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

In the matter of :  
 PERFORMANCE HEALTH, INC. : Opposition No.  
 and BIOFREEZE ASSOCIATES :  
 Opposers, : Application Serial No. 76/421,875  
 v. :  
 WELLNESS INTERNATIONAL : Mark: PERFORM X  
 NETWORK, LTD. :  
 Applicant. : Filed: June 17, 2002

03-14-2003  
 U.S. Patent & TMO/TM Mail Rcpt Dt. #

**NOTICE OF OPPOSITION**

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

Performance Health, Inc., a Pennsylvania corporation ("Performance Health") and Biofreeze Associates, a Pennsylvania partnership, both having their principal place of business at 1017 Boyd Road, Suite 105, Export, Pennsylvania, believe that they will be damaged by the registration of the alleged mark "PERFORM X" shown in Application Serial No. 76/421,875 (referred to hereinafter as "the Application"), and hereby oppose the Application under the provisions of 15 U.S.C. § 1063.

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 TRADEMARK TRIAL AND APPEAL BOARD

As grounds for opposing this registration, Performance Health and Biofreeze Associates aver as follows:

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1. Upon information and belief, Applicant, Wellness International Network, Ltd., is a Colorado corporation located at 5800 Democracy Drive, Plano, Texas 75024.

2. Applicant filed the Application for the registration of the mark "PERFORM X" on June 17, 2002 for the following goods in International Class 5: "nutritional and dietary supplements".

3. Applicant's mark "PERFORM X" was published in the December 17, 2002 issue of the Trademark Official Gazette of the United States Patent and Trademark Office.

4. Performance Health is the exclusive licensee of U.S. Trademark Registration No. 2,127,009 for the mark "PERFORM", for "cool pain relief medication in the form of a topical gel or liquid, namely an analgesic balm". This mark is registered in International Class 5. U.S. Trademark Registration No. 2,127,009 is owned by Biofreeze Associates, members of which own Performance Health.

5. Performance Health is engaged in the business of the sale of analgesic balm and other topical pain relief products. The "PERFORM" product is used for the temporary relief of muscle and joint pain.

6. Performance Health and/or Biofreeze Associates have been using the mark "PERFORM" in commerce in connection with the aforementioned goods since 1996. Performance Health and/or Biofreeze Associates have been using the mark "PERFORM" on the aforementioned goods since that time and this mark is still being used by Performance Health.

7. Performance Health spends substantial sums to advertise and otherwise promote its analgesic balm and topical pain relief products under the mark "PERFORM".

8. Because of the long term and extensive use made of the mark "PERFORM" by Performance Health and Biofreeze Associates in connection with the aforementioned goods, the "PERFORM" mark enjoys strong name recognition and goodwill in the health/pain relief product market.

9. The continued strength of the mark "PERFORM" is crucial to the continued success of the business of Performance Health and Biofreeze Associates.

10. Because of the extensive use of the mark "PERFORM" by Performance Health and Biofreeze Associates, the public strongly associates the mark "PERFORM" with Opposers for general health and pain relief products.

11. Performance Health sells its "PERFORM" products through retail stores, distributors, and direct sales.

12. Upon information and belief, Applicant has not yet commenced use of the alleged mark "PERFORM X", but plans to manufacture and/or sell nutritional and dietary supplements under such alleged mark.

13. On June 17, 2002, Applicant filed the present intent-to-use application for the alleged mark "PERFORM X" for the aforementioned goods.

14. To the extent it has been used to date, Applicant commenced the use of the mark "PERFORM X" in connection with the manufacture and/or sale of the aforementioned goods in the United States after the date of registration for U.S. Trademark Registration No. 2,127,009.

15. Applicant's proposed use of the mark "PERFORM X" for a product that is likewise directed to general health maintenance of an individual, and will likely be sold in the same stores and/or channels of trade is likely to be confused with Performance Health's prior use of "PERFORM", in that consumers would believe that Applicant's products are made, sponsored by or approved by Performance Health and/or Biofreeze Associates.

16. Applicant's proposed use of the mark "PERFORM X" in connection with nutritional and dietary supplements is likely to cause confusion, or cause mistake or will deceive the public into believing that said products emanate from Performance Health and/or Biofreeze Associates, and/or are manufactured by Performance Health and/or Biofreeze Associates, and/or is approved or endorsed by Performance Health and/or Biofreeze Associates.

17. The registration of the mark "PERFORM X" by Applicant on the Principal or Supplemental Registers of the United States Patent and Trademark Office would be inconsistent with Opposers' rights, including those under U.S. Trademark Registration No. 2,127,009 and common law, and would damage Opposers.

18. 15 U.S.C. § 1052(d) bars Applicant's mark from registration.

19. By making use of the alleged mark "PERFORM X", and seeking registration thereof, Applicant has appropriated the goodwill associated with the mark "PERFORM" and Opposers' use thereof.

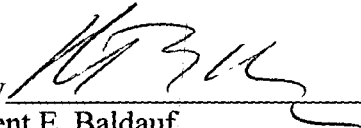
WHEREFORE, Opposers Performance Health and Biofreeze Associates pray that this Opposition be decided in their favor and that Application Serial No. 76/421,875 be rejected, and that no registration be issued for or in connection with that application.

An original and two copies of this Notice of Opposition and the required filing fee of \$600.00 are enclosed. The undersigned hereby authorizes the United States Patent and Trademark Office to charge any additional fees to Deposit Account No. 23-0650 and refund any overpayment in the form of a check.

Respectfully submitted,

WEBB ZIESENHEIM LOGSDON  
ORKIN & HANSON, P.C.


Dated: March 12, 2003

By   
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Counsel for Opposers  
Performance Health, Inc.  
and Biofreeze Associates

Date: March 12, 2003  
Attorney Docket No.: 1853-030006

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03-14-2003  
U.S. Patent & TMOfc/TM Mail Rcpt Dt: #70

Sir:

Transmitted herewith for filing with the United States Patent and Trademark Office is:

Opposer: PERFORMANCE HEALTH, INC. and BIOFREEZE ASSOCIATES

FOR: Trademark Application  
 Other Notice of Opposition re Application Serial No. 76/421,875 for the mark "PERFORM X" in International Class 005


including:  
 Check for \$ 600.00 for the filing fee.

The Commissioner of Patents and Trademarks is hereby authorized to charge any additional payment of the fees associated with this communication to Deposit Account No. 23-0650. Please refund any overpayment to Deposit Account No. 23-0650.

The original and two copies of this Transmittal sheet are enclosed.

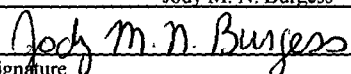
Respectfully submitted,

WEBB ZIESENHEIM LOGSDON  
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I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on March 12, 2003.

Jody M. N. Burgess  
  
Signature 3/12/03  
Date

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