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Filing date: **04/28/2014**

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

Proceeding	91205803
Party	Defendant Hercules Brand Corporation
Correspondence Address	HENRY P CHEATHAM HERCULES BRAND CORPORATION 630 FIFTH AVENUE, STE 2000 NEW YORK, NY 10111 UNITED STATES hcheatham@herculesbrand.com
Submission	Opposition/Response to Motion
Filer's Name	Henry P. Cheatham, III
Filer's e-mail	hcheatham@herculesbrand.com
Signature	/Henry P. Cheatham, III/
Date	04/28/2014
Attachments	Applicant Opposition to Opposer's Second Motion to Amend.pdf(662999 bytes )

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

In the Matter of Application:

Serial No.: 85/505,191  
Filed: December 28, 2011  
Applicant: Hercules Brand Corporation  
Mark: VERTOX  
Published: May 29, 2012

VERTEX PHARMACEUTICALS INCORPORATED,  Opposer,  -against-  HERCULES BRAND CORPORATION,  Applicant.
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**Opposition No. 91205803**

**Applicant Response to Opposer's Second  
Motion to Amend the Notice of Opposition**

**APPLICANT RESPONSE TO OPPOSER'S SECOND  
MOTION TO AMEND THE NOTICE OF OPPOSITION**

Hercules Brand Corporation (“Applicant”) contests Vertex Pharmaceuticals, Inc.’s (“Opposer’s”) **second** Motion to Amend the Notice to Opposition on the grounds that Opposer’s motion is untimely and Opposer has unclean hands. Although Fed. R. Civ. P. 15 allows one to amend the notice of Opposition after the trial begins, that only applies where “...justice so requires...”<sup>1</sup> and that is not the case at bar. Here, Opposer’s dilatory **second** Motion to Amend is unreasonable in light of Opposer’s bad faith conduct and should be denied. If, however, the Trademark Trial and Appeal Board (the “Board”) grants the motion, Applicant contends that the additional claims are without merit and proffers evidence in support of its bona fide intention to use and actual use of the VERTOX mark (Serial No. 85/505,191).

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<sup>1</sup> Fed. R. Civ. P 15a

I. OPPOSER'S MOTION IS UNTIMELY AS IT WAS NOT BROUGHT AS SOON AS THE ALLEGED EVIDENCE WAS UNCOVERED.

Opposer's Motion to Amend the Notice of Opposition is untimely. Amendments to Notices of Opposition are governed by Fed. R. Civ. P. 15, Amended and Supplemental Pleadings<sup>2</sup> and the Trademark Manual of Board Procedure (TMBP) §507<sup>3</sup>. Motions to Amend based on newly discovered evidence should be filed as soon as said evidence is uncovered<sup>4</sup>. "Opposers must identify all claims promptly in order to provide respondent with proper notice<sup>5</sup>. Unfair prejudice to the applicant results when an opposer brings a unreasonably late motion because it increases the time, effort, and money the applicant must expend to defend against opposer's new claims<sup>6</sup>." When there is no question of new evidence, an unexplained delay in filing a motion to amend renders the amendment untimely<sup>7</sup>.

**The Opposer has been aware of the facts that the new claims are based upon for an extended period of time and should not be granted leave to amend the Notice of Opposition to include these usage claims<sup>8</sup>. According to Opposer, the factual basis for its initial motion to amend was discovered during Applicant's deposition on 18 December 2013<sup>9</sup>. They contend that during said deposition they learned that the VERTOX mark is used in connection with dietary supplements. However, prior to December 2013, the use of the term dietary supplement in relation to the Vertox mark was discussed during the parties' settlement negotiations. Opposer was aware of Applicant's use of the term in the Fall of 2012; during discussions, with the knowledge that one product may fall under several descriptive headings and even**

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<sup>2</sup> FRCP 15

<sup>3</sup> TMBP §507

<sup>4</sup> See *Black & Decker Coprp. V. Emerson Electric Co.*, 84 U.S.P.Q.2d 1482, 2007 WL 894416 (TTAB 2007); *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285 (2008)

<sup>5</sup> See, *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285 (2008)

<sup>6</sup> See, *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285 (2008)

<sup>7</sup> See, *International Finance Company v. Bravo Co.*, 64 USPQ2d 1597, 1604 (TTAB 2002)

<sup>8</sup> See, *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285 (2008); *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540 (TTAB 2001).

