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Filing date: **10/18/2013**

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

Proceeding	92056067
Party	Plaintiff Ava Ruha Corporation dba Mother's Market & Kitchen
Correspondence Address	STEPHEN Z VEGH STETINA BRUNDA GARRED & BRUCKER 75 ENTERPRISE, SUITE 250 ALISO VIEJO, CA 92656 UNITED STATES opposition@stetinalaw.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Stephen Z. Vegh
Filer's e-mail	opposition@stetinalaw.com
Signature	/Stephen Z. Vegh/
Date	10/18/2013
Attachments	Motion.File.Second.Amended.Petition.pdf(657902 bytes) Decl.SZV.Second.Motion.Amend.pdf(506723 bytes) EXHIBIT A.DECL.SZV.pdf(398227 bytes) EXHIBIT B.DECL.SZV.pdf(104592 bytes) EXHIBIT C.DECL.SZV.pdf(68046 bytes) Exhibit 1.pdf(39851 bytes) Exhibit 2.pdf(103723 bytes) Exhibit 3.pdf(2121480 bytes) Exhibit.4.September 11 2008 ROA_Part1.pdf(1987641 bytes) Exhibit.4.September 11 2008 ROA_Part2.pdf(1959598 bytes) Exhibit.4.September 11 2008 ROA_Part3.pdf(1774741 bytes) Exhibit.4.September 11 2008 ROA_Part4.pdf(373940 bytes) Exhibit.5.April 15 2009 ROA.pdf(5799969 bytes) Exhibit 6.pdf(160297 bytes) Exhibit.7.March 11 2008 OA.pdf(3764065 bytes) Exhibit.8.September 11 2008 ROA_Part1.pdf(4187596 bytes) Exhibit.8.September 11 2008 ROA_Part2.pdf(1856980 bytes) Exhibit.9.April 15 2009 ROA.pdf(5798625 bytes) Exhibit 10.pdf(160620 bytes)

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

In the Matter of Trademark Registration No. 3,675,027

Ava Ruha Corporation dba Mother's Market & Kitchen,) Cancellation Nos.:
)
) 92056067 for Registration No. 3675027
Petitioner,) For the Mark MOTHER'S (stylized)
)
vs.) And
)
Mother's Nutritional Center, Inc.,) 92056080 for Registration No. 3675056
) For the Mark MOTHER'S NUTRITIONAL
Respondent.	CENTER

**PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET &
KITCHEN'S MOTION FOR LEAVE TO FILE A SECOND AMENDED AND
CONSOLIDATED PETITION FOR CANCELLATION ADDING AN
ADDITIONAL REGISTERED MARK SUPPORTING ITS CLAIMS**

Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen (hereinafter "Mother's") hereby moves pursuant to TBMP Rule 507.01 and Fed. R. Civ. P. 15(a) for leave to file a Second Amended and Consolidated Petition for Cancellation to add an additional registered mark supporting the basis of its claims against Respondent Mother's Nutritional Center, Inc. (hereinafter "MNC").

According to Fed. R. Civ. P. 15(a), "a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Pleadings in an opposition

and/or cancellation proceeding may be amended in the same manner and to the same extent as in a civil action in a United States District Court. TBMP Rule 507.01; 37 C.F.R. §2.107; and §2.115.

Courts have interpreted Fed. R. Civ. P. 15 with extraordinary liberality. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). The Board also liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate established law or be prejudicial to the rights of the adverse party or parties. TBMP Rule 507.01; *Polaris Industries v. DC Comics*, 59 USPQ2d 1789 (TTAB 2001). In fact, a denial of a party's request to amend its pleadings must include a finding of substantial prejudice to one or more parties affected by the request. *YNCLAN v. Department of Airforce*, 943 F.2d 1388, 1391 (5th Cir. 1991).

On or about January 11, 2012, Mother's filed an application for registration of the word mark MOTHER'S MARKET & KITCHEN. The Trademark Office issued Registration No. 4,351,088 for this mark on or about June 11, 2013. Mother's filed separate cancellation actions to the MOTHER'S NUTRITIONAL CENTER and MOTHER'S service marks on or about August 21, 2012, approximately ten months before the Trademark Office approved the registration of the MOTHER'S MARKET & KITCHEN word mark. As such, at the time of Mother's filing of its initial Petitions for Cancellation, the MOTHER'S MARKET & KITCEHN word mark could not have served as the basis for Petitioner's claims of likelihood of confusion and dilution.

On or about February 14, 2013, the Trademark Office consolidated Mother's Cancellation No. 92056067 with Cancellation No. 92056080, the former being

designated as the parent proceeding by the Board.

On or about October 10, 2013, Mother's counsel sent a stipulated request to MNC's counsel regarding the filing of Mother's Second Amended and Consolidated Petition for Cancellation that seeks to add the MOTHER'S MARKET & KITHCEN word mark registration as a basis for Mother's consolidated claims. (Vegh Decl., ¶2, Ex. "A".)

On October 15, 2013, Mother's counsel again followed up with MNC's counsel in this regard. At such time, MNC's counsel confirmed MNC would not stipulate to the filing of the Second Amended and Consolidated Petition on the grounds that its inclusion would be irrelevant because the registration issued after the issuance of the MOTHER'S NUTRITIONAL CENTER and MOTHER'S registrations. (Vegh Decl., ¶¶3-4, Ex. "A".)

The date of first use of this newly registered mark is September 19, 1978. (Vegh Decl., Ex. "B".) Therefore, this mark like Mother's initially-pleaded MOTHER'S MARKET & KITCHEN stylized mark, enjoys priority over MNC's marks and serves as a separate basis for Petitioner's claims of likelihood of confusion and dilution.¹

MNC has not and would not be prejudiced by any delay in amending these pleadings, as it has ample time to conduct discovery concerning this mark (discovery does not close until November 8, 2013). Furthermore, Mother's counsel is amenable to extending the discovery cut-off date in these proceedings so that additional time may be given to conduct additional discovery regarding Mother's new registration, to the extent

¹ Relatedly, MNC has very recently filed a motion for summary judgment on a laches defense, based on an allegedly unreasonable delay in Mother's filing of the initial Petitions to Cancel the MNC marks. The recent registration of the Mother's Market & Kitchen word mark could in and of itself serve as a basis to defeat this laches claim (apart from the several other grounds to be addressed in Petitioner's Opposition brief), as Mother's could not have asserted that mark as a basis for cancellation of the MNC marks until the Trademark Office allowed its registration.

it is necessary. (Vegh Decl., ¶6, Ex. "A").

Accordingly, Mother's submits that it has set forth more than adequate "good cause" for not having included the MOTHER'S MARKET & KITCHEN word mark in its initial Petitions to Cancel. As discussed above, there is no prejudice to MNC resulting from Mother's requested Motion for Leave to file a Second Amended and Consolidated Petition for Cancellation.

Therefore, it is respectfully requested that the Board grant Mother's Motion for Leave, thereby authorizing the filing of Mother's Second Amended and Consolidated Petition for Cancellation, attached to the concurrently filed Declaration of Stephen Z. Vegh as Exhibit "C".

A proof of service to MNC's counsel is attached hereto.

STETINA BRUNDA GARRED & BRUCKER

Dated: October 18, 2013

By: /s/Stephen Z. Vegh

Kit M. Stetina, Reg. No. 29,445

Stephen Z. Vegh, Reg. No. 48,550

75 Enterprise, Suite 250

Aliso Viejo, CA 92656

Counsel for Petitioner

PROOF OF SERVICE

State of California)
) ss.
County of Orange)

I am over the age of 18 and not a party to the within action; my business address is 75 Enterprise, Suite 250, Aliso Viejo, California 92656. On **October 18, 2013**, the attached **PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S MOTION FOR LEAVE TO FILE A SECOND AMENDED AND CONSOLIDATED PETITION FOR CANCELLATION ADDING AN ADDITIONAL REGISTERED MARK SUPPORTING ITS CLAIM** was served on all interested parties in this action by U.S. Mail, postage prepaid, at the address as follows:

Rod S. Berman
Jessica C. Bromall
Jeffer Mangels Butler & Marmaro LLP
1900 Avenue of the Stars
7th Floor
Los Angeles, CA 90067

Executed on **October 18, 2013** at Aliso Viejo, California. I declare under penalty of perjury that the above is true and correct. I declare that I am employed in the office of STETINA BRUNDA GARRED & BRUCKER at whose direction service was made.



Tara Hamilton

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

In the Matter of Trademark Registration No. 3,675,027

Ava Ruha Corporation dba Mother's Market & Kitchen,) Cancellation Nos.:
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vs.) And
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Mother's Nutritional Center, Inc.,) 92056080 for Registration No. 3675056
) For the Mark MOTHER'S NUTRITIONAL
Respondent.	CENTER

**DECLARATION OF STEPHEN Z. VEGH IN SUPPORT OF PETITIONER AVA
RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S MOTION
FOR LEAVE TO FILE A SECOND AMENDED AND CONSOLIDATED
PETITION FOR CANCELLATION ADDING AN ADDITIONAL REGISTERED
MARK SUPPORTING ITS CLAIMS**

I, Stephen Z. Vegh, declare as follows:

1. I am an attorney duly admitted to practice law before all Courts in the State of California, including the United States District Court for the Central District of California. I am also admitted to practice before the United States Patent and Trademark Office with Registration No. 48,550. I am one of the attorneys of record for Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen (hereinafter "Mother's") in the above-referenced matter. I have personal knowledge of the facts stated herein and if

called upon as a witness, I could and would competently testify to the below facts which are personally known to me.

2. On or about October 10, 2013, I forwarded to Respondent Mother's Nutritional Center, Inc.'s (hereinafter "MNC") counsel, Jessica Bromall, a correspondence requesting that MNC stipulate to the filing of Mother's Second Amended and Consolidated Petition for Cancellation to include as a basis for its claims Mother's newly issued registration no. 4,351,038. My email included Mother's proposed Joint Stipulation to file a Proposed Second Amended and Consolidated Petition for Cancellation along with the proposed Second Amended Petition to Cancel. Attached hereto as Exhibit "A" is a true and correct copy of my correspondence to Ms. Bromall and proposed Joint Stipulation for Mother's to file a Second Amended and Consolidated Petition for Cancellation.

3. On or about October 15, 2013, I again followed up with Ms. Bromall by email to determine whether MNC would stipulate to the filing of Mother's proposed amended pleading. Attached hereto as Exhibit "A" is a true and correct copy of this correspondence.

