

ESTTA Tracking number: **ESTTA99737**

Filing date: **09/18/2006**

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

Proceeding	91171426
Party	Defendant Michael Foods, Inc. Michael Foods, Inc. Suite 400 301 Carlson Parkway Minnetonka, MN 553055370
Correspondence Address	STEPHEN R. BERGERSON FREDRIKSON & BYRON, P.A. 200 S 6TH ST STE 4000 MINNEAPOLIS, MN 55402-1425
Submission	Answer and Counterclaim
Filer's Name	Dean R. Karau
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Signature	/Dean R. Karau/
Date	09/18/2006
Attachments	Michael Foods BETTER 'N EGGS PLUS.pdf (15 pages)(287934 bytes)

Registrations Subject to Cancellation

Registration No	2975706	Registration date	07/26/2005
Registrant	PPC Marketing, Ltd. P.O. Box 93 110 S. Texas Street Pittsburgh, TX 756860093 UNITED STATES		
Goods/Services Subject to Cancellation	Class 029. First Use: 1997/01/03 , First Use In Commerce: 1997/02/01 Goods/Services: Eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E		
Registration No	2401500	Registration date	11/07/2000
Registrant	Pilgrim's Pride Corporation 2777 Stemmons Freeway Suite 850 Dallas, TX 752072268 UNITED STATES		
Goods/Services Subject to Cancellation	Class 029. First Use: 1997/01/03 , First Use In Commerce: 1997/02/01 Goods/Services: eggs containing fatty acids and natural antioxidants and which are a good source for vitamin E		
Grounds for Cancellation	The registered mark has been abandoned.		
Registration No			
Registrant			
Goods/Services Subject to Cancellation			
Grounds for Cancellation			

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

PPC Marketing, Ltd. ,	)	Opposition No. 91171426
	)	Serial No. 78/544,615
Opposer,	)	Mark: BETTER 'N EGGS PLUS
)	
v.)	
)	
Michael Foods, Inc. ,)	
)	
Applicant,)	
)	
)	
)	
)	

United States Patent And Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**MOTION FOR LEAVE TO FILE LATE ANSWER OR OTHERWISE
RESPOND TO THE NOTICE OF OPPOSITION**

On August 29, 2006, the Board issued a Notice of Default against Applicant, Michael Foods, Inc., and allowed Applicant thirty days from the mailing date of its order to show cause why judgment by default should not be entered against Applicant.

As good cause why judgment by default should not be entered against Applicant, Applicant respectfully submits the following information and requests leave to file a late answer or otherwise respond to the Notice of Opposition.

While Applicant is technically in default, the standard for determining whether a default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard – that is, whether the defendant has shown good cause why default judgment should not be entered against it. *See* TBMP § 312.02 (2d ed. June 2003). Good cause why default judgment should not be entered against a defendant, for failure

to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. *See Paolo's Associates Limited Partnership v Paolo Bodo*, 21 USPQ2d 1899, 1903-04 (Comm'r 1990) and *Fred Haman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1557, 1557 (TTAB 1991). The TTAB tends to resolve any doubt on the issue of default in the defendant's favor. *See* TBMP § 312.02.

In this case, it appears that the Notice of Opposition became lost within the office of Applicant's attorney of record and, despite investigation, Applicant's attorney has been unable to determine as of this date why. Nevertheless, Applicant's failure to timely file an answer was not the result of willful conduct or gross neglect on the part of Applicant, and will be filed less than two months late. Further, there is no indication that Opposer will be prejudiced in any way by the late filing. In addition, Applicant has set forth a meritorious defense by way of the denials set forth in its answer.

Therefore, Applicant respectfully requests the Board to set aside the notice of default and grant it leave to file a late answer or otherwise respond to the Notice of Opposition.

Respectfully submitted,

Dated: September ____, 2006

_____/Dean R. Karau/
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Attorneys for Applicant
Michael Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the MOTION FOR LEAVE TO FILE LATE ANSWER OR OTHERWISE RESPOND TO NOTICE OF OPPOSITION was served by United States mail on the attorney of record for Opposer in this action, Nancy Navarro, Navarro Law Office, P.C., P.O. Box 166851, Irving, TX 75016, by mailing it to her address of record by first class mail, postage prepaid, this 18 day of September, 2006.

