

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

In the Matter of Application Serial No. 76/543,753
Published in the *Official Gazette* on July 6, 2004

VITALITY FOODSERVICE, INC.

Opposer,

INDIANA BOTANIC GARDENS, INC.

Applicant.

Opposition No.

Commissioner for Trademarks
Box TTAB FEE
2900 Crystal Drive
Arlington, VA 22202-3514

NOTICE OF OPPOSITION

Sir:

Opposer, Vitality Foodservice, Inc. believes it would be damaged by the registration of the trademark GARDEN VITALITY TEAS, as shown in the above-identified application, and hereby opposes the same. As grounds for this opposition it is alleged that:

1. Opposer Vitality Foodservice, Inc. is a corporation of the state of Florida having an address of 400 N. Tampa Street, Tampa, Florida.
2. Since at least as early as March 5, 1935, a date long prior to the filing date of the present application, Opposer and its predecessors, Lykes Pasco, Inc., and Lykes Pasco Packing Co. have provided throughout the United States a variety of non-alcoholic beverages, including iced tea, frozen concentrated lemonade, orange juice, grapefruit juice, grape juice and apple juice

09/22/2004 161320NS 00000014 76543753

01 FC:840E

300.00 OP

TPA#1944747.1



09-17-2004

under the trademark VITALITY. Opposer has sold in commerce frozen concentrated iced tea, lemonade, orange juice, grapefruit juice, grape juice and apple juice under the trademark VITALITY. As a result of its extensive sale of frozen concentrated iced tea, lemonade, orange juice, grapefruit juice, grape juice and apple juice, Opposer has become well known for frozen concentrated iced tea, lemonade, orange juice, grapefruit juice, grape juice and apple juice under the VITALITY trademark.

3. Since at least as early as June 28, 1971, a date long prior to the filing date of the present application, Opposer and its predecessors, Lykes Pasco, Inc., and Lykes Pasco Packing Co. have provided throughout the United States tomato and cranberry juice concentrates under the trademark VITALITY. Opposer has sold in commerce tomato and cranberry juice concentrates under the trademark VITALITY. As a result of its extensive sale of tomato and cranberry juice concentrates, Opposer has become well known for tomato and cranberry juice concentrates under the VITALITY trademark.

4. Since at least as early as December 17, 1991, a date long prior to the filing date of the present application, Opposer and its predecessor, Lykes Pasco, Inc. have provided, throughout the United States, beverages, including fruit juices, fruit juice concentrate and fruit drinks containing water under the trademark VITALITY EXPRESS PAK. Opposer has sold in commerce beverages, including fruit juices, fruit juice concentrate and fruit drinks containing

water under the trademark VITALITY EXPRESS PAK. As a result of its extensive sale of beverages, including fruit juices, fruit juice concentrate and fruit drinks containing water, Opposer has become well known for fruit juices, fruit juice concentrate and fruit drinks containing water under the VITALITY EXPRESS PAK trademark.

5. Since at least as early as April 2001, a date long prior to the filing date of the present application, Opposer has provided throughout the United States bottled water under the trademark VITALITY SPRINGS, and since that date Opposer has sold in commerce such bottled water under that trademark VITALITY SPRINGS. As a result of its extensive sale of bottled water, Opposer has become well known for bottled water under the VITALITY SPRINGS trademark.

6. Since at least as early as January 2000, a date long prior to the filing date of the present Application, Opposer has provided and sold throughout the United States sports drinks under the trademark VITALITY. Opposer has sold in commerce such sports drinks under that trademark VITALITY. As a result of its extensive sale of sports drinks, Opposer has become well known for sports drinks under the VITALITY trademark.

7. Opposer is the owner of United States Trademark Registration No. 907,932 for the mark VITALITY for concentrated juice dispensing units, frozen concentrated lemonade,

frozen concentrated orange juice, grapefruit juice, grape juice, apple juice and iced tea, which was registered on February 16, 1971.

8. Opposer is the owner of United States Trademark Registration No. 919,962 for the mark VITALITY for installation and maintenance of juice dispensing equipment, which was registered on September 7, 1971.

9. Opposer is the owner of United States Trademark Registration No. 966,673 for the mark VITALITY for tomato and cranberry juice, which was registered on August 21, 1973.

10. Opposer is the owner of United States Trademark Registration No. 1,729,171 for the mark VITALITY EXPRESS for refrigerated dispensing units for beverages, which was registered on November 3, 1992.

11. Opposer is the owner of United States Trademark Registration No. 1,792,848 for the mark VITALITY EXPRESS PAK for fruit juices, fruit juice concentrate and fruit drinks containing water, which was registered on September 14, 1993.

12. By the application hereby opposed, Indiana Botanic Gardens, Inc. seeks to register, the designation GARDEN VITALITY TEAS as a trademark for, herbal beverage teas in International Class 32, goods intimately related in purchasers' minds with Opposer's tea, sports drinks, fruit drinks, fruit juices, frozen concentrated fruit juices, and fruit juice concentrates.

13. From the information set forth in Applicant's trademark application file, Applicant has provided the goods for which the registration is being sought for only about one year, since August 20, 2003, while Opposer has made extensive use of the trademark VITALITY for more than 68 years in interstate commerce from a period long prior to Applicant's first use or the filing date of Applicant's application, and has made use in commerce of the trademark VITALITY for sports drinks from a period long prior to Applicant's first use or the filing of Applicant's application.

14. The trademark GARDEN VITALITY TREAS is likely, when applied to the goods sought to be registered by the Applicant, to cause confusion or mistake or to deceive, with consequent injury to Opposer and to the public.

15. Opposer will be damaged by the registration sought by Applicant, because said registration will support and assist Applicant in confusing and misleading use of Applicant's mark sought to be registered and will give color of exclusive statutory rights to Applicant in violation and derogation of the rights of Opposer, as set forth above.

Wherefore, Opposer believes it will be damaged by the registration sought by Applicant and pray that the opposition be sustained and registration of said mark be denied.

Please recognize as attorneys for Opposer in this proceeding and address all communications relating to this matter to C. Douglas McDonald, Andrew C. Greenberg and

In the Matter of Application Serial No. 76/543,753
Vitality Foodservice, Inc. v. Indiana Botanic Gardens, Inc.

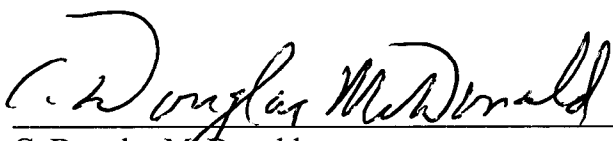
NOTICE OF OPPOSITION

Page 6

Suzette M. Marteny, and the firm of Carlton Fields, P.A., P. O. Box 3239, Tampa, Florida 33601. Please charge our Deposit Account No. 03-0683; a duplicate of this letter is enclosed for this purpose.

Dated: Tampa, Florida
September 17, 2004


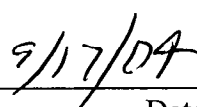
VITALITY FOODSERVICE, INC.

By: 
C. Douglas McDonald
Carlton Fields, P.A.
P. O. Box 3239
Tampa, Florida 33601
Tel.: (813) 223-7000
Fax: (813) 229-4133

CERTIFICATE OF EXPRESS MAILING

EXPRESS MAIL Mailing Label No. EV 528190484 US Date of Deposit: September 17, 2004

I hereby certify that an original and two copies of this Notice of Opposition are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and addressed to BOX TTAB FEE, Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514.


C. Douglas McDonald, Attorney of Record

Date