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

Proceeding	91195262
Party	Defendant World Gourment Marketing LLC
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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SENSIBLE FOODS, LLC,
Opposer,

vs.

WORLD GOURMET MARKETING, LLC,
Applicant/Registrant.

In re:

Trademark: SENSIBLE PORTIONS

Opposition No.: 91195262

Cancellation No.: 92053083

APPLICANT'S/REGISTRANT'S MEMORANDUM OF LAW IN OPPOSITION TO
OPPOSER'S MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES

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Applicant/Registrant, World Gourmet Marketing, LLC (“Applicant”)¹ respectfully submits this Memorandum of Law in opposition to Sensible Foods, LLC’s (“Opposer”) motion under 37 C.F.R. § 2.119(c) and Rule 12(f) of the Federal Rules of Civil Procedure to strike the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses² pled in Applicant’s Answer to Opposer’s Combined Notice of Opposition and Petition to Cancel (the “Answer”). For the reasons set forth below, the TTAB should deny Opposer’s motion.

PRELIMINARY STATEMENT

Opposer’s motion to strike is untimely under that portion of Rule 12(f) that provides for filing such motions within twenty-one days after service of the responsive pleading. In this case, Applicant’s Answer was served on Opposer on December 29, 2010, making a motion under Rule 12(f) due on January 19, 2011. Despite this deadline, Opposer did not file its motion until January 21, 2011, thus making it untimely. On that basis alone, the TTAB should dismiss the motion.³

In addition to being untimely, Opposer’s motion does not even come close to satisfying the stringent requirements imposed by the TTAB on motions to strike under the little-used and much-disfavored Rule 12(f). Opposer cannot show that the challenged defenses are

¹ Applicant respectfully notes that Applicant is no longer the correct party-in-interest with respect to the application and registration at issue. Applicant assigned all right, title, and interest in and to the marks in question to Hain Gourmet, Inc. on October 5, 2010 under Reel/Frame 4290/0117. Applicant and Hain Gourmet, Inc. are related entities, so other than having an incorrect caption, this is not a substantive issue.

² It should be noted that Applicant denominated all defenses under the label “Defenses” and not “Affirmative Defenses.”

³ As it did in its Moving Brief (see p. 3), Opposer will likely seek the leniency of the TTAB based on its claim that it is a “pro se” litigant. As an initial matter, Opposer is a limited liability company – not an individual – purportedly with significant sales per year. It is not a destitute litigant unable to afford counsel, as it would like the TTAB to believe. Moreover, Mr. Rarick, who submitted the Moving Brief on behalf of Opposer, is a sophisticated business person and an educated law student, who either knows or should know the rules of procedure.

clearly insufficient as a matter of law, and, in any event, cannot demonstrate that denial of this motion will prejudice it in any way. Opposer's motion is merely a procedural gambit intended to pre-empt the adjudication of potentially meritorious defenses before any factual record has been developed through discovery. As such, under well-established law, it should be denied.

LEGAL ARGUMENT

OPPOSER'S MOTION TO STRIKE SHOULD BE DENIED

A. Opposer Has Not Satisfied the Stringent Standard for Striking Applicant's Defenses

Opposer seeks to strike eight of Applicant's nine substantive defenses⁴ under Rule 12(f), which allows the TTAB to strike from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Motions to strike are "not favored" and matter will not be stricken unless it "clearly has no bearing upon the issues in the case." Ohio State University v. Ohio University, 51 USPQ2d 1289, 1293 (TTAB 1999); GTE Automatic Electric Inc. v. Nippon Electric Co., Ltd., 213 U.S.P.Q. 507, 509 (TTAB 1980) (denying motion to strike alternative and inconsistent legal theories); Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Co., Inc., 177 USPQ 401 (TTAB 1973); TBMP § 506.01. Indeed, the TTAB may decline to strike "even objectionable pleadings where their inclusion will not prejudice the adverse party" Ohio State University, 51 USPQ2d at 1293. The TTAB and courts throughout the country have developed a series of stringent requirements that must be met before a Rule 12(f) motion can be granted. Opposer has not met any of these requirements here.

