



11-27-2002

U.S. Patent & TMO/c/TM Mail Rpt Ct. #71

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 FOR LEAVE TO FILE REPLY BRIEF**

By this motion, opposer Sakata Rice Snacks Australia Pty Ltd. ("Sakata") asks the Trademark Trial and Appeal Board ("Board") for leave to file the reply brief which is attached hereto.

I. INTRODUCTION AND PURPOSE

Sesmark Foods Inc./Terra Harvest Foods Inc. ("Sesmark") filed several pleadings late. Sakata promptly moved to strike the late-filed pleadings. Since that date, Sakata sought the Board's direction as to whether Sakata should submit its reply to the late-filed pleadings *before* the Board's decision on Sakata's motion to strike. Representatives of the Board recently informed Sakata that its reply to Sesmark's late-filed pleading could be submitted notwithstanding that the Board has not yet ruled on Sakata's motion to strike. The

OPPOSER SAKATA RICE SNACKS AUSTRALIA PTY LTD'S
MOTION FOR LEAVE TO FILE REPLY BRIEF - 1
SEADOCs:141236. 2

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Board also issued its recent Notice of Suspension of Proceedings. The Notice expressly permits the filing of pleadings relevant to Sesmark's original motion to dismiss this proceeding. The reply brief is relevant to Sesmark's motion to dismiss. Based on the foregoing, Sakata asks the Board to accept the attached reply brief at this time.

II. SESMARK'S LATE-FILED PLEADINGS

On October 7, 2002, Sesmark filed and served a pleading entitled "Reply to Response by Plaintiff/Opposer to Motion for Dismissal and/or Judgment on the Pleadings for Failure to Take Testimony." It was filed along with several other late-filed pleadings.¹ As Sesmark has acknowledged, its pleadings were untimely. See Applicant's Response to Plaintiff/Opposer's Motion to Strike, Motion for Leave to File Amended Motion to Compel and Reservations of Rights to Respond dated October 22, 2002.

Sakata moved, pursuant to TBMP 517 and Fed. R. Civ. P. 6(b)(1), for an order striking these pleadings because they were filed late. By asking the Board to allow Sakata the standard twenty days to file replies to Sesmark's late-filed pleadings from the date the Board ruled on Sakata's motion to strike,² Sakata preserved its right to file replies to Sesmark's late-filed pleadings if the Board denied Sakata's motion to strike.

III. SAKATA'S REPLY TO SESMARK'S LATE-FILED REPLY PLEADING

Although the Board has not yet decided Sakata's motion to strike, Sakata hereby submits its reply to Sesmark'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,

¹ 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; Applicant's Response to Opposer's Motion to Reopen Testimony Period dated October 7, 2002; and Applicant's Response to Plaintiff/Opposer's Motion to Compel Discovery and Memorandum in Support dated October 7, 2002.

² The Trademark Rules of Practice do not provide for the filing of reply briefs on motions, and no time limit therefor is specified. TBMP 502.03.

2002. The subject matter of Sakata's reply is strictly limited to responding to new matter raised by Sesmark in its most recent pleadings. Sesmark has indicated that "should Opposer deem it necessary to further respond or reply, Sesmark does not oppose [the]... Board granting Opposer the opportunity to do so."³ Since Sesmark does not object to the filing of a reply, and since the reply is necessary to respond to new matter raised by Sesmark in its late-filed pleadings, Sakata asks the Board to consider its reply brief at this time.

IV. THE PROCEDURAL POSTURE OF THIS CASE

Sesmark's filing of a Motion to Dismiss these proceedings under 37 CFR 2.132(a) resulted in a stay of the proceedings pending disposition of the motion under 37 CFR 2.127(d) and TBMP 528.03, the former of which provides that:

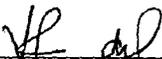
"[w]hen any party files a motion to dismiss . . . or any other motion which is potentially dispositive of a proceeding, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion and no party should file any paper which is not germane to the motion. If the case is not disposed of as a result of the motion, proceedings will be resumed pursuant to an order of the Board when the motion is decided."

