

# TTAB

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

AB Mauri Food Inc., :  
:   
Opposer, :   
:   
v. :   
:   
Clabber Girl Corporation, :   
:   
Applicant. :

Opposition No. \_\_\_\_\_

In the matter of trademark App. No. 78/427,203  
For the mark FLEISCHMANN'S  
Published in the Official Gazette on Sept. 6, 2005

### NOTICE OF OPPOSITION

AB Mauri Food Inc. ("Opposer"), a California corporation, located at 240 Larkin Williams Court, Fenton, Missouri 63026, will be damaged if Clabber Girl Corporation ("Applicant") is allowed to register the mark FLEISCHMANN'S in International Class 30 for baking soda as shown in Application Serial No. 78/427,203, and therefore opposes the registration.

The grounds for opposition are as follows:

### FACTS COMMON TO ALL COUNTS

#### Applicant's Mark

1. Applicant seeks to register FLEISCHMANN'S as a trademark for baking soda in International Class 30, as shown by publication in the Official Gazette on September 6, 2005.
2. Upon information and belief, Applicant has not made actual use of the FLEISCHMANN'S mark on baking soda.

#### Background Of The FLEISCHMANN'S Trademark

3. The FLEISCHMANN'S trademark has been used a very long time. It was first used in 1868 by Charles and Maximillian Fleischmann, two Austrian-Hungarian immigrants

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to the United States, in connection with yeast – a product thought to be America's first commercially produced yeast.

4. The FLEISCHMANN'S yeast product took off in popularity following its promotion in 1876, at Philadelphia's Centennial Exposition, which had 10 million visitors.

5. In 1922, FLEISCHMANN'S for yeast was registered on the Principal Register as Registration Number 151,760.

6. Opposer is successor owner of the well-known FLEISCHMANN'S yeast business. FLEISCHMANN'S yeast is a famous mark, and the FLEISCHMANN'S yeast products now produced and sold by Opposer, including FLEISCHMANN'S yeast with corn starch, command the largest share of the United States consumer yeast market. The FLEISCHMANN'S yeast business has been primarily responsible for building the fame of the FLEISCHMANN'S marks which, over time, was used on a variety of other products.

7. Between 1982 and 2002, Nabisco, Inc., the owner at the time of the FLEISCHMANN'S mark for a variety of goods, sold its various FLEISCHMANN'S businesses to four different companies, each with distinct product lines. Opposer acquired full rights to the FLEISCHMANN'S mark for yeast, vinegar, bread mix, bakery goods and related goods, together with the goodwill of the underlying business, which involved sales of these products in both the consumer and industrial markets.

8. Opposer's rights to the FLEISCHMANN'S mark include products in its immediate natural zone of expansion – i.e., the zone that includes products closely related to yeast, vinegar, bread mix, bakery goods, and yeast additives.

9. Baking soda is in Opposer's immediate natural zone of expansion because yeast, yeast with corn starch, vinegar, bread mix, bakery goods, and other baking ingredients such as flour and additives, for which Opposer has rights to the FLEISCHMANN'S mark, are closely related to baking soda and are sold through the same consumer channels including grocery

stores. The same consumers purchase yeast, yeast with corn starch, bread mixes, flour, and baking soda, for use in baking, and these products are often sold in close proximity in grocery stores.

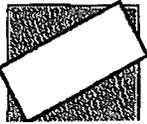
**Applicant's Fleischmann's Mark For  
Baking Powder In The Industrial Market**

10. Just as Opposer acquired the FLEISCHMANN'S yeast/vinegar/bread mix/bakery goods mark, three other companies, including Applicant, acquired the FLEISCHMANN'S mark for other product lines.

11. Applicant owns or is licensed to use a design mark including the word FLEISCHMANN'S for baking powder (Reg. No. 701,453). The design of this mark is of an industrial baking powder package. A true and correct copy of this design mark is shown at right.



12. Applicant also owns or is licensed to use two other design mark registrations for baking powder, which are derived from portions of the design mark registered in Registration No. 701,453, as follows:

Mark	Registration No.	Date of Registration
	0333295	3/17/1936
	280290	2/10/1931

13. At no time has Applicant ever received a registration for a word mark for FLEISCHMANN'S used in connection with baking powder or any other goods.

14. On information and belief, Applicant's marks shown above have been used by Applicant and its predecessors in interest solely in the industrial market.

15. Upon information and belief, neither Applicant nor any of its predecessors in interest is using the word FLEISCHMANN'S, or any design mark that includes the word FLEISCHMANN'S, for baking powder in the consumer market.

**Opposer's Mark**

16. Since at least as early as 1876, Opposer (or its predecessors in interest) has continually used as a trademark the word FLEISCHMANN'S on yeast sold in interstate commerce in both the consumer and industrial markets. Opposer (or its predecessors and/or licensees) have also sold under the FLEISCHMANN'S mark in interstate commerce in both the consumer and industrial markets vinegar since 1914, yeast with corn starch since 1950, bakery goods and bread mix since 1996, and enzyme based food additives since 2005.