First, the legal insufficiency of the asserted defense must be clear and indisputable on any set of facts that could be pled. See, e.g., TBMP § 506.01 (stating that a "defense will not be stricken as insufficient if the insufficiency is not clearly apparent"). This means that the

⁴ Opposer has not moved to strike the Ninth Defense, which is a substantive defense, or Applicant's Tenth Defense, which is prophylactic in nature.

motion may be granted only if it “appears to a **certainty** that . . . [the movant] would succeed despite any statement of the facts which could be proved in support of the defense.” Mars Inc. v. JCM American Corp., No. 05-3165, 2006 WL 1704469 (D.N.J. June 14, 2006) (emphasis added); see also Tonka Corp. v. Rose Art Industries, Inc., 836 F. Supp. 200, 218 (D.N.J. 1993) (“An affirmative defense can be stricken only if the defense asserted could not possibly prevent recovery under any pleaded or inferable set of facts.”) (internal quotations omitted).

Thus, where the law governing the defense is unsettled or the facts are in dispute, the motion cannot be granted. Central Mfg. Co. v. Stealth, Ltd., 2004 TTAB LEXIS 348, at *2 (TTAB 2004) (denying motion to strike unclean hands defense in order to permit applicant to prove the defense at trial). Nor do courts permit litigants to use this procedure to short-circuit an adjudication on the merits. Indeed, motions to strike defenses are consistently denied where, as here, “there has been little or no opportunity for discovery and hence to develop the factual background” necessary to evaluate the merits of a defense. United States v. Kramer, 757 F. Supp. 397, 410 (D.N.J. 1991); Hitachi Cable America, Inc. v. Wines, No. 85-4265, 1986 WL 2135, at *6 (D.N.J. Feb. 14, 1986) (denying motion to strike various defenses where the court found that the “main purpose of this motion is apparently to effect a pre-emptive strike against defendant on a record completely barren of facts” and noting that “[w]hile plaintiff’s arguments may have merit, the court is not willing to foreclose the defendant from further expanding the theory underlying its defenses at such an early stage in this case.”). Here, because there has been absolutely no discovery, granting Opposer’s motion, even in part, would be inappropriate.

Second, a plaintiff must demonstrate prejudice in order to prevail on a motion to strike an affirmative defense. See, e.g., Ohio State University, 51 USPQ2d at *3 (the TTAB may decline to strike an affirmative defense “where their inclusion will not prejudice the adverse party”); Harsco Corp. v. Elec. Sciences, Inc., 9 USPQ2d 1570 at*1 (TTAB 1988) (refusing to strike affirmative defenses, noting that that they were not prejudicial to adverse party”) (citing 2A MOORE’S FEDERAL PRACTICE § 12.21[2] (2d ed. 1985)); Bristol-Myers Squibb Co. v. IVAX Corp., 77 F. Supp. 2d 606, 619 (D.N.J. 2000) (motions to strike will usually be denied “unless

the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues”); Frank Briscoe Co., Inc. v. Travelers Indemn. Co., 65 F.Supp.2d 285, 311 n.29 (D.N.J. 1999) (“[E]ven when technically appropriate and well-founded[,] [motions to strike] often are not granted in the absence of a showing of prejudice to the moving party.”); J & A Realty v. City of Asbury Park, 763 F. Supp. 85 (D.N.J. 1991) (Rule 12(f) motions disfavored, especially in the absence of prejudice).

As discussed in detail below with regard to each defense at issue, Opposer has shown neither that Applicant’s challenged defenses are clearly insufficient nor that it will suffer any prejudice if its motion to strike is denied. Accordingly, the TTAB should deny Opposer’s motion.

B. Applicant’s Defenses Survive Rule 12(f) Analysis

1. Pleading Standard for Defenses

Section 311.02(b) of the TBMP requires that an answer include only “a short and plain statement of any defenses, including affirmative defenses that the defendant may have to the claim or claims asserted by the plaintiff.” In its motion, Opposer seeks to re-write this pleading standard by relying on a single foreign district court case, Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171-72 (N.D. Cal. 2010), for the proposition that Bell Atlantic Corp. v. Twombly, 550 U.S. 444 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) have heightened the pleading standard for affirmative defenses. Such is not the law, however.

In addition, numerous courts, including at least two circuit courts have expressly rejected this argument. See, e.g., Montgomery v. Wyeth, 580 F.3d 455, 468 (6th Cir. 2009) (ruling that “[t]he Federal Rules of Civil Procedure do not require a heightened pleading standard for . . . defense[s] and that defense pleadings are only required to give “fair notice”); Davis v. Indiana State Police, 541 F.3d 760, 763 (7th Cir. 2008) (finding Twombly inapplicable to affirmative defenses); First Nat’l Ins. Co. of Am. v. Camps Servs., Ltd, No. 08-cv-12805, 2009

U.S. Dist. LEXIS 149, 2009 WL 22891, at *2 (E.D. Mich. Jan. 5, 2009) (finding Twombly's analysis of the "short and plain statement" requirement inapplicable to affirmative defenses); Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 U.S. Dist. LEXIS 98699, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) (declining to apply Twombly to either affirmative or negative defenses).

