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

Proceeding	91212680
Party	Plaintiff Frito-Lay North America, Inc.
Correspondence Address	WILLIAM G BARBER PIRKEY BARBER PLLC 600 CONGRESS AVENUE, SUITE 2120 AUSTIN, TX 78701 UNITED STATES pmadrid@pirkeybarber.com, bbarber@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com
Submission	Motion to Compel Discovery
Filer's Name	Paul Madrid
Filer's e-mail	pmadrid@pirkeybarber.com, bbarber@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com
Signature	/Paul Madrid/
Date	01/23/2015
Attachments	motion to compel discovery (signed).pdf(147357 bytes) [PUBLIC] Declaration of Paul Madrid in support of Motion to Compel with attached Exhibits A-H.pdf(1322710 bytes)

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

In the Matter of Trademark Application
Serial No. 79111074 for CORN THINS and
Serial No. 85820051 for RICE THINS

FRITO-LAY NORTH AMERICA, INC.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91212680 (Parent)
	§	Opposition No. 91213587
REAL FOODS PTY LTD.,	§	
	§	
Applicant.	§	

MOTION TO COMPEL DISCOVERY

Having been unable to convince Applicant Real Foods Pty Ltd (“Applicant”) to comply with its discovery obligations pertaining to a document Applicant produced that is damaging to its position in this case, knowledge of which is entirely within the control and possession of Applicant, Opposer Frito-Lay North America, Inc. (“Opposer”) moves that the Board enter an order compelling Applicant to respond in full to Opposer’s Interrogatory Nos. 28, 29, and 30 as they pertain to the document identified by production numbers RF000282-360. Opposer further moves that the Board order Applicant to supplement its response to Interrogatory No. 32 when it responds in full to Interrogatory No. 29 and to supplement its production in response to Opposer’s Second Set of Requests for Production when it responds in full to Interrogatory No. 30.

I. Background

A. Opposer’s Requests for Admission and Applicant’s statements and denials thereto

On October 27, 2014, Opposer timely served a set of requests for admissions on Applicant. *See* Madrid Decl. ¶ 2, at 1. The requested statements pertained primarily to the

admissibility of a subset of the documents that Applicant had produced in discovery. *Id.* ¶ 3. Statement No. 1 was that the documents were authentic under Rule 901 of the Federal Rules of Evidence. Madrid Decl. Ex. A, at 4-6; *see also* Madrid Decl. ¶ 4, at 1. Statement No. 5 was that the documents were records of Applicant’s regularly conducted activity under Rule 803(6) of the Federal Rules of Evidence. Madrid Decl. Ex. A, at 6-7. Statement Nos. 10 and 11 pertained to one particular document within this subset of documents, the document identified by production numbers RF000282-360 (the “Document”). As Applicant has marked the Document as “Trade Secret/Commercially Sensitive” under the Board’s standard protective order, Opposer notes here without divulging the content of the Document only that the Document is relevant to Applicant’s allegation that its marks have acquired distinctiveness. Madrid Decl. Ex. B, at 9-88 (redacted in versions available to the public); *see also* Madrid Decl. ¶ 5, at 1. Statement No. 10 was that Applicant hired a third-party The Leading Edge to create the Document, and Statement No. 11 was that The Leading Edge’s statements contained in the Document were made within in the scope of its relationship with Applicant. Madrid Decl. Ex. A, at 8.

With respect to the Document, Applicant responded to Statement No. 1 by stating that it was unable to admit or deny that the Document was authentic, admitting that “it received the presentation” but alleging that the document “is not a business record of Applicant” and that Applicant “has no knowledge concerning the preparation or creation of the presentation.” Madrid Decl. Ex. E, at 100; *see also* Madrid Decl. ¶ 8, at 1. Applicant responded to Statement No. 5 by denying it in full with respect to the Document. Madrid Decl. Ex. E, at 104. For the statements directed specifically at the Document, Applicant responded to Statement No. 10 by denying it in full and responded to Statement No. 11 by admitting that “Applicant hired The Leading Edge” but otherwise denying the statement. Madrid Decl. Ex. E, at 105.

B. Opposer's Interrogatories and Applicant's incomplete answers

Anticipating that Applicant might not give unqualified admissions of some of the statements in the requests, Opposer concurrently served interrogatories in order to elicit additional relevant information that could potentially be used at trial concerning the produced documents. *See* Madrid Decl. ¶ 2, at 1. These interrogatories asked Applicant, for each request that was not admitted in full, to provide the basis for its answer (No. 28), to identify persons with knowledge concerning the subject matter of the request for admission (No. 29), and to identify the documents supporting Applicant's answer (No. 30). Madrid Decl. Ex. C, at 91; *see also* Madrid Decl. ¶ 6, at 1. Opposer also asked Applicant to provide service addresses for the persons identified in these Interrogatory responses so that Opposer could call them during Opposer's testimony period if necessary. Madrid Decl. Ex. C, at 92 (No. 32). Opposer also concurrently requested the production of documents identified in Applicant's interrogatory responses. Madrid Decl. ¶ 2; Madrid Decl. Ex. D, at 95; *see also* Madrid Decl. ¶ 7, at 1.

Applicant responded to Interrogatory Nos. 28 and 30 by objecting that they were unduly burdensome and "duplicative of Opposer's demands at set forth in Opposer's First Set of Requests for Admissions." Madrid Decl. Ex. F, at 108-09; *see also* Madrid Decl. ¶ 9, at 1. Instead of answering Interrogatory No. 28, Applicant merely directed Opposer to its responses to requests for admission. Madrid Decl. Ex. F, at 108-09. Notably, Applicant's responses to Statement No. 5 concerning the Document, and to Statement Nos. 10 and 11, do not provide a basis for the proffered answers. *See* Madrid Decl. Ex. E, at 104-05. For Interrogatory No. 30, Applicant simply stated that it had no documents responsive to the request. Madrid Decl. Ex. F, at 109.

Applicant responded to Interrogatory No. 29 by first objecting that the interrogatory was "vague and ambiguous" and sought privileged information. *Id.* Applicant then went on to state

that “counsel assisted in the preparation of the answers” and that “where a witness or Real Foods employee is mentioned” in a particular request for admission, “that person would have knowledge concerning the subject matter referred to in the particular request and the response thereto.” *Id.* Notably, Applicant’s responses to Statement Nos. 1 and 5 concerning the Document, and to Statement Nos. 10 and 11, do not mention any witnesses, any Real Foods employees, or any other person with knowledge concerning the subject matter. *See* Madrid Decl. Ex. E, at 100, 104-05.

