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

Proceeding	91200105
Party	Plaintiff NOVOZYMES BIOAG, INC.
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Attachments	Opposer's Opposition to Motion to Restrict Identification of Goods.PDF (4 pages)(73431 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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NOVOZYMES BIOAG, INC. (formerly EMD CROP BIOSCIENCE, INC.),)	
)	
Opposer,)	
)	Opposition No. 91200105
v.)	
CLEARY CHEMICALS, LLC.,)	
)	
Applicant.)	

**OPPOSER'S OPPOSITION TO APPLICANT'S
MOTION TO RESTRICT IDENTIFICATION OF GOODS**

Opposer does not consent to Applicant's motion to restrict the identification of its goods because the amendment does not avoid likelihood of confusion.

As stated by the Board in the decision of December 20, 2011, in this case, a request by defendant to restrict its identification of goods "must be made by way of motion under Trademark Rule 2.133, although the ground must also be raised as an affirmative defense in the answer . . . by way of an allegation that sets forth the proposed restriction in detail and alleges that the restriction will avoid a likelihood of confusion and that plaintiff is not using the mark on the products or services being excluded from the registration.

Cleary has filed a motion to restrict its identification of goods and included an affirmative defense in its answer setting forth the proposed restriction in detail and alleging that the restriction will avoid likelihood of confusion. Cleary has also

reiterated the required language asserting "that plaintiff is not using the mark on the products or services being excluded from the registration" (presumably referring to the registration which Cleary hopes to obtain).

The original recitation of Cleary's goods included two items – namely, fungicides for domestic use and fungicides for agricultural use. Cleary's proposed definition defines "agriculture use" as being "namely, outdoor terrestrial turf and ornamental agricultural fungicides. There is no change in the particular product being covered by Cleary's application – namely, fungicides. The only change relates to use – namely, from unrestricted "agricultural use" to restricted "agricultural use, namely, outdoor terrestrial turf and ornamental agricultural fungicides." Cleary has to show that Opposer is not using its mark for goods in the areas sought to be restricted – namely, the broad designation of "agricultural use." However, the definition of goods in Opposer's registration clearly indicates that these goods are used "in agriculture crops." Thus, Cleary is wrong when it states that "Opposer is not using the mark on the products being excluded from its registration (application?)." Opposer is using its mark "in agriculture crops."

It is appreciated that the Board has advised the parties "that an unconsented amendment to an opposed application is generally deferred until after final decision or until the case is decided upon summary judgment." It is further noted in this case that Cleary has not offered to accept default judgment on the original identification of goods. It would, of course, be helpful to know which definition of goods is to be the subject of the opposition. In summary, the

Board is urged to deny Cleary's motion because the amendment does not adequately distinguish the two goods.

Dated: January 26, 2012

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Certificate of Service

I hereby certify that on this 26th day of January, 2012, a true and correct copy of the foregoing Opposer's Opposition to Applicant's Motion to Restrict Identification of Goods was served by first-class mail, postage prepaid, with a courtesy email to counsel for Applicant, Cleary Chemicals, Inc., to:

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