

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

In the Matter of Registration No.: 2,656,013)
Mark: MAMA LUPE'S and Design)
Date Registered: December 3, 2002)
Tortilla King, Inc.)
Petitioner,)
v.)
Fineberg Packing Company, Inc.)
Respondent.)

76/284,600

Cancellation No.: _____

PETITION FOR CANCELLATION

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir:

Pursuant to 37 CFR § 2.111(b), Petitioner Tortilla King, Inc. ("Petitioner") believes that it will be damaged by the above-identified registration, and hereby petitions to cancel the same. As grounds therefor, it is alleged that:

12/16/2004 GIBBONS 00000036 2656013

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600.00 0P



12-09-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #77

Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to Commissioner for Trademarks, P.O. Box 1451, Arlington, Virginia 22202-1451, on:

Date: December 6, 2004
Signature: [Signature]

The Director is hereby authorized to charge any additional amount required, or credit any overpayment, to Deposit Account No. 19-4409.

The Parties

1. Petitioner Tortilla King, Inc. is a Kansas corporation having its principal place of business at 249 23rd Avenue, Moundridge, Kansas 67107.

2. On information and belief, Respondent Fineberg Packing Company, Inc. ("Respondent") is a Tennessee corporation and has its principal place of business at 2875 Starling Place, Memphis, Tennessee 38108.

The Subject Trademark Registration

3. On December 3, 2002, Respondent was granted United States Trademark Registration No. 2,656,013 by the United States Patent and Trademark Office for the mark MAMA LUPE'S and Design as shown in Exhibit 1, attached hereto, (the "Registered Mark") for chorizo in Int. Class 29 and hot tamales in Int. Class 30 (the "Registration"). The Registration was based on a trademark application filed July 9, 2001 (Serial No. 76/284,600). Exhibit 1 attached hereto is a copy of the Certificate of Trademark Registration.

4. On information and belief, Respondent first used the Registered Mark on March 1, 2001.

Damage to Petitioner

5. Petitioner believes it will be and is currently being damaged by the Registration sought to be cancelled, and by Registrant's prima facie exclusive right to use the Registered Mark in commerce on goods very similar to those goods sold by Petitioner, afforded by the Registration.

6. Petitioner filed in the United States Patent and Trademark Office an application for registration of the mark MAMA LUPE'S (the "MAMA LUPE'S Mark") on November 20, 2003 for use in conjunction with flour tortillas, corn tortillas, tortilla chips, taco

shells, tostadas shells and dipping salsas, which was granted serial number 78/330,919 (the "MAMA LUPE'S Application").

7. The Examiner has refused registration of the MAMA LUPE'S Application on the basis of a likelihood of confusion with the Registration.

8. Petitioner filed in the United States Patent and Trademark Office an application for registration of the MAMA LUPE'S Logo (the "MAMA LUPE'S Logo" and collectively with Petitioner's MAMA LUPE'S Mark, the "MAMA LUPE'S Marks") on November 20, 2003 for use in conjunction with flour tortillas, corn tortillas, tortilla chips, taco shells, tostadas shells and dipping salsas, which was granted serial number 78/331,033 (the MAMA LUPE'S Logo Application, collectively with the MAMA LUPE'S Application, the 'Applications").

9. The Examiner has also refused registration of the MAMA LUPE'S Logo Application on the basis of a likelihood of confusion with the Registration.

Grounds For Cancellation

10. The Registered Mark so resembles Petitioner's MAMA LUPE'S Marks, as to be likely, when used on or in connection with Respondent's goods, to cause confusion, or to cause mistake, or to deceive in violation of 15 U.S.C. §1052(d).

11. Petitioner's predecessor in interest began using the MAMA LUPE'S Mark and the MAMA LUPE'S Logo as shown in Exhibit 2 on flour tortillas at least as early as 1987. At least as early as 1995, Petitioner's predecessor in interest began using the MAMA LUPE'S Marks on flour tortillas, corn tortillas, tortilla chips, taco shells, tostadas shells and dipping salsas. In 1996, Petitioner obtained all right, title and interest in and to the MAMA LUPE'S

Marks. Petitioner or its predecessor in interest has continuously used the MAMA LUPE'S Marks since 1987.

