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

Proceeding	91181835
Party	Defendant American Weigh Scales, Inc.
Correspondence Address	JOHN ALUMIT PATEL & ALUMIT, PC 16830 VENTURA BLVD STE 360 ENCINO, CA 91436-1711  jalumit@patelalumit.com
Submission	Answer
Filer's Name	Michael Cerrati
Filer's e-mail	jalumit@patelalumit.com, michael@patelalumit.com
Signature	/michael cerrati/
Date	02/06/2008
Attachments	American Weigh Scales - Answer (91181835).pdf ( 17 pages )(602117 bytes )

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

BBK TOBACCO & FOODS, INC.	)	
	)	
Opposer,	)	Opposition No.: 91181835
	)	Serial No: 77/132,844
v.	)	Mark: NUTRIBALANCE
	)	Filed: March 16, 2007
AMERICAN WEIGH SCALES, INC.,	)	Published: September 18, 2007
	)	
Applicant.	)	
	)	
	)	
	)	
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**APPLICANT’S ANSWER TO THE NOTICE OF OPPOSITION**

Applicant, American Weigh Scales, Inc., by its attorneys hereby responds to the allegations set forth in the Notice of Opposition filed by Opposer, BBK Tobacco & Foods, Inc., as follows:

1. The allegations set forth in Paragraph 1 of the Notice of Opposition are admitted.
2. The allegations set forth in Paragraph 2 of the Notice of Opposition are admitted.
3. The allegations set forth in Paragraph 3 of the Notice of Opposition are admitted.
4. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 4 of the Notice of Opposition, and therefore, denies said allegations.

**OPPOSER’S IBALANCE MARK**

5. Applicant admits that Opposer is identified in the PTO database as the current owner of U.S. Registration Number 2,557,357 for the mark “IBALANCE” filed in the PTO on May 5, 2000 based on its current use of the Opposer’s IBALANCE mark in commerce. In addition, Applicant admits that the first use in commerce date is *listed* as January 15, 2001.

However, Applicant has insufficient knowledge or information as to whether Opposer's IBALANCE mark was actually used in commerce on the date listed in Paragraph 5 of the Notice of Opposition, and therefore, denies that Opposer's IBALANCE mark was actually in use as of January 15, 2001.

6. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 6 of the Notice of Opposition, and therefore, denies said allegations.
7. Applicant admits that Opposer's IBALANCE filing date and alleged first use date for the IBALANCE mark are earlier than Applicant's first use date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's IBALANCE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's IBALANCE mark was actually in use as of the alleged date of first use.
8. Applicant admits that Opposer's IBALANCE filing date and alleged first use date for the IBALANCE mark are earlier than Applicant's filing date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's IBALANCE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's IBALANCE mark was actually in use as of the alleged date of first use.
9. Applicant admits that Opposer's IBALANCE ® filing date precedes Applicant's Filing Date. However, Applicant has insufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph 9 of the Notice of Opposition, and therefore, denies said allegations. Applicant has insufficient knowledge or information as to whether Opposer's IBALANCE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's IBALANCE mark was actually in use as of the

alleged date of first use. Pending Applicant's further investigation, priority may be an issue in this proceeding.

10. Because the allegations set forth in Paragraph 10 of the Notice of Opposition contain only conclusions of law, Applicant is not required to admit or deny such conclusions.
11. Applicant denies that a paying customer cannot be expected to distinguish between Opposer's IBALANCE mark and Applicant's mark. In addition, Applicant has insufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph 11 of the Notice of Opposition, and therefore, denies said remaining allegations.
12. Applicant has insufficient knowledge or information as to how Opposer's IBALANCE mark is commonly employed, and therefore, denies said allegation. Applicant admits that Applicant's mark has been displayed as NUTRIBALANCE, NutriBalance, Nutribalance and in a stylized font as depicted in Exhibits A, B, C and D to the Notice of Opposition.
13. The allegations set forth in Paragraph 13 of the Notice of Opposition are denied.
14. The allegations set forth in Paragraph 14 of the Notice of Opposition are denied.