Relying in part on Montgomery, the District Court for the Middle District of Tennessee recently declined to extend Twombly and Iqbal to affirmative defenses, noting that neither Twombly nor Iqbal mention affirmative defenses or Fed. R. Civ. P. 8(c), which governs affirmative defenses. See McLemore v. Regions Bank, No. 3:08-cv-0021, 2010 WL 1010092, at *12–14 (M.D. Tenn. Mar. 18, 2010). Rather, Twombly dealt with the pleading requirements set forth in Federal Rule of Civil Procedure 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Twombly, 55 U.S. at 545 (citing Fed. R. Civ. P. 8(a)(2)). Thus, the court in McLemore found that "[o]n its face, Twombly applies only to complaints and Rule 8(a)(2)," while a "fair notice" standard is the benchmark for affirmative defenses. McLemore, 2010 WL 1010092, at *13. Twombly "does not mention affirmative defenses or any other subsection of Rule 8. Iqbal also focused exclusively on the pleading burden that applies to plaintiffs' complaints." Id.

Aside from their misstatements regarding the sufficiency of Applicant's pleadings, Opposer has not alleged (let alone demonstrated) that Applicant's defenses cannot succeed under any set of facts which could be proven, especially considering discovery has not even started. Opposer also has not shown that the defenses bear no possible relationship to the matters in controversy. Moreover, no prejudice arises from Applicant's defenses because the defenses are not lengthy or complex, so allowing the defenses to remain at this very early stage would place no burden on Opposer, let alone an "undue burden." Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953) ("Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking [affirmative defenses] should be sparingly used. . . . It is a drastic remedy to be resorted to only

when required for the purposes of justice. The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy.”) (internal citations omitted).

Contrary to Opposer’s argument, it is well-established that pleading specific facts in support of asserted affirmative defenses is not required, and, as noted above, the Twombly decision does not change that. Rather, “[a]n affirmative defense **may be pleaded in general terms** and will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives plaintiff fair notice of the nature of the defense”). United States v. Consolidation Coal Co., No. 89-2124, 1991 WL 333694, *4 (W.D. Pa. July 05, 1991) (quoting 5 Wright & Miller, Federal Practice and Procedure: Civil 2d (Federal Practice) § 1274 (1990)) (emphasis added).⁵ Accordingly, Opposer’s motion should be denied.

2. Applicant Has Properly Pleaded the First Defense

It is well-established that a defendant may assert the defense of failure to state a claim as a defense in its answer in order to preserve the defense. See, e.g., Trustees of Univ. of Penn v. Mayflower Transit, Inc., No. 97-1111, 1997 WL 598001, *1-2 (E.D. Pa. Sept. 16, 1997); Gerakaris v. Champagne, 913 F. Supp. 646, 650-51 (D. Mass. 1996) (defendants preserved Rule 12(b) motion by stating it in answer as an affirmative defense); Doolittle v. Ruffo, 882 F. Supp. 1247, 1257 n.9 (N.D.N.Y. 1994) (same). That is Applicant’s purpose in including this defense in its Answer here, and there is nothing improper about it.

It is also interesting (and instructive) to note that Opposer seeks to have it both ways with respect to pleading standards. Despite ample case law holding to the contrary, some of which is cited above, Opposer seeks to impose the heightened pleading standard of Twombly and Iqbal on Applicant’s affirmative defenses. Notwithstanding this demand, Opposer, in the very next paragraph, seeks the pre-Twombly “fair notice” pleading standard for its claims, and

⁵ Opposer’s argument is contrary to modern pleading practice. Indeed, if defendants were required, as Opposer suggests, to plead facts in support of their affirmative defenses, the typical answer filed in federal court or with the TTAB would look very different from what parties routinely file now.

even goes so far as to argue for the even less stringent “liberally construe” standard of Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002). See Moving Brief at 3-4.

The liberal pleading standard articulated in Higgins is inappropriate in this matter, as the facts could not be more different than those here. First, Higgins was an unrepresented prison inmate, not a sophisticated and profitable company represented by an educated law student who will presumably soon be a member of the bar. Higgins, 293 F.3d at 686. Second, Higgins was suing a state actor for deprivation of his Constitutional rights, not filing a trademark opposition against a company. Id. at 688-89. Finally, Higgins, unlike this matter, was decided before the Twombly and Iqbal decisions, so it is unclear if the same liberal pleading standard would be applied today in that case.