12. Petitioner's rights in the MAMA LUPE'S Marks are prior to Respondent's, in that the date Respondent first used its Registered Mark is subsequent to the date Petitioner first used its MAMA LUPE'S Marks.

13. Potential customers are likely to be confused, mistaken, or deceived as a result of Petitioner's use of the Registered Mark by virtue of the similarity between the Registered Mark and the MAMA LUPE'S Marks and the similarity of the goods covered by the Registration and the Applications.

14. Purchasers are likely to believe the goods of the Registrant sold under the Registered Mark originate with the Petitioner, and are likely to purchase such goods based upon those mistaken beliefs, resulting in loss of sales to Petitioner.

15. Respondent's use of the Registered Mark may result in irreparable damage to Petitioner's reputation and goodwill, if the goods sold by the Registrant are inferior, since purchasers are likely to attribute the source of Registrant's goods to the Petitioner.

16. Alternatively, if the Board determines that confusion between Petitioner's MAMA LUPE'S Marks and Respondent's Registered Mark is not likely, Petitioner submits that confusion would not be likely between Petitioner's Registered Mark and Petitioner's MAMA LUPE'S Marks covered by Petitioner's pending Applications and such Applications should be allowed to register.

WHEREFORE, Petitioner prays that the Trademark Trial and Appeal Board ("TTAB") order cancellation of United States Trademark Registration No. 2,655,013 and for such other relief as the TTAB deems just and proper. A duplicate copy of this petition and the fee required pursuant to §2.6(a)(16) are enclosed herewith.

Respectfully submitted,

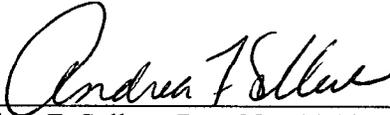
By: 
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Attorney for Applicant

Exhibit 1

Int. Cls.: 29 and 30

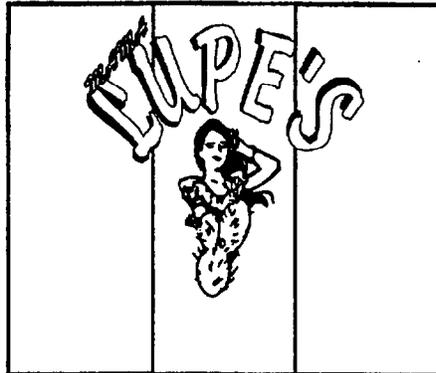
Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 2,656,013

Registered Dec. 3, 2002

**TRADEMARK
PRINCIPAL REGISTER**



FINEBERG PACKING COMPANY (TENNESSEE CORPORATION)
2875 STARLING PLACE
MEMPHIS, TN 38108

THE NAME "MAMA LUPE" IDENTIFIES A LIVING INDIVIDUAL WHOSE CONSENT IS OF RECORD. THE PORTRAIT IN THE MARK DOES NOT IDENTIFY A LIVING INDIVIDUAL.

FOR: CHORIZO, IN CLASS 29 (U.S. CL. 46).

FIRST USE 3-1-2001; IN COMMERCE 3-1-2001.

FOR: HOT TAMALES, IN CLASS 30 (U.S. CL. 46).

FIRST USE 3-1-2001; IN COMMERCE 3-1-2001.

SER. NO. 76-284,600, FILED 7-9-2001.

SAMUEL E. SHARPER JR., EXAMINING ATTORNEY

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Respectfully submitted,

By: 
Andrea F. Sellers, Reg. No. 44,102
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Telephone: (816) 842-8600
Facsimile: (816) 691-3495
Attorney for Applicant

Exhibit 1

Int. Cls.: 29 and 30

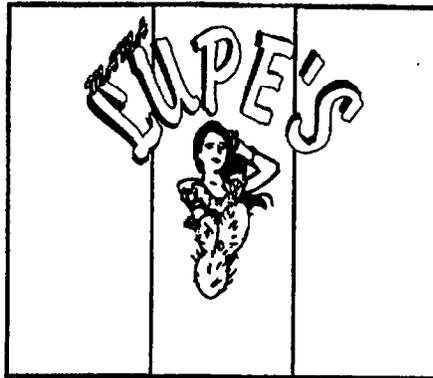
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