C. Opposer’s attempt to resolve dispute

Opposer brought these deficiencies to the attention of Applicant by letter from Opposer’s counsel dated December 10, 2014. Madrid Decl. ¶ 10, at 2; Madrid Decl. Ex. G, at 111-12. Opposer specifically noted that, despite failing to admit Statements Nos. 10-11 without qualification and failing to admit without qualification Statement Nos. 1 and 5 as they pertained to the Document, Applicant also failed to provide the information requested in Interrogatory Nos. 28-30. Madrid Decl. Ex. G, at 111-12. Opposer gave examples of information in the control of Applicant that would be responsive to those interrogatories. *Id.* at 111. Although Opposer requested supplementation of Applicant’s interrogatory responses to remedy the failure (including supplementation of other interrogatories and document production, if applicable), Opposer noted that it would not insist upon supplementation if Applicant would agree to a stipulation concerning the admissibility of the Document. *Id.* at 111-12.

Applicant’s counsel responded on January 5, 2015, asserting without explanation that Applicant had provided “thorough and complete” responses to Opposer’s discovery requests. Madrid Decl. ¶ 11, at 2; Madrid Decl. Ex. H, at 115. Applicant did not supplement its responses as requested and declined Opposer’s offer to stipulate, characterizing Opposer’s attempt to

resolve the dispute as “circumventing the rules of the TTAB by conducting follow-up discovery through correspondence.” *Id.* at 115-16. This motion followed.

II. Argument

Applicant’s responses concerning the Document were far from thorough and complete. Applicant’s objections and failure to provide complete responses to Interrogatory Nos. 28, 29, and 30 is an improper attempt to hide the ball concerning evidence that bears poorly on Applicant’s case. Applicant should be held to its discovery obligations so that Opposer may properly prepare for trial and should be ordered to answer the interrogatories as they pertain to the Document.

A. Standards for granting a motion to compel discovery

The scope of discovery in proceedings before the Board is the same as provided in Rule 26(b)(1) of the Federal Rules of Civil Procedure. 37 C.F.R. § 2.120(a) (citing Fed. R. Civ. P. 26); *accord Phillies v. Phila. Consol. Holding Corp.*, 107 USPQ2d 2149, 2152 (TTAB 2013). The parties may “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1).

The Board expects party cooperation during discovery, with each party obliged “to make a good faith effort to satisfy the reasonable and appropriate discovery needs of its adversary.” *Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, 94 USPQ2d 1789, 1791 (TTAB 2009). This cooperation helps “advance the case by requiring parties to share certain relevant information upon request, so that the issues for trial may be focused and the case may proceed in an orderly manner within reasonable time constraints.” *Phillies*, 107 USPQ2d at 2152. The Board’s discovery rules recognize that this required cooperation is not always forthcoming or

that legitimate disputes may nevertheless arise. Accordingly, a party that fails to answer an interrogatory is subject to a motion to compel an answer. *See* 37 C.F.R. § 2.120(e). Failure to answer does not simply mean a complete lack of response, but instead includes that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.” Fed. R. Civ. P. 37(a)(4). In a proceeding before the Board, a motion to compel is timely if it is filed before the commencement of the first testimony period. 37 C.F.R. § 2.120(e). The party seeking to compel a response should attempt in good faith to resolve the dispute first without Board intervention so that the discovery matters that reach the Board are narrowed to the matters that are actually disputed by the parties; accordingly, the propounding party should provide a written statement that it made a good faith attempt to resolve the discovery dispute but that the parties were unable to resolve their differences. *See id.*

B. Opposer presented a timely motion after a good faith attempt to resolve the dispute

As the correspondence between the parties indicates, Opposer here has made a good faith attempt to resolve the discovery dispute before seeking Board intervention and has requested Board intervention in a timely manner by moving before the testimony period commenced. Opposer brought the insufficient discovery responses to Applicant’s attention, requested supplementation, and provided an alternative other than full discovery of the requested information so that the parties could move past the dispute and continue preparing for trial. Opposer only approached the Board after Applicant’s response to the correspondence indicated that the parties were at an impasse. Given that the parties are at an impasse despite Opposer’s attempt to resolve the dispute (*see* Madrid Decl. ¶ 12, at 2), this motion is proper under 37 C.F.R. § 2.120(e).

C. Applicant's Interrogatory responses are incomplete

Applicant's bald, conclusory assertion that its answers are "thorough" and "complete" is refuted on the face of the very answers themselves. "Applicant denies this statement" provides no explanation as to the basis for the denial, yet Applicant, by reference, answered Interrogatory No. 28 in exactly that manner. "Applicant denies this statement but admits that Applicant hired The Leading Edge" similarly provides no explanation as to the basis for the qualified admission, yet that was the precise manner in which Applicant, by reference, answered Interrogatory No. 28. Its failure to respond meaningfully to Interrogatory No. 28 requires an answer.

Additionally, Applicant's response to Interrogatory No. 30 that it has no documents supporting its basis for its answers to the Requests for Admission, and its failure to identify any persons with knowledge of the subject matter of the Document's admissibility in Interrogatory No. 29, is inconsistent with its conduct in this proceeding. Indeed, as Applicant has marked the Document as "Trade Secret/Commercially Sensitive," it is logically inconsistent to maintain a claim that a document shared between it and a third party is trade secret without there also existing an agreement concerning the nature of the relationship between the third party and Applicant or any persons with knowledge concerning the nature of the relationship. *See* Provisions for Protecting Confidentiality of Information Revealed During Board Proceeding § 2, <http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp> ("Information may not be designated as subject to any form of protection if it . . . (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; . . ."); *see also* Board's Institution Order 3, Sept. 25, 2013 (making standard protective agreement applicable to proceeding).

Presuming that Applicant actually had a basis for designating its own produced document as “Trade Secret/Commercially Sensitive,” these persons and documents describing the nature of the relationship between Applicant and The Leading Edge and, thus, supporting the maintenance of a “Trade Secret/Commercially Sensitive” designation must exist. Thus, Applicant’s statement that it has no documents and its failure to identify persons with knowledge is either evasive or incomplete and requires appropriate supplementation.

