

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

In the matter of :
PERFORMANCE HEALTH, INC. : Opposition No. 91155875
and BIOFREEZE ASSOCIATES :
Opposers, : Application Serial No. 76/421,875
v. :
WELLNESS INTERNATIONAL : Mark: PERFORM X
NETWORK, LTD. :
Applicant. : Filed: June 17, 2002

**OPPOSERS' COMBINED MOTION TO COMPEL DISCOVERY
RESPONSES AND BRIEF IN SUPPORT THEREOF**

Pursuant to 37 C.F.R. § 2.120, Opposers, Biofreeze Associates and Performance Health, Inc. (together "Performance Health"), through their counsel, hereby request an order compelling responses to interrogatories and requests for production which were served on Applicant, Wellness International Network, Ltd. ("Wellness") on May 27, 2003. In support of this Motion, Performance Health sets forth the following:

1. On May 27, 2003, Performance Health served a set of interrogatories and requests for production on Wellness. Copies of these discovery requests are attached hereto as Exhibits A and B.

2. Wellness has never served responses to the interrogatories and requests for production which were served by Performance Health on May 27, 2003. Performance Health thus respectfully requests that the Board issue an order compelling Wellness to immediately serve responses to these outstanding discovery requests. Wellness has waived any objections to

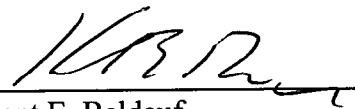
the specific interrogatories and requests by failing to raise any such objections in a timely manner.

3. Wellness has not sought an extension of time to respond to these outstanding discovery requests. These discovery requests have simply been ignored by Wellness.

4. The undersigned counsel of Performance Health contacted counsel for Wellness in an attempt to resolve the issues raised by this motion. The issues were not resolved. Counsel for Wellness has never returned this call.

WHEREFORE, Performance Health prays that the Board issue an order which requires Wellness to provide full and complete responses to the outstanding discovery requests within a time certain, and (2) grants Performance Health any necessary additional discovery time to take testimony depositions following the receipt of the discovery responses.

Respectfully submitted,




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Attorneys for Opposers

Dated: August 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSERS'**
COMBINED MOTION TO COMPEL DISCOVERY RESPONSES AND BRIEF IN
SUPPORT THEREOF was served by first class mail, postage prepaid, on this 12th day
of August 2003 upon the following:

Stephen L. Sapp, Esq.
Locke, Liddell & Sapp, LLP
2200 Ross Avenue
Suite 2200
Dallas, TX, 75201-6776



Attorney for Opposer

A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In the matter of :
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WELLNESS INTERNATIONAL : Mark: PERFORM X
NETWORK, LTD. :
Applicant. : Filed: June 17, 2002

**OPPOSER'S FIRST SET OF INTERROGATORIES
DIRECTED TO APPLICANT**

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Opposer, Biofreeze Associates and Performance Health, Inc. (together "Performance Health"), through their counsel, hereby propound the following Interrogatories to Applicant, Wellness International Network, Ltd.

Applicant is requested to provide its written response to these Interrogatories within thirty (30) days of the date of service hereof.

I. Instructions and Definitions

A. These Interrogatories require responses which are complete and accurate as of the date when such responses are made.

B. These Interrogatories are continuing in character so as to require Applicant to supplement its responses, including the identity of each person who has knowledge of discoverable matters, the identity of each expert whose testimony is to be

used by Applicant, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

C. As used herein, the following definitions apply:

1. Communication. The term "communication(s)" means the information that has been transmitted (in the form of facts, ideas, inquiries, or otherwise), regardless of the means utilized.

2. Document. The term "document(s)" has the meaning ascribed to it in Fed. R. Civ. P. 34(a), and includes, but is not limited to, every writing or record of every type and description that is or has been in the possession, control, or custody of Applicant or of which Applicant has knowledge, including without limitation: originals, masters and copies of writings, including handwritings, and printed, machine-readable matter, computer files, and typed or other graphic or photographic matter. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

3. Data. The term "data" shall mean any facts, documents, or communications, oral or otherwise, of which Applicant has knowledge, information, or belief.

