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

Proceeding	91195262
Party	Plaintiff Sensible Foods LLC
Correspondence Address	JOHN RARICK SENSIBLE FOODS LLC P.O. BOX 750832 PETALUMA, CA 94975 UNITED STATES jr@sensiblefoods.com, db@sensiblefoods.com
Submission	Motion to Strike
Filer's Name	John Rarick
Filer's e-mail	jr@sensiblefoods.com, db@sensiblefoods.com
Signature	/jcrSF888/
Date	01/21/2011
Attachments	Mtn To Strike Afm D--Scan.pdf (14 pages)(1573935 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of the mark "SENSIBLE PORTIONS" under Application Serial Nos. 77/833,401 and 77/833,386 Published in the Official Gazette of February 16, 2010 and Registration No. 3,195,083.

Applicant	:	World Gourmet Marketing, LLC
Mark	:	SENSIBLE PORTIONS
Serial No.	:	77/833,401 & 77/833,386
Filed	:	September 23, 2009
Reg. No.	:	3,195,083
Recorded	:	January 2, 2007

SENSIBLE FOODS, LLC	)	
	)	Opposition No. **91195262**
Opposer/Petitioner,	)	Cancellation No. **92053083**
	)	
v.	)	
	)	
WORLD GOURMET MARKETING, LLC	)	
	)	
Applicant/Respondent	)	

MOTION TO STRIKE CERTAIN DEFENSES

Opposer/Petitioner ("Opposer") is in receipt of Applicant/Respondent's answer ("Applicant's Answer") sent December 29, 2010, by first-class mail and submits this motion as per 37 CFR § 2.119(c) and Fed. R. Civ. P. 12(f) or under the Board's inherent discretionary authority. *See also* American Vitamin Products, Inc. v. Dow Brands Inc., 22 USPQ2d 1313 (TTAB 1992). The Board, upon its own initiative, and at any time, may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. TBMP §§506.01 and 506.02 and Fed. R. Civ. P. 12(f).

STANDARDS

According to the TBMP, the elements of a defense should be stated simply, concisely, and directly and should include enough detail to give the plaintiff fair notice of the basis for the defense . See TBMP 311.02 (b) and Fed. R. Civ. P. 8(e)(1). A motion to strike provides an early challenge to the legal sufficiency of a defense. California v. United States, 512 F. Supp. 36, 38 (N.D. Cal. 1981). Motions to strike are proper when a defense is insufficient as a matter of law. Cal. Dep't of Toxic Substances Control v. Alco Pac, Inc., 217 F.Supp. 2d 1028, 1032-33 (CD. Cal 2002). The grounds for a motion to strike must appear either on the face of the pleadings or from matters which the court may judicially notice. SEC v. Sands, 902 F.Supp. 1149, 1165 (CD Cal. 1995). ("To strike an affirmative defense, the moving party must convince the court that there are no questions of fact, 'that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.' ")

The Ninth Circuit has stated that "Fed. R. Civ. 8(c) determines whether the pleading of the . . . defense is sufficient .... The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff "fair notice" of the purported defense." Wyshak v. City of Nat'l Bank, 607 f.2d 824, 827 (9th Cir. 1979). Affirmative defenses must be supported with factual allegations because "bare statements reciting mere legal conclusions do not provide a plaintiff with fair notice of the defense asserted, as required under Wyshak." Qarbon.com, Inc. v. eHelp Corp., 315 F.Supp.2d 1046, 1049-50 (N.D. Cal. 2004) (striking defenses that did no more than name the defenses without listing their elements or supporting facts).

The Supreme Court clarified the fair notice pleading requirements of Federal Rule of Civil Procedure 8 in two decisions. In Twombly, the Court stated that a plaintiff is required to

allege "enough facts to state a claim to relief that is plausible on its face," in other words more than mere "labels and conclusions" or "formulaic re-citation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 50 U.S. at 547, 555. Later, in Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937 (2009), the Court clarified that its Twombly pleading standard was based on its interpretation of Federal Rule of Civil Procedure 8 and thus, extended to all civil cases. Id. at 1949. The Twomby pleading requirements have been extended to affirmative defenses because providing the opposing party fair notice of a claim or defense has always been the purpose of Rule 8. Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171-72 (N.D. Cal 2010).

