

ESTTA Tracking number: **ESTTA340093**

Filing date: **03/31/2010**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Universal Protein Supplements Corporation d/b/a Universal Nutrition		
Entity	Corporation	Citizenship	New Jersey
Address	3 TERMINAL ROAD NEW BRUNSWICK, NJ 08901 UNITED STATES		

Attorney information	Maureen Beacom Gorman Davis McGrath LLC 125 S. Wacker Drive, Suite 1700 Chicago, IL 60606 UNITED STATES wmcgrath@davismcgrath.com, mbgorman@davismcgrath.com, tgehrke@davismcgrath.com Phone:312-332-3033		
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Applicant Information

Application No	77832598	Publication date	03/02/2010
Opposition Filing Date	03/31/2010	Opposition Period Ends	04/01/2010
Applicant	Athletic Edge Nutrition Inc 3638 Rayment Dr Suite 3 Las Vegas, NV 89121 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. First Use: 2007/10/10 First Use In Commerce: 2007/10/10 All goods and services in the class are opposed, namely: Dietary and nutritional supplements; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary supplemental drinks; Dietary supplements
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Grounds for Opposition

Genericness	Trademark Act section 23
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Attachments	11793 - Motion to Intervene.pdf (10 pages)(770402 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Tiffany D Gehrke/
Name	Tiffany D. Gehrke
Date	03/31/2010

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

**IN THE MATTER OF TRADEMARK APPLICATION SERIAL NO. 77/832,598
FOR THE MARK: INTRA-WORKOUT
FILING DATE: September 22, 2009**

Gaspari Nutrition, Inc.)	
)	
v.)	OPPOSITION NO. 91194239
)	
Athletic Edge Nutrition Inc.)	
)	
APPLICANT.)	

MOTION TO INTERVENE

Universal Protein Supplements Corporation d/b/a Universal Nutrition (“Universal Nutrition”), through its counsel Davis McGrath LLC, hereby respectfully moves the Board to permit Universal Nutrition to intervene and be joined as an Opposer in this proceeding because Universal Nutrition believes that it will be damaged by the registration of this mark. This motion is brought pursuant to Rule 24 of the Federal Rules of Civil Procedure and Trademark Rule 2.101, 37 C.F.R. § 2.101.

As grounds for intervention, Universal Nutrition asserts as follows:

1. On March 22, 2010, Gaspari Nutrition Inc. (“Gaspari”) filed a Notice of Opposition of Application Serial No. 77832598, for the mark INTRA-WORKOUT, owned by Athletic Edge Nutrition Inc. (“Applicant”). The basis for the Opposition is that the term INTRA-WORKOUT is generic.
2. Intervenor, Universal Nutrition, is a New Jersey corporation with its principal place of business at 3 Terminal Road, New Brunswick, New Jersey 08901.

3. Since 1983, Universal Nutrition has become one of the largest nutritional supplement companies in the United States.

4. Universal Nutrition is a competitor of Applicant in the field of nutritional supplements. Universal Nutrition has used the term “intra-workout” as a generic and/or descriptive term for nutritional supplements consumed during a workout. For example, one of Universal Nutrition’s products, which is produced, marketed, and sold under the INTRA-AID brand is described as an “intra-workout supplement.” Accordingly, Universal Nutrition has standing to intervene in this action to oppose Applicant’s mark on grounds of genericness. *Johnson & Johnson, v. Klearsen Corp.*, Opposition Nos. 91173864 and 91173865 (T.T.A.B. March 5, 2010).

5. This Motion to Intervene is timely filed, and it will not cause prejudice to the Applicant or Gaspari or delay the proceeding. “The requirement of timeliness is a flexible one, and generally left to the sound discretion of the court.” *Pizza Donini, Inc. (Mass.) v. Pizza Donini, Inc. (Canada)*, 2002 WL 31173412 at *9 (T.T.A.B. 2002) (non-precedential). An application to intervene made before the parties have joined issue in the pleadings is generally regarded as timely. *Id.* This motion to intervene is being filed within the opposition period set forth in 15 U.S.C. § 1063, and Applicant has not yet answered. Since the proceedings are just beginning, intervention will not result in any delay. “[I]f intervention will not delay termination of the litigation, intervention ordinarily will be allowed.” *Id.*

6. Universal Nutrition’s intervention involves law and facts in common with those presented by Gaspari and Applicant. Like Gaspari, Universal Nutrition asserts that Applicant’s purported mark is generic. As a competitor, Universal Nutrition will be harmed if Applicant obtains a registration for this generic term.

7. Intervenor submits the proper fee as required by Trademark Rule 2.101(d) along with the proposed Notice of Opposition.

8. On information and belief, many other dietary and nutritional supplement companies use the term “intra-workout” as a generic term for a class of products designed to be consumed during the workout i.e. intra-workout.

