

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

BUO

Mailed: December 16, 2014

Opposition No. 91215813

*Crystalline Mgmt., LLC, Najat  
Kanache*

*v.*

*Int'l Pastry Concepts LLC*

**Benjamin U. Okeke, Interlocutory Attorney:**

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(a)(1) and (2), the parties held a timely discovery and settlement conference on Friday, December 5, 2014.<sup>1</sup> *See* TBMP § 401.01. At Applicant's request, a member of the Board participated in the conference. Participating were Applicants' counsel Candice Cook, Opposers' counsel Robert B.G. Horowitz, and the assigned interlocutory attorney, Benjamin U. Okeke.

The Board apprised the parties of general procedural rules and guidelines that govern *inter partes* proceedings, including the Board's liberal granting of motions to suspend for settlement efforts, the requirement that a party serve

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<sup>1</sup> Opposers' second amended notice of opposition, filed October 23, 2014, pursuant to leave granted by the Board's October 3, 2014 order, is noted and accepted and is now Opposers' operative pleading in this matter (hereafter "the amended notice of opposition").

its initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A)(i) and (ii) prior to serving discovery requests (*see* Trademark Rule 2.120(a)(3)).

***Standard Protective Order***

The Board reminded the parties that its Standard Protective Order is automatically applicable to this proceeding pursuant to Trademark Rule 2.116(g). The standard protective order is online at: <http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp>.

Although they are not required to do so, the parties may elect to exchange executed copies of the order. If the parties wish to modify the order in any manner, they must file a motion for the Board's approval of the modification(s).

***Pleadings***

The Board reviewed the pleadings with the parties:

**A. Notice of Opposition**

Crystalline Management, LLC and Najak Kaanache ("Opposers"), oppose registration of the mark CRONUT, in standard character format, in Application Serial No. 85936327 ("the '327 application"), filed by International Pastry Concepts LLC and Dominique Ansel ("Applicants"), for use in connection with various baked goods, confections, beverages of, or containing, coffee, tea, chocolate or cocoa, cake decorations, and packaged food combinations, in International Class 30.<sup>2</sup> In the initial notice of

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<sup>2</sup> The application was filed under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), alleging current use in commerce and asserting May 10, 2013 as the date of first use anywhere and

opposition Opposers alleged that registration should be denied: (1) based upon a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); (2) because the applied-for mark is primarily merely descriptive under Section 2(e)(1), 15 U.S.C. § 1052(e)(1); (3) that Applicants committed fraud on the USPTO in the prosecution of the subject application; (4) that Applicants lacked a bona fide intent to use the mark in commerce on the date the application was filed under Section 1(a); and (5) that Applicants have misused the registration symbol under Trademark Act Section 29, 15 U.S.C. § 1111.

On October 3, 2014, the Board issued a ruling granting in part Applicants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). In that order, the Board dismissed Opposers' descriptiveness and lack of bona fide intent to use claims, without prejudice, allowing Opposers twenty days to replead those claims.

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also the date of first use of the mark in commerce for "Bakery desserts; Bakery goods; Bakery goods and dessert items, namely, cheesecakes for retail and wholesale distribution and consumption on or off the premises; Bakery goods, namely, croissant and doughnut hybrid; Bakery products; Bakery products, namely, sweet bakery goods; Beverages made of coffee; Beverages made of tea; Beverages with a chocolate base; Beverages with a coffee base; Biscuits; Biscuits and bread; Biscuits, tarts, cakes made with cereals; Bread and buns; Bread and pastry; Bread doughs; Bread mixes; Bread rolls; Bread sticks; Brioches; Cake doughs; Cake icing; Cake mixes; Cakes; Chocolate for confectionery and bread; Cocoa-based beverages; Cocoa-based ingredient in confectionery products; Coffee based beverages; Coffee beverages with milk; Coffee-based beverages; Coffee-based iced beverages; Confectioneries, namely, snack foods, namely, chocolate; Confectionery chips for baking; Cookie dough; Cookie mixes; Cookies; Croissants; Doughnuts; Edible cake decorations; Edible decorations for cakes; Edible flour; Food package combinations consisting primarily of bread, crackers and/or cookies; Instant doughnut mixes; Macaroons; Madeleines; Mixes for bakery goods; Muffin mixes; Muffins; Pastries; Pastry dough; Pastry mixes; Prepared cocoa and cocoa-based beverages; Prepared coffee and coffee-based beverages; [and] Scones."

