

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

vw

Mailed: January 10, 2009

Opposition Nos. 91184700  
91184702  
91184703

NBTY, Inc.

v.

Phyto Tech Corp.

**Frances S. Wolfson, Interlocutory Attorney:**

On December 1, 2008, the parties filed stipulations to amend applicant's trademark applications, Serial Nos. 77427750, 77367538 and 77375600, with opposer's written consent.

By the proposed amendments, applicant seeks to change the mark in Ser. No. 77427750 from GOOD 'N SWEET and Design to GOOD & SWEET and Design; the mark in Ser. No. 77367538 from GOOD 'N SWEET(stylized) to GOOD & SWEET(stylized); and the mark in Ser. No. 77375600 from GOOD 'N SWEET to GOOD & SWEET.

Trademark Rule 2.72 allows an amendment to the drawing of a mark only if the character of the mark is not materially altered thereby. The general test of whether an alteration is material is whether the mark would have to be republished after the alteration in order to fairly present

the mark for purposes of opposition. See *Visa International Service Association v. Life-Code Systems, Inc.*, 220 USPQ 740, 743-44 (TTAB 1983); Trademark Manual of Examining Procedure ("TMEP") § 807.14 (5<sup>th</sup> Ed.).

In the case at hand, the modified marks contain the essence of the original marks, and the new forms create the impression of being essentially the same mark. No additional element has been added to or subtracted from the marks such that a new search would have to be conducted. Moreover, the changes in the marks do not require republication. Accordingly, the amendment is in compliance with the Trademark Rules.

However, applicant has not submitted new drawings of the marks to support the amendments. See Trademark Rules 2.52 and 2.54; and Trademark Manual of Examining Procedure ("TMEP") §§ 202.01 and 807 *et. seq.* (5<sup>th</sup> Ed.). In view thereof, applicant is allowed until TWENTY DAYS from the mailing date of this order to submit a new drawing for each application showing the modified marks, failing which the motions to amend the marks in the applications will be denied.

Because the amendments are otherwise in compliance with the Trademark Rules, and because the parties stipulated thereto, upon receipt of proper drawings that comply with

Trademark Rules 2.52 and 2.54, the amendments to the marks will be approved and entered. See Trademark Rule 2.133(a).

Proceedings herein are otherwise SUSPENDED.