

ESTTA Tracking number: **ESTTA528394**

Filing date: **03/22/2013**

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 parties oppose registration of the indicated application.

Opposers Information

Name	New Vitality SBP Holdings, Inc.
Granted to Date of previous extension	03/23/2013
Address	260 Smith Street Farmingdale, NY 11735 UNITED STATES

Name	NAC Marketing Company, LLC		
Entity	Limited Liability Company	Citizenship	Delaware
Address	260 Smith Street Farmingdale, NY 11735 UNITED STATES		

Attorney information	Britt L. Anderson K&L Gates LLP 630 Hansen Way Palo Alto, CA 94304 UNITED STATES PLTrademarks@klgates.com Phone:(650) 798-6700
----------------------	---

Applicant Information

Application No	85762469	Publication date	01/22/2013
Opposition Filing Date	03/22/2013	Opposition Period Ends	03/23/2013
Applicant	Western Holdings, LLC 1000 East William Street, Suite 204 Carson City, NV 89701 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: Dietary supplements
--

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
--------------------------------------	----------------------------

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2287219	Application Date	01/21/1998
-----------------------	---------	------------------	------------

Registration Date	10/19/1999	Foreign Priority Date	NONE
Word Mark	BETA PROSTATE		
Design Mark	Beta PROSTATE		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1998/01/12 First Use In Commerce: 1998/01/12 dietary supplements for the support of prostate health		

U.S. Application No.	85805720	Application Date	12/18/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BETA PROSTATE		
Design Mark	BETA PROSTATE		
Description of Mark	NONE		
Goods/Services	Class 005. First use: Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health		

U.S. Application No.	85805764	Application Date	12/18/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BETA PROSTATE		

Design Mark	BETA PROSTATE		
Description of Mark	NONE		
Goods/Services	Class 035. First use: Computerized online retail services in the field of nutritional and supplement products		

U.S. Registration No.	4209153	Application Date	12/23/2011
Registration Date	09/18/2012	Foreign Priority Date	NONE
Word Mark	SUPER BETA PROSTATE		
Design Mark	SUPER BETA PROSTATE		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1998/12/01 First Use In Commerce: 1998/12/01 Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health		

U.S. Application No.	85805769	Application Date	12/18/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SUPER BETA PROSTATE		

Design Mark	SUPER BETA PROSTATE
Description of Mark	NONE
Goods/Services	Class 035. First use: Computerized online retail services in the field of nutritional and supplement products

Attachments	75422381#TMSN.gif (1 page)(bytes) 85805720#TMSN.jpeg (1 page)(bytes) 85805764#TMSN.jpeg (1 page)(bytes) 85503374#TMSN.jpeg (1 page)(bytes) 85805769#TMSN.jpeg (1 page)(bytes) Notice of Opposition.pdf (18 pages)(2453121 bytes)
-------------	--

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	/britt l. anderson/
Name	Britt L. Anderson
Date	03/22/2013

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

In the matter of Application Serial No. 85/762,469
Published in the *Official Gazette* on January 22, 2013
Mark: BETAPROSTINATE

NAC Marketing Company, LLC and New)	
Vitality SBP Holdings, Inc.,)	
)	Opposition No. _____
Opposers,)	
)	
v.)	
)	
Western Holdings, LLC,)	
)	
Applicant.)	

NOTICE OF OPPOSITION

NAC Marketing Company, LLC, a limited liability company organized and existing under the laws of the state of Delaware and having a principal place of business at 260 Smith Street, Farmingdale, NY 11735, and New Vitality SBP Holdings, Inc., a corporation organized and existing under the laws of the State of Delaware and having a principal place of business at 260 Smith Street, Farmingdale, NY 11735 (hereinafter "Opposers"), believe they will be damaged by registration of the mark shown in Application Serial No. 85/762,469 in International Class 5 and hereby oppose the same.

