

ESTTA Tracking number: **ESTTA210180**

Filing date: **05/08/2008**

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 parties oppose registration of the indicated application.

Opposers Information

Name	NBTY, Inc.		
Entity	Corporation	Citizenship	Delaware
Address	2100 Smithtown Avenue Ronkonkoma, NY 11779 UNITED STATES		

Name	Vitamin World, Inc.		
Entity	Corporation	Citizenship	Delaware
Address	2100 Smithtown Avenue Ronkonkoma, NY 11779 UNITED STATES		

Attorney information	Scott B. Fisher Jaspan Schlesinger Hoffman LLP 300 Garden City Plaza Garden City, NY 11530 UNITED STATES SFisher@jshllp.com Phone:(516) 746-8000		
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Applicant Information

Application No	77311041	Publication date	04/08/2008
Opposition Filing Date	05/08/2008	Opposition Period Ends	05/08/2008
Applicant	Casey Petraceuticals, Inc. 8233 Belneath Ct. Raleigh, NC 27613 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: Dietary and nutritional supplements; Dietary supplements for animals; Dietary supplements for human consumption; Non-medicated additives for animal feed for use as nutritional supplements; Nutraceuticals for use as a dietary supplement
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2572074	Application Date	05/10/2000
Registration Date	05/21/2002	Foreign Priority Date	NONE
Word Mark	NUTRA-GAR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2000/05/01 First Use In Commerce: 2000/05/01 Nutritional supplements		

U.S. Registration No.	2572075	Application Date	05/10/2000
Registration Date	05/21/2002	Foreign Priority Date	NONE
Word Mark	NUTRA GAR		
Design Mark			
Description of Mark	The mark consists of a clove of garlic, the words "NURTA GAR" against a dark rectangular background, and two rows of dark circles that appear below the rectangle.		
Goods/Services	Class 005. First use: First Use: 2000/05/01 First Use In Commerce: 2000/05/01 Nutritional supplements		

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	NUTRA PAKS		
Goods/Services	Comprehensive daily supply of vitamins and nutritional supplement systems.		

Attachments	76044617#TMSN.gif (1 page)(bytes) 76044618#TMSN.gif (1 page)(bytes) NBTYCaseyPetraNotOpp(050808).pdf (18 pages)(794078 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/SBF/
Name	Scott B. Fisher
Date	05/08/2008

NBTY, with a place of business located at 2100 Smithtown Avenue, Ronkonkoma, New York 11779 (collectively, NBTY and Vitamin World are referred to herein as "Opposers").

Opposers believe that they will be damaged by the registration of NUTRI-PACS covering "Dietary and nutritional supplements; Dietary supplements for animals; Dietary supplements for human consumption; Non-medicated additives for animal feed for use as nutritional supplements; Nutraceuticals for use as a dietary supplement" in International Class 005 (the "NUTRI-PACS Mark"), by applicant, Casey Petraceuticals, Inc., a North Carolina corporation having a place of business located at 8233 Belneath Ct., Raleigh, North Carolina 27613 (the "Applicant"), and hereby oppose the same.

As grounds in support for this opposition, Opposers allege the following:

1. NBTY is the owner of all right, title and interest in United States Trademark Registration No. 2,572,074, registered May 21, 2002, on the Principal Register for the trademark NUTRA-GAR for "Nutritional supplements" in International Class 005 (the "NUTRA-GAR Mark"). Affidavits under Sections 8 and 15 of the Trademark Act (15 U.S.C. § 1065) were filed and acknowledged by the PTO. Furthermore, NBTY's NUTRA-GAR Mark has acquired distinctiveness as a result of its continuous and exclusive use since at least May 1, 2000. Therefore, NBTY's right to use the NUTRA-GAR Mark on said goods is incontestable. (See Exhibit "A").

2. NBTY is the owner of all right, title and interest in United States Trademark Registration No. 2,572,075, registered May 21, 2002, on the Principal Register for the trademark NUTRA GAR AND DESIGN for "Nutritional supplements" in International Class 005 (the "NUTRA GAR Mark"). Affidavits under Sections 8 and 15 of the Trademark Act (15 U.S.C. § 1065) were filed and acknowledged by the United States Patent and

Trademark Office ("PTO"). Furthermore, NBTY's NUTRA GAR Mark has acquired distinctiveness as a result of its continuous and exclusive use since at least May 1, 2000. Therefore, NBTY's right to use the NUTRA GAR Mark on said goods is incontestable. (See Exhibit "B"). The NUTRA-GAR and the NUTRA GAR Marks are collectively referred to herein as the "NUTRA GAR Marks".

3. Vitamin World has common law and prior use of the mark NUTRA PAKS in connection with vitamins and nutritional supplement systems (referred to as the "NUTRA PAKS Mark"). Vitamin World has been using the NUTRA PAKS Mark in connection with vitamins and nutritional supplement systems and other related goods, products and services since at least April 1, 2008 and will be using the NUTRA PAKS Mark in commerce as of on or before May 15, 2008.

