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Filing date: **10/02/2012**

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

Proceeding	91196767
Party	Defendant OlÃ© Mexican Foods, Inc.
Correspondence Address	PAUL S OWENS PAUL OWENS ASSOCIATES PO BOX 15310 ATLANTA, GA 30333 0310 UNITED STATES psowens@bellsouth.net
Submission	Motion to Amend/Amended Answer or Counterclaim
Filer's Name	Paul S. Owens
Filer's e-mail	psowens@bellsouth.net
Signature	/paul s. owens/
Date	10/02/2012
Attachments	Motion to Amend with Apps. A and B.pdf ( 53 pages )(1055082 bytes )

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

-----X  
In the Matter of Trademark Appl'n No.:  
77/734,156

For the Mark: LA MORENITA

Filing date: May 11, 2009

GRUMA CORPORATION,

Opposer,

v.

Opposition No. 91196767

OLÉ MEXICAN FOODS, INC.,

Applicant.

-----X

**APPLICANT'S MOTION TO FILE AN AMENDED ANSWER WITH  
COUNTERCLAIMS, TO REOPEN DISCOVERY AND RESET TRIALS DATES, AND  
TO SUSPEND**

Pursuant to Fed.R.Civ.P. 6(b) and 15(a), Trademark Rules 2.107, 2.117, 2.121, and 2.127, and TBMP 507, 509, and 510, Applicant, by its attorney, hereby moves the Board for an Order: (a) permitting Applicant to file the Amended Answer with Counterclaims added, a copy of which is attached hereto as Appendix A; (b) reopen the discovery period for at least 60 days to permit discovery in connection with the counterclaims and expert disclosures herein; and, (c) suspend proceedings herein pending the Board's decision on the within motion. The Declaration of Paul S. Owens with exhibits in support of this motion is attached hereto as Appendix B.

Applicant moves to amend its Answer herein to add two counterclaims for cancellation of Opposer's Registration Nos. 3,618,991 and 3,306,372 on the grounds of abandonment and the lack of a bona-fide use of the registered marks in interstate commerce. As is set forth more fully

below, Applicant has moved to amend promptly after learning of the grounds for the counterclaims—that is, Applicant only learned yesterday that Opposer’s Registration No. 2,534,248 had been cancelled by the USPTO on August 31, 2012, and only received Opposer’s late-served Responses to Applicant’s discovery requests indicating Opposer was no longer selling tortillas and masa under the LA MONITA mark on September 13, 2012, both well after discovery closed.

Finally, Applicant moves to reopen the discovery period for 60 days in order to conduct discovery with regard to the subject matter of the counterclaims Applicant seeks to file herein and to permit discovery with regard to Opposer’s late-served expert disclosures and to permit Applicant to serve rebuttal expert disclosures.

Applicant moves to suspend proceedings pending the Board’s decision since Opposer’s 30-day trial period is presently scheduled to close on October 27, 2012 and the Board’s decision on the within motion is needed before the parties enter the trial phase of this Opposition.

## **I. BACKGROUND**

Applicant filed an intent-to-use for the mark LA MORENITA on May 11, 2009 for use with “tortillas and tostadas.” On October 4, 2010, Opposer filed the above-captioned Opposition to the application, claiming prior rights and a likelihood of confusion.

Opposer based its claim of prior rights solely on its ownership of three federal trademark registrations as follows:

(a) LA MONITA (Reg. No. 2,534,248) for use with “tortillas [and masa].” Opposer deleted “masa” from the identification of goods on July 16, 2007.



(b) *La Monita* (Reg. No. 3306372) for use with “tortillas.”

(c) LA MONITA (Reg. No. 3618991) for use with “masa (corn dough).”

The undersigned learned for the first time yesterday from a search of TESS records that Opposer’s Registration No. 2,534,248 for LA MONITA for use with tortillas had been cancelled by the USPTO on August 31, 2012 for failure to file a Section 8 Affidavit. Owens Decl. ¶ 2. As of the date of this motion, Opposer has not moved to amend its Notice of Opposition in light of the cancellation of this registration, or otherwise notify Applicant of its cancellation.

On July 30, 2012, Applicant served Applicant’s First Set of Interrogatories and First Request for Production of Documents to Opposer. (See Owens Decl. Exh. 1.) Responses to these discovery requests were due on September 4, 2012. When Applicant had still not received responses by September 12, 2012, the undersigned wrote Opposer’s attorney notifying him that the responses were overdue. (See Owens Decl. Exh. 2.)

Opposer’s attorney emailed Opposer’s Responses to the undersigned on September 13, 2012. (See Owens Decl. Exh. 3.) As of the date of this Declaration, the undersigned has never received the mailed copy of Opposer’s Responses that Opposer maintains were sent to the undersigned by first-class mail on September 4, 2012, and Opposer has not indicated whether and when the mailed copy of these Responses were returned to it. (See Owens Decl. ¶ 6.)

Opposer admitted in its Interrogatory responses that it has ceased sales of its LA MONITA tortillas more than two years ago and its LA MONITA masa more than a year ago. Specifically, Opposer stated in its Responses that “[t]he most recent sales of LA MONITA corn tortillas were made in June 2010. The most recent sales of LA MONITA flour (masa) were

made in June 2011.” (See Owens Decl. Exh. 3, Interrog. No. 1.) Applicant did not know that Opposer was no longer selling products under its LA MONITA mark until it received this Interrogatory response less than three weeks ago. (See Owens Decl. ¶ 7.)

The scheduling Order currently in effect set Friday, June 29, 2012 as the date expert disclosures were due. Opposer did not serve its expert disclosures until July 30, 2012, more than a month after the expert disclosure deadline. (See Owens Decl. Exh. 4.)

## **II. ARGUMENT.**

**A. The Boad Should Grant Applicant’s Motion to Amend.** As outlined above, Applicant’s motion herein is based on newly discovered evidence and Applicant has moved promptly to amend its Answer and make its motion herein.

Opposer’s opposition herein is based solely on its three registrations for the LA MONITA mark and not on prior common-law rights in the mark. As outlined above, Applicant only learned yesterday that Opposer’s LA MONITA word mark Registration No. 2,534,248 for use of the mark with “tortillas,” the same product Applicant’s LA MORENITA mark has been applied for, had been cancelled on August 31, 2012 for failure to file a Section 8 Affidavit. Opposer has already admitted under oath that the most recent sales of LA MONITA in connection with “tortillas” was June, 2010, more than two years ago, and in connection with “masa (flour)” in June, 2011, more than a year ago. (See Owens Decl. Exh. 3, Interrog. No. 1.) Reading these facts about the cancellation of one LA MONITA registration together with the non-sales of the LA MONITA mark, it is a reasonable inference that Opposer has abandoned its two remaining Registration Nos. 3,618,991 and 3,306,372 for LA MONITA as well.