4. Identify or Specify. As used herein, "identify" or "specify" when used in reference to:

(a) a person who is an individual shall mean to state his or her full name, present or last known residence address (designating which), and present or

last known position or business affiliation (designating which), job title, employment address, and business and residence telephone numbers;

(b) a person who is a firm, partnership, corporation, proprietorship, association, or other organization or entity shall mean to state its full name, present or last known address (designating which), telephone number, legal form of such entity or organization (including state and country of incorporation and organization), and the identity of its present and former officers, directors, controlling shareholder(s) and all employees, agents and staff members who have responsibilities relating to use of trademarks;

(c) data shall mean to state, in the case of a document, the title (if any), the date, author(s), sender(s), recipient(s), the identity of the person(s) signing it, type of document (i.e., a letter, memorandum, book, telegram, chart, etc.) or some other means of identifying it, its present location or custodian, and whether Applicant is in possession of the original, master, or copy thereof.

5. Applicant. The term "Applicant" shall mean, Wellness International Network, Ltd. and, where applicable, its officers, directors, employees, stockholders, trustees, partners, predecessors, divisions, corporate parent, subsidiaries, affiliates, and agents. The term "Applicant" also includes any and all predecessors of Wellness International Network, Ltd.

6. Person. The term "person" shall include, without limitation, any natural person or any business, business association, business entity, partnership, corporation, legal, or governmental entity.

INTERROGATORY NO. 2

Identify each product in conjunction with which Applicant's Mark is currently being used in the United States, and/or with which Applicant's Mark will be used in the United States, and as to each such product, state the following:

- (a) whether and where such product is produced or provided by Applicant;
- (b) whether such products are labeled by Applicant; and
- (c) if such products are not produced or provided by Applicant, the identity of each producer, supplier, and provider of such products, and location where such production takes place.

ANSWER

INTERROGATORY NO. 3

With regard to each of the products identified in response to Interrogatory No. 2, provide the date(s) on which Applicant's Mark or any variations thereof was first used, if such use has commenced, as to both interstate and foreign commerce, and identify all documents upon which Applicant intends to rely to establish such date(s).

ANSWER

INTERROGATORY NO. 4

With respect to each of the products identified in response to Interrogatory No. 2, state whether Applicant's Mark is currently being used on such products by Applicant, or any of Applicant's affiliates, including importers, distributors, or licensees.

ANSWER

INTERROGATORY NO. 5

State whether there has occurred any period of time when Applicant discontinued its use of Applicant's Mark, if any such use has commenced since initial adoption, and state the reason for such discontinuation(s).

ANSWER

INTERROGATORY NO. 6

With respect to each of the products identified in response to Interrogatory No. 2, describe the channels of distribution in the United States including, without limitation, the type of sales (e.g., wholesale, retail, direct mail, etc.), the type of retail

outlets in which the Applicant's products sold under Applicant's Mark are or will be offered to the public, and the identity of Applicant's vendors and distributors, and retail outlets where the product are or will be sold.

ANSWER

INTERROGATORY NO. 7

State the total dollar amount expended by Applicant in the United States in any advertisement and promotion of each product specified in response to Interrogatory No. 2.

ANSWER

INTERROGATORY NO. 8

State the total dollar amount expended by any distributor or importer affiliated with Applicant in the United States on the advertisement and promotion of each product specified in response to Interrogatory No. 2.

ANSWER

INTERROGATORY NO. 9

With respect to each of the goods identified in response to Interrogatory No. 2, state the unit price to the consumer, any monthly sales by the number of units sold, and the gross revenues generated by such sales per month if Applicant has begun to sell or provide such product in the United States.

ANSWER

INTERROGATORY NO. 10

Identify all advertising agencies, public relations agencies, market research agencies, or other persons which Applicant has used, participated with, or cooperated with in any advertising, marketing, or promoting of the goods in the United States identified in response to Interrogatory No. 2, and indicate the time period(s) during which such activities were conducted in the United States.

ANSWER

INTERROGATORY NO. 11

Describe all media, including circulars, trade journals, magazines, newspapers, television, and radio in the United States by which Applicant or any authorized user of Applicant's Mark has advertised each product specified in response to Interrogatory No. 2, and the exact dates on which each such form of media was utilized. Also, state the identity of each authorized user who has conducted such advertising and the amount of money spent for such advertising on a monthly basis by Applicant and by each identified authorized user.

ANSWER

INTERROGATORY NO. 12

List all media, materials, advertisements, labels, promotional materials, packaging, store displays, or other documents or things on which Applicant's Mark has been printed, embossed or stamped, displayed, or otherwise used to advertise, promote, or sell Applicant's products under Applicant's Mark in the United States.

ANSWER

INTERROGATORY NO. 13

(a) State whether Applicant has ever conducted any trademark searches relating to: (i) Opposer's marks including "PERFORM", (ii) Applicant's Mark, or (iii) any other Mark, name or designation consisting in whole or in part of the term "Perform".