#### **OPPOSER'S NUTRISCALE MARK**

15. Applicant admits that Opposer is identified in the PTO database as the current owner of U.S. Registration Number 3,142,258 for the mark "NUTRISCALE" filed in the PTO on November 16, 2005 based on its current use of the Opposer's NUTRISCALE mark in commerce. In addition, Applicant admits that the first use in commerce date is *listed* as June 9, 2002. However, Applicant has insufficient knowledge or information as to whether Opposer's NUTRISCALE mark was actually used in commerce on the date listed in

Paragraph 15 of the Notice of Opposition, and therefore, denies that Opposer's NUTRISCALE mark was actually in use as of June 9, 2002.

16. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 16 of the Notice of Opposition, and therefore, denies said allegations.
17. Applicant admits that Opposer's NUTRISCALE filing date and alleged first use date for the NUTRISCALE mark are earlier than Applicant's first use date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's NUTRISCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's NUTRISCALE mark was actually in use as of the alleged date of first use.
18. Applicant admits that Opposer's NUTRISCALE filing date and alleged first use date for the NUTRISCALE mark are earlier than Applicant's filing date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's NUTRISCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's NUTRISCALE mark was actually in use as of the alleged date of first use.
19. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 19 of the Notice of Opposition, and therefore, denies said allegations. Applicant has insufficient knowledge or information as to whether Opposer's NUTRISCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's NUTRISCALE mark was actually in use as of the alleged date of first use. Pending Applicant's further investigation, priority may be an issue in this proceeding.

20. Because the allegations set forth in Paragraph 20 of the Notice of Opposition contain only conclusions of law, Applicant is not required to admit or deny such conclusions.
21. Because the allegations set forth in Paragraph 21 of the Notice of Opposition contain only conclusions of law, Applicant is not required to admit or deny such conclusions.
22. The allegations set forth in Paragraph 22 of the Notice of Opposition are denied.
23. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 23 of the Notice of Opposition, and therefore, denies said allegations.
24. The allegations set forth in Paragraph 24 of the Notice of Opposition are denied.

**OPPOSER'S I.SCALE MARK**

25. Applicant admits that Opposer is identified in the PTO database as the current owner of U.S. Registration Number 2,600,064 for the mark "I.SCALE" filed in the PTO on February 13, 2000 based on its current use of the Opposer's I.SCALE mark in commerce. In addition, Applicant admits that the first use in commerce date is *listed* as January 12, 1996. However, Applicant has insufficient knowledge or information as to whether Opposer's I.SCALE mark was actually used in commerce on the date listed in Paragraph 25 of the Notice of Opposition, and therefore, denies that Opposer's I.SCALE mark was actually in use as of January 12, 1996.
26. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 26 of the Notice of Opposition, and therefore, denies said allegations.
27. Applicant admits that Opposer's I.SCALE filing date and alleged first use date for the I.SCALE mark are earlier than Applicant's first use date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's I.SCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies

that Opposer's I.SCALE mark was actually in use as of the alleged date of first use. Moreover, any allegations relating to Opposer's I.SCALE mark are irrelevant to this proceeding and should be stricken from the record because Applicant's mark is not confusingly similar in appearance, sound, meaning, connotation or commercial impression to Opposer's I.SCALE mark.

28. Applicant admits that Opposer's I.SCALE filing date and alleged first use date for the I.SCALE mark are earlier than Applicant's filing date for Applicant's mark. However, Applicant has insufficient knowledge or information as to whether Opposer's I.SCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's I.SCALE mark was actually in use as of the alleged date of first use. Moreover, any allegations relating to Opposer's I.SCALE mark are irrelevant to this proceeding and should be stricken from the record because Applicant's mark is not confusingly similar in appearance, sound, meaning, connotation or commercial impression to Opposer's I.SCALE mark.

29. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 29 of the Notice of Opposition, and therefore, denies said allegations. Applicant has insufficient knowledge or information as to whether Opposer's I.SCALE mark was actually used in commerce on the alleged date of first use, and therefore, denies that Opposer's I.SCALE mark was actually in use as of the alleged date of first use. Pending Applicant's further investigation, priority may be an issue in this proceeding. Moreover, any allegations relating to Opposer's I.SCALE mark are irrelevant to this proceeding and should be stricken from the record because Applicant's mark is not

confusingly similar in appearance, sound, meaning, connotation or commercial impression to Opposer's I.SCALE mark.

