ESTTA Tracking number: **ESTTA226781**
Filing date: **07/28/2008**

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

Proceeding	91184700
Party	Defendant Phyto Tech Corp.
Correspondence Address	ROGER N. BEHLE, JR. FOLEY BEZEK BEHLE & CURTIS, LLP 575 ANTON BOULEVARD, SUITE 710 COSTA MESA, CA 92626 rbehle@foleybezek.com
Submission	Answer
Filer's Name	Roger N. Behle, Jr.
Filer's e-mail	rbehle@foleybezek.com, mpoulos@foleybezek.com
Signature	/roger n. behle, jr./
Date	07/28/2008
Attachments	Applicant's Answer to Opposition for 77427750.pdf (7 pages)(44140 bytes)

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

In the matter of:	Trademark Application Serial Number 77/427750
Application Filed:	March 20, 2008
Mark:	GOOD 'N SWEET for "dietary and nutritional supplements" in Int'l Class 30
Published:	May 20, 2008

NBTY, Inc., Opposer, vs. Phyto Tech Corp. d/b/a Blue California Co., Applicant.	OPPOSITION NO. 91184700

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION

Applicant, Phyto Tech Corp, d/b/a Blue California ("Phyto Tech"), by and through its attorney, hereby Answers the Opposition ("Opposition") filed by Opposer, NBTY, Inc., and admits, denies and alleges as follows.

Preliminarily, prior to the date the Opposition was filed by Applicant, Applicant spoke with the examining attorney at the USPTO about amending its mark to replace the "'N" with "&." After considering the requested amendment, the examining attorney approved the amendment and requested that the applicant file a preliminary amendment form, which Applicant submitted on July 17, 2008.

1. The allegation in paragraph 1 relating to the assignment and ownership of U.S. Registration No. 1,813,366 is a conclusion of law to which no response is required. As to the remainder of the allegations contained in paragraph 1, Applicant is without knowledge or information sufficient to form a belief as to the truth of the remainder of those allegations and therefore deny such allegations.

2. The allegation in paragraph 2 relating to the assignment and ownership of U.S. Registration No. 1,232,324 is a conclusion of law to which no response is required. As to the remainder of the allegations contained in paragraph 2, Applicant is without knowledge or information sufficient to form a belief as to the truth of the remainder of those allegations and therefore deny such allegations.

3. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 and therefore deny such allegations.

4. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 and therefore deny such allegations.

5. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 and therefore deny such allegations.

6. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 that Opposer has been actively expanding its use of its Good 'N Natural Marks and therefore deny such allegations. Applicant denies the remainder of the allegations contained in paragraph 6.

7. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 and therefore deny such allegations.

8. The Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore deny such allegations.

9. The Applicant denies the allegations contained in paragraph 9.

10. The Applicant denies the allegations contained in paragraph 10.

11. The Applicant denies the allegations contained in paragraph 11.

12. The Applicant denies the allegations contained in paragraph 12.

13. The Applicant denies the allegations contained in paragraph 13.

14. The Applicant denies the allegations contained in paragraph 14.

15. The Applicant denies the allegations contained in paragraph 15.

16. The allegation contained in paragraph 16 is communication directed to the USPTO and does not require a response.

AFFIRMATIVE DEFENSES

Without admitting or conceding that it has the burden of proof or persuasion with respect to the matters asserted below, the Applicant asserts the following affirmative defenses:

(Doctrines of Estoppel)

1. Each of the purported claims alleged in the Opposition is barred, in whole or in part, by the doctrine of estoppel.

(Doctrine of Waiver)

2. Each of the purported claims alleged in the Opposition is barred, in whole or in part, by the doctrine of waiver.

(Abandonment)

3. Each of the purported claims alleged in the Opposition is barred, in whole or in part by the doctrine of abandonment.

(Doctrine of Unclean Hands)

4. Each of the purported claims alleged in the Opposition is barred, in whole or in part, by the doctrine of unclean hands.

(No Likelihood of Confusion Between Marks)

5. Each of the purported claims set forth in the Opposition is barred, in whole or in part, because the Applicant's mark, "Good & Sweet" is not confusingly similar to Opposer's mark "Good 'N Natural" and no consumers have been or will be confused by the two marks.

(No Likelihood of Confusion)

6. Each of the purported claims set forth in the Opposition is barred, in whole or in part, because the goods and services sold by Phyto Tech are not confusingly similar to the goods and services sold by NBTY, Inc., and no consumers have been or will be confused into believing that goods and/or services offered and sold by Phyto Tech originate from the same source as the good and services offered and sold by NBTY, Inc.

(Restraint on Trade)

7. Each of the purported claims alleged in the Opposition is barred, in whole or in part, because NBTY, Inc. has acted to restrain trade or injure competition and has committed other acts constituting misuse of trademarks and unfair competition.

(Lack of Intent)

8. Any and all acts alleged to have been committed by the Phyto Tech, if performed, were performed with lack of knowledge and lack of willful intent.

(Reservation of Rights)

9. The Applicant reserves the right to allege other affirmative defenses as they may become known during the course of discovery, and hereby specifically reserve the right to amend their Answer to allege said affirmative defenses at such time as they become known.

(Ratification)

10. NBTY, Inc. expressly or by its conduct approved, authorized, accepted, or ratified the acts and/or transactions of which they complain and is thus barred from

the remedies it seeks.

(Common Use By Third Parties)

11. NBTY, Inc.'s claims are barred on the ground that marks utilizing the words "Good," "'N", and "Natural" are in common use by third parties unrelated to Phyto Tech.

(Lack of Standing)

12. NBTY does not have standing to bring the instant action against Phyto Tech.

(Invalid License and/or Assignment)

13. The alleged assignment and/or license of the "Good & Sweet" mark is invalid.

WHEREFORE, Phyto Tech prays that the Board Order the Opposition be dismissed.

Respectfully submitted,

Dated: July 28, 2008

FOLEY BEZEK BEHLE & CURTIS, LLP

Roger N. Behle, Jr.
Attorney for Applicant.

CERTIFICATE OF SERVICE

It is hereby certified that on the 28th day of July, 2008, the foregoing Applicant's Answer to Notice of Opposition was served on Opposer, NBTY, Inc., by sending a copy thereof to Scott B. Fisher, Jaspan Schlesinger Hoffman LLP, 300 Garden City, New York 11530, attorneys for Opposer, by first-class, postage-prepaid mail.

Roger N. Behle, Jr.

CERTIFICATE OF MAILING

It is hereby certified that on July 28, 2008 this correspondence is being deposited with the United States Postal Service as a first-class, postage-prepaid mail in an envelope addressed to:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Dated: July 28, 2008

Roger N. Behle, Jr.