Leave to amend pleadings should be freely granted at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be

prejudicial to the rights of the adverse party. Fed.R.Civ.P. 15(a) and TBMP 507. It would not be just to permit Opposer to block Applicant's application with invalid registrations, and Opposer will not be prejudiced in its litigation of this Opposition by Applicant's addition of counterclaims to its Answer seeking to cancel the aforementioned registrations.

**B. The Board Should Reopen Discovery for 60 Days and Reset the Trial Dates.** It does not prejudice Opposer to reopen discovery at this point. TBMP 509. Discovery is needed for Applicant to inquire into the validity of Opposer's registrations, particularly since the facts supporting the new counterclaims were not learned until after the discovery period herein had already closed.

The new discovery will not burden Opposer since there has been almost no discovery in this Opposition so far. The only discovery request Applicant has served so far was its First Set of Interrogatories and First Request for Production of Documents to Opposer. Even in connection with these discovery requests, Opposer repeatedly blocked Applicant's inquiries into its use, or lack thereof, of its LA MONITA mark by claiming that such inquiries were "irrelevant" and in many instances failed to give any response on that basis at all. (See Owens Decl. Exh. 3, Interrog. Nos. 2(b),(d), and (e), 3, 4, 5, 6, 7, 8, 9, 10, and 13, and Document Request Nos. 2, 3, 5, 6, 7, 8, 11, and 14.) Clearly these discovery requests will be relevant to Applicant's counterclaims and Applicant should be given the opportunity to take discovery on these subjects.

In addition, Applicant needs discovery into Opposer's expert disclosures, which were served on Applicant on the last day of the discovery period. (See Owens Decl. ¶ 8.) By serving its expert disclosures late, Opposer deprived Applicant of the opportunity to serve rebuttal expert disclosures in a timely manner and to obtain discovery of Opposer's expert. Although Applicant

could move to strike Opposer's expert testimony at trial, the parties would have to proceed with trial while being uncertain about the admissibility of the expert testimony. Reopening the discovery period for 60 days will remove that uncertainty.

As outlined above, Applicant has not delayed in moving to reopen discovery, but has promptly brought this motion less than three weeks after learning of the facts underlying its motion to reopen. Indeed, as outlined above, Opposer's discovery responses were served late and Applicant still has not yet received proper service of Opposer's responses. (See Owens Decl. ¶¶ 5-6.) Notwithstanding this, any delay there may be will have little impact on this proceeding and has not been due to neglect by either party to this Opposition, and Applicant's motion herein is made in good faith. The parties have been negotiating settlement of this matter in good-faith for over a year and both parties sincerely believed that the negotiations were proceeding to settlement. (See Owens Decl. ¶ 3.) The parties have been diligent about seeking extension of both discovery deadlines and trial dates over the past year and a half and even though the parties' last consented motion to extend the discovery and trial dates was denied by the Board for formal reasons, it was the clear intention of the parties at that time to extend both discovery and trial dates and not let discovery close while the parties were discussing settlement. (See Owens Decl. ¶ 4.)

WHEREFORE, Applicant respectfully requests that the Board:

(a) Grant Applicant's Motion to File the Amended Answer with Counterclaims attached hereto as Appendix A;

(b) Reopen the discovery period herein for at least 60 days and reset the trial dates accordingly;

(c) Suspend proceedings herein pending the Board's decision on the within motion; and,

(d) Grant such other and further relief as to the Board seems just.

Dated: October 2, 2012

Respectfully submitted,

/paul s. owens/  
Paul S. Owens, Esq.  
Attorney for Applicant--Olé Mexican  
Foods, Inc.  
Paul Owens & Associates  
P.O. Box 15310  
Atlanta, GA 30333-0310

Tel: (404) 370-9800  
Fax: (404) 370-9801  
E-mail: psowens@bellsouth.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Applicant's Motion to File An Amended Answer with Counterclaims, To Reopen Discovery and Reset Trial Dates, and to Suspend has been served upon John M. Cone, Esq., attorney of record for the Opposer, at Hitchcock Evert LLP, P.O. Box 131709, Dallas, Texas 75313-1709, the address designated by said attorney for that purpose, by causing to be mailed a true copy thereof in a sealed envelope, postage prepaid, and deposited with the United States Postal Service as first-class mail on Tuesday, October 2, 2012.

/paul s. owens/  
Paul S. Owens, Esq.

# **APPENDIX A**

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

-----X  
In the Matter of Trademark Appl'n No.:  
77/734,156

For the Mark: LA MORENITA

Filing date: May 11, 2009

GRUMA CORPORATION,

Opposer,

v.

Opposition No. 91196767

OLÉ MEXICAN FOODS, INC.,

Applicant.

-----X

**AMENDED ANSWER WITH COUNTERCLAIMS**

Olé Mexican Foods, Inc. ("Applicant"), through its attorney, hereby answers the above-captioned Notice of Opposition, as follows:

1. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation 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 or falsity of each and every allegation contained in paragraph 2 of the Notice of Opposition, except denies that Registration No. 2,534,248 is a currently valid and subsisting trademark registration.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation contained in paragraph 3 of the Notice of Opposition, except denials with regard to Registration No. 2,534,248.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation contained in paragraph 4 of the Notice of Opposition, except denials with regard to Registration No. 2,534,248.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation contained in paragraph 5 of the Notice of Opposition, except denials that the applied-for mark is likely to cause confusion with Opposer's LA MONITA mark, or to cause mistake or to deceive.

6. Applicant denies each and every allegation of paragraph 6 of the Notice of Opposition.

**AFFIRMATIVE DEFENSES**

7. Opposer has failed to state a claim upon which relief may be granted.

8. There is no likelihood of confusion, mistake, or deception of the public between the parties' marks since the marks are different in appearance, sound, and meaning.

9. Registration No. 2,534,248 has been cancelled.

**AS AND FOR A COUNTERCLAIM FOR CANCELLATION OF  
REGISTRATION NOS. 3,618,991**

10. Applicant reasserts and realleges each and every allegation at ¶¶ 1-9, inclusive, as if fully set forth herein.

11. Upon information and belief, Opposer ceased sales of masa (flour) under the LA MONITA mark in June, 2011.

12. Upon information and belief, Opposer's sales of masa (flour) under the LA MONITA mark prior to June, 2011 were only made in a few stores, if any, in the metropolitan Houston, Texas area and were not bona-fide sales of the products in interstate commerce.