4. Also on October 15, 2013, Ms. Bromall responded that MNC would not agree to the stipulation on the grounds that it was irrelevant to the proceeding because the registration issued after the date of registration for the MNC marks that are the subject of Mother's cancellation actions.

5. At the time Mother's filed its initial Petitions to Cancel on August 21, 2012, the Trademark Office had not yet approved the registration of the Mother's Market & Kitchen word mark. In fact, it was not until June 11, 2013 that the Trademark Office

issued registration no. 4,351,038 for the Mother's Market & Kitchen word mark, about 1.5 years after January 11, 2012 filing date for this trademark application. Attached hereto as Exhibit "B" is a true and correct copy of the recently issued Mother's Market & Kitchen trademark registration.

6. MNC has until November 8, 2013 (the current discovery cut-off date) to propound written discovery and/or conduct depositions regarding Mother's newly registered word mark. In my October 10, 2013 email to Ms. Bromall, I also stated that Mother's would not be opposed to a further extension of the discovery cut-off and other relevant deadlines in these consolidated proceedings, should MNC wish to conduct additional discovery regarding Mother's registration no. 4,351,038. Therefore, MNC cannot and will not be prejudiced in the granting of Mother's motion.

7. Attached hereto as Exhibit "C" is a true and correct copy of Mother's proposed Second Amended and Consolidated Petition for Cancellation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based upon my personal knowledge, and if called as a witness, I could and would competently testify thereto.

Executed this 18th day of October, 2013 at Aliso Viejo, California.

/s/Stephen Z. Vegh

Stephen Z. Vegh, Reg. No. 48,550

Declarant

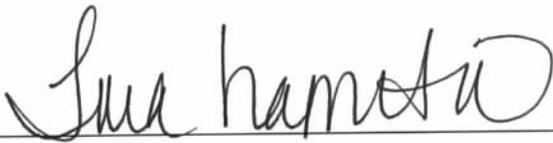
PROOF OF SERVICE

State of California)
) ss.
County of Orange)

I am over the age of 18 and not a party to the within action; my business address is 75 Enterprise, Suite 250, Aliso Viejo, California 92656. On **October 18, 2013**, the attached **DECLARATION OF STEPHEN Z. VEGH IN SUPPORT OF PETITIONER AVA RUHA CORPORATION DBA MOTHER’S MARKET & KITCHEN’S MOTION FOR LEAVE TO FILE A SECOND AMENDED AND CONSOLIDATED PETITION FOR CANCELLATION ADDING AN ADDITIONAL REGISTERED MARK SUPPORTING ITS CLAIM** was served on all interested parties in this action by U.S. Mail, postage prepaid, at the address as follows:

Rod S. Berman
Jessica C. Bromall
Jeffer Mangels Butler & Marmaro LLP
1900 Avenue of the Stars
7th Floor
Los Angeles, CA 90067

Executed on **October 18, 2013** at Aliso Viejo, California. I declare under penalty of perjury that the above is true and correct. I declare that I am employed in the office of STETINA BRUNDA GARRED & BRUCKER at whose direction service was made.



Tara Hamilton

EXHIBIT A

Tara L. Hamilton

From: Stephen Z. Vegh

To: Tara L. Hamilton

and to be filed along with the proposed Second Amended Consolidated Petition to Cancel will be the exhibits

From: Stephen Z. Vegh
Sent: Tuesday, October 15, 2013 9:41 AM
To: 'Bromall, Jessica'
Subject: RE: Stipulated Motion to Amend Petition to Cancel

Noted. To respond, the date of first use of the Mother's Market & Kitchen word mark Petitioner seeks to add to the subject Petitions to Cancel is long before the your client's stated date of first use of both the Mother's Nutritional Center and Mother's marks. As such, the registration is clearly relevant to these proceedings.

From: Bromall, Jessica [<mailto:JZB@JMBM.COM>]
Sent: Tuesday, October 15, 2013 9:33 AM
To: Stephen Z. Vegh
Cc: Berman; Silverman, Esther
Subject: RE: Stipulated Motion to Amend Petition to Cancel

Stephen - I have been out of the office. You are correct that MNC will not stipulate. Among other things, we fail to see the relevance of a registration that post-dates the issuance of the registrations that you are seeking to cancel.

Best regards,

Jessica

From: Stephen Z. Vegh [<mailto:svegh@stetinalaw.com>]
Sent: Tuesday, October 15, 2013 9:31 AM
To: Bromall, Jessica
Subject: FW: Stipulated Motion to Amend Petition to Cancel
Importance: High

Jessica,

Not having heard from you, at this point I will assume Mother's Nutritional Center refuses to stipulate to the filing of the proposed Second Amended Petition to Cancel. Please advise IMMEDIATELY if this is not the case.

Regards,

Stephen Vegh

From: Stephen Z. Vegh
Sent: Thursday, October 10, 2013 4:02 PM
To: Bromall, Jessica (JZB@JMBM.COM)
Subject: FW: Stipulated Motion to Amend Petition to Cancel

Here you go...

From: Bromall, Jessica [mailto:JZB@JMBM.COM]
Sent: Thursday, October 10, 2013 3:51 PM
To: Stephen Z. Vegh
Cc: Berman; Silverman, Esther
Subject: RE: Stipulated Motion to Amend Petition to Cancel

Stephen –

Can you send a redline showing the differences between the original petition and the amended petition?

Jessica

From: Stephen Z. Vegh [mailto:svegh@stetinalaw.com]
Sent: Thursday, October 10, 2013 3:44 PM
To: Bromall, Jessica
Cc: Tara L. Hamilton
Subject: Stipulated Motion to Amend Petition to Cancel
Importance: High

Dear Jessica,

Our client recently received a registration for the Mother's Market & Kitchen service mark in standard character form. This registration issued on June 11, 2013, well after the date of filing of Petitioner's First Amended and Consolidated Petition to Cancel your client's Mother's Nutritional Center and Mother's marks.

We have prepared a Stipulation for your consideration that allows the filing of a Second Amended and Consolidated Petition to Cancel that adds as a basis for cancellation Petitioner's new Mother's Market & Kitchen registration, no. 4,351,038. Attached hereto is the Stipulation and proposed Second Amended Petition to Cancel that cites this new registration.

Please advise by the close of business next Monday as to whether you will consent to the filing of this stipulation. Should you wish to conduct additional discovery regarding Petitioner's new registration, I would not be opposed to a further extension of the discovery cut-off and other relevant deadlines in this matter.

Also, we would like to take the depositions of Richard Flores and Gloria Martinez in the first week of November and request that you inquire as to whether they are available during that period.

Regards,

Stephen Vegh

Subject:

FW: Stipulated Motion to Amend Petition to Cancel

Attachments:

Stipulation.Second.Amend.Cancellation (fin).doc; Second Amended Consolidated Petition To Cancel.doc

Importance:

High

initial e-mail I sent to respondent's counsel which

attachments.

From: Stephen Z. Vegh

Sent: Thursday, October 10, 2013 3:45 PM

To: Bromall, Jessica (JZB@JMBM.COM)

Cc: Tara L. Hamilton

Subject: Stipulated Motion to Amend Petition to Cancel

Importance: High

Dear Jessica,

Our client recently received a registration for the Mother's Market & Kitchen service mark in standard character form. This registration issued on June 11, 2013, well after the date of filing of Petitioner's First Amended and Consolidated Petition to Cancel your client's Mother's Nutritional Center and Mother's marks.

We have prepared a Stipulation for your consideration that allows the filing of a Second Amended and Consolidated Petition to Cancel that adds as a basis for cancellation Petitioner's new Mother's Market & Kitchen registration, no. 4,351,038. Attached hereto is the Stipulation and proposed Second Amended Petition to Cancel that cites this new registration.

Please advise by the close of business next Monday as to whether you will consent to the filing of this stipulation. Should you wish to conduct additional discovery regarding Petitioner's new registration, I would not be opposed to a further extension of the discovery cut-off and other relevant deadlines in this matter.

Also, we would like to take the depositions of Richard Flores and Gloria Martinez in the first week of November and request that you inquire as to whether they are available during that period.

Regards,

Stephen Vegh

EXHIBIT B

United States of America

United States Patent and Trademark Office

MOTHER'S MARKET & KITCHEN

Reg. No. 4,351,038

Registered June 11, 2013

Int. Cls.: 35 and 43

SERVICE MARK

PRINCIPAL REGISTER

AVA RUHA CORPORATION (CALIFORNIA CORPORATION), DBA MOTHER'S MARKET & KITCHEN,
100 KALMUS DRIVE
COSTA MESA, CA 92626

FOR: RETAIL GROCERY STORE SERVICES FEATURING HEALTH FOOD PRODUCTS, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 9-19-1978; IN COMMERCE 9-19-1978.

FOR: RESTAURANT SERVICES FEATURING NATURAL AND HEALTHY FOOD PREPARATIONS, NAMELY, VEGETARIAN, GLUTEN-FREE, ORGANIC, VEGAN, LOW-CARBOHYDRATE, LOW SALT, RAW, DAIRY-FREE, POULTRY, FISH, AND LOW GLYCEMIC FOODS AND BEVERAGES, IN CLASS 43 (U.S. CLS. 100 AND 101).

FIRST USE 9-19-1978; IN COMMERCE 9-19-1978.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 1,440,871.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN", APART FROM THE MARK AS SHOWN.

SN 85-513,791, FILED 1-11-2012.

RONALD DELGIZZI, EXAMINING ATTORNEY



Sean Street Lee

Acting Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.*
See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or
reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

EXHIBIT C

1. Petitioner is and has been for many years engaged in the extensive development, advertising and marketing of restaurant and grocery services featuring natural and health products and food preparations and goods related thereto. In connection therewith, Petitioner has used in interstate commerce, the service marks MOTHER'S MARKET & KITCHEN for the aforementioned goods since long prior to Respondent's filing date and first use date of Respondent's Marks.

2. Since at least as early as May 1978, Petitioner has made use of its MOTHER'S MARKET & KITCHEN design service mark in commerce. Since at least as early as September 1978, Petitioner has made use of its MOTHER'S MARKET & KITCHEN standard character service mark in commerce. Petitioner's design and standard character MOTHER'S MARKET & KITCHEN service marks shall be collectively referred to hereinafter as the "MOTHER'S MARKET & KITCHEN Service Marks." Since adoption of the MOTHER'S MARKET & KITCHEN Service Marks, Petitioner has continuously used such mark in commerce.