D. Interrogatory Nos. 28 & 30 are not unduly burdensome

Despite Applicant’s objection that Interrogatory Nos. 28 and 30 are unduly burdensome, Applicant did not indicate in its initial response or in subsequent correspondence the grounds on which it bases this objection. Its silence on this point is telling, as is the fact that providing information concerning the documents that Applicant itself produced in the proceeding and upon which Applicant based its already proffered denials and qualified admissions cannot be unduly burdensome to Applicant. The basis for Applicant’s denial or qualified admission, along with the documents supporting that basis, are within Applicant’s easily accessible knowledge because otherwise Applicant would not have been able to provide a qualified admission or an outright denial of the respective statement in response to Opposer’s requests for admission. Proffering the basis and the documents supporting Applicant’s answers regarding the Document are accordingly not unduly burdensome for Applicant.

E. Interrogatory Nos. 28 & 30 are not duplicative

Applicant’s objection that these interrogatories are “merely duplicative of Opposer’s demands as set forth in Opposer’s First Set of Requests for Admission” is entirely without foundation. For the interrogatories to be duplicative, the interrogatories would have to ask Applicant to state same information as Applicant was required to state to answer the requests for admission. A responding party has several options when faced with requests for admission. For

example, it may admit, deny, or “state in detail why the answering party cannot truthfully admit or deny” the statement. Fed. R. Civ. P. 36(a)(4).

However, none of those options requires the respondent to state a basis for providing a denial or a qualified admission as Opposer requested in Interrogatory No. 28. None of them require the respondent to identify documents supporting the denial or qualified admission as Opposer requested in Interrogatory No. 30. Notably, with the possible sole exception being Applicant’s statement as to why it cannot admit or deny Statement No. 1, Applicant’s answers to the requests for admission contain none of this information. The fact that responses to requests for admission alone were not guaranteed to contain this information is why Opposer concurrently served interrogatories touching on these points, and Applicant’s objection that the interrogatories are duplicative is plainly refuted by the absence of information responsive to the interrogatories contained in Applicant’s response. Thus, Applicant’s objection on this ground is wholly without merit.

F. Interrogatory No. 29 is neither vague nor ambiguous

Although Applicant objected that Interrogatory No. 29 is vague and ambiguous, its objection is belied by its own answer directing Opposer to those persons mentioned in Applicant’s responses and stating that those persons “would have knowledge of the subject matter referred to in the particular Request and response thereto,” thus demonstrating that it sufficiently understands Opposer’s interrogatory. Applicant can similarly comply with this Interrogatory as it pertains to the Document by naming the persons with knowledge of (1) the authenticity of the Document, (2) whether the Document is a business record, (3) what Applicant hired The Leading Edge to do, and (4) the nature of The Leading Edge’s statements in the Document.

G. Interrogatory No. 30 is not overbroad

Finally, Applicant’s objection that Interrogatory No. 30 is overbroad lacks merit. In no way does asking Applicant to provide the existing documentary support for its denials and qualified admissions concerning the admissibility of documents that Applicant itself produced go outside the boundaries of permissible discovery. Discovery requests “relevant to any party’s claim or defense” including the “existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter” are proper. *See* Fed. R. Civ. P. 26(b)(1). Seeking the identification of documents supporting Applicant’s denials and partial admissions pertaining to the admissibility of the Document, which is a document relevant to Applicant’s own claim of acquired distinctiveness, are thus well within the permissible scope of discovery.

III. Conclusion

Applicant has been given the opportunity to remedy its discovery deficiencies and has indicated that it will not do so. Given Applicant’s failure to comply with its discovery obligations, the Board should compel Applicant to provide full and complete responses with respect to the Document so that Opposer may properly prepare for trial.

Respectfully submitted,

/Paul Madrid/ Paul Madrid
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pmadrid@pirkeybarber.com
ATTORNEYS FOR OPPOSER
FRITO-LAY NORTH AMERICA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO COMPEL DISCOVERY with attached declaration with exhibits has been served via first-class mail, postage prepaid, at the address below on January 23, 2015:

Bruce S. Londa
Norris McLaughlin & Marcus PA
875 3rd Avenue, 8th Floor
New York, NY 10022-6225

/Paul Madrid/

Paul Madrid

DECLARATION OF PAUL MADRID

1. My name is Paul Madrid. I am an attorney employed by the law firm Pirkey Barber PLLC, who represents Opposer Frito-Lay North America, Inc. (“Opposer”) in the proceeding *Frito-Lay North America, Inc. v. Real Foods Pty Ltd*, Consolidated Opposition No. 91212680. I have personal knowledge of the facts contained in this declaration.

2. I served Opposer’s First Set of Requests for Admission to Applicant, Opposer’s Second Set of Interrogatories to Applicant, and Opposer’s Second Set of Requests for Production to Applicant on Monday, October 27, 2014, by first-class mail, postage prepaid, addressed to counsel of record for Applicant Real Foods Pty Ltd (“Applicant”).

3. Opposer’s Requests for Admission pertained primarily to the admissibility of a subset of the approximately 1,600 documents or approximately 4,500 pages that Applicant produced in this proceeding.

4. Exhibit A consists of true and correct copies of excerpts of Opposer’s First Set of Requests for Admission to Applicant.

5. Exhibit B is a true and correct copy of the document identified by production numbers RF000282-360 (marked trade secret by Applicant).

6. Exhibit C consists of true and correct copies of excerpts of Opposer’s Second Set of Interrogatories to Applicant.

7. Exhibit D consists of true and correct copies of excerpts of Opposer’s Second Set of Requests for Production to Applicant.

8. Exhibit E consists of true and correct copies of excerpts of Applicant’s Responses and Objections to Opposer’s First Set of Requests for Admission to Applicant, which I received on December 2, 2014.

9. Exhibit F consists of true and correct copies of excerpts of Applicant's Responses and Objections to Opposer's Second Set of Interrogatories, which I received on December 2, 2014.

10. Exhibit G is a true and correct copy of the correspondence I sent to counsel for Applicant on December 10, 2014.

11. Exhibit H is a true and correct copy of correspondence that I received from counsel for Applicant on January 5, 2014.

