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

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| Proceeding | 92053501 |
| Party | Plaintiff Christian M. Ziebarth |
| Correspondence Address | KELLY K PFEIFFER AMEZCUA-MOLL ASSOCIATES PC LINCOLN PROFESSIONAL CENTER, 1122 E LINCOLN AVE SUITE 203 ORANGE, CA 92865 UNITED STATES kelly@amalaw.net |
| Submission | Rebuttal Brief |
| Filer's Name | Kelly K. Pfeiffer |
| Filer's e-mail | kelly@amalaw.net |
| Signature | /Kelly K. Pfeiffer/ |
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 1043729
Date of Registration: July 13, 1976

CHRISTIAN M. ZIEBARTH
Petitioner,
v.
DEL TACO, LLC
Registrant.

Cancellation No.: 92053501

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

**PETITIONER’S REPLY TO DEL TACO’S OPPOSITION/TRIAL BRIEF IN SUPPORT OF HIS
PETITION FOR CANCELLATION;
DECLARATION OF KELLY K. PFEIFFER IN SUPPORT THEREOF
(REDACTED FOR PUBLIC)**

Appendix A: PETITIONER’S RESPONSES TO DEL TACO’S OBJECTIONS TO PETITIONER’S
TESTIMONY AND EVIDENCE; AND PETITIONER’S REPLY/RESPONSE TO DEL TACO’S
OPPOSITION/RESPONSE TO PETITIONER’S MOTIONS TO STRIKE/OBJECTIONS

Petitioner CHRISTIAN M. ZIEBARTH (“Petitioner”) replies to Registrant DEL TACO LLC’S (“Del
Taco”) Trial Brief filed in Opposition to Petitioner’s Main Trial Brief (“Del Taco’s Brief”) as follows:

From the first pleadings and briefs filed by Del Taco in this proceeding four years ago, Del Taco’s
strategy has been clear: attempt to make the Board take its eye off the ball. Indeed, the first sentence of Del
Taco’s Opposition Brief gives away this strategy: “[T]his is not a case about the supposed abandonment by
Del Taco of its NAUGLES trademark over a decade ago.” Del Taco’s Brief, p. 1. Of course this case is
about the abandonment by Del Taco of the NAUGLES mark, as that is the sole ground upon which Petitioner
brings this petition to cancel and, therefore, the one and only focus of this proceeding.

Del Taco's Brief raises an affirmative defense it did not plead, re-hashes old discovery motions and accuses Petitioner and his counsel of acting in bad-faith – all of which are designed to cloud the main issue and draw focus away from the simplicity of this case. On the merits, this case is straightforward: Del Taco is attempting to warehouse the NAUGLES mark after 19 years of nonuse in restaurant services. Del Taco's attempts to complicate this case with meritless and immaterial arguments must be identified and discarded.

I. DEL TACO HAS NOT PLEADED THE AFFIRMATIVE DEFENSE OF LACK OF *BONA FIDE* INTENT AND, AS SUCH, IS BARRED FROM ARGUING IT.

Del Taco cannot raise the affirmative defense that Petitioner lacks standing because he did not have a *bona fide* intent to use his mark for the first time in its final Trial Brief. It is black letter law that Del Taco should have amended its Answer to include any affirmative defense it wished to argue. See Fed. R.Civ. P. 15(a); T.B.M.P. § 507.02. Further, the Board has reinforced this black letter law specific to the affirmative defense of lack of a *bona fide* intent. In Kaplan v. Brady, 98 U.S.P.Q.2d 1830 (T.T.A.B. 2011), the Board ruled,

If respondent wishes to rely at trial upon an affirmative defense that petitioner lacks standing to maintain this proceeding because he did not have a bona fide intent to use his pleaded mark when he filed the intent-to-use application to register that mark, he must seek leave to file an amended answer in which he includes such an affirmative defense. See Fed. R. Civ. P. 15(a); TBMP Section 507.02.

Id. at 1834, n. 7.

Based on the foregoing law, it is well-established that the **affirmative defense that petitioner lacks standing because he did not have a *bona fide* intent to use a mark must be pleaded**. Del Taco's Answer does not contain this affirmative defense. Del Taco never amended its Answer to include this affirmative defense. As such, Del Taco has waived its right to raise this affirmative defense, and Del Taco's attempts to argue it are barred.

A. This Affirmative Defense Has Not Been Tried by Consent.

Petitioner has in no way allowed this affirmative defense to be tried by consent. Simply because Petitioner provided discovery to satisfy the Board's early ruling that his standing could be the basis for discovery¹ **in no way equates to a waiver by Petitioner** to allow Del Taco to try a completely novel affirmative defense of lack of a *bona fide* intent. After reviewing Petitioner's discovery responses years ago, Del Taco had ample opportunity to decide if it wanted to assert an additional affirmative defense and move to amend its Answer to include one. However, Del Taco never took those readily-available steps. Petitioner should not be hamstrung now, at the 11th hour, when he has no ability to defend against a novel affirmative defense. This affirmative defense has not been tried by consent, and Petitioner opposes Del Taco's attempt to plead a novel affirmative defense for the first time in its Trial Brief.

Each and every portion of Del Taco's Brief that attempts to raise the affirmative defense that Petitioner lacks standing because he did not have a *bona fide* intent to use the NAUGLES mark at the time he filed his application must be disregarded, because Del Taco Failed to plead it. *E.g.*, Del Taco's Brief, p. 3-4 ("Petitioner had **no** *bona fide* intent to use the NAUGLES mark in commerce . . ."); *id.* at p. 4 (Petitioner's actions "do not constitute the required *bona fide* intent to use to support filing of the Application"); *id.* at pp. 11- 15 (Section V.C. of Del Taco's Brief entitled "Petitioner's Interest in Del Taco's NAUGLES Trademark and Alleged Bona Fide Intent to Use the Mark in Commerce"); *id.* at p. 30 ("Petitioner did not have a *bona fide* intent to use NAUGLES . . . when Petitioner's Application was filed . . ."); *id.* at p. 32 ("Petitioner lacked a *bona fide* intent to use . . ." and Petitioner's application was filed "with an intent not to make *bona fide* use of the mark . . ."); *id.* at p. 33 ("[N]o documentary evidence exists to support Petitioner's alleged bona fide

¹ A ruling from earlier in this proceeding (Doc. 16) issued as the result of a motion which concerned Petitioner's good-faith belief that all but one of Del Taco's 114 discovery requests sought information outside the scope of discovery. (Document No. 14, p. 7). Ultimately, the Board ruled that the information sought was within the scope of discovery and relied upon Kaplan v. Brady, 98 U.S.P.Q.2d 1830 (T.T.A.B. 2011), a case that was decided after Petitioner initiated this proceeding, to support its decision. Thereafter, Petitioner cooperated in discovery on the issue of his standing.

intent to use . . .”); *id.* at p. 34 (“Petitioner cannot manufacture a *bona fide* good faith intent to use . . .” and “this is not a *bona fide* intent to use”); *id.* at p. 35 (“Petitioner therefore had **no** *bona fide* intent to use . . .”).

II. DEL TACO’S “FACTUAL” STATEMENTS ARE NOT SUPPORTED BY THE EVIDENCE.

Del Taco’s Brief contains multiple statements that are not supported by the evidence. “Factual statements made in a party’s brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest.” T.M.B.P. § 704.06(b); Schering-Plough HealthCare Products, Inc. v. Ing-Jing Huang, 84 U.S.P.Q.2d 1323, 1328 (T.T.A.B. 2007) (lack of evidence undercuts contentions in brief); Baseball America, Inc. v. Powerplay Sports, Ltd., 71 U.S.P.Q.2d 1847, 1847 (T.T.A.B. 2004) (factual assertions in brief not supported by competent evidence not considered). Below is a non-exhaustive list of the instances in Del Taco’s Brief where it makes statements which should be given no consideration because they are not supported by evidence properly introduced at trial.

A. No Evidence That The Public Associates NAUGLES With Del Taco

Del Taco’s Brief asserts, “Del Taco is synonymous with NAUGLES in the minds of the public.” Del Taco’s Brief, p. 11. Del Taco cites paragraph 8 of Mr. Chillingworth’s affidavit as support for this statement, however, **his affidavit says no such thing**. Mr. Chillingworth’s cited testimony states, “. . . I am informed and believe that the public recognizes the NAUGLES brand as associated with Del Taco’s restaurant services and that Del Taco is the owner of the NAUGLES trademark and brand.” Chillingworth Aff., ¶ 8. Del Taco has overreached in its characterization of this testimony. As such, Del Taco’s statement that “Del Taco is synonymous with NAUGLES in the minds of the public” constitutes a factual assertion made without supporting evidence and, therefore, must be disregarded.

