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| FF ACQUISITION, L.L.C.,<br>Opposer,<br>- against -<br>STELLA & CHEWY'S LLC,<br>Applicant. | Opposition No.: 91160460<br>Mark: FARM FRESH<br>Serial No.: 78/222,155<br>Filing Date: March 5, 2003<br>Publication Date: November 4, 2003 |

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

Dear Commissioner:

In connection with the captioned matter, I am transmitting to you herewith the following documents:

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this Transmittal Letter and the paper, as described herein, are being deposited with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514 on this 20th day of September, 2004.

X Self-addressed stamped return postcard;
X Transmittal Letter in duplicate containing Certificate Under 37 CFR 1.8; and
X Applicant's Answer to Notice of Opposition (one [1] original and one [1] copy).

By: _____
John R. Wagner

09-23-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #64

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

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| FF ACQUISITION, L.L.C.,<br><br>Opposer,<br><br>- against -<br><br>STELLA & CHEWY'S LLC,<br><br>Applicant. | Opposition No.: 91160460<br><br>Mark: FARM FRESH<br><br>Serial No.: 78/222,155<br><br>Publication Date: November 4, 2003<br><br>**ANSWER** |

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

## APPLICANT'S ANSWER TO OPPOSER'S NOTICE OF OPPOSITION

In response to the Notice of Opposition issued by the Board on May 11, 2004, and pursuant to previously filed extensions of time to answer, Stella & Chewy's LLC, a New York limited liability company having its principal place of business at 5 Delavan Street, Suite 2T, Brooklyn, New York 11231 ("Applicant") hereby responds to FF Acquisition, L.L.C. ("Opposer") as follows:

1. Applicant admits the allegations of Paragraph 1 of the Notice of Opposition.

2. Applicant admits that the mark at issue in this opposition was published for opposition on November 4, 2003, but is without knowledge or information sufficient to form a belief as to whether the Notice of Opposition was timely filed.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraph 3 of the Notice of Opposition.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraph 4 of the Notice of Opposition.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraph 5 of the Notice of Opposition.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraph 6 of the Notice of Opposition relating to the incontestability of certain of Opposer's registrations, except affirmatively avers that each of Section 15 of the Lanham Act, codified as 15 U.S.C. §1065, and Section 33 of the Lanham Act, codified as 15 U.S.C. § 1115, speaks for itself. Applicant denies the allegations contained in Paragraph 6 of the Notice of Opposition with respect to Opposer's exclusive right to use the registered marks in commerce in connection with pet food.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in (the first) Paragraph 7 of the Notice of Opposition.

8. Applicant is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in (the second) Paragraph 7 of the Notice of Opposition.

9. Applicant denies each and every allegation contained in Paragraph 8 of the Notice of Opposition, except affirmatively avers that Section 43(c) of the Lanham Act, codified as 15 U.S.C. § 1125(c), speaks for itself.

10. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition with respect to Opposer's priority of use of the mark at issue in this opposition in connection with pet food. Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations asserted in Paragraph 9 of the Notice of Opposition.

11. Applicant denies each and every allegation contained in Paragraph 10 of the Notice of Opposition.

12. Applicant denies each and every allegation contained in Paragraph 11 of the Notice of Opposition.

13. Applicant denies each and every allegation contained in Paragraph 12 of the Notice of Opposition.

14. Applicant denies each and every allegation contained in Paragraph 13 of the Notice of Opposition.

15. Applicant denies each and every allegation contained in Paragraph 14 of the Notice of Opposition.

16. Applicant denies each and every allegation contained in Paragraph 15 of the Notice of Opposition.

17. Applicant denies each and every allegation contained in Paragraph 16 of the Notice of Opposition.

18. Applicant denies each and every allegation contained in Paragraph 17 of the Notice of Opposition.

19. Applicant denies each and every allegation contained in Paragraph 18 of the Notice of Opposition.

20. Applicant denies each and every allegation contained in Paragraph 19 of the Notice of Opposition, except admits that registration of the mark herein opposed would provide to Applicant at least a *prima facie* exclusive right to the use of the alleged mark in connection with the goods and services of pet food.