The Board grants motion to strike in appropriate cases[1]. The present Opposition is one such case. Accordingly, the Opposer brings the instant motion to Strike Applicant's insufficient, redundant, and immaterial affirmative defenses as follows.

STRIKING FIRST AFFIRMATIVE DEFENSE: FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED[2]

As a Pro Se litigant, the Board must liberally construe Opposer's pleadings, and apply the applicable law, irrespective of whether the pro se litigant has mentioned it by name. Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir.2002) (internal quotations omitted). Opposer need not set out in detail the facts upon which the claim is based; rather all that is required is short and plain statements of the claims that will give Applicant fair notice of what Opposer's claims are and the grounds upon which they rest. Fed. R. Civ. Pro Rule 8(a) (2). The Opposer requests relief

[1] *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG,* 36 USPQ2d 1221, 1292 and 1295 n. 16 (TTAB 1995) (defense stricken as redundant, that is, as nothing more than a restatement of a denial in the answer and does not add anything to that denial); *American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313 (TTAB 1992) (insufficient affirmative defenses stricken).

[2] *S. C. Johnson & Son, Inc. v. GAF Corp.*, 177 USPQ 720 (TTAB 1973) (affirmative defense of failure to state a claim upon which relief can be granted stricken since complaint did state such a claim);

pursuant to the TBMP §309.03(a) or the Lanham Act, in particular 15 U.S.C. §§ 1052 (a), (d), and §§ 1064 (1) and (3). The grounds and elements for Opposition under 15 U.S.C §§ 1052 (a) and (d) include, among many others, "falsely suggest a connection" and "likely to cause confusion, or to cause mistake or to deceive;" respectively.

The elements for cancellation under 15 U.S.C §§ 1064 include payment of a fee for a petition to cancel petition and a belief that Petitioner "is or will be damaged,... by the registration of a mark on the principal register established by [the Lanham] Act ," (1) within 5 years of the registration of the mark or (3) "at any time," among other grounds, the registration was obtained contrary to the provisions of §2 (a), (b), or (c), i.e. matters which may "falsely suggest a connection with persons..." 15 U.S.C. 1052 (a).

As per the Standards, the Board may judicially notice matters that serve as grounds for a motion to strike. SEC v. Sands, *supra*. At the same time, this does not turn a Motion to Strike motion into a Motion for Summary Judgment. Opposer directs the Board to the prosecution history of this Opposition (as if fully set forth herewith); namely, Document No. 11 "P's Combined Not. of Opposition and Petition" ("Opposition"), Document No. 12 "Answer," (or "Applicant's Answer"), and Exhibit One (attached), a copy of the Examining Attorney's Final Notice, which the Applicant admits receiving in response to Opposition Paragraph 35.

As per Higgins and its "liberally construe" standard, Opposer asserts sufficient grounds and facts in its Opposition to establish a prima facie case. In no particular order and for sake of economy, Opposer provides Applicant with the following, requisite "fair notice." First, Opposer asserts valid trademarks in Paragraph 2, two of which are Reg. Nos. 3,024,683 and 2,861,273, which is the exact same registration named by the Examining Attorney in Exhibit One

(Opposition Paragraphs 35-37). Applicant avers to the contents of the Examiner's Final Notice (Opposition Paragraphs 35-37). Opposer Paragraphs 35-37 or Exhibit One specifically state: 1) that Applicant's marks "so resembles Registration No. 3,024,683 and 2,861,273 as to be likely to cause confusion, to cause mistake, or to deceive." (Opposition Paragraph 35); 2) "Registration Refusal -Similarity of Marks:" (Opposition Paragraph 36) and lastly, 3) "Registration Refusal - Similarity of Goods/Services." (Opposition Paragraph 37). Paragraphs 2 and 35-37 and the claims contained therein demonstrate that Opposer's claims meet the "plausible" standard under Twombly, and it provides Applicant with "fair notice" of their grounds and bases. On the matter of damage required by §1064, Applicant avers to its recall of product (Opposition Paragraph 24, Applicant's Answer), which gives notice to Applicant regarding at least one ground upon which Opposer bases its claims.

Opposer is not trying to carry its burden with the Opposition, only providing the Applicant with "fair notice." Opposer has met its pleading burden; however, Applicant has not provided the grounds or basis for its First Defense, so it should be stricken.