B. No Testimony From Petitioner That Consumers Still Associate The Naugles Mark With Del Taco

Del Taco’s Brief states, “Petitioner admits that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco, even on Petitioner’s own Twitter account.” Del Taco’s Brief, p. 16. Del Taco cites to four portions of Petitioner’s cross-examination testimony and Twitter

posts to his “Señor Naugles” account as support for this statement. In reality, **Petitioner testified to no such thing and his Twitter posts show no such thing.**

1. First Inaccurate Cite: 84:20-86:14: Del Taco cites Petitioner’s cross-examination testimony at 84:20-86:14 which, in reality, consists of Petitioner discussing how he established his www.nauglestacos.com website and posted verbiage on it explaining his intent to open NAUGLES restaurants. Ziebarth Cross-Exam Test., 84:20-86:14. **Nowhere in this testimony does Petitioner “admit that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco.”**

2. Second Inaccurate Cite: 91:21-93:15: Del Taco cites Petitioner’s cross-examination testimony at 91:21-93:15 which, in reality, recounts an exchange between Petitioner and one of his Twitter followers wherein Petitioner wrote, “We still are.” This testimony also recounts that said follower posted “Egg burritos, *and not even from Del Taco*. Naugles was fantastic though.” Ziebarth Cross-Exam Test., 91:21-93:15. This testimony shows that Petitioner’s Twitter follower associates the egg burrito as being from NAUGLES, not from Del Taco. This implies that the Twitter follower does not consider Naugles as a part of Del Taco, but, instead, views the two as separate. **Nowhere in this testimony does Petitioner “admit that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco.”**

3. Third Inaccurate Cite: 95:24-96:8: Del Taco cites Petitioner’s cross-examination testimony at 95:24-96:8 which, in reality, consists of Petitioner confirming in a Twitter post that he does not believe that Del Taco has a secret NAUGLES menu. Ziebarth Cross-Exam Test., 95:24-96:8. **Nowhere in this testimony does Petitioner “admit that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco.”**

4. Fourth Inaccurate Cite: 100:21-103:24: Del Taco cites Petitioner’s cross-examination testimony at 100:21-103:24 which, in reality, consists of Petitioner explaining that he has been preemptively telling his customers he is not associated with Del Taco nor the Naugles restaurants that existed under Del Taco two decades ago. Petitioner testifies that he wants people to think of him when they think of

NAUGLES – meaning his NAUGLES venture. Ziebarth Cross-Exam Test., 100:21-103:24. **Nowhere in this testimony does Petitioner “admit that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco.”**

Not one cite provided in Del Taco’s Brief actually supports its assertion that Petitioner “admits that consumers are still openly recognizing the NAUGLES mark and brand as belonging to and associated with Del Taco.” As such, this statement in Del Taco’s Brief constitutes a factual assertion made without supporting evidence and must be disregarded.

C. No Evidence Of Consumer Confusion

Del Taco’s Brief states, “Petitioner . . . is still . . . attempting to correct consumer confusion . . . “ Del Taco’s Brief, p. 3. This statement points to no testimony or documentation to support it. **There is no evidence of consumer confusion in the record.** As such, it constitutes a factual assertion made without supporting evidence and, therefore, must be disregarded.

D. No Evidence That Any Naugles Secret Menu Is “One Of Del Taco’s Most Popular Aspects” Nor “One Of The Most Successful Examples Of Ongoing Use And Consumer Recognition”

Del Taco’s Brief states, “[A]mong one of Del Taco’s most popular aspects of its restaurant services is its ‘secret’ NAUGLES menu . . . This is one of the most successful examples of the ongoing use and consumer recognition of the NAUGLES trademark . . .” Del Taco’s Brief, p. 10. Del Taco points to no evidence to support this statement. **There is no evidence or testimony in the record to indicate that any secret menu is “one of Del Taco’s most popular aspects.” There is no evidence or testimony in the record to indicate that any secret menu is “one of the most successful examples of ongoing use and consumer recognition.”** These are factual statements made by Del Taco in its Brief without supporting evidence. As such, these statements should be disregarded.

E. No Evidence Of Multiple Examples Of “Advertising And Marketing Materials”

Del Taco’s Brief states that it has made use of the NAUGLES mark through “various means including 1) advertising and marketing materials; 2) on its website . . .” Del Taco’s Brief, p. 2. Because Del Taco listed “advertising and marketing materials” separate and apart from “its website,” it stands to reason

that there must be evidence in the record establishing both categories of evidence individually. Further, “advertising and marketing materials” is stated in the plural, inferring there is more than one example in the record. In reality, the only “advertising or marketing materials” in evidence consists of a single item: a one-page menu (Exhibit 11) containing the phrase “Viva Naugles,” a menu which Petitioner has objected to because Del Taco failed to lay any foundation for its use.² Del Taco has not offered multiple pieces of evidence constituting “advertising and marketing materials” and Del Taco’s Brief cites to no evidence or testimony to support this statement. This is a factual statement made by Del Taco in its Brief without supporting evidence. As such, it should be disregarded.

Because all of the factual assertions made in Del Taco’s Brief that are enumerated above are not supported by evidence, they should not be considered by the Board under Schering-Plough HealthCare Products, Inc. v. Ing-Jing Huang, 84 U.S.P.Q.2d 1323, 1328 (T.T.A.B. 2007) and Baseball America, Inc. v. Powerplay Sports, Ltd., 71 U.S.P.Q.2d 1847, 1847 (T.T.A.B. 2004).

III. DEL TACO’S ASSERTIONS OF “ONGOING EXTENSIVE NAUGLES MARKETING CAMPAIGNS” ARE UNSUPPORTED BY THE EVIDENCE AND MISLEADING.

Del Taco’s Brief makes numerous assertions, touting “ongoing,” “interactive” and “extensive” NAUGLES marketing campaigns - assertions which are misleading and inaccurate.

A. Mr. Chillingworth’s Testimony Does Not State What Del Taco Claims It Does.

Del Taco’s Brief creates a pattern of making assertions regarding alleged NAUGLES campaigns, then citing to portions of Mr. Chillingworth’s testimony which fail to support the underlying assertion.

1. First Unsupported Assertion: “Since 2009, Del Taco has been planning larger, more interactive marketing campaigns prominently featuring its NAUGLES trademark.” Del Taco’s Brief, p. 11, citing Chillingworth Cross-Exam Test., 88:18-89:21. However, **Mr. Chillingworth testified to no such thing**. The testimony cited by Del Taco has nothing to do with “interactive marketing campaigns,” nor marketing campaigns of any kind. The testimony cited reads as follows:

² Petitioner’s objection to Del Taco’s Exhibit 11 is discussed thoroughly in his Main Trial Brief and His Objections/Motion to Strike (Doc. 88).

Q: “What do you base your assumption on that people associate the bun taco with Naugles and not with Del Taco?”

A: “It was a Naugles menu item.”

Q: “I know you know that, but what are you basing your assumption on that other people know that?”

A: “Things I read and heard online, things I hear from former employees, things like that.”

Q: “Anything that has originated from Del Taco?”

A: “I can’t say for sure.”

Q: “You would be guessing if you said it came from Del Taco itself?”

A: “Yes.”

Q: “Since you’ve worked there in 2009, have you seen anything come from Del Taco that you could base the assumption on, that people assume that – your assumption that people associate the bun taco with Naugles and not just Del Taco? Have you seen anything originate from Del Taco to base that on?”

A: “Just conversation.”

Q: “And who were those conversations with?”

A: “Again, I can’t say there was one conversation with one person. Just a number of internal meetings or discussions or feedback I hear from operators.”

This testimony in no way supports the assertion Del Taco has made in its Brief. As such, the assertion constitutes a factual statement unsupported by evidence and should be disregarded.

To the contrary, Mr. Chillingworth testified to the opposite effect. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Second Unsupported Assertion: [REDACTED]

Del Taco's characterization of multiple portions of Mr. Chillingworth's testimony is inaccurate and does not support the assertion made in its brief. As such Del Taco's assertion that, [REDACTED]

[REDACTED]

[REDACTED] constitutes a factual statement which is unsupported by the evidence. Therefore, it should be disregarded.

3. Third Unsupported Assertion: [REDACTED]

[REDACTED]

[REDACTED] However, **Mr. Chillingworth's testimony evidences no such thing.**

[REDACTED]

[REDACTED]

[REDACTED]

Del Taco's characterization of the cited testimony is inaccurate and does support the assertion made in its brief. As such, the assertion by Del Taco that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] constitutes a factual statement which is unsupported by the evidence. Therefore, it should be disregarded.

B. Mr. Chillingworth's Testimony is Self-Serving.

Del Taco uses Mr. Chillingworth's testimony to support numerous factual assertions, many of which cannot be corroborated by independent evidence. Mr. Chillingworth is an executive for Del Taco. As such, his assertions are self-serving when they lack independent corroboration. Natural Answers, Inc. v. SmithKline Beecham Corp., 529 F.3d 1325 (11th Cir. 2008) (“[I]f all a party had to do to avoid a finding of abandonment was to aver that it never intended to abandon the trademark, then no trademark would ever be abandoned, no matter how long its use had been withdrawn from the market or how inchoate and speculative any intention to resume use.”).

1. No Corroborating Evidence Of Commercials

Del Taco brief alleges, based on Mr. Chillingworth's testimony, that it ran commercials featuring the NAUGLES mark and “further incorporated other aspects of the NAUGLES restaurants throughout is Del Taco branded restaurants.” Del Taco's Brief, pp. 9, 20. In reality, there is no corroborating evidence in the record of commercials featuring the NAUGLES mark. Del Taco produced no evidence of other ways it “further incorporated” the NAUGLES mark into its Del Taco branded restaurants. This testimony is not independently supported by the record and, thus, constitutes a self-serving statement which offers little to no

probative value. ShutEmDown Sports, Inc. v. Lacy, 102 U.S.P.Q.2d 1036 (T.T.A.B. 2012) [precedential] (self-serving interrogatory responses as to intent do not rebut presumption of abandonment).

2. No Corroborating Evidence That A “NAUGLES Secret Menu” Is “Strong,” “Popular,” “Viral” Or “Well-Recognized By The Public”

Del Taco’s brief asserts that there is a “well-known” and “popular” “NAUGLES secret menu” which is the subject of a “strong and well-recognized ‘viral’ campaign.” Del Taco’s Brief, pp. 2, 18, 20. However, these assertions were not supported by any evidence other than Mr. Chillingworth’s statements that such things are true. Del Taco produced no statements from consumers, no social media posts, no polls, no surveys, nor any other evidence that could provide a basis for these descriptions. In fact, there is nothing in the record that independently evidences that customers had knowledge of a secret menu at all, because Del Taco cannot point to a campaign that was actually green-lighted and presented to the public, let alone one that went “viral.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

If Del Taco had evidence to

the contrary, no doubt it would have been produced in discovery.