For the foregoing reasons, Opposer’s motion to strike Applicant’s First Defense should be denied.

3. Applicant Has Properly Pleaded the Second Defenses

Opposer argues that Applicant’s Second Defenses, namely, laches, waiver, and estoppel, should also be stricken. As an initial matter, Opposer does not offer a single reason for the TTAB to strike the waiver and estoppel defenses, and instead concentrates solely on the laches defense. Again, Opposer’s contentions are unavailing.

In order to state a prima facie defense of laches, a party must show “(1) unreasonable delay in asserting one’s rights against another, and (2) material prejudice to the latter as a result of the delay.” Aquion Partners L.P. v. Envirogard Ltd., 43 USPQ2d 1371, 1373 (TTAB 1991). The laches defense starts to run, as Opposer concedes, “from the time the mark is published for opposition.” Moving Brief at 5 citing TBMP § 311.02(b).

Here, Applicant’s application for SENSIBLE PORTIONS, Serial No. 78/596,051, for which Opposer seeks to cancel the registration, was published for opposition on December 27, 2005, almost five years before Opposer filed its petition to cancel. A true and correct copy of the TESS printout for the mark is attached to the Declaration of Jason I. Cohen as Exhibit 1 (the

Cohen Decl.). Despite threatening to oppose the registration, and even requesting and receiving an extension to oppose, Opposer did not object. Cohen Decl. at ¶ 3. Relying on this inaction, Applicant invested millions of dollars into cultivating the SENSIBLE PORTIONS mark and the brand. Cohen Decl. at ¶ 4.

In or around May 2010, it was publicly announced that Applicant was to be acquired by the very large, publicly-traded The Hain Celestial Group, Inc. Cohen Decl. at ¶ 5. A true and correct copy of a news release announcing the acquisition is attached to the Cohen Decl. as Exhibit 2. In conducting its diligence in connection with the acquisition, The Hain Celestial Group, Inc. also relied on Opposer's inaction before investing tens of millions of dollars to acquire Applicant. Cohen Decl. at ¶ 7. Coincidentally (or not), less than one month later, Opposer filed its initial notice of opposition to Applicant's then-pending applications for SENSIBLE PORTIONS, Serial Nos. 77/833,401 and 77/833,386.

In its Moving Brief, Opposer mistakenly concludes that Applicant cannot proffer a laches defense because Opposer has filed its petition to cancel within five years of the Applicant's registration. This is not the law. Indeed, the TTAB has dismissed petitions to cancel based on a laches defense for delays much less than Opposer's delay here. See, e.g., Teledyne Technologies, Inc. v. Western Skyways, Inc., 78 U.S.P.Q.2d 1203 (TTAB 2006) (holding that a delay of three years and eight months constituted laches in context of cancellation petition founded on an allegation of a likelihood of confusion). See also The Christian Broadcasting Network, Inc. v. ABS-CBN International, 84 U.S.P.Q.2d 1560 (TTAB 2007) (delay less than five years still constituted laches).

In light of these facts and others that may be learned once discovery actually commences, it is simply not appropriate to strike this defense – or the waiver and estoppel defenses for that matter – because, as the TTAB has held, “the defense of laches usually requires factual development beyond the content of the pleadings.” Aquion Partners L.P., 43 USPQ2d at 1373. As such, Opposer's motion to strike Applicant's Second Defenses should be denied.

4. Applicant Has Properly Pleaded the Third Defense

Opposer acknowledges that unclean hands is a viable defense and that all that must be shown is Opposer's inequitable conduct that relates to the subject matter of its claims. Moving Brief at 6 citing CIBA-GEIGY Corp. v. Bolar Pharmaceutical, 747 F.2d 844, 855 (3d Cir. 1984).

As previously noted, Opposer had constructive notice of Applicant's use of the disputed mark as early as 2005, but did nothing to contest Applicant's existing registration or pending applications until Applicant was acquired by a much larger, publicly-traded company. After news of the acquisition became public, Opposer immediately filed its notice of opposition, and then quickly amended that filing to include a petition to cancel. Cohen Decl. at ¶ 8. Without having any opportunity to create a factual record in this matter, the motivations of Opposer remain unclear, but given what has transpired since the acquisition, Applicant has a reasonable belief that Opposer is not operating in good faith and seeks to "cash in" on this dispute. Applicant should be provided the opportunity to explore this angle, and it would be premature to strike this defense without any discovery having been conducted.

