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

Proceeding	91216326
Party	Plaintiff Tom Miles
Correspondence Address	WENDY PETERSON NOT JUST PATENTS LLC PO BOX 18716 MINNEAPOLIS, MN 55418 UNITED STATES wsp@NJPLS.com
Submission	Opposition/Response to Motion
Filer's Name	Wendy Peterson
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Signature	/Wendy Peterson/
Date	11/05/2015
Attachments	Objection to Motion to Compel with Ex A.pdf(97639 bytes )

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

Opposition Proceeding 91216326

In the matter of Trademark Registration No. 85823549

For the mark: REAL FOOD FOR REAL PEOPLE

Publication Date: Nov. 12, 2013

Tom Miles v. Continental Mills, Inc.

**OBJECTION TO MOTION TO COMPEL**

Opposer provided complete and truthful responses to the discovery requests. Opposer has repeatedly identified that there are few documents available and none on point on their face to respond specifically to the requests made by Applicant. Opposer has identified as much in conversations and in its responses on many occasions. See 21 TTABVUE 43 “35. Identify and describe any documents reviewed or relied on by Opposer in answering the RFAs. RESPONSE: Opposer relied on memory and such documents as the “timeline of products” (referenced in question #6).”

Opposer has never alleged that documents were being withheld or that other documents existed. All the priority cards are on the table. To the contrary, Opposer’s repeated responses that there were no documents available is a repetition of candor.

Opposer’s statements regarding ‘wasting time’ are referring to **both parties’** failure to have documents produced in discovery that respond to requests. Opposer is not required to create documents

where they do not exist in order to respond to discovery requests. Opposer was forthright in admitting that there were no documents that were responsive.

Opposer's assertion that asking for Applicant to meet and confer regarding their own obligations was a waste of time was proven by Applicant who did not provide documents until the filing of their Motion to Compel on the last business day before discovery closed, months after they were requested. 12 TTABVUE 78 identifies Opposer agreeing to a meet and confer after Applicant's responses were completed. Applicant's documents were mailed on a CD on October 23, 2015 and received after discovery closed. Applicant's failure to produce its documents is the reason why the meet and confer has not occurred. Applicant's motion implies that only Applicant's request for a meet and confer was acceptable when it was merely an alternative suggestion to Opposer's request for a meet and confer. If Applicant would have been forthcoming and in good faith that it was going to wait for the whole discovery period to play out before it finished responding to discovery requests, Opposer could have documented the 'forthcoming' email for presentation here but Applicant was not forthcoming about when they were going to respond to discovery.

The email sent by Opposer's counsel to Applicant's counsel on 01/21/2015 and other emails are not a refusal to meet and confer, it is an explanation of why OPPOSER would not be filing a motion to compel: "your document productions [APPLICANT'S] so far qualify as a document dump and were 100% unresponsive to the discovery requests" "a motion to compel [served on Applicant] would be wasted since the burden is on your client [Applicant] to produce proof of bona fide intent." **Applicant has completely misconstrued Opposer's counsel's emails.**

As to its own production, Opposer's counsel reiterated that few documents were available and realizes the consequences of having few documents.

Applicant's objection to the interrogatories as being unsigned had never been identified by Applicant before their motion to compel. This is an easily curable deficiency and an amended Responses to Interrogatories is attached as Exhibit A and has been served on Applicant.

Opposer agreed to discuss both parties discovery. It is Applicant that did not agree to this meet and confer. Filing the motion to compel on the last day of discovery and serving it along with its document responses does not imply an effort of good faith.

Submitted By: /Wendy Peterson/

Date: November 5, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2015, the foregoing was served on Applicant's attorney by email to:

[pctrademarks@perkinscoie.com](mailto:pctrademarks@perkinscoie.com) with courtesy copies to [jhalski@perkinscoie.com](mailto:jhalski@perkinscoie.com), [gstanton@perkinscoie.com](mailto:gstanton@perkinscoie.com), [krobinson@perkinscoie.com](mailto:krobinson@perkinscoie.com),

/Wendy Peterson/

# **EXHIBIT A**

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

Opposition Proceeding 91216326

In the matter of Trademark Registration No. 85823549

For the mark: REAL FOOD FOR REAL PEOPLE

Publication Date: Nov. 12, 2013

Tom Miles v. Continental Mills, Inc.

**OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF  
INTERROGATORIES (NOS. 1-35)**

INTERROGATORIES

1. Identify the person or persons answering or who assisted or were consulted in answering on behalf of Opposer these Interrogatories and the Requests for Production of Documents and Things and Requests for Admission served herewith, including their current employment positions and/or relationships with Applicant and their current business and residence addresses.

RESPONSE: Dr. Tom Miles, Owner.

2. Describe the organizational structure or reporting responsibilities of all of Opposer's employees, officers and agents involved in the research, development, sales, use, purchase, resale, or marketing of

any and all products or services on or in connection with which Opposer uses or claims the right to use Opposer's Mark.

RESPONSE: Dr. Tom Miles, Owner of REAL ENERGY, is responsible for all such duties.

3. Identify the person who is responsible for selecting, controlling, supervising, overseeing, and enforcing Opposer's trade name, business name, trademark and service mark interests.

RESPONSE: Dr. Tom Miles, Owner of REAL ENERGY, is responsible for all such duties.

4. Identify the person or persons who is or are associated with developing any products or services under Opposer's Mark.

RESPONSE: Dr. Tom Miles, Owner of REAL ENERGY, is responsible for all such duties.

5. Identify the person or persons who is or are associated with advertising, promoting, selling or rendering any products or services under Opposer's Mark.

RESPONSE: Dr. Tom Miles, Owner of REAL ENERGY, is responsible for all such duties.

6. State all facts and identify all documents forming the basis of each allegation contained in the Amended Notice of Opposition.

RESPONSE: Opposer expects to receive most of these facts and documents from Applicant in its responses and from public records.

Tom Miles is claiming priority of usage dating back to June 6, 2011 through common law right to the mark "REAL FOOD FOR REALLY BUSY PEOPLE". The following is a brief history and timeline of the usage of Opposer's mark "real food for really busy people".

Phase I. 2003 through June 2010

(Sale of various health food products before the invention of "energy supplements")

- Used bags and jars with food items, such as honey, nuts, seeds, granola, flax crackers, kale chips
- No registered company name or use of REAL ENERGY or byline, "Real Food for really busy people"
- Names used on labels included, Dr. Tom's Energy balls, Health First Center, Health First Snacks

- This phase is the only one that does not include products classified in IC 005 and 029 by the USPTO (just 029)

Phase II. June 2010 through June 5<sup>th</sup> 2011  
(Development of “energy snacks/supplements”)

- During this phase, Dr. Miles invented the concept which would later become “REAL ENERGY”. In June of 2010 he formulate powdered super-foods with natural stimulates to use while training for an ultra-marathon. In November of 2010 he completed the 50 mile event while fueling exclusively on this energy product.
- From June 2010 to June 5<sup>th</sup> of 2011, Dr. Miles continued to experiment with his energy supplement/snack by combining various super-foods with herbal stimulants.
- Note that from this point forward, all products marketed were in class 005 and 029. By definition (and registration with USPTO) all products produced by Dr. Miles were at the same time considered a food product and a supplement. From phase I forward Dr. Miles has, in addition to the duel class energy products, continued to sell natural health foods such as chia and hemp, (which we are currently marketing under the division of REAL ENERGY branded as “REAL”
- Names used on labels included, Health First Center, Health First Snacks, Dr. Tom’s All Day Energy

Phase III. June 6<sup>th</sup> 2011 through November 19<sup>th</sup> 2011  
(Continuous use of byline with various band names being tested for energy products)

- There has been continuous documented sales of products sold with the tag line “REAL FOOD . . . FOR REALLY BUSY PEOPLE” and “FOR REALLY BUSY PEOPLE” since this date of June 6<sup>th</sup> 2011, however the REAL ENERGY brand name was not exclusively used until November 20<sup>th</sup> 2011
- Opposer used bags and jars with individual food items and mixes, including early prototype formulas of energy powder, which would later be referred to exclusively as REAL ENERGY
- The byline (REAL FOOD . . . FOR REALLY BUSY PEOPLE) continues to be used on energy granules and energy powder products.
- “company names” used at this time were “Health First Energy Snacks” and “Dr. Tom’s All Day Energy”
- Names under consideration for our permanent brand name and logo were, REAL ENERGY, TRUE ENERGY, PURE ENERGY, MILES OF ENERGY.
- This date range was not used as an “used in commerce date” for my first trademark because Opposer’s company name had not been definitively set. In other words Opposer was not yet applying for my byline, just the company name.

