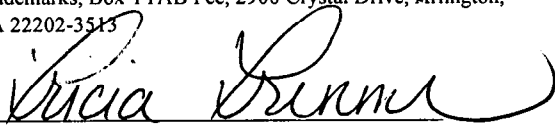


IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/538,792  
Published in the Official Gazette on May 25, 2004

<p>GENESIS W. E. COMPANY,  Opposer,  v.  B&amp;G EQUIPMENT COMPANY,  Applicant.</p>	<p>Opposition No. _____</p> <p>I hereby certify that on June 21, 2004, this paper is being deposited with the U.S. Postal Service by "Express Mail Post Office to Addressee" service with Express Mail Label No. ED027952583US for delivery to the Commissioner for Trademarks, Box TTAB Fee, 2900 Crystal Drive, Arlington, VA 22202-3513</p> <p> Tricia Trevino</p>
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**NOTICE OF OPPOSITION**

Opposer Genesis W. E. Company ("Opposer") believes that it will be damaged by registration of the mark shown in Application Serial No. 76/538,792 ("792 App."), and hereby opposes the same.

As grounds for opposition, Opposer alleges as follows:

1. Opposer is a Nevada corporation with its principal place of business located at 774 Mays Boulevard, Incline Village, Nevada 89451.
2. Opposer is a Nevada-based biotech corporation that is in the business of manufacturing, marketing, and distributing environmentally friendly substitutes for such toxic items as pesticides, fertilizers, and cleaners.
3. Opposer markets and offers its products for sale on an international basis through its [www.genesiswe.com](http://www.genesiswe.com) website, excerpts of which are attached hereto as Exhibit A.
4. One of the products Opposer manufactures, markets, and distributes is a product

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named "MicroFoam," which is designed to eliminate fruit flies and other small flies. MicroFoam is the derivative of a previous Opposer product, DFM 32x.

5. On December 11, 2001, the Opposer and Applicant B&G Equipment Company ("Applicant") executed an exclusive distributor agreement ("Agreement"), which is attached hereto as Exhibit B.

6. Opposer created, adopted and used the MicroFoam Mark (the "Mark") in the Fall of 2001 to identify Opposer's MicroFoam product, which Applicant was obligated to distribute under the Agreement. Applicant had nothing to do with the creation of the product or the Mark, and it was always understood that Opposer would be the owner of that Mark. This is confirmed by Articles 1.1, 2.1-2.2 of the Agreement, as well as emails between the parties, a press release, and MicroFoam advertising material, attached hereto as Exhibits C-E.

7. Pursuant to the Agreement, Opposer agreed to appoint Applicant as the exclusive distributor for the marketing and sale of Opposer's MicroFoam products in exchange for Applicant purchasing MicroFoam products, and using its best efforts to promote and distribute these products. Exhibit B.

8. Pursuant to Article 1.1 of the Agreement, MicroFoam is described as "Company's [Opposer's] product commonly known as DFM 32x, reformulated so as to foam." Exhibit B. Article 3.1 of the Agreement granted Applicant marketing rights in MicroFoam subject to the provisions of Article 1.1. Id.

9. Articles 2.1 and 2.2 of the Agreement state that Opposer is the owner of all rights, title and interest to all copyrights (2.1), **trademarks** (2.2), and patents (2.2) related to the MicroFoam

products. Exhibit B.

10. Numerous problems arose with Applicant's performance during the Spring and Summer of 2002, resulting in substantial lost sales. Specifically, Applicant failed to provide reports on its marketing and distribution activities, delayed sending samples of MicroFoam to potential purchasers and customers, failed to place advertisements for MicroFoam in trade journals and failed to put forth the required marketing effort under the Agreement. These failures to perform, combined with Applicant firing its national sales representative, use of poor quality foamers and other reasons, caused orders for MicroFoam to drop by approximately 50% in the second year of the Agreement.