3. Petitioner has expended considerable sums in exerting every effort to maintain the highest standard of quality for its retail restaurant and grocery services, and has created valuable goodwill among the purchasing public under its MOTHER'S MARKET & KITCHEN Service Marks.

4. As a result of the continuous and extensive use of the MOTHER'S MARKET & KITCHEN Service Marks by Petitioner, these marks have become and continue to function as valuable business and marketing assets of Petitioner, and serve to indicate to the trade and consuming public the retail restaurant and grocery services originating from Petitioner and its authorized representative.

5. Petitioner has obtained United States Trademark Registration No. 1,440,871, registered May 26, 1987, for the mark MOTHER'S MARKET & KITCHEN for the services set forth

in that registration. Petitioner's mark is incontestable. A copy of that registration is attached hereto as **Exhibit 1**.

6. Petitioner has obtained United States Trademark Registration No. 4,351,038, registered June 11, 2013, for the mark MOTHER'S MARKET & KITCHEN for the services set forth in that registration. A copy of that registration is attached hereto as **Exhibit 2**.

7. Petitioner enjoys a valuable reputation with the trade and consuming public as a provider of various products including but not limited to natural and health food items.

8. On or about November 29, 2007, Respondent filed its application for registration of the mark MOTHER'S (Serial No. 77/340,519).

9. On or about March 11, 2008, the Trademark Office issued an Initial Office Action to Respondent's application, citing as a basis for rejection under Trademark Act Section 2(d) Petitioner's design service mark MOTHER'S MARKET & KITCHEN. Specifically, the Examining Attorney stated that "with respect to U.S. Reg. No. 1,440,871, Registrant is using the mark with restaurant and grocery services directed toward natural and health products and food preparations. Applicant's services are 'retail grocery stores'. Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. . .with respect to all of the other cited registrations [including the MOTHER'S MARKET & KITCHEN mark], the goods are common food items that would be sold in any grocery store, including Applicant's retail grocery stores. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitation or restrictions that are not reflected therein. (Citations omitted). . . There are no limitations as to trade channels or classes of purchasers with respect to the Registrants' goods. Therefore, all are common items that would be sold in Applicant's grocery stores. Customers shopping in Applicant's grocery store would encounter food items provided by the Registrants [including Petitioner] bearing the

MOTHER'S trademark. . .Therefore, confusion as to source would be inevitable." See March 11, 2008 Office Action, attached hereto as **Exhibit 3**.

10. On or about September 11, 2008, Respondent filed a Response to the Office Action, presenting arguments attempting to demonstrate that there was no likelihood of confusion between Respondent's MOTHER'S mark and the marks cited by the Examining Attorney, including but not limited to Petitioner's MOTHER'S MARKET & KITCHEN design service mark. Specifically, with respect to the MOTHER'S MARKET & KITCHEN design service mark, Respondent stated that "the '871 Reg. for MOTHER'S MARKET & KITCHEN & DESIGN is issued in connection with 'restaurant and grocery services directed toward natural and health products and food preparations.' The '871 Reg. is *limited on its face* to 'services directed toward natural and health products and food preparations'." (Emphasis added.) See September 11, 2008 Response to Office Action, attached hereto as **Exhibit 4**.

11. Respondent's statement that Petitioner's MOTHER'S MARKET & KITCHEN design service mark is *limited* or exclusive to "natural and health products" was false and tantamount to fraud on the Trademark Office. Rather, the description of goods clearly uses the phrase "directed toward," thereby implying perhaps an emphasis but certainly not necessarily limited to or exclusive. The statement of "limitation" by Respondent was a material misrepresentation of fact offered to counter the Trademark Examining Attorney's finding that "with respect to all of the other cited registrations [including the MOTHER'S MARKET & KITCHEN], the goods are common food items that would be sold in any grocery store, including Applicant's retail grocery stores." That is, Respondent made the aforementioned misrepresentation in order to persuade the Trademark Examining Attorney that Petitioner's grocery services under the MOTHER'S MARKET & KITCHEN design service mark provided goods that would not be available for purchase in

Applicant's retail grocery stores. This was a false statement. As identified below, Petitioner provides many "common food items" under its MOTHER'S MARKET & KITCHEN Service Marks.

12. In a further Response to Office Action dated April 15, 2009, Respondent explicitly stated "A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants goods [including the MOTHER'S MARKET & KITCHEN] are available for purchase in Applicant's stores." See April 15, 2009 Response to Office Action, attached hereto as **Exhibit 5**.

13. This was a further false statement by Respondent as Petitioner's "natural and health products" include "common food items". A review of Respondent's WIC food list indicates that several items listed thereon are found in Petitioner's grocery stores, including but not limited to "carrots, tuna, instant oatmeal, milk, eggs, and peanut butter". Respondent made the false statement, that registrant's goods are not on the WIC food list with the intent to confuse and deceive the Examining Attorney. First, Petitioner's MOTHER'S MARKET & KITCHEN design service mark would not be found on the goods themselves listed on the WIC food list but rather on the storefront and related promotional materials identifying the source of Petitioner's retail grocery services. See **Exhibit 6** attached hereto. Petitioner notes that Respondent also uses its MOTHER'S mark in the same manner as Petitioner uses its MOTHER'S MARKET & KITCHEN Service Marks, namely, in the identification of Respondent's retail grocery services. Second, Petitioner's stores offer both "natural and health products" as well as "common food items" with many of the "natural and health products" themselves being "common food items".

14. On or about January 10, 2008, Respondent filed its application for registration of the mark MOTHER'S NUTRITIONAL CENTER (Serial No. 77/368,478).

15. On or about March 11, 2008, the Trademark Office issued an Initial Office Action to Respondent's application, citing as a basis for rejection under Trademark Act Section 2(d) Petitioner's design service mark MOTHER'S MARKET & KITCHEN. Specifically, the Examining Attorney stated that "with respect to U.S. Reg. No. 1,440,871, Registrant is using the mark with restaurant and grocery services directed toward natural and health products and food preparations. Applicant's services are 'retail grocery stores'. Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. . .with respect to all of the other cited registrations [including the MOTHER'S MARKET & KITCHEN mark], the goods are common food items that would be sold in any grocery store, including Applicant's retail grocery stores. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitation or restrictions that are not reflected therein. (Citations omitted). . . .There are no limitations as to trade channels or classes of purchasers with respect to the Registrants' goods. Therefore, all are common items that would be sold in Applicant's grocery stores. Customers shopping in Applicant's grocery store would encounter food items provided by the Registrants [including Petitioner] bearing the MOTHER'S NUTRITIONAL CENTER trademark. . . .Therefore, confusion as to source would be inevitable." See March 11, 2008 Office Action, attached hereto as **Exhibit 7**.

16. On or about September 11, 2008, Respondent filed a Response to the Office Action, presenting arguments attempting to demonstrate that there was no likelihood of confusion between Respondent's MOTHER'S NUTRITIONAL CENTER mark and the marks cited by the Examining Attorney, including but not limited to Petitioner's MOTHER'S MARKET & KITCHEN design service mark. Specifically, with respect to the MOTHER'S MARKET & KITCHEN mark, Respondent stated that "the '871 Reg. for MOTHER'S MARKET & KITCHEN & DESIGN is issued in connection with 'restaurant and grocery services directed toward natural and health

products and food preparations.’ The ‘871 Reg. is *limited on its face* to ‘services directed toward natural and health products and food preparations.’” (Emphasis added.) See September 11, 2008 Response to Office Action, attached hereto as **Exhibit 8**.

17. Respondent’s statement that Petitioner’s MOTHER’S MARKET & KITCHEN design service mark is *limited or exclusive to* “natural and health products” was false and tantamount to fraud on the Trademark Office. Rather, the description of goods clearly uses the phrase “directed toward”, thereby implying perhaps an emphasis but certainly not necessarily limited to or exclusive. The statement of “limitation” by Respondent was a material misrepresentation of fact offered to counter the Trademark Examining Attorney’s finding that “with respect to all of the other cited registrations [including the MOTHER’S MARKET & KITCHEN], the goods are common food items that would be sold in any grocery store, including Applicant’s retail grocery stores.” That is, Respondent made the aforementioned misrepresentation in order to persuade the Trademark Examining Attorney that Petitioner’s grocery services under the MOTHER’S MARKET & KITCHEN design service mark provided goods that could not be available for purchase in Applicant’s retail grocery stores. This was a false statement. As identified below, Petitioner provides many “common food items” under its MOTHER’S MARKET & KITCHEN Service Marks.

18. In a further Response to Office Action dated April 15, 2009, Respondent explicitly stated “A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants’ goods are on the WIC approved food list and therefore, that none of the cited registrants goods [including the MOTHER’S MARKET & KITCHEN] are available for purchase in Applicant’s stores.” See April 15, 2009 Response to Office Action, attached hereto as **Exhibit 9**.

19. This was a further false statement by Respondent as Petitioner’s “natural and health products” include “common food items”. A review of Respondent’s WIC food list indicates that

several items listed thereon are found in Petitioner's grocery stores, including but not limited to "carrots, tuna, instant oatmeal, milk, eggs and peanut butter." Respondent made the false statement that registrant's goods are not on the WIC food list with the intent to confuse and deceive the Examining Attorney. First, Petitioner's MOTHER'S MARKET & KITCHEN design service mark would not be found on the goods themselves listed on the WIC food list but rather on the storefront and related promotional materials identifying the source of Petitioner's retail grocery services. See **Exhibit 10** attached hereto. Petitioner notes that Respondent also uses its MOTHER'S NUTRITIONAL CENTER mark in the same manner as Petitioner uses its MOTHER'S MARKET & KITCHEN Service Marks, namely, in the identification of Respondent's retail grocery services. Second, Petitioner's stores offer both "natural and health products" as well as "common food items" with many of the "natural and health products" themselves being "common food items."

20. After Respondent's Responses to above-mentioned Office Actions, the Trademark Office reversed course and concluded no conflicting marks existed barring registration under Section 2(d) of the Trademark Act. But for the material misrepresentations by Respondent's representative, the Trademark Office would not have granted registrations for Respondent's Marks.

21. Respondent made these material misrepresentations to the Trademark Office knowingly with the intent to deceive the Trademark Examining Attorney concerning the scope of goods offered under the MOTHER'S MARKET & KITCHEN design service mark. Respondent made these false representations with the goal of obtaining registrations for Respondent's Marks.