This Notice of Opposition is based on 15 U.S.C. § 1063(a) and has been timely filed. As grounds for their opposition, Opposers allege as follows:

1. Upon information and belief, applicant Western Holdings, LLC is a Nevada corporation with a mailing address of 1000 East William Street, Suite, 204, Carson City, NV 89701 ("Applicant").

2. As illustrated in Application Serial No. 85/762,469, Applicant seeks to register the BETAPROSTINATE as a trademark for “Dietary supplements” in International Class 5 (“Applicant’s Mark”).

3. Since at least 1998, through their predecessors in interest, Opposers have continuously and pervasively used their distinctive BETA PROSTATE and SUPER BETA PROSTATE trademarks, and variants thereof (the “BETA PROSTATE Marks”) in connection with a market-leading male supplement used to support prostate health and promote healthy sleeping habits (the “BETA PROSTATE Product”).

4. Opposer NAC Marketing Company, LLC, which does business as “New Vitality” (“New Vitality”) markets and sells a wide range of vitamins, health supplements and personal care products directly to consumers and through a range of online and traditional retail channels. New Vitality is the exclusive licensee of the BETA PROSTATE Marks.

5. Opposer New Vitality SBP Holdings, Inc. owns a number of federal registrations and applications incorporating the distinctive BETA PROSTATE Marks. In particular, below is a listing of New Vitality SBP Holdings, Inc.’s federal registrations and applications for trademarks incorporating the BETA PROSTATE Marks.

Country	Reg. No. and/or App. No.	Goods/Services
	2,287,219	Dietary supplements for the support of prostate health.
BETA PROSTATE	85/805,720	Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health

Country	Reg. No. and/or App. No.	Goods/Services
BETA PROSTATE	85/805,764	Computerized online retail services in the field of nutritional and supplement products
SUPER BETA PROSTATE	4,209,153	Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health.
SUPER BETA PROSTATE	85/805,769	Computerized online retail services in the field of nutritional and supplement products

True and correct copies of the pages printed from the USPTO's online database reflecting the status of the marks are attached here as Exhibit A. In particular, Registration No. 2,287,219 is incontestable with respect to the goods thereunder.

6. Since the launch of the BETA PROSTATE Product in 1998, New Vitality and its predecessors have extensively marketed the BETA PROSTATE Marks on a national basis through a broad-based set of web-advertising programs, national television, radio advertising, and celebrity endorsements.

7. In particular, New Vitality maintains numerous websites on which it promotes and sells the BETA PROSTATE Product (the "BETA PROSTATE Websites"). In this context, New Vitality uses the BETA PROSTATE Marks, or portions thereof, as the second level domain of domain names to market the BETA PROSTATE Websites, including, but not limited to, betaprostate.com, buysuperbeta.com, free-super-beta-prostate.com, buysuperbetaprostate.com, superbeta.com, freesuperbeta.com, and trysuperbeta.com (the "Beta Prostate Domain Names").

8. During 2012, as a result of New Vitality's marketing and promotion of the BETA PROSTATE Product, the BETA PROSTATE Websites received hundreds of thousands of unique visitors.

9. New Vitality also maintains a webpage for sales of the BETA PROSTATE Product on its main company website, located at <newvitality.com> (the "New Vitality Website"). During 2012, as a result of New Vitality's marketing and promotion of the BETA PROSTATE Product, the webpage for sales of the BETA PROSTATE Product on the New Vitality Website received hundreds of thousands of unique visitors.

10. Since its launch, television advertisements for the BETA PROSTATE Product have appeared in thousands of paid commercial television advertising appearances on major television channels and networks, including, but not limited to, *A&E*, *ESPN*, *Fox News*, *MSNBC*, *SYFY*, *Discovery*, *The History Channel*, *Spike*, and *Univision*.

11. New Vitality has also used extensive radio advertising for the BETA PROSTATE Product with hundreds of thousands of radio spots on thousands of radio stations reaching nearly every radio market in the United States.

12. The BETA PROSTATE Marks also appear prominently on the BETA PROSTATE Product packaging and bottles. Over 5 million bottles of the BETA PROSTATE Product have shipped in the last 10 years.

