

**EXHIBIT**



01-21-2003

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

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./TERRA HARVEST  
FOODS INC.

Applicant.

124245

Opposition No. 124,425

Opposed Mark: SAKATA  
Application Serial No.78/032,358  
Filed: October 25, 2000  
Published: August 28, 2001

**OPPOSER SAKATA RICE SNACKS AUSTRALIA PTY LTD'S MOTION TO STRIKE,  
MOTION FOR LEAVE TO FILE AMENDED MOTION TO COMPEL, AND  
RESERVATION OF RIGHTS TO RESPOND**

**I. MOTION TO STRIKE**

Pursuant to T.B.M.P. 517 and Fed. R. Civ. P. 6(b)(1), opposer Sakata Rice Snacks Australia Pty Ltd. ("Sakata") moves the Trademark Trial and Appeal Board for an order striking the pleadings recently filed by applicant Sesmark Foods Inc./Terra Harvest Foods Inc. ("Sesmark") with the Trademark Trial and Appeal Board ("Board") on the ground that these pleadings were filed untimely. This motion is supported by the subjoined memorandum of law and the pleadings and files on record herein.

1 The following pleadings were untimely filed and served by Sesmark. Sakata  
2 respectfully moves that they be stricken and not considered by the Board.

- 3 a. Applicant's Reply to Response by Plaintiff/Opposer to Motion for  
4 Dismissal and/or Judgment on the Pleadings for Failure to Take  
5 Testimony dated October 7, 2002;
- 6 b. Supplemental Declaration of George H. Kobayashi and Exhibits 1-4 dated  
7 October 7, 2002;
- 8 c. Declaration of Nancy E. Sasamoto and Exhibits 1-2 dated October 7,  
9 2002;
- 10 d. Applicant's Response to Opposer's Motion to Reopen Testimony Period  
11 dated October 7, 2002; and
- 12 e. Applicant's Response to Plaintiff/Opposer's Motion to Compel Discovery  
13 and Memorandum in Support dated October 7, 2002.

14 **II. MEMORANDUM AND ARGUMENT**

15 On September 13, 2002, Sakata responded to Sesmark's recent motion to dismiss  
16 this case, filed a motion to reopen its testimony period, and filed a motion to compel Sesmark to  
17 produce discovery. These pleadings were served on Sesmark by Federal Express overnight  
18 courier service. The date of service was September 13.<sup>1</sup>

19 TBMP 502.03 requires that

20 "A brief in response to a motion must be filed within 15 days from the date of  
21 service of the motion (20 days if the service of the motion was made by first-class  
22 mail, 'Express Mail,' or *overnight courier* – see 37 CFR § 2.19(c)), . . ."  
23 (emphasis added.)

24 Twenty days from September 13 is October 3. Sesmark's responsive pleadings  
25 were therefore due on October 3.

26 As set forth in Sesmark's certificate of service (See Exhibits 1, 2 and 3 to the  
du Laney Declaration), Sesmark's responsive documents and declarations were all dated

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<sup>1</sup> Under TBMP 113(c), the date of mailing or of delivery to the *overnight courier* is considered the date of service. . . . "when service is made by first-class mail, Express Mail, or overnight courier." Id. Sakata served its responsive pleadings on Sesmark on September 13, 2002 via Federal Express *overnight courier*. See September 13, 2002 transmittal letter with Certificate of Mailing and Federal Express Shipment Details attached as Exhibits 1 and 2 to the Declaration of Valerie du Laney.

1 October 7, 2002. They were served on Sakata by Federal Express overnight courier on October  
2 7, 2002, four days late. As such, all of Sesmark's pleadings were untimely.

3 Sakata asks that the TTAB strike all of Sesmark's late-filed pleadings. Three of  
4 these pleadings were in the nature of reply briefs.<sup>2</sup> The Board generally discourages reply briefs.  
5 TBMP 502.03, citing *SDT Inc v. Petterson Dental Co.*, 30 USPQ2d 1707 (TTAB 1994); *Wells*  
6 *Fargo & Co. v. Lundeen & Associates*, 20 USPQ2d 1156 (TTAB 1991). On this basis, and  
7 because Sesmark neither timely filed its reply briefs nor offered an explanation for its late filing,  
8 Sakata asks that the Board exercise its authority to refuse to consider these untimely filed reply  
9 briefs.

10 Sakata also submits that it is in the interests of justice for the Board to strike  
11 Sesmark's Response to Opposer's Motion to Reopen Testimony Period and its Response to  
12 Plaintiff/Opposer's Motion to Compel Discovery and Memorandum in Support and to treat  
13 Sakata's motions as conceded. Sesmark has contested these motions filed by Sakata, albeit in an  
14 untimely fashion. This unexcused delay gives the Board discretion to treat Sakata's motions as  
15 conceded. See Trademark Rule 2.127(a). These motions are not dispositive ones, and Sakata, in  
16 its motions, has shown that the equities favor Sakata on each of these motions. For these  
17 reasons, Sakata asks the Board to treat each such motion as conceded.