Without corroborating evidence, Mr. Chillingworth’s assertions of a “strong,” “popular,” and “well-known viral secret menu” boil down to self-serving statements and, as such, should be given little to no weight.

3. No Corroborating Evidence Of Plans To Use The NAUGLES Mark In The Future; Regardless, Such Plans Could Not Cure Past Abandonment.

Del Taco's Brief asserts that Del Taco does, in fact, have plans to go forward in the future with some kind of NAUGLES-related campaign. Del Taco's Brief, p. 11. As discussed in detail above, the points in Mr. Chillingworth's cross-examination testimony to which Del Taco cites to support its assertion that, [REDACTED]

[REDACTED]

[REDACTED] have been shown to not support this assertion at all.

In any event, whether Del Taco can establish plans to use the NAUGLES mark in the future it is immaterial, because **future use cannot cure past abandonment**. "Once a period of nonuse results in abandonment, a resumption of use thereafter cannot cure the preceding abandonment. Such a separate resumption represents a new and separate use with a new date of first use. Once a trademark is abandoned, its registration may be cancelled even if the registrant subsequently resumes use of the mark." 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 17:3 (4th Ed. 2012), citing Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 13 U.S.P.Q.2d 1307 (Fed. Cir. 1989); Stromgren Supports Inc. v. Bike Athletic Co., 43 U.S.P.Q.2d 1100 (T.T.A.B. 1997) (registration was cancelled for abandonment; evidence of intent to resume, which intent occurred after abandonment, is evidence of a possible new use which cannot cure the abandonment).

IV. "ADIOS TO NAUGLES" DOES NOT SUPPORT DEL TACO'S CASE.

The newspaper article offered by Petitioner is literally entitled "ADIOS (GOODBYE) TO NAUGLES." The intended message to consumers that Del Taco is saying "goodbye" to NAUGLES cannot get much clearer than that. Further, Del Taco's predecessor provided comments for the article, and therefore must have approved of its publication, including the title. Common sense dictates that the headline topping a newspaper article sums up the article, and the bolded and enlarged headline is first and foremost what, and sometimes all, that the public sees.

Del Taco mischaracterizes statements made in the article. The article states, “Menus from the two restaurants have already been combined and, thus, the egg burrito, Naugle’s breakfast staple, will continue at Del Taco.” Doc. 55, p. 1. The article also states that an ad campaign focusing on the quality of food originating from both restaurants will continue. Doc. 55, p. 2. The assertion that certain food items, such as the mentioned egg burrito, will continue at Del Taco simply implies that Del Taco will continue to offer an egg burrito, *not necessarily a NAUGLES-branded egg burrito*. As such, whether Del Taco continued to sell any kind of egg burrito is **immaterial if it is not being marketed as a NAUGLES item**, and Del Taco has pointed to no evidence that it has marketed any of its food items as NAUGLES items.

[REDACTED]

In short, the newspaper article “Adios to Naugles” does not support Del Taco’s claim of “continued use” the way it claims it does, because the article merely states that Del Taco may have continued to offer food items originally sold at Naugles restaurants, not that Del Taco would make a continued effort to market any food items under the NAUGLES brand. Assertions to the contrary in Del Taco’s Brief are misleading on this point and should be given no weight.

V. DEL TACO’S CASE LAW IS EITHER NOT CONTROLLING, HAS DISSIMILAR FACTS, OR BOTH.

Del Taco’s Brief relies on many cases that either are not controlling and/or do not have similar facts as presented herein and, thus, are distinguishable.

A. Cumulus Media, Inc. v. Clear Channel Comm., Inc., 304 F. 3d 1167 (11th Cir. 2002)

Del Taco cites Cumulus Media, Inc. v. Clear Channel Communications, Inc., 304 F. 3d 1167 (11th Cir. 2002) to support its argument that continued used of a mark to keep up goodwill goes against a finding of abandonment. Del Taco’s Brief, p. 19. First, the 11th Circuit’s opinions are not controlling on the TTAB.

TBMP § 801.03 (“[T]he Board relies primarily on precedent from the Court Appeals for the Federal Circuit . . .”).

Second, this case is not instructive because the facts are dissimilar. In Cumulous Media, the trademark owner had continued to use the mark THE BREEZE on radio station materials including an outdoor sign at its headquarters, business cards, and promotional materials. Id. at 1174. These uses were enough that consumers maintained a continued association of the mark with its owner. The trademark owner had taken affirmative steps to outwardly demonstrate the continued association. In contrast, Del Taco has done no such thing. Del Taco produced no evidence of NAUGLES signage which it continued to use after 1995; no evidence of use of the NAUGLES mark on business cards; and no evidence of marketing materials that can be established as being seen by the public. Because Del Taco has taken no affirmative steps to outwardly demonstrate a continued association with the NAUGLES mark for restaurant services, customers cannot reasonably be assumed to have a continued association between NAUGLES and Del Taco. As such, Cumulus Media is distinguishable on its facts, and does not support Del Taco’s case.

Two TTAB opinions that Del Taco cites in an effort to support its argument that it has continuously used the NAUGLES mark since 1988 offer no help to its case either.

B. Azteca Enterprises, Inc., 50 U.S.P.Q. 2d 1209 (T.T.A.B. 1999)

Del Taco cites to Azteca Enterprises, Inc., 50 U.S.P.Q. 2d 1209 (T.T.A.B. 1999) to support its argument that it has continuously used the NAUGLES mark since 1988 for restaurant services. First, Azteca Enterprises addressed a likelihood of confusion issue, not abandonment. Second, the piece of evidence at issue in Azteca Enterprises was a menu specimen submitted during the application phase. As such, this case is inapposite to the instant action. Assuming that Del Taco is attempting to draw a parallel with its own contested Exhibit 11 menu specimen, which it contends was submitted to the USPTO as a specimen and therefore should be given credence, it is well-established that “[s]pecimens on the file of . . . a registration are not evidence on behalf of . . . the registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony.” 37 CFR § 2.122(b)(2). Because Del Taco was unable to lay a proper foundation for the Exhibit 11 menu by failing to identify any kind of time frame as to when the document was

used or created, who created it, where it was used, how it was used, whether it was ever seen by customers, or whether it was used after 1995, Del Taco's Exhibit 11 should be given no weight. Given the inapposite circumstances, Azteca Enterprises offers no support to Del Taco's case.

C. Kentucky Fried Chicken Corporation, 170 U.S.P.Q. 51 (T.T.A.B. 1971)

Del Taco's cite to Kentucky Fried Chicken Corporation, 170 U.S.P.Q. 51 (T.T.A.B. 1971) also fails to support its argument. In fact, it highlights Del Taco's lack of use because it also concerns restaurant services. In Kentucky Fried Chicken, the Board found it was clear from the food bags that the mark was used to identify the contents of the bags and/or to advertise the retail restaurant establishments. Id. at 54. By citing to this case, all that Del Taco has successfully demonstrated is that it, itself, has failed to show the level of use that was found sufficient in the Kentucky Fried Chicken case.

Not only has Del Taco never used the NAUGLES mark on any of its own fast food bags, but it also has never used it on any of its food containers, cups, napkins, signage in restaurants, nor anywhere else inside its restaurants. [REDACTED]

[REDACTED] Del Taco has made no effort to incorporate the brand NAUGLES into its current restaurant packaging, supplies or containers. Given the foregoing, Kentucky Fried Chicken, when compared to the instant action, highlights that Del Taco simply has not used the NAUGLES mark nor incorporated the NAUGLES brand into its restaurant services.

D. Am. Ass'n for Justice v. Am. Trial Lawyers Ass'n., 97 U.S.P.Q.2d 1614 (D. Minn. 2010)

Del Taco's cite to American Association for Justice fails to support its case. In American Association for Justice, the court found plaintiff had not abandoned use of ATLA because it identified itself as "formerly" the ATLA on its website, and in advertising. In our case, 1) Del Taco has never identified itself as being "formerly NAUGLES" on any advertising, and 2) this case is from a district court in Minnesota and, therefore, is not controlling. As such, American Association for Justice offers Del Taco no help.

VI. DEL TACO'S LACK OF PRODUCTION OF EVIDENCE DURING DISCOVERY AND PETITIONER'S INVESTIGATIONS HELPS PETITIONER MEET HIS STANDARD OF PROOF.

Del Taco's Brief tries to distort the standard of proof that Petitioner bears in this proceeding by making the argument that Petitioner did not conduct research to prove that Del Taco had abandoned the NAUGLES mark. Del Taco's Brief, p. 27. In reality, part of Petitioner's "research" was conducted in discovery, wherein he asked Del Taco to provide examples of use in commerce in connection with restaurant services in the past and present, as well as evidence of Del Taco's intent to resume use. If Del Taco had documents that supported these types of use, surely it would have produced them and, thereafter, admitted them into evidence during its Trial Period. The absence of what Del Taco could supply in response to these requests is partially what Petitioner relies upon to meet his burden in this proceeding. Common sense dictates that you cannot prove a negative. If evidence of use was not supplied by Del Taco in response to Petitioner's requests for it in discovery, it stands to reason that the evidence does not exist.

