

ESTTA Tracking number: **ESTTA663668**

Filing date: **03/30/2015**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Borealis AG
Granted to Date of previous extension	03/29/2015
Address	IZD Tower, Wagramerstr, 17-19 Wien, A-1220 AUSTRIA

Attorney information	Gabrielle S. Roth Sughrue Mion, PLLC 2100 Pennsylvania Avenue, NW Washington, DC 20037-3213 UNITED STATES groth@sughrue.com, tm@sughrue.com, kdunmire@sughrue.com Phone:2026637471
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Applicant Information

Application No	86340302	Publication date	09/30/2014
Opposition Filing Date	03/30/2015	Opposition Period Ends	03/29/2015
Applicant	aquatherm GmbH Biggen 5 Attendorn, 57439 GERMANY		

Goods/Services Affected by Opposition

Class 019. First Use: 1999/00/00 First Use In Commerce: 1999/00/00 All goods and services in the class are opposed, namely: Rigid pipes and fitting therefore made of polypropylene used for supply of drinking water in residential, commercial and industrial buildings
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Grounds for Opposition

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)
Other	Mark is ornamental and lacks acquired distinctiveness

Attachments	Notice of Opp.PDF(185527 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Gabrielle S. Roth/
Name	Gabrielle S. Roth
Date	03/30/2015

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_____)	
BOREALIS AG)	
)	
Opposer,)	Opposition No. _____
)	
v.)	Application No. 86/340302
)	
AQUATHERM GMBH)	Mark: The Color Green
)	
Registrant.)	Published: September 30, 2014
_____)	

NOTICE OF OPPOSITION

Borealis AG, an Austrian company with its principal place of business at IZD Tower, Wagramerstr. 17-19 A-1220 Wien AUSTRIA (“Opposer”), believes it will be damaged by issuance of a registration of the mark comprising the color green as applied to pipes used for drinking water as shown in Application No. 86/340302 (the “COLOR GREEN Mark”) to Applicant and hereby opposes the same.

The grounds for opposition are as follows:

OPPOSER’S MARK

1. Opposer is a manufacturer and producer of plastic products, including polypropylene plastic pellets for use in the manufacture of pipes and fittings. Opposer wishes to sell green colored polymers in the United States to customers that will use the product to manufacture green-colored pipes and pipe fittings. Opposer is currently conducting technical tests to ensure that its green polymer complies with U.S. standards for plastic pipes. The tests are expected to be complete within the next six months.

APPLICANT'S MARK

2. Upon information and belief, Aquatherm GmbH is a German corporation with an address at Biggen 5 Attendorn , Germany 57439 (“Applicant”).

3. On July 17, 2014, Applicant filed its application with the U.S. Patent and Trademark Office (“PTO”) for the COLOR GREEN Mark as applied to pipes. The application was assigned Application Serial No. 86/340302, and was published for opposition on September 30, 2014 (“Applicant’s Color Green Application”).

4. Applicant had filed three earlier applications for the same mark, each of which had been refused registration by the PTO on the basis of functionality of, and/or a lack of distinctiveness in, the claimed mark.

5. Following the publication of Applicant’s Color Green Application, Opposer sought and obtained extensions of time from the PTO to March 29, 2015 (which is a Sunday so, actual deadline is March 30, 2015), in which to file a Notice of Opposition.

COUNT I: FUNCTIONALITY

6. Opposer repeats and re-alleges each and every allegation set forth in the preceding paragraphs.

7. On information and belief, the American National Standards Institute (“ANSI”) is active in both national and international standardization. ANSI oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector. These guidelines are designed to assure the safety and health of consumers and the protection of the environment. ANSI has promulgated color coded standards for pipes that correspond to the content of the pipes. The purpose of the

color coding standards is to easily identify the contents of the pipe based on the pipe color. ANSI Pipe Marking Standards designates the color green for pipes carrying potable, cooling, boiler feed, and other water.

8. On information and belief, the Occupational Safety and Health Administration ("OSHA") and the American Society of Mechanical Engineers ("ASME") have each adopted the ANSI standards to code pipes. The color of the pipe immediately informs the viewer whether the pipe contains flammable or hazardous materials and serves both a safety and informational function. The color green on pipes informs the viewer that the contents are not hazardous.

9. On information and belief, ANSI promotes the adherence to the color coding of pipes by educating companies about the important safety considerations served by the various color codings.

10. Applicant's COLOR GREEN Mark is primarily functional for pipes and indicates that the goods are for use in carrying water and that the contents of the pipes are not hazardous. As a result, the Color Green for pipes does not function as a trademark, cannot serve as a source identifier for Applicant, and fails to comply with the requirements of the Trademark Act, including Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052 and 1127. In order to compete in the marketplace, Opposer must have the ability to use the Color Green for pipes, or for plastic pellets used to manufacture green-colored pipes.

**Count II: MARK IS ORNAMENTAL AND LACKS ACQUIRED
DISTINCTIVENESS**

11. Opposer repeats and re-alleges each and every allegation set forth in the preceding paragraphs.

12. Applicant's COLOR GREEN Mark consists of an ordinary green color applied to pipes. This COLOR GREEN Mark is merely ornamental and has been used in the United States by third-party companies that manufacture or sell pipes.

13. Applicant's GREEN COLOR Mark lacks secondary meaning and is not recognized by companies within the pipe and pipe fitting industry as an identifier of the source of Applicant's pipes.

14. The evidence submitted by the Applicant to the PTO to support Applicant's Color Green Application is insufficient to demonstrate that the purported mark sought to be registered has acquired distinctiveness.

15. On information and belief, other companies have used the Color Green on pipes in the United States before the filing date of Applicant's Color Green Application and before Applicant asserted its claim of acquired distinctiveness in Applicant's Color Green Application. Today, companies continue to use the color green for pipes in the United States.

16. Applicant has not acquired distinctiveness in the Color Green for pipes and therefore, Applicant's Color Green Application is not registrable on the Principal Register.

17. A registration for the ornamental COLOR GREEN Mark on the Principal Register will interfere with Opposer's right to continue to use the color green for plastic pellets used to manufacture green-colored pipes, thereby damaging Opposer.

WHEREFORE, Opposer respectfully requests that this Notice of Opposition be sustained and that registration of the COLOR GREEN Mark by Applicant be refused.

Respectfully submitted,

Dated: 3/30/2015

BOREALIS AG

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Opposition was served upon the Applicant by depositing a copy of same in the United States mail, postage prepaid, this 30th day of March, 2015.

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Kinsleya. Dunmire