

ESTTA Tracking number: **ESTTA657776**

Filing date: **02/24/2015**

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

Proceeding	91220185
Party	Defendant Be Powerful, LLC
Correspondence Address	JOHN C CAREY CAREY RODRIGUEZ ET AL LLP 1395 BRICKELL AVE , SUITE 700 MIAMI, FL 33131 UNITED STATES
Submission	Answer
Filer's Name	John Carey
Filer's e-mail	jcarey@careyrodriguez.com, aunderwood@careyrodriguez.com
Signature	/John Carey/
Date	02/24/2015
Attachments	2015-02-24 Answer to 1MR VORTEX Opposition .pdf(111987 bytes )

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

In the matter of Trademark  
Application Serial No. 86/076,649  
Mark: 1MR VORTEX  
Filing Date: September 27, 2013  
Published for Opposition: December 16, 2014

VERTEX PHARMACEUTICALS, Inc.,

Opposer,

v.

Opposition No. 91220185

BE POWERFUL, LLC

Applicant.

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**APPLICANT’S ANSWER AND AFFIRMATIVE DEFENSES  
TO NOTICE OF OPPOSITION**

Applicant Be Powerful, LLC (“Applicant”), by and through its undersigned counsel, Carey Rodriguez O’Keefe Milian Gonya, LLP, hereby sets forth its Answer and Affirmative Defenses to Opposer Vertex Pharmaceuticals, Inc.’s (“Opposer”) Notice of Opposition in the above-styled proceeding (“Notice of Opposition”) as follows:

**ANSWER**

Responding to the first unnumbered paragraph of the Notice of Opposition, Applicant admits that it owns U.S. Trademark Application Serial No. 86/076,649 for use in connection with “dietary and nutritional supplements” in Class 05. Applicant denies

that Opposers will be damaged by registration of U.S. Trademark Application Serial No. 85/521,731. Except as expressly admitted or denied, Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first unnumbered paragraph of the Notice of Opposition, and therefore denies the same. In response to the specifically enumerated paragraphs of the Notice of Opposition, Applicant responds as follows:

1. Applicant admits the allegations set forth in Paragraph 1 of the Notice of Opposition.

2. Applicant admits the allegations set forth in Paragraph 2 of the Notice of Opposition.

3. Applicant denies the allegations set forth in Paragraph 3 of the Notice of Opposition and demands strict proof thereof.

4. Applicant denies the allegations set forth in Paragraph 4 of the Notice of Opposition as phrased and demands strict proof thereof. Applicant cannot verify the authenticity of the attached Exhibit 1 and therefore denies the same.

5. Applicant denies the allegations contained in Paragraph 5 of the Notice of Opposition and demands strict proof thereof.

6. Applicant denies the allegations contained in Paragraph 6 of the Notice of Opposition and demands strict proof thereof.

7. Applicant denies the allegations contained in Paragraph 7 of the Notice of Opposition and demands strict proof thereof.

8. Applicant denies the allegations contained in Paragraph 8 of the Notice of Opposition and demands strict proof thereof.

9. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition and demands strict proof thereof.

10. Applicant denies the allegations contained in Paragraph 10 of the Notice of Opposition as phrased and demands strict proof thereof.

### **AFFIRMATIVE DEFENSES**

#### **FIRST DEFENSE**

Applicant is informed and believes, and thereon alleges that the facts set forth in the Notice of Opposition are insufficient to show damage necessary to oppose the subject matter application, and that the Notice of Opposition fails to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

There is no likelihood of confusion between Opposer's VERTEX marks for pharmaceutical research; pharmaceutical preparations for the diagnosis, treatment or prevention of conditions or diseases of the nervous system and pharmaceutical preparations, and the Applicant's 1MR VORTEX mark and application thereof for use in connection with dietary and nutritional supplements, considering the marks themselves, the respective goods and services in connection with which the marks are used, the marketing channels of trade and the fields of use.

#### **THIRD DEFENSE**

There are over 180 VORTEX registrations for goods and services unrelated to those provided by Opposer including Registration No. 1,786,455 for VORTEX in

international class 005 for “vitamin and food supplements”. To the extent that Opposer maintains the assertion that “pharmaceutical preparations” are similar to “vitamin and food supplements”, Opposer acknowledges that its VERTEX marks should never have been registered over Registration No. 1,786,455 for VORTEX.

#### **FOURTH DEFENSE**

Opposer's failure to enforce its VERTEX marks and registrations has resulted in numerous (over 70) third-party VERTEX registrations for goods and services unrelated to those provided by Opposer.

#### **FIFTH DEFENSE**

Opposer's Notice of Opposition and claims therein are barred, precluded or limited because, upon information and belief, there are significant numbers of third-party users of VERTEX marks for a variety of goods and services unrelated to those provided by Opposer. Therefore the term VERTEX is highly diluted and unworthy of a wide scope of protection.

#### **SIXTH DEFENSE**

Applicant's mark is not confusingly similar to Opposer's mark as none of the goods and services on which Applicant intends to use its proposed mark fall within Opposer's natural zone of expansion.

#### **SEVENTH DEFENSE**

Opposer will not be damaged and is not likely to be damaged by the registration of U.S. Trademark Application Serial No. 86/076,649.

**PRAYER FOR RELIEF**

**WHEREFORE**, Applicant respectfully prays that the Trademark Trial and Appeal Board:

- A. dismiss Opposer's Notice of Opposition in its entirety with prejudice, and
- B. enter judgment in favor of Applicant, and allow registrations to be issued to Applicant on U.S. Trademark Application Serial No. 86/076,649

Dated: February 24, 2015

By:     /s/ John C. Carey      
John C. Carey  
[jcarey@careyrodriguez.com](mailto:jcarey@careyrodriguez.com)  
Adam C. Underwood  
[aunderwood@careyrodriguez.com](mailto:aunderwood@careyrodriguez.com)

CAREY RODRIGUEZ O'KEEFE  
MILIAN GONYA, LLP  
1395 Brickell Avenue, Suite 700  
Miami, FL 33131  
Tel. 305.372.7474  
Fax. 305.372.7475

*Attorneys for Applicant,  
Be Powerful, LLC*

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES TO NOTICE OF OPPOSITION** was served via U.S.

First Class mail, postage prepaid, and properly addressed to counsel of record:

Lisa M. Tittlemore  
Sunstein Kann Murphy & Timbers LLC  
125 Summer Street  
Boston, MA 02110

this 24th day of February 2015

By: /s/ Adam C. Underwood  
Adam C. Underwood  
*Attorney for Applicant*