### CONCLUSION

30. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 30 of the Notice of Opposition, and therefore, denies said allegations.
31. The allegations set forth in Paragraph 31 of the Notice of Opposition are denied.
32. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 32 of the Notice of Opposition, and therefore, denies said allegations.
33. The allegations set forth in Paragraph 33 of the Notice of Opposition are denied.
34. While Applicant may have been aware of Opposer's products and product names, Applicant denies that Applicant was aware of Opposer's trademark registrations cited in the Notice of Opposition. Applicant also denies that Applicant combined Opposer's three marks to form a new trademark. Further, Applicant denies the remaining allegations set forth in Paragraph 34 of the Notice of Opposition.
35. The allegations set forth in Paragraph 35 of the Notice of Opposition are denied.
36. The allegations set forth in Paragraph 36 of the Notice of Opposition are denied.
37. The allegations set forth in Paragraph 37 of the Notice of Opposition are denied.
38. The allegations set forth in Paragraph 38 of the Notice of Opposition are denied.
39. The allegations set forth in Paragraph 39 of the Notice of Opposition are denied.
40. Because Opposer's prayer for relief does not state factual allegations, Applicant is not required to admit or deny the allegations. Applicant further denies that registration for Applicant's mark should be refused or that this opposition should be sustained in favor of Opposer.



### AFFIRMATIVE DEFENSES

41. As a first and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer is not damaged or harmed by the use of Applicant's mark by virtue of the fact that multiple live, third-party registrations exist for marks containing the terms NUTRI, BALANCE or SCALE, or variations thereof, alone or with additional wording, in connection with related goods and services, as evidenced by at least one hundred and five (105) live, third-party registrations on the United States Patent and Trademark Office Trademark Registers. *See Exhibit 1.* Accordingly, Opposer's marks should be entitled to only a narrow scope of protection.
42. As a second and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's marks are weak due to the fact that multiple live, third-party registrations exist for marks containing the terms NUTRI, BALANCE or SCALE, or variations thereof, alone or with additional wording, in connection with related goods and services. *See Exhibit 1.* Consequently, Opposer's marks should be entitled to only a limited scope of protection.
43. As a third and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's marks are weak due to the fact that the dominant portion of the marks – the words BALANCE and SCALE – are highly descriptive of Opposer's goods used in connection with the marks. As a result, Opposer is precluded from claiming exclusive ownership over the designation "BALANCE" or "SCALE."
44. As a fourth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that Applicant's mark is not confusingly similar to Opposer's marks because the respective

marks used in connection with each party's respective goods, including promotional material, are sufficiently distinct.

45. As a fifth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that there is no evidence or allegation of any actual confusion, deception or mistake as to the sponsorship, authorization or approval of Applicant's goods by Opposer, despite the coexistence in U.S. interstate commerce of Applicant's and Opposer's marks since at least as early as March of 2007, nearly one (1) year.
46. As a sixth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that Opposer's marks are not distinctive to Opposer.
47. As a seventh and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that Applicant's use of Applicant's mark has not harmed Opposer's marks, reputation or good will, and Opposer has not shown any injury to Opposer's business reputation or quality of goods or services relating thereto.
48. As an eighth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that there is no likelihood of confusion because the United States Patent and Trademark Office did not cite Opposer's marks as bars or grounds for a refusal to registration of Applicant's mark after considering the reality of the marks existing simultaneously in the marketplace.
49. As a ninth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that

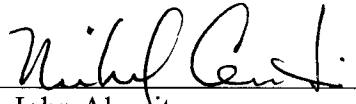
Applicant adopted and created its mark in good faith and without any intent to confuse or deceive the public.

50. As a tenth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery due to the fact that Applicant's use of Applicant's mark has not interfered with or damaged Opposer in any manner.
51. As an eleventh and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery by the doctrine of laches.
52. As a twelfth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery by reason of its own unclean hands.
53. As a thirteenth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery by the doctrine of estoppel.
54. As a fourteenth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery by the doctrine of acquiescence.
55. As a fifteenth and separate affirmative defense, Applicant is informed and believes, and on this basis asserts that Opposer's claim is barred from recovery by the doctrine of waiver.
56. There may be additional affirmative defenses to the claims alleged by Opposer that are currently unknown to Applicant. Therefore, Applicant reserves the right to amend its Answer to allege additional affirmative defenses in the event discovery of additional information indicates they are appropriate.

WHEREFORE, Applicant requests that the present Notice of Opposition be dismissed with prejudice.

Respectfully Submitted,

Dated as of: February 6, 2008

By:   
John Alunit  
Michael Cerrati  
Patel & Alunit, PC  
16830 Ventura Blvd., Suite 360  
Encino, CA 91436  
(818) 380-1900

Attorneys for Applicant,  
American Weigh Scales, Inc.