12. I believe that I attempted in good faith through the correspondence identified above with counsel for Applicant to resolve the discovery issues presented in the letters, but we were unable to resolve our differences.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

January 23, 2015



Paul Madrid

EXHIBIT A

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

In the Matter of Trademark Application
Serial No. 79111074 for CORN THINS and
Serial No. 85820051 for RICE THINS

FRITO-LAY NORTH AMERICA, INC.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91212680 (Parent)
	§	Opposition No. 91213587
REAL FOODS PTY LTD.,	§	
	§	
Applicant.	§	

OPPOSER’S FIRST SET OF REQUESTS FOR ADMISSION TO APPLICANT

Pursuant to 37 C.F.R. § 2.120 and Rule 36 of the Federal Rules of Civil Procedure, Opposer Frito-Lay North America, Inc. requests that Applicant Real Foods Pty Ltd (“Applicant”) respond to these requests by admitting the truth of each of the following numbered statements.

DEFINITIONS

The definitions and instructions forming part of Opposer’s First Set of Interrogatories to Applicant are hereby incorporated by reference.

STATEMENTS

STATEMENT NO. 1

The following documents identified by production numbers assigned by Applicant are authentic under Federal Rule of Evidence 901:

- 1) RF000005
- 2) RF000016-000017
- 3) RF000018-000020

- 4) RF000044
- 5) RF000082-000083
- 6) RF000228
- 7) RF000243
- 8) RF000265
- 9) RF000282-000360
- 10) RF000641
- 11) RF000657
- 12) RF000668-000671
- 13) RF000675-000676
- 14) RF000679-000680
- 15) RF000683
- 16) RF000684-000685
- 17) RF000723-000724
- 18) RF000727-000732
- 19) RF000733-000735
- 20) RF000830-000832
- 21) RF000867-000868
- 22) RF000898-000901
- 23) RF000906-000907
- 24) RF000915-000916
- 25) RF000924-000930
- 26) RF000931-000934

- 234) RF003318-003319
- 235) RF003342
- 236) RF003343-003344
- 237) RF003346-003347
- 238) RF003356-003357
- 239) RF003370-003375
- 240) RF003436-003437
- 241) RF003500-003501
- 242) RF003503-003505

STATEMENT NO. 2

The documents attached as Exhibit A are duplicates, within the meaning of Federal Rule of Evidence 1001(c), of the documents identified in Statement No. 1.

STATEMENT NO. 3

The copies of documents you produced in response to Opposer's Second Set of Requests for Production to Applicant are duplicates within the meaning of Federal Rule of Evidence 1001(c).

STATEMENT NO. 4

The originals of the copies you produced in response to Opposer's Second Set of Requests for Production to Applicant are authentic under Federal Rule of Evidence 901.

STATEMENT NO. 5

The following documents identified by production numbers assigned by Applicant are records of Applicant's regularly conducted activity under Federal Rule of Evidence 803(6).

- 1) RF000005

- 2) RF000016-000017
- 3) RF000018-000020
- 4) RF000044
- 5) RF000082-000083
- 6) RF000228
- 7) RF000243
- 8) RF000265
- 9) RF000282-000360
- 10) RF000641
- 11) RF000657
- 12) RF000668-000671
- 13) RF000675-000676
- 14) RF000679-000680
- 15) RF000683
- 16) RF000684-000685
- 17) RF000723-000724
- 18) RF000727-000732
- 19) RF000733-000735
- 20) RF000830-000832
- 21) RF000867-000868
- 22) RF001199
- 23) RF001203-001204
- 24) RF001208-001209

- 96) RF003312-003314
- 97) RF003318-003319

STATEMENT NO. 9

The emails of Jahan Spatchurst contained in the following documents were made within the scope of her employment with Applicant:

- 1) RF002404-002405
- 2) RF002419-002422

STATEMENT NO. 10

Applicant hired The Leading Edge to create the document identified by production numbers RF000282 to RF000360.

STATEMENT NO. 11

The statements of The Leading Edge contained within the document identified in Statement No. 10 were made within the scope of its relationship with Applicant.

STATEMENT NO. 12

In the survey conducted by Sarah Butler that Applicant disclosed for this proceeding, 78 survey respondents identified CHEEZ DOODLES as a brand name and also identified GRAHAM CRACKERS as a brand name.

STATEMENT NO. 13

In the survey conducted by Sarah Butler that Applicant disclosed for this proceeding, 95 survey respondents identified CHEEZ DOODLES as a common name and also identified GRAHAM CRACKERS as a common name.

EXHIBIT B

REDACTED

**Pursuant to Board's Standard
Protective Order**

EXHIBIT C

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

In the Matter of Trademark Application
Serial No. 79111074 for CORN THINS and
Serial No. 85820051 for RICE THINS

FRITO-LAY NORTH AMERICA, INC.,	§	
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	§	Opposition No. 91213587
REAL FOODS PTY LTD.,	§	
	§	
Applicant.	§	

OPPOSER’S SECOND SET OF INTERROGATORIES TO APPLICANT

Pursuant to 37 C.F.R. § 2.120 and Rule 33 of the Federal Rules of Civil Procedure, Opposer Frito-Lay North America, Inc. requests that Applicant Real Foods Pty Ltd (“Applicant”) answer the following interrogatories separately and fully in writing under oath.

DEFINITIONS

The definitions and instructions forming part of Opposer’s First Set of Interrogatories to Applicant are hereby incorporated by reference.

INTERROGATORIES

INTERROGATORY NO. 24

For each mark that is the subject of this proceeding, state the dollar amount of your annual sales in the United States for each of the previous five years.

INTERROGATORY NO. 25

For each mark that is the subject of this proceeding, state by percentage your market share in the United States during each of the previous five years for the following product categories: (1) crispbread slices, (2) popped corn cakes, and (3) rice cakes.

INTERROGATORY NO. 26

For each mark that is the subject of this proceeding, state your annual advertising expenditures in the United States for each of the previous five years.

INTERROGATORY NO. 27

State the date on which each product or service described in the answer to Interrogatory No. 7 was first sold in the United States.

INTERROGATORY NO. 28

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, state the basis for your answer to the request for admission.

INTERROGATORY NO. 29

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, identify the persons with knowledge concerning the subject matter of the request for admission.

INTERROGATORY NO. 30

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, identify the documents supporting your answer to the request for admission.

INTERROGATORY NO. 31

Identify the persons who participated in any way in the preparation of the answers or responses to these interrogatories.