Phase IV. November 20<sup>th</sup> 2011 forward  
(Exclusive use of REAL ENERGY and REAL FOOD . . . FOR REALLY PEOPLE)

- The date November, 20<sup>th</sup> 2011 was used as the first “use in commerce date” of Opposer’s original application for REAL ENERGY, because it was the date Opposer was exclusively using the company name and the byline together.
- Later this date was changed to 5/8/13 because that was the first date of interstate sales of Opposer’s final formula of my invention and that corresponded with my non-provisional patent.
- There has been continuous and documented interstate sales of the REAL ENERGY brand name with the byline REAL FOOD . . . FOR REALLY BUSY PEOPLE, since the date of June 6<sup>th</sup> 2011.
- Although the company name and byline were used exclusively in this phase, the current logo was not finalized until June 1<sup>st</sup> 2012, as a result of a worldwide internet design contest.
- The current single serving bags and displays were not distributed for sale until November 2013, and website and web sales were not finalized until February 2014.

Tom Miles, 06/08/2015



7. Identify the dates on which Opposer first used Opposer's Mark, in connection with the offer, sale, advertisement or promotion of any products or services, and identify those products or services.

RESPONSE: (See #6 for more detail) First use was June 6 2011 in connection with the three "energy food powders" referred to as "DAILY", "SPORT" and "ORIGINAL"

8. Identify and describe any goods or services other than Opposer's Goods with which Opposer can document an intent to use Opposer's Mark ("Additional Goods or Services").

RESPONSE: None at this time.

9. Identify customers (by type) who have been provided Opposer's Goods under Opposer's Mark ("Actual Customer Types"), identify the product provided, and provide the dates on which and locations where such customers purchased and were first provided such goods or services.

RESPONSE: Refer to **DOC1**, showing sales records of the dates in question, sales were made Opposer's location in Malvern PA, as well as mail orders to NY, NJ, and VA.

10. Identify (by type) any customers other than Actual Customer Types to whom Opposer intends to provide Opposer's Goods under Opposer's Mark.

RESPONSE: Unrestricted at this time.

11. Identify (by type) any customers other than Actual Customer Types to whom Opposer intends to provide any Additional Goods or Services under Opposer's Mark, and identify the product or service to be provided.

RESPONSE: Unrestricted at this time.

12. Identify the date when Opposer first became aware of Applicant' Mark, and state all facts and identify all documents relevant thereto.

RESPONSE: Exact date is unknown.

13. Identify and describe the actual trade channels used to date by Opposer for the rendering, sale, distribution or advertising of Opposer's Goods (the "Actual Trade Channels"), including the location of any sales of Opposer's Goods to customers.

RESPONSE: Channels of trade are unrestricted and include but are not limited to Health Food Stores, Opposer's place of business in and around Malvern PA, as well as mail order sales in multiple States and Canada.

14. Identify and describe any trade channels, different from or in addition to the Actual Trade Channels, Opposer intends to use for the rendering, sale, distribution or advertising of Opposer's Goods under Opposer's Mark.

RESPONSE: Unrestricted at this time.

15. Identify and describe the manner in which Opposer renders, sells, advertises and promotes Opposer's Goods under Opposer's Mark, including all web pages, advertisements, or other printed or electronic documents or material on which Opposer's Mark has been or is being used on or in connection with Opposer's Goods.

RESPONSE: Products are sold and marketed locally through existing customer referrals, flyers, and product displays. Additionally products are available through website sales at [www.realenergyfuel.com](http://www.realenergyfuel.com) and local Health Food Stores or Doctors' offices.

16. Identify and describe the manner in which Opposer intends to render, sell, advertise and promote any Additional Goods or Services under Opposer's Mark, including all web pages, advertisements, or other printed or electronic documents or material on which Opposer intends to use Opposer's Mark.

RESPONSE: Unrestricted at this time.