_____/Dean R. Karau/
Dean R. Karau

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

PPC Marketing, Ltd.,	)	Opposition No. 91171426
	)	Serial No. 78/544,615
Opposer,	)	Mark: BETTER 'N EGGS PLUS
v.)	
)	
Michael Foods, Inc. ,)	
)	
Applicant,)	
)	
and)	
)	
Michael Foods, Inc.,	)	Registration No. 2,975,706,
	)	For the Mark: EGGSPPLUS
Petitioner,)	
v.	)	Registration No. 2,401,500
	)	For the Mark: EGGSPPLUS
PPC Marketing, Ltd,)	
	)	Registration No. 2,164,616
Registrant.	)	For the Mark: EGGSP PLUS

United States Patent And Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**ANSWER TO NOTICE OF OPPOSITION
AND COUNTERCLAIM CONSOLIDATED PETITION TO CANCEL**

Applicant, Michael Foods, Inc., for its answer to the Notice of Opposition filed by Opposer, PPC Marketing, Ltd., states and alleges as follows:

1. Applicant is admits the allegations contained in Paragraph 1 of the Notice of Opposition.
2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Notice of Opposition and therefore denies same.

3. Applicant denies that Registration No. 2,975,706, issued on July 26, 2005, is incontestable pursuant to 15 U.S.C. §1065, that it is conclusive evidence of the validity of the registration of the mark in that registration, Opposer's ownership of the mark, and to Opposer's exclusive right to use the mark in connection with the goods specified in the registration, and puts Opposer to its strict burden of proof of same; and Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 3 of the Notice of Opposition and therefore denies same.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Notice of Opposition and therefore denies same.

5. Applicant denies the allegations contained 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 allegations contained in Paragraph 6 of the Notice of Opposition and therefore denies same.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Notice of Opposition and therefore denies same.

8. Applicant denies the allegations contained in Paragraph 8 of the Notice of Opposition.

9. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations contained in Paragraph 10 of the Notice of

Opposition.

11. Applicant denies the allegations contained in Paragraph 11 of the Notice of Opposition.

12. Applicant denies the allegations contained in Paragraph 12 of the Notice of Opposition.

13. Applicant admits the allegations contained in Paragraph 13 of the Notice of Opposition, and Applicant states that it required no license, authorization or permission of Opposer.

14. Applicant denies the allegations contained in Paragraph 14 of the Notice of Opposition.

15. Applicant denies the allegations contained in Paragraph 15 of the Notice of Opposition.

16. Except as expressly admitted or otherwise answered, Applicant denies each and every allegation contained in Opposer's Notice of Opposition.

SEPARATE DEFENSES

1. Opposer fails to state a claim upon which relief may be granted.
2. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,164,616.
3. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 75/167,047, by fraudulently declaring on or about September 12, 1996, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

4. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Registration No. 2,164,616, by fraudulently declaring on or about April 20, 2004, that it was using the mark depicted in the registration in commerce on or in connection with the goods/services identified in the registration; that the mark had been in continuous use in commerce for five consecutive years after the date of registration, or the date of publication under Section 12(c), and was still in use in commerce on or in connection with all goods and/or services as identified above, when in fact it was using another mark.

5. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,401,500.

6. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 75/677,036, by fraudulently declaring on or about April 7, 1999, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

7. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,975,706.

8. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 78/285,704, by fraudulently declaring on or about August 11, 2003, that Applicant was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application at least as early as January 3, 1997, and was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application as of the date of the application, when in fact it was using another mark.

9. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 78/285,704, by fraudulently stating on or about December 23, 2004, that Registration No. 2,164,616 is for the mark EGGSPPLUS, when in fact the registration is for EGGS PLUS.

10. Opposer's mark in U.S. Registration No. 2,975,706 was merely descriptive and lacked secondary meaning at time of registration.

11. Opposer failed to use the alleged mark in Registration No. 2,975,706 as trademark prior to application or registration.

