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

Proceeding	92053501
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Reg. No.: 1,043,729  
Reg. Date: July 13, 1976

**CHRISTIAN M. ZIEBARTH**

Petitioner,

**DEL TACO, LLC**

Registrant.

Cancellation No. 92053501

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**REGISTRANT DEL TACO, LLC'S RESPONSE IN OPPOSITION TO PETITIONER  
CHRISTIAN ZIEBARTH'S SEPARATE STATEMENT OF OBJECTIONS AND  
MOTIONS TO STRIKE**

Del Taco, LLC ("Del Taco") hereby submits the following Response in Opposition to Petitioner Christian M. Ziebarth's ("Petitioner") Separate Statement of Objections and Motions to Strike.

**ARGUMENT**

**I. PETITIONERS MOTIONS TO STRIKE ARE IMPROPER AND MERITLESS AND SHOULD BE DENIED.**

Petitioner's Motions to Strike set forth in Petitioner's Separate Statement of Objections and Motions to Strike (referred to separately herein as "Motion to Strike") are wholly improper in this proceeding. Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. Fed. R. Civ. P. 12(f); *see, e.g., Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Company, Inc.*, 177 U.S.P.Q. 401 (T.T.A.B. 1973) ("matter will not be stricken unless it clearly has no bearing upon the issues in the litigation").

It is well established that any objections to testimony depositions “on grounds other than the ground of untimeliness, or the ground of improper or inadequate notice, generally should not be raised by motion to strike.” TBMP § 533.03. Instead, any objections to particular testimony “should simply be made in writing at the time specified by in the applicable rules, and orally ‘on the record’ at the taking of the deposition, as appropriate.” *Id.*; *see also* TBMP § 707.03(c).

Here, Petitioner is seeking to strike three items of evidence: (1) the testimony of Noah Chillingworth regarding Del Taco’s activities prior to 2009; (2) Exhibit 11 submitted by Del Taco; and (3) Exhibit 29 submitted by Del Taco. Petitioner’s attempt to strike all pieces of evidence is based on an alleged “lack of personal knowledge” by Noah Chillingworth and his inability to state who specifically took a photograph. Motion to Strike, pg. 1. Not only are these arguments meritless, as described below, but they are also wholly improper as a foundation for a motion to strike under the rules. *See* TBMP § 533.03.

Additionally, despite separately captioning the Petitioner’s Objections and Motions to Strike, Petitioner embedded its Motion to Strike within its trial brief and objections which could be easily overlooked by Del Taco and the Board. TBMP § 502.02(b) (motions should not be embedded inside another filing “that is not routinely reviewed by the Board upon submission”); *see also Melwani v. Allegiance Corp.*, 97 U.S.P.Q.2d 1537, 1541 (T.T.A.B. 2010) (“To be clear, a party should not embed a motion within another filing... That is, all new motions should be separately filed and briefed, to ensure they receive the proper attention”). Petitioner should have filed its Motion to Strike in this proceeding separately from the objections and the trial brief to give Del Taco proper notice of its motion and to ensure the Board properly docketed and determined the Motion to Strike separately from the trial brief and Petitioner’s objections.

Based on Petitioner's failure to abide by these rules, Petitioner has therefore waived any potential objections to the material it seeks to strike in this case (namely, the testimony of Noah Chillingworth and Del Taco's Exhibits 11 and 29). More specifically, Petitioner has failed to properly "object" to these materials in its trial brief in an appropriate manner and on appropriate grounds for a motion to strike under the Trademark Rules.

Despite the numerous procedural problems with Petitioner's Motion to Strike, Del Taco will nonetheless also respond to the actual arguments posed by Petitioner. In short, Petitioner has presented no evidence whatsoever as to why the Board should grant its Motion to Strike, except to offer vague arguments that should have been properly raised in an objection, and not in a motion to strike. Petitioner's arguments are nothing more than a thinly veiled attempt to eliminate highly relevant evidence submitted by Del Taco that is fatally damning to Petitioner's case, and that directly contradicts Petitioner's claims. Such arguments are not only unfounded, they are wholly inappropriate for a Motion to Strike under the Trademark Rules. Therefore, Petitioner's Motion to Strike should be denied in its entirety.

