

ESTTA Tracking number: **ESTTA490672**

Filing date: **08/23/2012**

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 parties oppose registration of the indicated application.

Opposers Information

Name	Performance Formulations, Inc. d/b/a Dark Cycle		
Entity	Corporation	Citizenship	Texas
Address	3333 Lee Parkway Suite 600 Dallas, TX 75219 UNITED STATES		

Name	Formulife, Inc.		
Entity	Corporation	Citizenship	Texas
Address	3333 Lee Parkway Suite 600 Dallas, TX 75219 UNITED STATES		

Attorney information	David J. Moraine Marchand & Moraine, L.L.P. 10440 North Central Expressway Suite 643 Dallas, TX 75231 UNITED STATES vrossi@marchandmoraine.com, djmoraine@marchandmoraine.com Phone:214-378-1043		
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Applicant Information

Application No	85539196	Publication date	08/14/2012
Opposition Filing Date	08/23/2012	Opposition Period Ends	09/13/2012
Applicant	Dark Cycle Supplements, LLC 325 South Biscayne Blvd. Unit 2821 Miami, FL 33131 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: Nutritional supplements
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Applicant Information

Application No	85539184	Publication date	08/14/2012
Opposition Filing Date	08/23/2012	Opposition Period Ends	09/13/2012
Applicant	Dark Cycle Supplements, LLC 325 South Biscayne Blvd. Unit 2821 Miami, FL 33131 UNITED STATES		

Goods/Services Affected by Opposition

Class 035.

All goods and services in the class are opposed, namely: Export and import agencies in the field of nutritional supplements

Grounds for Opposition

Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)
The mark is deceptively misdescriptive	Trademark Act section 2(e)(1)
Dilution	Trademark Act section 43(c)
Other	The mark falsely suggests a connection with Opposer's name or identity and applicant is not the rightful owner of the mark.

Marks Cited by Opposer as Basis for Opposition

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	DARK CYDE SUPPLEMENTS		
Goods/Services	Nutritional Goods		

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	DARK CYDE		
Goods/Services	Nutritional Supplements		

Attachments	08.23.12 Notice of Opposition.pdf (8 pages)(394166 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	/Victoria M. Rossi/
Name	Victoria M. Rossi
Date	08/23/2012

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

In the matter of trademark application Serial No.....85539196
For the mark.....DARK CYDE SUPPLEMENTS
(Design Plus Words)
Published in the Official Gazette on.....August 14, 2012

In the matter of trademark application Serial No.....85539184
For the mark.....DARK CYDE SUPPLEMENTS
(Design Plus Words, Letters, Numbers)
Published in the Official Gazette on.....August 14, 2012

CONSOLIDATED NOTICE OF OPPOSITION

Opposer: Performance Formulations, Inc. d/b/a Dark Cyde
A Texas Corporation,
3333 Lee Parkway, Suite 600, Dallas, Texas 75219

successor in interest to

Joint-Opposer: Formulife, Inc., a Texas Corporation
3333 Lee Parkway, Suite 600, Dallas, Texas 75219

The above identified opposer believes that it will be damaged by registration of the marks shown in the above-identified applications and hereby opposes same. Opposer has standing because it would be damaged by the registration of the marks upon the principal register, including as a result of dilution under section 43(c). See 15 USC 1125(c). The above described Applications are owned by the same Applicant.

The grounds for opposition are as follows:

1. Formulife, Inc. (Formulife) is a corporation chartered in Texas in 2009 and doing business throughout the United States of American as a leading manufacturer of professional supplements.

2. In 2010, Formulife developed a brand of professional supplements called "Dark

Cyde" and placed same into the stream of commerce in the United States.

3. Beginning in 2010, Dark Cyde supplements were manufactured by Formulife and marketed through its d/b/a Dark Cyde Supplements, and later Performance Formulations.

4. In 2011, Formulife decided to incorporate Performance Formulations to further expand marketing efforts for Dark Cyde supplements. Performance Formulations, Inc. was formed as a Texas corporation.

5. Performance Formulations, Inc. (Performance Formulations) does business as Dark Cyde in the United States.

85539196, 85539184:

6. As part of the development of its brand, Opposer created a proprietary logo, product packaging, tradename (Dark Cyde), label design, and distinctive marks for use in commerce, and Opposer used and uses those marks in commerce beginning in December 2010. One such mark created by Opposer consists of a metal mask which contains the wording "DARK CYDE" on the forehead of the mask and the wording "SUPPLEMENTS" underneath the wording "DARK CYDE."

7. Opposer's use in commerce of the marks precedes any use by Applicant.

8. A true and correct exemplar of such marks as used in commerce by Opposer in the United States since 2010 are attached hereto as Exhibits A and B.