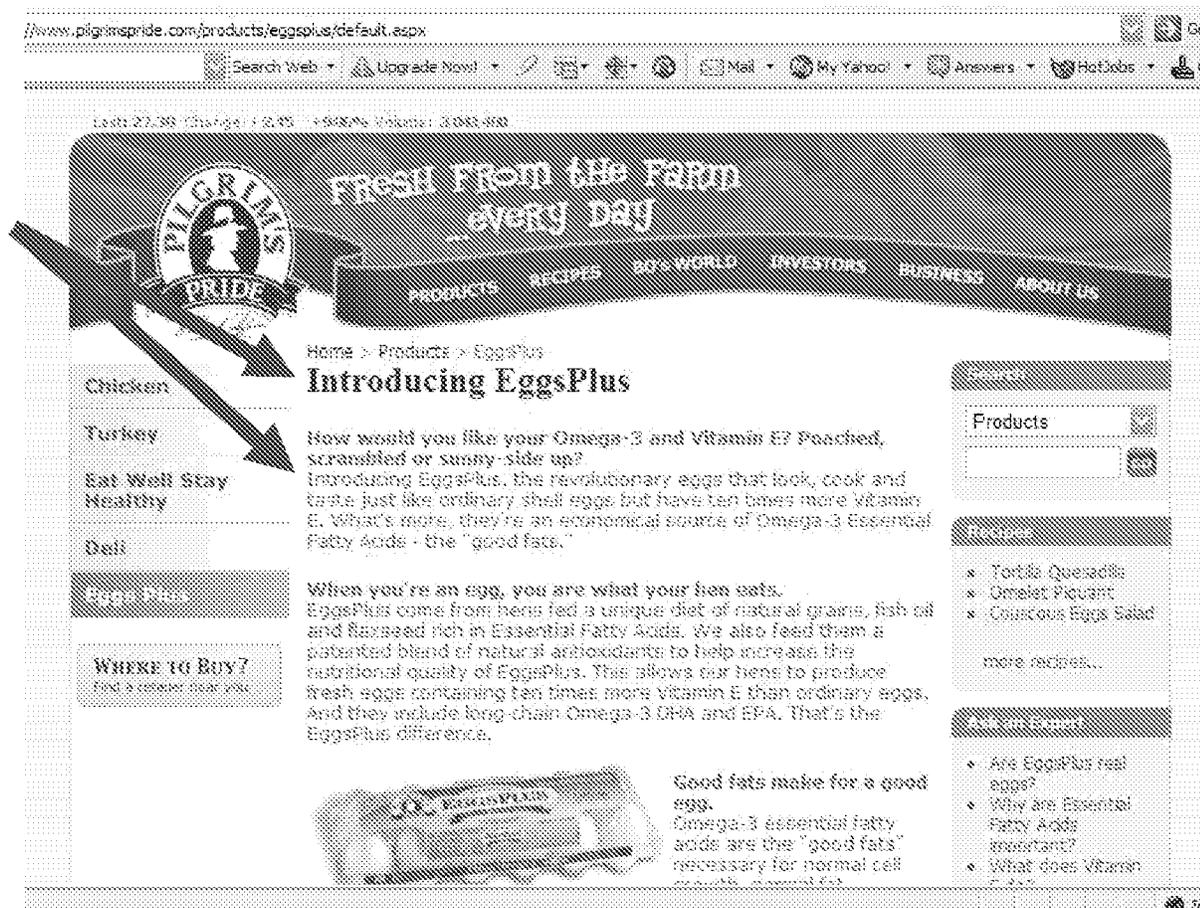
12. Opposer's alleged mark in Registration No. 2,975,706 has not become distinctive of the Opposer's goods and services in commerce and no customer recognition of said term as a valid mark identifying only Opposer has been achieved.

CONSOLIDATED PETITION TO CANCEL

1. Petitioner, Michael Foods, Inc., a Delaware corporation with its principle place of business at Suite 400, 301 Carlson Parkway, Minnetonka, Minnesota 55305-5370, believes that it is or will be damaged by Registration Nos. 2,975,706, 2,401,500 and 2,164,616, and hereby petitions to cancel the same. The grounds for cancellation are as follows:

2. Petitioner is a diversified food processor and distributor with businesses in egg products, refrigerated grocery products and refrigerated potato products and net sales exceeding \$1 billion.

3. Although Registrant claims it is using and has continuously used since 1997 its mark in the subject registrations, according to a current web page on Registrant's website, Registrant's "EggsPlus" product is a newly-introduced product:



13. Registrant's Registration No. 2,164,616 is for EGGS PLUS, while Registrant is using EGGSPUS.

14. Upon information and belief, Registrant committed fraud in connection with Application Serial No. 75/167,047, by fraudulently declaring on or about September 12, 1996, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

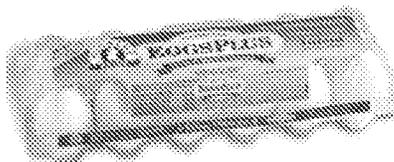
15. Upon information and belief, Registrant committed fraud in connection with Registration No. 2,164,616, by fraudulently declaring on or about April 20, 2004, that it was using the mark depicted in the registration in commerce on or in connection with the goods/services identified in the registration; that the mark had been in continuous use in

commerce for five consecutive years after the date of registration, or the date of publication under Section 12(c), and was still in use in commerce on or in connection with all goods and/or services as identified above, when in fact it was using another mark.

16. Registrant's Registration No. 2,401,500 is for



while Registrant is using

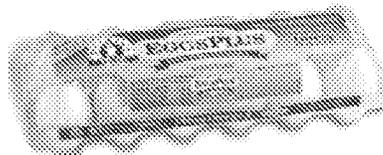


17. Upon information and belief, Registrant committed fraud in connection with Application Serial No. 75/677,036, by fraudulently declaring on or about April 7, 1999, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

18. Registrant's Registration No. 2,975,706 is for



While Registrant is using



19. Upon information and belief, Registrant committed fraud in connection with Application Serial No. 78/285,704, by fraudulently declaring on or about August 11, 2003, that

Applicant was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application at least as early as January 3, 1997, and was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application as of the date of the application, when in fact it was using another mark.