**a. All Testimony of Noah Chillingworth Regarding Events Prior to 2009 is Properly Based on his Knowledge from his Position with Del Taco.**

Petitioner's Motion to Strike first seeks to strike all testimony of Noah Chillingworth, Del Taco's Vice President of Marketing, regarding events prior to February 2009 on the sole grounds that "Mr. Chillingworth has no personal knowledge of Del Taco's business prior to that time." Motion to Strike, pg 1. Petitioner's statement in this regard is blatantly false and is contradicted directly by the actual testimony offered by Mr. Chillingworth in his cross-examination.

Mr. Chillingworth testified that he is engaged in and is familiar with all aspects of Del Taco's marketing promotions and advertising in his capacity serving as Del Taco's Vice President of Marketing (and prior to that, as the Senior Director of Brand Marketing and

Advertising). Chillingworth Cross Exam Testimony, Doc. Nos. 85-86 (hereinafter “Chillingworth Cross Exam”), 9:14-17. Petitioner suggests that Mr. Chillingworth’s testimony should be disqualified because he allegedly did not have “personal knowledge” of anything prior to 2009 and that Mr. Chillingworth may only give testimony based on his direct participation in or direct observation of relevant events. Motion to Strike, pg. 2. Petitioner cites to *City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, to argue that testimony by a witness on matters that took place prior to the witnesses’ employment should be excluded. 106 U.S.P.Q.2d 1668, 1674-75 (T.T.A.B. 2013).

However, Petitioner has clearly misinterpreted and misstated the law and the Federal Rules of Evidence. Simply because Mr. Chillingworth was not employed by Del Taco prior to 2009 does not mean that he is unqualified to speak on matters of marketing, advertising and branding for Del Taco prior to 2009. Federal Rule of Evidence 602 states that a “witness may not testify to matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” F.R.E. 602. As the Board in *City National Bank* noted, “testimony by a person that his job responsibilities require him to be familiar with the activities of the company that occurred prior to his employment may be sufficient to lay a foundation for his subsequent testimony.” *Id.* at 1673. In *City National Bank*, respondent’s witness, in-house counsel for respondent, was asked to testify regarding trademark matters that occurred prior to his employment. The Board found in this case that “respondent has not shown that [the witness’s] position, as respondent’s in-house counsel, required him to have knowledge, let alone knowledge of particular details, of the matters for which he was testifying and which pre-dated his employment.” *Id.*

However, and in contrast, Mr. Chillingworth's jobs at Del Taco, both in his current position as Vice President of Marketing and in his prior position as Senior Director of Brand Marketing and Advertising, **require** him to be knowledgeable about Del Taco's numerous past, present and intended future campaigns, brands, advertising and all aspects of marketing for Del Taco. *See, e.g., Chillingworth Cross Exam, 9:14-10:23.* These responsibilities obviously include understanding the history of Del Taco's ownership and use of the NAUGLES brand. *Id.* Throughout his deposition, including the portions Petitioner claims should be excluded, Mr. Chillingworth consistently testified to his own personal knowledge, understanding, and perception of both the NAUGLES brand and Del Taco's general marketing strategy based on his **personal experience** working as Vice President of Marketing for Del Taco. It is absolutely Mr. Chillingworth's job to understand all workings regarding the NAUGLES brand, including those uses prior to 2009, in his current position and simply because Mr. Chillingworth was not employed by Del Taco prior to 2009 does not make him unqualified to provide testimony on such actions.