In its Moving Brief, Opposer does not claim that Applicant's unclean hands defense is not viable, only that Applicant has not provided Opposer "fair notice."⁶ Moving Brief at 6. Applicant respectfully submits that if allowed to conduct any discovery, it will be in a position to fully articulate this defense. For the foregoing reasons, Opposer's motion to strike Applicant's Third Defense should be denied.

5. Applicant Has Properly Pleaded the Fourth Defense

As previously noted, Opposer threatened to oppose Applicant's application in late 2005 or early 2006, sought and received an extension of time to oppose, and ultimately elected not to object. Cohen Decl. at ¶ 3.

⁶ It is interesting to point out that Opposer oscillates between the (incorrect) heightened pleading standard of Twombly and the (correct) fair notice standard with respect to Applicant's defenses.

It is now over five years later; Applicant has been acquired; and many of the people and documents involved with this matter are no longer with Applicant. Applicant has proffered this defense, because it is unclear – without the benefit of any discovery – whether any discussions occurred or whether any agreements between the parties (oral, written, implied, express, or otherwise) were contemplated, discussed, or made several years ago.

It is well-established that a defendant may assert defenses in its answer in order to preserve the defense. *See, e.g., Trustees of Univ. of Penn*, 1997 WL 598001, *1-2; *Gerakaris*, 913 F. Supp. at 650-51; *Doolittle*, 882 F. Supp. at 1257 n.9. That is the primary purpose for Applicant having included this defense in its Answer, and there is nothing improper about it, especially since no discovery has been conducted.

Because striking this defense would be premature at this juncture, Opposer's motion to strike Applicant's Fourth Defense should be denied.

6. Applicant Has Properly Pleaded the Fifth, Sixth, Seventh, and Eighth Defenses

Opposer also seeks to strike Applicant's Fifth, Sixth, Seventh, and Eighth Defenses, which concern (1) Applicant's prior use of Applicant's mark in numerous states across the country; (2) that there is no likelihood of confusion between Opposer's marks and Applicant's marks; (3) that Opposer's marks are diluted and weak; and (4) that Applicant's marks are sufficiently distinct from Opposer's marks to avoid confusion, deception, or mistake.

The only basis Opposer provides for this argument is that these defenses "are merely allegations and redundant. . . ." Moving Brief at 7. Assuming that these defenses were redundant – which they are not – it is unclear the grounds on which Opposer can object to their inclusion. Simply, because Applicant is obviously entitled to discovery on the allegations it has proffered in the body of its Answer, if the defenses are simply duplicative of the Answer, there will be no harm or prejudice to Opposer if these defenses were to remain. Opposer has not – because it cannot – articulate the harm or prejudice it would suffer if these defenses are not stricken.

On the other hand, if Opposer were to have its way, Applicant would be left with only one substantive defense, its Ninth Defense, which is based on Opposer's marks being merely descriptive. Opposer's motion is overreaching, and its requests are beyond the bounds of the rules of procedure, particularly since there has been no discovery. Accordingly, Opposer's motion to strike Applicant's Fifth, Sixth, Seventh, and Eighth Defenses should be denied.

C. Opposer Has Failed to Demonstrate Prejudice

Denying the motion to strike will cause no prejudice to Opposer. In the absence of such prejudice, the motion should be denied. See Ohio State University, 51 USPQ2d at *3; Harsco Corp., 9 USPQ2d 1570 at*1; Bristol-Myers Squibb Co., 77 F. Supp. 2d at 619.

The most Opposer can muster on this score is its concern that the challenged defenses, if not stricken, will expose it to overbroad discovery. But this concern is both highly-speculative and misdirected. Despite the fact that the parties have not conducted any discovery as of yet, Opposer has not (because it cannot) point to a single discovery request or topic that would lead to "enormous expenses of discovery" and "needless costs." Moving Br. at 8. Should Opposer find any discovery request objectionable because Opposer believes it roams too far afield from the main issues in the case, it has a remedy: it can seek relief from the TTAB as appropriate under the applicable rules of procedure.