STRIKING SECOND AFFIRMATIVE DEFENSE: LACHES, WAIVER AND ESTOPPEL ARE BARRED BY THE APPLICABLE STATUE OF LIMITATIONS.

The availability of laches and related defenses is severely limited in opposition and cancellation proceedings because these defenses, in Board proceedings, start to run from the time of knowledge of the application for registration (that is, from the time the mark is published for opposition), not from the time of knowledge of use. TBMP §311.02(b).

As per Opposition Paragraph 41 and Applicant's Answer, the Opposer meets the requirements of §1064 (1), that the Petition to Cancel be filed within five (5) years of the registration of respondent's mark. Likewise, as Applicant's Answer attests, Opposer timely

followed all lawful methods and Board orders in its initiation and management of this Opposition and Cancellation. This Opposition is distinguished from Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery, 17 USPQ2d 1137 (TTAB 1990) (ground for cancellation not available for registration over five years old). Applicant has admitted that Opposer timely filed its Opposition, therefore the Applicant's Second Defense must be stricken.

STRIKING THIRD AFFIRMATIVE DEFENSE: UNCLEAN HANDS

When pleading special matters, the Federal Rules of Civil Procedure shall be followed. 37 C.F.R. § 2.11 (b)(1). Unclean hands is a defense to a Lanham Act infringement suit. CIBA-GEIGY Corp. v. Bolar Pharmaceutical, 747 f.2d 844, 855 (3d. Cir. 1984); cert denied, 417 U.S. 1137; see generally Coca-Cola v. Overland, Inc., 692 F.2d 1250- 1256-58 (9th Cir. 1982). To prevail, the defendant must demonstrate that the plaintiff's conduct is inequitable and that the conduct relates to the subject matter of its claims. CIBA-GEIGY, 747 F.2d at 855. "[E]quity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy in issue." Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985). Further, certain defenses must be plead with the specificity required by Fed. R. Civ Pro 9. (""In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") The Board established in Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc., 5 USPQ2d 1067, 1069 (TTAB 1987) that a defense of unclean hands was insufficient because allegations were either unclear, non-specific, irrelevant to the defense or merely conclusory. Applicant does not plead its defense of unclean hands with any specificity let alone providing the Opposer with "fair notice" of the basis of the alleged misrepresentation that satisfies the requirements of the defense. The Applicant's Third Defense must be stricken.

STRIKING FOURTH AFFIRMATIVE DEFENSE: ACCORD AND SATISFACTION BECAUSE THERE HAS NEVER BEEN ANY REQUIRED AGREEMENT.

Applicant's Fourth Defense, accord and satisfaction, requires an agreement to shield Applicant from liability. See Bowater North Am. Corp v. Murray Mach., Inc, 773F.2d 71, 75 (6th Cir. 1985) ("An accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from contract or tort by substituting for such contract or cause of action an agreement for the satisfaction thereof and the execution of such substituted agreement."). The Applicant does not state any contract or substituted agreement in which Opposer and Applicant have entered and under what circumstances and in what agreement the parties reached any meeting of the minds that such an accord was entered. Since there is no agreement, there can be no defense under accord and satisfaction. Further, Applicant's assertion of an accord-and-satisfaction defense does not make it unlikely that Opposer will succeed on the merits of its other claims, i.e., likelihood of confusion, therefore the Fourth Defense must be stricken.

STRIKING FIFTH, SIXTH, SEVENTH AND EIGHTH AFFIRMATIVE DEFENSE BECAUSE THEY ARE REDUNDANT TO APPLICANT'S RESPONSES TO THE COMPLAINT

The Board has stricken material that merely "amplifies" denial of claims[3]. The Applicant's Sixth, Seventh and Eighth defenses are merely allegations and redundant to its responses to Opposition Paragraphs 22/35, 35-37 and 23; respectively. Applicant's Fifth Defense is barred as App. Nos. '386 was filed under §1(b), "intent-to-use," and is also duplicative of its denials of Opposition Paragraphs, among others, 16, 17, 20 and 27. Consistent with Board practice, these defenses should be stricken.

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[3] *See Ohio State University v. Ohio University, supra* at 1294-95; *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG,* 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims); and *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 153 (TTAB 1973) (applicant's affirmative defense amplifies denial of likelihood of confusion).

