

Docket No. 1257.10

TRADEMARKS

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

Metabolic Nutrition, Inc.
Petitioner

v.

BioSan Laboratories, Inc.
Registrant

In the matter of Registration No. **2,662,341**

For the mark **BIO-METABOLIC NUTRITION**

Date registered **December 17, 2002**

Cancellation No. _____



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

12-27-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #6

PETITION TO CANCEL

1. Petitioner, Metabolic Nutrition, Inc., a Florida corporation with a principal place of business at 2054 N.E. 153rd Street, North Miami Beach, Florida 33162, petitions to cancel Certificate of Registration No. 2,662,341, now owned by BioSan Laboratories, Inc., a Delaware Corporation with a principal place of business at Organic Park, P.O. Box 325, Derry, New Hampshire 03038, hereinafter referred to as "Registrant."

GROUND FOR CANCELLATION

2. Petitioner seeks to cancel Certificate of Registration No. 2,662,341 for the mark *BIO-METABOLIC NUTRITION* on the grounds that the mark is confusingly similar to Petitioner's mark.
3. Petitioner first became aware of Registrant's mark upon conducting a search prior to filing U.S. Trademark Application Serial No. 78-127103 on May 8, 2002 for METABOLIC NUTRITION.
4. Registrant's mark was published for opposition in the Official Gazette on September

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24, 2002.

5. Accordingly, Petitioner filed a Notice of Opposition with fee on September 26, 2002. Petitioner attaches herein a copy of the postcard receipt acknowledging the timely receipt of the opposition and fee by the U.S. Patent and Trademark Office as Exhibit A. However, no action was initiated by this Board. Accordingly, this filing is Petitioner's second effort to seek a remedy before this Board. A comparison of the two marks follows:

	Applicant	Opposer
Mark	BIO-METABOLIC NUTRITION	METABOLIC NUTRITION
Serial No.	76-304645	78-127103
Filing Date:	August 20, 2001	May 8, 2002
Recitation of Goods:	vitamin, mineral and nutritional dietary supplements produced in tablet, capsule and powder form	dietary supplements
Date of First Use:	November 4, 1997	June 3, 1988

6. Both Petitioner's and Registrant's marks are used in association with dietary supplements.
7. The marks are nearly identical with the exception that Applicant uses BIO hyphenated to METABOLIC NUTRITION. The BIO term is short for "biology" and merely describes a characteristic of the product. Therefore, it adds little to distinguish the two marks apart and confusion is likely.
8. Petitioner will be harmed by Registrant's mark as it is confusingly similar to METABOLIC NUTRITION.
9. Petitioner has already been harmed by the suspension of action of U.S. Trademark Application Serial No. 78-127103 based on Registrant's earlier filed U.S. Trademark Application Serial No. 76-304645.
10. Petitioner is the senior user of the METABOLIC NUTRITION mark and attaches herein Exhibit B showing the METABOLIC NUTRITION mark affixed to its product packaging for a dietary supplement. The product packaging bears a copyright notice from 1995, which predates Registrant's claimed date of first use.

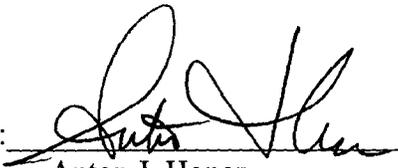
FEE

Petitioner attaches hereto a check in the amount of \$300.00 to cover the filing fee for this Petition.

A duplicate copy of this Petition to Cancel is enclosed.

Very respectfully,

SMITH & HOPEN, P.A.

By: 

Anton J. Hopen
SMITH & HOPEN, P.A.
Suite 220
15950 Bay Vista Drive
Clearwater, FL 33760
(727) 507-8558
Attorneys for Petitioner

EXHIBIT A

RECEIVED

THE UNITED STATES PATENT AND TR

MARK OFFICE

In re Application No.: 76/304,645
For the Mark: BIO-METABOLIC NUTRITION
Filed: August 20, 2001
Published: September 24, 2002
Our Ref. No.: 1257.10

Transmittal Letter with a Certificate of Mailing under 37 C.F.R. 1.10 dated September 26, 2002 - (1 page)

Notice of Opposition with
September 26, 2002 - (3

Exhibit A - evidentiary de
NUTRITION mark (2 pag

Check No. 2153 for \$300.0



37 C.F.R. 1.10 dated

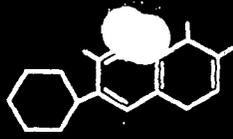
09-26-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #77

r use of the METABOLIC

Commissioner for Trademarks.

