

ESTTA Tracking number: **ESTTA50638**

Filing date: **10/26/2005**

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	Floragem LLC
Granted to Date of previous extension	10/26/2005
Address	3742 Bluebird Canyon Road Vista, CA 92084 UNITED STATES

Attorney information	Colleen F. Goss Fay, Sharpe, Fagan, Minnich & McKee 1100 Superior AvenueSeventh Floor Cleveland, OH 44114 UNITED STATES uspto@faysharpe.com
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Applicant Information

Application No	78386025	Publication date	06/28/2005
Opposition Filing Date	10/26/2005	Opposition Period Ends	10/26/2005
International Registration No.	NONE	International Registration Date	NONE

Applicant	Freshway Specialty Foods, Inc. Unit 1130 11180 River Road Richmond, BC, V6X 1Z5 CANADA
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Goods/Services Affected by Opposition

Class 031. All goods and services in the class are opposed, namely: fresh fruits and vegetables
Class 035. All goods and services in the class are opposed, namely: Wholesale distributorship services in the field of domestic and imported fresh fruits and vegetables

Attachments	notice of opp.vivafresh.txt (3 pages)
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Signature	/colleenfgoss/
Name	Colleen F. Goss
Date	10/26/2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
In the Matter of Application Serial No. 78/386,025
Filed: March 17, 2004
For the Mark : VIVAFRESH
Published in the Official Gazette on June 28, 2005
Floragem LLC,)

Opposer,)

Opposition No. _

vs.)

Freshway Specialty Foods, Inc.)

Applicant)

NOTICE OF OPPOSITION

Mail Stop TTAB FEE

Commissioner for Trademarks

2900 Crystal Drive

Arlington, Virginia 22202-3514

Floragem LLC, a California Limited Liability having its principa

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place of business at Comapny3724 bluebird Canyon Road, Vista,
California 92084 (hereinafter "Opposer?"), believes that it will be
damaged by registration of the mark shown in the application bearing
Serial No. 78/386,025 and hereby opposes such registration in classes
31 and 35, both classes in which registration is sought. Opposer filed
a thirty day extension of time to oppose and a sixty day extension of
time to oppose. Accordingly, the current date to file a notice of
opposition is October 26, 2005.

As grounds for opposition, Opposer submits the following:

1. On March 17, 2004, the applicant, Freshway Specialty Foo
ds, Inc.

("Applicant?"), filed an application, Serial No. Serial No 78/386,025,
seeking registration of the mark VIVAFRESH for "fresh fruits and
vegetables" in Class 31 and "Wholesale distributorship services in the
field of domestic and imported fresh fruits and vegetables" in Class 35
("Applicant?s ?025 Application). The application was based on Sections
1(b) and 44(d) of the Trademark Act of 1946, as amended (15 U.S.C. ?
1051 et seq.) ("Act?"), claiming a priority date of September 19, 2003.
The U.S. trademark application was published in the Official Gazette of
June 28, 2005.

2. Opposer is the owner of registration number 2,718,435 on
the

Principal Register for the mark VIVA! filed July 20, 2000 for the
goods "live plants, excluding grasses, namely Galleta Grass, Yellow
Bluestem, Kentucky Bluegrass, Perennial Ryegrass, Winter Rape and
Marigold, and vegetables and fruits, excluding tomatoes, sweet corn,
melon, lettuce, sugar beets, onions, barley and field beans" in Class
31 (the "435 registration"); registration number 2,485,981, on the
Principal Register, for the mark VIVA!VEGGIES filed September 15, 1999

for the goods "live potted vegetables" in Class 31 (the "981 registration); and registration number 2,362,305, on the Principal Register for the mark VIVA! HERBS for the goods "live potted herbs" in Class 31 (the "305 registration) (collectively "Opposer"s Registrations?). Said registrations are valid and subsisting and are prima facie evidence of Opposer"s exclusive right to use said mark in commerce in association with the goods specified in said registrations.

In view of the similarity of the respective marks and the related nature of the goods of the respective parties, Opposer alleges that Applicant"s mark so resembles Opposer"s registered marks as to be likely to cause confusion, or to cause mistake, or to deceive.

3. Opposer is the owner of application serial number 76/514,017 for

the mark VIVA! which was filed February 17, 2004 for the goods "Hand gardening tools, namely, trowels, weeding forks, spades, hoes, pruning shears, rakes, shovels, tillers, pitchforks, cultivators, and hedge clippers" in Class 8 (the "017 application) and serial number 76/501,156 for the mark VIVA! which was filed March 27, 2003 for the goods "Fertilizer for domestic use, potting soil" in Class 1 (the "156 application) (collectively "Opposer"s Applications?). In view of the similarity of the respective marks and the related nature of the goods of the respective parties, Opposer alleges that Applicant"s mark so resembles the marks of Opposer"s applications as to be likely to cause confusion, or to cause mistake, or to deceive.

4. Opposer is the owner of common law rights in Viva and variations

thereof for a variety of goods including, but not limited to, the goods recited in Opposer"s Registrations and Opposer"s Applications.

5. Opposer is the owner of a family of marks which include VIVA

formatives. The family of marks owned by Opposer includes Opposer"s Registrations, Opposer"s Applications, and Opposer"s common law rights. In VIVA and variations thereof (collectively "Opposer"s VIVA Marks?).

6. Opposer has used Opposer"s VIVA Marks to identify its products long prior to the filing of Applicant"s "025 Application and continues such use today.

7. Opposer has used Opposer"s VIVA Marks to identify its lo

ng prior to the priority date claimed in Applicant"s "025 Application and continues such use today.

8. Opposer"s VIVA Marks are symbolic of extensive good will and

consumer recognition built up by Opposer through substantial amounts of time and effort in advertising, promotion, and sales. In view of the similarity of the respective marks and the related nature of the goods of the respective parties, Opposer alleges that Applicant"s mark so resembles Opposer"s VIVA Marks previously used in the United States and not abandoned, as to be likely to cause confusion or to cause mistake, or to deceive.

9. Opposer owns, uses and has used since well prior to September 19,

2003, (the priority date of Applicant"s "025 Application), Opposer"s VIVA Marks in association with the goods recited in Opposer"s Applications and Opposer"s Registrations. Opposer"s use of Opposer"s

VIVA Marks has been valid and continuous and not abandoned since prior to Applicant's priority date.

10. The goods in association with which Opposer uses Opposer's VIVA Marks are closely related to the goods listed in Applicant's '025 Application.

11. The mark VIVAFRESH, if used or registered in association with Applicant's goods, is so similar to Opposer's VIVA Marks used in association with Opposer's goods, as to create a likelihood of confusion, to cause mistake, or to deceive, within the meaning of Section 2(d) of the Act, all to Opposer's irreparable damage.

12. Opposer will be damaged by registration of the mark VIVA FRESH for use in association with Applicant's goods in that, if registration issues, consumers are likely to purchase Applicant's goods believing them to be Opposer's goods, or to be sponsored by or in association with Opposer, and in that any defects in Applicant's goods are likely to be attributed to Opposer, all of which will cause injury to Opposer.

WHEREFORE, Opposer prays that said application Serial No. 78/386 ,025 be refused, and that the registration sought therein be denied, and that this opposition be sustained in favor of Opposer.

mitted, Respectfully sub

FAY, SHARPE, FAGAN,
LLP

e., Seventh Floor
44114

Dated: October 26, 2005

/colleenfgoss/
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