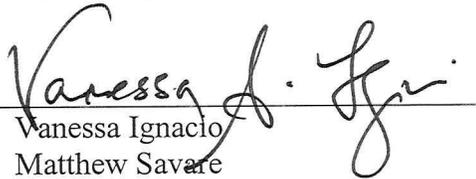
Moreover, striking the affirmative defenses as requested by Opposer will prejudice Applicant by depriving it of the ability to develop a factual record in support of legally viable defenses. Opposer should not be permitted to perpetrate such a pre-emptive strike against potentially meritorious contentions at this extremely early stage of the litigation. Hitachi Cable Amer., 1986 WL 2135, at *6.

The TTAB should deny Opposer's motion to strike.

CONCLUSION

For the reasons set forth above, Applicant respectfully requests that the TTAB deny Opposer's motion to strike in its entirety. To the extent it is not denied, Applicant should be granted leave to amend its defenses under Rule 15 of the Federal Rules of Civil Procedure.

Respectfully submitted,
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By: 
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Dated: March 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Memorandum of Law in opposition to Sensible Foods, LLC's motion to strike and the accompanying Declaration of Jason I. Cohen with exhibits has been electronically filed with the United States Trademark Trial and Appeal Board and served on the Pro Se Attorney of Record by mailing copies of said papers via United States Postal Service to:

Mr. John Rarick
Vice President
Sensible Foods, LLC
P.O. Box 750832
Petaluma, CA 94975

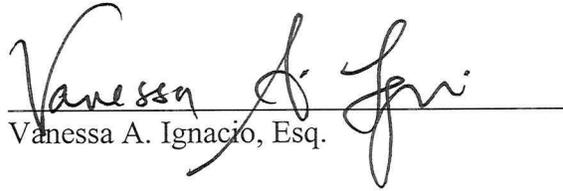

Vanessa A. Ignacio, Esq.

Exhibit A

LOWENSTEIN SANDLER PC
Attorneys at Law
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
Attorneys for Applicant/Registrant

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

SENSIBLE FOODS, LLC,
Opposer,

vs.

WORLD GOURMET MARKETING, LLC,
Applicant/Registrant.

In re:

Trademark: SENSIBLE PORTIONS

Opposition No.: 91195262

Cancellation No.: 92053083

**DECLARATION OF JASON I. COHEN IN SUPPORT OF
APPLICANT'S/REGISTRANT'S OPPOSITION TO OPPOSER'S MOTION TO STRIKE
CERTAIN AFFIRMATIVE DEFENSES**

JASON I. COHEN, being of full age, does hereby certify as follows:

1. I am President of World Gourmet Marketing, LLC ("Applicant"). As such, I have knowledge of the facts set forth in this declaration, and they are true and correct. I make this declaration in support of Applicant's Opposition to Opposer's Motion to Strike Certain Affirmative Defenses.

2. Annexed as Exhibit 1 is a true and correct copy of the TESS printout for the mark SENSIBLE PORTIONS, Serial Application No. 78/596,051.

3. In January 2006, Opposer filed for and received an extension of time to oppose this application, but Opposer took no action and did not object.

4. Relying on this inaction, Applicant invested millions of dollars into cultivating the SENSIBLE PORTIONS mark and the brand.

5. In or around May 2010, it was publicly announced that Applicant was to be acquired by large, publicly-traded The Hain Celestial Group, Inc.

6. Annexed as Exhibit 2 is a true and correct copy of a news release announcing the acquisition.

7. In conducting its diligence in connection with the acquisition, The Hain Celestial Group, Inc. also relied on Opposer's inaction before investing tens of millions of dollars to acquire Applicant.

8. After news of this acquisition became public, Opposer filed its notice of opposition to Applicant's pending applications for SENSIBLE PORTIONS, and then quickly amended that filing to include a petition to cancel Registration No. 3,195,083

I certify that all of the foregoing statements made by me are true, and I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated March 3, 2011

By:

Jason I. Cohen

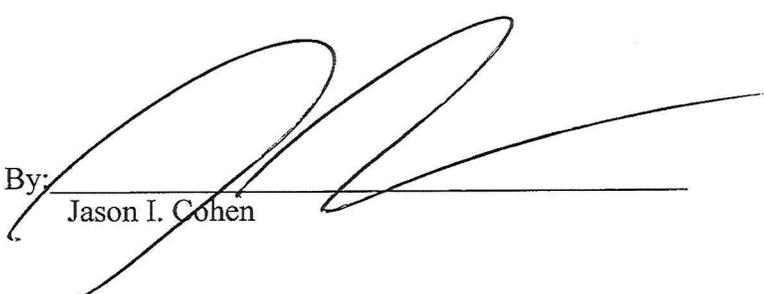


Exhibit 1



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SENSIBLE PORTIONS

Word Mark	SENSIBLE PORTIONS
Goods and Services	IC 029. US 046. G & S: 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. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701
	IC 030. US 046. G & S: 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. FIRST USE: 20030701. FIRST USE IN COMMERCE: 20030701
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78596051
Filing Date	March 28, 2005
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	December 27, 2005
Registration Number	3195083
Registration Date	January 2, 2007

