

ESTTA Tracking number: **ESTTA302828**

Filing date: **08/26/2009**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	PetAg Inc.
Granted to Date of previous extension	08/26/2009
Address	255 Keyes Avenue Hampshire, IL 60140 UNITED STATES

Attorney information	Robert E. Browne Neal, Gerber & Eisenberg LLP Two North LaSalle Street, Suite 1700 Chicago, IL 60602 UNITED STATES ipdocket@ngelaw.com Phone:312-269-8000
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**Applicant Information**

Application No	77560699	Publication date	04/28/2009
Opposition Filing Date	08/26/2009	Opposition Period Ends	08/26/2009
Applicant	Tamara Yapp 605 33rd Street Manhattan Beach, CA 90266 UNITED STATES		

**Goods/Services Affected by Opposition**

<p>Class 005. All goods and services in the class are opposed, namely: Dietary supplements; nutritional supplements; and probiotic nutritional and dietary supplements in the form of liquid mixtures, powdered drinks, protein powders, capsules, and nutritional bar containing beneficial bacteria resulting from fermented compositions such as greens, grains, fruits, vegetables, or proteins; probiotic food and probiotic food additives all for horses and domestic animals, namely, cats and dogs, containing beneficial bacteria derived from fermented vegetables, grains, fruits or proteins</p>
<p>Class 029. All goods and services in the class are opposed, namely: Protein based, nutrient-dense snack bars containing probiotic beneficial bacteria comprised of a fermented composition derived from vegetables, grains, fruits or proteins</p>

**Grounds for Opposition**

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

## Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	643350	Application Date	02/17/1956
Registration Date	03/26/1957	Foreign Priority Date	NONE
Word Mark	FERMACTO		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U046 (International Class 005). First use: First Use: 1956/01/04 First Use In Commerce: 1956/01/04 BLEND OF FERMENTATION PRODUCTS CONSISTING OF DRIED EXTRACTED STREPTOMYCES FERMENTATION RESIDUE, DRIED GRAIN FERMENTATION SOLUBLES, AND DRIED WHEY FERMENTATION SOLUBLES SUPPLYING UNIDENTIFIED GROWTH STIMULATING FACTORS FOR POULTRY AND LIVESTOCK FEEDS		

Attachments	Notice of Opposition.pdf ( 5 pages )(164488 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Robert E. Browne/
Name	Robert E. Browne
Date	08/26/2009

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

PETAG, INC.,	)	
	)	
Opposer,	)	Opposition No. _____
	)	
v.	)	
	)	
TAMARA YAPP	)	
	)	
Applicants.	)	

**NOTICE OF OPPOSITION**

This Notice of Opposition is submitted in the matter of Application Serial No. 77/560,699, for registration by Tamara Yapp (“Applicant”) of the trademark FERMACTIVE for use in connection with “dietary supplements; nutritional supplements; and probiotic nutritional and dietary supplements in the form of liquid mixtures, powdered drinks, protein powders, capsules, and nutritional bar containing beneficial bacteria resulting from fermented compositions such as greens, grains, fruits, vegetables, or proteins; probiotic food and probiotic food additives all for horses and domestic animals, namely, cats and dogs, containing beneficial bacteria derived from fermented vegetables, grains, fruits or proteins” in International Class 5 and “protein based, nutrient-dense snack bars containing probiotic beneficial bacteria comprised of a fermented composition derived from vegetables, grains, fruits or proteins” in International Class 29, which was published on April 28, 2009. PetAg, Inc. (“PetAg”), an Illinois corporation having a place of business at 255 Keyes Avenue, Hampshire, Illinois 60140, believes that it will be damaged by the registration, and therefore opposes the same. Petag has obtained an extension of time to file this Opposition.

The grounds for this Opposition herein are as follows:

1. For over 50 years, PetAg and its predecessors in interest have been creating, developing and selling a variety of high-quality animal feeds and feed supplements. Consequently, PetAg is recognized as a worldwide, leading manufacturer of animal feeds and feed supplements that improve flock/herd uniformity, production efficiencies, and overall health of poultry, swine and cattle.

2. Since at least 1956, PetAg and its predecessors in interest have devoted incalculable resources, time and effort in developing, marketing and distributing a line of animal feed supplements for poultry and swine under the FERMACTO mark.