In the second amended notice of opposition,<sup>3</sup> Opposers maintained their initially asserted claims of likelihood of confusion, descriptiveness, and fraud, and also repleaded the claims of descriptiveness and lack of bona fide intent to use, as grounds for opposition.

- *Standing*

Opposers allege that they have jointly filed two trademark applications for the mark CRONUTS, which have been assigned Application Serial Nos. 85961168<sup>4</sup> (“the ’168 application”) and 86008577<sup>5</sup> (“the ’577 application”). Amended Notice of Opposition, ¶¶ 3 and 4. Opposers further allege that the subject ’327 application “has been cited as a potential block against the ’168 application because of confusing similarity.” *Id.*, ¶ 8. These allegations, if proven, establish opposers’ standing to bring this opposition against the ’327 application. *See Saddlesprings Inc. v Mad Croc Brands Inc.*, 104 USPQ2d 1948, 1950 (TTAB 2012) (standing adequately alleged by allegation that petitioner’s intent-to-use application has been refused based on respondent’s registrations); *Mattel Inc. v. Brainy Baby Co.*, 101 USPQ2d 1140, 1142 (TTAB

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<sup>3</sup> Opposers’ first amended notice of opposition was filed on June 2, 2014, in response to Applicants’ first motion to dismiss, filed May 18, 2014.

<sup>4</sup> Filed June 17, 2013, under Trademark Act Section 1(b), alleging Opposers’ intent to use the mark in commerce for “Baked goods, namely, sweet donuts and savory donuts,” in International Class 30.

<sup>5</sup> Filed July 12, 2013, under Trademark Act Section 1(b), alleging Opposers’ intent to use the mark in commerce for downloadable, printed and non-downloadable publications “featuring recipes, not including recipes for hybrid doughnuts/croissants of any kind,” in International Classes 9, 16, and 41.

2011) (Office action refusing registration to plaintiff based on defendant's registration made of record).

Opposers also appear to claim common law usage of the mark CRONUTS dating back “before Applicants commenced using, and applied to register, the designation CRONUT.” Amended Notice of Opposition, ¶ 2. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981) (plaintiff may show standing based on common law rights in mark that is distinctive, inherently or otherwise); *Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (standing based on common law use of mark).

Moreover, because Opposers have sufficiently pleaded their standing, they have the right to assert any appropriate grounds for opposition in this proceeding. *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537 (TTAB 2009) (*citing Liberty Trouser Co., Inc. v. Liberty & Co., Ltd.*, 222 USPQ 357, 358 (TTAB 1983) (averments of priority, likelihood of confusion and resulting damage accepted to show petitioner's standing with respect to pleaded grounds of fraud and abandonment)).

- *Priority*

As stated, the amended notice of opposition alleges that Opposers' use of the mark CRONUTS predates Applicants' use of the CRONUT mark. Notice of Opposition, ¶ 2 and 9. Opposer's allegation of use “prior to any rights Applicants may claim” would, if proven, give Opposers priority of use with

regard to Applicants' constructive use date of May 19, 2013, the application filing date. This is the earliest date upon which Applicants could rely without proof by "competent evidence" of an earlier date of actual use.<sup>6</sup> See Trademark Rule 2.122(b)(2) (the date of use in an application is not evidence on behalf of the applicant; "a date of use of a mark must be established by competent evidence"); see also *Coach Servs. Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1606 n.7 (TTAB 2010).

Therefore, Opposers allege a plausible claim of priority.

- *Likelihood of Confusion*

Paragraphs 5-6 and 10 of the amended notice of opposition allege sufficient facts that if proven would entitle Opposers to the relief they seek under Trademark Act Section 2(d). That is, Opposers have alleged the similarity of the applied-for mark with their applied-for and previously used pleaded mark and the relatedness of the goods covered by those marks.

Inasmuch as Opposers have alleged that registration of Applicants' mark is likely to cause confusion, it appears that Opposers' claim of likelihood of confusion is sufficiently pleaded.<sup>7</sup>

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<sup>6</sup> Conversely, with regard to Opposers' pleaded applications, the constructive use dates, or filing dates, of those applications are the only dates which Opposers may rely upon without proof of an earlier date supported by competent evidence.