Petitioner nonetheless attempts to argue that because Mr. Chillingworth cannot state with absolute particularity exactly who informed him of use of the NAUGLES brand prior to 2009, his entire testimony regarding events prior to 2009 should be excluded. This, again, misstates the evidence and mischaracterizes Mr. Chillingworth's testimony. Mr. Chillingworth stated that his discussions with his large staff of employees and the collaborative office within which he works make it such that he cannot name one particular person who told him the information but that it is part of his job to have **personal knowledge** of all aspects of Del Taco's brand, history and past and present marketing campaigns. *See, e.g., Chillingworth Cross Exam 39-25-40:17* ("We, again, have a collaborative office. We have folks that used to work for Naugles that are in

the company. So those discussions with those folks through the course of business...I don't know that there was one person that informed me of this); *Id.* at 41:23-42:1 (“Yeah, it’s a statement that I came to on my own after conversation with folks around which products were Naugles products that we continue to sell on the Del Taco menu today”); *Id.* at 43:14-43:22 (“I speak to hundreds of operators on a yearly basis and have conversations in restaurants, through presentations I give, through classes I teach. And I can’t say exactly, you know, one person at one time in one place that I could point to or give to you. We probably have many employees—we have many tenured employees who worked for Naugles, and I can’t say exactly a specific person or a specific time”).

Mr. Chillingworth clearly has direct, personal knowledge of the events to which he is testifying on, including those prior to 2009, because it is **part of his job and position** to understand and know about these issues. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff’s owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Del Taco’s NAUGLES mark has been used and owned by Del Taco since 1988. It would be highly burdensome, not to mention entirely unnecessary, for Del Taco to present for Cross Examination every person employed by Del Taco since 1988 to testify to the use of NAUGLES when they specifically worked at Del Taco. By virtue of his senior positions, long employment, and extensive experience with Del Taco, Mr. Chillingworth has become familiar with Del Taco’s NAUGLES brand including the use of NAUGLES trademark by Del Taco since 1988. It is Mr. Chillingworth’s job to observe the various marketing pieces surrounding the use of NAUGLES and Mr. Chillingworth is uniquely qualified to offer testimony regarding the facts that establish Del Taco’s prior and continued use of the NAUGLES

trademark. Mr. Chillingworth has provided proper opinion testimony as a layperson through the particularized knowledge he has gained by virtue of his position in Del Taco's day-to-day business operations.

Mr. Chillingworth's testimony regarding events prior to 2009 is not only clear admissible it also is highly relevant to the case and its probative value is not outweighed by any danger of undue prejudice to Petitioner. Mr. Chillingworth has presented sufficient personal knowledge of Del Taco's use of NAUGLES prior to 2009, and Petitioner's Motion to Strike is unfounded and should be denied.

**b. Del Taco's Exhibit 11 Has Been Properly Authenticated by Mr. Chillingworth.**

Petitioner has next moved to strike Del Taco's Exhibit 11, which is an example of advertising featuring the NAUGLES mark used by Del Taco in connection with restaurant services. Petitioner's sole ground in support of this Motion is the allegation that Mr. Chillingworth "lacks personal knowledge" of the exhibit and therefore cannot authenticate the exhibit. Motion to Strike, pg. 3. Again, Petitioner's arguments blatantly misstate the evidence of record.

Under Federal Rule of Evidence 901, the only requirement to authenticate an item of evidence is that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." F.R.E. 901 (emphasis added). Testimony of a witness with knowledge that an item is what it is claimed to be is sufficient to authenticate an item. F.R.E. 901(b)(1). Mr. Chillingworth testified that he is responsible for the marketing, advertising and branding of Del Taco, and Mr. Chillingworth is qualified to testify regarding whether advertising offered under Exhibit 11 was a true and accurate copy of this advertising.

Petitioner's claims that Mr. Chillingworth cannot testify with certainty regarding the specifics of the advertising regarding who supplied the page or whether the document can be found online are both incorrect and irrelevant to the analysis. All that is required for proper submission of Exhibit 11 into evidence is testimony from Mr. Chillingworth (a witness with personal knowledge regarding what is contained within the exhibit) that Del Taco's Exhibit 11 is and stands for what it is claimed to be. Mr. Chillingworth established throughout the cross-examination testimony by Petitioner that the advertising presented in Exhibit 11 was used by Del Taco to promote the NAUGLES and the DEL TACO brands coming together and the advertising represented is consistent with other advertising previously used in the various NAUGLES campaigns. Chillingworth Cross Exam, 59:13-60:15. Therefore, Mr. Chillingworth has properly authenticated Exhibit 11.