(b) If the answers to Interrogatory 13(a) are anything other than an unqualified negative, state the date of each, and identify each person by whom it was conducted and each person having knowledge or information relating thereto.

ANSWER

INTERROGATORY NO. 14

State whether Applicant has ever conducted, caused to be conducted, or obtained any survey, test, market research study, or other investigation or study referring or relating to Opposer's marks, including "PERFORM", Applicant's Mark, or any other mark, name, or designation consisting in whole or in part of the term "Perform" or "Performance". If the answer to Interrogatory 14(a) is anything other than an unqualified negative, identify with respect to each such study:

- (a) the date, nature, and design thereof;
- (b) all persons responsible for designing it, conducting it, and interpreting its results; and
- (c) all persons having knowledge of the results thereof.

ANSWER

INTERROGATORY NO. 15

Describe each instance of which Applicant has knowledge of any inquiry regarding any actual or assumed association, affiliation, or connection between Applicant or its products identified in response to Interrogatory No. 2 and Opposer or its products, as well as any actual or purported association, mistake, or confusion by any person with regard to any affiliation with Opposer.

ANSWER

INTERROGATORY NO. 16

Describe each oral or written protest or objection that Applicant has received from any person(s), other than agents of the Opposer, regarding Applicant's use or registration of Applicant's Mark or any other trademark, and as to each, identify all documents referring or relating to such protest or objection.

ANSWER

INTERROGATORY NO. 18

Identify each person having knowledge or information concerning facts that support or contradict the allegations in the Notice of Opposition and/or the answer thereto.

ANSWER

INTERROGATORY NO. 19

Identify each expert witness whose testimony Applicant plans to adduce in this proceeding. As to each such witness, please state the following:

- (a) the name, address, place of employment, home and business telephone numbers;
- (b) the expert's qualifications;
- (c) the subject matter on which the expert is expected to testify; and
- (d) the facts and opinions to which the expert is expected to testify.

ANSWER

INTERROGATORY NO. 20

Identify all persons who were consulted or participated in the preparation of the answers or responses to these Interrogatories.

ANSWER

INTERROGATORY NO. 21

To the extent Applicant has not yet used the mark "PERFORM X" in commerce, set forth the following:

- a. each product on which Applicant intends to use such mark;
- b. the method of sales and distribution which Applicant intends to utilize for each product identified in subpart a;
- c. the brand names of all known competitor products with which the products identified in subpart a will compete;
- d. the methods and media which Applicant intends to utilize to promote the products identified in response to subpart a; and
- e. the price per unit which Applicant intends to sell the product(s) to consumers.

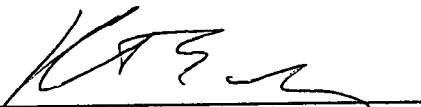
ANSWER

INTERROGATORY NO. 22

Identify all products currently manufactured and/or sold by Applicant, the trademark or tradename under which each such product is sold, method of distribution and sale for each, and unit price for each.

ANSWER

Dated: May 27, 2003



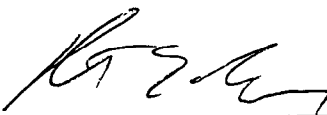
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436 Seventh Avenue
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Facsimile: (412) 471-4094

Attorneys for Opposers

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S FIRST SET OF INTERROGATORIES DIRECTED TO APPLICANT** was served by first class mail, postage prepaid, on this 27th day of May 2003 upon the following:

Stephen L. Sapp, Esq.
Locke, Liddell & Sapp, LLP
2200 Ross Avenue
Suite 2200
Dallas, TX, 75201-6776



Attorney for Opposer

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

B

In the matter of :
PERFORMANCE HEALTH, INC. : Opposition No. 91155875
and BIOFREEZE ASSOCIATES :
Opposers, : Application Serial No. 76/421,875
v. :
WELLNESS INTERNATIONAL : Mark: PERFORM X
NETWORK, LTD. :
Applicant. : Filed: June 17, 2002

**OPPOSER'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120 Opposers, Biofreeze Associates and Performance Health, Inc. (together "Performance Health"), through their counsel, hereby propounds to Applicant, Wellness International Network, Ltd. the following Requests for Production of Documents and Things. Applicant is requested to provide its written reply to this Request for Production of Documents and Things within thirty (30) days of service hereof and to produce the documents and things requested within thirty (30) days at the offices of Opposers' counsel, Webb Ziesenheim Logsdon Orkin & Hanson, P.C., 700 Koppers Building, 436 Seventh Avenue, Pittsburgh, PA 15219-1818.