22. Respondent's Marks are confusingly similar to Petitioner's MOTHER'S MARKET & KITCHEN Service Marks and their registration and use by Respondent on the goods and/or services claimed in Respondent's registrations are likely to cause confusion, deception and mistake.

23. Petitioner has also had numerous instances of confusion between the goods and services provided by Petitioner and that of Respondent.

24. Petitioner's MOTHER'S MARKET & KITCHEN Service Marks are famous with the trade and consuming public as designating Petitioner as a provider of various restaurant and grocery services, including but not limited to natural and health food items.

25. Petitioner's MOTHER'S MARKET & KITCHEN Service Marks became famous prior to Respondent's use of Respondent's Marks.

25. Respondent's use of Respondent's Marks interfere with Petitioner's use of its MOTHER'S MARKET & KITCHEN Service Marks and continued registration of Respondent's Marks by Respondent gives rise to a likelihood of dilution of the strength of Petitioner's MOTHER'S MARKET & KITCHEN Service Marks by blurring and/or tarnishment and will seriously damage Petitioner.

26. Accordingly, if Respondent's registrations are not cancelled, Petitioner will continue to suffer irreparable harm and damage.

27. On the foregoing basis, Petitioner believes it has been damaged by and will continue to be damaged by, the continued existence of Respondent's Marks.

Wherefore, Petitioner's prays for cancellation of United States Registration No. 3,675,027 and United States Registration No. 3,675,056.

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Petitioner authorizes any additional filing fees for this First Amended and Consolidated Petition for Cancellation be charged to Petitioner's deposit account.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: October 18, 2013

/s/Stephen Z. Vegh

Kit M. Stetina, Reg. No. 29,445

Stephen Z. Vegh, Reg. No. 48,550

75 Enterprise, Suite 250

Aliso Viejo, CA 92656

(949) 855-1246

Counsel for Petitioner

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EXHIBIT 1

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 1,440,871

United States Patent and Trademark Office Registered May 26, 1987

**SERVICE MARK
PRINCIPAL REGISTER**



AVA RUHA CORPORATION (CALIFORNIA CORPORATION), DBA MOTHER'S MARKET AND KITCHEN
225 EAST 17TH STREET
COSTA MESA, CA 92627

FIRST USE 5-1-1978; IN COMMERCE 5-1-1978.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN", APART FROM THE MARK AS SHOWN.

FOR: RESTAURANT AND GROCERY SERVICES DIRECTED TOWARD NATURAL AND HEALTH PRODUCTS AND FOOD PREPARATIONS, IN CLASS 42 (U.S. CLS. 100 AND 101).

SER. NO. 472,414, FILED 3-26-1984.

MARTIN MARKS, EXAMINING ATTORNEY

EXHIBIT 2

United States of America

United States Patent and Trademark Office

MOTHER'S MARKET & KITCHEN

Reg. No. 4,351,038

Registered June 11, 2013

Int. Cls.: 35 and 43

SERVICE MARK

PRINCIPAL REGISTER

AVA RUHA CORPORATION (CALIFORNIA CORPORATION), DBA MOTHER'S MARKET & KITCHEN,
100 KALMUS DRIVE
COSTA MESA, CA 92626

FOR: RETAIL GROCERY STORE SERVICES FEATURING HEALTH FOOD PRODUCTS, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 9-19-1978; IN COMMERCE 9-19-1978.

FOR: RESTAURANT SERVICES FEATURING NATURAL AND HEALTHY FOOD PREPARATIONS, NAMELY, VEGETARIAN, GLUTEN-FREE, ORGANIC, VEGAN, LOW-CARBOHYDRATE, LOW SALT, RAW, DAIRY-FREE, POULTRY, FISH, AND LOW GLYCEMIC FOODS AND BEVERAGES, IN CLASS 43 (U.S. CLS. 100 AND 101).

FIRST USE 9-19-1978; IN COMMERCE 9-19-1978.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 1,440,871.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN", APART FROM THE MARK AS SHOWN.

SN 85-513,791, FILED 1-11-2012.

RONALD DELGIZZI, EXAMINING ATTORNEY



Sean Street Lee

Acting Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or
reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

EXHIBIT 3

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)

Subject: TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004

Sent: 3/11/2008 3:40:53 PM

Sent As: ECOM107@USPTO.GOV

Attachments: [Attachment - 1](#)
[Attachment - 2](#)
[Attachment - 3](#)
[Attachment - 4](#)
[Attachment - 5](#)
[Attachment - 6](#)
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[Attachment - 35](#)

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/340519

MARK: MOTHER'S

77340519

CORRESPONDENT ADDRESS:

ROD S. BERMAN
JEFFER MANGELS BUTLER & MARMARO

LLP

1900 AVENUE OF THE STARS FL 7
LOS ANGELES, CA 90067-4308

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: MOTHER'S NUTRITIONAL
CENTER, INC.

CORRESPONDENT'S REFERENCE/DOCKET
NO:

66309-1004

CORRESPONDENT E-MAIL ADDRESS:

trademarkdocket@jmbm.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: **3/11/2008**

The assigned trademark examining attorney has reviewed the referenced application and has determined the following.

Search Results

Registration Refused – Registration of Confusingly Similar Mark Exists

Registration of the proposed mark is refused because of a likelihood of confusion with the marks in U.S. Registration Nos. 0552693, 0560717, 0581646 and others. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* See the enclosed registrations.

Principles Governing Section 2(d) Refusals

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the

potential consumer as to the source of the goods and/or services. TMEP §1207.01. The Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and/or services. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).

The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein. *See also In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984), wherein the Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard (at least in the absence of a consent agreement, which applicant has not submitted in this case).

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

Applicant has applied to register the mark "MOTHER'S", with design. The registrants are using the mark "MOTHER'S", "MOTHER'S" with design, "MAMACITA'S", translated to "mother's", "MOTHER'S COOKIES SINCE 1941" and "MOTHER'S MARKET & KITCHEN, with design.

Comparison of the Marks

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).

Applicant's proposed mark "MOTHER'S" is confusingly similar to the registrants' marks because the marks of the respective parties share the common wording "MOTHER'S". Further, the term

“MOTHER’S” is either the sole term in the registrant’s marks, or the first term and thus creates the dominant commercial impression in all the cited marks.

As a general rule, consumers are more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). The single term “MOTHER’S” in applicant’s mark is either the single term of the registrants’ marks, or the first term of the registrants’ marks.

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

The literal portions of both applicant’s mark and the registrants’ marks are identical or nearly identical in appearance, sound and meaning. The addition of the design element does not obviate the similarity between the marks in this case. *In re Shell Oil Company*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975); TMEP §1207.01(c)(ii).

Disclaimed matter is typically less significant or less dominant when comparing marks. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986). The registrant in U.S. Reg. Nos. 3287272 and 1440871 also contains descriptive material that has been disclaimed.

Finally, with respect to U.S. Reg. No. 2258873, the mark MAMACITA is translated as MOTHER’S. The English translation of the mark is identical to the applicant’s mark. According to the doctrine of foreign equivalents, an applicant may not register foreign words or terms if the English-language equivalent has been previously registered for related products or services and the consumer would be likely to translate the foreign word(s) into its English equivalent. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *In re Ithaca Industries, Inc.*, 230 USPQ 702 (TTAB 1986); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983); TMEP §1207.01(b)(vi).

Comparison of the Goods/Services

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *On-*

line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

With respect to U.S. Reg. No. 1440871, registrant is using the mark with restaurant and grocery services directed toward natural and health products and food preparations. Applicant's services are "retail grocery stores."

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. TMEP §1207.01(a)(iii).

With respect to all of the other cited registrations, the goods are common food items that would be sold in any grocery store, including applicant's retail grocery stores. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii). There are no limitations as to trade channels or classes of purchasers with respect to the registrants' goods. Therefore, all are common items that would be sold in applicant's grocery stores.

Customers shopping in applicant's grocery store would encounter food items provided by the registrants bearing the MOTHER'S trademark. Confusion as to source is likely to occur because the customers would naturally assume that the goods comprised a group of items from a house brand emanating from applicant. The marks on the food items and applicant's mark would be identical. Therefore, confusion as to source would be inevitable.

Accordingly, since there is no overriding factor to distinguish applicant's mark from the marks already registered, registration must be refused because the average purchaser would be likely to conclude that applicant's goods/services and registrants' goods/services emanate from a common source of origin. Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If applicant chooses to respond to the refusal(s) to register, then applicant must also respond to the following requirement(s).

Requirements

Mark in Specimen Does Not Match Mark in Drawing

The mark depicted on the drawing disagrees with the mark on the specimen. In this case, the drawing displays the mark as comprised of the word “MOTHER’S” and design appearing with patterning, while the specimen shows the mark as solid letters and design without the patterning. The difference may be due simply to a poor quality drawing.

The mark shown on the drawing must be a substantially exact representation of the mark as used on or in connection with the goods and/or services, as shown by the specimen. 37 C.F.R. §2.51(a); *see* C.F.R. §2.72(a)(1).

Therefore, applicant must submit one of the following:

- (1) A new drawing of the mark that agrees with the mark on the specimen but does not materially alter the original mark; 37 C.F.R. §2.72(a); TMEP §§807.14 *et seq.*; or
- (2) A substitute specimen that shows use of the mark that appears on the drawing, and the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: **“The substitute specimen was in use in commerce at least as early as the filing date of the application.”** 37 C.F.R. §2.59(a); TMEP §904.05. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c).

The following is a sample declaration under 37 C.F.R. §2.20 with a supporting statement for a substitute specimen:

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting there from, declares *that the substitute specimen was in use in commerce at least as early as the filing date of the application*; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

(Signature)

(Print or Type Name and Position)

(Date)

If applicant cannot satisfy the above requirements, applicant may amend the Section 1(a) filing basis (use in commerce) to Section 1(b) (intent to use basis), for which no specimen is required. However, should applicant amend the basis to Section 1(b), registration cannot be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. 15 U.S.C. §1051(c); 37 C.F.R. §§2.76, 2.88; TMEP Chapter 1100.

In order to amend to Section 1(b), applicant must submit the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: **“Applicant has had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the filing date of the application.”** 15 U.S.C. §1051(b); 37 C.F.R. §§2.34(a)(2), 2.35(b)(1); TMEP §806.01(b).

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney directly at the number below.

