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

Proceeding	92053419
Party	Defendant LT Biosyn, Inc.
Correspondence Address	LT BIOSYN, INC 3406 POMONA BLVD POMONA, CA 91768 UNITED STATES
Submission	Motion to Amend/Amended Answer or Counterclaim
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Date	06/29/2011
Attachments	Mtn-Amend-Answer.pdf ( 9 pages )(226679 bytes )

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

In the matter of Registration No.: 3126856  
Date of Issue: August 8, 2006  
Mark: MEGAGRO

W.A. INDUSTRIES, INC.,

Petitioner,

vs.

LT BIOSYN, INC.

Registrant.

Cancellation No.: 92053419

REGISTRANT'S MOTION TO AMEND  
ANSWER TO PETITION FOR  
CANCELLATION

**REGISTRANT'S MOTION TO AMEND ANSWER**

**TO PETITION FOR CANCELLATION**

Pursuant to TBMP §§315, 507; 37 C.F.R. §2.115; and Rule 15 of the Federal Rules of Civil Procedure, Registrant, LT Biosyn, Inc., hereby moves to amend its Answer to Petition for Cancellation in the above-captioned matter. The proposed Amended Answer is attached herein as Exhibit 1.

This motion is made on the grounds that Registrant seeks to correct an inaccurate admission made in its Answer.

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

### INTRODUCTION

In its Answer in this proceeding concerning its application for the trademark “Megagro,” Registrant alleged “Registrant admits the statements made in its application.” (page 2 of Answer).

In its application for the trademark “Megagro,” Registrant cited January 21, 2002, as the date Registrant first used the trademark “Megagro.” After the Answer in this proceeding was filed, during the course of investigating the matters set forth in the Petition for Cancellation in April 2011, Registrant discovered documents that indicated Registrant had used its trademark, “Megagro,” as early as June 7, 2001, a date earlier than the date cited as the first use in commerce in Registrant’s registration of the mark “Megagro.” Petitioner was advised that Registrant had used this mark as far back as June 2001 on May 16, 2011.

Accordingly, Registrant seeks leave to amend its Answer for the sole purpose to change the admission “Registrant admits the statements made in its application” to “Registrant admits the statements made in its application except that the date of Registrant’s first use in commerce of the trademark” Megagro” was on or about June 7, 2001.”

The parties engaged in settlement talks starting in April 2011. During these settlement talks on May 16, 2011, Registrant advised Petitioner it had found evidence indicating Registrant’s first use in commerce was in June 2001. As it appears progress on the settlement talks have now stalled, Registrant has commenced discovery and is filing

this motion. Discovery is currently scheduled to close on August 27, 2011. As of the time of the filing of this motion, Petitioner has not served any discovery. Registrant has previously offered to stipulate to extend all case management dates for 2 months and this offer remains open.

**GOOD CAUSE EXISTS TO GRANT LEAVE**  
**TO AMEND REGISTRANT'S ANSWER**

**LEGAL STANDARDS**

“Pleadings in a cancellation proceeding may be amended in the same manner and to the same extent as in a civil action in United States district court.” 37 C.F.R. §2.115.

Leave to amend a pleading must be freely given by the Board at any stage of a proceeding when justice so requires. Therefore, the Board liberally grants leave to amend pleadings at any stage of the proceeding unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party. TBMP §507.02; FRCP 15(a); *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993).

The timing of a motion for leave to amend plays a large role in determining whether an adverse party would be prejudiced by an amendment. TBMP §507.02(a). However, as held in *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1486 (TTAB 2007), where the amendment is based on evidence that was newly discovered before discovery closes, the requisite prejudice was not found and the motion for leave to amend was granted.

Whether or not the moving party can actually prove the allegation(s) sought to be added to a pleading is not a ground to deny a motion to amend as that is a matter to be determined after the introduction of evidence at trial or in connection with a proper motion for summary judgment. TBMP §507.02.

