

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



SAKATA RICE SNACKS AUSTRALIA PTY LTD.,

Opposer,

v.

SESMARK FOODS, INC.,

Applicant.

10-23-2002

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #70

Opposition No.: 124,245

10/23/02 OCT 30 PM 5:30  
COMMUNICATIONS SECTION

**APPLICANT'S RESPONSE TO PLAINTIFF/OPOSER'S MOTION TO STRIKE,  
MOTION FOR LEAVE TO FILE AMENDED MOTION TO COMPEL, AND  
RESERVATION OF RIGHTS TO RESPOND.**

Plaintiff/Opposer Sakata Rice Snacks Australia Pty Ltd. ("Opposer") has filed a Motion to Strike, Motion for Leave to File Amended Motion to Compel, and Reservation of Rights to Respond, moving to strike the pleadings recently filed by Applicant Sesmark Foods, Inc. ("Sesmark") (now known as Terra Harvest Foods, Incorporated) on the grounds that the pleadings were filed on a untimely basis. Opposer asks the Board to strike the following:

- a. Applicant's Reply to Response by Plaintiff/Opposer to Motion for Dismissal and/or Judgment on the Pleadings for Failure to Take Testimony, dated October 7, 2002;
- b. Supplemental Declaration of George H. Kobayashi and Exhibits 1-4, dated October 7, 2002;
- c. Declaration of Nancy E. Sasamoto and Exhibits 1-2, dated October 7, 2002;
- d. Applicant's Response to Opposer's Motion to Reopen Testimony Period, dated October 7, 2002; and
- e. Applicant's Response to Plaintiff/Opposer's Motion to Compel Discovery and Memorandum in Support, dated October 7, 2002.

Sesmark requests that Opposer's foregoing motions be denied and the Board consider the pleadings filed by Sesmark as timely filed.

On August 26, 2002, Sesmark filed with the Board a Motion for Dismissal and/or Judgment on the Pleadings for Plaintiff's Failure to Take Testimony. In response to Sesmark's Motion for Dismissal, Opposer filed a Motion to Reopen its Testimony Period and a Motion to Compel Discovery. These pleadings were served on Friday, September 13, 2002, and received by Sesmark on September 16, 2002. Opposer's Response to the Motion for Dismissal consisted of a 17-page brief and a 5-page supporting declaration with 17 exhibits. Based on the extensive new matters raised by Opposer in its response brief, Sesmark prepared a reply brief and counteraffidavits. Sesmark filed what it believed to be timely responses to Opposer's Motions on October 7, 2002, twenty days after the date of receipt of such Motion to Reopen.

Under TMBP 113(c), the date of mailing or of deliver to the overnight carrier is considered the date of service and not the date of receipt. Sesmark mistakenly calculated its due date as twenty days after its receipt, which was Sunday, October 6, 2002, and served its response and reply on October 7, 2002, the first business day thereafter. Therefore, the due date for responding to Opposer's Motion to Reopen was inadvertently miscalculated by Sesmark.

Motions to strike are generally not favored by the courts and will usually be denied unless the allegations have no possible relation to the controversy and may prejudice the other party. *Moore v. Prudential Ins. Co. of America*, 166 F.Supp. 215 (M.D.N.C.1958). Specifically in matters such as these, the Board retains broad discretion in disposing of a motion to strike. *Id.*

In *Rockline Industries, Inc. v. Dental Disposables International, Inc.*, a 2002 TTAB decision<sup>1</sup>, the court held that the five-day delay by the respondent in filing its brief was not sufficient to merit the granting of the petitioner's motion to strike. *Rockline Industries, Inc. v. Dental Disposables International, Inc.*, 2002 WL 187291 (TTAB 2002). The court in *Rockline*

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<sup>1</sup> This case is not being cited for its precedential value, but merely to identify factors that have been considered in past TTAB opposition proceedings in evaluating the merits of a motion to strike.

considered the overall issues involved in the opposition proceeding and the fact that the petitioner did not appear to be truly prejudiced by the delay in filing. Similarly, in *Apollo Group, Inc. v. International Foundation for Retirement Education*<sup>2</sup>, the applicant inadvertently miscalculated the due date for filing its motion to extend its testimony period by four days. The opposer in that case filed a motion to strike applicant's brief as untimely filed. *Apollo Group, Inc. v. International Foundation for Retirement Education*, 2002 WL 448715 (TTAB 2002). The court denied the opposer's motion to strike based upon the opposer's failure to indicate the specific harm or injury resulting from the delay in the applicant's filing and by consideration by the Board of the applicant's brief. The court held that the "Applicant's calculation error amounted to only a matter of several days and the Board prefers to decide a case of its merits, including considering both parties' briefs." *Id.*

In the instant case, the Opposer has failed to demonstrate that the four-day delay in filing Sesmark's pleadings resulted in any harm or prejudice to the Opposer. Further, in consideration of the material issues set forth by Sesmark in its pleadings and the overall impact of these issues on this case, Sesmark requests that the TTAB exercise its discretion in denying the Opposer's motion to strike and to consider the merits of Sesmark's pleading in reaching its decisions with regard to the motions pending before it.