I. INSTRUCTIONS AND DEFINITIONS

A. These requests for production require responses which are complete and accurate as of the date when such responses are made.

B. These requests for production are continuing in character so as to require Applicant to supplement its responses if it becomes aware of any document or thing responsive to these requests that Applicant has not yet produced.

C. As used herein, the following definitions apply:

1. Communication. The term "communication(s)" means the information that has been transmitted (in the form of facts, ideas, inquiries, or otherwise), regardless of the means utilized.

2. Document. The term "document(s)" has the meaning ascribed to it in Fed. R. Civ. P. 34(a), and includes, but is not limited to, every writing or record of every type and description that is or has been in the possession, control or custody of Applicant or of which Applicant has knowledge, including without limitation: originals, drafts, masters and copies of writings, including handwritings, and printed, machine-readable matter, computer files, and typed or other graphic, or photographic matter. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

3. Data. The term "data" shall mean any facts, documents, or communications, oral or otherwise, of which Applicant has knowledge, information or belief.

4. Applicant. The term "Applicant" shall mean , Wellness International Network, Ltd. and, where applicable, its officers, directors, employees, stockholders, trustees, partners, predecessors, divisions, corporate parent, subsidiaries, affiliates, and agents. The term "Applicant" also includes any and all predecessors of , Wellness International Network, Ltd.

5. Person. The term "person" shall include, without limitation, any natural person or any business, business association, business entity, partnership, corporation, legal, or governmental entity.

6. And and Or. The connectives "and" and "or" shall be construed broadly, both conjunctively and disjunctively, to bring within the scope of the discovery requests all responses that might otherwise be construed to be outside of its scope.

7. Date. The term "date" shall mean the exact day, month and year, if ascertainable, or if not, the best approximation, including the temporal relationship to other events.

8. Applicant's Mark. The term "Applicant's Mark" includes the mark "PERFORM X" and all extensions, derivatives and variant spellings.

II. REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

Applicant is hereby requested to produce for inspection and/or copying by Opposers, or to cause copies to be provided to Opposers, the documents specified herein to the extent that such documents and things are in the possession, custody, and control of Applicant or Applicant's attorneys.

Request No. 1

All documents referring to or relating to the selection, adoption, and first use, if any, of the Applicant's Mark in the United States, including, but not limited to, search reports, market surveys, interoffice memoranda, and all invoices, advertisements, brochures, labels, tags, and points of display advertising.

Request No. 2

All documents referring or relating to any search or investigation of records of the United States Patent and Trademark Office or any other records or publications in connection with the adoption, use, or application for registration of Applicant's Mark.

Request No. 3

All documents referring or relating to any attempt by Applicant to register Applicant's Mark, under the laws of any state or foreign country or before the United States Patent and Trademark Office.

Request No. 4

Any trademark opinion(s) prepared concerning the registrability or use of Applicant's Mark or any other marks considered by Applicant but not ultimately selected for use or registration, or documents referring or relating to any such opinion, including search reports.

Request No. 5

All documents referring or relating to any claimed predecessor in title to Applicant's Mark.

Request No. 6

Representative samples or photographs of Applicant's Mark in each and every form used as applied, or as will be applied, to each product with which Applicant's Mark has ever been associated in the United States (or will be), including, but not limited to invoices, advertisements, promotional materials, brochures, tags, labels, packaging, containers, or point of sale displays.

Request No. 7

Representative samples or photographs of (1) each product Applicant has ever manufactured, advertised, promoted, offered for sale, sold, or otherwise distributed under Applicant's Mark in the United States, and/or (2) each sample or prototype product bearing Applicant's Mark which has not yet been sold.

Request No. 8

Representative samples of all distributed or undistributed media, promotional materials, advertisements, store displays, labels, and packaging on which Applicant's Mark has been used, printed, embossed, stamped, displayed, or published in the United States.

Request No. 9

All documents that refer or relate to Applicant's marketing or advertising activities with regard to any products advertised, promoted, sold, or distributed in the United States using Applicant's Mark including, but not limited to, sales manuals, distributors' manuals, marketing bulletins, technical bulletins, marketing studies, and performance or evaluation reports.

Request No. 10

Representative samples of all trade journals in the United States in which Applicant has advertised any item of goods associated with Applicant's Mark.

Request No. 11

Representative samples of all trade journals in the United States in which Applicant's distributors, importers, or licensees have advertised any item of goods associated with Applicant's Mark.

