ESTTA Tracking number: **ESTTA232969**
Filing date: **08/27/2008**

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

Proceeding	91184963
Party	Defendant Niagara Conservation Corporation
Correspondence Address	EZRA SUTTON Ezra Sutton, P.A. 900 US HIGHWAY 9 N WOODBRIDGE, NJ 07095-1025 UNITED STATES
Submission	Answer
Filer's Name	Joseph Sutton
Filer's e-mail	jsutton@ezrasutton.com
Signature	/joseph sutton/
Date	08/27/2008
Attachments	Niagara 10.1-064 Answr to Opp 8-08.pdf (5 pages)(528837 bytes)

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

In the Matter of Application Serial No. 76/677227
Filed: May 21, 2007
Published on April 8, 2008
Mark: **ECO HET - Class 011**

TOTO U.S.A., INC.,	:	
	:	
Opposer,		
v.	:	Opposition No. 91/184963
NIAGARA CONSERVATION CORP.	:	
Applicant.	:	August 25, 2008

Trademark Trial & Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451
Box- TTAB -No Fee

ANSWER TO NOTICE OF OPPOSITION & AFFIRMATIVE DEFENSES

Sir/Madam:

Applicant, NIAGARA CONSERVATION CORP., through its attorneys, answers the Notice of Opposition, as follows:

1) Applicant does not have sufficient information to admit or deny the allegations of paragraphs **6, 8, 9, and 11,** and therefore denies same and leaves Opposer to its proofs.

2) Applicant admits to the allegations in paragraphs **1,2, 3, 4, 5, 10, 12,** of the Notice of Opposition.

3) Applicant denies the allegations contained in paragraphs **7, 13, 14, 15, 16, 17, and 21.**

4) With respect to Paragraph 18 in the Notice of Opposition, Applicant admits that its use of the mark ECO HET has not begun, but denies the conclusory statement that lack of such use means that Niagara's use is not "exclusive." In fact, a search of the Internet and other means of investigation has revealed that no entity connected to Niagara's field and industry has ever used the unique composite mark ECO HET as a trademark.

5) With respect to Paragraph 19 in the Notice of Opposition, Applicant admits that its use of the mark ECO HET has not begun, and that the mark lacks secondary meaning as of this time. However, Applicant maintains that the mark is a unique composite that has never been used by any other party, and is suggestive since it does not immediately convey the characteristics of the product to the average consumer. In fact, Applicant will prove that the average consumer does not know what the term HET stands for, let alone the combination of wording ECO HET.

6) With respect to the first part of Paragraph 20 in the Notice of Opposition, Applicant denies that consumers do not, or would not in the future, associate the mark ECO HET with a single source. With respect to the second part of Paragraph 20, Applicant admits that the mark **currently** does not have secondary meaning, however, Applicant maintains that the mark is suggestive, and thus inherently distinctive, and does not need to have secondary meaning(acquired distinctiveness) in order to be eligible for trademark registration on the Principal Register.

AFFIRMATIVE DEFENSES

7) Opposer's allegations are barred by laches, acquiescence, and estoppel, since, among other actions and omissions, Opposer has failed to oppose numerous other marks using the term **ECO** in the relevant field (Class 11) which arguably do not add any distinctive wording to create an overall distinctive composite mark.

8) Opposer has admitted that the term **ECO** is merely descriptive of ecological products, and therefore Opposer's registration for **ECO(and design)**, wherein **ECO** is not disclaimed, is **vulnerable to cancellation** (U.S. Registration No. 2,977,186).

9) Applicant's mark is suggestive since it requires imagination and thought to derive what the Applicant's goods are; the average consumer to whom Applicant's products are being sold to does not know what the term **HET** stands for, let alone the unique phrase ECO HET, and therefore the mark is inherently distinctive to the relevant consumer, thus entitling it to registration on the Principal Register. No secondary meaning, through acquired distinctiveness, is necessary for the mark to be valid.

10) Applicant's mark has never been used in combination before, which is indicative that the mark is not merely descriptive.

Accordingly, Applicant requests that the Notice of Opposition be dismissed with prejudice.

Respectfully submitted,
EZRA SUTTON, P.A.

Attorneys for Applicant

By: _____
JOSEPH E. SUTTON, Esq.

Dated: August 25, 2008

Plaza 9 Bldg., 900 U.S. Hwy. 9
Woodbridge, New Jersey 07095
(732) 634-3520 PH/3511 FAX

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

In the Matter of Application Serial No. 76/677227
Filed: May 21, 2007
Published on April 8, 2008
Mark: **ECO HET - Class 011**

TOTO U.S.A., INC.,	:	
	:	
Opposer,		
v.	:	Opposition No. 91/184963
NIAGARA CONSERVATION CORP.	:	
Applicant.	:	August 25, 2008

CERTIFICATE OF SERVICE

I, JOSEPH SUTTON, being over the age of 18 and not a party to this action, do hereby certify that the foregoing Applicant's **ANSWER TO NOTICE OF OPPOSITION AND AFFIRMATIVE DEFENSES,** was served by facsimile on this 25th day of August, 2008 upon the attorney for the Opposer, namely, Richard Zaitlen, Esq., at 213-629-1033.

JOSEPH E. SUTTON