Last week, Sakata's counsel received the Board Notice of Suspension of proceedings, which clarified that while pleadings relevant to Sesmark's original motion to dismiss would be considered by the Board, any other paper filed during the pendency of the motion would be given no consideration. The attached reply brief and Declaration of Hiroshi Suzukawa are relevant to Sesmark's original motion to dismiss, as are Sakata's Motion to Strike, Motion for Leave to File Amended Motion to Compel and Reservation of Rights to Respond, and the Declaration of Valerie du Laney in Support of Motion to Strike

³ Applicant's Response to Plaintiff/Opposer's Motion to Strike, Motion for Leave to File Amended Motion to Compel and Reservations of Rights to Respond.

dated October 11, 2002. Sakata therefore asks the Board to consider these pleadings at this time.

RESPECTFULLY SUBMITTED this 29th day of November, 2002.


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OPPOSER SAKATA RICE SNACKS AUSTRALIA PTY LTD'S
MOTION FOR LEAVE TO FILE REPLY BRIEF - 4
SEADOCs:141236. 2

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SAKATA RICE SNACKS AUSTRALIA PTY
LTD.

Opposer,

v.

SESMARK FOODS INC./TERRA HARVEST
FOODS INC.

Applicant.

Opposition No. 124,245

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
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**

On September 13, 2002, Opposer Sakata Rice Snacks Australia Pty Ltd.

("Sakata") responded to a motion by Sesmark Foods Inc. (now Terra Harvest Foods Inc.)

("Sesmark") to dismiss this proceeding, filed a motion to reopen its testimony period, and filed a motion to compel Sesmark to produce missing discovery.

An important ground of Sakata's response to Sesmark's motion to dismiss was that Sakata was not able to communicate with its counsel immediately prior to the close of the testimony period.

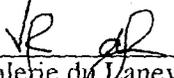
In its reply to Sakata's pleadings, Sesmark introduced new subject matter. Specifically, in its reply (at page 10), Sesmark attacks the sufficiency of Sakata's proof that it could not communicate with counsel by the end of the testimony period. Sesmark claims that Sakata's proof was inadequate because Sakata did not submit a declaration from Hiroshi Suzukawa, the President of Sakata. Sesmark argues that Sakata's proof should fail because "it has not submitted a supporting declaration from Mr. Suzukawa to establish his travel schedule, the fact that he could not communicate with counsel by telephone, facsimile or by electronic mail, or that he was the only decisionmaker for Plaintiff/Opposer." Id., page 10.

Prior to its September 13, 2002 filing, Sakata had attempted to prepare and file just such a declaration. However, again due to the significant difficulties in communicating between the U.S., Australia and Japan, a signed copy of the declaration did not reach Sakata's U.S. counsel before the September 13, 2002 deadline to respond to Sesmark's motion to dismiss. See 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 submitted herewith, paragraphs 2 and 3. Sakata therefore asks the Board to consider the Declaration of Hiroshi Suzukawa submitted herewith. That declaration provides additional proof that Sakata's inability to act within the discovery period was excusable.

For all of the reasons set forth herein, and in Sakata's other pleadings and based on the files and records in the case, Sakata has amply demonstrated that, under the circumstances of this case, the interests of justice require the Board to deny Sesmark's motion to dismiss and

reopen Sakata's testimony period. On this basis, Sakata respectfully asks the Board to deny Sesmark's motion to dismiss the proceeding.

RESPECTFULLY SUBMITTED this 25th day of November, 2002.


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

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v.

SESMARK FOODS INC./TERRA HARVEST
FOODS INC.

Applicant.

Opposition No. 124,245

DECLARATION OF HIROSHI SUZUKAWA

Hiroshi Suzukawa does declare as follows:

1. I am over the age of majority, am competent to testify to the matters set out herein, and I give this declaration based on personal knowledge unless otherwise indicated.
2. I am the President of Sakata Rice Snacks Australia Pty Ltd.
3. By August 30, 2000, we had directed the law firm of Tilton Fallon Lungmus & Chestnut, located in Chicago, Illinois, to file a U.S. trademark application to register the mark SAKATA (and design).
4. I am the only person authorized by Sakata to make decisions about this case.
5. During the critical dates running from July 26th, 2002 to August 12, 2002, my travel schedule changed due to unforeseen circumstances beyond my control.