13. Upon information and belief, Opposer has abandoned its LA MONITA mark in connection with "masa (flour)" and consequently Registration No. 3,618,991 should be cancelled.

**AS AND FOR A COUNTERCLAIM FOR CANCELLATION OF  
REGISTRATION NOS. 3,306,372**

14. Applicant reasserts and realleges each and every allegation at ¶¶ 1-13, inclusive, as if fully set forth herein.

15. Upon information and belief, Opposer ceased sales of tortillas under the LA MONITA mark in June, 2010.

16. Upon information and belief, Opposer's sales of tortillas under the LA MONITA mark prior to June, 2010 were only made in a few stores, if any, in the metropolitan Houston, Texas area and were not bona-fide sales of the products in interstate commerce.

17. Upon information and belief, Opposer has abandoned its LA MONITA mark in connection with "masa (flour)" and consequently Registration No. 3,306,372.

WHEREFORE, Applicant respectfully requests that the Notice of Opposition herein be dismissed with prejudice, that Registration Nos. 3,618,991 and 3,306,372 be cancelled, and for such other and further relief as to the Board seems just.

Dated: October 2, 2012

Respectfully submitted,

**/paul s. owens/**  
Paul S. Owens, Esq.  
Attorney for Applicant--Olé Mexican  
Foods, Inc.  
Paul Owens & Associates  
P.O. Box 15310  
Atlanta, GA 30333-0310

Tel: (404) 370-9800  
Fax: (404) 370-9801  
E-mail: psowens@bellsouth.net

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Applicant's Amended Answer with Counterclaims has been served upon John M. Cone, Esq., attorney of record for the Opposer, at Hitchcock Evert LLP, P.O. Box 131709, Dallas, Texas 75313-1709, the address designated by said attorney for that purpose, by causing to be mailed a true copy thereof in a sealed envelope, postage prepaid, and deposited with the United States Postal Service as first-class mail on Tuesday, October 2, 2012.

**/paul s. owens/**  
Paul S. Owens, Esq.

# **APPENDIX B**

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

-----X  
In the Matter of Trademark Appl'n No.:  
77/734,156

For the Mark: LA MORENITA

Filing date: May 11, 2009

GRUMA CORPORATION,

Opposer,

v.

Opposition No. 91196767

OLÉ MEXICAN FOODS, INC.,

Applicant.

-----X

**DECLARATION OF PAUL S. OWENS**

I, Paul S. Owens, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury, as follows:

1. I am an attorney in the law offices of Paul Owens & Associates, and I am attorney of record for Applicant in this Opposition. I have personal knowledge of the facts stated herein and can competently testify to if so required. I submit this Declaration in support of Applicant's Motion to File an Amended Answer with Counterclaims, to Reopen Discovery and Reset Trial Dates, and to Suspend.

2. The undersigned learned for the first time yesterday from a search of TESS records that Opposer's Registration No. 2,534,248 for LA MONITA for use with tortillas had been cancelled by the USPTO on August 31, 2012 for failure to file a Section 8 Affidavit.

3. The parties have been actively working to settle the above-captioned Opposition over the past 14 months to the present. In July-August, 2011, the parties through their attorneys negotiated a settlement agreement. On August 10, 2011, the undersigned sent Opposer's attorney a draft of the parties' proposed settlement agreement for Opposer's approval. On February 29, 2012, after several telephone calls and emails between the parties' attorneys, Opposer's attorney sent the undersigned a revised draft agreement embodying changes made by Opposer to the draft agreement. In September, 2012, after several telephone calls and emails, Opposer and Applicant, through their attorneys, made counterproposals to the draft settlement agreement, which are being given consideration by both parties. Some of the delay in the parties' settlement negotiations has arisen from miscommunication and confusion over which party was supposed to be responding to a particular counterproposal.

4. Over the past year and a half, the parties have filed several consented motions to extend the discovery dates and reset the trial dates accordingly. The parties' most recent consent motion to reopen/extend was filed on June 28, 2012. On July 25, 2012, however, the Board denied the motion on the ground that it did not include a detailed report on the progress of the parties' settlement agreement. Notwithstanding the formal insufficiencies of the June 28 consented motion, it was clearly the joint intention of the parties to extend the discovery dates and reset the trial dates while the parties attempted to work out a settlement agreement.

5. On July 30, 2012, Applicant served Applicant's First Set of Interrogatories and First Request for Production of Documents to Opposer. A true and correct copy of these discovery requests are attached hereto as Exhibit 1. Responses to these discovery requests were due on September 4, 2012. When Applicant had still not received responses by September 12, 2012, the

undersigned wrote Opposer's attorney notifying him that the responses were overdue. (A true and correct copy of the email to Opposer's attorney is attached hereto as Exhibit 2.)

6. Opposer's attorney emailed Opposer's Responses to the undersigned on September 13, 2012, a true and correct copy of which is attached hereto as Exhibit 3. As of the date of this Declaration, the undersigned has never received the mailed copy of Opposer's Responses that Opposer maintains were sent to the undersigned by first-class mail on September 4, 2012, and Opposer has not indicated whether and when the mailed copy of these Responses were returned to it.

7. Opposer admitted in its Interrogatory responses that it has ceased sales of its LA MONITA tortillas more than two years ago and its LA MONITA masa more than a year ago. Specifically, Opposer stated in its Responses that "[t]he most recent sales of LA MONITA corn tortillas were made in June 2010. The most recent sales of LA MONITA flour (masa) were made in June 2011." (See Exh. 3, Interrog. No. 1.) Applicant did not know that Opposer was no longer selling products under its LA MONITA mark until it received this Interrogatory response less than three weeks ago.

8. The scheduling Order currently in effect set Friday, June 29, 2012 as the date expert disclosures were due. Opposer did not serve its expert disclosures until July 30, 2012, more than a month after the deadline. (A true and correct copy of these disclosures are attached hereto as Exhibit 4.)

Dated: October 2, 2012

Respectfully submitted,

/paul s. owens/  
Paul S. Owens, Esq.  
Attorney for Applicant--Olé Mexican  
Foods, Inc.

Paul Owens & Associates  
P.O. Box 15310  
Atlanta, GA 30333-0310

Tel: (404) 370-9800  
Fax: (404) 370-9801  
E-mail: psowens@bellsouth.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Declaration of Paul S. Owens and Exhibits 1-4 has been served upon John M. Cone, Esq., attorney of record for the Opposer, at Hitchcock Evert LLP, P.O. Box 131709, Dallas, Texas 75313-1709, the address designated by said attorney for that purpose, by causing to be mailed a true copy thereof in a sealed envelope, postage prepaid, and deposited with the United States Postal Service as first-class mail on Tuesday, October 2, 2012.

