

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.	)	
	)	

**MOTION UNDER FED.R.CIV.P. 56(d) FOR DISCOVERY, AND BRIEF IN SUPPORT**

Now comes Applicant, Cleary Chemicals, LLC (“Cleary”), pursuant to Fed.R.Civ.P. 56(d), and moves the Board for time in which to conduct discovery. The grounds for this motion are as follows:

1. Cleary has brought a claim for fraud against Opposer, Novozymes Bioag, Inc. (“Novozymes”) (Doc. 18, pages13-14; see also, Doc. 7, pages 12-13);
2. Novozymes challenged the sufficiency of Cleary’s fraud claim by bringing a motion for judgment on the pleadings (Doc. 13, pages 3-8);
3. On December 20, 2011, the Board denied Novozymes’ motion, finding Cleary to have stated sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face. Particularly, the Board found that Cleary alleged that in support of its application and obtaining a registration, Novozymes submitted a specimen dated 2008 and stated that said specimen had been in use at least as early as the 2007 filing date of the application, and Novozymes made the representation with the intent to induce the trademark examining attorney to rely thereon in determining to grant the registration. (Doc. 17, pages 6 - 9);

4. Prior to the rescheduled deadlines for the discovery conference (March 2, 2012) and initial disclosures exchange (April 1, 2012), Novozymes has now brought a motion for summary judgment on Cleary's fraud claim that does not deny that it submitted a specimen dated 2008 (Doc. 19, page 5) and stated that it had been in use at least as early as the 2007 filing date of the application (Doc. 19, pages 6-7), but only that it lacked the intent to deceive, having done so in error (Doc. 19, page 7). As evidence, Novozymes has provided the declaration of Charles Broughton, Novozymes' current Director of Global Development;

5. Notably, Novozymes admits that it (and more particularly, declarant) was not involved in selecting the specimen (Doc. 19, page 7). Also, Novozymes does not give an explanation as to why the application to register was initially filed without a specimen, and was not signed and verified, additional facts alleged by Cleary (Doc. 18, page 13). Further, Novozymes' exhibits 2, 5, and 7 show the use of TORQUE for growth enhancement chemical for corn and not "agricultural crops" generally as listed in the description of goods. Exhibit 3 served on Cleary is illegible. Exhibit 4 lists four marks (Reveal, Optimize, and LCO Promoter Technology, as well as Torque), and again it cannot be determined from the exhibit if TORQUE used in connection with the sale of growth enhancement chemical for peas, lentils and soybeans;

6. Cleary has not had an opportunity to question Mr. Broughton regarding the self serving statements made in the declaration, and the exhibits; and

7. Novozymes is denying its intent, the information necessary to defend the motion for summary judgment is in the sole possession of Novozymes, and Cleary has not had an opportunity to depose Mr. Broughton or otherwise challenge his self serving statements or the exhibits, thus Cleary is unable to present facts essential to justify its request for cancellation,

Wherefore Cleary is seeking a period of time in which to take discovery necessary to its response.

These grounds are set forth with particularity in the brief in support below, and supported by the attached Declaration of Tama L. Drenski, attached as Exhibit A.

#### Brief in Support

Rule 56 (d) of the Federal Rules of Civil Procedure provided that if a nonmovant shows by declaration that for specified reasons it cannot present facts essential to justify its opposition, the [Board] may “(1) defer considering the motion or deny it; (2) allow time... to take discovery; or (3) issue any other appropriate order.”

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issue of material fact. *Daimlerchrysler Corp. v. American Motors Corp.*, 94 USPQ 2d 1086, 2010 WL 1146943 at \*4 (TTAB 2010). Contrary to Novozymes, Mr. Broughton’s declaration and the exhibits presented with it do not demonstrate that there is no genuine issue of material fact as to intent to deceive by demonstrating an honest misunderstanding or inadvertence such that no reasonable fact finder could decide the question in favor of Cleary.

No sworn statement has been offered by Novozymes to state that the false statement was made in error without deceptive intent. Mr. Broughton was not the maker of the false statement in the declaration that was submitted in the trademark application. Mr. Broughton does not state that the false statement was made in error.

Certain facts are known to Cleary from the public record. A first application to register Torque was filed on July 9, 2007 without a specimen or signed declaration. When the USPTO issued an office action requesting a specimen and appropriate declaration, Novozymes did not

respond. Three months after the original filing, and after having been sent the USPTO office action notifying them that a specimen and declaration were required, Novozymes filed the application resulting in the registration being asserted by Novozymes, without a specimen or declaration. In his declaration, Mr. Broughton does not attempt to explain why no specimen was attached to either application, and why neither application was initially verified.

