal Register.

9. Registration of applicant's trademark will result in damage to Opposer's trademark and Opposer's business.

Wherefore, Opposer requests that this Opposition be sustained and that the registration to the Applicant be refused.

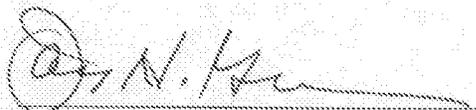
Dated: August 13, 2007



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