13. New Vitality's marketing of its BETA PROSTATE Product has been significantly enhanced over the last several years by well-known celebrities who have agreed to endorse and act as spokespersons in New Vitality's web, television and radio advertising for the BETA PROSTATE Product. For example, Complainant has worked to promote its BETA PROSTATE Product through endorsements by Joe Theismann, the well-known television sportscaster and

former quarterback in the National Football League (NFL) and Canadian Football League (CFL), and by Hulk Hogan, the well-known American professional wrestler and television personality.

14. There is no issue of priority. Applicant acquired no right in Applicant's Mark prior to October 24, 2012. Applicant filed an intent-to-use application in the U.S. Patent and Trademark Office on October 24, 2012.

15. Applicant's BETAPROSTINATE mark is confusingly similar to Opposers' BETA PROSTATE Marks because it is similar in appearance, meaning, and overall impression pursuant to 15 U.S.C. § 1052(d). Among other things, Applicant's Mark includes all of the syllables of Opposers' BETA PROSTATE trademark, except that it inserts an "IN" syllable between the syllables "PROST" and "ATE" to form BETAPROSTINATE.

16. Applicant's Mark is proposed for use with goods that are identical or of a very similar kind to those goods provided by Opposers.

17. Applicant's goods would also be marketed and advertised through overlapping channels to Opposers' BETA PROSTATE Product. Both parties would be marketing their respective supplement products, for example, on the Internet.

18. Given the goodwill and public recognition arising from the association of the distinctive BETA PROSTATE Marks with Opposers, consumers are likely to believe that Opposers have licensed, approved or otherwise authorized Applicant's use of the BETA PROSTINATE mark, when they have not.

19. The maturation of Applicant's application into registration will cause a likelihood of confusion, mistake or deception with respect to the source or origin of Applicant's goods. Consumers will erroneously believe that Applicant's goods are produced by or associated with Opposers.

20. Pursuant to 15 U.S.C. § 1063(a), Opposers will be damaged by registration of Applicant's Mark, which would grant Applicant a *prima facie* exclusive right to use the proposed mark despite Opposers' priority over Applicant, resulting in the likelihood of confusion as well as injury to Opposers' goodwill.

21. In summary, registration of the proposed marks would be incorrect and improper in view of the requirements of the Trademark Act of 1946, as amended, including specifically but not limited to the provisions of 15 U.S.C. §§ 1051, *et seq.*

WHEREFORE, Opposers pray that this Opposition be sustained, and that registration to Applicant of the BETAPROSTINATE Mark in Application Serial No. 85/762,469 be denied.

Opposer submits this Notice of Opposition via the e-filing procedure of the Trademark Trial and Appeal Board, and hereby authorizes the Board to debit Deposit Account No. 503229 of K&L Gates LLP for the appropriate filing fee of \$300. Please direct all notices, pleadings and correspondence in this matter to the undersigned counsel for Opposers.

DATED: March 22, 2013

Respectfully submitted,

By: _____



Britt L. Anderson, Esq.
K&L Gates LLP
630 Hansen Way
Palo Alto, CA 94304
(650) 798-6700
(650) 798-6701 (Fax)

Attorneys for Opposers
NAC Marketing Company, LLC
New Vitality SBP Holdings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF OPPOSITION** has been properly served, via first class mail, postage prepaid, on the following correspondent for Applicant this 22 day of March 2013.

David R. Parkinson, Esq.
5742 W HAROLD GATTY DR
SALT LAKE CITY, UT 84116-3762

A handwritten signature in blue ink, reading "Alan V. Reyes", is written over a horizontal line.

