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

Proceeding	91189780
Party	Defendant The Concept Foundation
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Date	05/26/2009
Attachments	CYCLOFEM 76514737 Answer to Notice of Opposition by The Concept Foundation.pdf (12 pages)(368025 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial 76/514,737
Published in the Official Gazette of November 11, 2008

VINTAGE PHARMACEUTICALS, LLC)	
Successor in interest to)	
Teva Pharmaceuticals USA Inc.,)	
)	
Opposer,)	
)	
)	Opposition : 91189780
v.)	
)	
THE CONCEPT FOUNDATION,)	
)	
Applicant.)	

ANSWER TO NOTICE OF OPPOSITION BY THE CONCEPT FOUNDATION

Applicant, The Concept Foundation (“Applicant”), for its Answer and Affirmative Defenses to the Notice of Opposition is brought by Vintage Pharmaceuticals LLC, (“Opposer”), states as follows:

1. A request for extension of time to file a Notice of Opposition was filed by Teva Pharmaceuticals USA Inc. (hereinafter “Teva”) on December 11, 2008.

Answer: Applicant admits the allegations in Paragraph 1 of the Notice of Opposition.

2. Teva and Opposer entered into an Asset Purchase Agreement as of December 23, 2008, wherein the Opposer acquired from Teva the marks, CYCLAFEM, CYCLAFEM 7/7/7, and CYCLAFEM 1/35, together with the business interests related thereto.

Answer: Applicant is without sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 2 of the Notice of Opposition and, therefore, denies these allegations.

3. A request for extension of time to file a Notice of Opposition was filed by Opposer on February 23, 2009.

Answer: Applicant admits the allegations in Paragraph 3 of the Notice of Opposition.

4. Opposer, as the successor of interest to Teva, is the owner of the following trademark applications:

CYCLAFEM, Serial 78789496, filed January 11, 2006;

CYCLAFEM 7/7/7, Serial 78789508, filed January 11, 2006; and

CYCLAFEM 1/35, Serial 77118770, filed February 28, 2007.

Answer: Applicant is without sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 4 of the Notice of Opposition and, therefore, denies these allegations.

5. The assignment of the above trademarks from Teva to Opposer has been recorded with the U.S. Patent and Trademark Office at Reel/Frame 3925/0447.

Answer: Applicant admits that Reel/Frame 3925/0447 reflects an alleged recordal of a change of ownership that pertains to the trademarks referenced in Paragraph 5 of the Notice of Opposition, among other trademarks,

but Applicant is without sufficient information to form a belief as to the truth or falsity of the remaining allegations in Paragraph 5 of the Notice of Opposition and, therefore, denies these allegations

6. Opposer would be damaged by the registration of Applicant's mark, because, *inter alia*, Opposer's application for the mark CYCLAFEM has been suspended by reason of Applicant's application for CYCLOFEM.

Answer: Applicant denies the allegations in Paragraph 6 of the Notice of Opposition.

7. Upon information and belief, Applicant has not used the mark, CYCLOFEM in the United States.

Answer: Applicant denies the allegations in Paragraph 7 of the Notice of Opposition.

8. Upon information and belief, Applicant is currently seeking registration of its mark CYCLOFEM under Section 44(e) of the Trademark Act.

Answer: Applicant admits the allegations in Paragraph 8 of the Notice of Opposition.

9. Upon information and belief, Applicant amended its application from its original filing basis, by deleting Section 1(b) and claiming Section 44(e) as its sole basis for registration of the mark.

Answer: Applicant admits the allegations in Paragraph 9 of the Notice of Opposition.

10. As set forth in TMEP § 806.03(h), “When the applicant substitutes one basis for another, the applicant will retain the original filing date, provided that the applicant has had a continuing valid basis for registration since the application filing date.” As further set forth, “If there is no valid basis, the application is void, and registration will be refused. In this situation, the applicant cannot amend the filing date, and the Office will not refund the filing fee.”

Answer: Applicant admits that TMEP § 806.03(h) contains the statements placed in quotation marks in Paragraph 10 of the Notice of Opposition, but denies the remaining allegations in Paragraph 10 including any implication or legal conclusion that Applicant has not had a continuing valid basis for registration since the filing date of the application.