Further, prior to filing his intent to use application, Petitioner did investigate whether Del Taco was still using the NAUGLES mark, including making a trip to the original Naugles location (now a Del Taco) on April 5, 2010 to determine whether any mention of NAUGLES could be found. Ziebarth Aff., Ex. H, p. 6. In an email to Mr. Hallstrom dated April 5, 2010, Petitioner shared that he went to the original Naugles location and found that Del Taco "had very clearly done everything they could to thoroughly and deliberately sweep away any possible remembrance of Naugles there . . . [I]t was kind of a bummer to see that they had stripped away every single hint that it had ever been anything other than a Del Taco. Not even a plaque on the wall or a photo of what it used to look like . . ." Id. Petitioner's own efforts to find use of the NAUGLES mark by Del Taco, the absence of what Del Taco produced in discovery, and the rest of Petitioner's offered evidence combine together to meet Petitioner's burden to establish abandonment by a "preponderance of the evidence." Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 13 U.S.P.Q.2d 1307 (Fed. Cir. 1989).

Del Taco's lack of continuous use triggered the statutory presumption of abandonment. Del Taco has not met its burden to rebut that presumption. These two elements, together, establish Del Taco's legal abandonment of the NAUGLES mark.

VII. DEL TACO’S “GOODWILL” ARGUMENT IS NOT SUPPORTED BY THE EVIDENCE AND, REGARDLESS, CANNOT SAVE ITS CASE.

Del Taco’s Brief alleges that the record “definitively establishes” that it holds “considerable goodwill” in the NAUGLES mark and that there is an “ongoing recognition by the public of the NAUGLES mark as belonging to and associated with Del Taco.” Del Taco’s Brief, p. 2.; see also Del Taco’s Brief, p. 3 (“[C]onsumers still recognize the mark as being associated with Del Taco . . .”). Del Taco cites to 1) Mr. Chillingworth’s uncorroborated testimony, and 2) posts made to Petitioner’s “Señor Naugles” Twitter account, neither of which evidence what Del Taco asserts they do.

The posts made to Petitioner’s Twitter account have been revealed as failing to establish the evidence Del Taco claims they do. See pp. 6-7, supra. After discrediting Del Taco’s assertions as to what the Twitter posts evidence, all that remains to support Del Taco’s assertion of goodwill is, once again, testimony from Mr. Chillingworth saying it is true. Because no customer surveys, polls, social media screenshots or other evidence that could support the conclusion that customers still associate the NAUGLES mark with Del Taco have been put into evidence, his is testimony uncorroborated and therefore self-serving. Given the foregoing, Del Taco is unable to support its assertion that it owns residual goodwill in the NAUGLES mark.

Even assuming for the sake of argument that Del Taco could evidence that it owns residual goodwill in the NAUGLES mark, **the Board has never found that a party may maintain its rights to an unused mark solely on the basis of the existence of residual goodwill.** The Board has held that neither the continued existence of fans of a product nor goodwill generated by subsequent sales of a product are enough to defeat the statutory presumption of abandonment. Chrysler LLC v. Pimpo, 2008 T.T.A.B. LEXIS 619 (T.T.A.B. 2008) [not precedential] (“The simple fact that there are collectors of an item, or that clubs exist for enthusiasts of a certain item . . . does not, by itself, defeat the statutory presumption of abandonment by the mark’s owner after almost forty years of nonuse in the ordinary course of trade”) see also General Motors Corp. v. Aristide & Co., Antiquaire de Marques, 87 U.S.P.Q.2d 1179 (T.T.A.B. 2008) [precedential] (“[R]esidual goodwill is not sufficient to avoid a finding of abandonment where the goodwill is generated through subsequent sales of a product by distributors or retailers”).

Given the foregoing, even if Del Taco were able to establish that it owns some residual goodwill in the NAUGLES mark, that fact, alone, would not be enough to save its case and defeat the statutory presumption of abandonment. Because Del Taco has pointed to no evidence that customers associate Del Taco with the NAUGLES mark, other than Mr. Chillingworth's self-serving testimony, and because, regardless, goodwill alone is not enough to make Del Taco's case, Del Taco's arguments regarding goodwill are not persuasive.

VIII. DEL TACO'S RE-HASHING OF PAST DISCOVERY MOTIONS IS ANOTHER ATTEMPT TO GET THE BOARD TO TAKE ITS EYE OFF THE BALL.

Del Taco spends multiple pages re-hashing past discovery motions and making accusations. Del Taco's Brief, pp. 5-6. Del Taco has raised these items in an attempt to cloud the issue. Del Taco has not given an accurate nor full account of the motions and circumstances raised in its Brief. These motions are not relevant to the matter at hand as they were considered and ruled upon years ago. However, to the extent that Del Taco has accused Petitioner of violating any previously-issued orders, Petitioner responds with the complete set of facts to put things back into their proper context so that the Board's ultimate ruling is not clouded by these inappropriate accusations.

A. Petitioner Has Complied With All Board Orders And Has Never Been Found To Have Acted In Anything Other Than Good-Faith.

With regard to the Board's January 2012 ruling and the underlying motion (Docs. 9-16), Del Taco's Brief alleges that Petitioner deceitfully withheld documents and information in discovery. In reality, Petitioner had honestly and truthfully believed that he was not required to supply the information sought. The Board's ruling, which ordered Petitioner to provide substantive responses to the discovery at issue, was based on a case that had been decided after Petitioner had initiated this action. Once the Board ruled that this new case law would control, Petitioner complied. For Del Taco to paint the scenario otherwise is disingenuous.

B. Petitioner And His Counsel Have Acted In Good-Faith And Have Not Utilized Any Evidence That Petitioner Did Not Produce During Discovery.

Del Taco alleges that Petitioner withheld documents in bad-faith that were discovered to exist during the cross-examination of Petitioner. Del Taco's Brief, p. 6. This is another attempt by Del Taco to cloud the issues and get the Board to take its eye off the ball. Del Taco has not recounted the facts honestly and, to prevent them from being taken out of context, Petitioner offers the full set of facts, sworn to under penalty of perjury by his counsel, to put things back into their proper context so that the Board's ultimate ruling is not clouded by this inappropriate accusation.

During the live cross-examination of Petitioner on October 28, 2013, Petitioner's counsel, Kelly Pfeiffer, learned for the first time while Petitioner was testifying that he still might possess additional emails between Jeff Naugle and himself that had not been produced but may be relevant to this proceeding. Declaration of Kelly K. Pfeiffer ("Pfeiffer Decl."), ¶ 4. Ms. Pfeiffer is the third counsel to represent Petitioner during the 4-year span of this proceeding. Pfeiffer Decl., ¶ 5. Because discovery closed on August 22, 2012 and Ms. Pfeiffer did not appear until January 23, 2013, she was unable to assist with conducting and producing discovery in this case. Pfeiffer Decl., ¶ 5. After Petitioner's cross-examination, Ms. Pfeiffer instructed Petitioner to make a thorough examination of his records to determine whether additional responsive documents were within his possession. Pfeiffer Decl., ¶ 6. On November 5, 2013, Petitioner sent to Ms. Pfeiffer six pages of emails, four being emails between Barbara Caruso and Petitioner attempting to set up a meeting between Petitioner and Mr. Chillingworth, and two being emails between Jeff Naugle and Petitioner, a few dated February 9, 2010, wherein Mr. Naugle confirmed that he has original Naugles recipes, that Del Taco knew he was using said recipes in his own restaurant but did nothing about it, and wherein Petitioner wrote, "Getting ready to come up on Saturday," corroborating Petitioner's testimony and documentation that he had a meeting with Jeff Naugle on February 10, 2010. Pfeiffer Decl., ¶ 7; see also Ziebarth Aff., ¶ 9, Ex. F. Ms. Pfeiffer had never seen nor been told about the existence of these emails prior to this time. Pfeiffer Decl., ¶ 7.

The very next day on November 6, 2013, Rose Amezcua-Moll, partner at Ms. Pfeiffer's firm, and Ms. Pfeiffer called Del Taco's counsel April Besl and Karen Gaunt and explained the situation honestly and bluntly. Ms. Pfeiffer promised to turn over the emails within 24 hours. Pfeiffer Decl., ¶ 8. Ms. Pfeiffer told

them that she understood that they would need time to evaluate these six pages to determine whether they thought anything else needed to be addressed and, after their review, to the extent they took issue with the documents, she invited a conversation on any issues they may have. Pfeiffer Decl., ¶ 8. Ms. Pfeiffer went out of her way to stress that she was open-minded to communication between the parties as a method of working this out, and she wanted to address any concerns of theirs that may exist. Ms. Pfeiffer's goal was to remedy the situation as quickly and easily possible. Pfeiffer Decl., ¶ 8.

On November 7, 2013, Ms. Pfeiffer sent a follow-up letter to Ms. Besl and Ms. Gaunt, recounting their conversation from the day prior and including the six pages of emails she had promised to produce. Pfeiffer Decl., ¶ 9, Ex. A. Ms. Pfeiffer's November 7th letter specifically requested, "[W]e respectfully request that you confirm with us one way or another if you take issue with the enclosed, additional documents so we can respond accordingly." Pfeiffer Decl., ¶ 10, Ex. A, p. 2. Thereafter, neither Ms. Besl nor Ms. Gaunt ever conveyed to Ms. Pfeiffer that they took issue with those six pages of emails. Pfeiffer Decl., ¶ 11.

Ms. Pfeiffer and her firm made the professional and ethical decision in the interest of fairness not to introduce these six pages of emails into evidence in this proceeding. Pfeiffer Decl., ¶ 12. Petitioner has not used these emails nor referenced them or their contents in any way. Pfeiffer Decl., ¶ 12. The first time these emails have been referenced in this proceeding was by Del Taco in its Brief and Objections. Pfeiffer Decl., ¶ 12. After waiving its opportunity to address any issues it had with these emails by failing to engage Ms. Pfeiffer in discussion which she openly invited 11 months ago, Del Taco is now using these emails to cloud the issues. Pfeiffer Decl., ¶ 13.