/paul s. owens/  
Paul S. Owens, Esq.

# **EXHIBIT 1**

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

-----X

GRUMA CORPORATION,

Opposer,

v.

Opposition No. 91196767

OLÉ MEXICAN FOODS, INC.,

Applicant.

-----X

**APPLICANT'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS TO OPPOSER**

PLEASE TAKE NOTICE that, pursuant to Rule 2.120 of the Trademark Rules of Practice and Fed.R.Civ.P. 26, 33, and 34, Opposer is directed to answer the interrogatories set forth below in writing and under oath, and respond to the requests for production of documents set forth below, within 30 days of service, the answers to be served on Paul S. Owens, Esq., P.O. Box 15310, Atlanta, Georgia 30333-0310.

Applicant requests that Opposer serve Bates-stamped photocopies of documents responsive to the within document production requests upon Applicant's attorney either by sending physical copies to the undersigned at Paul S. Owens, Esq., 390 Chelsea Circle, Atlanta, Georgia 30307 or to [psowens@bellsouth.net](mailto:psowens@bellsouth.net).

Please take further notice that, pursuant to Federal Rules of Civil Procedure 26(e), Opposer is under a continuing duty to supplement and/or amend its answers to all

interrogatories.

### **Definitions and Instructions**

1. As used herein, the term "Opposer" includes the above-captioned Opposer, as well as all of its subsidiaries and related organizations, any predecessor thereto, and the officers, directors, employees, representatives, accountants, consultants, advisors, attorneys, custodians of records, and/or agents of Opposer.

2. As used herein, the term "Applicant's Mark" shall include the word mark LA MORENITA.

3. As used herein, the term "metropolitan Houston area" shall include the area within a twenty-mile radius of the center of the city of Houston, Texas.

4. As used herein, the term "LA MONITA Mark" shall include Opposer's LA MONITA mark in any format whether or not in combination with a design element, including but not limited to the marks that are the subject of Opposer's Trademark Registration Nos. 2,534,248, 3,306,372, and 3,618,991.

5. As used herein, the term "Opposer's LA MONITA Products" shall include any goods or services Opposer applies the LA MONITA Mark to, including but not limited to the goods identified in Opposer's Trademark Registration Nos. 2,534,248, 3,306,372, and 3,618,991.

6. The term "document(s)" is defined to be synonymous in meaning and equal in scope with the usage of this term in the Federal Rules of Civil Procedure 34(a) and shall include, without limitation, any tangible thing from or on which information can be stored, recorded, processed, transmitted, inscribed or memorialized in any way regardless of technology or form.

7. The word "person(s)" shall include juristic persons as well as natural persons.

8. Whenever appropriate, the singular form of a word shall be interpreted in the plural.

9. The terms "identify" or "state the identity of" with respect to a document or thing shall mean a complete identification to the full extent known or ascertainable by Opposer, whether or not the document or thing is in the possession of Opposer and whether or not privileged, including the following information:

(a) The present depository or depositories and the name and address of the person having custody of any document or thing to be identified;

(b) A general description of the document or thing, including the signer, preparer or sender thereof, the recipient, the present location of the original thereof, its date, and other information sufficient to enable same to be subject to a subpoena duces tecum or request for production thereof.

10. The terms "identify" or "state the identity of" with respect to a natural person means to state the person's full name, the present or last known business or residence address and telephone number of such person, the current or last known employer of such person, and such employer's address and telephone number.

11. The terms "identify" or "state the identity of" with respect to an entity not a natural person means to state its full name, the address of its principal place of business, and its telephone number.

12. The terms "identify" or "describe" with respect to all other interrogatories and requests means to state descriptive information of sufficient particularity to enable same to be subject to a subpoena duces tecum or request for production thereof.

13. To the extent that answers any interrogatory herein by utilizing the option to

produce business records under Rule 33(c) of the Federal Rules of Civil Procedure, such document production shall segregate and identify the business records according to the interrogatories to which the records are responsive.

14. With respect to each document or thing or oral communication which Opposer contends is privileged or otherwise excludable from discovery, state:

- (a) the basis for the privilege or other grounds for objection;
- (b) the name and address of the author and the addressee of the document or thing;
- (c) the date, general subject matter, and the name and address of every recipient of the original or any copy of the document or thing;
- (d) the name and address of each person who has the original or any copy of the document or thing;
- (e) the identity and location of the files in which the original and each copy are normally kept; and,
- (f) if the privilege or objection is asserted with respect to an oral communication, identify all persons who participated in or heard such communication.

#### **INTERROGATORIES AND DOCUMENT REQUESTS**

INTERROGATORY 1. Identify by type each and every product or service Opposer promoted, sold, and/or offered for sale under the LA MONITA Mark from 2005 to the present, and state the time periods during which each such product or service was promoted sold, or offered for sale.

DOCUMENT REQUEST NO. 1. For each product or service identified in response to Interrogatory No. 1, produce all packaging, labeling, advertising, promotional materials and

other documents showing use of the LA MONITA Mark.

INTERROGATORY NO. 2. For each product or service identified in response to Interrogatory No. 1:

(a) State the date of first sale of the product in commerce and in interstate commerce and identify each document that Opposer will rely on to establish such date;

(b) State on an annual basis from 2005 to the present: (i) with regard to products, the total number of units sold and the dollar volume of such sales by type of product in the metropolitan Houston area; and, (ii) with regard to services, the total dollar amount billed for rendering such services in the metropolitan Houston area by type of service.

(c) State on an annual basis from 2005 to the present: (i) with regard to products, the total number of units sold and the dollar volume of such sales by type and by state of the United States; and, (ii) with regard to services, the total dollar amount billed for rendering such services by state of the United States.

(d) Identify on an annual basis from 2005 to the present: (i) the retail stores that have sold the products in the metropolitan Houston area; and, (ii) representative retail stores that have sold the products by state of the United States.

(e) Identify by month and year, each three-month period or longer from the date of first use to the present during which each such product or service identified in response to Interrogatory No. 1 was not sold or rendered and state the reason(s) therefor.

(f) Identify each person providing information or assisting in the preparation of answers to this Interrogatory by subpart.

(g) Identify all documents by the subpart they are responsive to that form the basis of or

support Opposer's response to Interrogatory No. 2, or that Opposer intends to rely on to prove the statements and identifications made in response to Interrogatory No. 2.

