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

Proceeding	91187908
Party	Plaintiff Oklahoma State University
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Signature	/Alicia Grahn Jones/
Date	06/09/2010
Attachments	Motion for Leave to File Supplemental Declaration in Support of MSJ.pdf (16 pages)(956833 bytes)

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

BOISE STATE UNIVERSITY,)	
UNIVERSITY OF GEORGIA ATHLETIC)	
ASSOCIATION, INC., UNIVERSITY OF)	
MICHIGAN, OKLAHOMA STATE)	
UNIVERSITY, UNIVERSITY OF NOTRE)	
DAME DU LAC, UNIVERSITY OF)	
WISCONSIN, AIR FORCE ACADEMY)	Opposition Nos. 91187905,
ATHLETIC ASSOCIATION, KANSAS)	91187796, 91187907, 91187908,
STATE UNIVERSITY,)	91187917, 91187920, 91187921,
)	91187927
Opposers,)	
)	
v.)	
)	
SUPER BAKERY, INC.,)	
)	
Applicant.)	
)	
)	

**OPPOSERS’ MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION IN
SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT**

Pursuant to the TBMP Rule § 528.05(b) and Federal Rule of Civil Procedure 56(e), Opposers University of Georgia Athletic Association, Boise State University, University of Michigan, Oklahoma State University, University of Notre Dame du Lac, University of Wisconsin, Air Force Academy Athletic Association, and Kansas State University (collectively referred to as “Opposers”) in the above-referenced opposition proceedings respectfully request leave to supplement Opposers’ Motions for Summary Judgment with the newly discovered evidence set forth in the Supplemental Declaration of Alicia Grahm Jones attached as Exhibit.¹

¹ Opposers’ Motions for Summary Judgment were supported by declarations of Lauren Ralls. Opposers request that the Board grant leave to file the Declaration of Alicia Grahm Jones to supplement Ms. Ralls’s earlier declarations.

I. BACKGROUND

This case involves Applicant Super Bakery’s attempt to obtain federal trademark registrations for marks that trade off of the goodwill and reputation of well-known collegiate mascots and nicknames of over twenty universities. Opposers filed Motions for Summary Judgment in the above-referenced opposition proceedings requesting that the Board refuse registration of Applicant’s marks on the grounds that Applicant’s use of Opposer’s mascots and nicknames in connection with the generic letter string “ADE” for a sports drink is likely to cause consumer confusion with Opposers. Indeed, Applicant is attempting to draw on the goodwill associated with Opposers’ trademarks without Opposers’ authorization.

After briefing of Opposers’ Motion and Memorandum in Support of Summary Judgment concluded, Applicant filed a Specimen of Use in connection with Applicant’s application for the mark BUCKEYE ADE (Serial No. 77/382,914) on May 20, 2010. *See* Declaration of Alicia Grahn Jones (“Jones Decl.”) ¶ 2.



Applicant’s Specimen of Use demonstrates that Applicant intends to use Opposers’ mascots and nicknames (e.g., “BUCKEYE”) separate from the letter string “ADE,” further increasing the similarity of the marks and, correspondingly, the likelihood of confusion.

This specimen was not produced to Opposers during discovery, and came to Opposers' attention only as the result of periodic reviews of the USPTO TESS website. *Id.*; *see also* Opposition No. 91187905; Dkt. Nos. 9-10 (Declaration of Lauren Sullins Ralls ¶ 3, Ex. E at pp. 12-13 (Applicant's Interrogatory Responses Nos. 7 and 9)).² Therefore, Opposers request leave to file the Jones Declaration to supplement their Motions for Summary Judgment with Applicant's Specimen of Use.