As evidenced above, Del Taco has not given an accurate nor full account of the above-discussed events, and has, instead, presented them out of context. Pfeiffer Decl., ¶ 13. Although it is not relevant to the matter at hand, this complete set of facts allows things to be put back into their proper context so that the Board's ultimate ruling is not clouded by this inappropriate accusation. Pfeiffer Decl., ¶ 13.

In short, Petitioner has not violated any order by the Board, has never been found to have acted in anything other than good-faith, and Petitioner and his counsel have conducted this proceeding with honesty and professionalism throughout. For Del Taco to attempt to frame the situations otherwise is misleading. **All**

issues raised by Del Taco on these subjects are immaterial and have no bearing on the ultimate judgment in this proceeding. Del Taco's entire discourse in its Brief regarding past motions, alleged board order violations and accusations of bad-faith is a ploy to draw focus away from the merits of this case.

IX. CONCLUSION

In short, **Del Taco's arguments do not match the evidence.** Numerous statements made in Del Taco's Brief have been proven to be unsupported by evidence in the record. Numerous portions of Mr. Chillingworth's testimony have been demonstrated to 1) not contain the testimony Del Taco represents it does, and 2) stand uncorroborated by independent evidence, thereby making it self-serving. Because Del Taco's Brief contains multiple instances of unsupported statements and misrepresented evidence, its credibility suffers. The sum and total of what Del Taco characterizes as "extensive evidence of continued use of the NAUGLES mark" (Del Taco's Brief, p. 7), in reality, is revealed to be a very thin showing, much of which has been shown to be trumped up or misrepresented by Del Taco.

Del Taco wants the Board to take its eye off the ball and be distracted by immaterial discussions and accusations. Del Taco attempts to cloud the issues instead of narrowing in on the relevant facts and allowing this case to be addressed on the merits. Del Taco has employed this strategy for the duration of this proceeding for one reason: on the merits, **this case is a textbook example of trademark abandonment by an owner who is fighting for the right to warehouse a mark which it has not used for the prescribed services for 19 years.**

After identifying and discarding Del Taco's attempts to draw focus away from the singular ground upon which this petition is based, the inevitable conclusion is reached: Petitioner's petition to cancel Del Taco's NAUGLES registration for restaurant services must be granted. Petitioner respectfully requests that the Board rule accordingly.

Respectfully submitted,

CHRISTIAN M. ZIEBARTH

By /Kelly K. Pfeiffer./
Attorney for Petitioner
Kelly K. Pfeiffer

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

In the Matter of Registration No. 1043729
Date of Registration: July 13, 1976

CHRISTIAN M. ZIEBARTH
Petitioner,

Cancellation No.: 92053501

v.

DEL TACO, LLC
Registrant.

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

**DECLARATION OF KELLY K. PFEIFFER IN SUPPORT OF
PETITIONER'S REPLY TO DEL TACO'S OPPOSITION TRIAL BRIEF**

I, Kelly K. Pfeiffer, declare as follows:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California, and I am the attorney of record for Petitioner CHRISTIAN M. ZIEBARTH ("Petitioner") in this proceeding.

2. I have personal knowledge of the facts herein and could and would testify regarding the same if called upon to do so.

3. On or about October 28, 2013, Del Taco's counsel Ms. April Besl conducted a live cross-examination of Petitioner.

4. During Petitioner's testimony, I learned for the first time while Petitioner was testifying that he still might possess additional emails between Jeff Naugle and himself that had not been produced but are relevant to this proceeding.

5. I am the third counsel to represent Petitioner during the 4-year span of this proceeding. It is my understanding that discovery closed on August 22, 2012. I made my appearance as counsel for Petitioner on January 23, 2013 - 5 months after discovery had already closed. As such, I was unable to assist with conducting and producing discovery in this case. Immediately after making my appearance, I reviewed the

documents that Petitioner had produced to Del Taco during discovery then turned my focus toward preparing for his Trial Period based solely on said documents, which included 2 pages of emails between Jeff Naugle and Petitioner. Ziebarth Aff., Exhibit G.

6. After learning from Petitioner *as he was testifying* that he still had possession of additional emails between Jeff Naugle and himself, I instructed him, at the conclusion of his testimony, to make a thorough examination of his records to determine whether additional responsive documents were within his possession.

7. On November 5, 2013, Petitioner sent to me six pages of emails. Four of the pages were emails between Barbara Caruso and Petitioner wherein it appears that Ms. Caruso was attempting to set up a meeting between Petitioner and Noah Chillingworth. The last two pages of emails were between Jeff Naugle and Petitioner, a few dated February 9, 2010, wherein Mr. Naugle confirmed that he has in his possession hand-written, original Naugles food recipes, that Del Taco had actual knowledge that he was using said recipes in his own restaurant but did nothing about it, and wherein Petitioner wrote, "Getting ready to come up on Saturday," which corroborates Petitioner's testimony and documentation that he had a meeting with Jeff Naugle on February 10, 2010. Ziebarth Aff., ¶ 9, Exhibit F. I had never seen nor been told about the existence of these emails prior to this time.

8. The very next day on November 6, 2013, Rose Amezcua-Moll and I initiated a phone call to Del Taco's counsel April Besl and another attorney in her firm, Karen Gaunt. During the conference call between the four of us, I explained the situation honestly and bluntly to Ms. Besl and Ms. Gaunt and promised to turn over the six pages of emails within 24 hours. I told them that I understood that they would need time to evaluate these six pages to determine whether they thought anything else needed to be addressed. I told them that, after they reviewed the emails, to the extent they took issue with the documents, I was inviting the conversation on any issues they may have. I told them that I felt it was important that Ms. Amezcua-Moll and I initiate this conversation with them, get the documents to them as soon as possible, and address the issue head-on. I went out of my way to stress that we were open-minded to communication between the parties as a method of working this out, and we wanted to address any concerns of theirs that may exist. Our goal was to remedy the situation as quickly and easily possible.

9. On November 7, 2013, I sent a follow-up letter to Ms. Besl and Ms. Gaunt, recounting our conversation from the day prior and including the six pages of emails I had promised to produce. Attached hereto as Exhibit A is a true and correct copy of said letter and the six pages of emails in question.

10. My November 7, 2013 letter to Ms. Besl and Ms. Gaunt specifically requested, “[W]e respectfully request that you confirm with us one way or another if you take issue with the enclosed, additional documents so we can respond accordingly. We look forward to your continued cooperation and appreciate your understanding of this situation.” Exhibit A, p. 2. 11. Thereafter, neither Ms. Besl nor Ms. Gaunt, nor anyone on behalf of Del Taco, ever conveyed to me or anyone at my firm that they took issue with those six pages of emails.

12. My firm and I made the professional and ethical decision in the interest of fairness not to introduce these six pages of emails into evidence in this proceeding. Petitioner has not used these emails nor referenced them or their contents in any way. The first time these emails have been referenced in this proceeding was by Del Taco in its Brief and Objections.

13. After waiving its opportunity to address any issues it had with these emails by failing to engage us in discussion which I openly invited 11 months ago, Del Taco is now using these emails to cloud the issues. Del Taco has not given an accurate nor full account of the above-discussed events, and has presented them out of context. Although it is not relevant to the matter at hand, we believe it was necessary to supply the Board with the complete set of facts on this issue in order to put things back in context so that the Board’s ultimate ruling is not clouded by this inappropriate accusation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 13th day of October 2014 in Aliso Viejo, California.



Kelly K. Pfeiffer

EXHIBIT A

TO THE DECLARATION OF KELLY K. PFEIFFER

Amezcu-Moll & Associates, P.C.

Lincoln Professional Center
1122 E. Lincoln Avenue, Suite 203
Orange, CA 92865
(714) 288-2826 ■ (714) 464-4536

November 7, 2013

VIA U.S. MAIL and E-MAIL

Ms. April Besl
Dinsmore Shohl LLP
255 East Fifth Street
Cincinnati, OH 45202

RE: Ziebarth v. Del Taco; TTAB Cancellation Proceeding No. 92053501

Dear Ms. Besl,

Please allow this letter to serve as a summary and follow-up to yesterday's telephonic conference between you, Rose Amezcu-Moll, and me. As Ms. Amezcu-Moll and I indicated on the phone, following your cross-examination of Petitioner Ziebarth, it was brought to our attention for the first time that additional documents may exist that one may argue are responsive to Del Taco's discovery requests, but were never produced.

As you know, we are third in a series of counsel to represent Mr. Ziebarth in this proceeding, and our representation of him began on January 23, 2013, long after discovery closed in this matter back on August 22, 2012. As such, we had no hand in gathering and preparing documents during the discovery process. After your cross-examination of Mr. Zeibarth, I circled back with Mr. Ziebarth and instructed him to make a thorough examination of his records to determine whether additional responsive documents were within his possession. Two days ago, Mr. Ziebarth gave to me the 6 pages of emails, enclosed herein. I say with complete sincerity that we were surprised to learn these emails exist. Thereafter, we immediately contacted you, explained the situation and promised to turn the documents over within 24 hours. As such, here they are.

We understand you will need time to evaluate these six emails to determine whether you believe anything else needs to be addressed. After your review, to the extent that you take issue with these documents, as we discussed, we invite the conversation on any issues you may have. In my opinion, these emails are benign and do not add any additional information to our proceeding, but, regardless, it was important that we initiate this conversation, get the documents to you as soon as possible, and address the issue head-on. We want to make sure you know that we are open-minded to communication between the parties as a method of working this out, and we want to address any concerns of yours that may exist. Our goal is to remedy the situation as quickly and easily as

possible.