DOCUMENT REQUEST NO. 2. Produce all documents identified in response to Interrogatory No. 2.

DOCUMENT REQUEST NO. 3. Produce all documents referring or relating to the information requested in Interrogatory No. 2.

INTERROGATORY NO. 3: Identify all those at Opposer engaged in the development, manufacture, distribution, sale, and marketing of each of the products or services identified in response to Interrogatory No. 1, and state each such person's job title and responsibilities.

INTERROGATORY 4. For each product and service identified in response to Interrogatory No. 1, state in detail the channels of trade in which the LA MONITA Mark is used or sold, including the geographic area in which the LA MONITA Mark is used or sold, the manner in which the goods or services reach the ultimate consumer, the geographic reach of each such channel, and the approximate percentage of total sales of products and/or services through each such channel, and identify each person at Opposer knowledgeable about such trade channels.

DOCUMENT REQUEST NO. 4. Produce all documents Opposer intends to rely on to prove the statements and identifications made in response to Interrogatory No. 4.

INTERROGATORY NO. 5. Identify with specificity the marketing methods used in the advertising, marketing, and promotion of products under the LA MONITA Mark, and identify each person employed by Opposer, or each outside agency or agent retained by Opposer, responsible for advertising, marketing, and promoting products sold under Opposer's Mark.

INTERROGATORY NO. 6. Identify in detail all relations, including contracts, agreements, licenses, assignments, or other relations, between Opposer and any third party relating in any manner to ownership or use of the LA MONITA Mark, and identify all documents relating thereto.

DOCUMENT REQUEST NO. 5. Produce all documents identified in response to Interrogatory No. 6.

INTERROGATORY NO.7. Identify all third parties who have used or sold products bearing the LA MONITA Mark as their own private-label, control-label, or branded products, and identify all documents relating thereto.

DOCUMENT REQUEST NO. 6. Produce all documents identified in response to Interrogatory No. 7.

INTERROGATORY NO. 8. Identify all manufacturers, or intended manufacturers, of products bearing or to be sold under the LA MONITA Mark, and all promoters, or intended promoters, of services under the LA MONITA Mark.

INTERROGATORY NO. 9. Identify any opinion letters, searches, investigations, surveys, analyses, or studies ever conducted by or for Opposer relating to Opposer's Mark.

DOCUMENT REQUEST NO. 7. Produce all documents identified in response to Interrogatory No. 9.

INTERROGATORY NO. 10. Identify any claims, conflicts, cease-and-desist demands, trademark inter partes proceedings, or litigation to which Opposer has been a party concerning Opposer's Mark, and identify all documents relating thereto.

DOCUMENT REQUEST NO. 8. Produce all documents identified in response to

Interrogatory No. 10.

INTERROGATORY NO. 11. Identify each person Opposer intends to call as an expert witness and with respect to each expert:

- (a) identify the subject matter on which the expert is expected to testify;
- (b) state the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each opinion; and,
- (c) state the credentials, qualifications, and publications of each such witness.

DOCUMENT REQUEST NO. 9. Produce all documents reviewed, exchanged with, sent to, or relied upon by any expert designated to testify or provide expert opinions in this Opposition.

INTERROGATORY NO. 12. State all facts upon which Opposer intends to rely to support its contention in the Notice of Opposition that Applicant's LA MORENITA Mark would be likely to cause confusion with Opposer's LA MONITA Mark, or to cause mistake or to deceive.

DOCUMENT REQUEST NO. 10. Produce all documents relating to the facts stated in response to Interrogatory No. 12.

INTERROGATORY NO. 13. Describe in detail Opposer's plans to expand the type of products or services it offers for sale under the LA MONITA Mark and/or expand the geographic scope of sales of the products or services it offers for sale under the LA MONITA Mark.

DOCUMENT REQUEST NO. 11. Produce all documents referring or relating to the plans described in response to Interrogatory No. 13.

INTERROGATORY NO. 14. Identify each statement Opposer has obtained from any person concerning any matter relating to this action including, but not limited to, whether the statement was oral or in writing, and identify all documents which record, refer to, or relate to such statement or opinion.

DOCUMENT REQUEST NO. 12. Produce all statements identified in response to Interrogatory No. 14.

DOCUMENT REQUEST NO. 13. For each of the products and services identified in response to Interrogatory No. 1, produce each different sign, display, point-of-sale display, label, hangtag, wrapper, container, package, advertisement, brochure, promotional material, and the like that contains or bears Opposer's LA MONITA Mark which has been used or disseminated from 2005 to the present.

DOCUMENT REQUEST NO. 14. Produce all documents and things referring to or relating to or comprising Opposer's first notice of the application for Applicant's Mark.

DOCUMENT REQUEST NO. 15. All documents and things, other than those produced in response to any of the foregoing document requests, upon which Opposer intends to rely in connection with this Opposition.

INTERROGATORY 15. To the extent such identification has not yet been made, identify each person supplying information in response to these Interrogatories, stating specifically the Interrogatory or Interrogatories by subpart for which such person has supplied information.

Dated: July 30, 2012

Respectfully submitted,

---

Paul S. Owens, Esq.  
Attorney for Registrant--Olé Mexican  
Foods, Inc.  
Paul Owens & Associates  
P.O. Box 15310  
Atlanta, GA 30333-0310

Tel: (404) 370-9800  
Fax: (404) 370-9801  
E-mail: psowens@bellsouth.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Applicant's First Set of Interrogatories and First Request for Production of Documents have been served upon John M. Cone, Esq., attorney of record for the Opposer, at Hitchcock Evert LLP, 750 North St. Paul Street, Suite 1110, Dallas, Texas 75201, the address designated by said attorney for that purpose, by causing to be mailed a true copy thereof in a sealed envelope, postage prepaid, and deposited with the United States Postal Service as first-class mail on Monday, July 30, 2012.

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Paul S. Owens, Esq.

# **EXHIBIT 2**

## Paul S. Owens

---

**From:** Paul S. Owens <psowens@bellsouth.net>  
**Sent:** Wednesday, September 12, 2012 10:28 PM  
**To:** John Morant Cone (jcone@hitchcockevert.com)  
**Subject:** LA MORENITA Opposition No. 91196767

John:

OMF served its First Set of Interrogatories and First Request for Production of Documents on Gruma on July 30, 2012. I haven't yet received any responses from Gruma. Please let me know immediately whether Gruma's responses have been served, since they are now overdue.

In addition, Gruma's expert disclosures were served more than thirty days after the expert disclosure cutoff date and, consequently, OMF will move to strike their use at trial or any testimony from Gruma's expert witness.