REDUCING TIME AND COSTS

The Opposer submits this motion using guidance from Twombly; "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a claim" or defense. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007). Granting Opposer's Motion to Strike will prevent needless costs associated with litigating redundant, immaterial, impertinent, or scandalous matter raised by the bare bones contention and assertions Applicant raises in its Defenses. "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. . . ." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

CONCLUSION

Applicant has done no more than merely name "bare bones" affirmative defenses and has failed to set forth the elements and facts supporting the purported defenses which does not give the Opposer the required "fair notice." Striking the above defenses does not hinder Applicant's ability to vigorously defend against the claims of the lawsuit as Applicant's Tenth Defense ensures. On the other hand, allowing the defenses to remain needlessly increases the cost and time Opposer will expend throughout the whole litigation process guessing the grounds and bases for Applicant's asserted defenses in direct violation of the Federal Rules of Civil Procedure and the TBMP. Therefore, the Opposer prays that Applicant's defenses be stricken or that it be ordered to re-plead them with additional, sufficient, known facts to support them.

WHEREFORE, Sensible Foods, LLC prays that Applicant's First through Ninth Defenses be stricken and that the Board reset the trial schedule according to the timeframe of the Board's decision to this motion.

Date January 21, 2011

Respectfully submitted,

By:_____

Appearing *pro se*:

John Rarick
Vice President
Sensible Foods, LLC
P.O. Box 750832
Petaluma, CA, 94975
jr@sensiblefoods.com
415.606.1689

CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on this 21 day of January, 2011, I caused to be served via the United States Patent and Trademark Office's Electronic System for Trademark Trials and Appeals (ESSTA) and via the US Postal Service, postage prepaid, the following:

MOTION TO STRIKE CERTAIN DEFENSES

TO:

World Gourmet Marketing, LLC, **C/O**
Vanessa A. Ignacio, Esq.
Lowenstein Sandler PC
65 Livingston Ave, Ste. 2
Roseland, NJ 07068-1791

_____
John Rarick

Attachment - 71
Attachment - 72
Attachment - 73

EXHIBIT ONE

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/210120

MARK: SENSIBLE SNACKS

77210120

CORRESPONDENT ADDRESS:
ALISON P. GROSSMAN
105 S. 12 STREET, #504
PHILADELPHIA, PA 19107

RESPOND TO THIS ACTION:
http://www.uspto.gov/teas/eTEASpageD.htm

GENERAL TRADEMARK INFORMATION:
http://www.uspto.gov/main/trademarks.htm

APPLICANT: World Gourmet Marketing LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:
N/A

CORRESPONDENT E-MAIL ADDRESS:
apglaw@verizon.net

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 9/21/2007

The assigned examining attorney has reviewed the referenced application and determined the following.

Registration Refusal –Likelihood of Confusion 2(d)

The examining attorney refuses registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because the applicant's mark, when used on or in connection with the identified goods/services, so resembles the marks in **U.S. Registration Nos. 3024683 and 2861273** as to be likely to cause confusion, to cause mistake, or to deceive. TMEP §§1207.01 *et seq*. See the enclosed registrations.

The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the examining attorney must compare the goods or services to determine

if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG,* 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978). TMEP §§1207.01 *et seq*.

Similarity of Marks

The examining attorney must compare the marks for similarities in sound, appearance, meaning or connotation. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements is sufficient to find a likelihood of confusion. *In re Mack*, 197 USPQ 755 (TTAB 1977). TMEP §§1207.01(b) *et seq*. The applicant's mark is SENSIBLE SNACKS. The registrant's marks are SENSIBLE FOODS and SENSIBLE FOODS with a design. The marks are similar in sound, appearance and commercial impression because they each contain the dominant term SENSIBLE. Further, the terms SNACKS and FOODS convey a highly similar commercial impression.

Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See e.g., Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd* 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.,* 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.,* 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §§1207.01(b)(ii) and (b)(iii).

