

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

78862294

Bodyonics, Ltd.)	Opposition No. 91176901
)	
Opposer,)	MEMORANDUM IN OPPOSITION
)	TO APPLICANT'S MOTION
)	FOR SUMMARY JUDGMENT
v.)	
)	
Jeffrey Lee Kaplan and)	
Ilie Ioncescu,)	
)	
Applicants)	
_____)		

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.¹ 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. A Motion to Amend is filed contemporaneously with this document. Further under TBMP 528.07, if the parties to the action have treated an unpleaded issue on its merits, and the nonmoving party has not objected to the Motion on the ground that it is based on an unpleaded issue, the Board may deem the pleadings to have been amended, by agreement of the parties, to allege the matter. No Opposition has been timely filed to Opposer's Motion for Summary Judgment.

Applicant has now filed its own Motion for Summary Judgment

¹ The Motion indicates a service date of July 9, 2007. The postmark on the envelope containing the Motion indicates a mailing date of July 11, 2007 (Geller decl.).



which Opposer opposes and believes should not be considered until the Board has disposed of Opposer's earlier filed Motion for Summary Judgment. To be clear: If the Applicant's mark cannot function as a trademark, it cannot be allowed on either the Principal or Supplemental Register and there is no case here. Indeed, the examiner in this case should have refused registration entirely had the Applicant been honest and forthright in its application and correctly stated that the mark is merely descriptive and/or generic for its goods.

In its Motion for Summary Judgment, if considered at all by the Board, Opposer submits that either there genuine issues of material fact on the issue of likelihood of confusion, or, in accordance with Opposer's cross-motion for Summary Judgment on the issue of likelihood of confusion, there is no genuine issue of material fact precluding Summary Judgment in Opposer's favor that there is a likelihood of confusion between Opposer's registered mark POPPERS and Applicant's proposed mark ENERGY POPPERS.

APPLICANT'S MOTION FOR SUMMARY JUDGMENT

I. ALLEGED NON-GENUINE ISSUES OF MATERIAL FACT

A. LIKELIHOOD OF CONFUSION

The first alleged non-genuine issue of fact is that Opposer filed its Opposition on the grounds of likelihood of confusion but has not submitted any evidence of possible or actual confusion in the marketplace. The second alleged non-issue of fact is that Opposer has not shown any damages. Neither of these statements is

correct as shown below.²

The evidence in Opposition to Applicant's Motion and in Support of Opposer's Motion on likelihood of confusion is the same.

The only "evidence" proffered by Applicant is that to date, Opposer has not submitted any evidence of potential or actual confusion. Since Applicant has not yet begun to market its product and does not allege that it has begun to use its product, actual confusion in the marketplace is a nonissue and it would be impossible for Opposer (or Applicant) to provide any evidence of actual confusion or for Applicant to provide any evidence of lack of actual confusion.

With respect to the likelihood of confusion, Opposer's POPPERS mark has become incontestable for the goods for which it is registered - dietary and nutritional supplements. It is beyond peradventure that the goods on which Applicant seeks to use its mark ENERGY POPPERS and the goods on which Opposer uses its mark POPPERS are closely related, if not identical. Attached to Applicant's Notice of Reliance (Ex. A) in support of its Motion for Summary Judgment and incorporated herein by this reference, are copies of the following registered trademarks for dietary supplements that all include the word "energy" as part of the trademark:

Reg. No. 2972779 for the trademark ENERGY SURGE;

² The same facts that support denial of Applicant's Motion support the granting of Opposer's Motion.

Reg. No. 2946159 for the trademark LIQUID ENERGY;
Reg. No. 3,044,314 for the trademark M MONSTER ENERGY;
Reg. No. 3,003,077 for the trademark 5 HOUR ENERGY;
Reg. No. 3,171,446 for the trademark WANT MORE ENERGY?
Reg. No. 3,227,616 for the trademark SYNERGY ENERGY; and
Reg. No. 3,173,832 for the trademark ENERGY NOW HEALTH FOR
LIFE.

Attached to the Geller declaration in Support of Opposer's Cross Motion and incorporated herein by this reference (Ex. A) are copies of printouts from the Internet for goods sold under all of these trademarks (with the exception of the last one where the owner sells a wide variety of "energy" supplements). These Internet printouts clearly establish that the goods covered by these registrations are for sale in commerce. Attached as Exhibit B to the Geller declaration is information for the product Athletic Boost an inhaled dietary supplement to boost athletic labeled as an "Aromatic Energy Supplement."

All of this evidence clearly establishes that applicant's goods and Opposer's goods are closely related and since they both share the common word "POPPERS", it is clear that the likelihood of confusion exists or, at least, there is a triable issue of fact. Significantly, the only "evidence" submitted by Applicant is that Opposer has submitted no evidence. In light of the evidence submitted here in Opposition to Applicant's Motion for Summary Judgment and in Support of its own Motion for Summary Judgment,

there are no genuine issues of material fact precluding Summary Judgment on the likelihood of confusion issue in favor of Opposer.

In passing, Opposer notes that the alleged third issue of genuine fact that supports Applicant's motion is that the examiner allowed the application of publication for Opposition. This comment is so naive it can be easily dismissed with one comment: The examiner's decision has no bearing on the Board and if the examiner's decision was dispositive, there would be no need for the Board to entertain ex parte appeals from examiner's rejections or Opposition to examiner's approvals. This ground is no ground upon which to find there is no genuine issue of material fact with respect to the issue of likelihood of confusion.

Likewise, the alleged fourth non-genuine issue of material facts is irrelevant to the analysis of the likelihood of confusion.

The Applicant argues that the disclaimer of "energy" does not mean that a compound word cannot function as a trademark. This is completely irrelevant to the likelihood of confusion issue and makes no sense. Likewise the argument in the fifth alleged non-genuine issue of fact, that in an unrelated application, not made of record here and not properly before the Board, Opposer disclaimed the descriptive word "muscle" in a mark MUSCLE POPPERS has no bearing here. The issue here is NOT compound marks. The issue here is whether there is a likelihood of confusion between Applicant's ENERGY POPPERS and Registrants' incontestable mark POPPERS. That is the only issue in THIS Motion for Summary

Judgment.

B. ABANDONMENT

Part of the last alleged non-genuine issue of material fact is an allegation, completely unsubstantiated, that Applicant has somehow proven by its discovery responses that Opposer has abandoned its mark POPPERS and that Opposer has acquiesced to the use of POPPERS by numerous third parties. None of the alleged "evidence" is properly before the Board. There is absolutely no evidence that Opposer has abandoned its mark and none of these improper exhibits establishes abandonment. Indeed, Opposer submits that Applicant does not understand what abandonment is. Furthermore, in their answer, Applicant did not raise abandonment as a defense.

C. ACQUIESCENCE

Likewise with acquiescence, there is no evidence before the Board of acquiescence. While this was raised as a defense, there is no evidence before the Board of acquiescence. Indeed, Applicant completely misunderstands the equitable doctrine of acquiescence. Acquiescence in the context of an Opposition defense means acquiescence in Applicant's use of the mark by Opposer, and is not relevant to non-parties. See, Gilson on Trademarks, Para. 11.08i (p. 11-230): "Acquiescence ... refers to a plaintiff's assent or to its express or implied assurance that it will not assert its rights against the defendants." Acquiescence requires (1) a showing of misleading conduct that assures another party no

trademark rights will be asserted against it, (2) reliance by the other party on those assurances, and (3) prejudice resulting from the reliance. Lincoln Logs Ltd v. Lincoln Pre-Cut Log Homes, Inc., 971 F.2d 732, 734, 23 USPQ 2d 1701 (Fed. Cir. 1992). There is no evidence that Opposer misled Applicant that no trademark rights would be asserted against them. In fact, just the opposite is true: The filing of the Opposition made clear that there is no acquiescence.

ARGUMENT

There is really nothing to respond to in the alleged "Argument" in support of Applicant's Motion for Summary Judgment. Applicant cites neither cases nor any law to support any of their arguments. They attach an affidavit to which they attach various discovery documents. However, as noted in TBMP 704.08, the Internet documents attached to the discovery submitted by Applicant are inadmissible because they have not been authenticated. Thus, they have no evidentiary value even if otherwise relevant.

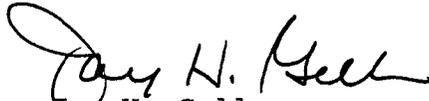
With respect to a substantive discussion of likelihood of confusion, Opposer cites the Board to its Memorandum in Support of its Motion for Summary Judgment and incorporates that argument herein by this reference.