EXHIBIT A



United States Patent and Trademark Office

[Home](#) | [Site Index](#) | [Search](#) | [FAQ](#) | [Glossary](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Mar 22 05:02:47 EDT 2013

[TESS HOME](#) | [NEW USER](#) | [STRUCTURED](#) | [FREE FORM](#) | [BROWSE DICT](#) | [SEARCH OG](#) | [BOTTOM](#) | [HELP](#) | [PREV LIST](#) | [CURR LIST](#) | [NEXT LIST](#)
[FIRST DOC](#) | [PREV DOC](#) | [NEXT DOC](#) | [LAST DOC](#)

[Logout](#) Please logout when you are done to release system resources allocated for you.

[Start](#) [List At:](#) [OR](#) [Jump](#) to record: **Record 2 out of 2**

[TSDR](#) | [ASSIGN Status](#) | [TTAB Status](#) (Use the "Back" button of the Internet Browser to return to TESS)

Beta PROSTATE

Word Mark	BETA PROSTATE
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: dietary supplements for the support of prostate health. FIRST USE: 19980112. FIRST USE IN COMMERCE: 19980112
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	75422381
Filing Date	January 21, 1998
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	July 27, 1999
Registration Number	2287219
Registration Date	October 19, 1999
Owner	(REGISTRANT) Young Again Products CORPORATION MARYLAND 310 N. FRONT ST. WILMINGTON NORTH CAROLINA 28401 (LAST LISTED OWNER) NEW VITALITY SBP HOLDINGS, INC. CORPORATION DELAWARE C/O BAIRD CAPITAL PARTNERS 227 WEST MONROE ST., SUITE 1900

CHICAGO ILLINOIS 60606

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Britt L. Anderson

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PROSTATE" APART FROM THE MARK AS SHOWN

Description of Mark Color is not claimed as a feature of the mark.

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20091209.

Renewal 1ST RENEWAL 20091209

Live/Dead Indicator LIVE

[TESS HOME](#)
[NEW USER](#)
[STRUCTURED](#)
[FREE FORM](#)
[BROWSE DICT](#)
[SEARCH OG](#)
[TOP](#)
[HELP](#)
[PREV LIST](#)
[CURR LIST](#)
[NEXT LIST](#)

[FIRST DOC](#)
[PREV DOC](#)
[NEXT DOC](#)
[LAST DOC](#)

| [HOME](#) | [SITE INDEX](#) | [SEARCH](#) | [eBUSINESS](#) | [HELP](#) | [PRIVACY POLICY](#)


United States Patent and Trademark Office
[Home](#) | [Site Index](#) | [Search](#) | [FAQ](#) | [Glossary](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Mar 22 05:02:47 EDT 2013

[TESS HOME](#) | [NEW USER](#) | [STRUCTURED](#) | [FREE FORM](#) | [BROWSE DICT](#) | [SEARCH OG](#) | [BOTTOM](#) | [HELP](#)

[Logout](#) Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

[TSDR](#) | [ASSIGN Status](#) | [TTAB Status](#) (Use the "Back" button of the Internet Browser to return to TESS)

BETA PROSTATE

Word Mark	BETA PROSTATE
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85805720
Filing Date	December 18, 2012
Current Basis	1B
Original Filing Basis	1B
Owner	(APPLICANT) New Vitality SBP Holdings, Inc. CORPORATION DELAWARE c/o Baird Capital Partners 227 West Monroe St., Suite 1900 Chicago ILLINOIS 60606
Attorney of Record	Britt L. Anderson
Type of Mark Register	TRADEMARK PRINCIPAL

Live/Dead
Indicator

LIVE

[TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [SEARCH OG](#) [TOP](#) [HELP](#)

[| HOME](#) [| SITE INDEX](#) [| SEARCH](#) [| eBUSINESS](#) [| HELP](#) [| PRIVACY POLICY](#)



United States Patent and Trademark Office

Home | Site Index | Search | FAQ | Glossary | Guides | Contacts | eBusiness | eBiz
 alerts | News | Help

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Mar 22 05:02:47 EDT 2013

TESS HOME NEW USER STRUCTURED FREE FORM BROWSE DICT SEARCH OG BOTTOM HELP

[Logout](#) Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

TSDR ASSIGN Status TTAB Status (Use the "Back" button of the Internet Browser to return to TESS)