We remain open to discuss this matter further as you deem appropriate. As such, we respectfully request that you confirm with us one way or another if you take issue with the enclosed, additional documents so we can respond accordingly. We look forward to your continued cooperation and appreciate your understanding of this situation.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/Kelly K. Pfeiffer/
Kelly K. Pfeiffer

Enclosures

----- Original Message -----

Subject:Lunch

Date:Fri, 01 May 2009 13:36:49 -0400

From:Barbara Caruso <[REDACTED]>

To:christianz@[REDACTED]

Hi, Christian,

Thanks for the call!

Noah's been pretty busy, so hard to pin down for a day but I'm trying for next Wed/Thursday....Will get back to you as soon as I know.

Thanks,

Barbara

Barbara Caruso, APR
Caruso Communications

[REDACTED]
[REDACTED]

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CZ000001

----- Original Message -----

Subject: Re: you didn't hear this from me but

Date: Thu, 11 Jun 2009 14:54:09 -0400

From: Barbara Caruso <[REDACTED]>

To: [REDACTED]

Hi, Christian,

Yes, I'm sorry... he and John are crazy busy still.... perhaps in about two weeks?

I will get back to you....

hope all is going well!!

taco on,

Barbara

Barbara Caruso, APR

Caruso Communications

[REDACTED]

[REDACTED]

----- Original Message -----

From: christianz <[REDACTED]>

To: carusocom <[REDACTED]>

Sent: Thu, 11 Jun 2009 11:49 am

Subject: Re: you didn't hear this from me but

Did the thing with Noah get held off some more?

----- Original Message -----

From: Barbara Caruso <[REDACTED]>

To: christianz <[REDACTED]>

Sent: Fri, 22 May 2009 9:56 am

Subject: Re: you didn't hear this from me but

Hi, Christian,

hmmm, may want to try the location at Red Hill and the 5....it's definitely going on there.

Have a great weekend!

Best,

Barbara

Barbara Caruso, APR

Caruso Communications

[REDACTED]

[REDACTED]

----- Original Message -----

From: christianz <[REDACTED]>

To: carusocom <[REDACTED]>

Sent: Fri, 22 May 2009 9:30 am

CZ000002

Subject: Re: you didn't hear this from me but

Hi Barbara,

Good to hear from you. I just went to their test restaurant last night and it was the first time I didn't see anything new or unusual there for a while. Do you think it starts beginning today? Here's a picture I took of the menu board since I thought I might post the picture of the Volcano Box:

<http://www.flickr.com/photos/cziebarth/3554613368/>

And, yeah, just let me know whenever things will work out with Noah.

Thanks,

Christian

-----Original Message-----

From: Barbara Caruso <barbaracaruso@carusocomm.com>
To: christianz@carusocomm.com
Sent: Fri, 22 May 2009 9:07 am
Subject: you didn't hear this from me but

Hi, Christian,

Hope you are doing well!

I understand TB is testing "authentic tacos" much like Del Taco's Tacos Del Carbon and Rubio's Street Tacos....I know you've been to their R&D locations near their HQ...

also, it doesn't look like we'll be able to schedule lunch with Noah Chillingworth at Del Taco until the second week of June... sorry but things are just crazy in a good way.

Have a great weekend!

taco on,
Barbara

Barbara Caruso, APR
Caruso Communications

barbaracaruso@carusocomm.com
www.carusocomm.com

We found the real 'Hotel California' and the 'Seinfeld' diner. What will you find? Explore WhereItsAt.com.

Make your summer sizzle with [fast and easy recipes](#) for the grill.

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CZ000003

----- Original Message -----

Subject:Re: Recipes?

Date:Tue, 9 Feb 2010 15:48:20 -0800 (PST)

From:Jeff Naugle <[REDACTED]>

To:Christian Ziebarth <[REDACTED]>

I was fighting Del Taco in City Council and when I stated I was using the original "Del Taco" recipes at BT'S their response was they were going to sue me. I assumed they could not produce the recipes since no suite was ever filed. The recipes I have are hand written by Dick Naugle.

Looking forward to meeting you!

Sent from my iPhone

On Feb 9, 2010, at 10:25 AM, Christian Ziebarth <[REDACTED]> wrote:

A reporter at The Orange County Register last night linked to my Naugles coverage and so far it has had about 500 hits from people interested in Naugles (think I mentioned something like this before but this is a brand-new incident). One of those readers just left a comment on my blog that says:

But the original Naugles recipes are available- Del Taco still owns them and can make Naugles items any time it wants. This has been verified with Jeff at B&Ts'.

But I thought I remembered you saying that Del Taco probably did not still have the recipes. Do you know if they have them?

Also, in researching trademark issues I found out there are federal trademarks and state trademarks. The inventor of Jelly Bellies only filed for a federal trademark and somebody else found out he didn't file for a state trademark so they filed it on their own then called him up and said, "Hi, I'm your new business partner." So, in addition to all the Naugles-oriented names Del Taco has never owned, has owned or let lapse, or owns but may not have filed all the proper paperwork for, "Naugles" may be up for grabs as a state trademark. The only problem is that I haven't yet found an easy way to search for state trademark registrations like there is for federal trademarks.

Getting ready to come up on Saturday.

Christian

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CZ000004

----- Original Message -----

Subject: Re: Naugles Update

Date: Sat, 18 Sep 2010 07:15:18 -0700 (PDT)

From: Jeff Naugle <[REDACTED]>

To: Christian Ziebarth <[REDACTED]>

Hang in there! Good things normally take lots of time and effort.

From: Christian Ziebarth <[REDACTED]>

To: jeff.naugle@[REDACTED]

Sent: Thu, September 16, 2010 12:13:29 PM

Subject: Naugles Update

Met with the lawyers again yesterday. The Trademark Office got back to me about two weeks ago and, as expected, identified the conflict involved with somebody attempting to register a trademark that has already been registered. Now that that has been done we can proceed with canceling their ownership. Sometimes this feels like slogging through molasses but at least something is happening.

Christian

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CZ000005

----- Original Message -----

Subject: Re: Jay Naugle?

Date: Sat, 16 Oct 2010 11:39:46 -0700

From: Jeff Naugle <[REDACTED]>

To: Christian Ziebarth <[REDACTED]>

My Uncle was always around and we depended on him for operational advice. He was on a salary but worked very little unless asked for his help/advice. Normally he only criticized our performance. He was one tough cookie! I personally owe my knowledge about this concept to him. He absolutely made a stronger and better operator!

Jeff

Sent from my iPad

On Oct 16, 2010, at 10:18 AM, Christian Ziebarth <[REDACTED]> wrote:

Did your uncle have anything to do with the chain after he sold out? Kind of seems like you were more involved with it than him after that point.

Going to try to have the funds to initiate the cancellation proceeding by around October 25th. When that goes through Del Taco will have 40 days to respond or default. Hmm, now I'm wondering if I could strategically time it so that the end of the 40 days would hit when the holiday rush is heavy. Well, I'll think about it but things will definitely be happening soon.

Christian

CZ000006

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **PETITIONER'S PRODUCTION OF DOCUMENTS (11-7-13)** was served upon April L. Besl, DINSMORE & SHOHL, LLP, attorney of record for the Registrant in this action by depositing one copy thereof in the United States mail, first-class postage prepaid on November 7, 2013 and addressed as follows:

April L. Besl, Esq.
DINSMORE & SHOHL, LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202

/Kelly K. Pfeiffer/ _____
Kelly K. Pfeiffer
AMEZCUA-MOLL & ASSOCIATES, P.C.
Lincoln Professional Center
1122 E. Lincoln Ave., Suite 203
Orange, CA 92865
Attorney for Petitioner CHRISTIAN M. ZIEBARTH

APPENDIX A

**PETITIONER'S RESPONSES TO DEL TACO'S OBJECTIONS TO
PETITIONER'S TESTIMONY AND EVIDENCE; AND PETITIONER'S
RESPONSE/REPLY TO DEL TACO'S OBJECTIONS/RESPONSES TO
PETITIONER'S MOTIONS TO STRIKE/OBJECTIONS**

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

In the Matter of Registration No. 1043729
Date of Registration: July 13, 1976

CHRISTIAN M. ZIEBARTH
Petitioner,
v.
DEL TACO, LLC
Registrant.

Cancellation No.: 92053501

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

**PETITIONER'S RESPONSES TO DEL TACO'S OBJECTIONS TO PETITIONER'S TESTIMONY
AND EVIDENCE**

Petitioner herein responds to Del Taco's Objections to Petitioner's Testimony and Evidence ("Del Taco's Objections") as follows:

I. STATEMENTS REGARDING BARBARA CARUSO

Del Taco's Objections allege that Petitioner's testimony regarding his conversations with Ms. Caruso was offered for the truth of the matter asserted, "namely, that Ms. Caruso supported his ideas for Del Taco's NAUGLES mark and had reached out to Del Taco on his behalf." Del Taco's Objections, p. i. However, Petitioner is not offering this evidence for the truth of the matter asserted. Whether Ms. Caruso truthfully supported Petitioner's ideas and whether she had truthfully reached out to Del Taco are immaterial, and therefore, this testimony does not fall under Federal Rule of Evidence 801(c).

Petitioner offers testimony regarding these conversations simply to establish a time line as to when he began conceiving of his idea to open his own NAUGLES restaurants. By offering testimony that he was in contact with Ms. Caruso as early as 2008 regarding use of the mark NAUGLES, Petitioner bolsters his assertion that he began forming a plan to begin a NAUGLES venture long before he filed his application to register the NAUGLES mark, thereby bolstering his ability to establish his standing in this proceeding. Whether Ms. Caruso actually supported his idea or actually reached out to Del Taco is immaterial, because it has no bearing on any issue relevant to this case and does not speak to any relevant fact that Petitioner is

seeking to establish. Because this testimony is being offered solely for the purpose of establishing that Petitioner and Ms. Caruso were in contact as early as 2008 and are not being offered to prove the truth of the matters asserted therein, this testimony should be allowed because it does not fall under Federal Rule of Evidence 801(c).

