

TTAB

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12-15-2003
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

13 Certificate of Mailing

14 I hereby certify that this correspondence, including listed enclosures, is being deposited
15 with the United States Postal Service as First Class Mail, postage prepaid, in an
16 envelope addressed to: BOX TTAB, FEE, Commissioner for Trademarks, 2900 Crystal
17 Drive, Arlington, Virginia 22202-3514, on December 10, 2003.

18 Signed: Gable A. Alfano
19 Gable A. Alfano

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

22 * * *

23 BIAGRO WESTERN SALES, INC., a)
24 California corporation,)
25 Plaintiffs,)
26 v.)
27 PLANT FOOD SYSTEMS, INC., A Florida)
28 corporation,)
29 Respondent.)
30 00000052 78231301)
31 300.00 OP)

Opposition No. _____

OPPOSITION TO REGISTRATION

Serial No. 78/231,301
Filing Date: March 28, 2003
Mark: K-PHITE

12/16/2003 KGIBBBS
01 FC:6402

32 Opposer Biagro Western Sales, Inc., a California corporation located and doing business
33 at 35801 Road 132, Visalia, California 93292 ("Biagro"), believes that it will be damaged by
34 registration of the mark shown in Serial No. 78/231,301 (K-PHITE), and hereby opposes same.

35 ///

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1 Description of Applicant's Application:

2 Filed on March 28, 2003.

3 Published for opposition on November 12, 2003.

4 Mark: K-PHITE in class 005 for fungicide for agricultural use.

5 As grounds of opposition it is alleged that:

6 1. Opposer is the owner of U.S. Trademark Registration No. 1,934,958 for the mark
7 NUTRI-PHITE on agricultural and horticultural fertilizers and chemicals that was registered on
8 the Principal Register on November 14, 1995. Said registration was based on an application filed
9 in the U.S. Patent and Trademark Office on June 24, 1994, which is a date prior to the date of
10 filing of applicant's application. Said registered mark of opposer is valid and subsisting and is
11 conclusive evidence of opposer's exclusive right to use said mark in commerce on the goods
12 specified in said registration. In view of the similarity of the respective marks and the related
13 nature of the goods of the respective parties, it is alleged that applicant's mark so resembles
14 opposer's registered mark, as to be likely to cause confusion or to cause mistake or to deceive.

15 2. Opposer is the owner of U.S. Trademark Registration No. 2,473,307 for the mark
16 MAGNA-PHITE on agricultural and horticultural fertilizers and chemicals that was registered on
17 the Principal Register on July 31, 2001. Said registration was based on an application filed in the
18 U.S. Patent and Trademark Office on March 28, 2000, which is a date prior to the date of filing
19 of applicant's application. Said registered mark of opposer is valid and subsisting and is prima
20 facie evidence of opposer's exclusive right to use said mark in commerce on the goods specified
21 in said registration. In view of the similarity of the respective marks and the related nature of the
22 goods of the respective parties, it is alleged that applicant's mark so resembles opposer's
23 registered mark, as to be likely to cause confusion or to cause mistake or to deceive.

24 3. Opposer since March 30, 1994, has been, and is now, operating a business that
25 promotes the sales of agricultural and horticultural fertilizers and chemicals under the
26 designation NUTRI-PHITE which, in addition to being used on the labels for such products, is
27 applied to sales literature, clothing such as jackets and shirts, caps, mugs, briefcases, and the like.
28 Said use has been valid and continuous since said date of first use, and the relevant class of the
public has come to associate opposer with said designation. In view of the similarity of

1 applicant's designation with opposer's designation, and in view of the related nature of the uses
2 thereof, it is alleged that applicant's designation consists of and comprises matter that may
3 falsely suggest a connection with opposer.

4 4. Opposer incorporates paragraphs 1 and 3 above as if fully set forth herein. In view
5 of the similarity of applicant's designation with opposer's mark, and in view of the related nature
6 of the uses thereof, it is alleged that applicant's designation would dilute the distinctive qualify
7 of opposer's famous NUTRI-PHITE mark.

8 5. Respondent Plant Food Systems, Inc. has already used the federal registration
9 symbol ® in connection with the designation K-PHITE on fungicide products, as set forth in the
10 attached advertisement taken from respondent's internet web site. On information and belief,
11 Respondent's use of the federal registration symbol ® is an intentional and fraudulent misuse
12 thereof, since no registration for the K-PHITE designation on fungicide products has yet
13 occurred, and registration of applicant's K-PHITE designation should therefore be refused.

14 WHEREFORE, opposer requests that registration be refused for application serial
15 number 78/231,301 for the designation K-PHITE.

16 A duplicate copy of this Opposition and the filing fee of \$300 are enclosed pursuant to 37
17 C.F.R. § 2.6(a)(17).

18
19 Dated: December 10, 2003

Respectfully Submitted,

20 KIMBLE, MacMICHAEL & UPTON
21 A Professional Corporation

22 By 
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K-Phite® is a registered trademark of PFS