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Filing date: **01/12/2009**

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

Proceeding	91187434
Party	Defendant E.A. Sween Company
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Submission	Other Motions/Papers
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Signature	/Bradley J. Walz/
Date	01/12/2009
Attachments	Motion to Set Aside Default.pdf ( 14 pages )(1017232 bytes )

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

In the matter of Application Ser. No.: 77/134,023  
Filed: March 19, 2007  
For the mark: FOOD FOR LIFE ON THE GO!  
Published in the Trademark Official Gazette on July 15, 2008

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Food for Life Baking Co., Inc.,

Opposer,

v.

Opposition No. 91187434

E.A. Sween Company,

Applicant.

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**MOTION TO SET ASIDE DEFAULT**

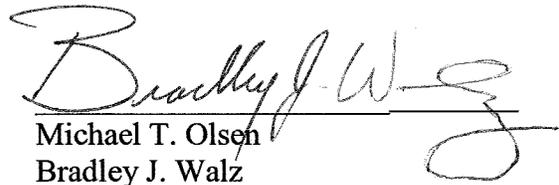
This is in response to the notice of default issued on January 9, 2009. Applicant respectfully submits that default should not be entered for the following reasons and moves that the Board reopen the proceeding. Applicant's Answer to the Notice of Opposition was not properly received by the Board because Applicant inadvertently misidentified its Answer and Counterclaim as Opposition No. 91187240 and not Opposition No. 91187434 (which is the correct Opposition number). Applicant's Answer was due December 21, 2008. (*See* Institution Order.) Because December 21, 2008 was a Sunday, Applicant was required to serve its Answer on the next succeeding day, Monday, December 22, 2008. 37 CFR § 2.196.

Applicant served and filed its Answer and Counterclaim by U.S. First Class Mail on December 22, 2008. Attached as Exhibit A is a true and correct copy of the Certificate of Mailing and Certificate of Service dated December 22, 2008. Applicant's Answer and Counterclaim was received by the United States Patent and Trademark Office ("USPTO") on

December 29, 2008. Attached as Exhibit B is a true and correct copy of the postcard returned to Applicant by the USPTO with the USPTO's mail receipt label dated December 29, 2008. For the Board's convenience, Applicant is resubmitting with its Motion to Set Aside Default Applicant's Answer and Counterclaim in Opposition No. 91187434, which is attached as Exhibit C. Therefore, Applicant respectfully requests that the Board set aside its order for default and reopen the proceeding.

Respectfully Submitted,

WINTHROP & WEINSTINE, P.A.

  
Michael T. Olsen  
Bradley J. Walz

Dated: January 12, 2008

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ATTORNEYS FOR APPLICANT  
E.A. SWEEN COMPANY

**EXHIBIT A**

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

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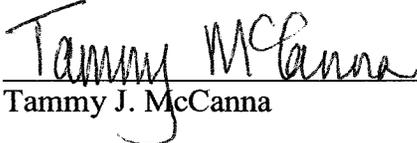
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**CERTIFICATE OF MAILING 37 C.F.R. 1.8**

I hereby certify that the following correspondence is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on the date below:

1. Answer and Counterclaim
2. Certificate of Service; and
3. Credit Card Payment Form.

Date: December 22, 2008

  
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Tammy J. McCanna



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**EXHIBIT B**

mailed, first class on Dec 29, 2008

Answer - Counterclaim

Return postcard

Credit Card authorization

Opposition No 91187240



12-29-2008

U.S. Patent & TMO/c/TM Mail Rpt Dt. #72

11419.740

**EXHIBIT C**

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

In the matter of Application Ser. No.: 77/134,023

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E.A. Sween Company,

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**ANSWER**

E.A. Sween Company (“Applicant”), for its Answer to the Notice of Opposition, states and alleges as follows:

1. Admitted.
2. Admitted.
3. Applicant is without sufficient information to admit or deny that Opposer is the owner of the following registered trademarks: (1) Registration No. 1,117,386 for the mark FOOD FOR LIFE in connection with “cakes and pastries”; (2) Registration No. 1,380,666 for the mark FOOD FOR LIFE in connection with “bread”; (3) Registration No. 3,252,877 For the mark FOOD FOR LIFE in connection with “breakfast cereals”; and (4) Registration No. 1,836,407 for the mark FOODLIFE in connection with “restaurant services”; therefore, specifically denies the same.

4. Applicant is without sufficient information to admit or deny the allegations in Paragraph 4 of the Notice of Opposition; therefore, specifically denies the same.

5. Applicant is without sufficient information to admit or deny the allegations in Paragraph 5 of the Notice of Opposition; therefore, specifically denies the same.

6. Admitted.

7. Admitted.

8. Applicant is without sufficient information to admit or deny the allegations in Paragraph 8 of the Notice of Opposition; therefore, specifically denies the same.

9. Applicant is without sufficient information to admit or deny the allegations in Paragraph 9 of the Notice of Opposition; therefore, specifically denies the same.

10. Applicant is without sufficient information to admit or deny the allegations in Paragraph 10 of the Notice of Opposition; therefore, specifically denies the same.