INTERROGATORY NO. 32

For each person identified in any of your answers to the interrogatories in this proceeding, provide a residence address at which the person may be served with a subpoena or other process for compelling testimony.

Respectfully submitted,

/Paul Madrid/ Paul Madrid
William G. Barber
Paul Madrid
PIRKEY BARBER PLLC
600 Congress Avenue, Suite 2120
Austin, TX 78701
Telephone: (512) 322-5200
Facsimile: (512) 322-5201
bbarber@pirkeybarber.com
pmadrid@pirkeybarber.com
ATTORNEYS FOR OPPOSER
FRITO-LAY NORTH AMERICA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of OPPOSER'S SECOND SET OF INTERROGATORIES TO APPLICANT has been served via First Class Mail at the address below on October 27, 2014:

Bruce S. Londa
NORRIS, MCLAUGHLIN & MARCUS, P.A.
875 3rd Avenue, 8th Floor
New York, NY 10022-6225

/Paul Madrid/
Paul Madrid

EXHIBIT D

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

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REAL FOODS PTY LTD.,	§	
	§	
Applicant.	§	

OPPOSER’S SECOND SET OF REQUESTS FOR PRODUCTION TO APPLICANT

Pursuant to Trademark Rule 2.120 and Rule 34 of the Federal Rules of Civil Procedure, Opposer Frito-Lay North America, Inc. (“Opposer”) requests that Applicant Real Foods Pty Ltd (“Applicant”) produce for inspection and copying the following documents and other tangible things within the possession, custody, or control of Applicant.

DEFINITIONS AND INSTRUCTIONS

The definitions and instructions forming part of Opposer’s First Set of Interrogatories to Applicant are hereby incorporated by reference.

Opposer requests that Applicant serve its responses to these requests within the time period specified in the applicable rules of practice (*see* Fed. R. Civ. P. 34 & 37 CFR 2.119(c)), regardless of the time when Opposer requests Applicant to produce documents.

Opposer further requests that, no later than **December 3, 2014**, Applicant produce duplicates, as defined by Federal Rule of Evidence 1001(c), of the requested documents and things to

Opposer's counsel, **Pirkey Barber PLLC, 600 Congress Avenue, Suite 2120, Austin, Texas 78701.**

Opposer requests that Applicant produce electronically stored information to Opposer's counsel in any of the following formats: (1) printouts; (2) TIFF files with optical character recognition; (3) PDF files with optical character recognition; or (4) the form in which the data is normally maintained provided that the data is stored in an open, non-proprietary file format.

If any document or thing is withheld from production in this opposition on the basis of any privilege or exemption from discovery, Applicant should produce a privilege list that identifies all withheld documents and things. The privilege list should include, at a minimum, the date, addressee, author, title, subject matter, and the specific grounds upon which each withheld document or thing is claimed to be privileged or otherwise not subject to discovery in this case.

REQUESTS

REQUEST NO. 41

To the extent not already produced in this proceeding, produce the documents identified in your response to Opposer's Second Set of Interrogatories to Applicant.

Respectfully submitted,

/Paul Madrid/ Paul Madrid
William G. Barber
Paul Madrid
PIRKEY BARBER PLLC
600 Congress Avenue, Suite 2120
Austin, TX 78701
Telephone: (512) 322-5200
Facsimile: (512) 322-5201
bbarber@pirkeybarber.com
pmadrid@pirkeybarber.com
ATTORNEYS FOR OPPOSER
FRITO-LAY NORTH AMERICA, INC.

EXHIBIT E

- 6) RF000228
- 7) RF000243
- 8) RF000265
- 9) RF000282-000360
- 10) RF000641
- 11) RF000657
- 12) RF000668-000671
- 13) RF000675-000676
- 14) RF000679-000680
- 15) RF000683
- 16) RF000684-000685
- 17) RF000723-000724
- 18) RF000727-000732
- 19) RF000733-000735
- 20) RF000830-000832
- 21) RF000867-000868
- 22) RF000898-000901
- 23) RF000906-000907
- 24) RF000915-000916
- 25) RF000924-000930
- 26) RF000931-000934
- 27) RF000935-000937
- 28) RF000939-000989
- 29) RF000990-000997
- 30) RF001022-001025

- 231) RF003297-003298
- 232) RF003304-003305
- 233) RF003312-003314
- 234) RF003318-003319
- 235) RF003342
- 236) RF003343-003344
- 237) RF003346-003347
- 238) RF003356-003357
- 239) RF003370-003375
- 240) RF003436-003437
- 241) RF003500-003501
- 242) RF003503-003505

RESPONSE TO STATEMENT NO. 1

Applicant responds to the Request in Statement No. 1 as set forth below:

- 1) RF000005 – Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates number RF000005 per the date and time stamp reflected therein and that an employee of Applicant transmitted a response as reflected therein. Applicant, however, has no knowledge of the identity of the author of this email and thus cannot admit or deny the authenticity of this document.
- 2) RF000016-000017 – Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates numbers RF000016-000017 per the date and time stamp reflected therein and that an employee of Applicant transmitted a response as reflected therein. Applicant, however, has no knowledge of the identity of the author of this email and thus cannot admit or deny the authenticity of this document.
- 3) RF000018-000020 – Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates numbers RF000018-000020 per the date and time stamp reflected therein and that an employee of Applicant transmitted a response as reflected therein. Applicant, however, has no knowledge of the identity of the author of this email and thus cannot admit or deny the authenticity of this document.

