

ESTTA Tracking number: **ESTTA560125**

Filing date: **09/18/2013**

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 party opposes registration of the indicated application.

**Opposer Information**

Name	Whole Foods Market IP, L.P.
Granted to Date of previous extension	09/18/2013
Address	550 Bowie Street 6th Floor Austin, TX 78703 UNITED STATES

Attorney information	Jered E. Matthyse Pirkey Barber PLLC 600 Congress Avenue Suite 2120 Austin, TX 78701 UNITED STATES jmatthyse@pirkeybarber.com, smeleen@pirkeybarber.com, cgraff@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com
----------------------	--

**Applicant Information**

Application No	85812336	Publication date	05/21/2013
Opposition Filing Date	09/18/2013	Opposition Period Ends	09/18/2013
Applicant	365 LABORATORIES, LLC 19555 NE 10th Ave Miami, FL 33179 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 005. First Use: 2012/11/25 First Use In Commerce: 2012/11/25 All goods and services in the class are opposed, namely: Dietary and nutritional supplements used for weight loss; Vitamins
---

**Grounds for Opposition**

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

**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	2062177	Application Date	09/14/1995
Registration Date	05/13/1997	Foreign Priority Date	NONE

Word Mark	365
Design Mark	
Description of Mark	NONE
Goods/Services	Class 003. First use: First Use: 1996/01/00 First Use In Commerce: 1996/01/00 skin and hair care products, namely, hair shampoo, hair conditioner, skin cleanser, [ facial scrub, skin astringent, skin moisturizer and night cream, ] skin moisturizing lotion, [ bath oil ][ and bubble bath ]

U.S. Registration No.	2062176	Application Date	09/14/1995
Registration Date	05/13/1997	Foreign Priority Date	NONE
Word Mark	365		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1996/01/00 First Use In Commerce: 1996/01/00 vitamins and dietary food supplements		

U.S. Registration No.	3318926	Application Date	03/24/2003
Registration Date	10/23/2007	Foreign Priority Date	NONE
Word Mark	365 EVERYDAY VALUE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1998/12/00 First Use In Commerce: 1998/12/00 Vitamins, vitamin supplements, mineral supplements, nutritional supplements, herbal supplements, dietary food supplements, nutritional drink mix for use as a meal replacement or supplement, meal replacement powders, nutritional food bars		

U.S. Registration No.	4094216	Application Date	02/20/2008
Registration Date	01/31/2012	Foreign Priority Date	NONE
Word Mark	365 EVERYDAY VALUE		
Design Mark			
Description of Mark	The mark consists of the colors green, yellow, orange and blue appear in the four squares depicting the four seasons along the top of the mark. The color black appears as background to the lettering and numerals, which are depicted in white.		
Goods/Services	Class 003. First use: First Use: 2009/08/00 First Use In Commerce: 2009/08/00 A full line of personal care products, namely, hair shampoo, skin soap, facial and skin lotions, hair conditioners, bath and shower gels, essential oils for personal use, facial and skin moisturizers, skin cleansers, liquid soap, bar soap, body and skin creams Class 005. First use: First Use: 2008/07/00 First Use In Commerce: 2008/07/00 A full line of vitamins and supplements for human consumption, nutritional drink		

	<p>mix for use as a meal replacement or supplement, dietary food supplements</p> <p>Class 029. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Dairy products excluding ice cream, ice milk and frozen yogurt; a full line of food products, namely, meat, fish, seafood, cheese, processed, canned, dried and preserved fruits and vegetables, soups, fruit sauces, namely, applesauce and cranberry sauce, potato and fruit-based snack foods, potato and fruit-based chips, frozen fruits, processed tomatoes, frozen potato dishes, processed beans, eggs, dried fruit, processed nuts, trail snack mix made primarily of nuts, nut butters, jams, fruit spreads, olive oil, cooking oil, canned tuna, milk, half and half, cream cheese, soy-based and rice-based food beverages used as a milk substitute, cheese, yogurt, fruit or vegetable based snack foods, and prepared, packaged and frozen meals consisting primarily of meat, fish, poultry, or vegetables</p> <p>Class 030. First use: First Use: 2008/09/00 First Use In Commerce: 2008/09/00 Confectionery, namely, bakery desserts, chocolates and chocolate based ready to eat candies and snacks, cookies, frozen confections; bread, pasta, confectionery, coffee, cocoa, tea, processed herbs, spices and seasonings, processed cereals, processed grains, macaroni and cheese, processed popcorn, corn-based chips, flour-based chips, cheese flavored puffed corn snacks, pretzels, crackers, salad dressing, mayonnaise, ketchup, mustard, relish, natural sweeteners, honey, pasta sauce, vinegar, salsas, pizza, cereal-based snack foods, wheat-based snack foods, whole grain and dry fruit bar, frozen fruit bars, ice cream, sorbet, cookies, waffles and frozen dinners consisting primarily of pasta or rice, tomato paste; trail snack mix made primarily of chocolate; tomato sauce; unpopped popcorn; tea and coffee based beverages, namely, tea, coffee, teas flavored with fruit juice</p> <p>Class 031. First use: First Use: 2008/04/00 First Use In Commerce: 2008/04/00 A full line of unprocessed cereals, fresh fruits and vegetables, unprocessed beans and rice, unprocessed grains for eating</p> <p>Class 032. First use: First Use: 2008/08/00 First Use In Commerce: 2008/08/00 Non-alcoholic beverages with tea flavor; non-alcoholic carbonated, malt, and fruit juice beverages; fresh and concentrated fruit juices, aloe vera drinks, sparkling water, juice, and spring water and bottled drinking water</p>
--	---