/bluken/
Bonnie Luken
Trademark Examining Attorney
Law Office 107
Phone (571)272 8807
Fax (571)273 9107

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office action should be filed using the form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

DESIGN MARK

Serial Number

71572371

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0552693

Date Registered

1952/01/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: SWEET AND SOUR
FISH. First Use: 1948/12/15. First Use In Commerce: 1948/12/15.

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE FOLLOWING COLORS: TOP AND BOTTOM
EDGES-VERTICAL AND HORIZONTAL CROSS HATCHING FOR BLACK; FIELD-SLANTING
LINES FOR GREEN; CENTER-BROKEN VERTICAL AND HORIZONTAL CROSS HATCHING
FOR YELLOW.

Filing Date

1949/01/18

Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

71575421

DESIGN MARK

Serial Number

71575421

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0560717

Date Registered

1952/07/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: BORSCHT. First
Use: 1949/02/09. First Use In Commerce: 1949/02/09.

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE COLORS YELLOW, GREEN AND BLACK.

Filing Date

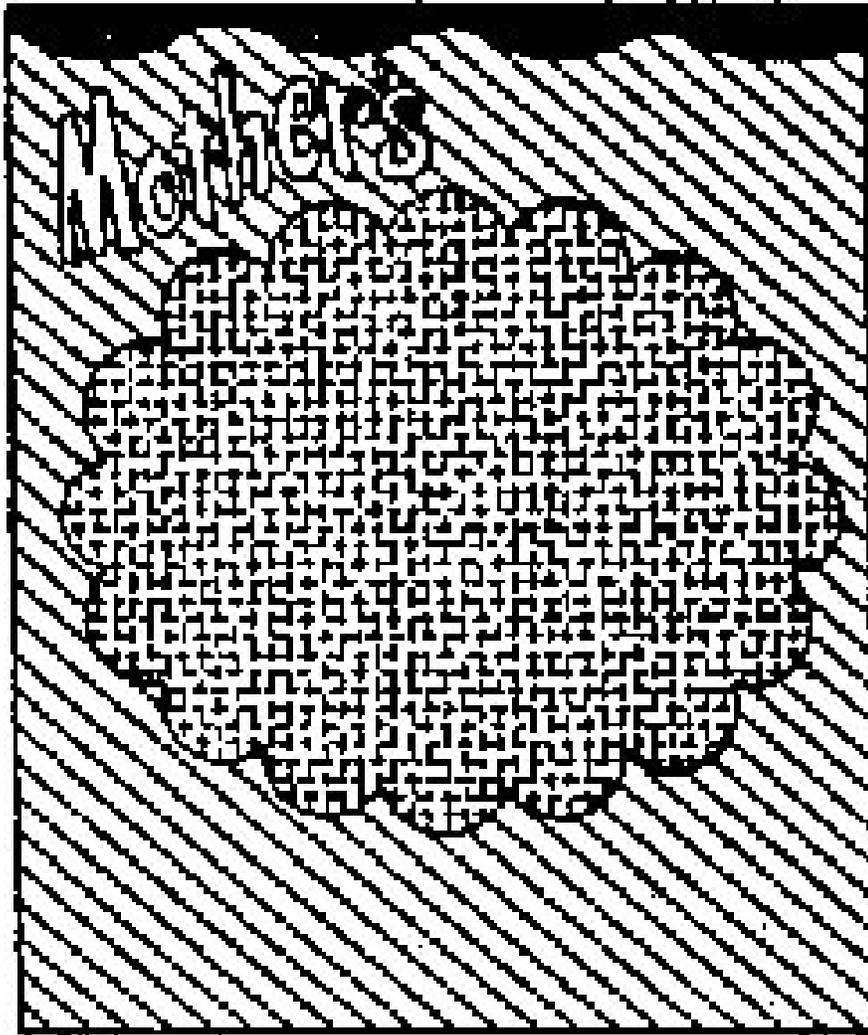
1949/03/14

Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

71640470

DESIGN MARK

Serial Number

71640470

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0581646

Date Registered

1953/10/27

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: SAUERKRAUT. First
Use: 1952/10/17. First Use In Commerce: 1952/10/17.

Prior Registration(s)

0540298;0552693;0560717;0565172

Filing Date

1953/01/07

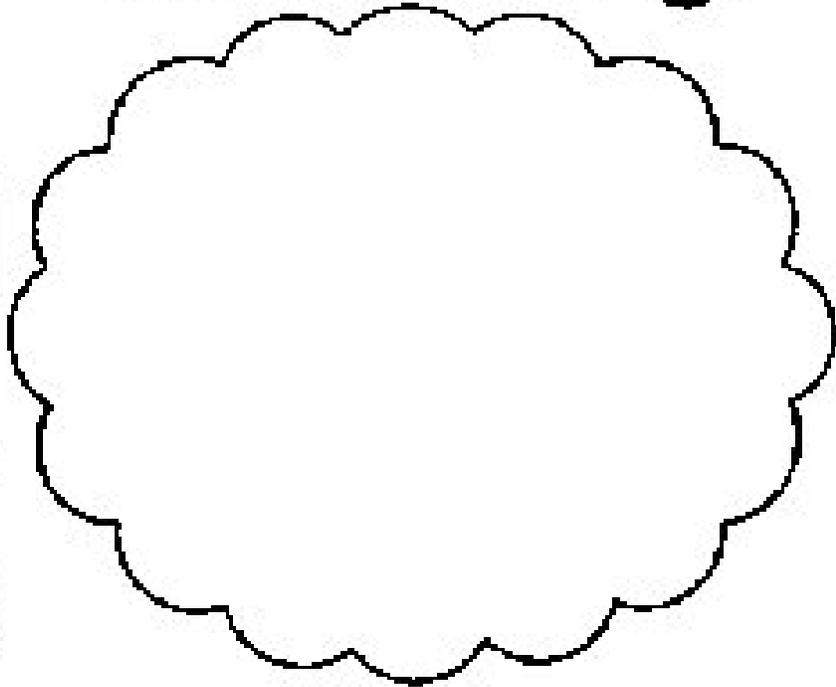
Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS

Mother's



Print: Mar 11, 2008

71642982

DESIGN MARK

Serial Number

71642982

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0589652

Date Registered

1954/05/11

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: OLEOMARGARINE.
First Use: 1953/02/13. First Use In Commerce: 1953/02/13.

Prior Registration(s)

0540298;0552693;AND OTHERS

Disclaimer Statement

THE YELLOW BACKGROUND SHOWN ON THE DRAWING IS DISCLAIMED.

Lining/Stippling Statement

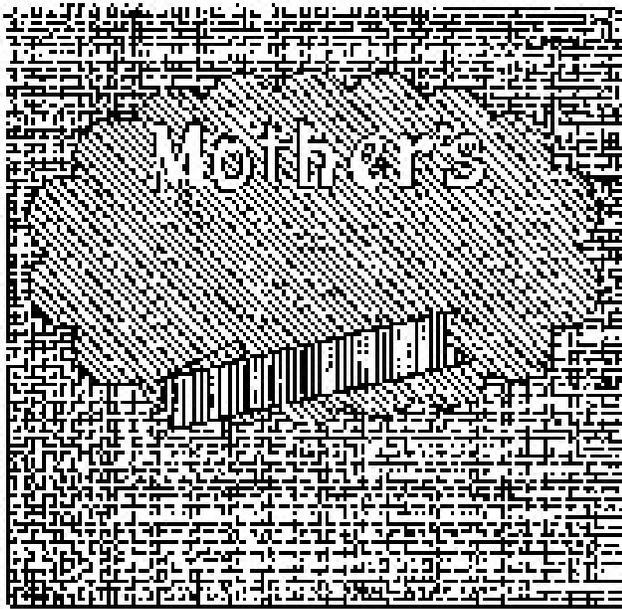
THE DRAWING IS LINED FOR THE COLORS GREEN, YELLOW, AND RED.

Filing Date

1953/03/02

Examining Attorney

UNKNOWN



Print: Mar 11, 2008

71674719

DESIGN MARK

Serial Number

71674719

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0617961

Date Registered

1955/12/20

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: MAYONNAISE AND
SALAD DRESSING. First Use: 1954/08/09. First Use In Commerce:
1954/08/09.

Prior Registration(s)

0540298;0565172;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR GREEN AND YELLOW.

Filing Date

1954/09/20

Examining Attorney

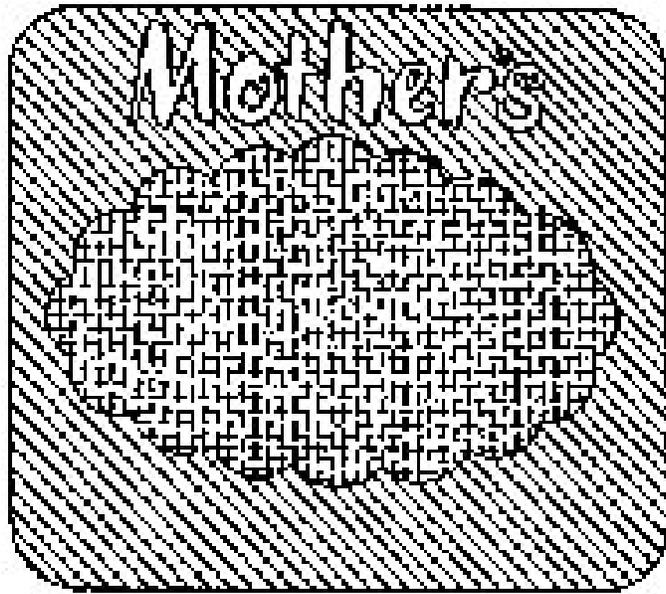
UNKNOWN

Attorney of Record

Print: Mar 11, 2008

71674719

GERALD E. HESPOS



Print: Mar 11, 2008

72129027

DESIGN MARK

Serial Number

72129027

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0739469

Date Registered

1962/10/16

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029 030. US 046. G & S: Pickles, Sliced
Pickles, Gherkins, Pickled Tomatoes, and Sweet Mixed Pickles. First
Use: 1952/04/25. First Use In Commerce: 1952/04/25.