11. Upon information and belief, Applicant has not had a continuing valid basis for registration since the application filing date.

Answer: Applicant denies the allegations in Paragraph 11 of the Notice of Opposition.

12. Upon information and belief, Applicant does not have a *bona fide* intent to use the mark CYCLOFEM in commerce and has not held any such intent since the application filing date.

Answer: Applicant denies the allegations in Paragraph 12 of the Notice of Opposition.

13. In fact, Applicant has a history of filing multiple, different trademark applications for contraceptives, including a prior application for CYCLOFEM, all based on an alleged Intent to Use (not on actual use), but has never filed a Statement of Use in connection with any of these applications.

Answer: Applicant denies the allegations in Paragraph 13 of the Notice of Opposition.

14. Upon information and belief, Applicant has never made any use in the United States of any trademark for contraceptive.

Answer: Applicant admits the allegations in Paragraph 14 of the Notice of Opposition only to the extent that it was not the registered trademark owner in the United States for any contraceptive product, but denies the remaining allegations in Paragraph 14 to the extent they suggest that Applicant's contraceptive products or formulations have not been sold or marketed in the United States under a trademark owned by a party other than Applicant.

15. Upon information and belief, as evidenced by the attached Exhibit A, Applicant describes itself on its website and as globally operation non-for-profit organization whose "principal purpose is to increase access to medicines of assured

quality at affordable prices for public health services in *developing* countries.” (emphasis added)

Answer: Applicant admits that Exhibit A is a printout of a portion of Applicant’s website and that the statement placed in quotation marks in the allegations in Paragraph 15 of the Notice of Opposition appears on Applicant’s website, but denies all remaining allegations in Paragraph 15 including any implication or conclusion that Applicant’s statement of having a “principal purpose” of providing access to medicines of quality at affordable prices for public health services in developing countries means that Applicant does not have any bona fide intent to use the subject trademark or market its products in the United States or any other country that is a developed country.

16. Upon information and belief, Applicant is presently active in more than 30 developing countries, in which it licenses certain pharmaceutical preparations to pharmaceutical manufacturers. Attached hereto as Exhibit B is a map from Applicant’s website which, upon information and belief, is intended to show the countries in dark color in which it is active, and in white the countries in which is not active.

Answer: Applicant admits that Exhibit B is a printout of a portion of Applicant’s website that contains a map that generally describes Applicant’s global activities, but denies the remaining allegations in Paragraph 16, including any implication or conclusion that Applicant is not active in any way in countries reflected in dark color on the map.

17. Upon information and belief, as evidenced by the attached Exhibit B, the United States is among the developed countries identified as those in which the Applicant is not active. This is consistent with Applicant's practice of filing Intent-to-use applications, but never making actual use in the United States, as referred to above in paragraph 13.

Answer: Applicant denies the allegations in Paragraph 17 of the Notice of Opposition.

18. Upon completion of its nomenclature review, the U.S. Food and Drug Administration ("FDA") stated to Opposer's predecessor-in-interest that the FDA had no objection to use the marks CYCLAFEM, CYCLAFEM 1/35, and CYCLAFEM 7/7/7, for oral contraceptives.

Answer: Applicant is without sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 18 of the Notice of Opposition and, therefore, denies these allegations.

19. Upon information and belief, Applicant has not received FDA approval for its mark CYCLOFEM for its goods.

Answer: Applicant admits the allegations in Paragraph 19 of the Notice of Opposition.

20. In order for Applicant to be able to use the CYCLOFEM trademark (or any prescription pharmaceutical trademark) in commerce in the United States, Applicant must first obtain approval of the trademark from the FDA.

Answer: Applicant admits the allegations in Paragraph 20 of the Notice of Opposition.

21. If the marks CYCLAFEM and CYCLOFEM, for the goods specified in the respective trademark applications, are too confusingly similar for trademark registration, then they also are too similar for Applicant to receive FDA approval for its mark, for its goods.

Answer: Applicant denies the allegations in Paragraph 21 of the Notice of Opposition.