**Exhibit 1**



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Current Search: S4: ("\*nutri\*" or "\*scale\*" or "\*balance\*")[bi,ti] and ((009)[ic] and ("weigh" or "weighing" or "balance" or "balances" or "balancing" or "scale" or "scales"))[gs] and (live)[ld] and (registrant)[on] docs: 105 occ: 674

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1	79027656	3312833	BALANCE-BALL	TARR	LIVE
2	79004793	3090443	BALANCE	TARR	LIVE
3	78755009	3142258	NUTRISCALE	TARR	LIVE
4	78729391	3203663	SCALEBOSS	TARR	LIVE
5	78668000	3326417	NUTRA TRACK	TARR	LIVE
6	78934453	3318117	BALANCE HOMOGENITÄT	TARR	LIVE
7	78796751	3263099	EBAL	TARR	LIVE
8	78667255	3269678	CLAY NELSON LIFE BALANCE	TARR	LIVE
9	78972456	3302638	B-TEK SCALES	TARR	LIVE
10	78795273	3299729	BALANCE MANAGER	TARR	LIVE
11	78960139	3232031	BRIEFCASE SCALE	TARR	LIVE
12	78669966	3231344	OFF BALANCE ON PURPOSE	TARR	LIVE
13	78552114	3076157	SCALEMAN	TARR	LIVE
14	78572750	3182634	THE COMPLETE WHEEL BALANCER	TARR	LIVE
15	78633766	3179617	B BALANCE INNOVATIONS	TARR	LIVE
16	78576505	3108175	INSCALE	TARR	LIVE
17	78703688	3094554	CD SCALE	TARR	LIVE
18	78569136	3094401	BALANCE IT	TARR	LIVE
19	78622560	3059153	VERICASH A BALANCE INNOVATIONS SOLUTION	TARR	LIVE
20	78537816	3077840	US BALANCE "THE ONLY WEIGH!"	TARR	LIVE
21	78063126	2588593	FLIPSCALE	TARR	LIVE
22	78034008	2564701	POINTSCALE	TARR	LIVE

23	78026700	2568491	CYBERSCALE	TARR	LIVE
24	78023258	2567499	1 SCALE	TARR	LIVE
25	78011347	2551369	PALMSCALE	TARR	LIVE
26	78006943	2557357	IBALANCE	TARR	LIVE
27	78002408	2679000	1 SCALE	TARR	LIVE
28	78497754	3248196	SCALES FOR THE WAY YOU LIVE	TARR	LIVE
29	78039885	2688699	US SCALE	TARR	LIVE
30	78142525	3190837	PROSCALE	TARR	LIVE
31	78471910	3001918	TOUGHEST SCALES ON EARTH	TARR	LIVE
32	78408834	2966905	ARLYN SCALES	TARR	LIVE
33	78405261	3003982	BLADE SCALE	TARR	LIVE
34	78368979	2902583	CREDIT CARD SCALE	TARR	LIVE
35	78326554	2974139	MEDICAL GRADE PATENTED MECHANISM PROFESSIONAL SCALE	TARR	LIVE
36	78277815	2941629	JSCALE	TARR	LIVE
37	78275529	2866814	DURASCALE	TARR	LIVE
38	78236235	2939634	DIGIWEIGH DIGITAL SCALES	TARR	LIVE
39	78215004	2947670	BILANCIAI CB	TARR	LIVE
40	78213276	2909198	ULTIMATE BALANCE	TARR	LIVE
41	78199827	2958769	MATH BALANCE	TARR	LIVE
42	78191831	2771851	ISCALE	TARR	LIVE
43	78134498	2758898	PROSCALE	TARR	LIVE
44	78117206	2729178	MIND BALANCE	TARR	LIVE
45	78115227	2672326	TOUCHSCALE	TARR	LIVE
46	78087712	2571686	AUTOSCALE	TARR	LIVE
47	77171971	3347984	WATCHSCALE	TARR	LIVE
48	77045230	3284958	COMBI SCALE	TARR	LIVE
49	76060450	2572084	IF IT SPINS, WE BALANCE IT!	TARR	LIVE
50	76007570	2487141	SCALECOM	TARR	LIVE
51	76581425	3064742	NETSCALER	TARR	LIVE
52	76342287	2759916	NET SCALER	TARR	LIVE
53	76459671	2794125	BRAIN BALANCE MUSIC	TARR	LIVE
54	76617505	3134699	SPEECH LSI	TARR	LIVE
55	76478110	2829461	PRECISION & TECHNOLOGY IN PERFECT BALANCE	TARR	LIVE
56	76478109	2819161	SRSCALES	TARR	LIVE
57	76635432	3178963	SLINGSCALE	TARR	LIVE
58	76017384	2430033	CHLOR-SCALE	TARR	LIVE
59	76618574	3043950	KANAWHA SCALES & SYSTEMS	TARR	LIVE
60	76570647	3033491	OKBALANCE	TARR	LIVE
61	76597652	3016033	SCALE TUNES	TARR	LIVE
62	76572881	2939372	QUICK SCALE	TARR	LIVE
63	76572878	2991246	QUICKSCALE	TARR	LIVE