CONCLUSION

Applicant submits that while failing to establish its case, Opposer has shown that there are no genuine issues of material fact precluding Summary Judgment in its favor on the ground of

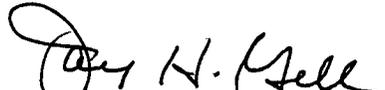
likelihood of confusion. Applicant's Motion should be denied and Opposer's Motion granted. Whether on the ground of likelihood of confusion or failure to function as a trademark, the Opposition must be sustained.

Dated: August 13, 2007.



Jay H. Geller
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F: 310-449-1394
email: jhgeller@aol.com
Attorneys for Opposer

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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Typed Drawing

Word Mark ENERGY SURGE
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: DIETARY SUPPLEMENTS. FIRST USE: 20030300. FIRST USE IN COMMERCE: 20030300
Mark Drawing Code (1) TYPED DRAWING
Serial Number 78156330
Filing Date August 21, 2002
Current Filing Basis 1A
Original Filing Basis 1B
Published for Opposition March 11, 2003
Registration Number 2972779
Registration Date July 19, 2005
Owner (REGISTRANT) IsoChem Corporation CORPORATION OREGON 24600 SW Valley View Rd. West Linn OREGON 97068
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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LIQUID ENERGY

Word Mark LIQUID ENERGY
 Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Dietary and nutritional supplements. FIRST USE: 19870000. FIRST USE IN COMMERCE: 19870000
 Standard Characters Claimed
 Mark Drawing Code (4) STANDARD CHARACTER MARK
 Serial Number 78404812
 Filing Date April 20, 2004
 Current Filing Basis 1A
 Original Filing Basis 1A
 Published for Opposition February 8, 2005
 Registration Number 2946159
 Registration Date May 3, 2005
 Owner (REGISTRANT) Precise Nutritional International, Inc. CORPORATION CALIFORNIA 44300 Sun Gold Indio CALIFORNIA 92201
 Attorney of Record Jay H. Geller
 Prior Registrations 2320715
 Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "LIQUID" APART FROM THE MARK AS SHOWN
 Type of Mark TRADEMARK
 Register PRINCIPAL

Live/Dead Indicator LIVE

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Typed Drawing

Word Mark M MONSTER ENERGY
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: nutritional supplements in liquid and non-liquid form, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not. FIRST USE: 20020327. FIRST USE IN COMMERCE: 20020418
Mark Drawing Code (1) TYPED DRAWING
Serial Number 78253930
Filing Date May 23, 2003
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition August 31, 2004
Registration Number 3044314
Registration Date January 17, 2006
Owner (REGISTRANT) Hansen Beverage Company CORPORATION DELAWARE 1010 Railroad Street Corona CALIFORNIA 92882
Attorney of Record Steven J. Nataupsky
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY" APART FROM THE MARK AS SHOWN
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE



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5 HOUR ENERGY

Word Mark	5 HOUR ENERGY
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: HOMEOPATHIC SUPPLEMENTS, PHARMACEUTICAL PREPARATIONS, NUTRITIONAL SUPPLEMENTS AND DIETARY SUPPLEMENTS THAT RELIEVE OR PREVENT FATIGUE. FIRST USE: 20050600. FIRST USE IN COMMERCE: 20050600
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78434496
Filing Date	June 14, 2004
Current Filing Basis	1A
Original Filing Basis	1B
Supplemental Register Date	July 19, 2005
Registration Number	3003077
International Registration Number	0890593

Registration Date September 27, 2005
Owner (REGISTRANT) Innovation Ventures LLC DBA Living Essentials LTD LIAB CO MICHIGAN
3141 Old Farm Lane Walled Lake MICHIGAN 48390
Attorney of Record Paul W. Kruse
Type of Mark TRADEMARK
Register SUPPLEMENTAL
Live/Dead Indicator LIVE

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WANT MORE ENERGY?

Word Mark WANT MORE ENERGY?
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Nutritional and dietary supplements. FIRST USE: 20020301. FIRST USE IN COMMERCE: 20020301
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Serial Number 78784265
Filing Date January 3, 2006
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition August 29, 2006
Registration Number 3171446
Registration Date November 14, 2006
Owner (REGISTRANT) Isagenix Worldwide, LLC LIMITED LIABILITY CORPORATION ARIZONA 2225 S. Price Road Chandler ARIZONA 85248
Attorney of Record Todd S. Sharinn
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE



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SYNERGY ENERGY

Word Mark SYNERGY ENERGY
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Dietary and nutritional supplements. FIRST USE: 20040122. FIRST USE IN COMMERCE: 20040122
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Serial Number 78893695
Filing Date May 26, 2006
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition January 23, 2007
Registration Number 3227616
Registration Date April 10, 2007
Owner (REGISTRANT) Nutraceutical Sciences, Inc. CORPORATION DELAWARE 2055 High Ridge Road Boynton Beach FLORIDA 33426
Attorney of Record Stewart L. Gitler
Prior Registrations 2970843
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE ENERGY APART FROM THE MARK AS SHOWN
Type of Mark TRADEMARK
Register PRINCIPAL

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ENERGY NOW HEALTH FOR LIFE

Word Mark ENERGY NOW HEALTH FOR LIFE
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: NUTRITIONAL SUPPLEMENTS; NUTRITIONALLY FORTIFIED BEVERAGES AND CONCENTRATES AND MIXES FOR THE PREPARATION OF SAME. FIRST USE: 20050930. FIRST USE IN COMMERCE: 20050930
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Serial Number 78774617
Filing Date December 15, 2005
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition September 5, 2006
Registration Number 3173832
Registration Date November 21, 2006
Owner

(REGISTRANT) New Sun Nutrition LLC LTD LIAB CO DELAWARE 6450 Via Real, Suites 3-5 Carpinteria CALIFORNIA 93013

(LAST LISTED OWNER) NEW SUN NUTRITION, INC. CORPORATION DELAWARE 6450 VIA
REAL SUITE 3 CARPINTERIA CALIFORNIA 93013

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Michael J. MacDermott
Type of Mark Register TRADEMARK
 PRINCIPAL
Live/Dead Indicator LIVE

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Opposer,)	OPPOSER'S SUPPLEMENTAL
)	MOTION FOR SUMMARY
)	JUDGMENT; MEMORANDUM AND
v.)	DECLARATION OF JAY H.
)	<u>GELLER IN SUPPORT</u>
Jeffrey Lee Kaplan and Ilie Ioncescu,)	
)	
Applicant)	
_____)	

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. A Motion to Amend is filed contemporaneously with this document. Further under TBMP 528.07, if the parties to the action have treated an unpleaded issue on its merits, and the nonmoving party has not objected to the Motion on the ground that it is based on an unpleaded issue, the Board may deem the pleadings to have been amended, by agreement of the parties, to allege the matter. No Opposition has been timely filed to Opposer's Motion for Summary Judgment.

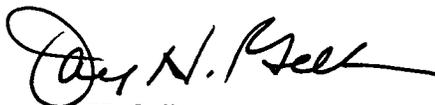
Applicant has now filed its own Motion for Summary Judgment which Opposer opposes and believes should not be considered until the Board has disposed of Opposer's earlier filed Motion for Summary Judgment. To be clear: If the Applicant's mark cannot function as a trademark, it cannot be allowed on either the Principal or Supplemental Register and there is no case here. Indeed, the examiner in this case should have refused registration entirely had the Applicant been honest and forthright in its application and correctly stated that the mark is merely descriptive and/or generic for its goods. Nevertheless, to cover all bases, Opposer opposes Applicant's Motion for Summary Judgment and herewith files its Cross-Motion for Summary Judgment on the issue of likelihood of confusion.

In support of its Supplemental Motion for Summary Judgment on the issue of likelihood of confusion Opposer submits there are no genuine issues of material fact precluding Summary Judgment in its favor as follows:

1. Applicant's mark ENERGY POPPERS for energy boosting nasal spray.
2. Opposer's incontestably registered mark POPPERS is for dietary supplements.
3. The word "energy" is disclaimed from Applicant's mark.
4. The common element of the two marks is Opposer's registered trademark POPPERS.
5. The goods on which the parties use their marks are identical and closely related as shown by the trademark registrations submitted with Opposer's Notice of Reliance and the evidence attached to the Geller declaration (Exs. A and B).
6. Goods in the form intended to be marketed by Applicant are considered dietary supplements (Geller Decl. Ex. B).
7. Opposer has been diligent in policing its mark POPPERS (Geller Decl, Ex. C);
8. There is a likelihood of confusion between Applicant's intended mark ENERGY POPPERS and Opposer's registered trademark POPPERS from which damage is presumed.