Owner (REGISTRANT) World Gourmet Marketing LLC LIMITED LIABILITY COMPANY NEW JERSEY 49
Lincoln Road Butler NEW JERSEY 07405

(LAST LISTED OWNER) HAIN GOURMET, INC. CORPORATION DELAWARE 58 SOUTH
SERVICE ROAD SUITE 250 MELVILLE NEW YORK 11747

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Vanessa A. Ignacio, Esq.

Type of Mark Register TRADEMARK
PRINCIPAL

Live/Dead Indicator LIVE

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Exhibit 2

FOOD INGREDIENTS *first*

Hain Celestial Group to Acquire World Gourmet Marketing

Date:06 May 2010

Summary:World Gourmet develops, produces, markets and sells Sensible Portions branded Veggie Straws, Pita Bites and other snack products into various sales channels and has developed significant strength in the club store channel.

6 May 2010 --- The Hain Celestial Group, Inc. a leading natural and organic products company providing consumers with A Healthy Way of Life has reported results for the third quarter ended March 31, 2010. The Company also announced that it has reached an agreement in principle to acquire the assets and business of World Gourmet Marketing, LLC, producer and marketer of Sensible Portions Veggie Straws and Pita Bites and that Hain Pure Protein (HPP), a joint venture where the Company holds a 48.7% interest, will divest its Kosher Valley brand.

Net sales in the third quarter totaled \$222,098,000 versus \$234,582,000 in the prior year period after excluding net sales of \$30,346,000 by HPP. Total net sales on a GAAP basis in the prior year quarter amounted to \$264,928,000 including HPP, which was then a consolidated subsidiary. Net sales in the current year third quarter were negatively affected by a total of approximately \$24,000,000 as a result of inventory reductions at two major distributors and the phasing out of the supply of fresh sandwiches to Marks and Spencer in the United Kingdom, offset by \$4,814,000 of favorable changes in exchange rates for foreign currencies.

"Our consumption trends improved across our branded business during the third quarter led by our operations in the United States and followed by Canada and Europe, as consumers continue to see healthy eating and living as a way of life. I'm pleased with the top line growth in Europe at 9% and the UK at 21%(2)," said Irwin D. Simon, President and Chief Executive Officer. "Despite inventory reductions at key distributors, our sales momentum gained in the natural, mass market and specialty channels while the grocery channel showed signs of improving trends. Our productivity and efficiencies continued to positively impact our margins, where we believe there is more room to improve, and the strength of our operations enabled us to generate healthy cash flow to maintain a strong balance sheet and reduce our debt."

"Our focus on driving profitable consumption growth was evident in our third quarter results," commented John Carroll, Chief Executive Officer, Hain Celestial US. "All US business units experienced consumption growth led by double digit increases from our Imagine, Terra , DeBoles, Spectrum Naturals and MaraNatha brands as well as our Alba personal care brand, followed by single digit increases from our Celestial Seasonings brand, Dream(TM) non-dairy beverages, Earth's Best baby food as well as our Avalon personal care brands."

The Company reported GAAP net income of \$2,656,000, or \$0.06 per share, which includes a

non-cash charge for the recording of a valuation allowance on deferred tax assets in the United Kingdom. Net income adjusted to exclude this charge was \$9,740,000, or \$0.24 per share. During the quarter, the Company also absorbed \$1,161,000 (\$721,000 after tax), or \$0.02 per share, related to litigation, and \$701,000 after tax, or \$0.02 per share, related to operating losses at HPP's Kosher Valley brand. In the prior year quarter the Company incurred a net loss of \$41,150,000, or \$1.01 per share, which was driven by non-cash impairment charges against goodwill and intangible assets related to the Company's European and HPP reporting units.

"We expect our UK operations will become profitable; however, accounting guidance requires that we take a charge against our recorded deferred tax assets now despite the potential that we may benefit from them in the future. We believe that we are experiencing a turnaround in our frozen food and food-to-go operations, as they win new business opportunities," commented Irwin Simon.