BETA PROSTATE

Word Mark	BETA PROSTATE
Goods and Services	IC 035. US 100 101 102. G & S: Computerized online retail services in the field of nutritional and supplement products
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85805764
Filing Date	December 18, 2012
Current Basis	1B
Original Filing Basis	1B
Owner	(APPLICANT) New Vitality SBP Holdings, Inc. CORPORATION DELAWARE c/o Baird Capital Partners 227 West Monroe St., Suite 1900 Chicago ILLINOIS 60606
Attorney of Record	Britt L. Anderson
Type of Mark Register	SERVICE MARK PRINCIPAL

Live/Dead
Indicator

LIVE

[TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [SEARCH OG](#) [TOP](#) [HELP](#)

[| HOME](#) [| SITE INDEX](#) [| SEARCH](#) [| eBUSINESS](#) [| HELP](#) [| PRIVACY POLICY](#)


United States Patent and Trademark Office
[Home](#) | [Site Index](#) | [Search](#) | [FAQ](#) | [Glossary](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)
Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Mar 22 05:02:47 EDT 2013

[TESS HOME](#) | [NEW USER](#) | [STRUCTURED](#) | [FREE FORM](#) | [BROWSE DICT](#) | [SEARCH OG](#) | [BOTTOM](#) | [HELP](#)

[Logout](#) Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

[TSDR](#) | [ASSIGN Status](#) | [TTAB Status](#) (Use the "Back" button of the Internet Browser to return to TESS)

SUPER BETA PROSTATE

Word Mark	SUPER BETA PROSTATE
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional and dietary supplements used for support of prostate, urinary, immune function and men's sexual health; nutritional and dietary supplements used for promoting male health. FIRST USE: 19981201. FIRST USE IN COMMERCE: 19981201
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85503374
Filing Date	December 23, 2011
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	July 3, 2012
Registration Number	4209153
International	

Registration Number 1126911; 1125345
Registration Date September 18, 2012
Owner (REGISTRANT) New Vitality SBP Holdings, Inc. CORPORATION DELAWARE
 c/o Baird Capital Partners 227 West Monroe St., Suite 1900 Chicago ILLINOIS
 60606
Attorney of Record Britt L. Anderson
Prior Registrations 2287219
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PROSTATE"
 APART FROM THE MARK AS SHOWN
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

[TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSER DICT](#) [SEARCH OG](#) [TOP](#) [HELP](#)

[| HOME](#) [| SITE INDEX](#) [| SEARCH](#) [| eBUSINESS](#) [| HELP](#) [| PRIVACY POLICY](#)



United States Patent and Trademark Office

Home | Site Index | Search | FAQ | Glossary | Guides | Contacts | eBusiness | eBiz
 alerts | News | Help

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Mar 22 05:02:47 EDT 2013

TESS HOME NEW USER STRUCTURED FREE FORM BROWSE DICT SEARCH OG BOTTOM HELP

Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

(Use the "Back" button of the Internet Browser to return to TESS)

SUPER BETA PROSTATE

Word Mark	SUPER BETA PROSTATE
Goods and Services	IC 035. US 100 101 102. G & S: Computerized online retail services in the field of nutritional and supplement products
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85805769
Filing Date	December 18, 2012
Current Basis	1B
Original Filing Basis	1B
Owner	(APPLICANT) New Vitality SBP Holdings, Inc. CORPORATION DELAWARE c/o Baird Capital Partners 227 West Monroe St., Suite 1900 Chicago ILLINOIS 60606
Attorney of Record	Britt L. Anderson
Type of Mark Register	SERVICE MARK PRINCIPAL

**Live/Dead
Indicator**

LIVE

[TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [SEARCH OG](#) [TOP](#) [HELP](#)

[| HOME](#) [| SITE INDEX](#) [| SEARCH](#) [| eBUSINESS](#) [| HELP](#) [| PRIVACY POLICY](#)