<sup>7</sup> To state a claim of likelihood of confusion under Trademark Act Section 2(d), Opposers must merely allege facts from which it may be inferred that Applicants' applied-for mark so resembles Opposers' previously used or registered marks that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the services of the Applicants and Opposers. See 15 U.S.C. § 1052(d); *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also TMEP § 1207.01.

- *Descriptiveness*

Paragraphs 12-13 and 20 allege, *inter alia*, that the term CRONUT “as applied to Applicants’ ‘bakery goods, namely, croissant and doughnut hybrid’ in their CRONUT application merely describes their feature and characteristic of being a croissant and doughnut hybrid.” Amended Notice of Opposition ¶ 20.<sup>8</sup>

Therefore, Opposers have set forth sufficient facts to plead a claim of descriptiveness under Section 2(e)(1), for partial cancellation of the registration with respect to the “bakery goods, namely, croissant and doughnut hybrid” as listed in the involved application. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)(a mark is considered merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of an applicant’s goods or services).

- *Lack of Bona Fide Intent to Use*

Nonuse of a mark on the goods claimed in an application at the time the application is filed under Section 1(a) of the Trademark Act is a valid ground for opposition. *See* Trademark Act Section 1(a), 15 U.S.C. § 1051(a). *See, e.g.*,

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<sup>8</sup> Opposers provided substantial explanation and legal argument regarding the descriptiveness analysis of a term, including exhibits and Internet website links in paragraphs 14-18 of the amended notice of opposition. Opposers were again reminded that exhibits attached to pleadings would not be considered. *See* Trademark Rule 2.122(c) (“an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony.”). Therefore, the Board will not consider Opposers’ exhibits to be a part of the record. If Opposers want to rely on this evidence in support of a motion or at trial, it must be properly submitted at the appropriate time.

*Int'l Mobile Machines Corp. v. Int'l Tel. and Tel. Corp.*, 800 F.2d 1118, 231 USPQ 142 (Fed. Cir. 1986); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012).

Inasmuch as paragraph 23 of the amended notice of opposition alleges that “Applicants had not used in interstate commerce the mark for the goods listed in their application,” Opposers have sufficiently pleaded a claim of nonuse.

- *Misuse of the Registration Symbol*

In the context of an *inter partes* proceeding before the Board, in order to form a basis to defeat an applicant’s rights to registration, an allegation of misuse of the registration symbol must have arisen from the applicant’s intent to deceive the purchasing public or others in the trade into believing that the mark was in fact registered. *See Wells Fargo*, 20 USPQ2d at 1158; *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976) *aff’g* 189 USPQ 310, 314 (TTAB 1975) (“improper use of a registration notice by an applicant is actionable only when it can be conclusively established that such use was occasioned by an intent, actual or implied, to deceive the purchasing public or even others in the trade into believing that the mark is in fact a registered mark entitled to all the presumptions under Section 7(b) of the Statute.”). Such a claim presents a question of fraud.

An allegation of fraud must assert the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b). Under Rule 9(b), together with Fed. R. Civ. P. 11 and USPTO Rule 11.18, “the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud.” *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478 (TTAB 2009) citing *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981).

Opposers have alleged that Applicants were mistakenly issued a registration for the mark CRONUT on January 14, 2014, but that the USPTO, citing a clerical error, cancelled the registration and informed Applicants of such cancellation on February 21, 2014. Amended Notice of Opposition ¶¶ 26 and 27. However, Opposers allege that Applicants have nonetheless continued using the registration symbol and asserting their “registration” in “enforcement efforts,” and are thus “intentionally misusing the registration symbol in an attempt to deceive the public into believing their CRONUT mark is registered.” *Id.* ¶¶ 28-30.

Consequently, Opposers’ claim that Applicants have misused the trademark registration symbol appears sufficiently pleaded.<sup>9</sup>

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<sup>9</sup> However, Opposers are reminded that there is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive. *Smith Int’l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981). Unless a party alleging fraud can point to clear and convincing evidence that supports drawing an inference of deceptive intent, it will not be entitled to judgment on a fraud claim. *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1942 (Fed. Cir. 2009). Any doubt must be resolved against the party making a claim of fraud. *Id.* at 1939.

- *Nonuse/Fraud*

In their fifth and final count Opposers allege fraud in Applicants' prosecution of their Section 1(a), use-based application for registration. Opposers have alleged that "at the time [applicant's counsel] signed said declaration, Applicants had not used the CRONUT mark for the goods in their application," and that applicant's "statement that the mark was in use for all of the goods was a false representation." It appears opposer has sufficiently pleaded a claim of fraud by way of nonuse.

