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

Proceeding	91179294
Party	Plaintiff The Dannon Company, Inc.
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Date	05/15/2009
Attachments	Relpy Brief.pdf (4 pages)(13913 bytes)

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

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The Dannon Company, Inc.,	:	Opposition No.: 91179294
	:	
	:	Opposer, : Application Serial No. 77/106,295
	:	
-v-	:	Filing Date: February 13, 2007
	:	
NutritionOptions LLC,	:	Published: August 14, 2007
	:	
	:	Applicant. : Trademark: ORGANIMALS
	:	
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OPPOSER’S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
ITS MOTION TO REOPEN DISCOVERY AND RESET
THE TRIAL AND TESTIMONY DATES

Pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, Opposer The Dannon Company, Inc. (“Dannon”) submits this reply memorandum of law in further support of its motion to reopen discovery so that Dannon may obtain information from Applicant NutritionOptions LLC (“NutritionOptions”) concerning NutritionOptions’ business planning activities in connection with the mark ORGANIMALS.

ARGUMENT

Dannon’s motion to reopen discovery is based solely on NutritionOptions’ failure to disclose information concerning its business planning activities in connection with the ORGANIMALS mark, despite Dannon’s repeated requests that NutritionOptions produce this information during the originally-set discovery period. Dannon only recently learned from

allegations made by NutritionOptions that NutritionOptions did in fact engage in various business planning activities. As set forth in Dannon's opening brief and the legal authority cited therein, the discovery of this new evidence constitutes a sufficient basis for reopening discovery.

In its opposition brief, NutritionOptions completely fails to rebut Dannon's legal basis for reopening discovery and does not cite a single case or other legal authority to support its request that the Board deny Dannon's motion. Instead, NutritionOptions focuses almost entirely on the parties' settlement agreement in principle, namely, addressing NutritionOptions' reasons for refusing to comply with the parties' already agreed upon material terms for settling this opposition by attempting to add a new material term that Dannon pay NutritionOptions over \$10,000 in settlement money. NutritionOptions argues that it was justified in making this new demand for money because the formal Settlement Agreement still contained certain language that was objectionable to NutritionOptions. (Opp'n. Brief at 21-22.) First, NutritionOptions' excuse for demanding money from Dannon at the last minute is disingenuous and defies reason and logic since counsel for Dannon made clear to NutritionOptions that (1) it would remove the specific language to which NutritionOptions objected and (2) any remaining references to that language in the last draft of the Settlement Agreement was inadvertent. Second and moreover, NutritionOptions' excuse is completely irrelevant to Dannon's request to reopen discovery because it fails to address the key issue, which is the newly found evidence concerning NutritionOptions' business planning activities. In fact, at no point in NutritionOptions' opposition brief does NutritionOptions deny the fact that it engaged in some level of business

planning activities and failed to disclose that information to Dannon in response Dannon's discovery requests.¹

Given NutritionOptions' complete failure to sufficiently rebut Dannon's legal arguments and factual showing, the Board should grant Dannon's motion to reopen discovery so that Dannon will finally have the proper opportunity to take full discovery of NutritionOptions concerning its business planning activities with respect to the ORGANIMALS mark. In the event that the Board denies Dannon's request to reopen discovery, in the alternative Dannon respectfully requests that the Board reset the trial and testimony periods in this proceeding due to NutritionOptions' bad faith behavior during settlement, so that the close of Dannon's testimony period ends at least four (4) months from the date that the Board issues its decision on this motion.

Dated: New York, New York
May 15, 2009

Respectfully submitted,

HUGHES HUBBARD & REED LLP

By: /Perla M. Kuhn/

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1. NutritionOptions has also failed to swear under penalty of perjury that the factual statements set forth in its declaration submitted with its opposition brief are true and accurate pursuant to 37 C.F.R. § 2.20 and 28 U.S.C. § 1746. Because NutritionOptions' declaration does not meet the requirements of 37 C.F.R. § 2.20 or 28 U.S.C. § 1746, the Board should strike NutritionOptions' declaration, the exhibits attached thereto and all factual statements set forth in its opposition brief that are derived from that declaration.

CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, not a party to this action, and that on the 15th day of May 2009, I caused to be served a true and correct copy of the foregoing
OPPOSER'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
ITS MOTION TO REOPEN DISCOVERY AND RESET THE TRIAL AND TESTIMONY
DATES by email and first-class mail to Applicant as follows.

Dr. Deborah Kennedy
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mdoucette@nutritionoptions.com

I further certify under penalty of perjury that the foregoing is true and correct.

Dated: New York, NY
May 15, 2009

By/Claudia Salzberg/
Claudia Salzberg