Prior Registration(s)

0540298;0560717;AND OTHERS

Lining/Stippling Statement

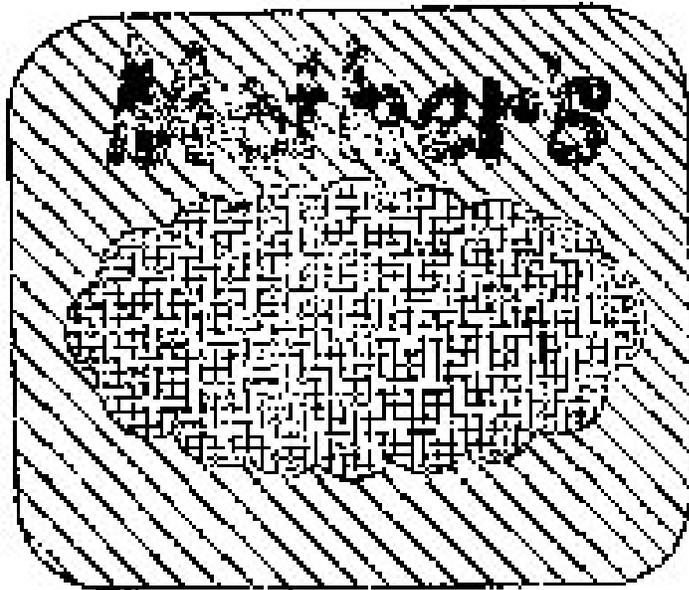
The center scalloped edge medallion is lined for yellow and the
background is lined for green in the drawing.

Filing Date

1961/10/02

Examining Attorney

UNKNOWN



Print: Mar 11, 2008

72298026

TYPED DRAWING

Serial Number

72298026

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0867634

Date Registered

1969/04/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029 031 032. US 046. G & S: GEFILTE
FISH, BORSCHT, [SWEET PEPPERS, CUCUMBER SALAD,] OLEOMARGARINE, [HOT
CHERRY PEPPERS, PICKLES,] MAYNONNAISE, [HORSE RADISH;] SCHAV
(BEVERAGE MADE FROM SOUR-GRASS, WHICH IS SORREL, WATER, SALT AND
EGGS), FISH D'OEUVRES (FISHBALLS), [SAUERKRAUT (PICKLED COUNTRY
DELUXE AND PICKLED COUNTRY CABBAGE),] AND MATZO BALLS. First Use:
1946/12/20. First Use In Commerce: 1946/12/20.

Prior Registration(s)

0540298;0777505;AND OTHERS

Filing Date

1968/05/13

Examining Attorney

UNKNOWN

Print: Mar 11, 2008

72298026

Attorney of Record

ANTHONY J. CASELLA

DESIGN MARK

Serial Number

72300879

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0862099

Date Registered

1968/12/17

Type of Mark

TRADEMARK

Register

PRINCIPAL

Concurrency

CONCURRENT USE

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

WACHOVIA CAPITAL FINANCE CORPORATION(NEW ENGLAND) , AS AGENT
CORPORATION MASSACHUSETTS ONE POST OFFICE SQUARE BOSTON MASSACHUSETTS
02109

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1967/12/02. First Use In Commerce: 1967/12/02.

Concurrent Use Statement

NOW, THEREFORE, IT IS ORDERED THAT SAID REGISTRATION BE, AND THE SAME
HEREBY IS, RESTRICTED TO THOSE STATES LYING GENERALLY WEST OF THE
MISSISSIPPI RIVER INCLUDING ALASKA, ARIZONA, ARKANSAS, CALIFORNIA,
COLORADO, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON,
SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WYOMING IN ACCORDANCE WITH
SECTION 18 OF THE TRADEMARK ACT OF 1946.

Prior Registration(s)

Print: Mar 11, 2008

72300879

0577159;0840952;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR PURPLE AND RED.

Filing Date

1968/06/20

Examining Attorney

UNKNOWN

Attorney of Record

ANTHONY B. DIEPENBROCK

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Page

Page 10

Page 10

DESIGN MARK

Serial Number

72300880

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0862100

Date Registered

1968/12/17

Type of Mark

TRADEMARK

Register

PRINCIPAL

Concurrency

CONCURRENT USE

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

WACHOVIA CAPITAL FINANCE CORPORATION(NEW ENGLAND) , AS AGENT
CORPORATION MASSACHUSETTS ONE POST OFFICE SQUARE BOSTON MASSACHUSETTS
02109

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1968/05/07. First Use In Commerce: 1968/05/07.

Concurrent Use Statement

NOW, THEREFORE, IT IS ORDERED THAT SAID REGISTRATION BE, AND THE SAME
HEREBY IS , RESTRICTED TO THOSE STATES LYING GENERALLY WEST OF THE
MISSISSIPPI RIVER INCLUDING ALASKA, ARIZONA, ARKANSAS, CALIFORNIA,
COLORADO, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OLKAHOMA, OREGON,
SOUTH DAKATO, TEXAS, UTAH, WASHINGTON AND WYOMING IN ACCORDANCE WITH
THE PROVISIONS OF SECTION 18 OF THE TRADEMARK ACT OF 1946.

Prior Registration(s)

Print: Mar 11, 2008

72300880

0577159;0840952;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR PURPLE AND RED.

Filing Date

1968/06/20

Examining Attorney

UNKNOWN

Attorney of Record

ANTHONY B. DIEPENBROCK

TYPED DRAWING

Serial Number

72433786

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1065521

Date Registered

1977/05/10

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

KELLOGG NORTH AMERICA COMPANY CORPORATION DELAWARE ONE KELLOGG SQUARE
BATTLE CREEK MICHIGAN 49016

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1946/00/00. First Use In Commerce: 1946/00/00.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United
States lying generally east of the Mississippi River including
Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana,
Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New
Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania,
Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West
Virginia and Wisconsin pursuant to Concurrent Use Proceeding Nos.
94000392 and 94002153. Concurrent Use with Application Serial Nos.
75572874 and 75070062.

Filing Date

1972/08/25

Print: Mar 11, 2008

72433786

Examining Attorney
UNKNOWN

Attorney of Record
DAVID A. HERDMAN

DESIGN MARK

Serial Number

73472414

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S MARKET & KITCHEN

Standard Character Mark

No

Registration Number

1440871

Date Registered

1987/05/26

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

AVA RUHA CORPORATION DBA MOTHER'S MARKET AND KITCHEN CORPORATION
CALIFORNIA 225 EAST 17TH STREET COSTA MESA CALIFORNIA 92627

Goods/Services

Class Status -- ACTIVE. IC 042. US 100 101. G & S: RESTAURANT AND
GROCERY SERVICES DIRECTED TOWARD NATURAL AND HEALTH PRODUCTS AND FOOD
PREPARATIONS. First Use: 1978/05/01. First Use In Commerce:
1978/05/01.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN"
APART FROM THE MARK AS SHOWN.

Filing Date

1984/03/26

Examining Attorney

MARKS, MARTIN H.

Attorney of Record

KIT M. STETINA



DESIGN MARK

Serial Number

73587697

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1422150

Date Registered

1986/12/23

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: MATZO BALLS IN
BROTH. First Use: 1963/02/05. First Use In Commerce: 1963/02/05.

Prior Registration(s)

0739469;0777505;0867634;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE COLORS GREEN AND YELLOW.

Filing Date

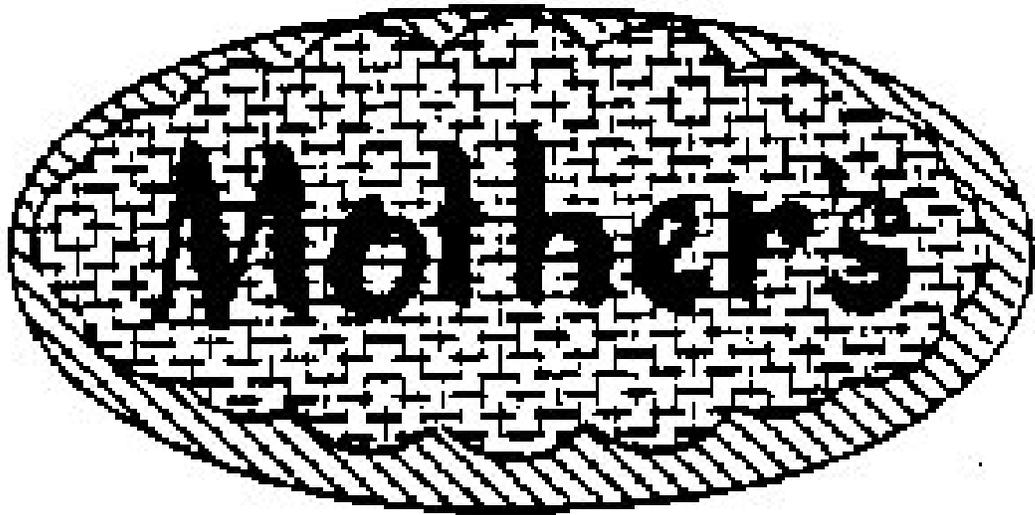
1986/03/13

Examining Attorney

PRICE, JERRY L.

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

73820569

TYPED DRAWING

Serial Number

73820569

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1584991

Date Registered

1990/02/27

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

QUAKER OATS COMPANY, THE CORPORATION NEW JERSEY QUAKER TOWER 321 NORTH CLARK STREET CHICAGO ILLINOIS 60610

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: PROCESSED HOT AND COLD CEREALS; GRAIN CAKES. First Use: 1895/07/01. First Use In Commerce: 1895/07/01.

Prior Registration(s)

0075622;0143143;0539986;1288064;AND OTHERS

Filing Date

1989/08/21

Examining Attorney

STEINMAN, KEVIN PAUL

TYPED DRAWING

Serial Number

75070062

Status

REGISTERED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

3287270

Date Registered

2007/09/04

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Mother's Cake & Cookie Co. CORPORATION CALIFORNIA 520 Lake Cook Road
Suite 520 Deerfield ILLINOIS 60015

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: cakes, cookies,
crackers and other bakery goods. First Use: 1914/06/01. First Use In
Commerce: 1914/06/01.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United
States lying generally west of the Mississippi River including,
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa,
Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New
Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah,
Washington and Wyoming pursuant to Concurrent Use Proceeding No.
94000392 and 94002153. Concurrent Registration with Registration No.
1065521.

Prior Registration(s)

0577159;0635300;0862099;0862100;AND OTHERS

Print: Mar 11, 2008

75070062

Filing Date

1996/03/11

Examining Attorney

CHOE, KELLY

Attorney of Record

Robert T. Johnson, Jr.

TYPED DRAWING

Serial Number

75395778

Status

CANCELLATION TERMINATED - SEE TTAB RECORDS

Word Mark

MAMACITA'S

Standard Character Mark

No

Registration Number

2258873

Date Registered

1999/07/06

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

CASA DE ORO FOODS LLC LTD LIAB CO DELAWARE 3701 WEST MAGNOLIA AVENUE
LOUISVILLE KENTUCKY 40211

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: Tortillas. First
Use: 1995/10/00. First Use In Commerce: 1995/10/00.