The Company's gross profit increased 24 basis points to 27.69% of net sales in the third quarter, from 27.45% in the year ago period, after adjusting the prior year quarter for the gross profit of HPP(1). The prior year gross profit reported under GAAP was 22.6%. The gross profit improvement was primarily driven by a favorable mix of sales of higher margin products in the US, a more normalized cost environment and continued improvements from productivity initiatives. In addition, the Company's gross margins in Canada benefited from a stronger Canadian currency.

Selling, general and administrative expenses were 19.0% of net sales in this year's third quarter compared to 18.3% after adjusting the prior year quarter for the deconsolidation of HPP(1). SG&A as reported under GAAP was 17.1% of net sales in the prior year period. Both the GAAP and HPP-adjusted SG&A in the prior year quarter were favorably reduced by a net insurance recovery of \$2,303,000, without which, SG&A as a percentage of net sales in the prior year would have been 17.9% under GAAP and 19.2% as adjusted for HPP. The increase in SG&A as a percentage of net sales was principally the result of the lower net sales in the current quarter.

Operating free cash flow was \$59,362,000 over the most recent 12-month period ended March 31, 2010, improving by \$83,948,000 from the comparable period one year ago(1). The Company's balance sheet remained strong as the Company reduced borrowings by \$10,000,000 in the quarter, bringing the total debt reduction to \$63,500,000 over the 12 months ended March 31, 2010. Debt as a percentage of equity was 30.7%, with equity at \$734,267,000 at the end of the third quarter this year.

The Company has reached an agreement in principle to acquire the assets and business, subject to certain liabilities, of World Gourmet Marketing, LLC. World Gourmet develops, produces, markets and sells Sensible Portions branded Veggie Straws, Pita Bites and other snack products into various sales channels and has developed significant strength in the club store channel. The transaction is subject to regulatory and other approvals. The Company expects the acquisition will be accretive to the Company after closing. "We are excited about adding Sensible Portions to our portfolio of brands and the opportunity to leverage their distribution and in-house capabilities," said Irwin Simon. "We look forward to having Jerry Bello and Jason Cohen, co-founders of Sensible Portions, join us and continue to lead the growth and innovation of their products in Hain Celestial's portfolio."

"We are also pleased that HPP has entered into a letter of intent to exchange its Kosher Valley

brand and customer relationships with Empire Kosher Poultry, Inc. ("Empire") for an equity interest in Empire. We are delighted that this combination will expand the breadth of the product lines and their distribution reach," said Irwin D. Simon, a Director of HPP. "Empire has been a premier brand in kosher poultry for many years, and Kosher Valley will benefit greatly from Empire's production capabilities and reputation for delivering high-quality products to a broad market. Hain Pure Protein has made significant investments over the last year in building Kosher Valley into the strong brand that it is today," concluded Irwin Simon. Mr. Simon is expected to become a director of Empire. The Company's share of the after-tax losses incurred by Kosher Valley amounted to \$701,000 in the three months and \$1,644,000 in the nine months ended March 31, 2010, which had the effect of reducing Hain Celestial's diluted earnings per share by \$0.02 in the three months and \$0.04 in the nine months, and therefore this transaction is expected to be accretive to Hain Celestial.

During the third quarter this year, the Company recorded a valuation allowance of \$7,084,000 as a result of the Company's evaluation of its United Kingdom tax position in accordance with the requirements of Accounting Standards Codification Topic 740, "Accounting for Income Taxes" ("ASC 740"). The Company's United Kingdom operations have incurred losses in recent years and have been affected by restructuring and other charges, such as the costs incurred in connection with the recent consolidation of its food-to-go production facilities, the phase out of sales to Marks and Spencer, as well as the economy in the United Kingdom. In accordance with ASC 740, current year losses coupled with the losses of prior periods required that management record a full valuation allowance against the deferred tax assets that arose in the loss periods despite management's expectations indicating that the United Kingdom operations will be profitable in fiscal year 2011. If the United Kingdom operations are able to realize any of these deferred tax assets in the future, the provision for income taxes will be reduced by a release of the corresponding valuation allowance.

The Company updated its fiscal year 2010 guidance. The Company anticipates full fiscal year net sales will be \$915 to \$925 million. GAAP earnings per share is expected to be \$0.78 to \$0.81, and non-GAAP earnings per share is expected to be \$1.03 to \$1.06, which excludes the effects of the valuation allowance recorded for United Kingdom deferred tax assets, the costs related to litigation settlements, the non-cash write-down of the Company's investment in Yeo Hiap Seng Limited and costs incurred in connection with the consolidation of our two United Kingdom production facilities.