II. STATEMENTS REGARDING JEFF NAUGLE

Petitioner's testimony and documentary evidence regarding his meetings and emails with Jeff Naugle go toward establishing Petitioner's state of mind prior to filing his trademark application and, as such, constitute an exception to the hearsay rule under Federal Rule of Evidence 803(3). Most conversations and emails between Petitioner and Jeff Naugle that have been put into evidence took place prior to the time that Petitioner filing his intent-to-use trademark application. Petitioner's state of mind during that time frame is relevant, because it helps Petitioner establish that he had a good-faith intent to use the NAUGLES mark prior to filing that application. As such, because Petitioner's testimony and documentary evidence regarding his meetings and emails with Jeff Naugle establish Petitioner's state of mind, they constitute an exception to the hearsay rule and are permitted under Federal Rule of Evidence 803(3).

In the alternative, to the extent that the Board adopts the position that this evidence is hearsay that does not fall within an exception, Petitioner respectfully requests that the evidence still be considered admissible as not constituting hearsay, because it is not being offered for the truth of the matter asserted, "namely, that Mr. Jeff Naugle will provide financing, has suggested locations, and will provide recipes to support his future infringing venture." Del Taco's Objections, p. ii. Instead, it is being offered simply to illustrate the existence of records of communication between Petitioner and Jeff Naugle during the relevant time frame, much of which pre-dates his filing of his application.

Petitioner's offered testimony and documents also go toward establishing a time line as to when he began conceiving of his the idea to open his own NAUGLES restaurants. Petitioner's testimony and emails establish 1) that he was in contact with Jeff Naugle as early as 2009 and 2010 regarding use of the NAUGLES mark, and 2) that he began forming a plan to begin a NAUGLES venture and took steps to make it a reality prior to filing his trademark application. In turn, this bolsters Petitioner's ability to establish his standing in

this proceeding. Because this testimony is not being offered to prove the truth of the matters asserted therein, this testimony should be allowed because it does not fall under Federal Rule of Evidence 801(c).

III. STATEMENTS REGARDING JOHN JOSEPH NAUGLE

Petitioner's testimony regarding his conversations with John Joseph Naugle goes toward establishing Petitioner's state of mind and, as such, constitutes an exception to the hearsay rule under Federal Rule of Evidence 803(3). While these conversations between Petitioner and John Joseph Naugle did not take place prior to the time Petitioner filed his application, they did take place contemporaneously to that time, as well as prior to the time when he filed his petition to cancel. Petitioner's state of mind during that time frame is relevant, because it helps Petitioner establish that he had a good-faith intent to use the NAUGLES mark. In addition, the testimony helps bolster Petitioner's assertion that he was taking multiple, concrete steps to get his NAUGLES venture off the ground, which included reaching out to multiple members of the original Naugle family. As such, because Petitioner's testimony regarding his conversations with John Joseph Naugle goes toward establishing Petitioner's state of mind, they constitute an exception to the hearsay rule and are permitted under Federal Rule of Evidence 803(3).

In the alternative, to the extent that the Board adopts the position that this evidence is hearsay that does not fall within an exception, Petitioner respectfully requests that the evidence still be considered admissible as not constituting hearsay, because it is not being offered for the truth of the matter asserted, namely, that John Joseph Naugle will provide "support" and "recipes." Del Taco's Objections, p. iii. Instead, it is being offered simply to illustrate the existence of records of communication between Petitioner and John Joseph Naugle during the relevant time frame. Petitioner offers the testimony to 1) corroborate his assertions that he reached out to multiple members of the Naugle family in an effort to further his NAUGLES venture, and 2) to lend credence to his established timeline of when he began taking concrete steps to make his NAUGLES venture a reality. Because this testimony is being offered for the purpose of corroborating Petitioner's assertions that he was in contact with multiple members of the Naugle family regarding use of the NAUGLES mark, adds to his timeline establishing when this contact was made, and is

not being offered to prove the truth of the matter asserted therein, this testimony should be allowed because it does not fall under Federal Rule of Evidence 801(c).

IV. STATEMENTS REGARDING BILL NAUGLE

Petitioner's testimony regarding conversations and emails with Bill Naugle goes toward establishing Petitioner's state of mind and, as such, constitutes an exception to the hearsay rule under Federal Rule of Evidence 803(3). While these conversations and emails between Petitioner and Bill Naugle did not take place prior to the time that Petitioner filed his application, they did take place contemporaneously to that time. Petitioner's state of mind during that time frame is relevant, because it helps Petitioner establish that he had a good-faith intent to use the NAUGLES mark. In addition, the testimony helps bolster Petitioner's assertion that he was taking multiple, concrete steps to get his NAUGLES venture off the ground, which included reaching out to multiple members of the original Naugle family. As such, because Petitioner's testimony regarding his conversations with John Joseph Naugle goes toward establishing Petitioner's state of mind, they constitute an exception to the hearsay rule and are permitted under Federal Rule of Evidence 803(3).

In the alternative, to the extent that the Board adopts the position that this evidence is hearsay that does not fall within an exception, Petitioner respectfully requests that the evidence still be considered admissible as not constituting hearsay, because it is not being offered for the truth of the matter asserted, namely, that Bill Naugle will provide support, recipes, and possibly a website. Del Taco's Objections, p. iii. Petitioner offers testimony regarding his conversations and emails with Bill Naugle, to show that a record exists to corroborate that he was in contact with Bill Naugle during the relevant time frame. It also corroborates Petitioner's assertions that he reached out to multiple members of the Naugle family in an effort to further his NAUGLES venture. This evidence also lends credence to Petitioner's established timeline of when he began taking concrete steps to make his NAUGLES venture a reality. Because this evidence is not being offered to prove the truth of the matter asserted therein, this testimony should be allowed because it does not fall under Federal Rule of Evidence 801(c).

V. PETITIONER’S TESTIMONY REGARDING INTERACTIONS WITH WILLIAM “BILL” ODELL ARE PROPER AND WERE NOT PROHIBITED BY THE BOARD.

Del Taco mischaracterizes the Board’s August 12, 2013 (Doc. 49) ruling and gives an inaccurate description of the testimony being offered.

On August 12, 2013, the Board ruled, “Respondent’s motion to preclude the testimony of Mr. Odell is granted to the extent that **petitioner may not take testimony of Mr. Odell.**” Doc. 49, p. 10. Petitioner has offered no testimony from Mr. Odell. Petitioner has not even offered documentary evidence in the form of emails between Mr. Odell and himself. The only thing Petitioner offered was his own testimony limited to one paragraph in his affidavit which simply recounts that Mr. Odell was one of the first individuals with whom he discussed his NAUGLES venture and recounts that Mr. Odell accompanied him to his first meeting with Jeff Naugle on February 13, 2010, a meeting corroborated by a page taken out of Petitioner’s personal calendar wherein he had recorded that he drove to Visalia with Mr. Odell to meet with Jeff Naugle. Ziebarth Affidavit, ¶ 8, Exhibit F.

Del Taco’s Objections describe Petitioner’s testimony on this point inaccurately. Del Taco asserts in reference to paragraph 8 of Petitioner’s affidavit, “Petitioner provides testimony to at least five conversations with Mr. O’Dell/sic/ . . .” Del Taco’s Objections, p. iv. In reality, Petitioner did not provide testimony to at least five conversations; he simply stated that he had at least five conversations. Petitioner’s affidavit states, “I had at least 5 conversations with Mr. Odell regarding my desire to use the mark NAUGLES myself.” Ziebarth Affidavit, ¶ 8.

Given that Petitioner has not offered any testimony from Mr. Odell, in compliance with the Board’s August 12, 2013 order, this objection from Del Taco is meritless and should be overruled.

VI. THE “ADIOS TO NAUGLES” ORANGE COUNTY REGISTER NEWSPAPER ARTICLE IS A “PRINTED PUBLICATION” UNDER TRADEMARK RULE 2.122(e).

Del Taco’s Objections mischaracterize the Orange County Register Newspaper article “Adios to Naugles” as “internet evidence.” Del Taco’s Objections, p. iv. This newspaper article is properly submitted under a Notice of Reliance in accordance with Trademark Rule 2.122(e) because it falls squarely within the

category of “[p]rinted publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding.” Trademark Rule 2.122(e). Further, the copy of the article provided was “an electronically generated document which is the equivalent of the printed publication or relevant portion” taken directly from LexisNexis, which is a specifically authorized source. T.B.M.P. § 704.08(a) (“ . . . for example, by a printout from the NEXIS computerized library of an article published in a newspaper or magazine of general circulation”). Del Taco’s objection to this article is meritless and should be overruled.

VII. PETITIONER’S OPINION TESTIMONY IS PROPER UNDER FRE 701.

Del Taco objects to all opinion testimony given by Petitioner regarding his opinions on Del Taco’s abandonment of the NAUGLES mark. Del Taco’s Objections, p. v. Petitioner has never claimed to have any “specialized knowledge” of trademark law nor is he being presented as an expert in this proceeding. Petitioner’s testimony regarding Del Taco’s abandonment of the NAUGLES mark is “rationally based on [his] personal perception” and is helpful to the Board, because it constitutes Petitioner’s understanding about the legal concept of abandonment which is based on his own “personal perceptions” from conducting his own online research. Petitioner’s offered testimony illustrates his understanding of what he believes the law to be and also establishes why he felt filing this petition to cancel was proper under the law.