Attachments	Notice of Opposition (WFMV5602).pdf(409807 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	/JEM/
Name	Jered E. Matthyse
Date	09/18/2013



well as on national television programs aired on networks such as Bravo, MTV, and The Food Network.

4. As a result of Opposer's extensive use and promotion of its 365 marks, the marks have become distinctive and are widely recognized by consumers. Opposer has invested significant effort and resources in advertising and promoting its 365 marks and the goods sold under those marks, with the result that the purchasing public has come to know, rely on, and recognize the goods of Opposer by those marks. Opposer has established significant goodwill in its 365 marks.

5. Opposer's 365 marks have become famous for all purposes relevant to this proceeding, including within the meaning of 15 U.S.C. § 1125(c)(2)(A).

6. In addition to its extensive common law rights, Opposer is the owner of numerous United States Trademark Registrations covering its 365 marks, including the following:

Mark	U.S. Reg. No.	Registration Date
365	2,062,177	May 13, 1997
365	2,062,176	May 13, 1997
365 EVERYDAY VALUE	3,318,926	Oct. 23, 2007
	4,094,216	January 31, 2012

Each of the registrations listed in the chart above are valid and subsisting.

7. 365 Laboratories, LLC (the "Applicant") is a limited-liability company organized in Florida with an address of 19555 NE 10th Avenue, Miami, Florida 33179. Applicant filed U.S.

Serial No. 85/812,336 (the “Application”) pursuant to 15 U.S.C. § 1051(a) on December 28, 2012 for the mark NATURE365 (stylized). The Application covers “dietary and nutritional supplements used for weight loss; vitamins” in Class 05.

8. Applicant claims a first-use date of November 25, 2012.

9. There is no issue as to Opposer’s priority. Opposer’s first use in commerce of its 365 marks long precedes any date of first use of Applicant’s mark NATURE365 (stylized) and/or the filing date of the Application.

10. Opposer’s 365 marks became famous prior to any date of first use of Applicant’s mark NATURE365 (stylized) and/or the filing date of the Application.

11. The mark NATURE365 (stylized) so resembles Opposer's 365 marks as to be likely, when used in connection with Applicant’s goods, to cause confusion, or to cause mistake, or to deceive. Applicant’s “nutritional supplements” and “vitamins” are, in fact, identical to products offered under Opposer’s 365 marks. Further, Applicant’s mark NATURE365 (stylized) depicts the “6” raised above the “3” and “5,” as shown below, which depiction is nearly identical to Opposer’s 365 marks. Purchasers and prospective purchasers are likely to believe that the products offered under Applicant’s mark NATURE365 (stylized) are sponsored, endorsed, or approved by Opposer, or are in some way affiliated, connected, or associated with Opposer or its goods and services. Registration should therefore be refused under 15 U.S.C. § 1052(d).



12. Opposer has not given Applicant permission or approval to use or register the mark NATURE365 (stylized).

13. Registration of the mark NATURE365 (stylized) would damage Opposer because purchasers are likely to attribute the source or sponsorship of Applicant's goods offered under that mark to Opposer.

14. In addition, registration of the mark NATURE365 (stylized) would damage Opposer because it would confer upon Applicant statutory presumptions to which it is not entitled in view of Opposer's prior use and registration of its 365 marks.

15. Finally, registration of the mark NATURE365 (stylized) would also damage Opposer because it would cause dilution by blurring of Opposer's famous 365 marks, and registration should therefore be refused under 15 U.S.C. § 1125(c).

WHEREFORE, Opposer prays that U.S. Serial No. 85/812,336 be rejected, and that registration of the mark therein be refused.

This Notice of Opposition is being filed electronically, along with the filing fee required by 37 C.F.R. § 2.6(a)(17). The Commissioner is authorized to draw on the Deposit Account of Pirkey Barber PLLC, Account No. 50-3924/WFMV:5602/CLG, if there is any problem with the processing of the electronically submitted fee.

Respectfully submitted,

Date: September 18, 2013



Christopher L. Graff  
Jered E. Matthyse  
PIRKEY BARBER PLLC  
600 Congress Avenue, Suite 2120  
Austin, TX 78701  
(512) 322-5200

ATTORNEYS FOR OPPOSER

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing NOTICE OF OPPOSTION was served via first-class mail, postage prepaid, on September 18, 2013 on Applicant at the address of record listed below:

365 Laboratories, LLC  
19555 NE 10th Avenue  
Miami, Florida 33179-3501