In a last ditch effort to strike this highly relevant and probative evidence, Petitioner argues that there are issues regarding when the advertising was created, provided or used and there are questions whether the advertising was created prior to October 1995. These are arguments that more appropriately belong in a trial brief, not in a motion to strike or an objection to evidence. Petitioner is simply using this Motion to Strike in an effort to provide further arguments to the Board as to its case in chief. None of these arguments are actually relevant to whether Mr. Chillingworth properly provided enough evidence to authenticate the document for Petitioner. Instead, Petitioner is simply trying to use an improper Motion to Strike to exclude highly relevant evidence from this proceeding that support's Del Taco's case and that directly contradicts Petitioner's unfounded claims of abandonment.

Ultimately, Petitioner has presented nothing more than vague statements about the "proper foundation" of evidence to suggest that Exhibit 11 should be struck. These vague

statements are expressly contradicted by the clear and consistent testimony and authentication by Mr. Chillingworth. As such, Petitioner's Motion to Strike Exhibit 11 should be denied.

c. **Exhibit 29 from Noah Chillingworth's Affidavit Has Been Properly Authenticated by Noah Chillingworth.**

Finally, Petitioner has moved to strike photographs of articles of clothing sold by Del Taco, which were attached as Exhibit 29 to the affidavit of Mr. Chillingworth. Petitioner again vaguely suggests that Mr. Chillingworth lacks personal knowledge of the exhibit and therefore cannot authenticate it. Both of these statements by Petitioner, again, misstate both the evidence of record and the law.

Under Federal Rule of Evidence 901, admission of a photograph into evidence only requires an identification or a statement as to what the photograph shows, and a statement that the photograph is an accurate depiction of the thing being represented, **both of which were provided by Mr. Chillingworth.** FRE 901; Chillingworth Cross Exam, 15:18-16:22; *see also* 9 A.L.R. 899. Since the ultimate object of an authentication is simply to establish the correctness and accuracy of a photograph, this can be established "through any witness who has the requisite knowledge of the facts." 9 A.L.R. 899. When a photograph is simply offered as a representation of a particular thing (in this case, the clothing sold by Del Taco under the NAUGLES mark), a simple statement (by a person that does not need to be the photographer) as to 1) what the photograph shows and 2) that it is a correct representation of the thing being shown is appropriate. *Id.*

Here, Petitioner seeks to exclude Exhibit 29 simply because Mr. Chillingworth did not take the pictures himself and could not say who took the pictures. Motion to Strike, pg. 5. Yet Petitioner cites no case law whatsoever to which states that to properly authenticate a

photograph, the actual photographer or actual knowledge of who the photographer was must be introduced.

Indeed, it is well established that knowledge of the photograph or when it was taken is not required to authenticate a photograph. *See, e.g., United States v. Gonzalez*, 279 Fed. Appx. 806, 810 (11th Cir. 2008) (witness' lack of knowledge about the photographer and date of photograph did not affect its admissibility into evidence; testimony from the witness **of what was featured in the photograph provided sufficient information to authenticate it**). Mr. Chillingworth specifically testified that he had personal knowledge of the items contained within the photograph (namely, the clothing sold by Del Taco) and that he had personal knowledge that Del Taco sold the items in the photograph. Chillingworth Cross Exam, 15:22-23; 18:12-13 (“These are the items we currently sell and have since 2011”). Mr. Chillingworth’s testimony is more than sufficient to establish that the photograph is what Del Taco claims it is—namely, a photograph of Del Taco’s use of Del Taco’s NAUGLES trademark on clothing. Mr. Chillingworth even testified as to where Del Taco sells the clothing depicted in the photograph and why Del Taco made the decision to start selling the clothing depicted in the photograph. *Id.* at 19:18-22; 21:22-22:17.