Prior Registration(s)

1075615;1829935;AND OTHERS

Translation Statement

The word "MAMACITA" is a Spanish term of endearment for "MOTHER".

Filing Date

1997/11/25

Examining Attorney

UNKNOWN

Attorney of Record

JEFFREY E. FINE

Print: Mar 11, 2008

75453614

DESIGN MARK

Serial Number

75453614

Status

SECTION 8 & 15-ACCEPTED AND ACKNOWLEDGED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

2226184

Date Registered

1999/02/23

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Quaker Oats Company, The CORPORATION NEW JERSEY 555 West Monroe
Chicago ILLINOIS 60661

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: READY-TO-EAT
CEREAL. First Use: 1998/03/16. First Use In Commerce: 1998/03/16.

Prior Registration(s)

0143143;0538157;0539986;1277240;1278200;1279122;1584991;1584992;AND
OTHERS

Filing Date

1998/03/20

Examining Attorney

LORENZO, ROBERT

Attorney of Record

JANET L SILVERBERG



DESIGN MARK

Serial Number

75572874

Status

REGISTERED

Word Mark

MOTHER'S COOKIES SINCE 1914

Standard Character Mark

No

Registration Number

3287272

Date Registered

2007/09/04

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Mother's Cake & Cookie Co. CORPORATION CALIFORNIA 810-81st Avenue
Oakland CALIFORNIA 946212583

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: cookies. First
Use: 1998/01/05. First Use In Commerce: 1998/01/05.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United States lying generally west of the Mississippi River including, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming pursuant to Concurrent Use Proceeding No. 94000392 and 94002153. Concurrent Registration with Registration No. 1065521.

Prior Registration(s)

0577159;0635300;0862099;0862100;1065521;1195834;1212613;2087140;AND
OTHERS

Print: Mar 11, 2008

75572874

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COOKIES" and "SINCE 1914" APART FROM THE MARK AS SHOWN.

Colors Claimed

Color is not claimed as a feature of the mark.

Filing Date

1998/10/19

Examining Attorney

SHARPER, SAMUEL E.

Attorney of Record

Robert T. Johnson, Jr.



To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 3/11/2008 3:40:56 PM
Sent As: ECOM107@USPTO.GOV
Attachments:

IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 3/11/2008 FOR
APPLICATION SERIAL NO. 77340519

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link
http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77340519&doc_type=OOA&
(or copy and paste this URL into the address field of your browser), or visit
<http://tportal.uspto.gov/external/portal/tow> and enter the application serial number to [access](#) the
Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable [response time period](#). Your response deadline will be calculated from **3/11/2008**.

Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

HELP: For *technical* assistance in accessing the Office action, please e-mail TDR@uspto.gov. Please contact the assigned examining attorney with questions about the Office action.

WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the [ABANDONMENT](#) of your application.**

EXHIBIT 4

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77340519
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (current)	
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	MOTHER'S
COLOR(S) CLAIMED (If applicable)	Color is not claimed as a feature of the mark.
DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the word "Mother's".
MARK SECTION (proposed)	
MARK FILE NAME	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0002.JPG
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	MOTHER'S
COLOR MARK	YES
COLOR(S) CLAIMED (If applicable)	The color(s) Color is not claimed as a feature of the mark. is/are claimed as a feature of the mark.
DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the word "Mother's".
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	916 x 250

ARGUMENT(S)

The Examining Attorney has refused registration of Applicant's mark MOTHER'S on the basis that Applicant's mark, when used in connection with the identified goods and services, so resembles the following registered marks as to be likely to cause confusion, mistake, or deception pursuant to Trademark Act Section 2(d):

(A) Registrations for MOTHER'S and MOTHER'S & Design, for use in connection with various food products (collectively the "MOTHER'S Food Registrations"):

(1) In the name of Mother's Food Products, Inc.: Reg. No. 552,693, Reg. No. 560,717, Reg. No. 581,646, Reg. No. 589,652, Reg. No. 617,961, Reg. No. 739,469, Reg. No. 867,634, and Reg. No. 1,422,150;

(2) In the name of Quaker Oats Company: Reg. No. 1,584,991 and Reg. No. 2,226,184;

(3) In the name of Kellogg North America Company: Reg. No. 1,065,521; and

(4) In the name of Mother's Cake & Cookie Co.: Reg. No. 3,287,272, Reg. No. 3,287,270, Reg. No. 862,099, Reg. No. 862,100, all for use in connection with cookies;

(B) Reg. No. 2,258,873 for MAMACITA in the name of Casa de Oro Foods LLC for use in connection with tortillas (the "873 Reg").

(C) Reg. No. 1,440,871 for MOTHER'S MARKET & KITCHEN & Design in the name of Ava Ruhn Corporation dba Mother's Market and Kitchen for use in connection with restaurant and grocery store services directed toward natural and health products and food preparations (the "871 Reg.")

For the reasons set forth below, Applicant respectfully disagrees with the Examining Attorney's position and requests that the refusal be withdrawn and Applicant's Mark be allowed to proceed to publication.

(A) **Confusion is Not Likely Between Applicant's Mark and the MOTHER'S Food Registrations**

The Examining Attorney argues that confusion is likely to arise because consumers will believe that, upon seeing products in grocery stores bearing the marks in the MOTHER'S Food Registrations, consumer will believe that those products originate from Applicant. However, although, the goods identified in the MOTHER'S Food Registrations may be found in grocery stores, it does not follow that consumers will believe that those goods originate from Applicant. See In re Sentry Drug Center, Inc., 177 U.S.P.Q. 208, 209 (T.T.A.B. 1973).

In In re Sentry Drug Center, Inc., the Examining Attorney refused registration for SENTRY DRUG CENTERS ("drug centers" disclaimed) because of a likelihood of confusion with "existing registrations of the word 'SENTRY' to different parties for an oral antiseptic mouthwash and for vitamins-dietary supplement." See id. There, as here, the examining attorney reasoned that "mouthwashes and vitamin supplements are goods which are commonly sold in drug stores and that applicant has appropriated the dominant element of the registered marks for a retail drug store service." Id.

The applicant, in turn, noted that there were numerous registrations for SENTRY in connection with items that may be sold in an average drug store and argued, *inter alia*, that there is a distinction between retail drug store services and drugs or pharmaceuticals. See id. Just as there is a distinction between drug store services and drug or pharmaceuticals, there is a distinction between grocery store services and groceries.

Further, here, as in In re Sentry Drug Center, Inc., there are numerous registered marks incorporating the term MOTHER'S and used in connection with goods that are commonly sold in grocery stores. In Classes 29 and 30 alone, there are more than 80 registered marks that contain the element "MOTHER" or "MOTHER'S." The Examining Attorney has identified no less than 15 such registrations for the term MOTHER'S in the name of at least four different registrants. Many of these registrations, including each of the registrations identified by the Examining Attorney, are issued for use in connection with food items commonly found in grocery stores.

In In re Sentry Drug Centers, Inc., the TTAB agreed with applicant that there is an important distinction between the provision of store services and the products stocked in the store, and reversed the examining attorney's refusal to register the mark. See id. Applicant submits, that here, as in In re Sentry Drug Center, Inc., a refusal on the grounds of likelihood of confusion with the MOTHER'S Food Registrations, is not appropriate.

(B) Confusion is Not Likely Between Applicant's Mark and the '873 Reg.

Applicant's mark is MOTHER'S and the mark in the '873 Reg. is MAMACITA. There are visual and phonetic distinctions between these two marks. Because of the distinctions between Applicant's mark and the mark MAMACITA in the '873 Reg., Applicant's arguments in Section A above apply with even greater force to the '873 Reg. For all of those reasons, and because of the distinctions between Applicant's mark and the mark in the '873 Reg., a refusal on the grounds of likelihood of confusion based on the '873 Reg. is not appropriate.

(C) Confusion is Not Likely Between Applicant's Mark the '871 Reg.

The '871 Reg. for MOTHER'S MARKET & KITCHEN & Design is issued in connection with "restaurant and grocery services directed toward natural and health products and food preparations." The 871 Reg. is limited on its face to "services directed toward natural and health products and food preparations."

Applicant has amended its identification of services to read "retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children." As reflected in its amended identification of goods and services, Applicant is the owner of a chain of groceries stores dedicated exclusively to women, infants, and children under the federally funded Women's, Infant, and Children ("WIC") program. WIC helps to ensure that pregnant women, infants, and children under five receive proper nutrition by providing checks that may be redeemed at authorized vendors for the purchase certain food items. A copy of the authorized food list is attached hereto as Exhibit "A."

Both Applicant and registrant provide specialized services. Natural and health food stores are specialized, offering health food, organic foods, local produce, and often nutritional supplements. Applicant is also very specialized, providing services only to those women and children in the WIC program and providing only those goods on the WIC authorized food list.

Due to the specialization of both Applicant and registrant, it is unlikely that any confusion will arise between Applicant's WIC grocery stores and registrant's health food store, and a refusal on the grounds of likelihood of confusion is not appropriate.

Concluding Remarks

Applicant has presented arguments demonstrating that there is no likelihood of confusion between Applicant's mark and the marks cited by the Examining Attorney. Accordingly, it is respectfully requested that the Section 2(d) refusal be withdrawn and the application be allowed to proceed to publication.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)

ORIGINAL PDF FILE	evi_6310711710-193925083_ . Exh. A - WIC Food List.pdf
CONVERTED PDF FILE(S) (15 pages)	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0003.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0004.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0005.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0006.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0007.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0008.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0009.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0010.JPG
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	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0014.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0015.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0016.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0017.JPG
DESCRIPTION OF EVIDENCE FILE	a copy of the WIC approved foods list

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS	035
DESCRIPTION	Retail grocery stores
FILING BASIS	Section 1(a)
FIRST USE	At least as early as 05/09/2007

ANYWHERE DATE	
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	09/11/2008
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Sep 11 19:58:38 EDT 2008
TEAS STAMP	USPTO/ROA-63.107.117.10-2 0080911195838327607-77340 519-430fadfb7c2ce06b48db e8948179779e32-N/A-N/A-20 080911193925083108

Response to Office Action
To the Commissioner for Trademarks:

Application serial no. **77340519** has been amended as follows:

MARK

Applicant proposes to amend the mark as follows:

Current: MOTHER'S (Stylized and/or with Design)

Color is not claimed as a feature of the mark.

