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Filing date: **10/02/2015**

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

Proceeding	91222947
Party	Defendant Natralus Australia Pty Ltd
Correspondence Address	ROBERT B. BURLINGAME PILLSBURY WINTHROP SHAW PITTMAN LLP PO BOX 2824 SAN FRANCISCO, CA 94126-2824 rburlingame@pillsburylaw.com, sfrademarks@pillsburylaw.com
Submission	Answer and Counterclaim
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Signature	/Robert B. Burlingame/
Date	10/02/2015
Attachments	NATRALUS answer and counterclaim.pdf(483481 bytes)

Registration Subject to the filing

Registration No	1013963	Registration date	06/24/1975
Registrant	NESTLE SKIN CARE COMPANY AG FROSHACKERSTRASSE 6 EGERKINGEN, 4622 SWITZERLAND		
Grounds for filing	The registered mark has been abandoned.		
	The registration was obtained fraudulently.		

Goods/Services Subject to the filing

Class 003. First Use: 1974/10/03 First Use In Commerce: 1974/10/03
All goods and services in the class are requested, namely: SKIN EMOLLIENT

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_____)	
Nestlé Skin Care Company AG,)	Opposition
)	No. 91222947
Opposer,)	
)	
v.)	Ser. No. 86336621
)	Mark: NATRALUS
Natralus Australia Pty Ltd,)	
)	
Applicant.)	
_____)	

ANSWER & COUNTERCLAIM TO NOTICE OF OPPOSITION

Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

Dear Sir or Madam:

Natralus Australia Pty Ltd (“Applicant”), by his attorneys, responds as follows to the Notice of Opposition filed by Nestlé Skin Care Company AG (“Opposer”):

For its answer to the introductory, unnumbered paragraph in the Notice of Opposition, Applicant avers as follows: Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments regarding Opposer’s business, address and beliefs, and denies same; Applicant admits that it is the owner of U.S. Trademark Application Serial No. 86336621, which application was filed July 14, 2014; and Applicant denies that Opposer will be damaged by registration of the mark shown in that U.S. Trademark Application Serial No. 86336621.

For its answer to the numbered paragraphs in the Notice of Opposition, Applicant avers as follows, with the following paragraph numbers corresponding to the numbered paragraphs in the Notice of Opposition:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
3. Admitted.
4. Applicant admits that U.S. Trademark Registration No. 1013963 is for the mark NUTRAPLUS for “skin emollient” in Class 3, that U.S. Trademark Application Serial No. 73035045 was the application that eventually matured into U.S. Trademark Registration No. 1013963, and that U.S. Trademark Application Serial No. 73035045 was filed on October 21, 1974 based on a claim of § 1(a) use in commerce which claim alleged that the mark was used in U.S. commerce since at least as early as October 3, 1974. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the other averments of the paragraph, and denies same.
5. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
6. Admitted.
7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
8. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

9. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

10. Applicant admits that it filed on July 14, 2014, a § 1(b) intent-to-use application in the United States Patent and Trademark Office, Serial No. 86336621, for registration on the Principal Register of the trademark NATRALUS. Applicant denies that the paragraph accurately states the description of goods set forth in U.S. Trademark Application Serial No. 86336621 on July 14, 2014.

11. Denied.

12. Denied.

13. Denied.

14. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

15. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

16. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

17. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

18. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

19. Denied.

20. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.

21. Denied.
22. Denied.
23. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
24. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
25. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
26. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
27. Denied.
28. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
29. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments, and denies same.
30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Denied.
35. Denied.
36. Admitted, although Applicant notes that no consent of Opposer was required.
37. Denied.

AFFIRMATIVE DEFENSES

Opposer's claims are barred by: laches; estoppel; acquiescence; unclean hands; the absence of a likelihood of confusion; the fact that Opposer's mark NUTRAPLUS is weak and entitled to limited protection; and fraud in obtaining and maintaining its U.S. Trademark Registration No. 1013963 (as detailed below).

COUNTERCLAIM FOR CANCELLATION OF
U.S. TRADEMARK REGISTRATION NO. 1013963

1. Applicant is an Australian proprietary limited company and the current owner-of-record for U.S. Trademark Application Serial No. 86336621 for the mark NATRALUS for goods classified in International Classes 3 and 5.
2. Opposer has initiated Opposition No. 91222947 based on Opposer's alleged registration for, and alleged rights in, the mark NUTRAPLUS, including U.S. Trademark Registration No. 1013963 for the mark NUTRAPLUS for "skin emollient" in International Class 3.
3. On information and belief, International Class 3 is intended for certain non-medicated goods and certain goods that are not used for therapeutic or medical purposes.
4. On information and belief, International Class 5 is intended for certain medicated goods and certain goods that are intended to be used for medical purposes.
5. On information and belief, therapeutic skin emollients are goods that should be classified in International Class 5.