Thus, there are no genuine issues of material fact precluding summary judgment in favor of Opposer. A memorandum, the declaration of Jay H. Geller and a Notice of Reliance are filed in support.

Dated: August 13, 2007.



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2425 W. Olympic Bl.
Santa Monica, CA 90404
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Attorneys for Opposer

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Applicant's application is for the mark ENERGY POPPERS for energy boosting nasal spray. Opposer's incontestably registered mark is for POPPERS for dietary supplements. The word "energy" is disclaimed from Applicant's mark. The common element of the two marks is Opposer's registered trademark POPPERS. As shown below, the goods of the two parties are identical. The marks are identical but for the descriptive word "energy" in applicant's mark.

II. FACTS

Opposer's POPPERS mark has become incontestable for the goods for which it is registered - dietary and nutritional supplements. It is beyond peradventure that the goods on which Applicant seeks to use its mark ENERGY POPPERS and the goods on which Opposer uses its mark POPPERS are closely related, if not identical. Attached to Applicant's Notice of Reliance (Ex. A) are copies of the following registered trademark for dietary supplements that all include the word "energy" as part of the trademark:

Reg. No. 2972779 for the trademark ENERGY SURGE;

Reg. No. 2946159 for the trademark LIQUID ENERGY;

Reg. No. 3,044,314 for the trademark M MONSTER ENERGY;

Reg. No. 3,003,077 for the trademark 5 HOUR ENERGY;

Reg. No. 3,171,446 for the trademark WANT MORE ENERGY?

Reg. No. 3,227,616 for the trademark SYNERGY ENERGY; and

Reg. No. 3,173,832 for the trademark ENERGY NOW HEALTH FOR LIFE.

Attached to the Geller declaration (Ex. A) are copies of printouts from the Internet for goods sold under all of these trademarks (with the exception of the last one where the owner sells a wide variety of "energy" supplements) that show these goods freely available for sale in commerce. Attached as Exhibit B to the Notice of Reliance is information for the product Athletic Boost an inhaled dietary

supplement to boost athletic labeled as an "Aromatic Energy Supplement" that if freely available for sale in commerce. Attached as Exhibit C to the Geller declaration is evidence of Opposer's policing the use of its mark POPPERS in commerce.

All of this evidence clearly establishes that applicant's goods and Opposer's goods are identical and closely related and since they both share the common word "POPPERS", it is clear that the likelihood of confusion exists. Significantly, the only "evidence" submitted by Applicant is that Opposer has submitted no evidence.

In light of the evidence submitted here in Opposition to Applicant's Motion for Summary Judgment and in Support of its own Motion for Summary Judgment, there are no genuine issues of material fact precluding Summary Judgment on the likelihood of confusion issue in favor of Opposer.

ARGUMENT

The law applicable to a determination of likelihood of confusion is clear. It is well settled that the relevant test is *likelihood of confusion*, not actual confusion. It is unnecessary to show actual confusion to establish likelihood of confusion. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein.

If the marks of the respective parties are identical, as they are here, the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as would be required in a case where there are differences between the marks. *Ancor, Inc. v. Ancor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). The goods or services do not have to be identical or even competitive in order to determine that there is a likelihood of confusion. The inquiry is whether the goods are related, not identical. The issue is not whether the goods will be confused with each other, but rather whether the public will be confused about their source. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A.

1975). It is sufficient that the goods or services of the applicant and the registrant are so related that the circumstances surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief that they originate from the same source. *See, e.g., On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); and *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984). Here, at a minimum, the goods are closely related and, in fact, are identical.

The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993). Here, the goods recited in Opposer's registration are dietary food supplements and the goods in the opposed application are energy boosting nasal spray.

If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. Here, neither Opposer's registration nor applicant's application is limited in any way – as to goods described, channels of commerce and/or class of purchasers. Therefore, if the cited registration has a broad identification of goods or services, an applicant does not avoid likelihood of confusion merely by more narrowly

identifying its related goods. *See, e.g., In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Diet Center Inc.*, 4 USPQ2d 1975 (TTAB 1987); *In re Uncle Sam Chemical Co., Inc.*, 229 USPQ 233 (TTAB 1986).

In addition, any goods or services in the registrant's normal fields of expansion must be considered to determine whether the registrant's goods or services are related to the applicant's identified goods or services under §2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). A trademark owner is entitled to protection against the registration of a similar mark on products that might reasonably be expected to be produced by him in the normal expansion of his business. The test is whether purchasers would believe the product or service is within the registrant's logical zone of expansion. *CPG Products Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983). Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods or services are used together or used by the same purchasers: advertisements showing that the relevant goods or services are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant's goods and services and the goods and services listed in the cited registration. Third-party registrations that cover a number of different goods or services have probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source (TMEP 1207.01(d)(iii)). Attached to Opposer's Notice of Reliance (Exhibit A) are copies of recently issued registrations that cover goods in the dietary supplement category that are energy boosting. Attached to the Geller declaration are documents downloaded from the Internet that show databases and advertisements of companies

that currently sell the goods covered by these registration (Ex. A) as well as a product absolutely identical to Applicant's that is marketed as an energy supplement (Ex. B).

Finally, if there is any doubt as to whether there is a likelihood of confusion, that doubt must be resolved in favor of the prior registrant. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio), Inc.* 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Here, using the well established relevant factors from *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) it is clear that there is a likelihood of confusion:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. Here the marks are identical as to the significant portion of each mark in appearance and sound. The commercial impression of Applicant's mark has already been admitted by Applicant to be generic. This is not the case with Opposer's mark but any one factor is sufficient for a finding of likelihood of confusion.
2. The similarity or dissimilarity and nature of the goods described in an application or registration or in connection with which a prior mark is in use. The goods here are at worst closely related but are really, in fact, identical.
3. The similarity or dissimilarity of established, likely-to-continue trade channels. There is no evidence that the goods of the parties will move through different channels of commerce.

4. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing. Here Opposer submits, that consumers familiar with Opposer's mark will believe that the goods of the applicant originate with Opposer.
5. The number and nature of similar marks in use on similar goods. The only evidence on this issue is Opposer's regular action to protect its mark (Geller Decl., Ex. C).
6. The nature and extent of any actual confusion. There is none.
7. The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion. There has been none.
8. The extent to which applicant has a right to exclude others from use of its mark on its goods. There has been none.
9. The extent of potential confusion. Opposer submits this is clearly established in its favor by its long exclusive use of POPPERS for these goods and its regular policing of its mark.

CONCLUSION

Opposer submits that there are no genuine issues of material fact precluding Summary Judgment in its favor on the issue of likelihood of confusion and requests that the Board grant its Motion, sustain

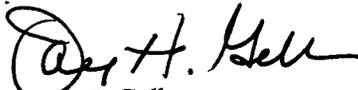
the Opposition and deny registration to Applicant.

Dated: August 13, 2007.



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Santa Monica, CA 90404
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F: 310-449-1394
email: jhgeller@aol.com
Attorneys for Opposer

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

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 August 12, 2007, I conducted a search of the Internet with respect to the registered trademarks that are referenced in the foregoing Memorandum in Support of Opposer's Motion for Summary Judgment. Attached as Exhibit A are documents that I downloaded from the Internet that show the availability for sale of the following products covered by these trademark registrations: ENERGY SURGE (www.ecaps.com); LIQUID ENERGY (www.vital4u.com); M MONSTER ENERGY (www.monsterenergy.com); 5 HOUR ENERGY (www.5hourenergy.com); WANT MORE ENERGY (www.isagenix.com); and SYNERGY ENERGY (www.vitacost.com/NSA-synergy-energy-multi-vitamin-version-3). From the website of the owner of the ENERGY NOW HEALING FOR LIFE website I downloaded information about energy supplements (the heading on the website which does not appear on the printout uses the phrase "energy now health for life") (www.healthyenergy.com).

3. On August 12, 1007, I downloaded information about the product named "AROMA-RING" which is represented as "an inhalable athletic performance **supplement** that will truly have you breathing energy into your workouts" (emphasis in original). This product appears to be identical the goods identified in the Applicant's application.

4. Attached as Exhibit C are documents of which I have personal knowledge since I was the attorney involved in each of these matters that represent the Opposer's policing of its trademark POPPERS. Action has been taken against the following infringing marks and, in each case, the infringer either abandoned a pending application or agreed to discontinue use or not commence use: Opposition against the mark OXYPOPPERS where the Opposition was sustained; TESTROPOPPERS where the application was abandoned

after initiation of an Opposition; Opposition against the mark PET POPPERS where the Opposition was sustained; HEALTH POPPERS which was abandoned after the applicant received a cease and desist letter from Opposer; PROTEIN POPPERS (Macopin Corp.), use discontinued after receipt of cease and desist letter; VEGAS POPPERS use discontinued after receipt of cease and desist letter; PROTEIN POPPERS (Next Cereals) use discontinued after receipt of cease and desist letter); and PLASMAVOL POWER POPPERS – P3 use discontinued after receipt of cease and desist letter.