<sup>9</sup> Opps.'s Motion to Amend Pleading at 3 (14 January 2014)[Dkt. 25]

international classes<sup>10</sup> and believing in good faith that the descriptive terms “dietary supplement” and “vitamin” were interchangeable<sup>11</sup>, Applicant offered to withdraw its current application and file a new application with “dietary supplement” as the goods description, if Opposer agreed not to file an opposition to the new application. This offer was rejected; nonetheless, Opposer knew of the distinction between the term on the label of the Product for which Applicant seeks the VERTOX mark as early as Fall 2012. However, even accepting the premise that Opposer first learned of this product category usage during discovery, the timeline was still five (5) months prior to this motion<sup>12</sup> and four (4) months after they brought their first Motion to Amend their Notice of Opposition<sup>13</sup>, which was denied. It is unjust to grant Opposer’s Motion because too much time has passed and Applicant would be disadvantaged if it was required to defend the new claims.

A. IF OPPOSER’S MOTION IS GRANTED, APPLICANT WOULD BE UNDULY PREJUDICED

If Opposer’s Motion to Amend the Notice of Opposition is granted, undue prejudice to the Applicant will result. Applicant had no notice of Opposer’s reliance on and intention to again amend the Notice of Opposition to include usage claims when it travelled to Boston, Massachusetts on 28 March 2014 to cross examine Opposer’s witness during Opposer’s testimonial period. Opposer’s Notice of Deposition mentions “use;” however, it does so only in reference to lines of inquiry related to the existing claim of likelihood of confusion<sup>14</sup>. Although the matter was previously brought up in Opposer’s initial Motion to Amend<sup>15</sup>, the denial of said motion and the failure to mention their intent during Opposer’s testimonial period lulled Applicant into believing that

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<sup>10</sup> See, *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 312 F.2d 125, 136 U.S.P.Q. 236 (1963)

<sup>11</sup> 21 U.S.C. 321 (ff)

<sup>12</sup> Deposition of Henry P. Cheatham, III (18 December 2013)

<sup>13</sup> Opps.’s Motion to Amend Pleading (14 January 2014)[Dkt. 25]

<sup>14</sup> See Exhibit , “Notice of Taking Trial Testimony Deposition of Vertex Pharmaceuticals, Inc.”

<sup>15</sup> Opps.’s Motion to Amend Pleading (14 January 2014)[Dkt. 25]

Opposer would not act in furtherance of any new claim(s)<sup>16</sup>. If Applicant was aware of Opposer's decision to file this Motion to Amend the Notice of Opposition on usage grounds, it would have potentially been able to inquire about the matter with Opposer's witness to further its case. Virginia Carnahan, Vertex Pharmaceutical, Inc.'s Vice President of Commercial and Strategic Management, Opposer's witness, could have given testimony that would have furthered Applicant's contention that the VERTOX mark is properly described in the Application and Amendment to Allege Use. Moreover, Opposer has represented to Applicant that it wishes to settle and has continually obliged Applicant to reformat its label in pursuit of said settlement while Opposer makes repeated excessive motions; Applicant was preoccupied expending its energies toward settlement, which Opposer knew when it brought this motion.

## II. OPPOSER'S MOTION SHOULD BE DENIED BECAUSE OPPOSER HAS UNCLEAN HANDS

Opposer's bad faith settlement negotiations and excessive motion practice support denial of this **second** Motion to Amend. The Doctrine of Unclean Hands "... is found when such standards as the following are violated: justice, good faith, uprightness, fairness and conscientiousness; conscience, good faith or other equitable principle; or public policy." "The Doctrine bars relief to a plaintiff ... has dirtied his hands in acquiring the right presently asserted." Good faith requires "A state of mind consisting [of] ...observance of reasonable commercial standards of fair dealing in a given trade or business, or ... absence of intent ... to seek unconscionable advantage." The conduct of a party against whom the unclean hands doctrine is asserted does not need to be criminal in nature to rise to the level required for this defense<sup>17</sup>. Opposer's conduct rises to the requisite level intentioned by the unclean hands doctrine and as such the Board should deny their Motion to Amend the Notice of Opposition.

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<sup>16</sup> See, *Bridgestone / Firestone Research, Inc. v. Automobile Club De L'Ouest De La France*, 58 USPQ2dv 1460 (TTAB 2001)

<sup>17</sup> *United States Jaycees v. Ceder Rapids Jaycees*, 794 F.2d 379, 383, 230 U.S.P.Q. 340, 342 (8<sup>th</sup> Cir. 1986)