17. Identify and describe any materials used by Opposer in connection with the rendering, sale, advertising, marketing or promotion of Opposer's Goods under Opposer's Mark. RESPONSE: Such materials include product displays, website exposure, flyers, and handouts relating to the goods.

RESPONSE: Unrestricted at this time.

18. Identify and describe any materials Opposer intends to use in connection with the rendering, sale, advertising, marketing or promotion of any Additional Goods or Services under Opposer's Mark.

RESPONSE: Unrestricted at this time.

19. Identify and describe the factual basis for the claim in paragraph 1 of the Amended Notice of Opposition that "Opposer has continuous [sic] used the slogan REAL FOOD ... FOR REALLY BUSY PEOPLE! since June 1, 2011 as a trademark in connection with snack foods containing miracle seeds including hemp and chia; bee pollen; dried sea vegetables and other super greens and a proprietary blend of energizing herbs and spices."

RESPONSE: There has been continuous documented sales of products sold with the tag line "REAL FOOD . . . FOR REALLY BUSY PEOPLE" since this date of June 6<sup>th</sup> 2011, however the REAL ENERGY brand name was not exclusively used until November 20<sup>th</sup> 2011. We used bags and jars with individual food items and mixes, including early prototype formulas of energy powder, which would later be referred to exclusively as REAL ENERGY.

20. Identify and describe the documents included in Exhibit A of the Amended Notice of Opposition, and for each such document, identify and describe the factual basis for the claim in paragraph 1 of the Amended Notice of Opposition that Exhibit A contains “samples of use in commerce” of the Opposer’s Mark.

RESPONSE: Analysis will not be available until closer to trial and documents are expected to be received in discovery responses from Applicant.

21. Identify and describe Opposer’s use of Opposer’s Mark over the period from June 1, 2011 to October 31, 2011, including the location of any rendering, sale, distribution or advertising of Opposer’s Goods under Opposer’s Mark over this period.

RESPONSE: Sales were made during this time at Opposer’s location in Malvern PA, as well as mail orders to NY, NJ, and VA.

22. Identify and describe Opposer’s Goods sold or offered for sale under Opposer’s Mark over the period from June 1, 2011 to October 31, 2011.

RESPONSE: The first in use date, as noted in response #6, was June 6<sup>th</sup> 2011 in connection with the three “energy food powders” referred to as “DAILY”, “SPORT” and “ORIGINAL” These goods consist of natural dried and ground food ingredients including, nuts, seeds, fruits, and herbs, bee pollen, honey, palm sugar, vitamins and minerals. Such as but not limited to: hemp, chia, pecan, pine nut, macadamia, mango, cocoa nib, yerba mate, ginseng, coconut, pomegranate, goji, plantain, sea salt.

23. Identify and describe Opposer's use of Opposer's Mark over the period from November 1, 2011 to the present, including the location of any rendering, sale, distribution or advertising of Opposer's Goods under Opposer's Mark over this period.

RESPONSE: Since November 2011, products have been sold and marketed locally through existing customer referrals, flyers, and product displays and local Health Food Stores or Doctors' offices. Additionally products became available through web sales starting in February of 2014 at [www.realenergyfuel.com](http://www.realenergyfuel.com)

24. Identify and describe Opposer's Goods sold or offered for sale under Opposer's Mark over the period from November 1, 2011 to the present.

RESPONSE: The products in this phase are essentially the same as the products referenced in question #22 and likewise very similar to the current products used today. We continued to market Daily, Sport, and Original, and four new formulas (OMG, SYNERGY, FUSION, FOCUS). These goods consist of natural dried and ground food ingredients including, nuts, seeds, fruits, and herbs, bee pollen, honey, palm sugar, vitamins and minerals; Such as but not limited to: hemp, chia, pecan, pine nut, macadamia, mango, cocoa nib, yerba mate, ginseng, coconut, pomegranate, goji, plantain, sea salt.

25. Identify and describe the factual basis for the claim in paragraph 14 of the Amended Notice of Opposition that "Applicant did not have a bona fide intent to use all the goods in this application and the application is void and the opposition should be sustained."

RESPONSE: Based on public records and based on responses that are expected to be received from Applicant in its responses to discovery.