**B. Answer**

In their amended answer, Applicants admitted that "Opposers' subsequent [applied-for mark] ... is substantially identical to Applicants' mark." Applicants denied the remainder of the salient allegations of the amended notice of opposition. Additionally, Applicants asserted nine "affirmative defenses" to the opposition.

- *Failure to State a Claim & Standing*

Applicants' first and fourth "affirmative defenses," which respectively assert that the amended notice of opposition "fails to state a basis for the relief sought," and that "Opposers lack standing," are not "affirmative defenses," but are an attack on the sufficiency of the pleadings, which is properly asserted by separate motion filed prior to or with the answer. *See* Fed. R. Civ. P. 12(b)(6). However, as noted above the Board has reviewed the amended notice of opposition and has determined that Opposers have indeed

sufficiently pleaded their standing and valid claims for opposition. Accordingly, these defenses are **STRICKEN**, and will be given no further consideration.

- *Laches, Waiver, Acquiescence and Estoppel*

Applicant then asserts laches, waiver, acquiescence and estoppel. However, Applicants have failed to plead facts necessary to support these defenses. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Indeed, the affirmative defenses of laches, waiver, and estoppel are severely limited in opposition proceedings because the consideration is taken as of the time the challenged application is published for opposition, not from the time of knowledge of use. *See Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1531 (TTAB 2008) (conduct which occurs prior to publication of application for opposition generally cannot support a finding of equitable estoppel); *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007) (defenses of laches, acquiescence or estoppel generally not available in opposition proceeding). For example, given the brief period allowed for filing an opposition, see Trademark Rule 2.101(c), laches would be all but impossible to prove.

Further, waiver and estoppel are not time dependent defenses, but instead turn on the conduct of plaintiff during the time of prosecution of the application. *See Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc.*, 23 USPQ2d 1701 (Fed. Cir. 1992) (“The elements of equitable estoppel are (1)

misleading *conduct*, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.”)(emphasis added).

As to waiver and estoppel, Opposers may well have taken some action prior to or during the prosecution of the subject application that may have given Applicants the impression that Opposers did not intend to assert their rights against the application. *See Lincoln Logs*, 23 USPQ2d 1701; *Copperweld Corp. v. Astralloy-Vulcan Corp.*, 196 USPQ 585, 590-91 (TTAB 1977). While these claims are not categorically inapposite to the case, they nonetheless lack factual support in the pleadings.

Accordingly, these defenses are **STRICKEN**.

- *Acquired Distinctiveness*

The third “affirmative defense” asserted by Applicants alleges that Applicants’ mark has acquired distinctiveness. This is merely an amplification of Applicants’ denials with respect to Opposers’ descriptiveness claim, and provides fuller notice of how Applicants intend to defend this opposition. *See Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999). While this is not an appropriate affirmative defense, the Board does not find it necessary to strike this language from the Answer.

- *Unclean Hands*

“Assertion of the defense of unclean hands, though often based on allegations of fraud, misrepresentation of source, or violation of antitrust laws, ‘may result from any imaginable immoral or illegal conduct.’” *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733 (TTAB 2001) (quoting 3 J. Gilson Trademark Protection and Practice § 8.12[13] (1999)). When the assertedly improper conduct relates to the use of the mark, the defense may be considered even in relation to rights acquired through use. *See Indep. Grocers’ Alliance Distrib. Co. v. Zayre Corp.*, 149 USPQ 229 (TTAB 1966) (Though the Board did not find for applicant on the issue, it considered applicant's assertion that the opposer, relying not on a registration but on rights acquired through use, had unclean hands because it misused the statutory registration symbol.)

In this case, Applicants allege that Opposers “engaged in drastic and overt measures to intentionally and wrongfully divert Applicants’ customers, fans, and professional colleagues through actions intended to cause consumer confusion.” This allegation, taken in the context of Applicants’ other assertions, is sufficient to plead an affirmative defense of unclean hands.

- *Genericness*

The sixth “affirmative defense” asserted by Applicants is also not an affirmative defense, but rather an attack on Opposers rights in the mark as applied to the goods and services listed in the applications pleaded by

Opposers. While this is not an appropriate affirmative defense, the Board does not find it necessary to strike this language from the Answer and Applicants are left to their proofs on this assertion.