Opposer has violated the tenants of fair dealings in its interactions with Applicant and thusly should have its Motion to Amend denied. “Settlement of legal disputes is a highly favored course of conduct for which a party should be rewarded, not penalized<sup>18</sup>.” Applicant has diligently reallocated its limited business resources to work in pursuit of settlement and to defend its Application and Amendment to Allege Use in litigation, all while Applicant conducts daily business operations. Throughout this action Applicant has continued its zealous search for an equitable settlement so that each party may go back to their respective businesses. In keeping with this commitment, Applicant has spent multiple business resources testing new label layouts and generally negotiating proposed terms in good faith to find amenable solutions<sup>19</sup>; however, following each offer to settle, Opposer also would then file unnecessary and lengthy motions. During this time Opposer has filed a total of three (3) motions each within a month of each other – one Motion to Amend that alleged **very serious new claims of fraud** and nonuse, one Motion for Summary Judgment that was a total of **three hundred and fifty (350) pages**, and finally the present Motion to Amend that again brings up usage claims. In fact the summary judgment, which the Board denied due to its excessive length, came before the first motion was even decided and this **second** Motion to Amend on the heels of another Opposer settlement offer. It is Applicant’s contention that Opposer is not acting in good faith. Opposer has attempted to intimidate Applicant by engaging Applicant in settlement discussions and then overwhelming Applicant in paperwork to which Applicant must carefully respond for fear of losing a legal right – both of which Opposer knows require Applicant to allocate the same small business resources. **Although Opposer spoke of the intent to settle, Opposer acts contrary to said intention.**

Opposer’s inappropriate behavior has occurred during the course of this action and with the aim to further its allegedly superior trademark right. If granted, Opposer will be able to offer

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<sup>18</sup> *Varitronics Sys.v. Merlin Equip.*, 682 F.Supp. 1203, 6 U.S.P.Q.2d 1789 (S.D. Fla. 1988)

<sup>19</sup> *NAACP v. NAACP Legal Def. & Educ. Fund., Inc.*, 753 F.2d 131 (D.C. Cir. 1985)

evidence in support of its allegation that Applicant had no intent to use, nor did Applicant in fact use the VERTOX mark in connection with the goods services listed in its trademark documentation. In fact, with this Motion Opposer seeks to have Applicant's VERTOX mark void *ab initio*<sup>20</sup> in an effort to assert Opposer's alleged right of priority. Applicant, a small corporation with minimal assets acting *pro se*, requests that the Board deny the current motion put forth by Opposer, a large publically traded corporation with the aid of top outside counsel. Applicant should not be punished for actively seeking an amiable solution in the shadow the mounds of paper Opposer has filed before the Board<sup>21</sup>, which is exactly what Opposer seeks to achieve with the current motion. Applicant requests that the Board deny Opposer's Motion to Amend because it should be barred by the Unclean Hands Doctrine.

### III. APPLICANT FILED ITS INTENT TO USE APPLICATION WITH THE BONA FIDE INTENT TO USE THE MARK FOR MULTI-VITAMIN PREPARATIONS; VITAMIN AND MINERAL SUPPLEMENTS; VITAMINS

Applicant had a bona fide good faith intention to use the VERTOX mark in connection with "Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins." According to Lanham Act Section 1(b)(1), "A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" may apply for registration of the mark. According to T.M.R.P. 2.86(a), an application may be filed for any or all of the goods in connection with which the mark is intended to be used<sup>22</sup>. Although the term "bona fide" is not defined in the Act, "...the Senate included, and the House retained in revised form[,] a good faith requirement in section 1(b)<sup>23</sup>." A bond fide intention is thusly one: "made in good faith; without fraud or deceit<sup>24</sup>." This belief is a "...firm [intention] though it may be contingent on the outcome of an event – e.g.

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<sup>20</sup> *Academy Award Products, Inc, v, Bulova Watch Co.*, 129 F. Supp. 780, 105 U.S.P.Q.2d 1929 (S.D.N.Y. 1955)

<sup>21</sup> See, *Trek Bicycle Corporation v. Styletrek Limited*, 64 USPQ2d 1540 (TTAB 2001)

<sup>22</sup> T.M.R.P. 2.86(a)

<sup>23</sup> *McCarthy* § 19:14 at 19-44 (2011) (Citing USTA, "The Trademark Law Rev. Act of 1988." Comment on Section 1(b) at p. 43 (1989))

<sup>24</sup> Black's (9<sup>th</sup> ed. 2009), bona fide

product testing or market research...<sup>25</sup>” The evidence required to prove bona fide intent must be objective – “...in the form of real life facts and by the actions of the applicant, not by the applicant’s testimony as to its subjective state of mind<sup>26</sup>.” Examples of such objective evidence include: “product or service research or development, market research, manufacturing activities, steps to acquire distributors, steps to obtain required governmental approval, or other similar activities<sup>27</sup>.” In light of the aforementioned, Applicant contends that it had a bona fide intent to use the VERTOX mark in connection with Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins.