4. NBTY manufactures and markets in the United States, and beyond, nutritional supplements and other similar goods, products and services under the famous and well-known NUTRA GAR Marks.

5. NBTY has been actively expanding its use of the NUTRA GAR Marks. Through such extensive and continuous use, NBTY has acquired significant and valuable interest in the NUTRA GAR Marks. This interest will be injured by Applicant's use of the NUTRI-PACS Mark, which is substantially similar to Opposer's valuable NUTRA GAR Marks and confusingly similar in appearance, sound, connotation, and commercial impression to NBTY's valuable NUTRA GAR Marks.

6. NBTY has continuously used its distinctive NUTRA GAR Marks since at least as early as May 1, 2000, more than seven (7) years before Applicant filed its intent to use application for the proposed NUTRI-PACS Mark.

7. NBTY has been actively using the NUTRA GAR Marks. Through such extensive and continuous use, NBTY has acquired significant and valuable interest in the NUTRA GAR Marks and the goods, products and services offered thereunder. These interests will be injured by Applicant's use of the NUTRI-PACS Mark, which is confusingly, substantially similar in appearance, sound, connotation, and commercial impression to NBTY's valuable NUTRA GAR Marks.

8. NBTY has expended considerable time, money and effort in advertising and promoting the NUTRA GAR Marks and the goods, products and services sold under the marks, and in developing substantial and exclusive goodwill and reputation in connection with the NUTRA GAR Marks, and the goods, products and services with which the NUTRA GAR Marks are used.

9. As a result of these expenditures, combined with substantial sales of quality goods under the NUTRA GAR Marks, the relevant consuming public has come to recognize the NUTRA GAR Marks as favorably distinguishing NBTY's goods, products and services from those of others.

10. NBTY has clear priority with respect to the use and registration of the NUTRA GAR Marks, or any mark confusingly similar thereto, in connection with nutritional supplements and other similar goods, products and services.

11. The dominant portion of Applicant's NUTRI-PACS Mark is confusingly similar in appearance, sound, spelling, connotation and commercial impression to the dominant portion of the NBTY's NUTRA GAR Marks.

12. Applicant seeks to register a mark that is confusingly similar to the NUTRA GAR Marks, and will be used in connection with goods, products and services which are

substantially similar to those goods, products and services sold under the NUTRA GAR Marks.

13. Applicant's goods, products and services that are or may be sold under its NUTRI-PACS Mark are or will be offered through the same or similar channels of trade and to the same or similar class of consumers as NBTY's goods, products and services.

14. Applicant's use and registration of the NUTRI-PACS Mark will cause NBTY injury because such use is likely to cause confusion or mistake, or both, by wrongly leading consumers to believe that NBTY provides, or somehow is associated with Applicant's goods, products and services.

15. These consumers, upon purchasing, using or otherwise receiving Applicant's goods, products and services bearing the NUTRI-PACS Mark are likely to be confused and deceived, and are likely to believe in the existence of some association between the Applicant or Applicant's goods, products and services and NBTY, all to the injury of the NUTRA GAR Marks.

16. Applicant's use and registration of the NUTRI-PACS Mark will dilute the distinctive quality of and diminish or detract from the prior rights firmly established by NBTY in and to the NUTRA GAR Marks.

17. In addition, the NUTRI-PACS Mark is merely descriptive.

18. Vitamin World, by virtue of its NUTRA PAKS Mark, is engaged in the manufacture, sale and use of the same or related goods as those listed in Applicant's application for the registration of the NUTRI-PACS Mark and Vitamin World reasonably expects to use the NUTRA PAKS Mark in the normal expansion of its business and vitamin and dietary and nutritional supplement product lines.

19. Vitamin World has a real interest in this proceeding because it has a present and future right to use the term NUTRA PAKS, or any term similar thereto, descriptively in its business.

20. Applicant's use and registration of the descriptive mark NUTRI-PACS for the same or related goods associated with Vitamin World's NUTRA PAKS Mark will diminish or detract from the rights of Vitamin World to use the NUTRA PAKS Mark.

21. Please charge any additional fees to Deposit Account No. 501,844 and direct all correspondence in connection with this opposition to the undersigned.

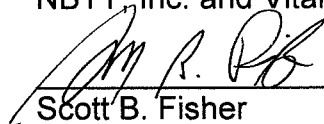
WHEREFORE, refusal of the registration applied for by Application Serial No. 77/311,041 is respectfully submitted to be in order and is hereby requested.

Dated: May 8, 2008
Garden City, New York

Respectfully submitted,

NBTY, Inc. and Vitamin World, Inc.

By:

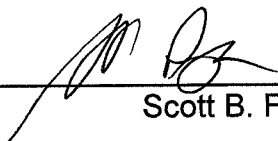


Scott B. Fisher
Kei Robert Hirasawa
Jaspan Schlesinger Hoffman LLP
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Garden City, New York 11530
Tel. (516) 746-8000
Fax (516) 393-8282

*Attorneys for Opposers
NBTY, Inc. and Vitamin World, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF OPPOSITION** was served on the applicant and owner of record, Casey Petraceuticals, Inc., identified in the Trademark Applications and Registrations Retrieval system, by mailing a copy thereof, via First Class Mail, in a properly addressed, postage prepaid wrapper, addressed to Casey Petraceuticals, Inc., 8233 Belneath Ct., Raleigh, North Carolina 27613-6961, on May 8, 2008.



