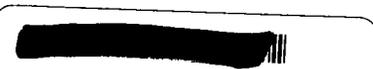


UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 2,105,538
Registration date: October 13, 1997
For the Mark: CONCHITAS
For: corn chips



08-18-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Conchita Foods, Inc.
Petitioner,

Cancellation No. 92032853

v.

Fritas Encanto de Monterrey, S.A. de C.V.
Registrant.

PETITIONER'S RESPONSE
MEMORANDUM IN OPPOSITION TO REGISTRANT'S
FILING OF AMENDED ANSWER AND MOTION TO DISMISS

Petitioner, Conchita Foods, Inc., opposes the filing of the above captioned papers¹ and alleges as follows:

Registrant's purported motion to dismiss should be characterized as a motion on the pleadings. *Western Worldwide Enterprises Group, Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137 (TTAB 1990). The legal standard for the latter is basically the same as for

¹ Registrant's papers include a certificate of service without a date for service.

the former. In any event, there are several reasons for denying the motion.

Petitioner filed its Petition for Cancellation on August 8, 2002, as stamped by the Trademark Trial and Appeal Board (hereinafter "TTAB"). Although the filing fee was not paid at this time, it was indeed acknowledged by the TTAB as received on September 6, 2002, as shown on the receipt hereto attached as Exhibit "A."

On February 5, 2003, the Board issued an order giving 40 days to Registrant to file an answer. The answer was filed on March 4, 2003. To the extent that Registrant's filing of the above captioned papers attempts to amend the answer, it should be stricken from the record. Amendments to pleadings in inter parties proceedings before the Board are governed by F.R.C.P § 15. As such, a motion for leave to amend a pleading should be accompanied by a signed copy of the proposed amended pleading. A party may amend its pleading only by written consent of every adverse party or by leave of the Board. *Mack Trucks, Inc. v. Monroe Auto Equipment Co.*, 182 USPQ 511 (TTAB 1974).

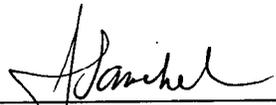
Registrant filed the purported amended answer without Petitioner's consent and without requesting leave to file such amended pleading from the Board. As such, the amended answer should be stricken for non-compliance with the Rules.

Finally, Registrant relies on Section 15 of the Lanham Act (15 USC 1065) and claims that since its registration is over 5 years old, it has achieved incontestability status and not susceptible to a cancellation proceeding. This argument fails because the petition was filed prior to the 5th anniversary and the ground (abandonment) for the petition is an exception under Section 14(3). Petitions for cancellation based on abandonment of the challenged registration can be filed at any time. TBMP 307.01.

WHEREFORE, Petitioner prays for an Order striking the papers filed by Registrant purporting to be an answer and motion to dismiss these proceedings, and if said papers are treated as a motion (to dismiss or for judgment on the pleadings), to deny it.

Respectfully submitted,

SANCHELIMA & ASSOCIATES, P.A.
Attorneys for Petitioner
235 S.W. Le Jeune Road
Miami, FL 33134-1762
Telephone: (305) 447-1617
Telecopier: (305) 445-8484

By: 

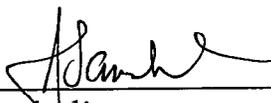
Jesus Sanchelima
(Fla. Bar No. 231207)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's **MEMORANDUM IN OPPOSITION TO REGISTRANT'S AMENDED ANSWER AND MOTION TO DISMISS**, was served via U.S. First Class Mail to: Law Offices of Richard Rodriguez, ATT: Richard Rodriguez, Esq. 1117 East Harrison Street Harlingen, Texas 78550, attorney for Registrant, on this 18 day of August 2003.

SANCHELIMA & ASSOCIATES, P.A.

Counsel for the Petitioner
235 S.W. Le Jeune Road
Miami, FL 33134-1762
Telephone: (305) 447-1617
Telecopier: (305) 445-8484

By: 
Jesus Sanchelima
(Fla. Bar No. 231207)

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited in the United States Postal Service as First Class mail, in an envelope addressed to the Honorable Assistant Commissioner of Trademarks, Box: TTAB/NO FEE, 2900 Crystal Drive, Arlington, Va. 22202-3513 on the below-mentioned date.

Date: August 18, 2003

By: 
Jesus Sanchelima, Esq.

facsimile transmittal

To: Jesus Sanchelima Fax: 305/445-8484

From: L.Harrison Date: 9/11/02

Re: 2,105,538 Pages: 1

CC:

- Urgent For Review Please Comment Please Reply Please Recycle

Notes: THIS IS CONFIRMATION THAT I RECEIVED A FAX ON SEP. 6, 2002
 AUTHORIZING ME TO CHARGE ACCOUNT NO. 190129 FOR 300.00 FOR THE
 PETITION OF CANCELLATION.
 THANK YOU.

CONFIDENTIAL

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 A

M/JS/ette

Sanchelima & Associates, P.A.
Attorneys at Law

Patent, Trademark & Copyright Law

J. Sanchelima, Patent Attorney
Maitte R. Netsch, Esq.
Albert Bordas, Reg. Patent Attorney

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August 18, 2003

Box TTAB No Fee
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Re: Registration No.: 2,105,538
Cancellation No. 32,853
Mark: CONCHITAS
Our File No.: 22525

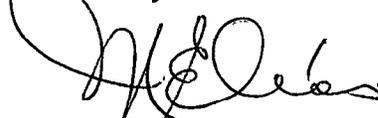
Dear Sir/Madam:

Enclosed please find **Petitioner's Response Memorandum in Opposition to Registrant's Filing of Amended Answer and Motion to Dismiss**, for filing in connection with this matter.

We would appreciate your acknowledging receipt by signing the enclosed self-addressed, postage paid postcard.

If you have any questions and/or concerns, please feel free to contact us.

Sincerely,



Maribel Elias, paralegal for
Jesus Sanchelima, Esq.

JS/me
Enclosures

TTAB



08-18-2003
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

03 AUG 21 AM 9:32
COMMUNICATIONS SECTION