In good faith in “...observance of reasonable commercial standards of fair dealing in a given trade or business ...<sup>28</sup>” Applicant retained counsel<sup>29</sup> to assist with its application for the VERTOX mark. In communication between Applicant and counsel prior to and around the time of application, the terms Dietary Supplement and Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins were used interchangeably. The Food and Drug Administration definition of a dietary supplement supported this classification because it integrates the terms<sup>30</sup>. Moreover, according to The National Institute of Health, “No standard or regulatory definition is available for an [multivitamin] ... supplement—such as what nutrients it must contain and at what levels. Therefore, the term can refer to products of widely varied compositions and characteristics<sup>31</sup>.” Applicant felt confident that dietary supplements, like “Vitamins are organic substances ([derived from] ...plants or animals), minerals are inorganic elements that come from the earth; soil and water

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<sup>25</sup> Report of the Trademark Review Commission, 77 Trademark Rep. 375, 397 \*1987), USTA, “The Trademark Law Rev. Act of 1988,” p. 37 (1989)

<sup>26</sup> *McCarthy* § 19:14 at 19-46 (2011)

<sup>27</sup> T.M.R.P. 2.89(d)

<sup>28</sup> Black’s Law Dictionary (*hereinafter* “Black’s”) (9<sup>th</sup> ed. 2009), good faith

<sup>29</sup> Motion to Withdraw as Counsel for Applicant (4 September 2013)[Dkt. 20]

<sup>30</sup> 21 U.S.C. 321 (ff)

<sup>31</sup> NIH (National Institutes of Health, Office of Dietary Supplements). Multivitamin/mineral Supplements Fact Sheet for Health Professionals. January 2013



and are absorbed by plants. ... that [aid physiological]...grow[th] and develop[ment]...<sup>32</sup>” Accordingly, Applicant applied for the mark under the goods description Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins. As evidenced by the correspondence with then counsel in Exhibit B from the critical time in question, the Application was made with the requisite belief that it was appropriately descriptive.

#### IV. APPLICANT’S AMENDMENT TO ALLEGE USE IN OF THE VERTOX MARK IN ASSOCIATION WITH MULTI-VITAMIN PREPARATIONS; VITAMIN AND MINERAL SUPPLEMENTS; VITAMINS WAS LAWFUL

Applicant properly filed its Amendment to Allege Use in connection with Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins because “...the mark has been used on or in connection with all of the goods or services specified in the application...<sup>33</sup>” “Adopting a realistic view of the difficulty of deciding whether a given use is sufficient ... the Board [has] held that when [an] applicant files an application in good faith reliance on a borderline transaction,...<sup>34</sup>” use in commerce will be found. “Deference should be given to the language set forth by the applicant in the original application<sup>35</sup>.” The VERTOX mark has been in use in commerce since 16 February 2012. Based on the definitions of the terms, vitamin, mineral, and “dietary supplement<sup>36</sup>,” and the fact that the product for which Applicant seeks the VERTOX mark contains ingredients with vitamins and minerals that are “...essential to health ,” Applicant reasonably believed the Multi-vitamin preparations; Vitamin and mineral supplements; Vitamins description within International Class 005 was appropriate. As such the sale of said product as noted in Exhibit C, illustrate the actual use of the VERTOX mark and the validity of Applicant’s Amendment to Allege Use.

#### V. CONCLUSION

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<sup>32</sup> See, Center for Disease Control and Prevention, available at <http://www.cdc.gov/nutrition/everyone/basics/vitamins/index.html> (parenthetical appears in the original CDC definition)

<sup>33</sup> McCarthy § 19:21 at 19-56 (2011)

<sup>34</sup> McCarthy 31:72at 31-159 (2011)

<sup>35</sup> Trademark Manual of Examining Procedure Section 1402.01(a)

<sup>36</sup> 21 U.S.C. 321 (ff)

Applicant, Hercules Brand Corporation, requests that the Trademark Trial and Appeals Board deny Opposer's, Vertex Pharmaceuticals, Inc.'s **second** Motion to Amend the Notice of Opposition and permit registration of Hercules's proposed mark in Application Serial No. 85,505,191 in the U.S. Patent and Trademark Office.

Dated: 28 April 2014

HERCULES BRAND CORPORATION,

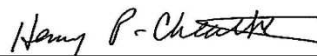


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Henry P. Cheatham III  
Vice President, Hercules Brand  
630 Fifth Avenue, Suite 2000  
New York, New York 10111 USA  
(212) 813 - 8000  
hcheatham@herculesbrand.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document has been served, by email on 28 April 2014, to Opposer's Legal Counsel, Sharona H. Sternberg, SUNSTEIN KANN MURPHY & TIMBERS LLP, 125 Summer Street, Boston, Massachusetts, 02110-1618 (617) 443-9292, ssternberg@sunsteinlaw.com.



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Henry P. Cheatham III

## **EXHIBIT A**

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

In the Matter of Application:

Serial No.: 85/505,191

Filed: December 28, 2011

Applicant: Hercules Brand Corporation

Mark: VERTOX

For: Multi-vitamin preparations; vitamin and mineral supplements; vitamins

Published: May 29, 2012

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VERTEX PHARMACEUTICALS )  
INCORPORATED, )  
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Opposer, )  
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v. )  
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HERCULES BRAND CORPORATION )  
 )  
Applicant. )

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Opposition No. 91205803

NOTICE OF TAKING TRIAL TESTIMONY DEPOSITION OF VERTEX  
PHARMACEUTICALS, INC.