3. As a result of its consistent and extensive efforts to promote and protect its FERMACTO mark, PetAg has developed widespread recognition and goodwill in its FERMACTO mark, which is among its most valuable assets.

4. PetAg is the owner of a federal trademark registration for the FERMACTO mark, Registration No. 643,350, used in connection with “blend of fermentation products consisting of dried extracted streptomyces fermentation residue, dried grain fermentation solubles, and dried whey fermentation solubles supplying unidentified growth stimulating factors for poultry and livestock feeds” in International Class 5, which issued on March 26, 1957.

5. On September 2, 2008, decades after PetAg and its predecessors in interest began use of and developed rights in the FERMACTO mark, and long after this mark was registered in the U.S. Patent and Trademark Office, and after the FERMACTO mark had become famous, Applicant filed an application to register the mark FERMACTIVE for use in connection with “dietary supplements; nutritional supplements; and probiotic

nutritional and dietary supplements in the form of liquid mixtures, powdered drinks, protein powders, capsules, and nutritional bar containing beneficial bacteria resulting from fermented compositions such as greens, grains, fruits, vegetables, or proteins; probiotic food and probiotic food additives all for horses and domestic animals, namely, cats and dogs, containing beneficial bacteria derived from fermented vegetables, grains, fruits or proteins” in International Class 5 and “protein based, nutrient-dense snack bars containing probiotic beneficial bacteria comprised of a fermented composition derived from vegetables, grains, fruits or proteins” in International Class 29.

6. The FERMACTIVE mark, which Applicant seeks to register, is substantially similar in sound, appearance, and meaning to PetAg’s registered FERMACTO mark. Moreover, both marks are used on highly-related goods. Therefore, the goods offered under FERMACTIVE would easily be perceived by the public as related to those offered by PetAg. As a result, registration of this term is likely to cause confusion or mistake, or to deceive purchasers in that purchasers would be likely to believe that Applicant’s goods are related in some fashion to PetAg, in violation of 15 U.S.C. § 1114(1)(a).

7. Registration of this term to Applicant would also diminish and dilute the distinctiveness of PetAg’s FERMACTO mark and harm PetAg’s goodwill and reputation associated with its FERMACTO mark by allowing any fault with or objection to Applicant’s goods to reflect upon PetAg, and would restrict the natural growth and expansion of PetAg’s FERMACTO mark in violation of 15 U.S.C. § 1125(c).

8. Accordingly, if registration is issued to Applicant for the FERMACTIVE mark, the resulting confusion with PetAg's FERMACTO mark and the dilution of the FERMACTO mark would cause damage and injury to PetAg and the public.

WHEREFORE, PetAg requests that this Opposition be sustained and Application Serial No. 77/560,699 be refused registration.

PetAg requests that the requisite filing fee of \$600.00 be charged to the deposit account of Neal, Gerber & Eisenberg LLP, Account No. 502261.

Please address all communications relating to this matter to Robert E. Browne and Lara V. Klapper, Neal, Gerber & Eisenberg LLP, Two North LaSalle Street, Chicago, Illinois 60602-3801, (312) 269-8000.

Respectfully submitted,

Date: August 26, 2009

By: /Robert E. Browne/  
One of the Attorneys for PetAg, Inc.

Robert E. Browne  
Lara V. Klapper  
Neal, Gerber & Eisenberg LLP  
Two North LaSalle Street – Ste. 1700  
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(312) 269-8000

**CERTIFICATE OF TRANSMISSION**

I hereby certify that the foregoing **NOTICE OF OPPOSITION** is being electronically transmitted via the Electronic System for Trademark Trials and Appeals (“ESTTA”) at <http://estta.uspto.gov/> on the date noted below:

Date: August 26, 2009

By: /Robert E. Browne/  
One of the Attorneys for Opposer,  
PetAg, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing **NOTICE OF OPPOSITION** upon:

DANIEL C. COTMAN  
DALINA LAW GROUP P.C.  
530 S. LAKE AVENUE  
SUITE 422  
PASADENA, CA 91101-3515

by depositing said copy in a properly addressed envelope, First Class postage prepaid, and depositing same in the United States mail at Two North LaSalle Street, Chicago, Illinois, on the date noted below:

Date: August 26, 2009

By: /Lara V. Klapper/  
One of the Attorneys for Opposer,  
PetAg, Inc.