11. Applicant admits that its FOOD FOR LIFE ON THE GO! mark incorporates FOOD FOR LIFE and specifically denies the remaining allegations in Paragraph 11 of the Notice of Opposition.

12. Denied.

13. Denied. Applicant affirmatively states that its use of the FOOD FOR LIFE ON THE GO! mark is outside the scope of this Opposition proceeding.

14. Applicant is without sufficient information and belief to admit or deny whether Opposer's products and services are "high quality"; therefore, specifically denies the same. Applicant denies the remaining allegations in Paragraph 14 of the Notice of Opposition.

15. Applicant is without sufficient information to admit or deny whether "Opposer's bread products bearing the mark FOOD FOR LIFE are sold to restaurants which [sic] advise and

market that their products[,] including sandwiches[,] are made using Opposer's bread products . . ."; therefore, specifically denies the same. Applicant denies the remaining allegations in Paragraph 15 of the Notice of Opposition.

16. Denied

#### **AFFIRMATIVE DEFENSES**

1. Opposer's dilution allegations fail to state a claim for which relief can be granted.
2. Opposer is estopped from claiming a likelihood of confusion with Applicant's FOOD FOR LIFE ON THE GO! mark because Opposer took the position that its FOOD FOR LIFE mark could co-exist with the identical FOOD FOR LIFE mark and the virtually identical GOOD FOOD FOR LIFE mark in connection with, among other related goods and services, "retail store services featuring prepared food."

**WHEREFORE**, Applicant respectfully requests that the Trademark Trial and Appeal Board:

- 1 Deny Opposer's opposition to the registration of Application Serial No. 77/134,023 in International Class 43; and
- 2 Award Applicant any further relief the Board deems equitable.

#### **COUNTERCLAIM**

**(Cancellation, U.S. Reg. No. 1,836,407 is Void Ab Initio)**

Applicant believes that it is and will continue to be damaged by continued registration of the mark FOODLIFE (U.S. Registration No. 1,836,407) and hereby petitions to cancel the same pursuant Lanham Act § 18, 15 U.S.C. § 1064 (2008). The grounds for cancellation are as follows:

1. Applicant is the record owner of the mark FOOD FOR LIFE ON THE GO! ("Applicant's Mark") (Application Serial No. 77/134,023) in connection with "Fast food

Services, consisting of an area in a convenience store featuring sandwiches and other items” in International Class 43 (collectively “Applicant’s Application”).

2. Food for Life Baking Co., Inc. (“Opposer”) is the record owner of U.S. Reg. No. 1,836,407 for the mark FOODLIFE in connection with “restaurant services” in International Class 42 (“Opposer’s Registration”).

3. Opposer has opposed the registration of Applicant’s Application based on Opposer’s Registration.

4. Opposer entered into a License Agreement with Lettuce Entertain You Enterprises, Inc. (“LEYE”) on October 7, 1992.

5. Opposer granted LEYE the exclusive right to use and license the right to use the FOODLIFE mark within a 25 mile radius of 835 N. Michigan Avenue, Chicago, IL.

6. Opposer signed the Statement of Use for the FOODLIFE mark on October 28, 1993.

7. Upon information and belief, Opposer did not use the FOODLIFE mark in interstate commerce on or prior to October 28, 1993.

8. Upon information and belief, Opposer relied on LEYE’s use of the FOODLIFE mark to support the Statement of Use filed in connection with the federal service mark application to register the FOODLIFE mark.

9. Upon information and belief, LEYE did not use the FOODLIFE mark in interstate commerce on May 5, 1993.

10. Upon information and belief, LEYE did not use the FOODLIFE mark in interstate commerce between May 5, 1993 and October 28, 1993.

11. Upon information and belief, LEYE did not establish an Internet presence with the mark FOODLIFE until about March 9, 1998 (i.e., almost five years after Opposer signed the Statement of Use filed in connection with the federal service mark application to register the FOODLIFE mark).

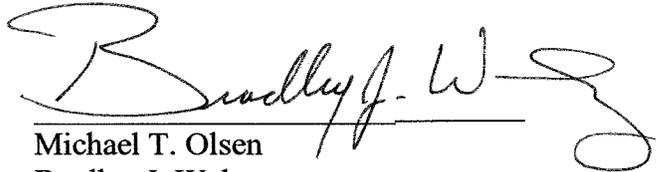
12. Upon information and belief, because LEYE did not use the FOODLIFE mark in interstate commerce prior to October 28, 1993, Opposer's application to register Opposer's Mark is *void ab initio*.

13. On information and belief, the continued existence of U.S. Registration No. 1,836,407 for the FOODLIFE mark damages Applicant because Opposer is asserting this registration against the registration of Applicant's Application.

**WHEREFORE**, Opposer respectfully requests that the Board grant its petition for cancellation of U.S. Reg. No. 1,836,407, pursuant to Section 14 of the Lanham Act, 15 U.S.C. § 1064 (2008).

Respectfully Submitted,

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ATTORNEYS FOR APPLICANT  
E.A. SWEEN COMPANY

Dated: December 22, 2008