- 4) RF000044 – Without waiver of the general objections, Applicant admits that it received the letter contained in the document identified by bates number RF000044 near or about the date reflected therein. Applicant, however, has no knowledge of the identity of the author of this letter and thus cannot admit or deny the authenticity of this document.
- 5) RF000082-000083 – Without waiver of the general objections, Applicant admits the authenticity of the document identified by bates numbers RF000082-000083.
- 6) RF000228 – Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates number RF000228 per the date and time stamp reflected therein. Applicant, however, has no knowledge of the identity of the author of this letter and thus cannot admit or deny the authenticity of this document.
- 7) RF000243– Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates number RF000243 per the date and time stamp reflected therein. Applicant, however, has no knowledge of the identity of the author of this letter and thus cannot admit or deny the authenticity of this document.
- 8) RF000265 – Without waiver of the general objections, Applicant admits that its servers received the email contained in the document identified by bates number RF000265 per the date and time stamp reflected therein. Applicant, however, has no knowledge of the identity of the author of this letter and thus cannot admit or deny the authenticity of this document.
- 9) RF000282-000360 – Without waiver of the general objections, Applicant admits that it received the presentation contained in the document identified by bates numbers RF000282-000360 near or about the date reflected therein. The presentation, however, is not a business record of Applicant and Applicant has no knowledge concerning the preparation or creation of the presentation, and thus cannot admit or deny the authenticity of this document.
- 10) RF000641 – Without waiver of the general objections, Applicant admits that it received the spreadsheet contained in the document identified by bates number RF000641. The spreadsheet, however, is not a business record of Applicant and Applicant has no knowledge concerning the preparation or creation of the spreadsheet. However, there are some calculations on said spreadsheet produced to Opposer which were made by an employee of the Applicant, and Applicant therefore admits to the authenticity of said calculations by such employee but not the rest of the spreadsheet. Said calculations were based on the third-party provided information.
- 11) RF000657– Without waiver of the general objections, Applicant admits the authenticity of the document identified by bates number RF000657.
- 12) RF000668-000671 – Without waiver of the general objections, Applicant admits the authenticity of the document identified by bates numbers RF000668-000671.

STATEMENT NO. 2

The documents attached as Exhibit A are duplicates, within the meaning of Federal Rule of Evidence 1001(c), of the documents identified in Statement No. 1.

RESPONSE TO STATEMENT NO. 2

Without waiver of the General Objection, Applicant admits this statement.

STATEMENT NO. 3

The copies of documents you produced in response to Opposer's Second Set of Requests for Production to Applicant are duplicates within the meaning of Federal Rule of Evidence 1001(c).

RESPONSE TO STATEMENT NO. 3

Without waiver of the General Objection, Applicant admits this statement.

STATEMENT NO. 4

The originals of the copies you produced in response to Opposer's Second Set of Requests for Production to Applicant are authentic under Federal Rule of Evidence 901.

RESPONSE TO STATEMENT NO. 4

Without waiver of the General Objection, Applicant admits the authenticity of that document bates numbered RF004788, which is the only document Applicant is producing concurrently herewith in response to Opposer's Second Set of Requests for Production.

STATEMENT NO. 5

The following documents identified by production numbers assigned by Applicant are records of Applicant's regularly conducted activity under Federal Rule of Evidence 803(6).

- 1) RF000005
- 2) RF000016-000017
- 3) RF000018-000020
- 4) RF000044

- 5) RF000082-000083
- 6) RF000228
- 7) RF000243
- 8) RF000265
- 9) RF000282-000360
- 10) RF000641
- 11) RF000657
- 12) RF000668-000671
- 13) RF000675-000676
- 14) RF000679-000680
- 15) RF000683
- 16) RF000684-000685
- 17) RF000723-000724
- 18) RF000727-000732
- 19) RF000733-000735
- 20) RF000830-000832
- 21) RF000867-000868
- 22) RF001199
- 23) RF001203-001204
- 24) RF001208-001209
- 25) RF001217-001221
- 26) RF001240-001241
- 27) RF001250-001251
- 28) RF001255-001256
- 29) RF001284-001285

- 230) RF003436-003437
- 231) RF003500-003501
- 232) RF003503-003505

RESPONSE TO STATEMENT NO. 5

- 1) RF000005 – Without waiver of the general objections, Applicant admits that the email response transmitted by an employee of Applicant to the customer communication contained in the document identified by bates number RF000005 is a record of Applicant’s regularly conducted activity. Applicant denies that the customer communication contained in this document is a record of Applicant’s regularly conducted activity.
- 2) RF000016-000017 – Without waiver of the general objections, Applicant admits that the email response transmitted by an employee of Applicant to the customer communication contained in the document identified by bates numbers RF000016-000017 is a record of Applicant’s regularly conducted activity. Applicant denies that the customer communication contained in this document is a record of Applicant’s regularly conducted activity.
- 3) RF000018-000020 – Without waiver of the general objections, Applicant admits that the email response transmitted by an employee of Applicant to the customer communication contained in the document identified by bates numbers RF000018-000020 is a record of Applicant’s regularly conducted activity. Applicant denies that the customer communication contained in this document is a record of Applicant’s regularly conducted activity.
- 4) RF000044 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates number RF000044 is a record of Applicant’s regularly conducted activity.
- 5) RF000082-000083 – Without waiver of the general objection, Applicant admits this statement.
- 6) RF000228 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates number RF000228 is a record of Applicant’s regularly conducted activity.
- 7) RF000243 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates number RF000243 is a record of Applicant’s regularly conducted activity.
- 8) RF000265 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates number RF000265 is a record of Applicant’s regularly conducted activity.

- 9) RF000282-000360 – Without waiver of the general objections, Applicant denies that the presentation contained within the document identified by bates number RF000282-000360 is a record of Applicant’s regularly conducted activity.
- 10) RF000641 – Without waiver of the general objections, Applicant denies that the spreadsheet contained within the document identified by bates number RF000641 is a record of Applicant’s regularly conducted activity.
- 11) RF000657 – Without waiver of the general objections, Applicant admits this statement.
- 12) RF000668-000671 – Without waiver of the general objections, Applicant admits this statement.
- 13) RF000675-000676 – Without waiver of the general objections, Applicant admits this statement.
- 14) RF000679-000680 – Without waiver of the general objections, Applicant admits this statement.
- 15) RF000683 – Without waiver of the general objections, Applicant admits this statement.
- 16) RF000684-000685 – Without waiver of the general objections, Applicant admits this statement.
- 17) RF000723-000724 – Without waiver of the general objections, Applicant admits this statement.
- 18) RF000727-000732 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates numbers RF000727-RF000732 is a record of Applicant’s regularly conducted activity.
- 19) RF000733-000735 – Without waiver of the general objections, Applicant denies that the customer communication contained within the document identified by bates numbers RF000733-000735 is a record of Applicant’s regularly conducted activity.
- 20) RF000830-000832 – Without waiver of the general objections, Applicant denies that the sample circular contained within the document identified by bates numbers RF000830-000832 is a record of Applicant’s regularly conducted activity.
- 21) RF000867-000868 – Without waiver of the general objections, Applicant admits this statement.
- 22) RF001199 – Without waiver of the general objections, Applicant admits this statement.