- *Fraud*

Applicants' seventh affirmative defense, alleging fraud, is insufficiently pleaded. As previously stated, in a notice of opposition alleging fraud, the elements of fraud must be pleaded with particularity in accordance with Fed. R. Civ. P. 9(b). *Supra*, p.9.

Applicants have not specified any particular material fact that has been misrepresented by Opposer. Instead, Applicants' arguments appear to be a charged description of their overall gravamen in this proceeding. For example, the proper classification of goods and services is a purely administrative matter within the sole discretion of the United States Patent and Trademark Office. *In re Tee-Pak, Inc.*, 164 USPQ 88, 89 (TTAB 1969). Therefore, Applicants' assertions regarding the Opposers' classification of its goods is of no moment.<sup>10</sup>

Accordingly, Applicants' seventh affirmative defense alleging fraud is **STRICKEN**, and will be given no further consideration.

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<sup>10</sup> Additionally, the allegations do not impugn Opposers' subjective beliefs regarding their right to register the mark. In order to sufficiently plead fraud on the USPTO to the level of specificity required, Applicants would have to plead, and of course then prove, that Opposers subjectively believed they were engaging in fraudulent activities. *See Am. Sec. Bank v. Am. Sec. & Trust Co.*, 571 F.2d 564, 197 USPQ 65, 67 (CCPA 1978).

- *Abandonment*

As their eighth “affirmative defense” Applicants allege that Opposers have abandoned their rights in the mark. A prima facie showing of abandonment may be established where the alleged nonuse has ensued for three years or more. *See* 15 U.S.C. § 1127; *ShutEmDown Sports*, 102 USPQ2d at 1042. However, where the alleged nonuse has ensued for less than three years “[t]here are two elements to an abandonment claim that a plaintiff must [allege and subsequently] prove: nonuse of the mark and intent not to resume use.” *ShutEmDown Sports*, 102 USPQ2d at 1042.

In this case Applicants allege that Opposers ceased using the mark CRONUTS “in the spring of 2013.” However, inasmuch as Opposers filed the ’168 application on June 17, 2013, it appears facially implausible for Applicants to allege that Opposers had no intention to resume use.

Accordingly, Applicants’ eighth affirmative defense alleging abandonment is **STRICKEN**, and will be given no further consideration.

- *Failure to Police*

Applicants’ ninth, and final, affirmative defense alleges that “Opposers are barred from relief because Opposers have failed to police their alleged rights in the CRONUT trademark.”

Under Trademark Act Section 45(2), 15 U.S.C. § 1127, a mark is deemed to be abandoned when the course of conduct of the owner of the mark causes the mark to lose its significance as an indication of origin. *See Woodstock’s*

*Enter. Inc. (Cal.) v. Woodstock's Enter. Inc. (Or.)*, 43 USPQ2d 1440, 1445-46 (TTAB 1997). *Cf. Univ. Book Store v. Univ. of Wis. Board of Regents*, 33 USPQ2d 1385, 1393 (TTAB 1994), *citing Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp.*, 680 F.2d 755, 214 USPQ 327, 336 (CCPA 1982) (“If there are numerous products in the marketplace bearing the alleged mark, purchasers may learn to ignore the ‘mark’ as a source indication. When that occurs, the conduct of the former owner, *by failing to police its mark*, can be said to have caused the mark to lose its significance as a mark.”) (emphasis added). In view thereof, the Board construes Applicants’ claim as being a hybrid of an abandonment claim.

To properly plead an abandonment claim, the plaintiff must aver underlying facts pertaining to the alleged abandonment. *Cf. Clubman's Club Corp. v. Martin*, 188 USPQ 455, 456 (TTAB 1975). With regard to an abandonment claim based on “failure to police,” Applicants must plead facts which show a course of conduct by Opposers which has caused its mark to lose its trademark significance. *Tbc Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1314 (TTAB 1989) (*citing Colgate-Palmolive Co. v. Colton Razor Blade Co.*, 153 USPQ 370 (TTAB 1966)).

In the present case, while Applicants allege that Opposers have failed to properly police its marks by allowing numerous “third-parties” to use the term CRONUTS to describe their products *without objection*, Applicants

failed to *specify any of these third parties*.<sup>11</sup> Moreover, Applicants have failed to allege particularly that Opposers' mark has, *as a result of Opposers failure to police, lost its significance as an indication of source*.

