



TTAB

Francine Villeta
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Reply to: Costa Mesa Office

July 28, 2008

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

77/367,538

Re: NBTY, Inc. vs. Phyto Tech Corp d/b/a Blue California Co.
Opposition Nos: 91184702, 91184703 and 91184700

Dear Commissioner:

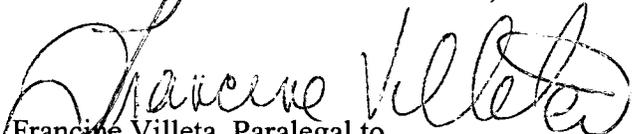
Enclosed please find the originals of the following:

- 1) Applicant Phyto Tech Corp, d/b/a Blue California's Answer to Notice of Opposition re Opposition Number 91184702 re Trademark Application 77/367538;
- 2) Applicant Phyto Tech Corp, d/b/a Blue California's Answer to Notice of Opposition re Opposition Number 91184703 re Trademark Application 77/375600; ; and
- 3) Applicant Phyto Tech Corp, d/b/a Blue California's Answer to Notice of Opposition re Opposition Number 91184700 re Trademark Application 77/427750.

Please advise if you require anything further. Thank you.

Sincerely,

FOLEY BEZEK BEHLE & CURTIS, LLP



Francine Villeta, Paralegal to
Roger N. Behle, Jr.

Enclosures



08-07-2008

U.S. Patent & TMO/TM Mail Post D1. 900

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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)

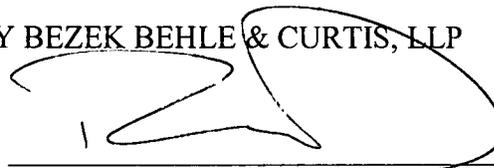
13. The alleged assignment and/or license of the "Good & Sweet" mark is invalid.

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

Respectfully submitted,

Dated: July 28, 2008

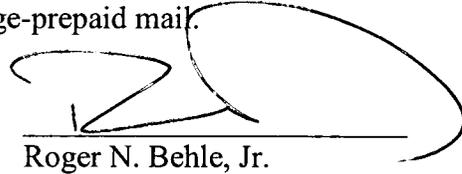
FOLEY BEZEK BEHLE & CURTIS, LLP



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.



A handwritten signature in black ink, consisting of a stylized 'R' and 'B' followed by a horizontal line, positioned above the printed name.

Roger N. Behle, Jr.

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Roger N. Behle, Jr.

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.

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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.

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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.

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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.

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(Lack of Intent)

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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

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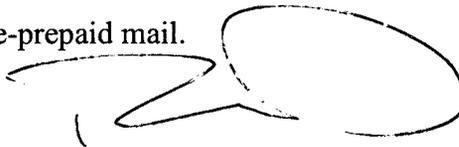
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A handwritten signature in black ink, appearing to read "R. Behle, Jr.", written over a horizontal line.

Roger N. Behle, Jr.

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P.O. Box 1451
Alexandria, Virginia 22313-1451

Dated: July 28, 2008

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a smaller 'N' and a 'Jr.' that is partially obscured by the end of the signature stroke.

Roger N. Behle, Jr.

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.

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Roger N. Behle, Jr.
Attorney for Applicant.

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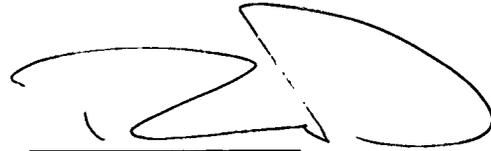
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