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

Proceeding	91200105
Party	Plaintiff Novozymes Bioag, Inc.
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Attachments	Opposer's Reply to MotStrike or Pgrphs 25 and 26.PDF (5 pages)(96097 bytes)

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

NOVOZYMES BIOAG, INC.,	)	
	)	
Opposer,	)	Opposition No. 91200105
	)	
v.	)	
	)	
CLEARY CHEMICALS, LLC,	)	
	)	
Applicant.	)	

Opposer's Reply to Cleary's Response to Opposer's Motion to Strike Fraud Counterclaims or Paragraphs 25 and 26 Thereof

Cleary argues that following the Board's grant of a period of discovery, it learned facts which "gave rise to additional counts – (1) the applicant (Opposer) was not the owner of the mark and the mark was not used by the applicant (Opposer), and (2) the applicant (Opposer) was not the owner and thereby asserted no control over the nature and quality of the goods sold under the mark." These contentions appear as Counts I and II in the Second Amended Counterclaim under the theory that the Torque application was void ab initio. It is further contended that "the facts of Counts I and II further support the original claim of fraud, which became Count III in the Second Amended Counterclaim."

Cleary claims to have submitted "as Count III the original fraud charges further supported by the facts presented in Counts I and II." (Emphasis added.) Cleary argued that Counts I and II were "totally new counts" but that "the fraud count remains the same, only amplified with newly discovered facts, evidencing the pattern of conduct engaged by Opposer throughout the prosecution of its Registration No. 3,511,124." (Emphasis added.)

The original fraud count did remain the same in one version of the counterclaim. However, it was changed in the other version, and the changed version was the one Cleary orally selected as its amended counterclaim at the end of the oral hearing.

It seems to be Cleary's contention that filing an application for plant growth enhancers for agricultural crops is fraudulent because Opposer has only used the mark for plant growth enhancers for corn. It is believed that the Board can take judicial notice of the fact that corn is an agricultural crop. Furthermore, a 2007/2008 price list refers to the Torque product being promoted for cotton which is also an agricultural crop.

Legal Precedent

Cleary argues that Opposer cited no legal precedent for the contention that a pleading cannot incorporate facts by reference. The legal precedent seems self-evident but will be explained hereinafter. Furthermore, it should be noted that Cleary itself has cited no legal precedent in support of the contention that a pleading can incorporate facts by reference.

To the extent that legal precedent is necessary, Cleary's attention is directed to the Federal Rules of Civil Procedure. Rule 8 states in part that a pleading stating a claim for relief must contain:

. . .

(2) a short and plain statement of the claim showing that the pleader is entitled to relief

. . .

Paragraph 26 of the amended counterclaim contains no such short and plain statement and accordingly should be struck. Rule 9, F.R.C.P., pertains to pleading special matters and states in part:

> (b) Fraud or mistake; conditions of mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of the person's mind may be alleged generally.

Paragraph 26 does not comply with the requirement of stating "with particularity the circumstances constituting fraud or mistake" and accordingly should be struck.

Cleary concludes that "to the extent Opposer is unable to perceive what is referenced in paragraph 26, Opposer's appropriate remedy would be through a Motion for More Definite Statement, or through an Interrogatory. . . ." To the contrary, it is not Opposer's duty to file a Motion for a More Definite Statement. Rather, it is Cleary's duty to comply with Rules 8 and 9 of the Federal Rules of Civil Procedure.

As for paragraph 25, discussed above, Cleary takes the position that a motion to strike is hardly a means for "disposing of an otherwise meritorious claim." It is respectfully submitted that Cleary has not shown that paragraph 25 presents a "meritorious claim."

For the above reasons, Opposer requests that its Motion for Summary Judgment dismissing the fraud claim be granted, or, in the alternative, paragraphs 25 and 26 be struck as irrelevant and contrary to the Federal Rules of Civil Procedure regarding claims of fraud.

Respectfully submitted,

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Dated: March 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2013, a true and correct copy of the foregoing Opposer's Reply to Cleary's Response to Opposer's Motion to Strike Fraud Counterclaims or Paragraphs 25 and 26 Thereof was served by U.S. mail and email on Applicant by serving Applicant's counsel addressed as follows:

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