18 For all of the reasons set forth above, Sakata asks that the Board strike Sesmark's  
19 October 7, 2002 pleadings and grant Sakata's Motion to Reopen Testimony Period and its  
20 Motion to Compel Discovery.

21 **III. WITHDRAWAL OF GROUND FOR MOTION TO COMPEL**

22 In response to Sakata's motion to compel discovery, Sesmark has produced copies  
23 of its documents numbered 000004, 000007, and 000087. These were requested by Sakata's

24 \_\_\_\_\_  
25 <sup>2</sup> The following documents were replies to Sakata's responses to Sesmark's motion to dismiss the case:  
26 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; Supplemental Declaration of George H.  
Kobayashi and Exhibits 1-4 dated October 7, 2002; Declaration of Nancy E. Sasamoto and Exhibits 1-2  
dated October 7, 2002.

1 motion to compel. The portion of the motion to compel directed to these documents is  
2 withdrawn by Sakata. The remainder of the motion to compel is still pending.

3 **IV. RESERVATION OF RIGHTS TO RESPOND**

4 In the event that the Board denies its instant motion to strike, Sakata respectfully  
5 reserves its rights to respond to Sesmark's Reply to Response by Plaintiff/Opposer to Motion for  
6 Dismissal and/or Judgment on the Pleadings for Failure to Take Testimony dated October 7,  
7 2002, the Supplemental Declaration of George H. Kobayashi and Exhibits 1-4 dated October 7,  
8 2002, the Declaration of Nancy E. Sasamoto and Exhibits 1-2 dated October 7, 2002, Sesmark's  
9 Response to Opposer's Motion to Reopen Testimony Period dated October 7, 2002 and  
10 Sesmark's Response to Plaintiff/Opposer's Motion to Compel Discovery and Memorandum in  
11 Support dated October 7, 2002. Sakata asks that the Board allow Sakata the standard 20 days  
12 from the date the Board rules on this motion to serve and file its replies.

13 **V. RELIEF REQUESTED**

14 Sakata respectfully asks the Board to strike all of Sesmark's October 7, 2002  
15 pleadings as untimely.

16 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of October, 2002.

17 SAKATA RICE SNACKS AUSTRALIA PTY  
18 LTD.

19   
20 Valerie duLaney  
21 Erich Merrill

22 Attorneys for Applicant Sakata Rice Snacks  
23 Australia Pty Ltd.

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January 20, 2003

**VIA FEDERAL EXPRESS FOR HAND-DELIVERY**

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01-21-2003

U.S. Patent & TMO/TM Mail Rcot Dt. #77

Subject: *Sakata Rice Snacks Australia Pty Ltd. v. Terra Harvest Foods, Incorporated F/K/A Sesmark Foods Inc.*  
Opposition No. 124,245  
Our Reference: 202360-0001

Dear Ms. Omelko:

Thank you for your voice mail of Saturday. In your message, you advised that you do not have copies of certain pleadings we previously submitted to the TTAB on behalf of Sakata Rice Snacks Australia Pty Ltd., the opposer in this case. You indicated you had received (on October 23, 2002), Applicant's [Sesmark] responses to these pleadings (namely, Plaintiff/Opposer's Sesmark/Terra Harvest Foods Inc.'s Responses to our Motion to Strike, Motion for Leave to file Amended Motion to Compel, and Reservation of Rights to Respond.

We compared the TTAB's online docket to our case docket and find that you are missing the following the documents which we filed with the TTAB on the dates below indicated:

1. Opposer Sakata's Motion to Strike, Motion for Leave to File Amended Motion to Compel and Reservation of Rights to Respond (10/11/02);
2. Declaration of Valerie du Laney in Support of Motion to Strike (10/11/02);
3. Opposer Sakata Rice Snacks Australia Pty Ltd's Motion for Leave to File Reply Brief (11/25/02);

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Box TTAB  
January 20, 2003  
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4. Opposer Sakata Rice Snacks Australia Pty Ltd's Response to Applicant's Reply to Response by Plaintiff/Opposer to Motion for Dismissal and/or Judgment on the Pleadings for Failure to Take Testimony (11/25/02);
5. Declaration of Hiroshi Suzukawa (10/10/02); and
6. Supplemental Declaration of Valerie du Laney in Support of Response by Opposer Sakata Rice Snacks Australia Pty, Ltd. To Applicant's Motion for Dismissal and/or Judgment on the Pleadings (11/25/02).

In your telephone message, you asked us to fax to you the missing documents. Because today is a federal holiday and your office is closed, I am sending you the documents via Federal Express instead. My office will contact you tomorrow to verify you have received these documents. Please don't hesitate to call or e-mail me if I can be of any further assistance.

Very truly yours,



Valerie du Laney

cc w/o enc: Sakata Rice Snacks Australia Pty Ltd.  
KMPG Legal - Melbourne, Aleksandra Janezic  
Erich W. Merrill, Jr.

du LANEY:gj  
Enc.: As Stated  
File No.: 202360-0001  
Doc ID: SEADOCs:145044.2