Request No. 12

All documents referring or relating to Applicant's intended or actual channels of distribution to ultimate consumers in the United States of products under Applicant's Mark, including documents relating to actual or intended distribution and sales outlets for products sold under Applicant's Mark, as well as placement of said products with said distribution and sales outlets.

Request No. 13

All documents referring or relating to or tending to show advertising expenditures incurred by, or budgeted by, Applicant in connection with use of Applicant's Mark in the United States.

Request No. 14

All documents evidencing, relating, or referring to authorizations or agreements with third parties involving Applicant's Mark including, but not limited to, all licenses, franchise agreements, manufacturing agreements, assignments, pledges, or conditional assignments.

Request No. 15

All documents referring or relating to advertising in the United States conducted by authorized users of Applicant's Mark.

Request No. 16.

All documents referring or relating to, or tending to show, the amount of money spent by any authorized users of Applicant's Mark on advertisements for goods sold under Applicant's Mark.

Request No. 17

All documents referring or relating to any objection raised by any third party to Applicant's use or attempted registration of Applicant's Mark in the United States.

Request No. 18

All documents referring or relating to any objections made by Applicant to the use by others of marks believed by Applicant to be confusingly similar to Applicant's Mark.

Request No. 19

All documents referring or relating to, or tending to show sales of Applicant's goods, if such sales have commenced, in both units and dollars, on which Applicant's Mark has been used in the United States from the inception of use.

Request No. 20

All documents referring or relating to or tending to show any instance of actual confusion or possible confusion between Applicant's mark and Opposer's Mark "PERFORM" including any document referring or relating to any communication received by Applicant which was intended for Opposer.

Request No. 21

All documents referring to the exportation of goods out of the United States bearing Applicant's Mark.

Request No. 22

All documents relating or referring to any discontinuation or suspension of Applicant's use of Applicant's Mark since its initial adoption and use in commerce.

Request No. 23

All documents referring or relating to any adversarial proceeding involving Applicant's Mark before the Trademark Trial and Appeal Board, Bureau of Customs, F.T.C., or any state or federal court in the United States.

Request No. 24

All documents referring or relating to any survey conducted on Applicant's behalf relating to Applicant's Mark or Opposer's "PERFORM" Mark.

Request No. 25

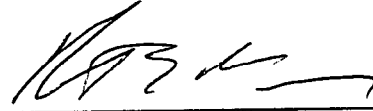
All documents relating or referring to each of the following:

- a. each product on which Applicant intends to use Applicant's Mark;
- b. the method of sales and distribution which Applicant intends to utilize for each product identified in subpart a;
- c. the brand names of all known competitor products with which the products identified in subpart a will compete;
- d. the methods and media which Applicant intends to utilize to promote the products identified in response to subpart a;
- e. the price per unit which Applicant believes the product will be sold to consumers;
- f. the identity of retailers, stores and distributors who have sold, sell or will be selling products labeled with Applicant's Mark; and
- g. all business plans or other documents relating to Applicant's planned use of Applicant's Mark and/or the products on which it will be used.

Request No. 26

All documents referring to Opposers or the product PERFORM.

Dated: May 27, 2003



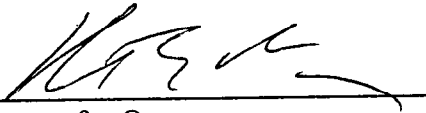
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Attorneys for Opposers

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Stephen L. Sapp, Esq.
Locke, Liddell & Sapp, LLP
2200 Ross Avenue
Suite 2200
Dallas, TX, 75201-6776



Attorney for Opposer

TAB

Opposition No. 91155875

Date: August 12, 2003
Case Docket No. 1853-030006

COMMISSIONER FOR TRADEMARKS
2900 CRYSTAL DRIVE
ARLINGTON, VA 22202-3513



08-14-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #58

Sir:

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

APPLICANT (Opposer): Performance Health, Inc. and Biofreeze Associates
FOR: **Opposition of United States Trademark Application
Serial No. 76/421,875 filed June 17, 2002
for the mark "PERFORM X"**

INCLUDING: Transmittal Form (in Trip.); Opposer's Combined Motion to Compel Discovery Responses and Brief in Support Thereof (2 pp.); Exhibits to Motion (26 pp.)

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
ORKIN & HANSON, P.C.

By

Kent E. Baldauf, Jr.
Registration No. 36,082
700 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219-1818
Telephone: (412) 471-8815
Facsimile: (412) 471-4094
Attorney for Opposer

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

Jody M. N. Burgess
(Name of Person Mailing Paper)

Jody M. N. Burgess 8/12/2003
Signature Date