

ESTTA Tracking number: **ESTTA573960**

Filing date: **12/02/2013**

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	12/01/2013
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, cgraff@pirkeybarber.com, ryounger@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com Phone:512-322-5200
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**Applicant Information**

Application No	85824859	Publication date	06/04/2013
Opposition Filing Date	12/02/2013	Opposition Period Ends	12/01/2013
Applicant	BeautyBank Inc. 767 Fifth Avenue New York, NY 10153 GERMANY		

**Goods/Services Affected by Opposition**

Class 003. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Non-medicated skin care preparations
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**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.	3318923	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 003. First use: First Use: 1999/06/00 First Use In Commerce: 1999/06/00 [ Laundry detergent, liquid and dry dishwashing soap, all purpose cleaning preparations, ] glass cleaning preparations [ and essential oil extracts for		

	personal use, hair shampoo, skin soap, skin andmoisturizing lotion, hair conditioners,and bath and shower gels ]
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U.S. Registration No.	3098711	Application Date	03/14/2003
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Registration Date	05/30/2006	Foreign Priority Date	NONE
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Word Mark	365 EVERYDAY VALUE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	<p>Class 003. First use: First Use: 1999/06/00 First Use In Commerce: 1999/06/00 Laundry detergent, liquid and dry dishwashing soap, all purpose cleaning preparations, [ glass cleaning preparations, ]and essential oil extracts for personaluse, hair shampoo, skin soap, skin and moisturizing lotion, hair conditioners, and bath and shower gels</p> <p>Class 004. First use: First Use: 1997/12/00 First Use In Commerce: 1997/12/00 [ Candles and ] charcoal briquettes</p> <p>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]</p> <p>Class 016. First use: First Use: 1997/10/00 First Use In Commerce: 1997/10/00 Paper towels, toilet paper, paper napkins, [ and paper coffee filters ]</p> <p>Class 021. First use: First Use: 2005/11/00 First Use In Commerce: 2005/11/00 [ Plastic food storage containers ]</p> <p>Class 029. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00 Frozen boxed dinners consisting primarily of meat, fish, poultry or vegetables,soups, jams, frozen fruits, frozen vegetables, dried fruit, [ marmalade, ] potato and fruit-based snack foods, potato and fruit-based chips, vegetable-based chips, processed potatoes, processed vegetables, processed fruits, tomato paste, frozen potato dishes, processed beans, processed nuts, trail snack mix consistingprimarily of processed fruits, processed nuts and/or raisins, nut butters, fruit spreads, olive oil, [ canola oil, ] cooking oil, canned tuna, milk, [ cream, ]half and half, cream cheese, cheeses, yogurt, butter, [ soy-based food bars ]</p> <p>Class 030. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00 Processed cereals, processed grains, pasta, macaroni and cheese, [ ready to eatcereal-based food bars, ] whole grain and dry fruit bars, [ wheat-based food bars, chocolate-based food bars, ] corn-based chips, tortilla chips, cheese flavored puffed corn snacks, flour-based chips, crackers, cereal-based snack foods, corn-based snack foods, [ rice-based snackfoods, ] wheat-based snack</p>
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	<p>foods, cookies, [ confectionery chips for baking, chocolate chips, ] pizza, whole grain and dry fruit bars, frozen fruit bars, ice cream, frozen confections, [ flour, ] mayonnaise, coffee, ketchup, relish, vinegar, spices, natural sweeteners, sauces, pasta sauce, processed herbs, and tomato sauce</p> <p>Class 031. First use: First Use: 1997/12/00 First Use In Commerce: 1997/12/00 [ Pet food ]</p> <p>Class 032. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00 Fresh and concentrated fruit juices, [ fresh and concentrated vegetable juices,] soft drinks, lemonade, [ sparkling water, ] spring water and bottled drinkingwater</p> <p>Class 033. First use: First Use: 2001/11/00 First Use In Commerce: 2001/11/00 Wine</p>
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U.S. Registration No.	3098712	Application Date	03/14/2003
Registration Date	05/30/2006	Foreign Priority Date	NONE