5. Attached as Exhibit D is a true and accurate copy of the mailing envelope for the Applicant's Motion for Summary Judgment showing the actual mailing date of the Motion as July 11, 2007. The certificate of service indicates that it was mailed on July 9, 2007 whereas the actual mailing date was July 11, 2007.

Dated: August 13, 2007


Jay H. Geller



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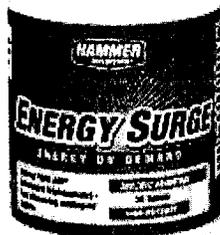
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12 Aug 2007

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- Coffee
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- Accessories
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Pure, Instant Energy

Product Pricing		Discount	
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\$19.95			
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- Instant energy right when you need it
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- Help maintain overall energy production

Extra Benefits:

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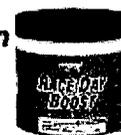
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- 08. Vital 4U® Daily Vitamins
- 09. Stoppers Appetite Stopper™
- 10. THINK Before You Drink™
- 11. Vital 4U® Sport Teas
- 12. Screamin Energy® Drink
- 13. Anitiox 636™
- 14. Vital 4Flex™
- 15. Screamin Energy® Shot



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PRODUCT ENERGY DRINK COMPARISON FAQs DIRECTIONS AVAILABLE AT CONTACT US

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Tired is in your head. Wake up your brain and your body will follow. That's what 5-Hour Energy drinks are all about. Drink just one little energy shot, and you can feel awake, alert and productive for hours - without the jitters and crash associated with other energy drinks.

[Learn more about 5-Hour Energy >]

Why is it safe?

Other energy drinks are designed to make you feel wired up, jittery and hyper. But 5-Hour Energy drinks are formulated for hours of "smooth energy" - so it's ideal for combating a groggy morning, that afternoon lull, or to motivate you to work out. [Read 5-Hour Energy FAQ >]

Why is it better?

Canned energy drinks are full of sugar, caffeine and herbal stimulants. But 5-Hour Energy is packed with stuff that's good for you - B-vitamins, enzymes and amino acids. Zero sugar, zero net carbs and only eight calories.

[5-Hour Energy Ingredients & Safety >]



MARKET

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The Superior Electrolyte Drink

Do you need to replace electrolytes and nutrients lost due to stress and exercise? Unlike other energy or electrolyte drinks, Want More Energy? is a delicious and refreshing drink powder containing a healthy potassium-to-sodium ratio and no stimulants. In addition, its B vitamins and IsaLyte ionic trace minerals help safely charge your body's natural energy—and support peak mental and physical performance.

Available in:

- Citrus
- Grape
- Orange

Benefits

- Replaces electrolytes/nutrients lost due to stress or exercise
- Delicious and refreshing
- To support peak mental and physical performance
- No stimulants, Ma Huang, or caffeine

Resources

- [Ingredients - Citrus](#)
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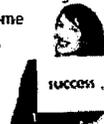


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Vitamins / Multivitamins



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About NSI

NSI Synergy Energy Multi-Vitamin Version 3 -- 120 Capsules



Retail price: \$69.99 **You save \$40.00**
Our price: \$29.99 **57% off**

Quantity:

Availability: Ships within 24 hours

Shopping with us is safe. **Guaranteed.**

Item Number: NI 007172
or
835003007172

Package Description: 120.00 Capsules
Product Weight Per Unit: 0.00
Serving Size: (4.00 cp)
Number of Servings: 30.00

Overall Rating ★★★★★
Value: ----- 4.6 out of 5
Quality: ----- 4.9 out of 5
Effectiveness: ----- 4.9 out of 5
Satisfaction: ----- 4.7 out of 5

5 of 7 (71%) of customers would recommend this product.

[Read all reviews](#) [Write a review](#)

Better Together:

Buy this item with **NSI Glucosamine Chondroitin MSM -- 120 Capsules**



+



54% off
Retail price together: \$103.89
Our price together: \$46.98

Ships within 24 hours

Customers who have bought this product have also bought:

- NSI Glucosamine Chondroitin MSM -- 120 Capsules
- NSI Mega EFA Omega-3 EPA & DHA -- 240 Softgels
- NSI Complete EFA (Fish Oil, GLA, Flax, EPA , DHA) -- 180 Softgels
- NSI Tonalin XS-CLA -- 1g (1,000 mg) - 120 Softgels
- NSI Probiotic 15-35 with NutraFlora FOS (15 strains - 35 billion CFUs per serving - #1 probiotic) -- 120 Vegetarian Capsules
- NSI Calcium Citrate Malate, Magnesium & Vitamin D -- 180 Capsules

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Synergy Energy Multi-Vitamin Version 3 is a foundational, broad spectrum multi-vitamin and potent antioxidant formula that is designed to protect your general health. In addition, it may help



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FRS® Unlocks and Sustains Your Natural Energy



Low-Calorie! Perfect for Dieters!

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Unlocks and sustains your body's natural energy for healthy energy throughout the day
- Enhances Metabolism
Green tea cachetins in FRS have been shown in clinical studies to boost metabolism
- Increases Focus
In a university study, a 24% increase in concentration and a 35% decrease in work frustration when taking FRS
- Strengthens Immune System
Contains 100%+ of B1, B2 B3, B6, B12, C & A vitamins, and six servings of fruits and vegetables worth of antioxidants



FRS Supports: LIVESTRONG LANCE ARMSTRONG FOUNDATION

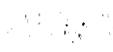
"I lost 50 pounds... I love your product!! I lost 50 pounds in the past year and couldnt have done it without you!! I love the way I feel with FRS! Gina. Roseville, MN Not pictured.

Results not typical. Statement not verified by FRS

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Why Lance Armstrong uses FRS

"I need a healthy source of energy. As an athlete and a cancer survivor, I have to think about what I put into my body. After studying the science behind FRS, I feel confident in making it part of my daily routine. FRS fits with me wanting to live to be 90 and beyond, when I'll still be running marathons, riding my bike, staying fit and having fun."

-Lance Armstrong

7-Time Tour de France Champion Cancer Survivor and Activist FRS User and Board Director

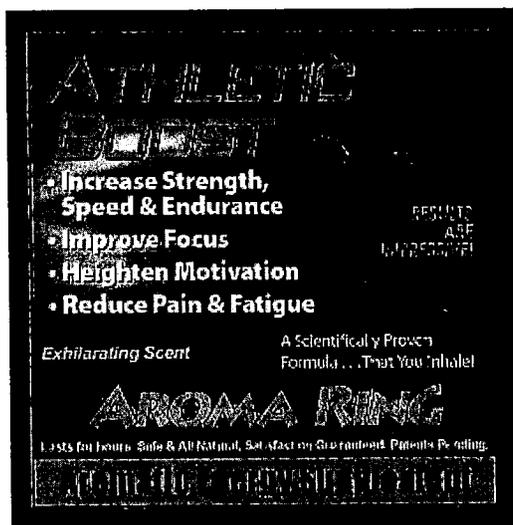
How FRS works

Long Term Healthy Energy

The antioxidants in FRS protect your cells from damage caused by Free Radicals. Your system uses less energy to repair damaged cells so more energy is available to you.



Inhalable Energy Supplement Improves Your Athletic Performance!



Increased Performance and Endurance Are Just A Breath Away!

If you're like most serious athletes, you want to get the most out your workout. You want to perform at the top of your game. You want a competitive edge. So you focus on fine-tuning your form, eating properly, resting enough and trying to keep up to date on the latest research on performance products. Problem is, there's a lot to keep up to date on and there's of conflicting information -- and products.



*Whether you're an elite-level athlete training everyday
or
a weekend-warrior waging a one-day battle –
you want results from your efforts.*

We're not here to add complexity to your training regime – we're just setting the stage for our remarkable, new product! An inhalable athletic performance **supplement** that provides a measurable boost without the nervousness or jitters of caffeine. A product that reduces fatigue, increases your pain threshold, improves lung capacity, increases oxygen exchange AND will truly have you breathing energy into your workouts.

Faster! Farther! Stronger!
Athletic Boost – Aroma-Ring.

This ingenious, inhalable energy source has been *proven* effective time and time again ([click here for a research note](#)).

It is a 100% natural performance enhancement formula that provides you with an immediate increase in strength, speed and endurance.

In the time it takes to open the package, slip the ring on your finger and take a few breaths – you go from huffing to hammering!



