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

Proceeding	91202732
Party	Defendant Ecolab USA Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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EcoWater Systems LLC,

Opposition No. 91202732

Opposer,

v.

Ecolab USA Inc.

Applicant.

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**ECOLAB USA INC.'S RULE 12(B)(6) MOTION AND  
MEMORANDUM OF LAW IN SUPPORT THEREOF**

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**MOTION**

Ecolab USA Inc. hereby moves the Board to dismiss the claim by EcoWater Systems LLC (“EcoWater”) that there is a likelihood of confusion based on an alleged family of marks.

While alleging it owns a family of “ECO” marks, EcoWater has neither pleaded nor alleged any facts that suggest that its marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the purported family, with EcoWater. As such, EcoWater has failed to state a claim upon which relief can be granted under Rule 12(b)(6) and its opposition must be dismissed to the extent that it is based on an alleged family of marks.

**MEMORANDUM OF LAW**

**I. ARGUMENT**

**A. Rule 12(b)(6) Standard.**

The purpose of a Rule 12(b)(6) motion is to allow for elimination of “actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Systems Inc. v. SciMed Life*

*Systems Inc.*, 988 F.2d 1157, 1160, 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993).

To withstand a motion to dismiss for failure to state a claim, a plaintiff needs to allege facts that would, if proved, establish that (1) it has standing to maintain the proceedings, and (2) a valid ground for opposing the mark. *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536 (TTAB 2007). When evaluating a Rule 12(b)(6) motion to dismiss, the plaintiff's well-pleaded allegations are accepted as true, and the complaint is construed in the light most favorable to plaintiff. *Advanced Cardiovascular Systems*, 988 F.2d at 1160, 26 USPQ2d at 1041.

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the standard applied to motions to dismiss. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the fact finder to draw a reasonable inference in the plaintiff’s favor. *Id.* A formulaic recitation of the elements of a cause of action will not do. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

**B. EcoWater Systems Has Neither Plead the Elements of a Family of Marks 2(d) Claim Nor Factual Support.**

The Board’s reviewing court advises that

[a] family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.

*J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). Moreover, the common family characteristic must be distinctive by itself – that is, the common feature must not be not descriptive, so highly suggestive, or so commonly used that it cannot function as a distinguishing characteristic of the party's mark. *Marion Laboratories v. Biochemical/Diagnostics*, 6 USPQ2d 1215 (TTAB 1988).

Thus, to establish a family of marks, EcoWater must show (1) a recognizable common characteristic, (2) wherein the marks are composed and used in such a way that (a) the public associates the individual marks with EcoWater, and (b) the public associates the common characteristic of the family with EcoWater. Further, the common characteristic must be distinctive in and of itself.

EcoWater has only alleged that its marks contain a common surname, "ECO." EcoWater has neither alleged, nor provided any facts that suggest, that its marks are used in such a way that the public associates both the individual marks and the common characteristic of the purported "family" with EcoWater. EcoWater has not even attempted a formulaic recitation of the requisite elements, and certainly has not alleged *facts* that "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949. Nor has EcoWater alleged that the alleged family's common characteristic, "ECO," is distinctive on its own.

Put simply, EcoWater has failed to state a claim based on an alleged family of marks. Therefore EcoWater's opposition should be dismissed to the extent that EcoWater alleges a likelihood of confusion based on the purported "family."

## II. CONCLUSION

For all of the foregoing reasons, Ecolab requests that the Board grant its motion, finding that EcoWater has failed to state a claim upon which relief may be granted based on an alleged family of marks.

Dated: January 9, 2012

/s/ Laura L. Myers

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of ECOLAB USA INC.'S RULE 12(B)(6) MOTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF was served by United States mail on the attorney of record for Opposer, Caroline Stevens, Leydig, Voit & Mayer, Ltd., 1420 Fifth Ave., Suite 3670, Seattle, WA 98101, by mailing it to her address of record by first class mail, postage prepaid, this 9th day of January, 2012.

/s/ Laura L. Myers \_\_\_\_\_

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