20. Upon information and belief, Registrant committed fraud in connection with Application Serial No. 78/285,704, by fraudulently stating on or about December 23, 2004, that Opposer is the registered owner of U.S. Registration No. 2,164,616, and that registration is for the mark EGGSPPLUS, not EGGS PLUS.

21. The preceding acts of Registrant constitute fraud and resulted in the fraudulent procurement and maintenance of the subject registrations. Registrant's acts were done with the intent to induce authorized agents of the U.S.P.T.O. to grant and maintain the subject registrations, and reasonably relying upon the truth of said acts or omissions, the U.S.P.T.O. did in fact grant and maintain the subject registrations to Registrant.

22. Upon information and belief, Registrant has abandoned the mark in Registration No. 2,164,616.

23. Upon information and belief, Registrant has abandoned the mark in Registration No. 2,401,500.

24. Upon information and belief, Registrant has abandoned the mark in Registration No. 2,975,706.

25. In connection with its business, Petitioner has continuously used in commerce the trademark BETTER 'N EGGS and variations since at least as early as 1995, long prior to the date of first use claimed in Registration No. 2,975,706.

26. Petitioner's BETTER 'N EGGS marks have been extensively and continuously

used in advertising and promotional materials, and in other ways customary in the trade, to promote Petitioner's goods throughout the United States, and Petitioner has developed enormous and widespread good will through ownership and use of its BETTER 'N EGGS marks. By reason of such advertising, promotion and widespread use, the public has come to recognize Petitioner's BETTER 'N EGGS marks as signifying Petitioner's goods.

27. Petitioner's BETTER 'N EGGS mark is inherently distinctive and is a strong mark and should be accorded the broad protection given to strong marks.

28. Notwithstanding Petitioner's long prior rights in and to the BETTER 'N EGGS mark and variations, upon information and belief, Registrant on August 11, 2003, filed an application for registration of the trademark EGGSPPLUS & Design, claiming a date of first use of January 3, 1997. Said application was given Serial No. 78/285,704, and the mark was registered on July 26, 2005, as Registration No. 2,975,706.

29. On June 17, 2006, Registrant filed a Notice of Opposition, opposing the registration of Petitioner's application for BETTER 'N EGGS PLUS, Serial No. 78/544,615, alleging, among other things, that the registration and/or use of the mark BETTER 'N EGGS PLUS is likely to cause confusion, mistake, and/or deceive members of the general public by creating the erroneous impression that Petitioner's goods originate with or are associated with Registrant, or that Petitioner's goods are authorized, endorsed or sponsored by Registrant.

30. If Petitioner's BETTER 'N EGGS PLUS trademark is found to be confusingly similar to Registrant's EGGSPPLUS & Design trademark, then its registration and continued use by Registrant for its goods is likely to cause confusion, deception and mistake with Petitioner's BETTER 'N EGGS marks in which Petitioner has priority of right, all to Petitioner's damage.

31. Registrant failed to use the alleged mark in Registration No. 2,975,706 as

trademark prior to application or registration.

32. Registrant's alleged mark in Registration No. 2,975,706 has not become distinctive of the Registrant's goods in commerce and no customer recognition of said term as a valid mark identifying only Registrant has been achieved.

33. Registrant's mark in U.S. Registration No. 2,975,706 was merely descriptive and lacked secondary meaning at time of registration.

34. As a result of all of the allegations above, Petitioner is and will be damaged by the continued registration of the marks in the subject registrations.

35. In view of the above allegations, Registrant is not entitled to continued registration of the marks in the subject registrations.

36. A check in the amount of \$900.00 is enclosed, as required under 37 C.F.R. § 2.6. If any other fees are required by this filing, they may be charged to deposit account number 061910.

Please address all communication to Dean R. Karau, Fredrikson & Byron, P.A., Suite 4000, 200 South Sixth Street, Minneapolis, Minnesota, 55402-1425.

WHEREFORE,

1. Applicant respectfully requests that the Opposer's Opposition be dismissed with prejudice; and

2. Counterclaim Petitioner believes that it will be damaged by the subject registrations and prays that they be cancelled.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the ANSWER TO NOTICE OF OPPOSITION AND COUNTERCLAIM CONSOLIDATED PETITION TO CANCEL was served by United States mail on the attorney of record for Opposer in this action, Nancy Navarro, Navarro Law Office, P.C., P.O. Box 166851, Irving, TX 75016, by mailing it to her address of record by first class mail, postage prepaid, this 18 day of September, 2006.

_____/Dean R. Karau/
Dean R. Karau

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