21. Applicant denies each and every allegation contained in Paragraph 20 of the Notice of Opposition, except affirmatively avers that each of Sections 2(d) and 2(f) of the Lanham Act, codified as 15 U.S.C. §§ 1052(d) and 1052(f), respectively, speaks for itself.

## AFFIRMATIVE DEFENSES

In further answer to the Notice of Opposition, Applicant asserts that:

## FIRST AFFIRMATIVE DEFENSE

Opposer's Notice of Opposition fails to state a claim upon which relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition.

## SECOND AFFIRMATIVE DEFENSE

Applicant's mark, when used on Applicant's goods, is not likely to cause confusion, or to cause mistake or deception as to the affiliation, connection or association of Applicant with Opposer, or as to the origin, sponsorship, or approval of Applicant's goods by Opposer because, *inter alia*, the goods and services covered by the respective marks are vastly different. Applicant is seeking registration of the mark for *pet food*, namely, freeze-dried beef patties and other similar items intended for domestic animal consumption, whereas, Opposer has registered the mark for *human food*, namely, fresh fruits and vegetables, pizza, ham, seafood, milk and breads -- none of which are intended for pets, but rather -- human consumption. The goods and services covered by Application's mark are very distinguishable from the goods and services recited in Opposer's alleged registrations, such that a consumer desiring any of the goods and services intended to be covered by Applicant's mark would not believe that the source of origin of that good or service is Opposer. Further, the channels of trade and customer

base for Applicant's goods and services are markedly different from those for Opposer's goods and services.

## THIRD AFFIRMATIVE DEFENSE

Since on or about March 14, 2002, Applicant has continuously and substantially used the mark FARM FRESH for a variety of pet food products, and hence, the mark FARM FRESH has become and remains a valuable asset of Applicant, inuring considerable goodwill and consumer recognition of products sold under the mark. Such goodwill and widespread usage has made the mark FARM FRESH distinctive to Applicant and its products.

## FOURTH AFFIRMATIVE DEFENSE

Applicant affirmatively alleges that other third party registrations and apparent uses of marks containing the elements "FARM FRESH" and formatives thereof now exist for a variety of goods and services, which include pulp fruits and vegetables used in the food industry, as well as promotional and advertising services. Hence, Opposer's mark is highly diluted as a trademark formative, and Opposer's purported rights extend no further than to the specific marks which Opposer alleges it owns.

## FIFTH AFFIRMATIVE DEFENSE

Applicant's mark in its entirety, when used on Applicant's goods, is sufficiently distinctively different from Opposer's marks to avoid confusion, deception or mistake as to the source or sponsorship or association of Applicant's goods.

## RELIEF REQUESTED

**WHEREFORE,** Applicant respectfully requests that this opposition proceeding be dismissed, with prejudice, and that Applicant's application be permitted to mature to registration.

Dated: September 20, 2004

Respectfully submitted,
STELLA & CHEWY'S LLC

By its Attorneys,

John R. Wagner
WAGNER DAVIS P.C.
(f/k/a Wagner, Davis & Gold, P.C.)
99 Madison Avenue, 11th Floor
New York, New York 10016
(212) 481-9600

Please direct all correspondence to:

John R. Wagner, Esq.
Wagner Davis P.C.
99 Madison Avenue, 11th Floor
New York, New York 10016

Dated: September 20, 2004

Respectfully submitted,

STELLA & CHEWY'S LLC

By its Attorneys,

John R. Wagner
WAGNER DAVIS P.C.
(f/k/a Wagner, Davis & Gold, P.C.)
99 Madison Avenue, 11th Floor
New York, New York 10016
(212) 481-9600

## CERTIFICATE OF MAILING

The undersigned hereby certifies that the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION, regarding Opposition No. 91160460, is being deposited with the U.S. Postal Service by first-class mail, in an envelope addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514 on this 20th day of September, 2004.

John R. Wagner

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION, regarding Opposition No. 91160460, was served upon the following attorneys of record for Opposer by depositing the same with the U.S. Postal Service by first-class mail, postage prepaid, on this 20th day of September, 2004:

Andrew S. Ehard, Esq.
Merchant & Gould P.C.
P.O. Box 2910
Minneapolis, Minnesota 55402-9944

Scott W. Johnston, Esq.
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John R. Wagner