Empirical Proof This Works!

According to numerous studies, the particular scents used in the *Athletic Boost* Aroma-Ring produce the following results:

1. Basketball Players Validate Results

A unique study proved that the psychological change associated with inhaling particular vapors has measurable improvements in an athletes' performance, and indicated the players using the inhalant reported increases in motivation, energy, speed, alertness, reaction time, confidence and strength.

2. Athletes Experience Increased Nasal Dilation and Lung Capacity

Participants' average force of nasal exhalation after inhaling the particular odor via the inhaler was significantly greater than their force of nasal exhalation when no odor was administered. Thus, the inhalation of this particular odor does in fact have a significant effect on the nasal dilation and lung capacity of individuals.

3. Proven Increases In Running Speed, Grip Strength and Push Ups

The application of a particular odor before or during athletic competitions enhances an athletes' mood and motivation and subsequent performance . . . the administration of certain odors could serve as an important adjunct to an athlete's normal training regiment and could also help the athlete maintain a positive mood during physical therapy.

Take A Trainer's Word For It

*"With the ability of these odors to **enhance both cognitive and athletic performance**, most likely new products will soon be marketed which capitalize on their all-natural, non-pharmaceutical properties."*

*"The administration of these odors also significantly reduced perceived effort and frustration in the athletes. Self-evaluated performance was also greater in the odor condition, and participants **rated their vigor higher, and their level of fatigue lower.**"*

*"Inhaling these odors can **improve the quality of life** for many people through enhancing mental and athletic performance, cognitive functioning and pain tolerance."*

Brandan Ellsworth

Results Are Impressive We Can Prove It!

Our beneficial scents have been **validated** by volumes of research and clinical trials. What has been missing is a convenient, easy to use and mess-free *delivery device*. One that provides a consistent 'dose' of active ingredients and focuses those beneficial effects directly to the individual athlete and not his or her competitors.

Professional athletes, elite-level endurance cyclists, marathon runners, triathletes -- all kinds of competitors have benefited from the effects of this **inhaled energy** source. And all kinds of people have enjoyed the increased motivation and focus of this intriguing and powerful scent.



The Athletic Boost Aroma-Ring also helps athletes maintain a positive mood during physical therapy.

I Feel Energized To Put The Hammer Down . . .

"I've come to call my Aroma-Ring my 'bridging booster.' In concert with a couple of clearing breaths before I kick up the effort, I take a hit or two off my Aroma-Ring. I feel energized to put the hammer down and don't notice the pain as much. It's a cool tool!"

Josh Ketchum – Lyons, CO

Numerous design engineers and product packaging experts were consulted and a number of viable prototypes were developed and assessed. Over a two-year period and in parallel with the on-going scent studies, the Aroma-Ring design was *tested, refined and released*.

The Aroma-Ring was initially designed with elite-level athletes in mind who were looking for 'an extra edge' in performance.

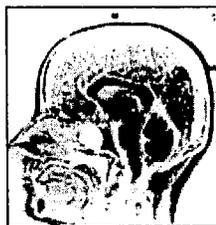


We discovered these individuals wanted a supplement-type product that was pre-packaged, easy to use and mess-free. They demanded a product that provided immediate and **measurable effects**.

The Athletic Boost Aroma-Ring accomplishes that – in fact we hit a home-run! Then as we poured over the research from the clinical trials and studies, we realized that **ALL** of these competitors were also feeling a greater motivation to push harder and to put up with a greater workload and pain threshold. We discovered these athletes considered their 'inhalable ergogenic' as a secret weapon.

Now you can put our discovery to work for you!

Physiological Validation This Works!



As you breathe in the vapors of the **specially formulated scent**, the inhaled odorant molecules of the active ingredients reach the olfactory receptor cells in the nasal epithelium inside your nose. These cells send nerve processes directly to the olfactory bulb in the brain. The impulses are relayed further to other parts of the brain, where the information from several *olfactory receptors* is combined to form a sensory pattern.

The sense of smell is the only sense that reports directly to the brain without going through a filtering process in the nervous system. The beneficial effects of the Aroma-Ring scents are carried along *neural pathways* to the brain, which enable a “**near-instant**” reaction to the odor stimuli.

. . . Better Breath Control.

"I'm not an athlete, but I do rely on my breathing in order to perform. I sing in a regional choir and recently tried your Athletic Boost Aroma-Ring during a rehearsal. I experienced an increased lung capacity and better breath control and only a few people in my section even noticed the fragrance."

Karen Butler, Cedar City, UT

Highest Quality Construction and Materials

The Aroma-Ring is constructed of a special *porosity-weave fabric* and *pharmaceutical-grade elastic*. The ridges that are woven into the fabric help suspend the scent material and allow a systematic diffusion and evaporation of the vapors. Numerous *patents* are in process on the Aroma-Ring concept, usage and designs.

All of the active ingredients have been approved by the United States Food and Drug Administration (FDA) and have GRAS (Generally Regarded As Safe) certification numbers.



It's Like An Extra Reserve Of Energy Prove It To Yourself!

Remove the Aroma-Ring from the **hermetically-sealed package** and stretch it a few times to activate the scent. Place the Aroma-Ring on your finger and position it underneath your nose. Start by gently drawing-in a normal breath. There's no need to keep the scent in your lungs, so don't hold your breath. Slowly exhale and then repeat a two or three times.

The beneficial effects of a few inhalations will linger for awhile, so you don't need to continually keep the Aroma-Ring under your nose. In fact it's important to periodically 'clear' the *olfactory receptors* with unscented air so they don't satiate.

For **maximum effectiveness**, we recommend you place the *Aroma-Ring* on your index finger and hold it about an inch below your nose while following the cyclical protocol described.



Just slip it on your finger and begin breathing in the benefits of the Aroma-Ring!

There's no mess. Doesn't interfere with your normal activities. And won't contradict with other foods, drinks or supplements.

Using the Aroma-Ring

Any of your fingers will work just fine, however we've found that placing the Aroma-Ring between the second and third knuckle of your index finger works the best. This is because bringing that part of your hand to your nose creates an anatomical, **ergonomic angle** which causes the least amount of extraneous effort.

With the Aroma-Ring on your finger, gently close-off one nostril and slowly draw-in a breath, while counting to five. Exhale and then switch nostrils. Take three breaths through each nostril. Then breathe normally without the Aroma-Ring for a few minutes (or about 15 unscented breathes). Repeat this cycle a few times.

If your 'cycles' are spaced too close together, you'll notice that the *scent* doesn't seem as strong. This is because your olfactory receptors have become satiated and you've temporarily lost the ability to sense the scent. Use this **scent-feedback** to develop your own personal breathing cycle.

... I Did Feel Something ...

"I entered the Las Vegas marathon, hoping to qualify for Boston (in my age group). Someone in the crowd was handing out Aroma-Rings before the start, so I grabbed one and put in a pocket. I ended up using the Aroma-Ring and qualifying . . . and while I'm not giving credit to the Aroma-Ring (cause I trained well), I will say I did feel something and have been ordering more ever since."

Craig Barker, St. George, UT

Quite Simply, There Is No Other Product Like This!

The *Athletic Boost* Aroma-Ring is an aromatic, ergogenic supplement - an **aromaceutical** - that provides the proven and powerful benefits of scented breathing in a portable, personal, mess-free delivery device.

No other energy supplement compares to the Aroma-Ring, because **there is no other supplement like this!** The bottom line is, IT WORKS! It has been tested and validated. It has been purchased by the public and people like it. Now it's your chance to experience our inhalable energy product for yourself.

... Playing Harder And Feeling Sharp ...

"Our hockey coach won't let use amonium

carbonate as an energy aid. He says it's too harsh on the lungs. I started using the Aroma-Ring and felt I was playing harder and feeling sharp. The coach says I can keep it up."

Stephanie Nelson – Denver, CO

You Have To Inhale It To Believe It!



With the Aroma-Ring, you get a '**near-instant**' increase in energy, stamina and power. You DON'T get a feeling of nervousness or the jitters. You can use the Aroma-Ring right along with other foods, drinks and energy supplements -- including caffeine. It's like putting another log on your energy fire. It's 100% natural and contains NO BANNED SUBSTANCES!

You've read how our **inhalable energy products** work. You've taken a look at our research. You've seen a bunch of testimonials. You may be wondering, will it work for me? We're confident it will, but YOU have to inhale it to believe it!

I Feel Focused And Riveted . . .

"I'm a competitive archer and archery biathlete. I shot my best 'group' ever, after using the Aroma-Ring. I feel focused and riveted on my target – this after running hard from the previous station."