9. On information and belief, consumers of dietary and nutritional supplements recognize the term “intra-workout” primarily as the common name for a class of products designed to be consumed during the workout i.e. intra-workout. TMEP § 1209.01(c).

10. Applicant seeks to register the mark INTRA-WORKOUT for “Dietary and nutritional supplements; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary supplemental drinks; Dietary supplements” in International Class 5.

11. Applicant claims October 10, 2007 as the first date it used Applicant’s mark anywhere and in commerce.

12. Should Applicant register “intra-workout” as a mark, it would inhibit competition in the sale of dietary and nutritional supplements. TMEP § 1209.

13. Intervenor’s proposed Notice of Opposition is attached as Exhibit A.

14. If, for any reason, this motion is not properly brought as a motion to intervene under Fed. R. Civ. Pro. 24, Universal Nutrition requests the Board to treat it as a motion for joinder under Fed. R. Civ. Pro. 20. The facts stated above satisfy the requirements of both rules.

Gaspari Nutrition, Inc. v. Athletic Edge Nutrition Inc.
Motion to Intervene in Opposition No. 91194239
Application Serial No. 77832598

WHEREFORE, for the reasons stated above, Universal Nutrition respectfully requests that the Trademark Trial and Appeals Board join Universal Nutrition as an Opposer in this opposition.

Respectfully submitted,

Universal Protein Supplements Corporation
d/b/a Universal Nutrition

Date: March 31, 2010

By: /Tiffany D. Gehrke/
One of its Attorneys

William T. McGrath, Esq.
Maureen Beacom Gorman, Esq.
Tiffany D. Gehrke, Esq.
Davis McGrath, LLC
125 S. Wacker Drive, Suite 1700
Chicago, Illinois 60606
Tel.: (312) 332-3033
Fax : (312) 332-6376

Gaspari Nutrition, Inc. v. Athletic Edge Nutrition Inc.
Motion to Intervene in Opposition No. 91194239
Application Serial No. 77832598

CERTIFICATE OF MAILING

I, Tiffany D. Gehrke, Esq., hereby certify that the foregoing MOTION TO INTERVENE is being served upon Athletic Edge Nutrition Inc. and Gaspari Nutrition, Inc. by depositing the same with the United States Postal Service on the date indicated below, with sufficient First Class postage prepaid, pursuant to 37 C.F.R. 1.10, in an envelope addressed to:

ATHLETIC EDGE NUTRITION INC
3638 RAYMERT DR STE 3
LAS VEGAS, NV 89121

GASPARI NUTRITION, INC.
C/O: GREGORY M. KRAKAU
MORSE, BARNES-BROWN & PENDLETON, P.C.
1601 TRAPELO ROAD SUITE 205
WALTHAM, MA 02451

March 31, 2010

/Tiffany D. Gehrke/
Tiffany D. Gehrke, Esq.

CERTIFICATE OF FILING

I hereby certify that the foregoing MOTION TO INTERVENE is being filed, on the date indicated below, by means of the ESTTA system.

March 31, 2010

/Tiffany D. Gehrke/
Tiffany D. Gehrke, Esq.



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

**IN THE MATTER OF TRADEMARK APPLICATION SERIAL NO. 77/832,598
FOR THE MARK: INTRA-WORKOUT
FILING DATE: September 22, 2009**

Gaspari Nutrition, Inc.)	
)	
)	OPPOSER,
v.)	OPPOSITION NO. 91194239
)	
Athletic Edge Nutrition Inc.)	
)	
)	APPLICANT.

INTERVENOR'S NOTICE OF OPPOSITION

Universal Protein Supplements Corporation d/b/a Universal Nutrition ("Universal Nutrition"), as an Intervenor, through its counsel Davis McGrath LLC, hereby opposes registration of the mark INTRA-WORKOUT that is subject of Application Serial No. 77832598, published in the *Official Gazette* of March 2, 2010, and requests refusal of registration to Applicant because Universal Nutrition believes that it will be damaged by the registration of this mark.

As grounds for opposition, Universal Nutrition asserts as follows:

1. On March 22, 2010, Gaspari Nutrition Inc. ("Gaspari") filed a Notice of Opposition of Application Serial No. 77832598, owned by Athletic Edge Nutrition Inc. ("Applicant"). The basis for the Opposition is that the term INTRA-WORKOUT is generic.
2. Intervenor, Universal Nutrition, is a New Jersey corporation with its principal place of business at 3 Terminal Road, New Brunswick, New Jersey 08901.
3. Since 1983, Universal Nutrition has become one of the largest nutritional supplement companies in the United States.