To: Henry Cheatham  
Hercules Brand Corporation  
630 Fifth Avenue, Suite 2000  
New York, NY 10111

Please take notice that, at 1:00 pm on March 28, 2014, at the offices of Sunstein Kann Murphy & Timbers LLP at 125 Summer Street Boston Massachusetts, Opposer in this action, Vertex Pharmaceuticals Incorporated, by its attorneys, will take the trial testimony upon oral examination of Virginia Carnahan, Vice President of Commercial and Strategic Management, Vertex Pharmaceuticals Incorporated, pursuant to 37 C.F.R. § 2.123 and applicable provisions of the Federal Rules of Civil Procedure and the Trademark Rules of Practice, before a notary public

in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths, with respect to the following matters:

- (1) The selection, adoption, registration, and use of the VERTEX marks associated with U.S. Registration Nos. 1,630,448, 2,578,974, 2,704,913, and 3,531,356 (“the VERTEX and VERTEX (plus design)” marks);
- (2) Vertex’s business;
- (3) the channels of trade in which the goods and services identified in the VERTEX and VERTEX (plus design) registrations travel;
- (4) the consumers of such goods and services;
- (5) the nature of the goods and services of Applicant and Opposer and the associated consumers and channels of trade;
- (6) the facts and circumstances surrounding Opposer’s claim that Applicant's use and registration of the proposed VERTOX mark will cause purchasers, prospective purchasers, users and others to be confused, mistaken or deceived into the belief, contrary to fact, that Applicant’s goods emanate from or are sponsored or approved by Opposer or are related to Opposer's goods and services, thereby damaging Opposer;
- (7) other relevant information regarding the likelihood of confusion in this case; and
- (8) any other topic(s) concerning the registration or use of the VERTEX and VERTEX (plus design) marks that may be relevant to this proceeding.

You are invited to attend and cross-examine.

Dated: Boston, Massachusetts  
March 24, 2014

VERTEX PHARMACEUTICALS  
INCORPORATED  
By its attorneys,

/s/ Sharona H. Sternberg  
Sharona H. Sternberg  
Lisa M. Tittmore  
Steven A. Abreu  
SUNSTEIN KANN MURPHY & TIMBERS LLP  
125 Summer Street  
Boston, Massachusetts 02110-1618  
(617) 443-9292

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Opposer's Second Set of Interrogatories to Applicant has been served, by email on March 24, 2014, to Applicant's representative of record, Henry Cheatham, 630 Fifth Avenue, Suite 2000, New York, New York 10111, hcheatham@herculesbrand.com.

/s/Sharona H. Sternberg  
Sharona H. Sternberg

01618/05081 2073206.1

## **EXHIBIT B**



**From:** [Jan Sabo](#)  
**To:** [Smedresman, Scott](#); [Shela Trinidad](#)  
**Cc:** [Bialek, Adam](#); [Shela Trinidad](#); [Henry Cheatham](#)  
**Subject:** "VERTOX" wordmark trademark - please advise when and how to apply  
**Date:** Thursday, November 10, 2011 12:46:24 PM  
**Attachments:** [Hercules Vitamins label - VERTOX - trademarks highlighted.pdf](#)  
[Hercules vitamins - bottle, cap, label - placeholder.jpg](#)  
[Hercules Trademark Deadline chart 08.31.11.pdf](#)

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Hello Scott,

I would like to introduced my CCd' colleagues Shela Trinidad (Product Manager, 212 813 8000 x 312) and Henry (Hank) Cheatham (VP Product Development & Branding, 212 813 8000 x 315 who are working with me on trademarking of our product portfolio.

Thanks for the below email. Just wanted to make a correction –for trademarking purposes, please use our corporate address at 630 Fifth Avenue, Suite 2000, New York, NY 10111, USA, phone +1 212 813 8000

I have a quick question about the most appropriate type of application US trademark application to prepare for the VERTOX word mark at this time.

This product name VERTOX is the name we are giving to our product technically called supreme greens with resveratrol. It is a multi-ingredient dietary supplement, and we wanted to give it a nice snappy name, so we chose the name VERTOX.

The timeline for launching this product is January 2012. I understand that we have a choice of:

- a) submitting an intent to use application now, in mid-November 2011, only to submit evidence of trademark usage sometime in January 2012 for this product and for our remaining marks.
- b) we can wait until January 2012 and submit a full trademark application with existing evidence of trademark usage for this mark, and also for our other intent-to-use marks.

[REDACTED]

[REDACTED]

There are several places where we are using the marks, most obviously on the relevant product label. The VERTOX product label design (...to be attached as a sticker on a bottle, as per the attached photo) is enclosed, and is representative of our other label designs.