I look forward to hearing from you soon. Thanks.

Paul S. Owens  
Tel: 404-370-9800  
Fax: 404-370-9801  
E-mail: [psowens@bellsouth.net](mailto:psowens@bellsouth.net)



Mailing Address:  
P.O. Box 15310  
Atlanta Georgia 30333-0310

**PRIVILEGED AND CONFIDENTIAL:** This electronic message and any attachments are attorney work product, legally privileged and are the confidential property of the sender. The information is intended only for the use of the person to who it was addressed. Any other reception, interception, copying, accessing or disclosure of this message is prohibited. The sender takes no responsibility for any unauthorized reliance on this message. If you have received this message in error, please immediately notify the sender by return e-mail and purge the message you received. Do not forward this message without permission.

# **EXHIBIT 3**

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

In the Matter of Application Serial No. 77/734,156 LA MORENITA

<hr/>		
GRUMA CORPORATION,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91196767
	§	
OLÉ MEXICAN FOODS, INC.,	§	
	§	
Applicant.	§	
<hr/>		

**OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF  
INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS**

**GENERAL OBJECTIONS**

Opposer objects to Applicant's Interrogatories and Document Production Requests in their entirety because Applicant did not serve its initial disclosures within the time provided by the effective Scheduling Order in this proceeding. Rather, Applicant elected to wait until the very last day of the discovery period and then to serve its Initial Disclosures simultaneously with its written discovery requests. Service of initial disclosures is a prerequisite to serving discovery requests. 37 C.F.R. § 2.120(a)(3).

Opposer objects to producing documents at the office of Applicant's attorney and will produce them, if ordered to do so, at Opposer's attorney's office.

The total number of Interrogatories, including subparts, exceeds the number of Interrogatories permitted under the Rules.

Without prejudice to Opposer's General Objections, Opposer responds to Applicant's requests as follows:

**INTERROGATORY NO. 1:** Identify by type each and every product or service Opposer promoted, sold, and/or offered for sale under the LA MONITA Mark from 2005 to the present, and state the time periods during which each such product or service was promoted sold, or offered for sale.

**RESPONSE:**

In the last three years, Opposer has sold corn tortillas and flour (masa) under the mark LA MONITA. The appearance of the packages and labels of the goods are as shown in attached documents GRUM-0001 to 0009. The most recent sales of LA MONITA corn tortillas were made in June 2010. The most recent sales of LA MONITA flour (masa) were made in June 2011.

**INTERROGATORY NO. 2:** For each product or service identified in response to Interrogatory No. 1:

(a) State the date of first sale of the product in commerce and in interstate commerce and identify each document that Opposer will rely on to establish such date;

(b) State on an annual basis from 2005 to the present: (i) with regard to products, the total number of units sold and the dollar volume of such sales by type of product in the metropolitan Houston area; and, (ii) with regard to services, the total dollar amount billed for rendering such services in the metropolitan Houston area by type of service.

(c) State on an annual basis from 2005 to the present: (i) with regard to products, the total number of units sold and the dollar volume of such sales by type and by state of the United States; and, (ii) with regard to services, the total dollar amount billed for rendering such services by state of the United States.

(d) Identify on an annual basis from 2005 to the present: (i) the retail stores that have sold the products in the metropolitan Houston area; and, (ii) representative retail stores that have sold the products by state of the United States.

(e) Identify by month and year, each three-month period or longer from the date of first use to the present during which each such product or service identified in response to Interrogatory No. 1 was not sold or rendered and state the reason(s) therefor.

(f) Identify each person providing information or assisting in the preparation of answers to this Interrogatory by subpart.

(g) Identify all documents by the subpart they are responsive to that form the basis of or support Opposer's response to Interrogatory No.2, or that Opposer intends to rely on to prove the statements and identifications made in response to Interrogatory No. 2.

**RESPONSE:**

Opposer objects to Interrogatories 2(a) – (g) on the grounds that the information requested is not relevant to any claim or defense in this proceeding.

(a) Opposer relies on its federal registrations as the basis for its opposition. On the issue of priority, the opposed application was filed on an intent to use basis. Opposer's registrations were obtained prior to the filing date

of the application. The date of first use of the registered trademarks is not relevant to its ownership of the registrations or to the priority of its rights.

(b) The details of Opposer's sales of products under the registered marks in a particular geographic market are irrelevant to any claim or defense in the proceedings.

(c) Opposer has produced documents giving details of sales under its LA MONITA trademarks from 2002-2011.

(d) The identity of the retail stores in which Opposer's trademarked products have been sold are not relevant to any claim or defense in this proceeding.

(e) The existence, vel non, of any three month period prior to 2009 in which the products were not sold under Opposer's trademarks is not relevant to any claim or defense in this proceeding.

(f) Christine Wentworth, Private Label Brand Marketing Coordinator of Gruma Corporation, provided information regarding Opposer's sales of goods under the trademark LA MONITA.

(g) Opposer relies on its summary of sales of LA MONITA goods, produced as GRUM-0108 to 0110. To be produced as Trade Secret/Commercially Sensitive documents pursuant to the TTAB's standard protective order.

INTERROGATORY NO. 3: Identify all those at Opposer engaged in the development, manufacture, distribution, sale, and marketing of each of the

products or services identified in response to Interrogatory No. 1, and state each such person's job title and responsibilities.

**RESPONSE:**

The identify of all persons employed by Opposer in the development, manufacture, distribution, sale and marketing of tortillas and flour (masa) is irrelevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 4:** For each product and service identified in response to Interrogatory No. 1, state in detail the channels of trade in which the LA MONITA Mark is used or sold, including the geographic area in which the LA MONITA Mark is used or sold, the manner in which the goods or services reach the ultimate consumer, the geographic reach of each such channel, and the approximate percentage of total sales of products and/or services through each such channel, and identify each person at Opposer knowledgeable about such trade channels.

**RESPONSE:**

Opposer relies on its trademark registrations. The goods of the registrations are not restricted to particular channels of trade, or to any particular manner in which the goods reach the ultimate consumer. Accordingly, the information requested and the additional information regarding the geographical reach of each channel and the approximate percentage of total sales of products through each channel is not relevant to any claim or defense in this proceeding. Numerous persons at Opposer are knowledgeable about the trade channels. In

particular, Antonio Benavides and Ron Anderson, both executives of Opposer, have knowledge of the trade channels.

**INTERROGATORY NO. 5:** Identify with specificity the marketing methods used in the advertising, marketing, and promotion of products under the LA MONITA Mark, and identify each person employed by Opposer, or each outside agency or agent retained by Opposer, responsible for advertising, marketing, and promoting products sold under Opposer's Mark.

