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

Proceeding	91191029
Party	Defendant ProBioHealth, LLC
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Date	09/22/2009
Attachments	ProBioHealth Answer to C Hansen Opposition Notice FINAL.pdf (5 pages) (31061 bytes)

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

CHR. HANSEN A/S, CHR. HANSEN, INC.,)	
)	
Opposer,)	Opposition No. 91191029
)	
v.)	Trademark: PRO-BIOK
)	
PROBIOHEALTH, LLC,)	Appl. No.:77/482,825
)	Int. Class: 5
Applicant.)	
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ANSWER TO NOTICE OF OPPOSITION

By and for its Answer to the Notice of Opposition filed by Chr. Hansen A/S, Chr. Hansen, Inc. (“Opposers”) Applicant ProBioHealth, LLC (“Applicant”) responds as follows, the paragraph numbers hereof corresponding to those of the Notice of Opposition.

INTRODUCTORY PARAGRAPH

Opposer, Chr. Hansen NS, a Denmark corporation with a business address of 10-12 Boge Alle, Horsholm, DK-2970, Denmark, and Opposer, Chr. Hansen, Inc., a Wisconsin corporation with a business address of 9015 West Maple Street, Milwaukee, WI 53214 (collectively “Opposers”), believe that they will be damaged by, and hereby oppose registration of, the mark PRO-BIOK that is the subject of Application Serial No. 77/482,825, published in the Official Gazette as of March 17, 2009, and request that registration be refused to this Application. Opposers filed for and were granted extensions of time to oppose Serial No. 77/482,825 (“PRO-BIOK”), the last of which expires on July 15, 2009.

ANSWER: Applicant admits that U.S. Trademark Application No. 77/482,825 for the mark “PRO-BIOK” was published in the Official Gazette dated March 17, 2009, and that Opposers were granted extensions of time to oppose said Application. Applicant denies that Opposers will be damaged by the subject Application. Applicant is without information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

1. Opposer, Chr. Hansen A/S is the owner of Registration No. 1,131,165 for the mark PROBIOS covering animal feed supplements and Registration No. 1,185,389 for the mark PROBIOCIN covering feed supplements. Printouts from the United States Patent and Trademark Office trademarks database, showing the current status and title of these registrations are attached as Exhibits A and B, respectfully.

ANSWER: Applicant admits that printouts of what Opposers purport to be copies of U.S. Registration Nos. 1,131,165 for PROBIOS and Registration No. 1,185,389 for PROBIOCIN are attached as Exhibits A and B to the Notice of Opposition, and avers that the documents speak for themselves. Applicant is without information or belief concerning the remaining allegations of this paragraph and, on that basis, denies the same.

2. Opposers, prior to any filing date or date of first use upon which Applicant can rely, have adopted, used and continue to use (in some cases through a licensee) the trademarks PROBIOS (along with product line expansions of the PROBIOS mark) and PROBIOCIN to identify products intended for distribution and sale in the animal feed markets including its animal feed supplements.

ANSWER: Applicant is without information or belief concerning the allegations of this paragraph and, on that basis, denies the same.

3. Opposers are entities related to one another, specifically, Chr. Hansen Holding A/S is the parent organization of both Chr. Hansen, Inc. and Chr. Hansen A/S.

ANSWER: Applicant is without information or belief concerning the allegations of this paragraph and, on that basis, denies the same.

4. Applicant has filed an application to register the mark PRO-BIOK for probiotics for equine nutrition in the nature of a dietary supplement including lactobacillus casei. This application was filed on May 23, 2008, and was assigned Serial No. 77/482,285.

ANSWER: Applicant admits the allegations of this paragraph.

5. Applicant's mark so resembles Opposers' previously used and registered PROBIOS and PROBIOCIN marks that when applied to the goods set forth in Applicant's application, it is likely to or will cause confusion, mistake, or deception within the meaning of Section 2(d) of the Trademark Act, all to the damage of Opposers.