Please advise.

Many thanks,

Ján

**Ján Sabo** | Vice President, International Relations  
Hercules Brand | Long Island  
66 Powerhouse Road, Suite 301 | Roslyn Heights, New York 11577 | USA

Hercules Brand | New York  
630 Fifth Avenue, Suite 2000 | New York City, New York 10111 | USA  
T +1 212 813 8000 x308 | F +1 212 899 5559 | M +1 646 330 0518

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**From:** Smedresman, Scott [mailto:Scott.Smedresman@wilsonelser.com]  
**Sent:** Thursday, November 03, 2011 4:29 PM  
**To:** Jan Sabo; Shela Trinidad  
**Cc:** Bialek, Adam  
**Subject:** RE: Please proceed to register "VERTOX" wordmark trademark

Jan:

Adam is on the West Coast, but he and I have discussed your inquiry. He sends his regards. Below if our reply.

The next steps depend on where (the countries) you would like to file applications for this trademark.

We would propose a budget of [REDACTED] to file this application in the U.S., in Class 5, covering "Multi-vitamin preparations; vitamin and mineral supplements; vitamins," as an Intent-to-Use trademark, in the name of Hercules Brand Corporation, a New York corporation, with an address at 66 Powerhouse Rd., Suite 301, Roslyn Heights, NY 11577. [REDACTED]

[REDACTED] If you would like us to proceed with a U.S. application with these details, we can have the application on file shortly.

[REDACTED]

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[REDACTED]

[REDACTED]

Please let us know if you would like to proceed. We are available to file upon instruction.

Regards,

Scott Smedresman  
Attorney At Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
150 E 42nd Street  
New York, NY 10017  
212-915-5309 (Direct)  
212-490-3000 (Main)  
212-490-3038 (Fax)  
[scott.smedresman@wilsonelser.com](mailto:scott.smedresman@wilsonelser.com)

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**From:** Jan Sabo [mailto:JSabo@herculesbrand.com]  
**Sent:** Thursday, November 03, 2011 11:44 AM  
**To:** Bialek, Adam  
**Cc:** Smedresman, Scott; Shela Trinidad  
**Subject:** Please proceed to register "VERTOX" wordmark trademark

Dear Adam,

We have decided to proceed with the trademark application for "VERTOX" after all (...sic, VERTOX, despite the UK brand of rodent poison...).

We want to apply for this trademark as a word mark in the same category as our other vitamin

trademarks. Please advise on the precise next steps and budget.

I understand that a detailed trademark search is recommended – we have considered it, and decided to proceed straight to registration

Many thanks,

Ján

**Ján Sabo** | Vice President, International Relations

Hercules Brand | Long Island

66 Powerhouse Road, Suite 301 | Roslyn Heights, New York 11577 | USA

Hercules Brand | New York

630 Fifth Avenue, Suite 2000 | New York City, New York 10111 | USA

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[Redacted content]

**From:** [Smedresman, Scott](#)  
**To:** [Jan Sabo](#)  
**Cc:** [Bialek, Adam](#); [Shela Trinidad](#)  
**Subject:** RE: Please proceed to register "VERTOX" wordmark trademark  
**Date:** Monday, November 28, 2011 9:35:02 AM

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Jan:

[REDACTED]

To proceed with the U.S. VERTOX application, please confirm the following:

Mark: VERTOX (no stylization)

Owner: Hercules Brand Corporation, a New York corporation, with an address at 66 Powerhouse Rd., Suite 301, Roslyn Heights, NY 11577;

Recitation: Class 5 - Multi-vitamin preparations; vitamin and mineral supplements; vitamins;

Status: Intent-to-Use (the trademark has not yet been used in the United States);

With your confirmation of the above information, we can file your trademark application.

Best regards,

Scott Smedresman  
Attorney At Law  
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## **EXHIBIT C**