II. ARGUMENT AND AUTHORITIES

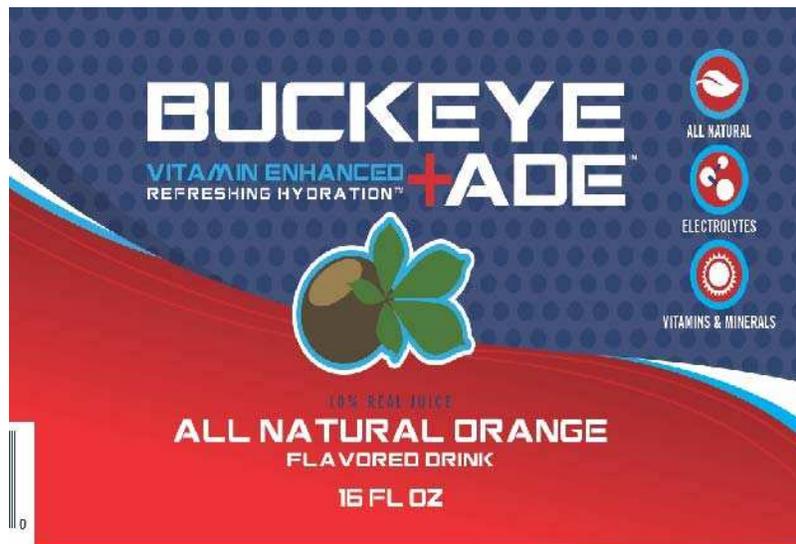
It is appropriate for the Board to grant Opposers' Motion for Leave to supplement their Motions for Summary Judgment with Applicant's specimens pursuant to TMBP § 528.05(b), which provides: "The Board may permit affidavits submitted in connection with a summary judgment motion to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." TMBP § 528.05(b) (citing Fed. R. Civ. P. 56(e); *Shalom Children's Wear Inc. v. In-Wear A/S*, 26 U.S.P.Q.2d 1516 (T.T.A.B. 1993)). Where, as here, the evidence to be admitted is newly discovered, a motion for leave should be granted. *See Nabisco, Inc. v. Wm Wrigley Jr. Co.*, 40 U.S.P.Q.2d 1251, 1254 (T.T.A.B. 1995) (permitting the admission of newly discovered evidence more than a year and a half after full briefing on summary judgment).

Applicant's newly discovered Specimen of Use is highly relevant to the likelihood of confusion analysis. As set forth in Opposers' Motions for Summary Judgment, the dominant element in Applicant's marks is Opposers' mascot names and nicknames. *See* Opp. No. 91187905, Dkt. No. 26, p. 10. Where the dominant feature of the marks is the same or similar,

² In the interest of efficiency, this Motion cites only to the docket in Opposition No. 91187905. Similar Declarations and Responses to Interrogatories were filed in each of the Oppositions referenced in the caption and those corresponding citations are set forth in the chart attached as **Exhibit 2**.

the likelihood of confusion increases. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266 (Fed. Cir. 2002).

Applicant’s specimen for the BUCKEYE ADE mark uses the term BUCKEYE, Ohio State University’s well-known nickname, separate and apart from the “ADE” letter string:



Jones Decl. ¶ 2, Ex. A. As reflected in the Specimens of Use filed in connection with Applicant’s registrations of PHILLYADE and NEWYORKADE, Applicant consistently separates the dominant terms in its marks (i.e., “Buckeye,” “Philly” and “NewYork”) from the “ADE” letter string. Jones Decl. ¶¶ 3-4, Exs. B & C. Applicant’s separation of the mascot and nickname from the “ADE” letter string further increases the likelihood of confusion. *See Digi Int’l Inc. v. DigiPos Sys. Inc.*, Opp. No. 91163719, 2008 WL 2515105, at *13 (T.T.A.B. Jan. 10, 2008) (refusing registration where applicant’s typical presentation of the mark “increase[d] the visual similarity of the two marks and the likely perception of applicant’s mark as two separate terms” and made confusion more likely).

Accordingly, Opposers’ Motion for Leave should be granted and the newly discovered evidence considered as part of the Supplemental Declaration of Alicia Grahn Jones. *See*

Genesco Inc. v. Levi Strauss & Co., 219 U.S.P.Q. 1205, 1208 n.4 (T.T.A.B. 1983) (permitting consideration of additional evidence relevant to motion for summary judgment).

III. CONCLUSION

For the foregoing reasons, Opposers respectfully request leave to file the Supplemental Declaration of Alicia Grahn Jones, attached as Exhibit 1, in support of their Motions for Summary Judgment.