Petitioner recognizes that he is commenting on what he understands the ultimate determination of this case should be, but is confident that the Board sees the distinction between his testimony and that which would be asserted by an expert. What Petitioner has provided is an allowable means of giving his opinion under Federal Rule of Evidence 701, because it is not being offered to “interpret statutes or give legal opinions,” and his testimony is not being offered as an authority on trademark law based on “specialized knowledge.” As such, Del Taco’s objection should be overruled.

VIII. DEL TACO’S OBJECTION REGARDING TESTIMONY BASED ON EVIDENCE NOT DISCLOSED.

Del Taco takes issue with testimony provided by Petitioner which states, “I first became acquainted with Jeff Naugle after he left a comment on my blog asking me to contact him on or about September 8, 2009; I subsequently contacted him.” Ziebarth Aff., ¶ 9. Petitioner acknowledges the oversight of not providing the referenced blog post and respectfully apologizes to the Board and/or Del Taco for any inconvenience it may have caused.

That being said, Petitioner contends that how he became acquainted with Jeff Naugle is immaterial to the ultimate decision before the Board. There is sufficient evidence in the record to provide support for the fact that Petitioner and Jeff Naugle have an ongoing relationship which dates back prior to the time when Petitioner filed his trademark application. How the relationship actually began is of no consequence. As such, Petitioner contends that this objection by Del Taco concerns a fact that is immaterial to the ultimate decision the Board has to make in this proceeding.

IX. DEL TACO’S OBJECTION REGARDING THE LACK OF PRODUCTION OF ADDITIONAL EMAILS IS WITHOUT MERIT.

Del Taco’s objection and allegation that Petitioner offered testimony regarding Jeff Naugle based on documents and evidence that was not disclosed in violation of the Board’s December 12, 2012 order is without merit.

Del Taco falsely alleges that Petitioner withheld documents in bad-faith that were discovered to exist during the cross-examination of Petitioner, then used them and their contents to support his case. Del Taco has not recounted the facts accurately and, to prevent them from being taken out of context, Petitioner offers the full set of facts, sworn to under penalty of perjury by his counsel, to put things back into their proper context so that the Board’s ultimate ruling is not clouded by this inappropriate accusation.

During the live cross-examination of Petitioner on October 28, 2013, Petitioner’s counsel, Kelly Pfeiffer, learned for the first time while Petitioner was testifying that he still might possess additional

emails between Jeff Naugle and himself that had not been produced but may be relevant to this proceeding. Declaration of Kelly K. Pfeiffer, filed concurrently with Petitioner's Reply Brief ("Pfeiffer Decl."), ¶ 4. Ms. Pfeiffer is the third counsel to represent Petitioner during the 4-year span of this proceeding. Pfeiffer Decl., ¶ 5. Because discovery closed on August 22, 2012 and Ms. Pfeiffer did not appear until January 23, 2013, she was unable to assist with conducting and producing discovery in this case. Pfeiffer Decl., ¶ 5. After Petitioner's cross-examination, Ms. Pfeiffer instructed Petitioner to make a thorough examination of his records to determine whether additional responsive documents were within his possession. Pfeiffer Decl., ¶ 6. On November 5, 2013, Petitioner sent to Ms. Pfeiffer six pages of emails, four being emails between Barbara Caruso and Petitioner attempting to set up a meeting between Petitioner and Mr. Chillingworth, and two being emails between Jeff Naugle and Petitioner, a few dated February 9, 2010, wherein Mr. Naugle confirmed that he has original Naugles recipes, that Del Taco knew he was using said recipes in his own restaurant but did nothing about it, and wherein Petitioner wrote, "Getting ready to come up on Saturday," corroborating Petitioner's testimony and documentation that he had a meeting with Jeff Naugle on February 10, 2010. Pfeiffer Decl., ¶ 7; see also Ziebarth Aff., ¶ 9, Ex. F. Ms. Pfeiffer had never seen nor been told about the existence of these emails prior to this time. Pfeiffer Decl., ¶ 7.

The very next day on November 6, 2013, Rose Amezcua-Moll, partner at Ms. Pfeiffer's firm, and Ms. Pfeiffer called Del Taco's counsel April Besl and Karen Gaunt and explained the situation honestly and bluntly. Ms. Pfeiffer promised to turn over the emails within 24 hours. Pfeiffer Decl., ¶ 8. Ms. Pfeiffer told them that she understood that they would need time to evaluate these six pages to determine whether they thought anything else needed to be addressed and, after their review, to the extent they took issue with the documents, she invited a conversation on any issues they may have. Pfeiffer Decl., ¶ 8. Ms. Pfeiffer went out of her way to stress that she was open-minded to communication between the parties as a method of working this out, and she wanted to address any concerns of theirs that may exist. Ms. Pfeiffer's goal was to remedy the situation as quickly and easily possible. Pfeiffer Decl., ¶ 8.

On November 7, 2013, Ms. Pfeiffer sent a follow-up letter to Ms. Besl and Ms. Gaunt, recounting their conversation from the day prior and including the six pages of emails she had promised to produce. Pfeiffer Decl., ¶ 9, Ex. A. Ms. Pfeiffer's November 7th letter specifically requested, "[W]e respectfully request that you confirm with us one way or another if you take issue with the enclosed, additional documents so we can respond accordingly." Pfeiffer Decl., ¶ 10, Ex. A, p. 2. Thereafter, neither Ms. Besl nor Ms. Gaunt ever conveyed to Ms. Pfeiffer that they took issue with those six pages of emails. Pfeiffer Decl., ¶ 11.

Ms. Pfeiffer and her firm made the professional and ethical decision in the interest of fairness not to introduce these six pages of emails into evidence in this proceeding. Pfeiffer Decl., ¶ 12. **Petitioner has not used these emails nor referenced them or their contents in any way.** Pfeiffer Decl., ¶ 12. The first time these emails have been referenced in this proceeding was by Del Taco in its Brief and Objections. Pfeiffer Decl., ¶ 12. After waiving its opportunity to address any issues it had with these emails by failing to engage Ms. Pfeiffer in discussion which she openly invited 11 months ago, Del Taco is now using these emails to cloud the issues and assert a meritless objection. Pfeiffer Decl., ¶ 13.

As evidenced above, Del Taco has not given an accurate nor full account of the above-discussed events, and has, instead, presented them out of context. Pfeiffer Decl., ¶ 13. This complete set of facts allows things to be put back into their proper context so that the Board's ultimate ruling is not clouded by this inappropriate accusation. Pfeiffer Decl., ¶ 13.

In short, Petitioner has not violated any order by the Board, and, as evidenced above, and Del Taco's objection is meritless because **Petitioner has not introduced the emails in question nor offered any testimony regarding their contents.** As such, Del Taco's objection should be overruled.

**PETITIONER'S RESPONSE/REPLY TO DEL TACO'S OBJECTIONS/RESPONSES TO
PETITIONER'S MOTIONS TO STRIKE/OBJECTIONS**

1. PETITIONER'S LABELS ARE IMMATERIAL.

Del Taco objects to the fact that Petitioner labeled some of his objections to Del Taco's evidence as Motions to Strike. Petitioner respectfully asserts that the labels for his objections are immaterial. As illustration, should the Board see fit to sustain any of Petitioner's "objections," the outcome would be the preclusion of the cited evidence. Should the Board see fit to grant any of Petitioner's "Motions to Strike," the outcome would be the preclusion of the cited evidence. Regardless of Petitioner's label used to object to Del Taco's evidence, the practical effect and outcome would be the same: the evidence would be deemed admitted or excluded.

Further, the Federal Rules of Civil Procedure dictate that the label is less important than the underlying facts, and that pleadings should be construed in the interest of fairness and justice. FRCP 8(e) ("Pleadings must be construed so as to do justice"). As such, should the Board agree with Del Taco that Petitioner presented his objections via an improper format (i.e., as motions to strike), Petitioner respectfully requests that the Board look beyond the "labels" and rule on Petitioner's objections to the cited evidence based on the facts. In the alternative, Petitioner respectfully requests that the Board convert his "Motions to Strike" to "Objections" to the cited evidence, with said "Objections" being based on all of the case law, statutes and arguments containing in Petitioner's originally filed "Objections and Motions to Strike."

Respectfully submitted,

CHRISTIAN M. ZIEBARTH

By /Kelly K. Pfeiffer./
Attorney for Petitioner
Kelly K. Pfeiffer

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing:

1. **PETITIONER'S REPLY TO DEL TACO'S OPPOSITION/TRIAL BRIEF IN SUPPORT OF HIS PETITION FOR CANCELLATION (PUBLIC-REDACTED);**
2. **DECLARATION OF KELLY K. PFEIFFER IN SUPPORT THEREOF; AND**
3. **APPENDIX A: PETITIONER'S RESPONSES TO DEL TACO'S OBJECTIONS TO PETITIONER'S TESTIMONY AND EVIDENCE; AND PETITIONER'S RESPONSE/REPLY TO DEL TACO'S OBJECTIONS/RESPONSES TO PETITIONER'S MOTIONS TO STRIKE/OBJECTIONS.**

was served upon April L. Besl, DINSMORE & SHOHL, LLP , attorney of record for the Registrant in this action by depositing one copy thereof in the United States mail, first-class postage prepaid on October 13, 2014 and addressed as follows:

April L. Besl, Esq.
DINSMORE & SHOHL, LLP
255 East Fifth Street
Cincinnati, OH 45202

/Kelly K. Pfeiffer/_____

Kelly K. Pfeiffer
AMEZCUA-MOLL & ASSOCIATES, P.C.
Lincoln Professional Center
1122 E. Lincoln Ave., Suite 203
Orange, CA 92865
Attorney for Petitioner CHRISTIAN M. ZIEBARTH