**HERCULES BRAND CORP.**  
**Sales by Item Detail**  
 2012 Transactions

Type	Date	Num	Memo	Name	Class	Qty	U/M	Sales	
								Price	Amount
<b>Assembly</b>									
<b>HERC-VERTOX-60</b>									
Invoice	02/16/2012	0001	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/16/2012	0001	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/16/2012	0002	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0003	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0004	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0005	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0006	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0007	Vertox capsules 650mg - 60ct	REDACTED NY:New York, NY					
Invoice	02/21/2012	0008	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	02/23/2012	0009	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/23/2012	0010	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/23/2012	0011	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/23/2012	0012	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/23/2012	0013	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/23/2012	0014	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	02/27/2012	0015	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	02/27/2012	0015	Vertox 650 mg - 60 capsules - REDACTED	REDACTED VITAMINS					
Invoice	02/29/2012	0017	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	03/01/2012	0018	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	03/05/2012	0020	Vertox 650 mg - 60 capsules	REDACTED CA:Bellflower, CA					
Invoice	03/05/2012	0021	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	03/26/2012	0025	Vertox 650 mg - 60 capsules	REDACTED NY:New York, NY					
Invoice	03/27/2012	0026	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	03/29/2012	0027	Vertox 650 mg - 60 capsules	REDACTED NY:East Setauket, NY					
Invoice	04/02/2012	0029	Vertox 650 mg - 60 capsules	REDACTED NY:East Setauket, NY					
Invoice	04/03/2012	0030	Vertox 650 mg - 60 capsules	REDACTED NJ:Engelwood, NJ					
Invoice	04/03/2012	0031	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	04/03/2012	0032	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	04/03/2012	0033	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					
Invoice	04/03/2012	0034	Vertox 650 mg - 60 capsules	REDACTED VITAMINS					

**HERCULES BRAND CORP.**  
**Sales by Item Detail**  
 2012 Transactions

Type	Date	Num	Memo	Name	Class	Qty	U/M	Sales		Balance
								Price	Amount	
Invoice	04/03/2012	0037	Vertox 650 mg - 60 capsules	REDACTED	WI:Madison, WI					
Invoice	04/03/2012	0041	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/03/2012	0042	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/03/2012	0044	Vertox 650 mg - 60 capsules	REDACTED	NY:Brooklyn, NY					
Invoice	04/04/2012	0045	Vertox 650 mg - 60 capsules	REDACTED	NY:Commack, NY					
Invoice	04/04/2012	0046	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/05/2012	0047	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/05/2012	0048	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/09/2012	0051	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/09/2012	0052	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/10/2012	0056	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/13/2012	0057	Vertox 650 mg - 60 capsules	REDACTED	NY:Brooklyn, NY					
Invoice	04/13/2012	0058	Vertox 650 mg - 60 capsules	REDACTED	NY:Brooklyn, NY					
Credit M	04/17/2012	0060	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	04/17/2012	0061	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	04/19/2012	0062	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Credit M	04/19/2012	0063	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/20/2012	0065	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	04/20/2012	0066	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Credit M	04/23/2012	0068	Vertox 650 mg - 60 capsules	REDACTED						
Invoice	04/30/2012	0070	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Credit M	05/04/2012	0072	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	05/04/2012	0073	Vertox 650 mg - 60 capsules	REDACTED	IL:Chicago, IL					
Invoice	05/04/2012	0074	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	05/04/2012	0076	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Credit M	05/08/2012	0078	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	05/24/2012	0082	Vertox 650 mg - 60 capsules	REDACTED						
Invoice	05/25/2012	0084	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	05/30/2012	0086	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	06/28/2012	0097	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	07/13/2012	0100	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	07/19/2012	0101	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					



**HERCULES BRAND CORP.**  
**Sales by Item Detail**  
 2012 Transactions

Type	Date	Num	Memo	Name	Class	Qty	U/M	Sales		
								Price	Amount	Balance
Invoice	07/25/2012	0122	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	07/26/2012	0127	Vertox 650 mg - 60 capsules	REDACTED	CA:Sherman Oaks, CA					
Invoice	07/31/2012	0152	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	08/01/2012	0155	Vertox 650 mg - 60 capsules	REDACTED	CA:Irvine, CA					
Invoice	08/03/2012	0171	Vertox 650 mg - 60 capsules	REDACTED	NY:Garden City, NY					
Invoice	08/08/2012	0182	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	08/08/2012	0186	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	08/09/2012	0191	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	08/17/2012	0210	Vertox 650 mg - 60 capsules	REDACTED	NY:Ozone Park, NY					
Invoice	08/17/2012	0203	Vertox 650 mg - 60 capsules	REDACTED	NY:Richmond Hill, NY					
Invoice	08/29/2012	0206	Vertox 650 mg - 60 capsules	REDACTED	NJ:Cranford, NJ					
Invoice	08/29/2012	0207	Vertox 650 mg - 60 capsules	REDACTED	NJ:Cranford, NJ					
Invoice	08/29/2012	0208	Vertox 650 mg - 60 capsules	REDACTED	FL:Kissimmee, FL					
Invoice	08/30/2012	0205	Vertox 650 mg - 60 capsules	REDACTED	NY:Glen Oaks, NY					
Invoice	08/30/2012	0234	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	08/31/2012	0209	Vertox 650 mg - 60 capsules	REDACTED	VITAMINS					
Invoice	09/04/2012	0246	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	09/14/2012	0274	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	09/14/2012	0275	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	09/14/2012	0276	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	09/15/2012	0285	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	09/17/2012	0291	Vertox 650 mg - 60 capsules	REDACTED	NC:Mount Holly, NC					
Credit M	09/27/2012	0325	Vertox 650 mg - 60 capsules	REDACTED	NY:East Setauket, NY					
Invoice	09/28/2012	0331	Vertox 650 mg - 60 capsules	REDACTED	NM:Santa Fe, NM					
Invoice	09/28/2012	0332	Vertox 650 mg - 60 capsules	REDACTED	MO:St Peters, MO					
Invoice	09/28/2012	0333	Vertox 650 mg - 60 capsules	REDACTED	MA:East Boston, MA					
Invoice	10/02/2012	0336	Vertox 650 mg - 60 capsules	REDACTED	NY:Flushing, NY					
Invoice	10/02/2012	0337	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	10/03/2012	0343	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	10/05/2012	0349	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	10/15/2012	0367	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	10/15/2012	0370	Vertox 650 mg - 60 capsules	REDACTED	NE:Ohama, NE					