Dated: June 9, 2010

Respectfully submitted,

/Alicia Grahn Jones/
R. Charles Henn Jr.
Alicia Grahn Jones
Harris W. Henderson
KILPATRICK STOCKTON LLP
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(404) 815-6500
Counsel for Opposers

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

BOISE STATE UNIVERSITY,)	
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)	91187927
Opposers,)	
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v.)	
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SUPER BAKERY, INC.,)	
)	
Applicant.)	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT was served on counsel for the Applicant on June 9, 2010 via first class mail to:

David G. Oberdick
Meyer, Unkovic & Scott LLP
535 Smithfield Street, Suite 1300
Pittsburgh, PA 15222

/Alicia Grahm Jones/
Alicia Grahm Jones
Counsel for Opposers

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing OPPOSERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT is being filed electronically with the TTAB via ESTTA on this day, June 9, 2010

/Alicia Grahm Jones/
Alicia Grahm Jones
Counsel for Opposers

EXHIBIT 1

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

BOISE STATE UNIVERSITY,)	
UNIVERSITY OF GEORGIA ATHLETIC)	
ASSOCIATION, INC., UNIVERSITY OF)	
MICHIGAN, OKLAHOMA STATE)	
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WISCONSIN, AIR FORCE ACADEMY)	Opposition Nos. 91187905,
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Opposers,)	
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v.)	
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SUPER BAKERY, INC.,)	
)	
Applicant.)	
)	
)	

**SUPPLEMENTAL DECLARATION OF ALICIA GRAHN JONES IN SUPPORT
OF OPPOSERS' MOTIONS FOR SUMMARY JUDGMENT**

I, Alicia Grahn Jones, make the following Declaration:

1. I am an attorney at the law firm Kilpatrick Stockton LLP, which represents Opposers University of Georgia Athletic Association, Boise State University, University of Michigan, Oklahoma State University, University of Notre Dame du Lac, University of Wisconsin, Air Force Academy Athletic Association, and Kansas State University (collectively referred to as "Opposers") in the above-referenced oppositions. I am over the age of twenty-one and am competent to make this Declaration. The facts set forth in this Declaration are based on my personal knowledge and upon documents maintained by my firm in the ordinary course of business under my control and supervision.

2. On or about June 1, 2010, Opposers became aware that Super Bakery, Inc. ("Applicant") had filed a Specimen of Use in connection with Application Serial No. 77/382,914

for the mark BUCKEYEADE. The Specimen of Use was discovered during a routine review of Applicant's trademark filings. A true and correct copy of the specimen for Applicant's BUCKEYEADE mark is attached as **Exhibit A**.

3. As reflected in the Specimen of Use filed in connection with Applicant's Reg. No. 3,779,157 for PHILLYADE, Applicant separates the dominant term in its marks (e.g., "Philly") from the "ADE" letter string. A true and correct copy of the Specimen of Use submitted in connection with Reg. No. 3,779,157 is attached as **Exhibit B**.

4. As reflected in the Specimens of Use filed in connection with Applicant's Reg. No. 3,773,030 for NEWYORKADE, Applicant consistently separates the dominant term in its marks (e.g., "NewYork") from the "ADE" letter string. A true and correct copy of the Specimen of Use submitted in connection with Reg. No. 3,773,030 is attached as **Exhibit C**.

5. Applicant's specimen for its application to register the mark BUCKEYEADE demonstrates that Applicant intends to use Opposers' mascots and nicknames separate and apart from the letter string "ADE", further increasing the likelihood of confusion with Opposers.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 9th day of June, 2010.

/Alicia Grahm Jones/
Alicia Grahm Jones

EXHIBIT A TO DECLARATION OF ALICIA GRAHN JONES

BUCKEYE ADE™
www.mymascotade.com

Distributed by: SUPER BAKERY
P.O. Box 107005 Pittsburgh, PA 15237

BUCKEYE

VITAMIN ENHANCED + ADE™
REFRESHING HYDRATION™



ALL NATURAL



ELECTROLYTES



VITAMINS & MINERALS

10% REAL JUICE REFRIGERATE AFTER OPENING

10% REAL JUICE
ALL NATURAL ORANGE
FLAVORED DRINK
16 FL OZ

Nutrition Facts

Serving Size: 8 fl oz (240 mL)
Servings Per Container: 2

Amount Per Serving	
Calories 100	
	% Daily Value*
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Sodium 80 mg	3%
Potassium 120 mg	3%
Total Carbohydrate 24g	8%
Dietary Fiber 0g	0%
Sugars 24g	
Protein 0g	

Vitamin A 0% · Vitamin C 10%
Calcium 10% · Iron 0%
Vitamin D 25% · Magnesium 5%

*Percent Daily Values (DV) are based on a 2,000 calorie diet.

INGREDIENTS: FILTERED WATER, CANE SUGAR, ORANGE JUICE CONCENTRATE, NATURAL FLAVOR, CALCIUM LACTATE, CITRIC ACID, POTASSIUM CITRATE, SALT, BETA CAROTENE (COLOR), PECTIN, MODIFIED CORN STARCH, MAGNESIUM HYDROXIDE, ASCORBIC ACID (VITAMIN C) AND VITAMIN D3.