6. On information and belief, non-therapeutic skin emollients are goods that should be classified in International Class 3.

7. The specimens submitted to the United States Patent & Trademark Office to obtain and maintain U.S. Trademark Registration No. 1013963 solely display medicated and/or therapeutic goods.

8. The specimens submitted to the United States Patent & Trademark Office to obtain and maintain U.S. Trademark Registration No. 1013963 solely display goods that are the types of goods that should be classified in International Class 5.

9. On information and belief, the specimen submitted with the “Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9” filed June 24, 2015, to renew U.S. Trademark Registration No. 1013963 displayed solely a good that is the type of good properly classified in International Class 5.

10. On information and belief, the specimen submitted with the “Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9” filed June 24, 2015, to renew U.S. Trademark Registration No. 1013963 did not display any good that is the type of good properly classified in International Class 3.

11. On information and belief, U.S. Trademark Registration No. 1013963 was improperly obtained and maintained using specimens that did not show use of the mark in U.S. commerce for the covered goods (“skin emollients” in Class 3).

12. On information and belief, Opposer has never used the mark NUTRAPLUS for skin emollients that are properly classified in International Class 3.

13. On information and belief, Opposer intentionally submitted the specimen that it submitted with the “Combined Declaration of Use and/or Excusable Nonuse/Application for

Renewal of Registration of a Mark under Sections 8 & 9” filed June 24, 2015, to renew U.S. Trademark Registration No. 1013963, with an intent to deceive the United States Patent and Trademark Office and other parties and to maintain that registration despite the lack of any current use of the mark in U.S. commerce on any goods properly classified in International Class 3.

14. U.S. Trademark Registration No. 1013963 should be cancelled because of Opposer’s above-referenced commissions of fraud on the United States Patent and Trademark Office in obtaining and maintaining that U.S. Trademark Registration No. 1013963.

15. U.S. Trademark Registration No. 1013963 should be cancelled because of the failure of Opposer and/or its predecessors-in-interest to file proper specimens of use in the course of obtaining and maintaining U.S. Trademark Registration No. 1013963.

WHEREFORE Applicant prays that:

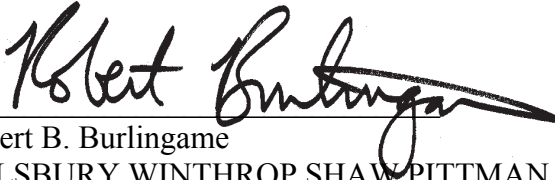
1. the Board find that there is no likelihood of confusion between the mark NUTRAPLUS and the mark NATRALUS when used in connection with Opposer’s and Applicant’s respective products;
2. the Board dismiss Opposition No. 91222947 with prejudice and pass U.S. Trademark Application Ser. No. 86336621 to the allowance stage; and
3. the Board cancel Opposer’s U.S. Trademark Registration No. 1013963.

This Answer & Counterclaim is accompanied by the official filing fee for the counterclaim against U.S. Trademark Registration No. 1013963.

Dated: October 2, 2015

Respectfully Submitted,

Natralus Australia Pty Ltd

By: 
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Opposition No. 91222947

PROOF OF SERVICE BY FIRST-CLASS MAIL

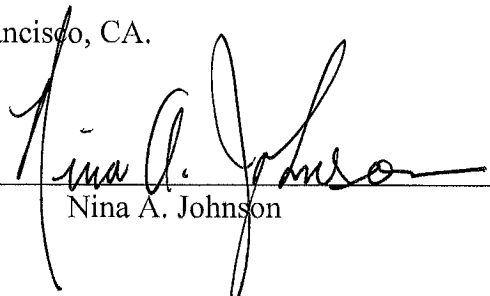
I, Nina A. Johnson, the undersigned, hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in San Francisco, CA.
2. My business address is Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111. My mailing address is P.O. Box 2824, San Francisco, CA 94126-2824.
3. On October 2, 2015, I served a true copy of the attached document titled exactly "Answer & Counterclaim to Notice of Opposition" by placing it in an addressed and sealed envelope and transmitting it by first-class mail, to the following:

**G. Mathew Lombard
Lombard & Geliebter LLP
305 Broadway, 7 Floor
New York, NY 10007**

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of October, 2015, at San Francisco, CA.



Nina A. Johnson