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

Proceeding	91200597
Party	Plaintiff Bronson Nutritionals, LLC
Correspondence Address	JAY H GELLER 12100 WILSHIRE BLVD SUITE 500 LOS ANGELES, CA 90025 UNITED STATES jhgeller@aol.com
Submission	Other Motions/Papers
Filer's Name	Jay H. Geller
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Date	01/26/2012
Attachments	corrmsj.pdf ( 6 pages )(656504 bytes )

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

Bronson Nutritionals, LLC	)	
	)	Opposition No. 91200597
Opposer,	)	
	)	CORRECTED
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
Supreme Protein, Inc.	)	
	)	
Applicant.	)	
_____	)	

Bronson Nutritionals, LLC, Opposer herein, pursuant to Rule 56 F.R.Civ.P. and TBMP Sec. 528, moves the Board for an Order granting Summary Judgment in its favor in this matter on the ground that there are no genuine issues of material fact precluding Summary Judgment in its favor as follows:

1. Opposer is the owner of United States Trademark Registration No. 3,112,032 for the trademark PERFORMANCE EDGE for vitamin supplements and mineral supplements with accessory nutrients, dietary or nutritional protein-rich and carbohydrate-rich mix for use as a meal replacement or nutritional supplement in International Class 5. The registration is incontestable and valid and subsisting. A Section 8 and 15 declaration was accepted and acknowledged on August 18, 2011. Opposer's first use of the mark PERFORMANCE EDGE was in November, 1992. The registration is of record here.

2. Applicant has applied for registration of the mark A PERFORMANCE EDGE SO INTENSE....IT'S ALMOST UNFAIR, Serial No. 85141648 for nutritional food bars for use as a meal replacement in International Class 5. The application claims a use date of September, 2009, long after Opposer's first use of its mark in November, 1992. The application is of record here.

3. Opposer currently uses mark PERFORMANCE EDGE mark in interstate commerce. Attached to the Welling declaration are copies of pages from the website [www.bronsonvitamins.com](http://www.bronsonvitamins.com) and [www.performanceedge.com](http://www.performanceedge.com) showing the products that are currently sold under the name PERFORMANCE EDGE. In addition, the Welling declaration establishes that the PERFORMANCE EDGE products are also sold on-line at [www.amazon.com](http://www.amazon.com) and [www.lowrydrug.com](http://www.lowrydrug.com) and are sold in retail

establishments such as Vitamin Shoppe and Lowry Drug Co. Attached to the Welling declaration are copies of the pages from the bronsonnutritionals website and the performanceedge website showing the PERFORMANCE EDGE products offer for sale. The products include capsules and powders to be mixed with liquids. Also attached to this Motion are copies of the Lowry Drug and Amazon website pages offering the PERFORMANCE EDGE products for sale.


4. Attached to the Geller declaration are additional websites offering Opposer's goods under the mark PERFORMANCE EDGE for sale. The Geller declaration also establishes that Opposer appears to be the only entity that markets dietary and nutritional products under the trademark PERFORMANCE EDGE.

5. The goods on which the parties use their marks are identical. Applicant's mark incorporates Opposer's registered mark in its entirety into its alleged trademark.

6. The likelihood of confusion exists in the marketplace because the goods are identical; Applicant's mark incorporates Opposer's mark in its entirety; the mark PERFORMANCE EDGE is the dominant portion of both marks; the commercial impression and connotation of the two marks, i.e., a "performance edge" are also identical; and Opposer is the apparent only entity that markets dietary and nutritional products under the mark PERFORMANCE EDGE.

Based on the foregoing, Applicant submits that there is no genuine issue of material fact precluding Summary Judgment in favor of Opposer and Opposer respectfully requests that the Board enter an Order granting Summary Judgment in favor of Opposer and denying registration to Applicant.

Dated: January 26, 2012

  
Jay H. Geller  
Jay H. Geller, a Prof. Corp.  
Attorneys for Applicant

I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Catherine M Clayton, Gibbons Pk, 1 Penn Plz Fl 37, New York, NY 10119-3799 on January 26, 2012.

  
Jay H. Geller  
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## MEMORANDUM IN SUPPORT

### INTRODUCTION

Opposer has filed a Motion for Summary Judgment alleging that there are no genuine issues of material fact precluding Summary Judgment in favor of Opposer. The Motion lays out in great detail the basis for the Motion: the dominance of the words PERFORMANCE EDGE in both marks; the appearance and connotation and commercial impression of the marks of the parties; the identical nature of the goods on which each party uses its respective mark; and Opposer's exclusive use of the mark PERFORMANCE EDGE on nutritional products.. These facts make it abundantly clear there is a likelihood of confusion in the marketplace between Opposer's registered PERFORMANCE EDGE and Applicant's A PERFORMANCE EDGE SO INTENSE....IT'S ALMOST UNFAIR.