Novozymes admits in its brief that it was not involved in selecting the specimen. (Doc. 19, page 7). Mr. Broughton states that he was employed by Novozymes' predecessor-in-interest in 2007, but he does not state that Torque was used in interstate commerce, nor does he state that Torque was used in connection with the sale of plant growth enhancement chemicals for agricultural crops generally as is stated in the description of goods. The statement that was verified was "the applied for mark is in use in commerce and was in use in commerce on or in connection with the *goods* listed in the application at least as early as the application filing date."

Novozymes' exhibit 2 appears to be merely an advertisement, and would not be suitable as a specimen of use for goods. Novozymes' Exhibit 3 served on Clearly, is illegible. Novozymes' exhibits 4 and 5 appear to be an advertisement, which would not be suitable as evidence to show use in commerce for the goods cited in the trademark registration. Exhibit 7 does not show the mark "TORQUE," and appears to show that the product was identified as "LCO-C IF," or by the number 8300.

Even with the Broughton declaration and exhibits, circumstances surrounding Novozymes' predecessor's application remain unexplained and all doubts as to whether any particular factual issues are genuinely in dispute must be resolved in the light most favorable to the non-moving party. *Daimlerchrysler Corp.*, 2010 WL1146943 at \*4. Indeed, questions of intent are typically unsuited to resolution by summary judgment. *Id.*

Both *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 160 USPQ 715 (CCPA) and *In re Bose Corp.*, 91 USPQ 2d 1938 (Fed. Cir. 2009) cited by Novozymes as determinative here, are distinguishable in one very important regard—both were decided after testimony. Here, apart from Novozymes serving its initial disclosures upon Cleary contemporaneously with this motion for summary judgment, there has been no discovery. Here, there has been only a selective disclosure of documents by Novozymes.

Notwithstanding, Cleary appreciates that it ultimately bears the burden of demonstrating that there is no genuine issue about the existence of intent to deceive the Office. “Intent” is generally a fact laden issue, proven by indirect or circumstantial evidence, and there has been no discovery here. *Daimlerchrysler Corp.*, 2010 WL1146943 at \*4. All information relating to the circumstances of Novozymes’ predecessor’s application and intent, apart from that which may be gleaned from the public record, is in the sole possession of Novozymes and/or its predecessor. It is well settled that the granting of a motion for summary judgment is inappropriate where the responding party has been denied discovery needed to enable it to respond to the motion. *Orion Group, Inc. v. The Orion Ins. Co.*, 12 USPQ 2d 1923, 1924 (TTAB 1989). Thus, in *Orion Group*, the Board granted the opposer’s motion for discovery where the applicant sought summary judgment based upon a single affidavit, and the opposer set forth specific issues of fact on which it asserted it needed information in the applicant’s control. *Orion Group, Inc.*, 12 USPQ 2d at 1924-25.

Wherefore, Cleary asks the Board to deny Novozymes’ motion. Alternatively, Cleary asks that the Board defer considering Novozymes’ motion for summary judgment until discovery closes. This will avoid additional costs to both parties from having to proceed with discovery on the fraud claim, and then resume discovery later on the balance of the issues involved in this



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MOTION UNDER FED.R.CIV.P. 56(d) FOR DISCOVERY, AND BRIEF IN SUPPORT has been sent by first class mail, postage

prepaid, to:

Edward M. Prince, Esq.  
Alston & Bird LLP  
950 F Street NW, The Atlantic Building  
Washington, DC 20004

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

/Tama L. Drenski/  
Tama L. Drenski

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	)	Opposition No. 91200105
v.	)	
	)	
	)	
CLEARY CHEMICALS, LLC,	)	
Applicant.	)	
	)	

**DECLARATION OF TAMA L. DRENSKI IN SUPPORT OF  
MOTION UNDER FED. R. CIV. P. 56(d) FOR DISCOVERY**

Tama L. Drenski states:

1. I am counsel for Applicant, Cleary Chemicals, LLC (“Cleary”), in this matter and make this Declaration in support of Petitioner’s statement of facts in support of its Motion Under Fed. R. Civ. P. 56(d) for discovery;
2. Cleary has brought a claim for fraud against Opposer, Novozymes Bioag, Inc. (“Novozymes”) (Doc. 18, pages 13-14; see also, Doc. 7, pages 12-13);
3. Novozymes challenged the sufficiency of Cleary’s fraud claim by bringing a motion for judgment on the pleadings (Doc. 13, pages 3-8);
4. On December 20, 2011, the Board denied Novozymes’ motion, stating “In its counterclaim, applicant specifically asserts that opposer, in support of its application and obtaining a registration, submitted a specimen dated 2008 and stated that said specimen had been in use at least as early as the 2007 filing date of the application, and alleges that opposer made such representation with the intent to induce the trademark examining attorney to rely thereon in determining to grant the registration. By way of its allegations, applicant has set forth with

adequate particularity factual allegations that opposer made a misrepresentation that was material to the decision to issue opposer's registration, and that said misrepresentation was made with the intent to deceive the USPTO in making such determination." (Doc. 17, pages 6 - 9);

5. Novozymes has now (January 26, 2012) brought a motion for summary judgment on Cleary's fraud claim;

6. Novozymes' motion has been brought prior to the rescheduled deadlines for the discovery conference (March 2, 2012) and initial disclosures exchange (April 1, 2012), although Novozymes did serve its initial disclosures with its motion;

7. In its motion, Novozymes does not deny that it submitted a specimen dated 2008 (Doc. 19, page 5) and stated that it had been in use at least as early as the 2007 filing date of the application (Doc. 19, pages 6-7);

8. No sworn statement has been offered by Novozymes to state that the false statement was made in error without deceptive intent.

9. Novozymes seeks to establish error through the single declaration of its current Director of Global Development, Charles Broughton, and its exhibits;

10. Novozymes admits that it was not involved in selecting the specimen (Doc. 19, page 7);

11. Mr. Broughton was not the maker of the false statement in the declaration that was submitted in the trademark application. Mr. Broughton does not state that the false statement was made in error;

12. Certain facts are known to Cleary from the public record. A first application to register Torque for specific use with regard to corn was filed on July 9, 2007 without a specimen or signed declaration. When the USPTO issued an office action requesting a specimen and

appropriate declaration, Novozymes did not respond. Three months after the original filing, and after being sent the USPTO office action notifying them that a specimen and declaration were required, Novozymes filed the application resulting in the registration being asserted by Novozymes, for Torque for use with agricultural crops, generally, without a specimen or declaration;

13. Novozymes does not give an explanation as to why the application to register was initially filed without a specimen, and was not signed and verified, additional facts alleged by Cleary (Doc. 20, page 13);

14. In his declaration, Mr. Broughton does not attempt to explain why no specimen was attached to either application, and why neither application was initially verified;

15. Novozymes admits in its brief that it was not involved in selecting the specimen. (Doc. 19, page 7). Mr. Broughton states he was employed by Novozymes' predecessor-in-interest in 2007, but he does not state that Torque was used in interstate commerce, nor does he state that Torque was used in connection with the sale of plant growth enhancement chemical for agricultural crops generally as is stated in the description of goods in the trademark application. The statement that was verified was "the applied for mark is in use in commerce and was in use in commerce on or in connection with the *goods* listed in the application at least as early as the application filing date;"

16. Novozymes' Exhibits 2, 5, and 7 show the use of TORQUE for growth enhancement chemical for corn and not "agricultural crops" generally as listed in the description of goods. Exhibit 3 served on Cleary is illegible. Exhibit 4 lists four marks (Reveal, Optimize, and LCO Promoter Technology, as well as Torque), and again it cannot be determined from the

exhibit if TORQUE used in connection with the sale of growth enhancement chemical for peas, lentils and soybeans;

17. Cleary has not had an opportunity to question Mr. Broughton regarding the self-serving statements made in the declaration, and the exhibits; and

18. As Novozymes is denying its intent, the information necessary to defend the motion for summary judgment is in the sole possession of Novozymes, and Cleary has not had an opportunity to depose Mr. Broughton or otherwise challenge his self-serving statements or the exhibits, Cleary is unable to present facts essential to justify its request for cancellation.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: 2/10/2012

/Tama L. Drenski/  
Tama L. Drenski

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MOTION UNDER FED.R.CIV.P. 56(d) FOR DISCOVERY, AND BRIEF IN SUPPORT has been sent by first class mail, postage prepaid, to:

Edward M. Prince, Esq.  
Alston & Bird LLP  
950 F Street NW, The Atlantic Building  
Washington, DC 20004

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

/Tama L. Drenski/  
Tama L. Drenski