Opposer has also asked the TTAB to strike Sesmark's reply briefs. The Opposer in its Motion to Strike states that the Board generally discourages reply briefs. Though the Board does discourage reply briefs on motions, they are not expressly prohibited. TBMP 502.03. The Board may in its discretion entertain a reply brief if the Board in its opinion believes that such reply brief is necessary under the circumstances. *See Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991); *DataNational Corp. v. Bell South Corp.*, 18

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<sup>2</sup> Again, this case is not being cited for its precedential value, but merely to identify factors that have been considered in past TTAB opposition proceedings in evaluating the merits of a motion to strike.

USPQ2d 1862 (TTAB 1991). In the instant case, Sesmark's reply brief is necessary to clarify new issues raised in the Opposer's response to the Motion to Dismiss, which Opposer incorporated by reference in its Motion to Reopen its Testimony Period and to address other issues pertaining to the outcome of this opposition. Therefore, Sesmark respectfully requests that the Board deny Opposer's request to strike Sesmark's reply brief. Should the Board consider Sesmark's pleadings as if they were timely filed, but strike the reply brief, Sesmark notes that the arguments and supporting declarations and exhibits were incorporated by reference as if repeated in their entirety in Sesmark's response to Opposer's Motion to Reopen Testimony Period.

Sesmark is confident that the Board will consider the salient facts presented by Sesmark in its pleadings, the minimal delay in filing, and the lack of prejudice to Opposer in denying the Opposer's motion to strike. Should Opposer deem it necessary to further respond or reply, Sesmark does not oppose to Board granting Opposer the opportunity to do so.

For the above reasons, Sesmark requests that Opposer's Motion to Strike should be denied. Sesmark concurs in the Motion for Leave to File Amended Motion to Compel.

Respectfully submitted,

MASUDA, FUNAI, EIFERT & MITCHELL, LTD.

By:   
Attorneys for Applicant Sesmark Foods, Inc. (now known as Terra Harvest Foods, Incorporated) Joseph S. Parisi, Nancy E. Sasamoto, and George H. Kobayashi  
Masuda Funai Eifert & Mitchell, Ltd.  
One East Wacker Drive, Suite 3200  
Chicago, Illinois 60601  
(312) 245-7500

Date: October 22, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing APPLICANT'S RESPONSE TO PLAINTIFF/OPOSER'S MOTION TO STRIKE, MOTION FOR LEAVE TO FILE AMENDED MOTION TO COMPEL, AND RESERVATION OF RIGHTS TO RESPOND was mailed Federal Express, to Miller Nash LLP, attorneys for the Opposer, this 22nd day of October, 2002.

Marci L. Kushner

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**Transmitted herewith for filing is Applicant's Response to Plaintiff/Opposer's Motion to Strike, Motion for Leave to File Amended Motion to Compel, and Reservation of Rights to Respond:**

Sakata Rice Snacks Pty Ltd. v. Terra Harvest Foods, Incorporated

Opposition Number: 124,245



10-23-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #70

**TRANSMITTAL LETTER AND CERTIFICATE OF FEDERAL EXPRESS MAILING**

To: United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA 22202-3513

From: Masuda, Funai, Eifert &  
Mitchell, Ltd.  
One East Wacker Drive  
Suite 3200  
Chicago, Illinois 60601-2002

Attn: Duion Walker  
Legal Assistant  
Trademark Trial and Appeal Board

RECEIVED  
OCT 30 PM 5:50  
COMMUNICATIONS SECTION

Enclosed are:

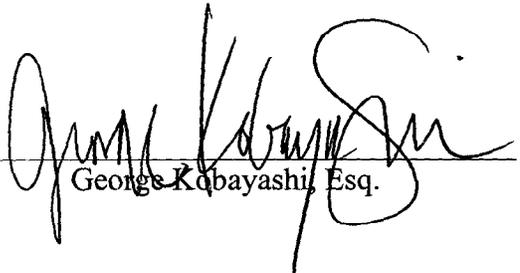
1. Transmittal letter including Certificate of Federal Express Mailing;
2. One (1) Return Postcard Receipt;
3. Applicant's Response to Plaintiff/Opposer's Motion to Strike, Motion for Leave to File Amended Motion to Compel, and Reservation of Rights to Respond.

**CERTIFICATE OF FEDERAL EXPRESS MAILING**

I hereby certify the papers listed above are sent via Federal Express to Addressee in an envelope addressed to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, 2900 Crystal Drive, Arlington, VA 22202-3513, on the date indicated below.

Federal Express Airbill No. is 8359 9487 1124

Date: October 22, 2002

Signature:   
George Kobayashi, Esq.