There can be no question that Mr. Chillingworth specifically and clearly authenticated Exhibit 29 such that it should be introduced into evidence as expressly required by the Federal Rule of Evidence 901. Petitioner’s attempts to impose a higher standard of authentication is nothing more than an unfounded attempt to exclude highly relevant evidence in support of Del Taco’s case and as such, should be denied. Testimony that an item is what it is claimed to be specifically satisfies this requirement; Mr. Chillingworth provided this proper testimony based on his personal knowledge as Vice President of Marketing and his knowledge of the clothing

currently sold by Del Taco. Therefore, Petitioner's Motion to Strike Exhibit 29 should be denied.

## **II. OBJECTIONS FILED BY PETITIONER.**

Because Petitioner has improperly filed his objections as part of his Motion to Strike, in an abundance of caution Del Taco hereby submits its responses to these objections as part of this response. Del Taco will also provide responses to these objections as part of its trial brief, as is the normal course of response under the Trademark Rules and Trademark Board Manual of Procedure.

Petitioner's objections are no more than a brazen attempt to once again exclude highly relevant and probative evidence from this proceeding simply because such evidence clearly disproves Petitioner's entire case. Specifically, Petitioner has objected to the following evidence: 1) cross-examination testimony of Petitioner regarding his knowledge of Del Taco's use of NAUGLES on clothing, and 2) the content of Twitter posts made after Petitioner filed his intent to use application. Del Taco responds to each of these objections in turn.

### **A. Testimony Elicited During the Cross Examination of Petitioner Christian Ziebarth Regarding Del Taco's Clothing Registration and Del Taco's Offer for Sale of NAUGLES Clothing.**

Petitioner objects to the inclusion of all testimony by Petitioner in his cross-examination regarding Del Taco's registration of the NAUGLES mark for clothing goods and Del Taco's contention that it is offering for sale NAUGLES on the basis that such testimony is allegedly "outside the scope of direct examination." Petitioner's interpretation of the Federal Rules of Evidence on this point is disingenuous and inaccurate.

Federal Rule of Evidence 611(b) states that cross-examination "should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility." F.R.E.

611(b). The subject matter of this litigation is alleged abandonment of the NAUGLES trademark by Del Taco. In particular, Petitioner testified in numerous places throughout his direct testimony introduced by affidavit about: 1) Petitioner's belief that Del Taco had "most likely abandoned its use of the NAUGLES mark;" 2) Petitioner's investigation into the use and/or alleged abandonment of the NAUGLES mark by Del Taco; and 3) the extent and ways in which Petitioner intends to use the NAUGLES mark for restaurant services. *See e.g.* Ziebarth Affidavit, Doc Nos. 57-58, ¶¶ 3, 5, 8, 12, 19, 21-22. The scope of cross-examination is measured by the **subject matter** and the topics covered under the direct examination rather than specific exhibits introduced during testimony. 45 A.L.R. Fed. 639. Implicit in Rule 611(b) is that **all** evidence relevant to the **subject matter** of direct examination is **within** the scope of cross-examination. *Id.*; *see also, e.g., United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (stating all evidence that is relevant to the subject matter of the direct examination is within the scope of cross-examination, provided the evidence is admissible).

Sustaining Petitioner's objection and allowing Petitioner to exclude highly relevant evidence based on the fact that Petitioner did not specifically reference the exact registration or reference Del Taco's ongoing use of its NAUGLES trademark on clothing in his affidavit would inappropriately limit the cross-examination and cause undue prejudice to Del Taco. Even though Petitioner did not specifically discuss Del Taco's clothing registration in his affidavit, the line of questioning regarding Del Taco's use of NAUGLES on clothing speaks to the supposed "knowledge" by Petitioner of the alleged abandonment and the extent of the investigation conducted by Petitioner regarding Del Taco's ongoing use of its NAUGLES mark. Counsel for Del Taco specifically stated during Petitioner's cross-examination testimony that it was important to explore the knowledge of Petitioner as to the extent of Del Taco's use of

NAUGLES in connection with various goods and services. *See* Ziebarth Cross Exam 112:7-113:9. If Petitioner did not want information introduced regarding the nature of his beliefs, his investigation into Del Taco's use of its NAUGLES trademark, and his beliefs regarding the alleged abandonment of the NAUGLES mark by Del Taco, Petitioner should not have made these subjects part of his direct testimony. Del Taco's cross-examination in this case merely further explored subject matter which was first introduced by Petitioner in his direct testimony.