Zane Hutton, Salt Lake City, UT

Have A Positive Experience or We'll Return Your Money

Right now you're just a couple of clicks away from having this **amazing new supplement** sent right to your door! A few short days away from experiencing first hand; increased endurance, speed and strength.

And since you've read all the way to here, you must be serious about giving it a try. Well we want you to and we're willing to let you **do it on our dime**. Which is why we're offering a 100% money-back guarantee. Order it, try it and if you don't have a positive experience, we'll return your money.



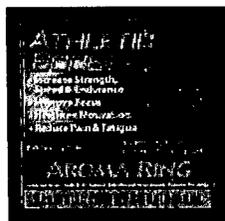
Imagine . . .
having more power, speed and endurance
feeling less pain and fatigue and
experiencing a greater motivation to push
your limits.

Can you see yourself putting pressure on your fellow competitors and even setting a new personal best?

It's a no-brainer -- do yourself a favor, order your Aroma-Ring now and start enjoying the **scientifically proven benefits** of scented breathing. Even though the actual value -- of increased strength, speed and endurance will be

worth a lot more to you than this, each Aroma-Ring can be as low as \$2.49 each.

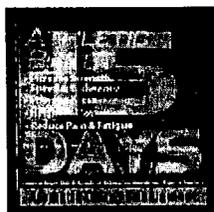
Can you believe it? For less than the cost of a high-quality protein bar, you can have the power of the latest energy supplement working for you.



**ORDER ONE
ONLY 2.99!**



**ORDER A 7-DAY SUPPLY - \$2.74 each
SAVE 25¢
On EACH Aroma-Ring!**



**ORDER A 15-DAY SUPPLY - \$2.49 each
SAVE \$7.50
On Your Aroma-Ring Order!**



**ORDER A 30-DAY SUPPLY - \$1.99 each
SAVE \$30.00
On Your Aroma-Ring Order!**



Experience All Of Our Aroma-Rings With The **Quick-Pack-Ten Sampler**

Click here to read about our [Quick-Pack-Ten Sampler](#) (with FREE SHIPPING), where you can experience all of our exciting and effective Aroma-Rings. Be sure to read about each of these great products. The research for each one is unique and the results are just as amazing!



This powerful endurance aid and energy supplement will improve your athletic performance or we'll give you your money back. Better Living Through Scented Breathing. So Get Out There and Enjoy Every Breath!

© 2006 copyright www.aroma-ring.com | athletic | weight loss | energy | relaxation | arousal



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TTABVUE. Trademark Trial and Appeal Board Inquiry System

Opposition**Number:** 91151291**Filing Date:** 12/17/2001**Status:** Terminated**Status Date:** 05/22/2002**Interlocutory Attorney:** THOMAS W WELLINGTON**Defendant****Name:** X M INTERNATIONAL, L.L.C.**Correspondence:** X M INTERNATIONAL, L.L.C.
402 W 5050 N
PROVO, UT 84604-5650**Serial #:** 78055466**Application Status:** Abandoned - After Inter-Partes Decision**Mark:** OXYPOPPERS**Plaintiff****Name:** BODYONICS, LTD.**Correspondence:** JAY H GELLER
WEST TOWER
SUITE 4000 2425 W. OLYMPIC BL.
SANTA MONICA, CA 90404**Serial #:** 75636209**Registration #:** 2447371**Application Status:** Section 8 and 15 - Accepted and Acknowledged**Mark:** POPPERS**Prosecution History**

#	Date	History Text	Due Date
7	05/06/2002	<u>DEF'S APPEARANCE</u>	
6	05/22/2002	TERMINATED	
5	05/22/2002	<u>BOARD'S DECISION: SUSTAINED</u>	
4	05/06/2002	<u>WITHDRAWAL OF APPLICATION</u>	
3	04/10/2002	PENDING, INSTITUTED	
2	04/10/2002	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	05/20/2002
1	12/17/2001	<u>FILED AND FEE</u>	

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LAW OFFICES OF
JAY H. GELLER
A PROFESSIONAL CORPORATION
WEST TOWER, SUITE 4000
2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404

TELEPHONE
(310) 449-1399
FACSIMILE
(310) 449-1394
E-MAIL
jhgeller@aol.com

December 12, 2001

Commissioner of Patents and Trademarks
Washington, D.C. 20231

Re: Serial Number 78/055470 - TESTROPPERS

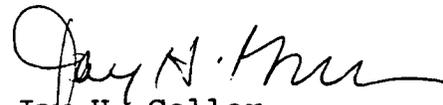
Dear Sir:

Enclosed please find the a Notice of Opposition with regard to Serial Number 78/055470 for the trademark TESTROPPERS published in the Official Gazette of September 18, 2001. I will appreciate your stamping the date of receipt of this Request on the enclosed stamped, self-addressed postal card, and returning to me at your earliest convenience. This request is filed in triplicate.

Kindly charge deposit account 50-1284 in the amount of \$300 to cover the filing fee for this Opposition.

Please do not hesitate to contact me if you have any further questions in this regard.

Very truly yours,


Jay H. Geller

JHG:mk
Encls. a/s
cc: Stephen R. Stern, Esq.

Poppers

Subj: Re: OxyPoppers Trademark
Date: 4/19/02 12:21:55 PM Pacific Daylight Time
From: JHGELLER
To: DaAnders@basicresearch.org
CC: sstem@hsrlaw.com

In a message dated 4/19/02 12:19:23 PM Pacific Daylight Time, DaAnders@basicresearch.org writes:

Subj: OxyPoppers Trademark
Date: 4/19/02 12:19:23 PM Pacific Daylight Time
From: DaAnders@basicresearch.org
To: jhgeller@aol.com
CC: pate@patepiercebaird.com
Sent from the Internet

Dear Mr. Geller:

In response to the office action you filed against XM International's application for OxyPoppers, I left a voice message at your office regarding Basic Research's abandonment of the OxyPoppers trademark. Since the time I left that message, I have been in contact with our outside counsel, Mr. Jack Pate of Pate, Pierce & Baird, and in the spirit of cooperation under the settlement agreement with Bodyonics, have authorized him to proceed to file an express abandonment of the trademark applications of OxyPoppers and TestroPoppers. I trust this alleviates your need to pursue the opposition proceedings. If you have any questions, please contact Mr. Jack Pate at (801) 530-0330.

Dan Anderson

Dan Anderson
 General Counsel
 (801) 234-7069
 Fax (801) 234-8169
 dananderson@basicresearch.org

Mr. Anderson:

Please accept my apologies for not calling you back yesterday - things have been very hectic around here the last few days. I did finally receive from the TTAB the institution of the OXYPOPPERS opposition and I believe the TESTROPOPPERS opposition had already been instituted. In light of the settlement of the trademark issues between the clients, I agree that filing the express notices of abandonment will take care of the Oppositions that have been instituted. Thanks for attending to this matter so promptly. Please let me know if you have any further questions on this matter.

Jay H. Geller
 West Tower, Suite 4000
 2425 W. Olympic Bl.
 Santa Monica, CA 90404
 PH: 310-449-1399
 FX: 310-449-1394

Friday, April 19, 2002 America Online: JHGELLER

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-08-13 12:27:27 ET

Serial Number: 78055470 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): TESTROPOPPERS

Standard Character claim: No

Current Status: Abandoned: Applicant's express request.

Date of Status: 2002-05-06

Filing Date: 2001-03-28

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 102

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2002-07-03

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. X M INTERNATIONAL, L.L.C.

Address:

X M INTERNATIONAL, L.L.C.
402 WEST 5050 NORTH
PROVO, UT 84604
United States

Legal Entity Type: Ltd Liab Co

State or Country Where Organized: Utah

Phone Number: (801) 234-7008

Fax Number: (801) 234-8108

GOODS AND/OR SERVICES

International Class: 005

Class Status: Active

DIETARY SUPPLEMENTS MAINLY USED FOR WEIGHT LOSS AND/OR SPORTS NUTRITION

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2002-05-06 - Abandonment - Express mailed, 2nd exam ITU case

2002-05-14 - Notice of allowance - mailed

2001-10-15 - Extension Of Time To Oppose Received

2001-09-18 - Published for opposition

2001-08-29 - Notice of publication

2001-07-14 - Approved for Pub - Principal Register (Initial exam)

2001-07-12 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent

X M INTERNATIONAL, L.L.C.