EXHIBIT B TO DECLARATION OF ALICIA GRAHN JONES

PHILLYADE™
www.mycityade.com

Distributed by: SUPER BAKERY
P.O. Box 101005 Pittsburgh, PA 15237



PHILLY +ADE™

VITAMIN ENHANCED
REFRESHING HYDRATION™



ALL NATURAL



ELECTROLYTES



VITAMINS & MINERALS

10% REAL JUICE REFRIGERATE AFTER OPENING

10% REAL JUICE
ALL NATURAL ORANGE
FLAVORED DRINK
16 FL OZ

Nutrition Facts

Serving Size: 8 fl oz (240 mL)
Servings Per Container: 2

Amount Per Serving	
Calories 100	
	% Daily Value*
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Sodium 80 mg	3%
Potassium 120 mg	3%
Total Carbohydrate 24g	8%
Dietary Fiber 0g	0%
Sugars 24g	
Protein 0g	
Vitamin A 0%	Vitamin C 10%
Calcium 10%	Iron 0%
Vitamin D 25%	Magnesium 5%

*Percent Daily Values (DV) are based on a 2,000 calorie diet.

INGREDIENTS: FILTERED WATER, CANE SUGAR, ORANGE JUICE CONCENTRATE, NATURAL FLAVOR, CALCIUM LACTATE, CITRIC ACID, POTASSIUM CITRATE, SALT, BETA CAROTENE (COLOR), PECTIN, MODIFIED CORN STARCH, MAGNESIUM HYDROXIDE, ASCORBIC ACID (VITAMIN C) AND VITAMIN D3.

EXHIBIT C TO DECLARATION OF ALICIA GRAHN JONES

NEW YORK ADE™
www.mycityade.com

Distributed by: SUPER BAKERY
P.O. Box 101005 Pittsburgh, PA 15237

NEW YORK ADE™

VITAMIN ENHANCED
REFRESHING HYDRATION™ + ADE™



ALL NATURAL



ELECTROLYTES



VITAMINS & MINERALS

10% REAL JUICE REFRIGERATE AFTER OPENING

10% REAL JUICE
ALL NATURAL ORANGE
FLAVORED DRINK
16 FL OZ



8 111802 101573 0

Nutrition Facts

Serving Size: 8 fl oz (240 mL)
Servings Per Container: 2

Amount Per Serving	
Calories 100	
	% Daily Value*
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Sodium 80 mg	3%
Potassium 120 mg	3%
Total Carbohydrate 24g	8%
Dietary Fiber 0g	0%
Sugars 24g	
Protein 0g	
Vitamin A 0%	Vitamin C 10%
Calcium 10%	Iron 0%
Vitamin D 25%	Magnesium 5%

*Percent Daily Values (DV) are based on a 2,000 calorie diet.

INGREDIENTS: FILTERED WATER, CANE SUGAR, ORANGE JUICE CONCENTRATE, NATURAL FLAVOR, CALCIUM LACTATE, CITRIC ACID, POTASSIUM CITRATE, SALT, BETA CAROTENE (COLOR), PECTIN, MODIFIED CORN STARCH, MAGNESIUM HYDROXIDE, ASCORBIC ACID (VITAMIN C) AND VITAMIN D3.

EXHIBIT 2

Opposition	Declaration of Lauren Sullins Ralls		
	Dkt. Nos	¶ No.	Exhibit
BULLDOGADE (Opp. No. 91187905)	7-8	3	E at p.12 -13 (Interrogatory Responses 7, 9)
WOLVERINEADE (Opp. No. 91187907)	5-6	3	Ex. D at p. 16 (Interrogatory Responses Nos. 16, 17)
COWBOYADE (Opp. No. 91187908)	14	3	E at pp. 13-14 (Interrogatory Responses 10, 12)
IRISHADE (Opp. No. 91187917)	5-6	3	E at pp. 11-12 (Interrogatory Responses 3, 5)
BADGERADE (Opp. No. 91187920)	8	3	E at pp. 11-12 (Interrogatory Responses 3, 5)
FALCONADE (Opp. No. 91187921)	5	3	D at pp. 5, 11-13 (Interrogatory Responses 3, 7)
CATADE (Opp. No. 91187927)	8	3	E at pp. 5, 12 (Interrogatories 2, 5 and 7)