

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**  
**P.O. Box 1451**  
**Alexandria, VA 22313-1451**  
General Contact Number: 571-272-8500

Mailed: December 1, 2014

Opposition No. 91205081 (parent)

Merck Sharp & Dohme B.V. and  
Aspen Global Incorporated

v.

Dynamic Sports Nutrition, LLC

-----and-----

Opposition No. 91210254

Merck Sharp & Dohme B.V.

v.

Dynamic Sports Nutrition, LLC

**Robert H. Coggins,**  
**Interlocutory Attorney:**

Now before the Board is opposer Merck Sharp & Dohme B.V.'s (MSD) motion (filed July 25, 2014) to substitute Aspen Global Incorporated (AGI) as the party plaintiff in the parent proceeding. The motion is fully briefed.

Motion to Substitute

In support of the motion, MSD states that AGI acquired by way of a December 31, 2013 asset purchase agreement most (except for the rights in a

few foreign countries) of MSD's rights, title, interest, and business in the DECA-DURABOLIN mark pleaded in parent Opposition No. 91205081; and that AGI and MSD executed a Deed of Transfer of Trademarks, dated December 31, 2013, wherein MSD sold, transferred, and assigned to AGI almost all of the rights, title, and interest in the DECA-DURABOLIN mark, and any goodwill attaching thereto, together with any and all common law rights relating to the DECA-DURABOLIN mark.

In opposition to the motion, applicant argues that AGI "did not timely oppose" the application subject to parent Opposition No. 91205081; AGI is not a new owner or transferee of rights in MSD's mark because MSD "did not plead a mark in [the parent o]pposition"; and AGI has not paid the fee for filing a notice of opposition.

In reply, MSD argues that applicant's opposition to the motion is without merit; suggests that joinder, rather than substitution, may be appropriate; and provides authorization to debit a deposit account if any fee is necessary. MSD attached to the reply brief a revised Ahmed declaration and a (redacted) copy of the Deed of Transfer of Trademarks.

If a mark pleaded by a plaintiff is assigned and a copy of the assignment is filed with the Board, the assignee ordinarily will be substituted for the originally named party if the assignment occurred prior to the commencement of the proceeding, if the discovery and testimony periods have closed, if the assignor is no longer in existence, or if the defendant raises no objection to substitution. Otherwise, the assignee will be joined, rather

than substituted, to facilitate the taking of discovery and the introduction of evidence. *See* TBMP § 512.01 (2014) and cases cited therein at Note 10.

Applicant's arguments related to former and current use of the DECA-DURABOLIN mark in the United States were dealt with upon determination of applicant's earlier motion to dismiss the notice of opposition for lack of standing and failure to state a claim upon which relief can be granted. *See* Board order dated December 27, 2012. In addition, applicant made some of the same arguments in its motion for summary judgment which was denied by the Board in an October 30, 2013 order. Applicant's arguments as to AGI's failure to file a notice of opposition during the original period or an extension thereof are similarly unpersuasive. The right to go forward with an opposition may be transferred when the opposer, or its pleaded mark and the goodwill associated therewith, has been acquired by another party. *SDT Inc. v. Patterson Dental Co.*, 30 USPQ2d 1707, 1709 (TTAB 1994).

Inasmuch as most, but not all, of the rights to the DECA-DURABOLIN mark pleaded in parent Opposition No. 91205081 have been assigned to AGI; the assignment occurred after the commencement of the parent case; the testimony periods have not closed; applicant has objected to substitution; and MSD has authorized the payment of the proper fee; the motion is **granted** to the extent that AGI is joined as a party plaintiff in the parent case. The caption of these consolidated proceedings has accordingly been updated to

reflect the joinder. The deposit account will be charged the fee required under Trademark Rule 2.6(a)(17).

Schedule

Proceedings are resumed. Dates are reset on the following schedule.

Plaintiffs' Pretrial Disclosures	1/5/2015
Plaintiffs' 30-day Trial Period Ends	2/19/2015
Defendant's Pretrial Disclosures	3/6/2015
Defendant's 30-day Trial Period Ends	4/20/2015
Plaintiffs' Rebuttal Disclosures	5/5/2015
Plaintiffs' 15-day Rebuttal Period Ends	6/4/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.