**COUNT I**

**APPLICANT'S USE OF FLEISCHMANN'S  
FOR BAKING SODA WOULD EXCEED ITS RIGHTS**

17. Opposer incorporates the allegations of paragraphs 1 through 16 as this paragraph 17.

18. Applicant's rights to use the FLEISCHMANN'S mark derive solely from its purchase of those rights, together with the related business, from another company, Jel Sert, which in turn purchased those rights and that business from Nabisco.

19. The business that Applicant acquired from Jel Sert, and indirectly from Nabisco, was and is distinct from the business that Opposer acquired from Nabisco.

20. Opposer's business, which it acquired from Nabisco, includes consumer sales of baking ingredients such as yeast, yeast with corn starch, and bread mix, along with sales of these and several other products in the industrial market.

21. Applicant's business which it acquired from Nabisco consists of sales of baking powder sold in the industrial market.

22. Consumer sales of baking soda more closely relate to Opposer's business than to Applicant's business, and the right to use the FLEISCHMANN'S mark on baking soda particularly in the consumer markets belongs to Opposer, not Applicant.

23. Because Applicant does not have the right to use the FLEISCHMANN'S mark in connection with consumer sales of baking powder, its application for registration of FLEISCHMANN'S for baking soda should be denied.

## COUNT II

### **APPLICANT'S REGISTRATION IS LIKELY TO CAUSE CONFUSION WITH OPPOSER'S MARK**

24. Opposer incorporates the allegations of paragraphs 1 through 23 as this paragraph 24.

25. Yeast and baking soda are sold to consumers through the same retail channels, including grocery stores. Since both products are used in baking, the same consumers purchase both yeast and baking soda, and these products are often sold in close proximity in grocery stores.

26. As a result of Opposer's use, promotion and advertising of its FLEISCHMANN'S mark for yeast, and promotion of other products, Opposer's FLEISCHMANN'S mark has become well known to the trade and to the public, and has accordingly acquired significant goodwill. Opposer's FLEISCHMANN'S mark identifies and distinguishes Opposer's goods from the goods of others, and identifies the source and origin of Opposer's goods, to both the trade and the public.

27. Opposer's considerable efforts and expense in promoting its FLEISCHMANN'S mark on its products, have resulted in the purchasing public knowing, relying upon and recognizing Opposer's products, by the FLEISCHMANN'S mark. Opposer has valuable goodwill established in its FLEISCHMANN'S mark as used on its products.

28. Applicant's registration and use of the FLEISCHMANN'S mark for baking soda is likely to cause confusion in the minds of the trade and of the public that Applicant's baking soda emanates from or is licensed, sponsored or otherwise authorized by Opposer.

29. The mark Applicant seeks to register is identical to the mark Opposer uses in the United States, as to be likely, when applied to Applicant's goods, to cause confusion or to cause mistake or to deceive, and in an attempt to deceive the public and to benefit from the reputation and goodwill developed by Opposer.

### COUNT III

#### **APPLICANT'S REGISTRATION WILL FALSELY SUGGEST A CONNECTION WITH OPPOSER**

30. Opposer incorporates the allegations of paragraphs 1 through 29 as this paragraph 30.

31. Opposer's considerable efforts and expense in promoting its FLEISCHMANN'S mark on its products have resulted in the purchasing public knowing, relying upon and recognizing Opposer's products its FLEISCHMANN'S mark. Opposer has valuable goodwill established in its FLEISCHMANN'S marks as used on its products.

32. Upon information and belief, Applicant neither owns nor is licensed to use a mark including the word FLEISCHMANN'S for baking powder in the consumer market.

33. Upon information and belief, Applicant and its predecessors have not used the FLEISCHMANN'S mark on any product targeted to the consumer market.

34. Upon information and belief, Applicant and its predecessors narrowly used the FLEISCHMANN'S design mark in substantially the design shown on the registration, and have never deviated from that design.

35. Upon information and belief, Applicant's registration and use of the FLEISCHMANN'S mark for baking soda is likely to falsely suggest a connection with Opposer

because consumers expect FLEISCHMANN'S baking soda to come from Opposer, not Applicant.

36. Registration of Applicant's mark will weaken Opposer's sales position and reduce Opposer's income.

37. By reason of the foregoing, Applicant is not entitled to the registration of the trademark sought by its application.

**PRAYER FOR RELIEF**

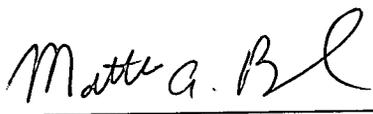
For each of the foregoing reasons, Opposer respectfully prays that this opposition should be sustained and the application for registration denied.

Opposer authorizes the Commissioner for Trademarks to charge the fee of \$300 to Deposit Account 20-0823 for filing this Notice of Opposition. Opposer believes that no additional fees are due; however, the Commissioner for Trademarks is authorized to debit our Account 20-0823 for any additional fees.

Respectfully submitted,

THOMPSON COBURN LLP

December 30, 2005

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I hereby certify that this correspondence is being deposited with the United States Postal Service on December 30, 2005, in an envelope as 'Express Mail Post Office To Addressee' Mailing Label Number EV 578257285 US addressed to: Box TTAB — FEE, Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

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