22. Based on the foregoing, since the FDA has no objection to the use by Opposer of CYCLAFEM for contraceptives, and since, on information and belief, the Applicant has not received FDA approval for the mark CYCLOFEM for contraceptives, *even if* the Applicant had in the past a *bona fide* intent to use its mark in the United States (which the Opposer is not willing to concede, and which in fact the above factual allegations controvert), Applicant can no longer have a *bona fide* intent to use the mark, because Applicant cannot obtain the required FDA approval.

Answer: Applicant denies the allegations in Paragraph 22 of the Notice of Opposition.

23. Applicant therefore cannot have a *bona fide* intent to use the mark CYCLOFEM in the United States for its goods.

Answer: Applicant denies the allegations in Paragraph 23 of the Notice of Opposition.

24. Without a *bona fide* intent to use the mark in commerce, the Applicant is not entitled to registration of the mark under Section 44(e).

Answer: The allegations in Paragraph 24 of the Notice of Opposition merely state a legal conclusion for which no admission or denial is required, but to the extent any answer is required, Applicant denies the allegations of Paragraph 24 of the Notice of Opposition on the basis that it implies that Applicant is not entitled to registration of the subject mark under Section 44(e).

25. Opposer respectfully requests that this opposition be sustained, and the registration of application Serial 76/514,737 for the mark CYCLOFEM sought by Applicant be refused.

Answer: Applicant denies the allegations in Paragraph 25 of the Notice of Opposition.

AFFIRMATIVE DEFENSES

1. Opposer is barred under the doctrine of unclean hands from seeking relief before the Board on the grounds that, on information and belief, that the FDA has not completed its nomenclature review of Opposer's (and its predecessors-in-interest's)

CYCLAFEM, CYCLAFEM 1/35 and CYCLAFEM 7/7/7 marks and products as alleged by Opposer in Paragraph 18 of the Notice of Opposition, such allegation forming the premise under which Opposer claims that Applicant cannot possibly have a bona fide intent to use the subject mark.

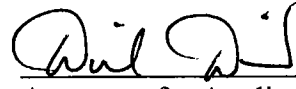
2. Opposer is barred on the basis of fraud from seeking relief on the grounds that, on information and belief, Opposer's alleged acquisition of the CYCLAFEM, CYCLAFEM 1/35 and CYCLAFEM 7/7/7 marks were an invalid attempt by Opposer to acquire from Teva Pharmaceuticals USA, Inc. intent-to-use applications for which the marks had not been used and for which the ongoing business interests or portions thereof associated with the trademarks were not acquired by Opposer. On information and belief, Opposer is similarly barred from seeking relief on the basis that Teva Pharmaceuticals USA, Inc.'s apparent acquisition in November, 2006 of the CYCLAFEM, CYCLAFEM 1/35 and CYCLAFEM 7/7/7 marks were an invalid attempt by Teva Pharmaceuticals USA, Inc. to acquire from Andrx Pharmaceuticals, LLC intent-to-use applications for which the marks had not been used and for which the ongoing business interests or portions thereof associated with the trademarks were not acquired by Opposer Teva Pharmaceuticals USA, Inc.

3. Applicant reserves the right to plead or assert other affirmative defenses as discovery proceeds.

WHEREFORE, Applicant respectfully requests that this Opposition be rejected and that Application Serial 76/514,737 be passed to registration.

Respectfully submitted,

THE CONCEPT FOUNDATION

A handwritten signature in black ink, appearing to read "David J. Davis", written over a horizontal line.

Attorneys for Applicant

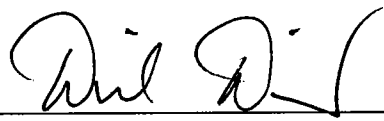
Date: May 26, 2009

David J. Davis
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CERTIFICATE OF MAILING

I hereby certify that the foregoing ANSWER TO NOTICE OF OPPOSITION BY THE CONCEPT FOUNDATION has been submitted electronically to the TTAB

on the 26th day of May, 2009.




David J. Davis

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ANSWER TO NOTICE OF OPPOSITION BY THE CONCEPT FOUNDATION was served upon the attorneys of record by depositing a copy of the same with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to:

Frank M. Caprio
Bradley Arant Boult Cummings LLP
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801

on the 26th day of May, 2009.



David J. Davis