Essentially, Petitioner's testimony regarding Del Taco's ongoing use of its NAUGLES trademark on clothing is highly relevant to this proceeding. Petitioner's objection is nothing more than an attempt to exclude relevant and damaging evidence that directly refutes Petitioner's contention that Del Taco has abandoned use of its NAUGLES mark thereby justifying cancellation of the registration. Del Taco therefore asserts that this objection is improper and unfounded and therefore, should be overruled.

**B. All Testimony Elicited During Cross-Examination Concerning the Content of Twitter Posts Made after Petitioner filed his ITU Application.**

In an attempt to exclude evidence highly relevant to the continuing goodwill in Del Taco's NAUGLES mark, Petitioner objects to the relevancy of all testimony regarding Petitioner's "Señor Naugles" Twitter account and various pages associated therewith that were posted or published after Petitioner filed his intent-to-use application. Petitioner is correct that, under Federal Rule of Evidence 401, evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." F.R.E. 611(b). However, what Petitioner fails to recognize is that the Twitter pages **are** highly relevant to the issue of abandonment. In fact, the Twitter pages illustrate that there is still goodwill associated with Del Taco's NAUGLES mark, and that the consuming public (even in 2013—many years after the alleged abandonment) **still**

associates the NAUGLES mark with Del Taco. This is **direct** evidence of the fact that Del Taco has **not** abandoned its NAUGLES trademark.

Petitioner's Twitter pages are highly relevant to this proceeding as they clearly demonstrate that goodwill in Del Taco's NAUGLES mark continues (and has continued since long before Petitioner filed his ITU application) and that goodwill is directly associated with Del Taco as the source. The marketplace perception and recognition by consumers is highly relevant to the ultimate question of whether abandonment has taken place. *See, e.g., Defiance Button Machine, Co. v. C&C Metal Products Corp.*, 225 U.S.P.Q. 797 (2d Cir. 1985); MCCARTHY ON TRADEMARKS 17:15. Consumer perceptions of Del Taco's NAUGLES trademark and its association with Del Taco are highly probative in this proceeding given the allegations of abandonment by Petitioner. The evidence is highly relevant to demonstrate the continuing goodwill in the mark held by Del Taco and that consumers "may well mistakenly think that a new use of that mark by another is a renewed use by the former user," which is exactly what is happening with Petitioner's infringing Twitter account pages. MCCARTHY ON TRADEMARKS 17:15.

Ultimately, there is no prejudice to Petitioner, nor has Petitioner sufficiently articulated any such prejudice which is likely to result from the inclusion of the Twitter pages into evidence, except for the fact that this evidence tends to help Del Taco's case. This is not a sufficiently basis upon which to exclude this evidence. Petitioner should not be permitted to exclude this evidence as irrelevant simply because it support's Del Taco's position and the Board should overrule Petitioner's objection to this evidence.

## V. CONCLUSION

As set forth above, Petitioner's Motion to Strike was improperly filed as an attachment to its trial brief and on grounds not proper for a motion to strike. Moreover, Petitioner's vague statements regarding the appropriateness and sufficiency of Del Taco's evidence are wholly meritless and not supported by the evidence and the applicable Federal Rules and the law. Petitioner simply has not come anywhere close to meeting his burden to prove why any of this evidence should be excluded.

Accordingly, Registrant Del Taco, LLC respectfully requests that Petitioner's Motion to Strike and all objections raised in Petitioner's Separate Statement of Objections and Motions to Strike be denied in their entirety.

Dated: September 17, 2014

/ April L Besl /

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