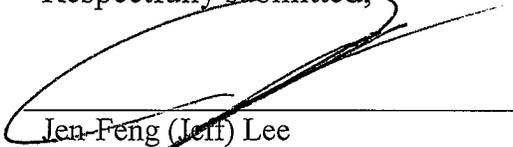
GOOD CAUSE TO GRANT LEAVE TO AMEND

Registrant seeks leave to amend to correct a factual inaccuracy stated in its Answer. The factual inaccuracy was discovered after its Answer was filed. Registrant is filing this motion to amend only 2 months after the inaccuracy was discovered, and any delay in filing this motion was due to waiting to see if this matter would be settled. There is no prejudice to Petitioner as Petitioner was advised of the factual inaccuracy on May 16, 2011. Petitioner has not conducted any discovery as of the time of the filing of this motion. The discovery period remains open and Registrant remains willing to stipulate for an additional 2 months to conduct discovery. Therefore, Registrant submits Petitioner is not prejudiced by this amendment.

Accordingly, to allow disposition of this case on the complete and accurate factual merits and in the interest of justice, Registrant respectfully requests that leave be granted to amend its Answer to Petition in this proceeding.

Respectfully submitted,

**Dated:** June 28, 2011

  
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# **Exhibit 1**

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

In the matter of Registration No.: 3126856  
Date of Issue: August 8, 2006  
Mark: MEGAGRO

W.A. INDUSTRIES, INC.,

Petitioner,

vs.

LT BIOSYN, INC.

Registrant.

Cancellation No.: 92053419

[PROPOSED] REGISTRANT'S AMENDED  
ANSWER TO PETITION FOR  
CANCELLATION

**REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION**

Registrant, LT Biosyn, Inc., by and through its undersigned counsel, hereby responds to the unnumbered allegations in the petition for cancellation as follows:

Registrant denies the trademark "Megagro" was wrongfully awarded to Registrant. Registrant denies that the trademark "Megagro" should be canceled and made available for Petitioner to reclaim.

Registrant admits the Factual information from TESS is what is stated in TESS.

Registrant admits Petitioner applied for the trademark "Megagro" before September 6, 2005. Registrant denies it should have known that from Petitioner's prior application that "Megagro" was allegedly in use since July 1, 2001, as a "plant growth hormone/stimulator for domestic use on domestic plants."

Registrant admits both applications have a similar, although not the same, class and description.

Registrant is without knowledge or information sufficient to form a belief as to Petitioner's ownership of the domain names www.mymegagro.com and MegaGro.com and therefore denies the same.

Registrant denies it should have been aware it was marketing a product name that allegedly was in use by Petitioner.

Registrant is without knowledge or information sufficient to form a belief as to the reason why Petitioner's trademark was denied and therefore denies the same.

Registrant admits the statements made in its application except that the date of Registrant's first use in commerce of the trademark "Megagro" was on or about June 7, 2001.

Registrant denies there is no conceivable way that it was not aware of Petitioner's product "Megagro" when it filed its application.

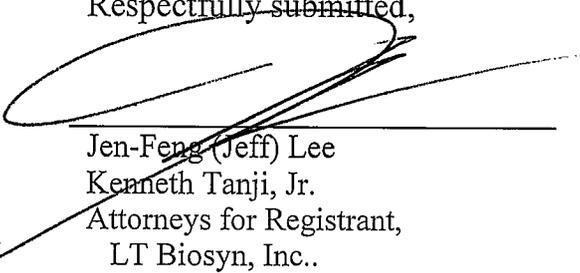
Registrant denies that it should not have been awarded this trademark.

Registrant denies it willfully made false statements in applying for this trademark as to its belief that no other person had the right to use the mark in commerce.

Registrant denies that the trademark of Megagro should be reassigned to Petitioner.

Respectfully submitted,

**Dated:** June 28, 2011



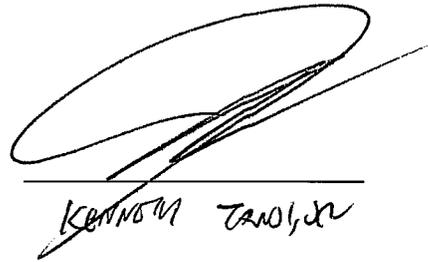
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## CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true copy of the foregoing REGISTRANT'S MOTION TO AMEND ANSWER TO PETITION FOR CANCELLATION was served by depositing a copy of same in the United States mail, first class postage prepaid, to the following address on

JUNE 29, 2011

Matt Aven  
W.A. Industries Inc.  
236 Stanton Court West  
Buffalo Grove, IL 60089



KENNETH TANO, JR