26. State the total annual amount spent by Opposer for or in connection with the advertising or promotion of Opposer's Goods under Opposer's Mark for each year from June 1, 2011 to the present.

RESPONSE: Estimates numbers are:

2011 - \$2,000,

2012 - \$3,500

2013 - \$4,500

2014 - \$1,500

27. State the total annual amount spent by Opposer for or in connection with the advertising or promotion of any Additional Goods or Services under Opposer's Mark for each year from June 1, 2011 to the present.

RESPONSE: None

28. Identify and describe any documents filed with the FDA in connection with Opposer's Goods, including but not limited to any petitions, notifications or requests for approval of any product, label, advertisement or claim.

RESPONSE: None

29. Identify any requests for registration of any facility for the manufacture of Opposer's Goods filed with the FDA and the location of such facility.

RESPONSE: None.

30. Identify any ingredients contained in Opposer's Goods as well as any ingredients intended to be contained with any Additional Goods or Services, including with respect to each ingredient (a) the

amount of said ingredient per serving of Opposer's Goods or Additional Goods or Services, and (b) the percentage of said ingredient contained in said serving relative to the other ingredients.

RESPONSE: Such trade secrets of REAL ENERGY and Tom Miles will be revealed to the Board under seal.

31. Identify any encumbrances, transfers, licenses, consents or other agreements to which Opposer is a party or of which Opposer is aware involving Opposer's Mark.

RESPONSE: None

32. Identify and describe any current or previous dispute (including administrative and district court litigation and cease and desist correspondence) in which Opposer has been involved, relating to Opposer's Mark and for each such dispute, list the names of the parties, the date of and forum for the dispute, and a description of the dispute, including any outcome and the mark or term at issue.

RESPONSE: Two such disputes are noted.

1. In April of 2014 Counsel of Applicant contacted Opposer by way of an email with a "demand letter" to cease and desist all use of the "REAL FOOD" marks, based on likelihood of confusion. Tom Miles issued an action in the TTAB (proceeding # 91216399) to oppose the pending mark SN 85823549 (REAL FOOD FOR REAL PEOPLE). Obviously, at this time this issue has not been resolved by the two parties and is following the normal TTAB proceeding.
2. In proceeding #91218484 Opposers mark "RE REAL ENERGY REAL FOOD FOR REALLY BUSY PEOPLE" was Opposed by IIPH, the makers of 5-Hour Energy for a claim of likelihood of confusion. This case has been consolidated with a similar one (proceeding # 91216399) and is following the normal steps within the TTAB. To date this case has not been resolved.

33. Identify all searches or investigations of any trademark, service mark or business name conducted by, for or on behalf of Opposer for Opposer's Mark.

RESPONSE: A reasonable search was done and no discoverable documents were found that are responsive to this request.

34. Identify and describe the factual basis for any answer other than an unequivocal admission to any request to admit contained in Applicant's First Set of Requests to Admit (the "RFAs") served contemporaneously herewith.

RESPONSE: Applicant will need to be more specific regarding any explanations regarding responses to admissions. There are certainly facts that Opposer is willing to stipulate to in order to decrease the issues for trial. There are many facts and assumptions made in each admission and it would be excessive and inappropriate to require responses and under Trademark Rule 2.120(j)(3)(i), responses to denials are not admissible.

35. Identify and describe any documents reviewed or relied on by Opposer in answering the RFAs.

RESPONSE: Opposer relied on memory and such documents as the "timeline of products" (referenced in question #6).

"I have read the foregoing " **OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES (NOS. 1-35)**" and know the contents thereof. The matters stated therein are true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Executed on: November 5, 2015  
/Dr. Tom Miles/  
Dr. Tom Miles



Submitted By: /Wendy Peterson/

Date: November 5, 2015

Wendy Peterson, Attorney for Tom Miles, Opposer  
Not Just Patents LLC  
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2015, the foregoing was served on Applicant's attorney by email to:

[pctrademarks@perkinscoie.com](mailto:pctrademarks@perkinscoie.com) with courtesy copies to [jhalski@perkinscoie.com](mailto:jhalski@perkinscoie.com), [gstanton@perkinscoie.com](mailto:gstanton@perkinscoie.com), [krobinson@perkinscoie.com](mailto:krobinson@perkinscoie.com),

/Wendy Peterson/