4. Universal Nutrition is a competitor of Applicant in the field of nutritional supplements. Universal Nutrition has used the term "intra-workout" as a generic and/or descriptive term for nutritional supplements consumed during a workout. For example, one of Universal Nutrition's products, which is produced, marketed, and sold under the INTRA-AID brand is described as an intra-workout supplement. Accordingly, Universal Nutrition has standing to oppose Applicant's mark on grounds of genericness.

5. Pursuant to 15 U.S.C. § 1063, this Notice of Opposition is timely filed as it is filed within the opposition period after the publication of the application at issue.

6. On information and belief, many other dietary and nutritional supplement companies use the term "intra-workout" as a generic term for a class of products designed to be consumed during the workout i.e. intra-workout.

7. On information and belief, consumers of dietary and nutritional supplements recognize the term "intra-workout" primarily as the common name for a class of products designed to be consumed during the workout i.e. intra-workout.

8. Applicant seeks to register the mark INTRA-WORKOUT for "Dietary and nutritional supplements; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary supplemental drinks; Dietary supplements" in International Class 5.

9. Applicant claims October 10, 2007 as the first date it used Applicant's mark anywhere and in commerce.

10. Should Applicant register "intra-workout" as a mark, it would inhibit competition in the sale of dietary and nutritional supplements.

Count I
15 U.S.C. § 1052
Applicant's Mark is Generic

11. Universal Nutrition repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 10.

12. Pursuant to 15 U.S.C. § 1052, Applicant's alleged INTRA-WORKOUT mark is a generic term for Applicant's goods and cannot be registered as a trademark.

13. The class of goods at issue is intra-workout dietary and nutritional supplements.

14. The relevant public understands the term "intra-workout," as stated in paragraph 7 above, as a generic term for dietary and nutritional supplements consumed intra-workout.

15. Accordingly, Applicant's alleged mark is incapable of denoting source, is not registrable on the Principal Register or on the Supplemental Register, and Applicant's registration should be refused.

Count II
15 U.S.C. § 1052
Alternatively, Applicant's Mark is Merely Descriptive

16. In the alternative, Universal repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 10.

17. If Applicant's alleged INTRA-WORKOUT mark is not generic, then Applicant's mark is merely descriptive when used on or in connection with the goods of the Applicant. 15 U.S.C. § 1052(e)(1).

18. Applicant's mark is merely descriptive because it describes a characteristic, function, feature, purpose, or use of the specified goods. Specifically, Applicant's mark merely describes that the product should be used intra-workout.

Gaspari Nutrition, Inc. v. Athletic Edge Nutrition Inc.
Intervenor's Notice of Opposition in Opposition No. 91194239
Application Serial No. 77832598

19. On information and belief, Applicant's mark does not have secondary meaning or acquired distinctiveness and is incapable of acquiring secondary meaning or distinctiveness. The primary significance of the term "intra-workout" in the mind of the consuming public is a description of the class of intra-workout dietary and nutritional supplements.

20. Accordingly, Applicant's alleged mark is not registrable on the Principal Register or the Secondary Register and registration should be refused.

WHEREFORE, for the reasons stated above, Universal Nutrition respectfully requests that the Trademark Trial and Appeals Board sustain this opposition in favor of Universal Nutrition and Gaspari and refuse registration of U.S. Application No. 77832598.

Respectfully submitted,

Universal Protein Supplements Corporation
d/b/a Universal Nutrition

Date: March 31, 2010

By: /Tiffany D. Gehrke/
One of its Attorneys

William T. McGrath, Esq.
Maureen Beacom Gorman, Esq.
Tiffany D. Gehrke, Esq.
Davis McGrath, LLC
125 S. Wacker Drive, Suite 1700
Chicago, Illinois 60606
Tel.: (312) 332-3033
Fax : (312) 332-6376

Gaspari Nutrition, Inc. v. Athletic Edge Nutrition Inc.
Intervenor's Notice of Opposition in Opposition No. 91194239
Application Serial No. 77832598

CERTIFICATE OF MAILING

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ATHLETIC EDGE NUTRITION INC
3638 RAYMERT DR STE 3
LAS VEGAS, NV 89121

GASPARI NUTRITION, INC.
C/O: GREGORY M. KRAKAU
MORSE, BARNES-BROWN & PENDLETON, P.C.
1601 TRAPELO ROAD SUITE 205
WALTHAM, MA 02451

March 31, 2010

/Tiffany D. Gehrke/
Tiffany D. Gehrke, Esq.

CERTIFICATE OF FILING

I hereby certify that the foregoing INTERVENOR'S NOTICE OF OPPOSITION together with appropriate FEE is being filed, on the date indicated below, by means of the ESTTA system.

March 31, 2010

/Tiffany D. Gehrke/
Tiffany D. Gehrke, Esq.