STATEMENT NO. 9

The emails of Jahan Spatchurst contained in the following documents were made within the scope of her employment with Applicant:

- 1) RF002404-002405
- 2) RF002419-002422

RESPONSE TO STATEMENT NO. 9

- 1) RF002404-002405 – Applicant objects on the basis that the phrase “scope of employment” is a legal term that must be defined. Without waiver of the foregoing or General Objections, Applicant denies this statement but admits that the referenced document was sent by Mr. Spatchurst while engaged as an employee of Applicant and sent as a part of his duties and in the ordinary course of employment.
- 2) RF002419-002422 – Applicant objects on the basis that the phrase “scope of employment” is a legal term that must be defined. Without waiver of the foregoing or General Objections, Applicant denies this statement but admits that the referenced document was sent by Mr. Spatchurst while engaged as an employee of Applicant and sent as a part of his duties and in the ordinary course of employment.

STATEMENT NO. 10

Applicant hired The Leading Edge to create the document identified by production numbers RF000282 to RF000360.

RESPONSE TO STATEMENT NO. 10

Applicant denies this statement.

STATEMENT NO. 11

The statements of The Leading Edge contained within the document identified in Statement No. 10 were made within the scope of its relationship with Applicant.

RESPONSE TO STATEMENT NO. 11

Applicant objects on the basis that the phrase “scope of its relationship” is not defined. Without waiver of the foregoing or General Objections, Applies denies this statement but admits that Applicant hired The Leading Edge.

EXHIBIT F

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

FRITO-LAY NORTH AMERICA, INC.,

Opposer,

v.

REAL FOODS PTY LTD,

Applicant.

Opposition No. 91212680 (parent)

Opposition No. 91213587

**APPLICANT'S RESPONSES AND OBJECTIONS TO
OPPOSER'S SECOND SET OF INTERROGATORIES TO APPLICANT**

Pursuant to TBMP Rule 2.120 and Rule 33 of the Federal Rules of Civil Procedure, Applicant, Real Foods Pty Ltd. ("Applicant"), responds and objects to Opposer's Second Set of Interrogatories, as follows:

OBJECTIONS

Applicant repeats and incorporates by reference its objections to Opposer's First Set of Interrogatories in this proceeding. Applicant responds to Opposer's Second Set of Interrogatories subject to those objections.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 24

For each mark that is the subject of this proceeding, state the dollar amount of your annual sales in the United States for each of the previous five years.

RESPONSE TO INTERROGATORY NO. 24

Subject to the General Objections, Applicant has produced documents from which a response to this interrogatory can be derived or ascertained, and refers Opposer to that document bates numbered RF001185.

INTERROGATORY NO. 25

For each mark that is the subject of this proceeding, state by percentage your market share in the United States during each of the previous five years for the following product categories: (1) crispbread slices, (2) popped corn cakes, and (3) rice cakes.

RESPONSE TO INTERROGATORY NO. 25

Subject to the General Objections, Applicant states that it does not possess information or knowledge sufficient to respond to this interrogatory.

INTERROGATORY NO. 26

For each mark that is the subject of this proceeding, state your annual advertising expenditures in the United States for each of the previous five years.

RESPONSE TO INTERROGATORY NO. 26

Subject the General Objections, Applicant states that it has produced documents from which a response to this interrogatory can be derived or ascertained, and refers Opposer to that document bates numbered RF004788.

INTERROGATORY NO. 27

State the date on which each product or service described in the answer to Interrogatory No. 7 was first sold in the United States.

RESPONSE TO INTERROGATORY NO. 27

Applicant objects to this interrogatory as being duplicative of Interrogatory No. 8 and refers Opposer to Applicant's response to that interrogatory.

INTERROGATORY NO. 28

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, state the basis for your answer to the request for admission.

RESPONSE TO INTERROGATORY NO. 28

Applicant objects to this interrogatory as being unduly burdensome and as duplicative of Opposer's demands as set forth in Opposer's First Set of Requests for Admissions. Subject to these objections and the General Objections, Applicant directs Opposer to its responses to the statements set forth in Opposer's First Set of Requests for Admission.

INTERROGATORY NO. 29

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, identify the persons with knowledge concerning the subject matter of the request for admission.

RESPONSE TO INTERROGATORY NO. 29

Applicant objects to this interrogatory as being vague and ambiguous and as seeking information protected by the attorney-client privilege and the work product doctrine. Subject to these objections and the General Objections, to the extent a response was not an unqualified admission, dependent on the application of the law to the facts, counsel assisted in preparation of the answers; in instances where a name of a witness or Real Foods employee is mentioned, that person would have knowledge of the subject matter referred to in the particular Request and response thereto.

INTERROGATORY NO. 30

For each request for admission in Opposer's First Set of Requests for Admission to which you did not answer with an unqualified admission, identify the documents supporting your answer to the request for admission.

RESPONSE TO INTERROGATORY NO. 30

Applicant objects to this interrogatory as being overbroad and unduly burdensome, and as duplicative of Opposer's demands as set forth in Opposer's First Set of Requests for Admissions. Subject to these objections and the General Objections, Applicant states it has no documents responsive to this interrogatory.

INTERROGATORY NO. 31

Identify the persons who participated in any way in the preparation of the answers or responses to these interrogatories.

EXHIBIT G



Paul Madrid
(512) 482-5244 (direct)
pmadrid@pirkeybarber.com

December 10, 2014

VIA EMAIL: abhatt@nmmlaw.com
VIA U.S. MAIL

Ami Bhatt
Norris, McLaughlin & Marcus, P.A.
875 Third Avenue, Eighth Floor
New York, New York 10022

Re: *Frito-Lay N. Am., Inc. v. Real Foods Pty Ltd, Consolidated Opp. No. 91212680*
(PB ref. FRIT030)

Dear Ami:

We write concerning your client's responses to Opposer's Interrogatory Nos. 28-30, in particular as they pertain to its responses to Statement Nos. 1 and 5-11 of Opposer's First Set of Requests for Admission.