402 W 5050 N

PROVO UT 84604-5650

Phone Number: (801) 234-7008

Fax Number: (801) 234-8108



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TTABVUE. Trademark Trial and Appeal Board Inquiry System

Opposition**Number:** 91158919**Filing Date:** 12/15/2003**Status:** Terminated**Status Date:** 06/30/2004**Interlocutory Attorney:** THOMAS W WELLINGTON**Defendant****Name:** Archer, Philip R.**Correspondence:** Petapol, LLC.
5608 BIG RIVER DR
THE COLONY, TX 75056-3718**Serial #:** 78244261**Application Status:** Abandoned - After Inter-Partes Decision**Mark:** PET POPPERS**Plaintiff****Name:** Bodyonics, Ltd.**Correspondence:** JAY H GELLER
WEST TOWER
SUITE 4000 2425 W. OLYMPIC BL.
SANTA MONICA, CA 90404**Serial #:** 75636209**Registration #:** 2447371**Application Status:** Section 8 and 15 - Accepted and Acknowledged**Mark:** POPPERS**Prosecution History**

#	Date	History Text	Due Date
6	06/30/2004	TERMINATED	
5	06/30/2004	<u>BOARD'S DECISION: SUSTAINED</u>	
4	04/23/2004	<u>NOTICE OF DEFAULT</u>	
3	12/30/2003	PENDING, INSTITUTED	
2	12/30/2003	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	02/08/2004
1	12/15/2003	<u>FILED AND FEE</u>	

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LAW OFFICES OF
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A PROFESSIONAL CORPORATION
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2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404

TELEPHONE
(310) 449-1399
FACSIMILE
(310) 449-1394
E-MAIL
jhgeller@aol.com

December 12, 2003

Mr. Philip R. Archer
5608 Big River Drive
The Colony, TX 75056

Re: POPPERS Trademark Infringement

Dear Mr. Archer:

Bodyonics, Ltd., Hicksville, NY (hereafter "Bodyonics"), owns United States Trademark Registrations No. 2447371 for the trademark POPPERS for dietary and nutritional supplements.

It has come the company's attention that you have filed applications to register the marks PET POPPERS and HEALTH POPPERS. An Opposition was filed earlier this week against your application to register PET POPPERS and an Opposition will be filed against your application to register the mark HEALTH POPPERS if it is ever published for Opposition. It is highly unlikely that your HEALTH POPPERS application will ever be approved for publication for Opposition in light of Bodyonics' prior ownership of its POPPERS mark. It appears that you have not yet commenced use of either mark. We suggest you voluntarily abandon both pending applications.

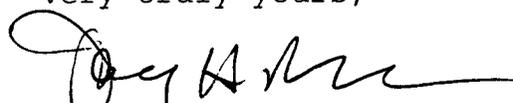
Any use by you of the mark POPPERS, alone or in combination with any other word or design, will constitute an infringement of Bodyonics' registered trademark. Bodyonics' POPPERS supplements are widely advertised and widely available in the retail market.

This letter is to demand that you forthwith cease and desist from any use of any mark or name consisting in whole or in part of the mark POPPERS. The company further demands that you recall all product from the channels of commerce that bear the name POPPERS, that you destroy all unused packaging bearing the name and that you relabel or destroy all currently packaged product that you have in inventory. The company further demands that you provide an immediate accounting of all the sales you have made of this product, and all product that you have in inventory.

Please respond to this letter by the close of business on December 22, 2003. Bodyonics vigorously protects its trademarks. It has used the POPPERS mark for over four years and has built up tremendous good will in the mark.

I look forward to hearing from you.

Very truly yours,


Jay H. Geller

JHG:mk

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-08-13 12:47:13 ET

Serial Number: 78252571 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): HEALTH POPPERS

Standard Character claim: No

Current Status: Abandoned-Failure To Respond Or Late Response

Date of Status: 2004-05-28

Filing Date: 2003-05-21

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 102

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2004-06-22

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Archer, Philip, R.

Address:

Archer, Philip, R.
5608 Big River Dr.
The Colony, TX 75056
United States

Legal Entity Type: Individual
Country of Citizenship: United States
Phone Number: 972-701-0559
Fax Number: 972-370-0397

GOODS AND/OR SERVICES

International Class: 005

Class Status: Active

US 006 018 044 046 051 052 GandS-- Nutraceutical formulated nutritional supplements suspended in non-refrigerated gel served in individual servings in multiple flavors

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

Disclaimer: "HEALTH"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2004-05-28 - Abandonment - Failure To Respond Or Late Response

2003-10-09 - Non-final action e-mailed

2003-09-28 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent

Archer, Philip, R.

5608 Big River Dr.

The Colony, TX 75056

Phone Number: 972-701-0559

Fax Number: 972-370-0397

LAW OFFICES OF
JAY H. GELLER
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WEST TOWER, SUITE 4000
2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404
December 22, 2005

TELEPHONE
(310) 449-1399
FACSIMILE
(310) 449-1394
E-MAIL
jhgeller@aol.com

Mr. Eric Organ
206 Macopin Corporation
206 Macopin Road
Bloomingdale, NJ 07403

Via facsimile:
973-838-0560
and first class mail

Re: POPPERS Trademark Infringement

Dear Mr. Organ:

Bodyonics, Ltd., Farmingdale, NY (hereafter "Bodyonics"), owns United States Trademark Registrations No. 2447371 for the trademark POPPERS for dietary supplements. Bodyonics has used the mark continuously since May, 1999.

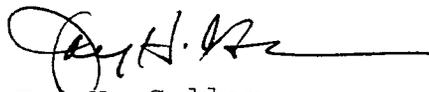
It has come the company's attention that you may be marketing a dietary supplement that wholly incorporates Bodyonics' registered trademark POPPERS, namely PROTEIN POPPERS and have applied to register the name. We are aware that your application has been rejected based upon Bodyonics' prior registration of the trademark POPPERS. Your use of that name is an infringement of Bodyonics' registered trademark. It is inconceivable that in the market in which you sell your products, you were not aware of Bodyonics' prior use of, and rights in, the name POPPERS prior to your use of the name. Your infringement appears to be intentional and will subject you to triple damages if Bodyonics is forced to initiate litigation to stop your use of the mark.

This letter is to demand that you forthwith cease and desist from any further use of the name POPPERS, that you recall all product from the channels of commerce bearing the name POPPERS, that you destroy all unused packaging bearing the name, that you relabel or destroy all currently packaged product that you have in inventory, and that you provide an immediate accounting of all the sales you have made of this product, and all product that you have in inventory.

Please respond to this letter by the close of business on Friday, December 30, 2005. Bodyonics vigorously protects its trademarks. It has used the POPPERS mark for nearly seven years and has built up tremendous good will in the mark. Your failure to voluntarily accede to the demands in this letter will result in the company promptly taking further action against you.

I look forward to hearing from you.

Very truly yours,


Jay H. Geller

JHG:mk

Poppers

206 Macopin Corp.

206 Macopin Road
Bloomingdale, NJ 07403
973-838-8300

December 23, 2005

Jay H. Geller, Esq.
West Tower, Suite 4000
2425 West Olympic Boulevard
Santa Monica, CA 90404

Re: Alleged Poppers Trademark Infringement

Dear Mr. Geller:

This is in response to your letter dated December 22, 2005.

206 Macopin Corp. sent its original application to register "Protein Poppers" on January 21, 2005. Although unconceivable by you, we were 100% unaware of Bodyonics' use of the mark in the nutritional industry, even with our affiliation to a small chain health food store, mail order and internet mailing company through which we have distributed Bodyonics, Cytodyne and Pinnacle products, and we had never heard of "Poppers". Some time during Midsummer 2005, we were made aware of the use of the mark by Bodyonics. As soon as I became aware of use of the mark, I contacted the office of Mel Rich, the president of Great Earth Companies, Inc., to discuss the matter. I was informed he was unavailable, and I was given your name and phone number. I immediately called and believe I spoke to you. Through the conversation, it was determined that Bodyonics was currently using the mark and had no interest in discontinuing. Based on the conversation, it was agreed that 206 Macopin Corp. would abandon its application and rename its product. A letter was sent to our attorney on December 14, 2005 advising them to abandon the mark. As discussed on the phone, no finished product was ever manufactured or marketed under the name, "Protein Poppers".

If you have any further questions, please call me at 973-838-8300.

Very truly yours,


Richard L. Quine

RLQ/low

Poppers

LAW OFFICES OF
JAY H. GELLER
A PROFESSIONAL CORPORATION
WEST TOWER, SUITE 4000
2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404

TELEPHONE
(310) 449-1399
FACSIMILE
(310) 449-1394
E-MAIL
jhgeller@aol.com

May 29, 2007

Dave McAuliff
AASLabs/Getanabolics.com
4809 Clairmont Dr., No. 395
San Diego, CA 92117

Certified No. 70051820
000107574435
Return Receipt Requested

Re: POPPERS Trademark Infringement

Dear Mr. McAuliff:

Bodyonics, Ltd., Farmingdale, NY (hereafter "Bodyonics"), owns United States Trademark Registrations No. 2447371 for the trademark POPPERS for dietary and nutritional supplements. The registration has become incontestable.