Similarity of the Goods/ Services

The goods/services of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods/services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). TMEP §1207.01(a)(i). The applicant's goods/services are "protein-based nutrient-dense snack bars; soy-based food bars; soy-based snack foods; potato-based snack foods; snack food dips; potato chips; soy chips; soy nuts; vegetable-based snack foods; pellet snacks" and "crackers; cookies; corn chips; tortilla chips; bakery goods; ready to eat, cereal-derived food bars; granola-based snack bars; chocolate-based ready to eat food bars; grain-based chips; cheese flavored snacks, namely, cheese curls; corn-based snack foods; popcorn; caramel popcorn; glazed popcorn; pita chips". The registrant's goods are Dried Fruits, Dried Vegetables and Dried fruit snacks respectively. The goods are related because these goods are all snack foods which would be marketed and sold to similar consumers using the same channels of trade.

Attached are copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods and/or services as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods and/or services listed therein are of a kind that may emanate from a single source. *See In re Infinity Broad. Corp.,* 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785-86 (TTAB

1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

Accordingly, registration is refused under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The examining attorney must resolve any doubt as to the issue of likelihood of confusion in favor of the registrant and against the applicant who has a legal duty to select a mark which is totally dissimilar to trademarks already being used. *Burroughs Wellcome Co. v. Warner-Lambert Co.,* 203 USPQ 191 (TTAB 1979).

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

Prior Pending Application

Information regarding pending **Application Serial No. 78827662 is enclosed.** The filing date of the referenced application precedes applicant's filing date. There may be a likelihood of confusion between the two marks under Trademark Act Section 2(d), 15 U.S.C. §1052(d). If the referenced application registers, registration may be refused in this case under Section 2(d). 37 C.F.R. §2.83; TMEP §§1208 *et seq*. Therefore, upon entry of a response to this Office action, action on this case may be suspended pending final disposition of the earlier-filed application.

If applicant believes there is no potential conflict between this application and the earlier-filed application, then applicant may present arguments relevant to the issue in a response to this Office action. The election not to submit arguments at this time in no way limits applicant's right to address this issue at a later point.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following informalities.

INFORMALITIES

Identification of Goods Unacceptable

International Class 30 is acceptable as presented.

The identification of goods is unacceptable as indefinite because "pellet snacks" is indefinite. The applicant must specify these goods by the common commercial name for the goods.

The applicant may adopt the following identification, if accurate:

PROTEIN-BASED NUTRIENT-DENSE SNACK BARS; SOY-BASED FOOD BARS; SOY-BASED SNACK FOODS; POTATO-BASED SNACK FOODS; SNACK FOOD DIPS; POTATO CHIPS; SOY CHIPS; SOY NUTS; VEGETABLE-BASED SNACK FOODS; PELLET SNACKS, NAMELY, [SPECIFY THE GOODS BY THE COMMON COMMERCIAL NAME FOR THE GOODS], IN INTERNATIONAL CLASS 29. TMEP §1402.01.

The applicant is advised that the brackets and parentheses shown in the identification manual and/or in the suggested identification are in the nature of directional signals, the significance of which is explained in the introduction to the Identification Manual. Parentheses and brackets ***should not*** be included in the actual

identification of goods or recitation of services adopted by the applicant.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. §2.71(a); TMEP §1402.06. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

ID Manual

To the extent the suggested identification of goods or services is incomplete or inaccurate, the applicant is advised that the Trademark *Acceptable Identification of Goods and Services Manual* is accessible via the USPTO homepage at the following address: http://tess2.uspto.gov/netahtml/tidm.html.

Disclaimer

The applicant must disclaim the descriptive wording "SNACKS" apart from the mark as shown. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.03(a). The wording is merely descriptive because the applicant's goods are snack foods.

A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use SNACKS apart from the mark as shown.

A disclaimer does *not* remove the disclaimed matter from the mark. It is simply a statement that the applicant does not claim exclusive rights in the disclaimed wording or design apart from the mark as shown in the drawing.

Claim of Prior Registration

If applicant is the owner of U.S. Registration No. 3195083, then applicant must submit a claim of ownership. 37 C.F.R. §2.36; TMEP §812. The following standard format is suggested:

Applicant is the owner of U.S. Registration No. 3195083.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Kathryn E. Coward/
Trademark Examining Attorney
United States Patent & Trademark Office
Law Office 115
(571)-272-9468

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office Action should be filed using the Office's Response to Office action form available at http://www.uspto.gov/teas/eTEASpageD.htm. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at http://tarr.uspto.gov. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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