EXHIBIT B



**METABOLIC
NUTRITION**

**CHOCOLATE
FLAVOR**

opti GENETICS™

(GENETIC OPTIMIZERS)

• **ADVANCED CELL GROWTH FORMULA** •

**New/Improved
Spoon Mix**

NET WEIGHT

3.2 LBS. / 1450 GRAMS

ALSO AVAILABLE IN VANILLA FLAVOR

Nutrition Facts

Serving Size - 2 round scoops (113grams)

Servings Per Container 13

Amount Per Serving:

Calories 413 Calories from Fat 9

		% Daily Value*	
Total Fat	less than 1g	1g	1%
Saturated Fat	1g	1g	5%
Cholesterol	32mg	32mg	10%
Sodium	225mg	225mg	9%
Total Carbohydrates	85g	85g	28%
Dietary Fiber	0g	0g	0%
Sugars	44g	44g	
Protein	16g	16g	32%

50% RDA of the following:

Vitamin A	Biotin	Magnesium
Vitamin D	Niacin	Copper
Vitamin C	Vitamin E	Zinc
B1	Pantothenic Acid	Iron
B2	Folic Acid	Iodine
B6	Calcium	Boron
B12		

Percentage of Daily Values are based on a diet of other people's secrets.

	Calories	Protein	Fat
Total Fat	less than 1g	16g	1g
Saturated Fat	1g		
Cholesterol	32mg		
Sodium	225mg		
Total Carbohydrates	85g		
Dietary Fiber	0g		
Sugars	44g		
Protein		16g	

INGREDIENTS:

Maltodextrine, Whey Protein Concentrate, Natural and Artificial Vanilla Flavoring, Fructose, Calcium Caseinate, Di-Calcium Phosphate, opti-D'ZYME™ (Metabolic Nutrition's digestive enzymes: Betain HCL, Pancreat. Ox Bile Extract, Pepsin, Papain, Amylase.), Magnesium Oxide, Ascorbic Acid, Vitamin A Acetate, Vitamin E Acetate, Niacinamide, Iron Electrolytic, Zinc Oxide, D-Calcium Pantothenate, Ergocalciferol Pyridoxine HCL, Copper Gluconate, Riboflavin, Thiamine Mononitrate, Folic Acid, Biotin, Potassium Iodide, Cyanocobalamine, L-Glutamine, Nucleic Acids, RNA, DNA, Chromium Picolinate, L-Leucine, L-Carnitine, L-Arginine, Succinates, Citrates.

Mg per 100 grams of Pure Protein

Alanine	1000mg	Phenylalanine	3400mg
Arginine	2000mg	Proline	1000mg
Aspartic Acid	2000mg	Threonine	1000mg
Cysteine	1000mg	Tyrosine	1000mg
Glutamic Acid	2000mg	Valine	1000mg
Glycine	1000mg		
Histidine	1000mg		
Isoleucine	1000mg		
Leucine	2000mg		
Lysine	1000mg		
Methionine	1000mg		



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PO BOX 600-500, MIAMI, FLORIDA 33160 U.S.A.

TTAB

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REGISTRANT: **BioSan Laboratories, Inc.**
REG. NO.: **2,662,341**
MARK: **BIO-METABOLIC NUTRITION**
REGISTERED: **December 17, 2002**



12-27-2002

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BOX TTAB - FEE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

TRANSMITTAL OF PETITION TO CANCEL

Sir:

Please accept the enclosed: Petitioner's Petition to Cancel and the filing fee. Also enclosed is our return postcard, which we would appreciate the mail room stamping as to the date received and returning to our office. The Commissioner is authorized to charge any additional fees, or credit any overpayment, to Account No. 500745. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

SMITH & HOPEN, P.A.

Anton J. Hopen
15950 Bay Vista Drive, Ste. 220
Clearwater, FL 33760
(727)507-8558

COPIES TO FILED

CERTIFICATE OF MAILING

(37 C.F.R. § 1.10)

I certify that this Petition and enclosed fee are being deposited with the U.S. Postal Service as Express Mail Post Office to Addressee, addressed to: Box TTAB-Fee, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on December 27, 2002.

EL401413199US

Express Mail Label Number

Deborah Preza (signature above)