ANSWER: Applicant denies the allegations of this paragraph.

Conclusory Paragraph. WHEREFORE, Opposers will be damaged by registration of the Application, Opposers pray that Application Serial No. 77/482,285 be denied; that the Application be refused registration; and that this Opposition be sustained in Opposers' favor.

ANSWER: Applicant denies the allegations contained in the Conclusory Paragraph of the Notice of Opposition.

Notice of Reliance. Opposers hereby give notice under 37 C.F.R. § 2.122(d)(1) that they will rely on their respective registrations as seen in Exhibits A and B as evidence in support of this Notice of Opposition. The registrations are evidenced by the attached printouts from the United States

Patent and Trademark Office trademarks database, showing current status and title of the registrations.

ANSWER: Applicant denies the sufficiency of Opposers attempt to place the alleged registrations into evidence in this proceeding and avers that the contents of Exhibits speak for themselves.

AFFIRMATIVE DEFENSES

1. Opposers fail to state a claim upon which relief can be granted.
2. Opposers own no rights in the subject PRO-BIOK mark in the United States that are enforceable against Applicant.
3. The term “probiotics” is generic and, to the extent that Opposers seek to claim any rights based on their use of that term, such claims are unsupported.
4. Opposers are asserting and seeking to obtain broad exclusive rights in the use and registration of the designation or root word “probio” alone and/or in combination with other letters. Opposers are not entitled to such broad exclusive rights, either by virtue of their registrations or under the common law.
5. Opposers own no rights in the designation or root word “probio” that are enforceable against Applicant’s mark used on or in connection with the goods recited in the instant application.
6. There is no likelihood of confusion between Opposers’ claimed marks and Applicant’s opposed mark.
7. Applicant’s PRO-BIOK mark, when used in connection with the goods recited in the instant application, is not likely to cause confusion with Opposers’ alleged marks.
8. Numerous trademarks and service marks containing the designation or root word “probio” have been registered and used by third parties on goods and services, and used with the knowledge and acquiescence of Opposers. As a result of such uses and registrations, the alleged

marks asserted in the Notice of Opposition are entitled to only a limited scope of protection that does not extend to Applicant's mark and associated goods.

9. Given the foregoing, Opposers have not and will not be damaged by Applicant's use and registration of its PRO-BIOK mark.

10. Consumers and the trade have come to associate Applicant's family of PROBIO* and PRO-BIO* marks with Applicant by virtue of Applicant's long and continuous use and promotion of said marks, and Applicant's significant sales of products under said marks, including veterinary products.

11. Opposer's demands and recovery sought are barred by acquiescence and waiver because Opposer knew or should have known, long prior to its filing of the instant Notice of Opposition, that Applicant was using and had registered numerous variants of the PROBIO* family of trademarks and trade name, including the Applicant's trade name, ProBioHealth, and the marks that are the subject of the registrations identified below, and Opposer permitted their use and registration to continue, without objection.

Serial Number	Reg. Number	Word Mark	Status
78549261	3035821	PROBIORIS	LIVE
78140062	2890107	PROBIOPET	LIVE
78242694	3234136	PROBIOMEGA	LIVE
78242678	3104629	PROBIOLIVE	LIVE
78242669	3261784	PROBIOSOY	LIVE

12. Opposer's demands are barred by laches and equitable estoppel.

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WHEREFORE, Applicant respectfully requests that the Notice of Opposition be dismissed and denied and that Application No. 77/482,825 issue to registration.

DATED this 22nd day of September 2009.

Respectfully submitted,

K&L GATES LLP

By /Allen J. Baden/

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Certificate of Mailing

I certify that I caused to be mailed by U.S. Mail, postage prepaid, the foregoing Answer to Notice of Opposition upon the counsel of record for Opposer at the following address, this the 22nd day of September 2009, and that an electronic copy of said Answer was transmitted to Opposer pursuant to the Board's electronic service system.

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 /Allen J. Baden/