Grounds Common To All Marks:

12. Opposer has sold thousands of units in the United States and worldwide. Opposer's marks have become famous through the expenditure of the time, effort, and capital of Opposer, and have gained a following and reputation in the marketplace such that the marks have

become synonymous with Opposer's brand and business.

13. Opposer, through the expenditure of substantial time, expertise, and effort has produced and marketed the Dark Cycle marks creating substantial goodwill in the marketplace.

14. Renato Teles, by and through his company Teles Import and Export, Inc., who is the manager of Applicant, has been passing off goods as Opposer's brand.

15. In February 2012, Teles formed Dark Cycle Supplements, L.L.C. (Applicant) and misappropriated Opposer's brand and marks.

16. Opposer has learned that Applicant is selling counterfeit products under Opposer's Dark Cycle brand.

17. Applicant was actually aware of Opposer's use and brand, and posted several deceptive advertisements and press statements on the internet attempting to create confusion regarding Opposer's brand.

18. Applicant is marketing products under Opposer's marks within the same markets occupied by Opposer, and without Opposer's permission.

19. Opposer will be damaged by the registration of the mark because such registration is likely to cause dilution by blurring or dilution by tarnishment. Applicant's requested mark is deceptively similar to the marks of Opposer.

20. Applicant is further tarnishing Opposer's marks by marketing "Dark Cycle" utilizing deceptive claims and statement prohibited by federal law. As an example, Applicant claims that Dark Cycle will "detoxify the liver" and makes other health related claims which are prohibited by the United States Food and Drug Administration resulting in the classification of such substances as drugs, See 21 U.S.C. § 321(g)(1). Same have not been approved by the

United States Food and Drug Administration as a drug, thus imputing illegal conduct to Opposer's marks. See also 21 U.S.C. § 321(p). New drugs may not be legally marketed in the U.S. without prior approval from FDA as described in 21 U.S.C. § 355(a).

21. Applicant has been actively passing off its product as Opposer's brand, without the consent of Opposer.

22. Applicant's unauthorized use of Opposer's marks, and its brand infringement are likely and probable to cause confusion among third parties who will mistake Applicant's products for Opposer's products.

23. Applicant is unlawfully taking advantage of the sight and meaning of Opposer's distinctive marks in the way that such marks are used in the marketplace.

24. The total commercial effect and impression created by Applicant's marks infringes upon the marks of Opposer and dilutes Opposer's brand.

25. It is likely that prospective customers of Opposer will believe that Applicant's products are somehow associated with Opposer when they are not. This confusion is further heightened by virtue of the use of "Dark Cyde" which purports to describe Opposer's products.

26. Applicant has publicly advertised its counterfeit product as "the real Dark Cyde" and has represented itself products services similar to those of Opposer and consumers will mistakenly conclude that Applicant's products are somehow connected with or licensed by Opposer.

27. Applicant's unauthorized use of Opposer's famous marks will confuse consumers and place Opposer's reputation in the market beyond its control.

28. Applicant' adoption of a confusingly similar name or mark (including essentially

reproducing Opposer's logo and trade names) with full knowledge of Opposer's prior use is evidence of Applicant's unlawful intent to appropriate Opposer's goodwill in the marketplace and to trade off of the goodwill of Opposer.

29. Opposer opposes Applicant's Applications for Registration numbered 85539196 and 85539184 pursuant to 15 U.S.C. §1052(a).

30. Opposer opposes Applicant's Applications for Registration numbered 85539196 and 85539184 pursuant to 15 U.S.C. §1052(d).

31. Opposer opposes Applicant's Applications for Registration numbered 85539196 and 85539184 pursuant to 15 U.S.C. §1052(e)(1).

32. Opposer opposes Applicant's Applications for Registration numbered 85539196 and 85539184 because the mark falsely suggests a connection with Opposer's name or identity.

33. Opposer opposes Applicant's Applications for Registration numbered 85539196 and 85539184 because Applicant is not (and was not, at the time of the filing of its application for or that registration) the rightful owner of the mark.

34. All of the above grounds for opposition are asserted in the alternative.

Date: August 22, 2012.

/s/ David J. Moraine
David J. Moraine, J.D., LL.M.
Texas Bar Number 00795830
MARCHAND & MORAINÉ, L.L.P.
10440 North Central Expressway, Suite 643
Dallas, Texas 75231
(214) 378-1043
(214) 378-6399 FAX

ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Opposition has been served on Robert Thornburg, attorney of record for Applicant, by serving same by United States mail addressed to 777 Brickell Avenue, Suite 1114, Miami, Florida 33131 which is the usual place of business for Robert Thornburg, on June 6, 2012.

/s/ David J. Moraine _____

DARHCYDE

REIGN