### ARGUMENT

The standard basis for determination of likelihood of confusion is fourfold: sight, sound, connotation and commercial impression. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 583 (C.C.P.A. 1973). A side by side comparison of the marks demonstrates that all of these factors are present here: Opposer's mark is PERFORMANCE EDGE and Applicant's mark is A PERFORMANCE EDGE SO INTENSE....IT'S ALMOST UNFAIR. The dominant and only portion of Opposer's mark is the words PERFORMANCE EDGE. The dominant and emphasized portion of Applicant's mark is also PERFORMANCE EDGE. Discarding the article "a" in the Applicant's mark, the dominant portion of Applicant's mark is PERFORMANCE EDGE. Thus, the marks look alike, sound alike and provide the same commercial impression and connotation – i.e. use of the subject goods will give the user a "performance edge". In addition, the goods on which the two entities use their respective marks are identical – nutritional products in International Class 5.

Another factor in the duPont test is the number of other products in the marketplace that use the term PERFORMANCE EDGE that are related or identical to those of both Opposer and Applicant.

Attached to this Motion is the declaration of Jay H. Geller. The Geller declaration establishes that the Opposer's products are sold on many websites (copies of pages from the websites are attached to the Geller declaration). Mr. Geller also attests to the fact that he conducted a Google search for PERFORMANCE EDGE Nutrition Bars and in the first ten pages, only Opposer's products appeared under that name. This clearly establishes that the mark PERFORMANCE EDGE for dietary supplements and nutritional products is limited to Opposer. Thus, this duPont factor weighs entirely in Opposer's favor.

Based upon the overwhelming evidence, it clear that there is a likelihood of confusion exists in the marketplace between Opposer's marks and Applicant's mark.

#### Conclusion

There are no genuine issues of material fact precluding Summary Judgment in favor of the Opposer on the allegations in the Notice of Opposition. Opposer respectfully requests that its Motion be granted, that the Opposition be sustained and that Applicant's application be denied registration.

Dated: January 26, 2012

Respectfully submitted,



Jay H. Geller

Jay H. Geller, a Prof. Corp.

Attorneys for Applicant

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### Performance Edge for Women

by [Bronson Vitamins](#)

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Price: **\$20.98**

**Note:** \$4.95 shipping when purchased from Bronson Laboratories. Not eligible for Amazon Prime.

**In Stock.**

Ships from and sold by [Bronson Laboratories](#).

Quantity:

**\$20.98** + \$4.95 shipping

In Stock. Sold by **Bronson Laboratories**

or 1-Click Checkout

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#### Product Features

- Serving size 6 Capsules
- Recommended for daily health use.
- A wise additoin in anyones diet
- Guaranteed Discount Prices
- Conveniently shipped to your door

#### Important Information

##### Safety Information

WARNING: Accidental overdose of iron-containing products is a leading cause of fatal poisoning in children under 6. Keep this product out of the reach of children. In case of accidental overdose, call a physician or poison control center immediately.

##### Ingredients

Vitamin A-C-D-E

##### Directions

Suggested use: As a dietary supplement for women, adults 6 capsules daily or as directed by a health professional. Take with or after meals.

##### Legal Disclaimer

Actual product packaging and materials may contain more and different information than what is shown on our website. We recommend that you do not rely solely on the information presented and that you always read labels, warnings, and directions before using or consuming a product. Please [see our full disclaimer](#) below.

#### Product Description

Weve added extra vitamin D for enhanced calcium absorption as well as additional calcium. Weve also included more iron in a different form - Ferronyl - for good absorption. Performance Edge for Women is fortified with extra antioxidants.

#### Product Details

**Shipping Information:** [View shipping rates and policies](#)



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Languages

US Dollar

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Health & Wellness

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Pharmacy Services

Supplements & Products

Specials

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Enter search keywords here

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Fiber

Glandular Support

Herbs->

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Lotions and Soaps

Minerals

Probiotics

Sports Nutrition->

Topicals

Vitamins->

Multi Vitamins

Single Vitamins

Specials

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Privacy Notice

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Product 21/28

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larger image

Performance Edge for Men 180 Capsules - Bronson  
\$18.89

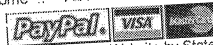
Quantity in Cart: 1  
Add to Cart:

Model: B030322  
Shipping Weight: 0.5lbs  
100 Units in Stock  
Manufactured by: Bronson

**This store is not open for business at this time. Please be patient as we are still under construction.**

**Please contact us at 704-873-9032 to place an order. Thank you!**

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