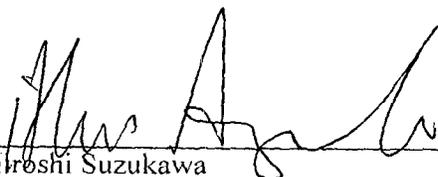
6. Specifically, my original travel schedule included a flight from Japan to Australia which would have arrived before August 12, 2002. I had planned to return to my office, review information prepared by counsel, and speak with U.S. counsel about this case upon arrival. My flight plans changed, and as a result I was unable to return to my office, review the case and speak with counsel before the close of Sakata's testimony period on August 12, 2002.

7. It was impossible for me to discuss either Sesmark's settlement entreaties or the close of the testimony period in this proceeding with my U.S. counsel between July 26th, 2002 and August 12, 2002.

8. All statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true.

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

DATED this 10th day of October, 2002.


Hiroshi Suzukawa



11-27-2002

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

SAKATA RICE SNACKS AUSTRALIA PTY
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Opposer,

v.

SESMARK FOODS INC./TERRA HARVEST
FOODS INC.

Applicant.

Opposition No. 124,245

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

**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**

I, Valerie du Laney, declare under penalty of perjury:

1. I am an attorney for Sakata Rice Snacks Australia Pty Ltd. ("Sakata"). I am over the age of majority, am competent to testify to the matters set out herein, and I give this declaration based on personal knowledge.

2. Sesmark Foods Inc. (now Terra Harvest Foods Inc., "Sesmark") now argues that Sakata submitted insufficient proof that Mr. Hiroshi Suzukawa, the President of Sakata, was unavailable to communicate with this office before the close of the discovery period in this proceeding. Specifically, Sesmark argues that Sakata should have supported its claim of unavailability with a declaration from Mr. Suzukawa.

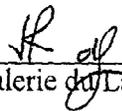
SUPPLEMENTAL DECLARATION
OF VALERIE DU LANEY - 1
SEADOCs:140948. 2

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3. Prior to September 13, 2002, this office had sent a draft declaration to Mr. Suzukawa. That draft declaration provided for Mr. Suzukawa to testify that (1) He is the sole decisionmaker for Sakata in this proceeding and (2) it was impossible for him to communicate with counsel before the close of the discovery period.

4. This office received a signed copy of Mr. Suzukawa's declaration only after the September 13, 2002 deadline to respond to Sesmark's motion to dismiss this proceeding.

DATED this 8th day of November, 2002.



Valerie du Laney

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November 25, 2002

VIA FEDERAL EXPRESS FOR HAND-DELIVERY

Commissioner for Trademarks
Box TTAB – NO FEE
2900 Crystal Drive
South Tower Building, Ninth Floor
Arlington, Virginia 22202-3513

Subject: *Sakata Rice Snacks Australia Pty Ltd. v. Terra Harvest Foods, Incorporated F/K/A Sesmark Foods Inc.*
Opposition No. 124,245
Our Reference: 202360-2100

Dear Sir or Madam:

Enclosed for delivery by hand pursuant to 37 CFR 1.6 and for filing in this opposition proceeding are the following:

1. Opposer Sakata Rice Snacks Australia Pty Ltd's Motion for Leave to File Reply Brief;
2. 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;
3. Declaration of Hiroshi Suzukawa;
4. 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; and
5. A postcard to acknowledge receipt of these documents.

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DD

Commissioner for Trademarks
Box TTAB
November 25, 2002
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Pursuant to 37 CFR § 2.119(a), these documents are also being served via Federal Express for hand delivery on the attorney for the applicant, Terra Harvest Foods, Incorporated F/K/A Sesmark Foods Inc. All correspondence in this matter should be directed to the undersigned.

Very truly yours,



Valerie du Laney

CERTIFICATE OF MAILING

I, Geena L. Jackson, hereby certify that these documents have been deposited with Federal Express on November 25, 2002 for hand-delivery by November 26, 2002 pursuant to 37 CFR § 2.119(b)(5) addressed to:

Commissioner for Trademarks
Box TTAB
2900 Crystal Drive
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(703) 308-9000; and to

Ms. Nancy E. Sasamoto
Mr. George H. Kobayashi
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Geena L. Jackson