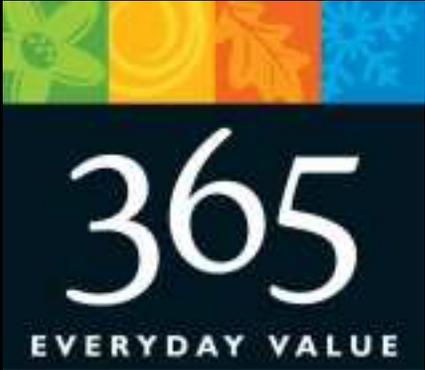
Word Mark	365 EVERYDAY VALUE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	<p>Class 003. First use: First Use: 1999/06/00 First Use In Commerce: 1999/06/00 Laundry detergent, liquid and dry dishwashing soap, all purpose cleaning preparations, [ glass cleaning preparations, ]and essential oil extracts for personaluse, hair shampoo, skin soap, skin and moisturizing lotion, hair conditioners, and bath and shower gels</p> <p>Class 004. First use: First Use: 1997/12/00 First Use In Commerce: 1997/12/00 [ Candles and ] charcoal briquettes</p> <p>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]</p> <p>Class 016. First use: First Use: 1997/10/00 First Use In Commerce: 1997/10/00 Paper towels, toilet paper, paper napkins, [ and paper coffee filters ]</p> <p>Class 021. First use: First Use: 2005/11/00 First Use In Commerce: 2005/11/00 [ Plastic food storage containers ]</p> <p>Class 029. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00 Frozen boxed dinners consisting primarily of meat, fish, poultry or vegetables,soups, jams, frozen fruits, frozen vegetables, dried fruit, [ marmalade, ] potato and fruit-based snack foods, potato and fruit-based chips, vegetable-based chips, processed potatoes, processed vegetables, processed fruits, tomato paste, frozen potato dishes, processed beans, processed nuts,</p>
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	<p>trail snack mix consisting primarily of processed fruits, processed nuts and/or raisins, nut butters, fruit spreads, olive oil, [ canola oil, ] cooking oil, canned tuna, milk, [ cream, ] half and half, cream cheese, cheese, yogurt, butter, [ soy-based food bars ]</p> <p>Class 030. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00          Processed cereals, processed grains, pasta, macaroni and cheese, [ ready to eat cereal-based food bars, ] whole grain and dry fruit bars, [ wheat-based food bars, chocolate-based food bars, ] corn-based chips, tortilla chips, cheese flavored puffed corn snacks, flour-based chips, crackers, cereal-based snack foods, corn-based snack foods, [ rice-based snackfoods, ] wheat-based snack foods, cookies, [ confectionary chips for baking, chocolate chips, ] pizza, whole grain and dry fruit bars, frozen fruit bars, ice cream, frozen confections, [ flour, ] mayonnaise, coffee, ketchup, relish, vinegar, spices, natural sweeteners, sauces, pasta sauce, processed herbs, and tomato sauce</p> <p>Class 031. First use: First Use: 1997/12/00 First Use In Commerce: 1997/12/00          [ Pet food ]</p> <p>Class 032. First use: First Use: 1997/03/00 First Use In Commerce: 1997/03/00          Fresh and concentrated fruit juices, [ fresh and concentrated vegetable juices, soft drinks, ] lemonade, [ sparkling water, ] spring water and bottled drinking water</p> <p>Class 033. First use: First Use: 2001/11/00 First Use In Commerce: 2001/11/00          Wine</p>
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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	<p>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.</p>		
Goods/Services	<p>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</p> <p>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 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</p>		

	<p>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>
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Attachments	<p>74729006#TMSN.jpeg( bytes )  74729005#TMSN.jpeg( bytes )  76499844#TMSN.gif( bytes )  76977929#TMSN.gif( bytes )  76977931#TMSN.jpeg( bytes )  77982625#TMSN.jpeg( bytes )  Notice of Opposition (WFMV5579).pdf(400934 bytes )</p>
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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	/JEM/
Name	Jered E. Matthyse
Date	12/02/2013



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:

<b>Mark</b>	<b>U.S. Reg. No.</b>	<b>Registration Date</b>
365	2,062,177	May 13, 1997
365	2,062,176	May 13, 1997
365 EVERYDAY VALUE	3,318,923	October 23, 2007
365 EVERYDAY VALUE & Design	3,098,711	May 30, 2006
365 EVERYDAY VALUE & Design	3,098,712	May 30, 2006
365 EVERYDAY VALUE & Design	4,094,216	January 31, 2012

Each of the registrations listed in the chart above are valid and subsisting, and the first five registrations are incontestable pursuant to 15 U.S.C. § 1065.

7. BeautyBank Inc. (the "Applicant") is a Delaware corporation with an address of 767 Fifth Avenue, New York, New York 10153. Applicant filed U.S. Serial No. 85/824,859 (the

“Application”) on January 16, 2013 for the mark PORE-365 based on an alleged intent to use that mark. The Application covers “non-medicated skin care preparations” in Class 03.

8. Opposer has priority based on its prior use and registration of its 365 marks in the United States.

9. Opposer’s 365 marks became famous long prior to Applicant’s filing date.

10. The mark PORE-365 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 “skin care” goods are, in fact, identical to products offered under Opposer’s 365 marks and are likely to be sold and marketed to the same or similar consumers as the goods offered under Opposer’s 365 marks. Purchasers and prospective purchasers are likely to believe that the products offered under Applicant’s PORE-365 mark 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).

11. Opposer has not given Applicant permission or approval to use or register the mark PORE-365.

12. Registration of the mark PORE-365 would damage Opposer because purchasers are likely to attribute the source or sponsorship of Applicant’s goods offered under that mark to Opposer.

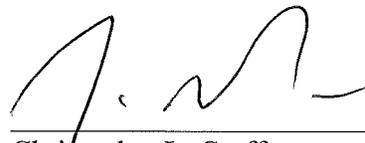
13. In addition, registration of the mark PORE-365 would damage Opposer because it would confer upon Applicant statutory presumptions to which it is not entitled in view of Opposer’s prior use and registration of its 365 marks.

14. Finally, registration of the mark PORE-365 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. 85/824,859 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:5579/CLG, if there is any problem with the processing of the electronically submitted fee.

Respectfully submitted,



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

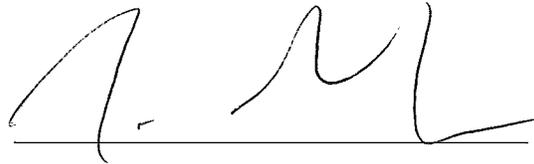
Date: December 2, 2013

ATTORNEYS FOR OPPOSER

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing NOTICE OF OPPOSITION was served via first-class mail, postage prepaid, on December 2, 2013 on Applicant's attorney of record:

Jessica Heiss  
The Estee Lauder Companies Inc.  
767 5th Avenue, Floor 37  
New York, New York 10153-0003

A handwritten signature in black ink, appearing to read 'J. Heiss', is written above a horizontal line.