Statement Nos. 10-11 and Interrogatory Nos. 28-30

Although your client did not provide an unqualified admission of Statement Nos. 10-11, its responses to Interrogatory Nos. 28-30 (and its responses to Statement Nos. 10-11 which were incorporated by reference) do not contain the information requested pertaining to those statements. The response to Interrogatory No. 28 did not identify the basis for the complete denial of Statement No. 10 and the almost complete denial of Statement No. 11. For example, if your client did hire The Leading Edge to create Document No. RF000282-360 and that document was not made within the scope of their relationship as the denial suggests, then the response to Interrogatory No. 28 should explain what your client hired The Leading Edge to do and how or why that document was outside the scope of that relationship. Further, your client's response to Interrogatory No. 29 should identify the persons at both Real Foods and The Leading Edge with knowledge of their relationship and that document. Finally, although your client's response to Interrogatory No. 30 stated that it had no documents supporting its denials of Statement Nos. 10-11, it should identify the existence of documents (such as a signed agreement, email chain, or other correspondence) documenting The Leading Edge's relationship with your client.

Accordingly, we request that your client supplement its response to Interrogatory Nos. 28-30 to provide the information requested with respect to its answers to Statement Nos. 10-11. After those interrogatories are supplemented, we request that your client supplement Interrogatory No. 32 and its production responsive to Opposer's Second Set of Requests for Production of Documents and Things accordingly.

Ami Bhatt
December 10, 2014
Page 2 of 3

Alternatively, if you will stipulate to the truth of the following statements, we will forgo our request for supplementation of these discovery requests:

- (1) In hiring The Leading Edge, Applicant authorized The Leading Edge to investigate and report on facts pertaining to Applicant's American market share and American marketing strategy.
- (2) As a result of Applicant hiring The Leading Edge, The Leading Edge prepared and presented Document No. RF000282-360 to Applicant.
- (3) Applicant paid The Leading Edge for its services in preparing and presenting Document No. RF000282-360.
- (4) Document No. RF000282-360 is a record of The Leading Edge's acts and opinions made at or near the time by, or from information obtained by, someone with knowledge of those acts and opinions; the record was kept in the course of The Leading Edge's regularly conducted activity; and the making of the record was a regular practice of The Leading Edge.

Statement Nos. 1 & 5-9 and Interrogatory No. 29

Your client also did not provide unqualified admissions for Statement Nos. 1 and 5-9, yet it did not identify in Interrogatory No. 29 (or in its responses to Statement Nos. 11 and 5-9 which were incorporated by reference) the persons with knowledge concerning the subject matter of those statements. Although your client objected to this interrogatory based on undue burden, because your client produced each of the documents identified in the requests for admission, the identity of the persons (such as employees) from whom your client produced these documents would be within your client's knowledge and would not be unduly burdensome to provide.

Accordingly, we request that your client supplement its response to Interrogatory No. 29 to list the persons with custody of the documents to which you did not provide an unqualified admission in Statement Nos. 1 and 5-9. We also request that, after your client supplements Interrogatory No. 29, it supplement Interrogatory No. 32 accordingly.

Interrogatory No. 32

Your client's response to this interrogatory is incomplete. The interrogatory asked for an address at which persons identified in your client's interrogatory responses may be served with compulsory testimonial process, yet the response merely states that a particular individual "may be contacted," but not served, "through the undersigned counsel." Please clarify whether you are accepting service of compulsory testimonial process on behalf of the individuals that "may be contacted through the undersigned counsel." If not, we request that your client supplement this interrogatory by providing the addresses at which persons identified in its interrogatory responses may be served with compulsory testimonial process.

Ami Bhatt
December 10, 2014
Page 3 of 3

We look forward to your response.

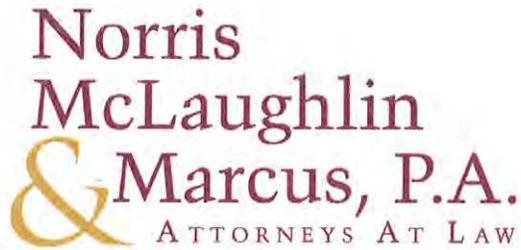
Very truly yours,



Paul Madrid

cc: Jeanne Hamburg (via jhamburg@nmmlaw.com)
Bruce S. Londa (via bslonda@nmmlaw.com)
William G. Barber (via bbarber@pirkeybarber.com)

EXHIBIT H



875 Third Avenue
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Direct Dial: 917-369-8885
Email: abhett@nmmlaw.com

January 5, 2015

Via First-Class Mail and Email

Paul Madrid
Pirkey Barber PLLC
600 Congress Avenue, Suite 2120
Austin, TX 78701

Re: Frito-Lay North America, Inc. v. Real Foods Pty Ltd.
Trademark Trial and Appeal Board
Opposition No. 91212680
Opposition No. 91213587

Dear Paul:

We are in receipt of your letter dated December 10, 2014, setting forth purported deficiencies in Applicant Real Foods' responses to Opposer's Interrogatory Nos. 28-30, and respond as set forth below:

Interrogatory Nos. 28-30, Statement Nos. 1 & 5-9 and Statement Nos. 10-11

Applicant objects to Opposer's characterization of its responses as deficient. Despite Opposer having served an additional three sets of discovery demands on the absolute eve of the close of discovery—including a First Set of Requests for Admission which totaled 37 pages and sought to ascertain the genuineness of over 200 documents, among other matters—Applicant provided timely, thorough and complete responses to each of Opposer's demands, resulting, *inter alia*, in a Response to Opposer's Requests for Admission totaling over 125 pages.

Further, as the discovery period has closed, any "follow-up discovery" by Opposer to these responses is untimely and not permitted. As the TBMP makes clear, should a party wish to take "follow-up" discovery it must serve initial requests early in the discovery period so that it has sufficient time to prepare and serve additional discovery requests prior to the expiration of the discovery period. *See* TBMP § 403.05(a). Applicant timely provided complete responses to



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Norris McLaughlin & Marcus, P.A.

January 5, 2015

Page 2

Opposer's discovery demands served on the last day of the discovery period. Opposer may not circumvent the rules of the TTAB by conducting follow-up discovery through correspondence.

Interrogatory No. 32

Applicant clarifies that undersigned counsel can and will accept service of compulsory testimonial process on behalf of Mr. Pels. However, it reserves Mr. Pels' right to be deposed in Australia under TBMP § 404.03(b) and counsel's acceptance of service is not to be construed as a waiver of his right to do so.

Sincerely,

NORRIS MCLAUGHLIN & MARCUS, P.A.



Ami Bhatt

cc: Paul Madrid, Esq.
Jeanne M. Hamburg, Esq.
Bruce S. Londa, Esq.