**HERCULES BRAND CORP.**  
**Sales by Item Detail**  
 2012 Transactions

Type	Date	Num	Memo	Name	Class	Qty	U/M	Sales		Balance
								Price	Amount	
Invoice	10/16/2012	0374	Vertox 650 mg - 60 capsules	REDACTED	NY:Manhasset, NY					
Invoice	10/16/2012	0378	Vertox 650 mg - 60 capsules	REDACTED	CA:Santa Fe Springs, CA					
Invoice	10/16/2012	0382	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	10/19/2012	0388	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	10/19/2012	0389	Vertox 650 mg - 60 capsules	REDACTED	CA:Davis, CA					
Invoice	10/22/2012	0396	Vertox 650 mg - 60 capsules	REDACTED	CA:Torrance, CA					
Invoice	10/25/2012	0414	Vertox 650 mg - 60 capsules	REDACTED	NY:Uniondale, NY					
Invoice	10/25/2012	0416	Vertox 650 mg - 60 capsules	REDACTED	NY:Bronx, NY					
Invoice	10/28/2012	0427	Vertox 650 mg - 60 capsules	REDACTED	NY:Mineola, NY					
Invoice	11/07/2012	0430	Vertox 650 mg - 60 capsules	REDACTED	MO:St Peters, MO					
Invoice	11/09/2012	0438	Vertox 650 mg - 60 capsules	REDACTED	NY:Glen Oaks, NY					
Invoice	11/12/2012	0441	Vertox 650 mg - 60 capsules	REDACTED	Russia					
Invoice	11/19/2012	0463	Vertox 650 mg - 60 capsules	REDACTED	NY:Westbury, NY					
Invoice	11/25/2012	0470	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	11/26/2012	0481	Vertox 650 mg - 60 capsules	REDACTED	NY:Roslyn Heights, NY					
Invoice	11/28/2012	0491	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	11/28/2012	0493	Vertox 650 mg - 60 capsules	REDACTED	CA:Van Nuys, CA					
Invoice	12/04/2012	0499	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	12/04/2012	0500	Vertox 650 mg - 60 capsules	REDACTED	NY:New York, NY					
Invoice	12/04/2012	0501	Vertox 650 mg - 60 capsules	REDACTED	NY:Floral Park, NY					
Invoice	12/04/2012	0502	Vertox 650 mg - 60 capsules	REDACTED	NY					
Invoice	12/04/2012	0508	Vertox 650 mg - 60 capsules	REDACTED	WA:Four Lakes, WA					
Invoice	12/05/2012	0513	Vertox 650 mg - 60 capsules	REDACTED	IA:Creston, IA					
Invoice	12/05/2012	0516	Vertox 650 mg - 60 capsules	REDACTED	MA:East Boston, MA					
Invoice	12/06/2012	0519	Vertox 650 mg - 60 capsules	REDACTED	MD:Fallston, MD					
Invoice	12/08/2012	0522	Vertox 650 mg - 60 capsules	REDACTED	NY:Rye, NY					
Invoice	12/10/2012	0524	Vertox 650 mg - 60 capsules	REDACTED	NY:Melville, NY					
Invoice	12/10/2012	0525	Vertox 650 mg - 60 capsules	REDACTED	NY:Uniondale, NY					
Invoice	12/10/2012	0526	Vertox 650 mg - 60 capsules	REDACTED	China:Beijing, China					
Invoice	12/11/2012	0559	Vertox 650 mg - 60 capsules	REDACTED	CA:Los Angeles, CA					
Invoice	12/15/2012	0548	Vertox 650 mg - 60 capsules	REDACTED	CT:Farmington, CT					
Invoice	12/17/2012	0561	Vertox 650 mg - 60 capsules	REDACTED	CA:Davis, CA					

HERCULES BRAND CORP.  
**Sales by Item Detail**  
2012 Transactions

Type	Date	Num	Memo	Name	Class	Qty	U/M	Sales Price	Amount	Balance
Total HERC-VERTOX-60										
Total Assembly										