**RESPONSE:**

The particular marketing methods used in the advertising, marketing and promotion of Opposer's products under the LA MONITA mark is irrelevant to any claim or defense in this proceeding. They are advertised, marketed and promoted in all the customary ways that tortillas and flour (masa) are advertised, marketed and promoted to consumers. The identity of each person employed by Opposer or each outside agency or agent retained by Opposer responsible for advertising, marketing or promoting the products sold under Opposer's mark is not relevant to any claim or defense in this Opposition.

**INTERROGATORY NO. 6:** Identify in detail all relations, including contracts, agreements, licenses, assignments, or other relations, between Opposer and any third party relating in any manner to ownership or use of the LA MONITA Mark, and identify all documents relating thereto.

**RESPONSE:**

The existence, vel non, of any agreements, licenses, assignments, or other relations between Opposer and third party relating to ownership or use of the mark LA MONITA are not relevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 7:** Identify all third parties who have used or sold products bearing the LA MONITA Mark as their own private-label, control-label, or branded products, and identify all documents relating thereto.

**RESPONSE:**

The identity of third parties, if any, who have used or sold products bearing the LA MONITA mark as their own private-label, control-label, or branded products is irrelevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 8:** Identify all manufacturers, or intended manufacturers, of products bearing or to be sold under the LA MONITA Mark, and all promoters, or intended promoters, of services under the LA MONITA Mark.

**RESPONSE:**

The identity of the manufacturers, or intended manufacturers, of products bearing the LA MONITA mark is not relevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 9:** Identify any opinion letters, searches, investigations, surveys, analyses, or studies ever conducted by or for Opposer relating to Opposer's Mark.

**RESPONSE:**

Opposer objects to Interrogatory No. 9 to the extent it seeks discovery of information and documents protected against production under the doctrines of attorney-client-privilege and/or work product privilege.

The existence, vel non, of any opinion letters, searches, investigations, surveys, analyses, or studies relating to the LA MONITA mark is not relevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 10:** Identify any claims, conflicts, cease-and-desist demands, trademark inter partes proceedings, or litigation to which Opposer has been a party concerning Opposer's Mark, and identify all documents relating thereto.

**RESPONSE:**

The existence, vel non, of any claims, cease-and-desist demands, trademark inter partes proceedings or litigation concerning Opposer's LA MONITA mark is not relevant to any claim or defense in this proceeding.

Gruma, however, has produced documents GRUM-0100 to 0107, its attorney's letter to Alejandro R. Malacara who filed Trademark Application S.N. 77/089,204 LA MORENITA and Design.

**INTERROGATORY NO. 11:** Identify each person Opposer intends to call as an expert witness and with respect to each expert:

- (a) identify the subject matter on which the expert is expected to testify;
- (b) state the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each opinion; and
- (c) state the credentials, qualifications, and publications of each such witness.

**RESPONSE:**

Opposer has previously disclosed its possible expert witness and has produced a report from that witness.

**INTERROGATORY NO. 12:** State all facts upon which Opposer intends to rely to support its contention in the Notice of Opposition that Applicant's LA MORENITA Mark would be likely to cause confusion with Opposer's LA MONITA Mark, or to cause mistake or to deceive.

**RESPONSE:**

In general, the goods of the opposed application overlap with those covered by Opposer's registered mark LA MONITA. Accordingly, the respective goods can be presumed to travel through the same trade channels, to be sold to the same consumers and advertised and promoted using the same media. The two marks are closely similar in appearance, sound, meaning and overall commercial impression.

**INTERROGATORY NO. 13:** Describe in detail Opposer's plans to expand the type of products or services it offers for sale under the LA MONITA Mark and/or expand the geographic scope of sales of the products or services it offers for sale under the LA MONITA Mark.

**RESPONSE:**

Opposer objects that the request seeks confidential business information, the disclosure of which to a competitor outweighs any benefit to the Applicant in terms of relevance to any claim or defense in this proceeding.

Opposer's plans, if any, to expand the type of products or services it offers for sale under the mark LA MONITA, or the geographic scope of sales, are irrelevant to any claim or defense in this proceeding.

**INTERROGATORY NO. 14:** Identify each statement Opposer has obtained from any person concerning any matter relating to this action including, but not limited to, whether the statement was oral or in writing, and identify all documents which record, refer to, or relate to such statement or opinion.

**RESPONSE:**

There are no such statements.

**INTERROGATORY NO. 15:** To the extent such identification has not yet been made, identify each person supplying information in response to these Interrogatories, stating specifically the Interrogatory or Interrogatories by subpart for which such person has supplied information.

**RESPONSE:**

No additional persons supplied information for these responses.

**DOCUMENT REQUEST NO. 1:** For each product or service identified in response to Interrogatory No.1, produce all packaging, labeling, advertising, promotional materials and other documents showing use of the LA MONITA Mark.

**RESPONSE:**

Representative samples of LA MONITA packaging are shown in GRUM-0007 to 0009.

**DOCUMENT REQUEST NO. 2:** Produce all documents identified in response to Interrogatory No. 2.

**RESPONSE:**

Opposer has generally objected to Interrogatory No. 2, but has produced all identified documents.

**DOCUMENT REQUEST NO. 3:** Produce all documents referring or relating to the information requested in Interrogatory No. 2.

**RESPONSE:**

This request is duplicative of Request No. 2.

**DOCUMENT REQUEST NO. 4:** Produce all documents Opposer intends to rely on to prove the statements and identifications made in response to Interrogatory No. 4.

**RESPONSE:**

Opposer produces as GRUM-0001 to 0006 copies of its Trademark Registrations relied on in this proceeding.

**DOCUMENT REQUEST NO. 5:** Produce all documents identified in response to Interrogatory No. 6.

**RESPONSE:**

Opposer has not identified any documents in its response to Interrogatory No. 6.

**DOCUMENT REQUEST NO. 6:** Produce all documents identified in response to Interrogatory No. 7.

**RESPONSE:**

Opposer has not identified any documents in its response to Interrogatory No. 7.

**DOCUMENT REQUEST NO. 7:** Produce all documents identified in response to Interrogatory No. 9.

**RESPONSE:**

Opposer has not identified any documents in its response to Interrogatory No. 9.

DOCUMENT REQUEST NO. 8: Produce all documents identified in response to Interrogatory No. 10.

**RESPONSE:**

Opposer has not identified any documents in its response to Interrogatory No. 10.

DOCUMENT REQUEST NO. 9: Produce all documents reviewed, exchanged with, sent to, or relied upon by any expert designated to testify or provide expert opinions in this Opposition.