11. In May of 2003, Opposer further learned that Applicant's new sales representatives were providing sub-standard sales presentations of MicroFoam to major companies such as Terminix International, Inc. ("Terminix"). Terminix eventually refused to buy MicroFoam from Applicant partially for this reason. Opposer also learned that the head sales representative for Applicant had told Terminix it should not buy certain Opposer products because Applicant could sell similar products to Terminix at a cheaper price. Opposer informed Applicant of these problems and breaches of the Agreement, but sales remained dismal.

12. In August of 2003, Applicant admitted that it had been shopping Opposer's products, that it had done no independent advertising for MicroFoam during 2003, and that it had stopped selling MicroFoam to certain major customers.

13. After advising Applicant on numerous occasions that it was in breach of the Agreement, and giving Applicant numerous opportunities to cure these breaches, Opposer terminated the Agreement in an August 28, 2003 letter, attached hereto as Exhibit F.

14. In the late Fall of 2003, Opposer learned that Applicant was considering selling a competing MicroFoam product. As a result, Opposer sent a cease and desist letter to Applicant, which is attached hereto as Exhibit G.

15. At the beginning of February, 2004, Opposer learned that Applicant had filed the '792 App. for "MicroFoam." Exhibit H. As shown on Exhibit H, the '792 App. was filed on August 21, 2003, just 7 days prior to Opposer's termination letter. Id. Also, the '792 App. lists a date of first use and first use in commerce as February 14, 2002, which was subsequent to Opposer's adoption and use of the Mark, after the execution of the Agreement expressly stating that Opposer was the owner of the Mark, and during the contractual relationship between the parties. This application was published for opposition on May 25, 2004.

16. On approximately February 22, 2004, Opposer also became aware that Applicant was offering "MicroFoam II" for sale on its website www.bgequip.com in violation of the Lanham Act and the Agreement's covenant not to compete. True and correct excerpts from Applicant's www.bgequip.com website showing its advertisement and offering of sale of MicroFoam II are attached hereto as Exhibit I. Not only is the mark the same as Opposer's Mark, but the stylized lettering and coloring are virtually identical as well. Compare Exhibits A and I.

17. Opposer's MicroFoam business has been damaged as a direct result of Applicant's breaches of the Agreement, and its wrongful sale of its competing "MicroFoam II" product in the marketplace. Opposer is only making on average \$100 to \$200 dollars per-month in sales of MicroFoam during what is now the height of fly season.

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18. Applicant's unauthorized use of its infringing MicroFoam Mark creates a likelihood of confusion, mistake and deception as to the affiliation, connection, association, origin, sponsorship or approval of its goods and services by or with Opposer's MicroFoam product, all to Opposer's irreparable loss and damage.

19. On June 15, 2004, Opposer filed a Complaint and Motion for Preliminary Injunction against Applicant in the United States District Court for the District of Nevada. This action is styled: Genesis W. E. Company v. B&G Equipment Company, Case No. CV-N-04-0308-HDM-VPC.

### **FIRST CLAIM FOR RELIEF**

#### **(Likelihood of Confusion with Previously-Used Trademarks)**

20. Opposer repeats, realleges and reiterates each and every paragraph set forth above as if fully set forth herein.

21. The mark shown in the '792 App. so resembles Opposer's Mark as to be likely, when used on or in connection with the goods identified in the '792 App., to cause confusion, to cause mistake, or to deceive, and Applicant's mark is thus unregistrable under § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), as amended.

22. Opposer will be damaged by registration of the mark shown in the '792 App. because registration of the mark would give Applicant prima facie evidence of ownership of, and exclusive right to use in commerce, a mark that is confusingly similar to Opposer's Mark.

WHEREFORE, Opposer prays for the entry of judgment sustaining this Opposition and refusing registration to Applicant of the mark shown in the '792 App.; and that prosecution of the '792 App. be stayed pending resolution of the outcome of the litigation referenced in Paragraph 19 above.

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