Scott B. Fisher

EXHIBIT “A”



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Typed Drawing

Word Mark NUTRA-GAR
Goods and Services IC 005. US 006 018 044 046 051 052. G & S: Nutritional supplements. FIRST USE: 20000501. FIRST USE IN COMMERCE: 20000501
Mark Drawing Code (1) TYPED DRAWING
Serial Number 76044617
Filing Date May 10, 2000
Current Filing Basis 1A
Original Filing Basis 1B
Published for Opposition April 10, 2001
Registration Number 2572074
Registration Date May 21, 2002
Owner (REGISTRANT) NBTY, INC. CORPORATION DELAWARE 90 Orville Drive Bohemia NEW YORK 11716
Attorney of Record Lee Grosskreuz Hechtel, Irene B. Fisher
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE

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Serial Number: 76044617 Assignment Information Trademark Document Retrieval

Registration Number: 2572074

Mark (words only): NUTRA-GAR

Standard Character claim: No

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2007-07-16

Filing Date: 2000-05-10

Transformed into a National Application: No

Registration Date: 2002-05-21

Register: Principal

Law Office Assigned: LAW OFFICE 115

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 40S -Scanning On Demand

Date In Location: 2007-08-30

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. NBTY, INC.

Address:

NBTY, INC.
90 Orville Drive
Bohemia, NY 11716
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Delaware

GOODS AND/OR SERVICES

International Class: 005

Class Status: Active

Nutritional supplements

Basis: 1(a)

First Use Date: 2000-05-01

First Use in Commerce Date: 2000-05-01

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2007-08-30 - Case File In TICRS

2007-07-16 - Section 8 (6-year) accepted & Section 15 acknowledged

2007-06-21 - Assigned To Paralegal

2007-05-29 - Section 8 (6-year) and Section 15 Filed

2007-05-29 - TEAS Section 8 & 15 Received

2007-05-22 - Counter claim opp. for Proceeding No.

2006-10-21 - Attorney Revoked And/Or Appointed

2006-10-21 - TEAS Revoke/Appoint Attorney Received

2002-05-21 - Registered - Principal Register

2002-02-07 - Allowed for Registration - Principal Register (SOU accepted)

2002-01-11 - Assigned To Examiner

2002-01-09 - Statement of use processing complete

2001-12-18 - Amendment to Use filed

2001-07-03 - Notice of allowance - mailed

2001-04-10 - Published for opposition

2001-03-28 - Notice of publication

2000-09-29 - Approved for Pub - Principal Register (Initial exam)

2000-09-27 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

Lee Grosskreuz Hechtel, Irene B. Fisher

Correspondent

Lee Grosskreuz Hechtel, Irene B. Fisher

NBTY, Inc.

Legal Dept.

90 Orville Drive

Bohemia NY 11716

Phone Number: 631 218 7335

Fax Number: 631 218 7341

EXHIBIT “B”



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Word Mark	NUTRA GAR
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional supplements. FIRST USE: 20000501. FIRST USE IN COMMERCE: 20000501
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	25.03.04 - Backgrounds covered with circles or ellipses 26.11.01 - Rectangles as carriers or rectangles as single or multiple line borders
Serial Number	76044618
Filing Date	May 10, 2000
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	March 27, 2001
Registration Number	2572075
Registration Date	May 21, 2002
Owner	(REGISTRANT) NBTY, INC. CORPORATION DELAWARE 90 Orville Drive Bohemia NEW YORK 11716
Attorney of Record	Lee Grosskreuz Hechtel, Irene B. Fisher
Description of Mark	The mark consists of a clove of garlic, the words "NURTA GAR" against a dark rectangular background, and two rows of dark circles that appear below the rectangle.
Type of Mark	TRADEMARK
Register	PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).
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Serial Number: 76044618 Assignment Information Trademark Document Retrieval

Registration Number: 2572075

Mark



(words only): NUTRA GAR

Standard Character claim: No

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2007-07-16

Filing Date: 2000-05-10

Transformed into a National Application: No

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Bohemia, NY 11716
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Delaware

GOODS AND/OR SERVICES

International Class: 005
Class Status: Active
Nutritional supplements
Basis: 1(a)
First Use Date: 2000-05-01
First Use in Commerce Date: 2000-05-01

ADDITIONAL INFORMATION

Description of Mark: The mark consists of a clove of garlic, the words "NURTA GAR" against a dark rectangular background, and two rows of dark circles that appear below the rectangle.

Design Search Code(s):

25.03.04 - Backgrounds covered with circles or ellipses
26.11.01 - Rectangles as carriers or rectangles as single or multiple line borders

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

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2001-03-14 - Notice of publication

2000-11-01 - Approved for Pub - Principal Register (Initial exam)

2000-10-20 - Examiner's amendment mailed

2000-09-27 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

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