**RESPONSE:**

All responsive documents were previously produced with Opposer's Rule 26 Expert Report.

DOCUMENT REQUEST NO. 10: Produce all documents relating to the facts stated in response to Interrogatory No. 12.

**RESPONSE:**

Opposer objects to this request as vague and unduly broad. Opposer has produced copies of its registrations as GRUM-0001 to 0006; its LA MONITA packaging as GRUM-0007 to 0009. It may also rely on third party registrations produced as GRUM-0010 to 0099.

DOCUMENT REQUEST NO. 11: Produce all documents referring or relating to the plans described in response to Interrogatory No. 13.

**RESPONSE:**

Opposer has not identified any plans in its response to Interrogatory No. 13.

**DOCUMENT REQUEST NO. 12:** Produce all statements identified in response to Interrogatory No. 14.

**RESPONSE:**

Opposer has not identified any documents in its response to Interrogatory No. 14.

**DOCUMENT REQUEST NO. 13:** For each of the products and services identified in response to Interrogatory No.1, produce each different sign, display, point-of-sale display, label, hangtag, wrapper, container, package, advertisement, brochure, promotional material, and the like that contains or bears Opposer's LA MONITA Mark which has been used or disseminated from 2005 to the present.

**RESPONSE:**

Opposer has produced documents GRUM-0007 to 0009.

**DOCUMENT REQUEST NO. 14:** Produce all documents and things referring to or relating to or comprising Opposer's first notice of the application for Applicant's Mark.

**RESPONSE:**

Opposer objects to this request as the documents requested are not relevant to any claim or defense in this proceeding.

DOCUMENT REQUEST NO. 15: All documents and things, other than those produced in response to any of the foregoing document requests, upon which Opposer intends to rely in connection with this Opposition.

**RESPONSE:**

Opposer objects to this request as requiring the production of documents protected against discovery under the attorney work product doctrine.

Dated: September 4, 2012

Respectfully submitted,

/s/ John M. Cone  
John M. Cone  
Hitchcock Evert LLP  
PO Box 131709  
Dallas, Texas 75313-1709  
(214) 880-3606 Telephone  
(214) 953-1121 Facsimile  
jccone@hitchcockevert.com

ATTORNEY FOR OPPOSER  
GRUMA CORPORATION

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of September 2012, a true and correct copy of the foregoing document was served via U.S. First Class Mail, postage prepaid on:

Paul S. Owens  
Paul Owens & Associates  
PO Box 15310  
Atlanta GA 30333-0310

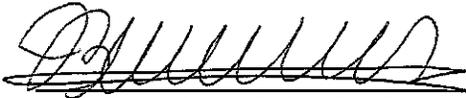
/s/ John M. Cone  
John M. Cone

**VERIFICATION**

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that I have read the foregoing OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS and the answers to Interrogatories are true and correct based on information available to Gruma Corporation.

September 4, 2012

ANTONIO BENAVIDES

 09-05-12  
Vice President, Sales for Central U.S. of  
Gruma Corporation

# **EXHIBIT 4**

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

**In the Matter of Application Serial No. 77/734,156 LA MORENITA**

**GRUMA CORPORATION,**

**Opposer,**

**v.**

**OLE MEXICAN FOODS, INC.,**

**Applicant.**

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§

**Opposition No. 91196766**

**REPORT UNDER FED. R. CIV. P. 26(a)(2)(B)  
OF GABRIELA MORLETT**

**INTRODUCTION**

I have been retained by Gruma Corporation, the Opposer in this Opposition, to explain the commercial impressions created by the trademark LA MORENITA applied for under No. 77/734156 on the one hand and the trademarks LA MONITA and LA MONITA and Design, as registered under numbers 2534248, 3618991 and 3306372, on the other hand.

**BACKGROUND**

I was born in Mexico and educated there in bilingual private schools in Mexico City for my Elementary, Middle and High School years.

I attended the National Autonomous University of Mexico ("UNAM") in Mexico City from 1989-1992 and received a Bachelor's Degree in Political Science and Public Administration.

After graduation from UNAM, I worked for the Political Studies Foundation performing research regarding the 1994 Mexican elections process, while also

teaching classes in Social Theory for the Faculty of Political and Social Sciences at UNAM.

From 1993-1997, I worked for the Mexican Federal Communications Commission in the Cofetel, Telecomm division in charge of political advisory and relations before the Asia-Pacific Economic Corporation ("APEC") in the Telecommunications Work Group. From 1998-2000, I worked for the Mexico City Municipal Government, specifically for the entity in charge of ruling and regulating the neighborhoods and apartment living.

I moved to the United States in 2003 with my family and am now a U.S. citizen. From 2006 to the present, I have been involved in charitable events relating to ADVANCE-DALLAS, a community-based, non-profit organization that provides family support and education services to at-risk, economically impoverished families in the Dallas/Fort Worth area. I am bilingual in English and Spanish. In the course of this work, I have spent considerable time talking to Latina mothers in North Texas and am familiar with the version of Spanish spoken by this population.

#### OPINIONS

As stated in application no. 77/734156, "LA MORENITA," in Mexican Spanish means the little dark-skinned girl. LA MONITA literally means a female monkey, but it is often used to mean a pretty girl, probably because the words LA MONITA differ by only one letter from LA BONITA, which is the most direct way of saying pretty girl. It could also be understood to mean "doll" or describing a girl who looked like a doll.

When LA MONITA is used, as it is in the trademark of registration no. 3306372, with a picture of a young girl's head, the words would certainly be understood to mean pretty girl.

I consider that the terms LA MORENITA and LA MONITA, particularly when LA MONITA is used in association with the device of a girl's head, are likely to be confused for tortillas because of the general similarity in appearance and pronunciation of the words MORENITA and MONITA because of the similarity in meaning. In my view, the lack of care generally given to the purchase of low cost items, such as tortillas, increases the likelihood of confusion.

In considering the above opinions, I have reviewed the details of the application opposed and the registrations relied on by Gruma Corporation, as shown by the copies attached as Exhibit 1 to this report.

I have not authored any publications during the past 10 years.

I have not testified as an expert witness at trial or deposition during the previous 4 years.

I am being compensated at the rate of \$130.00 per hour for my study and testimony in this case.



---

Gabriela Morlett

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of July 2012, a true and correct copy of the foregoing document was served via U.S. First Class Mail, postage prepaid on:

Paul S. Owens  
Paul Owens & Associates  
PO Box 15310  
Atlanta GA 30333-0310



\_\_\_\_\_  
John M. Cone