64	76544115	3003268	BALANCE NAVIGATOR	TARR	LIVE
65	76506364	2933730	DYNAMIC SCALES	TARR	LIVE
66	76499572	2885757	ACCU BALANCE	TARR	LIVE
67	76455295	2848770	WEBSCALE	TARR	LIVE
68	76323785	2710045	SCALEWORKS	TARR	LIVE
69	76284301	2648813	SCALEMASTER	TARR	LIVE
70	76175549	2657047	PHAT SCALE	TARR	LIVE
71	76088878	2985660	MYSCALE	TARR	LIVE
72	75930265	2600064	I.SCALE	TARR	LIVE
73	75724055	2465001	THE DOCTOR'S SCALE	TARR	LIVE
74	75703486	2505610	ULTIMATE SCALE	TARR	LIVE
75	75575462	2437469	NETSCALER	TARR	LIVE
76	75955450	2465442	EZ SCALE	TARR	LIVE
77	75907487	2562351	SODISCALE	TARR	LIVE
78	75634645	2336891	PC SCALE	TARR	LIVE
79	75346453	2422468	SCALE BLASTER	TARR	LIVE
80	75496627	2540805	D.A.I. TRUCK SCALES DATA AUDIT INDUSTRIES INC.	TARR	LIVE
81	75026069	2094204	KANAWHA SCALES & SYSTEMS	TARR	LIVE
82	75402457	2298793	CELLSCALE	TARR	LIVE
83	75234649	2333911	COMPUTERSCALES	TARR	LIVE
84	74627805	1986340	SCALEVISION	TARR	LIVE
85	74472458	1962673	INDUSTRIAL SOLUTIONS ON A GLOBAL SCALE	TARR	LIVE
86	74558432	1916217	THURMAN SCALE	TARR	LIVE
87	74527555	1974187	FAIRBANKS SCALES	TARR	LIVE
88	74618187	2144882	NUTRI MATE	TARR	LIVE
89	74372924	1807276	ACCUSCALE	TARR	LIVE
90	74296489	1769861	SCOTTY THE SCALE	TARR	LIVE
91	74275501	1794487	AUTO BALANCE	TARR	LIVE
92	74064775	1721464	SMART SCALE	TARR	LIVE
93	74042339	1667993	SCALEWARE	TARR	LIVE
94	73110697	1079302	THE SEAL OF GOOD BALANCE	TARR	LIVE
95	73549322	1412743	LASERSCALE	TARR	LIVE
96	73087229	1055482	FAIRBANKS SCALES	TARR	LIVE
97	73771385	1551774	PULSCALE	TARR	LIVE
98	73740673	1551695	SCALE-TRONIX 2001 SLINGSCALE	TARR	LIVE
99	73720606	1525362	BALANCE MASTER	TARR	LIVE
100	73675025	1495649	SCALE-PRO	TARR	LIVE

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102	73308722	1220650	JOHNSON SCALE CO.	TARR	LIVE
103	73090043	1097254	ACME SCALE CO.	TARR	LIVE
104	72130282	0738595	GERBER VARIABLE SCALE	TARR	LIVE
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**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S ANSWER TO NOTICE OF OPPOSITION** has been served on Opposer's Legal Department on February 6, 2008, via First Class U.S. Mail, postage prepaid to:

BBK Tobacco & Foods, Inc.  
Attn: Legal Department  
3315 W. Buckeye Rd., Ste. 4  
Phoenix, AZ 85009

  
\_\_\_\_\_  
Jessica Torres