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

Proceeding	91200105
Party	Defendant Cleary Chemicals, LLC
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Attachments	Reply Brief.pdf (4 pages)(140587 bytes) Brief in Opposition.pdf (5 pages)(163373 bytes) 56(d) Motion.pdf (7 pages)(259548 bytes) Declaration of TLD.pdf (5 pages)(155216 bytes)

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

	)	In re Matter of Trademark
	)	Application No. 77/942162
NOVOZYMES BIOAG, INC.,	)	Filed: Feb. 23, 2011
Opposer,	)	
	)	Opposition No. 91200105
v.	)	
	)	
	)	
CLEARY CHEMICALS, LLC,	)	
Applicant.	)	
	)	

REPLY BRIEF OF CLEARY CHEMICALS, LLC, IN SUPPORT OF MOTION TO RESTRICT IDENTIFICATION OF GOODS

Now comes Cleary Chemicals, LLC ("Cleary"), and asks the Board to consider the following reply brief in support of its motion to restrict the identification of its goods. In its opposition to Cleary's motion Opposer, Novozymes BioAg, Inc. ("Novozymes"), acknowledges that: Cleary has filed a motion to restrict the identification of its goods under Trademark Rule 2.133; and Cleary has also raised this request as an affirmative defense in its amended answer, setting forth the proposed restriction in detail and alleging that the proposed restriction will avoid a likelihood of confusion. (Doc. 20 at pages 1-2). Novozymes' sole opposition to Cleary's motion to restrict its identification of goods is Novozymes' insistence that Cleary has to show that Novozymes is not using the mark TORQUE "in agricultural crops." (Doc. 20 at page 2). Novozymes' argument begins and ends with its rewriting of the description of goods in its own registration.

First, Novozymes' argument fails because its description of goods is not "chemicals for use in agricultural crops." Novozymes' description of goods is, "natural molecule or bacteria for plant growth enhancement in agricultural crops." See, Registration No. 3,511,124. Stated

otherwise, Novozymes' description of goods is agricultural chemicals, namely growth enhancement chemicals for use in crops. Novozymes' description of goods is not for fungicides. It should be sufficient at this stage of this proceeding, that Cleary alleges (and later proves) that Novozymes is not using TORQUE for fungicides, and that Cleary's proposed restriction of its goods avoids a likelihood of confusion. *Euro-Star Inc. v. Euro-Star Reitmoden GmbH & Co. KG*, 34 USPQ 2d 1266, 1272 (TTAB 1994). The mere fact that both Cleary's goods and Novozymes' goods can be described as "agricultural chemicals" does not establish that the goods are related so as to create a likelihood of confusion. *Electronic Data Sys. Corp. v. EDSA Micro Corp.,* 23 USPQ 2d 1460, 1463 (TTAB 1987).

Second, Novozymes' argument fails because its description of goods is directed to "natural molecule or bacteria for plant growth enhancement in agricultural crops;" it is not directed to "terrestrial turf" or "ornamental" plants. The reality of the marketplace is that "crops" and "terrestrial turf" and "ornamental" plants are distinct markets. See the third party Internet websites attached as exhibits to Cleary's answer, Doc. 18, which are of the nature of evidence which may be (and will be) submitted by notice of reliance. *Safer, Inc. v. OMS Investments, Inc.,* 94 USPQ 2d 1031, 2010 WL 985355 at *8 (TTAB 2010). It should be sufficient at this stage of this proceeding that Cleary alleges (and later proves) that Novozymes is not using TORQUE for products sold into the terrestrial turf and ornamental plant markets, and that its proposed restriction of its goods avoids a likelihood of confusion. *Euro-Star Inc.,* 34 USPQ 2d at 1272. Even if two parties conduct business in the same field and with some of the same companies, this does not, by itself, establish similarity of trade channels or overlap of customers so as to create a likelihood of confusion. *Electronic Design & Sales Inc. v. Electronic Data Sys. Corp.,* 954 F.2d 713, 21 USPQ 2d 1388, 1391 (Fed. Cir. 1992). Here, Cleary's goods

and Novozymes' goods serve different functions, and Cleary's proposed restriction of its goods avoids a likelihood of confusion.

Notably, Novozymes does not oppose Cleary's motion to restrict its description of goods on the grounds that Novozymes is making fungicides, much less outdoor turf and ornamental agricultural fungicides. These arguments are absent from Novozymes' opposition, as they were from Novozymes' notice of opposition. Cleary moved to restrict its description to "fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides, thus excluding fungicides used in other markets." Therefore, Cleary has correctly stated that Novozymes is not using the mark TORQUE on the goods being excluded, namely, fungicides.

Cleary is at least entitled to a registration whereby its identification of goods is restricted to "fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides." Such restriction of the identification of Cleary's goods will avoid a likelihood of confusion, and Novozymes is not using the mark TORQUE on the products being excluded.

Respectfully Submitted,

Dated: February 10, 2012

/Tama L. Drenski/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief Of Cleary Chemicals, LLC in Support of Motion to Restrict Description of Goods has been sent by first class mail, postage prepaid, to:

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Attorney for Opposer, Novozymes Bioag, Inc., on the 10th day of February 2012.

/Tama L. Drenski/
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