It has come the company's attention that you are marketing a dietary supplement under the name VEGAS POPPERS on the websites www.vegasparty pill.com and getanabolics.com.

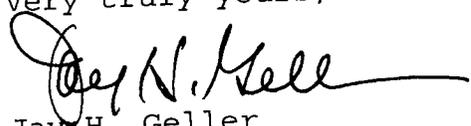
Any use by you of the mark POPPERS, alone or in combination with any other word or design, constitutes an infringement of Bodyonics' registered trademark. Bodyonics' POPPERS supplements are widely advertised and widely available in the retail market, both on the Internet and in brick and mortar stores.

This letter is to demand that you forthwith cease and desist from any use of any mark or name consisting in whole or in part of the mark POPPERS. The company further demands that you recall all product from the channels of commerce that bear the name POPPERS, that you destroy all unused packaging bearing the name and that you relabel or destroy all currently packaged product that you have in inventory. The company further demands that you provide an immediate accounting of all the sales you have made of this product, and all product that you have in inventory.

Please respond to this letter by the close of business on June 8, 2007. Bodyonics vigorously protects its trademarks. It has used the POPPERS mark for over eight years and has built up tremendous good will in the mark.

I look forward to hearing from you.

Very truly yours,


Jay H. Geller

JHG:mk
cc: Mel Rich
Stephen R. Stern, Esq.

Poppers



Advanced Anabolic Sciences, LLC

4809 Clairemont Dr. #395

San Diego, CA 92117

Fax - (858) 408-2622

June 6, 2007

Dear Mr. Geller,

Thank you for bringing this oversight by us to our attention we were not aware of the trademark held by Bodyonics, Ltd.

We have renamed Vegas Poppers and it will be called "Vegas Party Pill" and we are re-labeling the existing labeled bottles.

We have only direct to consumer sales so there is no product to recall thru any distribution channels. Changes have been made to our website and all print media is in the process of being changed and will be implemented immediately.

Sincerely,



David McAuliff

LAW OFFICES OF
JAY H. GELLER
A PROFESSIONAL CORPORATION
WEST TOWER, SUITE 4000
2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404

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jhgeller@aol.com

August 15, 2001

Mr. John Haller
Brown, Martin, Haller & McClain
1660 Union Street
San Diego, CA 92101-2926

Re: POPPERS Trademark Infringement

Dear John:

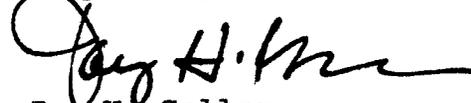
I represent Bodyonics, Ltd., Hicksville, NY (hereafter "Bodyonics"), which owns United States Trademark Registration No. 2,447,371 for the trademark POPPERS for dietary supplements (see copy of registration enclosed).

It has come to the company's attention that your client, Next Cereals, LLC, has filed an application, based upon a bona fide intent to use, to register the mark PROTEIN POPPERS for cereal foods, SN 75800906, which was published for Opposition in the Official Gazette of August 7, 2001. Your client's intent to use the mark PROTEIN POPPERS is an infringement of Bodyonics' registered trademark.

Since the application is based upon intent to use, and I have been unable to find any actual use of the mark by Next Cereals, LLC, abandonment of the pending application appears to be the easiest and most cost effective manner of disposing of this matter. I have filed a 60 day extension request for filing an Opposition to give Next Cereals, LLC adequate time to voluntarily abandon the pending application. If it fails to do so, Bodyonics will file an Opposition.

Please respond to this letter at your earliest convenience. I look forward to hearing from you.

Very truly yours,


Jay H. Geller

JHG:mk
Encl. a/s
cc: Mel Rich

Poppers

BROWN MARTIN HALLER & McCLAIN LLP

NEIL F. MARTIN
JOHN L. HALLER*
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BARRY F. SOALT
KATHLEEN L. CONNELL
SUSAN B. MEYER
HEIDI L. EISENHUT

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SPECIALIZING IN INTELLECTUAL
PROPERTY MATTERS, UNFAIR
COMPETITION AND RELATED LITIGATION

PATENTS
TRADEMARKS
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FRANCHISING
LICENSING
TRADE SECRETS

November 2, 2001

Jay H. Geller
Law Offices of Jay H. Geller
West Tower
Suite 4000
2425 West Olympic Blvd.
Santa Monica, CA 90404

Re: Mark: PROTEIN POPPERS
Serial No.: 75/800,906
Our Ref. No.: 7578-TM61

Dear Mr. Geller:

I just received a copy of the U.S. Patent and Trademark Office Trademark Trial and Appeal Board's grant until November 6 of your request for Extension of Time to file Opposition in the above-referenced matter.

As you know, we requested abandonment of the above-referenced application. I am enclosing, for your reference, a copy of the notification from the U.S. Patent and Trademark Office regarding the withdrawal of Next Cereals' PROTEIN POPPERS Application Serial No. 75/800,906. In view of the above, I assume this matter is now closed.

Please call if you have any questions or comments.

Very truly yours,


John L. Haller

JLH:lr
Enclosure

LAW OFFICES OF
JAY H. GELLER
A PROFESSIONAL CORPORATION
WEST TOWER, SUITE 4000
2425 WEST OLYMPIC BOULEVARD
SANTA MONICA, CALIFORNIA 90404
December 22, 2005

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(310) 449-1399
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E-MAIL
jhgeller@aol.com

Mr. Trent Hinde
President
Sportlab
130 Don Park Road, No. 3
Markham, ON L3R 1C3

Via facsimile:
905-474-1057
and email:
trent@sportlabdirect.com

Re: POPPERS Trademark Infringement

Dear Mr. Hinde:

Bodyonics, Ltd., Farmingdale, NY (hereafter "Bodyonics"), owns United States Trademark Registrations No. 2447371 for the trademark POPPERS for dietary supplements. Bodyonics has used the mark continuously since May, 1999.

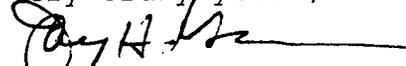
It has come to the company's attention that you are marketing a dietary supplement that wholly incorporates Bodyonics' registered trademark POPPERS, namely PlasmaVol Power Poppers - P3. Your use of that name is an infringement of Bodyonics's registered trademark. It is inconceivable that in the market in which you sell your products, you were not aware of Bodyonics's prior use of, and rights in, the name POPPERS prior to your use of the name. Your infringement appears to be intentional and will subject you to triple damages if Bodyonics is forced to initiate litigation to stop your use of the mark.

This letter is to demand that you forthwith cease and desist from any further use of the name POPPERS. The company further demands that you recall all product from the channels of commerce that bear the name POPPERS, that you destroy all unused packaging bearing the name and that you relabel or destroy all currently packaged product that you have in inventory. The company further demands that you provide an immediate accounting of all the sales you have made of this product, and all product that you have in inventory. Be advised that Bodyonics has deposited its registration with the United States Customs Service to block any further importations of your offending product into the United States.

Please respond to this letter by the close of business on Friday, December 30, 2005. Bodyonics vigorously protects its trademarks. It has used the POPPERS mark for nearly seven years and has built up tremendous good will in the mark. Your failure to voluntarily accede to the demands in this letter will result in the company promptly taking further action against you.

I look forward to hearing from you.

Very truly yours,


Jay H. Geller

JHG:mk

Poppers

Subj: RE: [Fwd: POPPERS Trademark Infringement]
Date: 1/3/2006 5:58:58 A.M. Pacific Standard Time
From: trenthinde@hotmail.com
To: JHGELLER@aol.com

Hello Mr. Geller,

thank you for your email. We have actually discontinued our Plasmavol P3 approximately 6 months ago. We have only ever sold 24 units into the US, to Bodybuilding.com, who could confirm this purchase volume for you. If you have any further concerns, please let me know.

Best regards,

Trent Hinde

President

Sportlab Nutritional Science Ltd.

>----- Original Message -----

>Subject: POPPERS Trademark Infringement
>From: JHGELLER@aol.com
>Date: Thu, December 22, 2005 5:31 pm
>To: trent@sportlabdirect.com
>Cc: srstern@hsrlaw.com

>-----

>
>Please see attached letter.
>
>Jay H. Geller
>West Tower, Suite 4000
>2425 W. Olympic Bl.
>Santa Monica, CA 90404
>PH: 310-449-1399
>FX: 310-449-1394
>

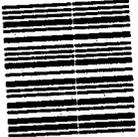
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