Accordingly, Applicants ninth affirmative defense alleging failure to police is **STRICKEN**.

***Stipulations/Filings***

The parties agreed to service of submissions by email. The following email addresses are of record:

Submissions may be served on Applicants at the following email addresses:

csc@ca-coglobalinc.com; candicescook@hotmail.com.

Submissions may be served on Opposers at the following email addresses:

rhorowitz@bakerlaw.com; nydocketing@bakerlaw.com;  
adossantos@bakerlaw.com; ipdocketing@bakerlaw.com.

The parties are urged to continue to file all submissions through the Board's Electronic System for Trademark Trials and Appeals (ESTTA), available online at: <http://estta.uspto.gov>.

Throughout this proceeding, the parties should review the Trademark Rules of Practice and the Trademark Board Manual of Procedure ("TBMP"), online at: <http://www.uspto.gov/trademarks/process/appeal/index.jsp>.

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<sup>11</sup> The answer does indicate that a cease and desist letter was sent to Applicants regarding the use of the term CRONUT.

The Board expects all parties appearing before it to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at: <http://www.law.cornell.edu/rules/frcp/>.

***Accelerated Case Resolution (ACR)***

The parties may discuss a modified proceeding and schedule that may be more time and cost efficient for the parties. In modifying the proceeding the parties may seek to: 1) stipulate to facts, e.g. the similarity of the marks; 2) limit the number of interrogatories, document requests, and depositions allowed during the proceeding; 3) stipulate that discovery depositions may be taken by telephone or video conference; 4) stipulate that the parties may submit declarations or affidavits in lieu of oral testimony at trial; or 5) stipulate that the parties forego trial and oral hearing and submit summary judgment briefs accompanied by any evidence, which may be submitted in the form of declarations or affidavits and stipulate that the Board may resolve any genuine disputes of material fact and issue a final ruling based on the parties' ACR submissions.

The parties are directed to review the Board's website regarding ACR at: [http://www.uspto.gov/trademarks/process/appeal/TTAB\\_ACR\\_Options.jsp](http://www.uspto.gov/trademarks/process/appeal/TTAB_ACR_Options.jsp); and [http://www.uspto.gov/trademarks/process/appeal/Accelerated\\_Case\\_Resolution\\_\\_ACR\\_notice\\_from\\_TTAB\\_webpage\\_12\\_22\\_11.pdf](http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution__ACR_notice_from_TTAB_webpage_12_22_11.pdf).

If the parties agree to pursue ACR after exchange of disclosures or discovery (or wish to further discuss their options), they should notify the

interlocutory attorney, preferably within **SIXTY DAYS** from the opening of the discovery period.

***Contested Motions***

The parties are reminded that uncooperative behavior during the discovery process will not be well-taken. *See HighBeam Mktg. LLC v. Highbeam Research LLC*, 85 USPQ2d 1902 (TTAB 2008); *Sunrider Corp. v. Raats*, 83 USPQ2d 1648, 1654 (TTAB 2007) (parties have a duty to cooperate in resolving discovery issues). The Board requires the parties to make a good-faith effort to resolve all discovery issues prior to filing a motion to compel seeking relief from the Board. *See* TBMP Section 408.01(c).

Similarly, the parties should confer before filing any motion to extend or suspend these proceedings. If either party files an unconsented motion to extend or suspend in this case, the moving party must contact the Board interlocutory attorney assigned to the case by telephone upon filing so that such motion can be resolved promptly by telephone conference.

***Schedule***

The parties were reminded that the next significant due date is January 6, 2015, when the parties' initial disclosures are due. *See* Fed. R. Civ. P. 26(a)(1)(A)(i) and (ii) regarding required initial disclosures. Neither the service of discovery requests nor the filing of a motion for summary judgment (except on the basis of *res judicata* or lack of Board jurisdiction) should occur

until the parties have exchanged their initial disclosures as required by Fed. R. Civ. P. 26(f). *See* Trademark Rules 2.120(a)(3) and 2.127(e)(1).

The Board again thanks the parties for their participation in the conference. As a final matter, the Board reminds the parties of their duty to conduct themselves with decorum and courtesy and encourages open communication between the parties during this proceeding. Trademark Rule 2.192; *MySpace Inc. v. Mitchell*, 91 USPQ2d 1060, 1062 n.4 (TTAB 2009).

Dates remain as set in the Board's October 3, 2014 order.

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.