The mark consists of the word "Mother's".

Proposed: MOTHER'S (Stylized and/or with Design, see [mark](#))

The color(s) Color is not claimed as a feature of the mark. is/are claimed as a feature of the mark. The mark consists of the word "Mother's".

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has refused registration of Applicant's mark MOTHER'S on the basis that Applicant's mark, when used in connection with the identified goods and services, so resembles the following registered marks as to be likely to cause confusion, mistake, or deception pursuant to Trademark Act Section 2(d):

(A) Registrations for MOTHER'S and MOTHER'S & Design, for use in connection with various food products (collectively the "MOTHER'S Food Registrations"):

(1) In the name of Mother's Food Products, Inc.: Reg. No. 552,693, Reg. No. 560,717, Reg. No. 581,646, Reg. No. 589,652, Reg. No. 617,961, Reg. No. 739,469, Reg. No. 867,634, and Reg. No. 1,422,150;

(2) In the name of Quaker Oats Company: Reg. No. 1,584,991 and Reg. No. 2,226,184;

(3) In the name of Kellogg North America Company: Reg. No. 1,065,521;
and

(4) In the name of Mother's Cake & Cookie Co.: Reg. No. 3,287,272, Reg. No. 3,287,270, Reg. No. 862,099, Reg. No. 862,100, all for use in connection with cookies;

(B) Reg. No. 2,258,873 for MAMACITA in the name of Casa de Oro Foods LLC for use in connection with tortillas (the "873 Reg").

(C) Reg. No. 1,440,871 for MOTHER'S MARKET & KITCHEN & Design in the name of Ava Ruhn Corporation dba Mother's Market and Kitchen for use in connection with

restaurant and grocery store services directed toward natural and health products and food preparations (the " '871 Reg.")

For the reasons set forth below, Applicant respectfully disagrees with the Examining Attorney's position and requests that the refusal be withdrawn and Applicant's Mark be allowed to proceed to publication.

(A) Confusion is Not Likely Between Applicant's Mark and the MOTHER'S Food Registrations

The Examining Attorney argues that confusion is likely to arise because consumers will believe that, upon seeing products in grocery stores bearing the marks in the MOTHER'S Food Registrations, consumer will believe that those products originate from Applicant. However, although, the goods identified in the MOTHER'S Food Registrations may be found in grocery stores, it does not follow that consumers will believe that those goods originate from Applicant. See In re Sentry Drug Center, Inc., 177 U.S.P.Q. 208, 209 (T.T.A.B. 1973).

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The applicant, in turn, noted that there were numerous registrations for SENTRY in connection with items that may be sold in an average drug store and argued, *inter alia*, that there is a distinction between retail drug store services and drugs or pharmaceuticals. See id. Just as there is a distinction between drug store services and drug or pharmaceuticals, there is a distinction between grocery store services and groceries.

Further, here, as in In re Sentry Drug Center, Inc., there are numerous registered marks incorporating the term MOTHER'S and used in connection with goods that are commonly sold in grocery stores. In Classes 29 and 30 alone, there are more than 80 registered marks that contain the element "MOTHER" or "MOTHER'S." The Examining Attorney has identified no less than 15 such registrations for the term MOTHER'S in the name of at least four different registrants. Many of these registrations, including each of the registrations identified by the

Examining Attorney, are issued for use in connection with food items commonly found in grocery stores.

In In re Sentry Drug Centers, Inc., the TTAB agreed with applicant that there is an important distinction between the provision of store services and the products stocked in the store, and reversed the examining attorney's refusal to register the mark. See id. Applicant submits, that here, as in In re Sentry Drug Center, Inc., a refusal on the grounds of likelihood of confusion with the MOTHER'S Food Registrations, is not appropriate.

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(C) Confusion is Not Likely Between Applicant's Mark the '871 Reg.

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Applicant has amended its identification of services to read "retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children." As reflected in its amended identification of goods and services, Applicant is the owner of a chain of groceries stores dedicated exclusively to women, infants, and children under the federally funded Women's, Infant, and Children ("WIC") program. WIC helps to ensure that pregnant women, infants, and children under five receive proper nutrition by providing checks that may be redeemed at authorized vendors for the purchase certain food items. A copy of the authorized food list is attached hereto as Exhibit "A."

Both Applicant and registrant provide specialized services. Natural and health food stores are specialized, offering health food, organic foods, local produce, and often nutritional

supplements. Applicant is also very specialized, providing services only to those women and children in the WIC program and providing only those goods on the WIC authorized food list.

Due to the specialization of both Applicant and registrant, it is unlikely that any confusion will arise between Applicant's WIC grocery stores and registrant's health food store, and a refusal on the grounds of likelihood of confusion is not appropriate.

Concluding Remarks

Applicant has presented arguments demonstrating that there is no likelihood of confusion between Applicant's mark and the marks cited by the Examining Attorney. Accordingly, it is respectfully requested that the Section 2(d) refusal be withdrawn and the application be allowed to proceed to publication.

EVIDENCE

Evidence in the nature of a copy of the WIC approved foods list has been attached.

Original PDF file:

[evi_6310711710-193925083 . Exh. A - WIC Food List.pdf](#)

Converted PDF file(s) (15 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Retail grocery stores

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

Proposed: Class 035 for Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

SIGNATURE(S)

Declaration Signature

I hereby elect to bypass the submission of a signed declaration, because I believe a declaration is not required by the rules of practice. I understand that the examining attorney could still, upon later review, require a signed declaration.

Response Signature

Signature: /jessica c. bromall/ Date: 09/11/2008

Signatory's Name: Jessica C. Bromall

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 77340519

Internet Transmission Date: Thu Sep 11 19:58:38 EDT 2008

TEAS Stamp: USPTO/ROA-63.107.117.10-2008091119583832

7607-77340519-430fadfb7c2ce06b48dbe8948

179779e32-N/A-N/A-20080911193925083108

mother's

California WIC Authorized Food List (WAFL, August 2008)



California WIC Authorized Food List
August 2008

Breastfeeding Women	
<p>Carrots</p> <p>Can buy</p> <p>Any brand Pre-packaged only</p> <ul style="list-style-type: none">• Fresh, large, whole	<p>Cannot buy</p> <ul style="list-style-type: none">• Canned, shredded, frozen, or baby carrots• Bulk (not packaged)
<p>Tuna</p> <p>Can buy</p> <p>Any brand 5 oz. or 6 oz. cans</p> <ul style="list-style-type: none">• Chunk light water-packed• Dietetic tuna• Low-sodium tuna	<p>Cannot buy</p> <ul style="list-style-type: none">• Solid white or Albacore tuna• Tuna with soy protein added• Oil-packed tuna• Prime fillet

Ways to Buy up to 36 oz. of Cereal

- 12 oz. + 12 oz. + 12 oz. = 36 oz.
- 20 oz. + 15 oz. = 35 oz.
- 17.3 oz. + 17.3 oz. = 34.6 oz.
- 17.5 oz. + 17.3 oz. = 34.8 oz.
- 17.5 oz. + 17.5 oz. = 35 oz.
- 18 oz. + 18 oz. = 36 oz.
- 14.5 oz. + 19 oz. = 33.5 oz.
- 20 oz. + 14 oz. = 34 oz.
- 21.5 oz. + 13 oz. = 34.5 oz.
- 20.4 oz. + 12 oz. = 32.4 oz.

California WIC Authorized Food List
August 2008

Cereals for Women

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for store brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- Malt-o-Meal
 - **Malt-O-Meal Original** (plain)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
 - **Premium Bran Flakes**
- Quaker
 - **Life** (plain)
 - **Oatmeal Squares** (blue box)
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz. or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Cereals for Children

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
 - **Kix** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- B&G Foods
 - **Cream of Wheat** (1 minute, 2-1/2 Minute, 10 minute)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
- Quaker
 - **Life** (plain)
 - **Crunchy Corn Bran**
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Store Brand Cereals

Can buy

Crisp(y) Rice box or bags
12 oz. packages or larger

- Albertsons
- American Fare
- Best Yet
- Flavorite
- Great Value
- Home & Garden
- Hospitality
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Instant Oatmeal – Regular plain, unflavored
11.8 oz. or 12 oz. box of individual serving
packets

- Albertsons
- Best Yet
- Flavorite
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt clusters/pieces

California WIC Authorized Food List
August 2008

Juice – Frozen Concentrate

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**

- Must state "100% Juice" **and** "120% Vitamin C" on the front label

- Added calcium if the FI does **not** state: "No added calcium allowed"

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Orange juice**

- Must state "100% Juice" on the front label

- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Orange juice that does not state 100% juice on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Juice - Bottled

Can buy

Any brand of ready-to-drink
64 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**
- **Vegetable Cocktail**
-Low sodium allowed
- Must state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice, or Vegetable Cocktail that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Infant Formula

MUST BUY THE NUMBER OF CANS OF FORMULA PRINTED ON THE FOOD INSTRUMENT (FI)

Can Buy

Infant Formula specified on FI
Can size and quantity specified on the FI

- **Enfamil LIPIL with Iron**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil ProSobee LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil LactoFree LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil Gentlease LIPIL**
12 oz. powder only
- **Enfamil A.R. LIPIL**
12.9 oz. powder only
- Other formula allowed ONLY if it is printed on the WIC FI. (For example: Nutramigen LIPIL; Similac NeoSure; Enfamil Enfacare LIPIL; Alimentum; PediaSure, vanilla flavor only.)

Cannot buy

- Any other brand, type, or size not printed on the FI
- Low iron infant formula or formula with no iron

California WIC Authorized Food List
August 2008

Infant Cereal	
MUST BUY THE NUMBER OF BOXES OF CEREAL PRINTED ON THE FOOD INSTRUMENT (FI)	
<i>Can buy</i> Gerber Infant Cereal only 8 oz. boxes <ul style="list-style-type: none">• Dry pack cereal with iron• May buy any combination of allowed cereals:<ul style="list-style-type: none">- Barley- Rice- Oatmeal- Mixed	<i>Cannot buy</i> <ul style="list-style-type: none">• Other types, brands, flavors or sizes of infant cereal• Infant cereal with added fruit• Single servings cups• 6 oz. variety packages

California WIC Authorized Food List
August 2008

Milk	
<p>Can buy</p> <p>Any brand Container size determined by type of milk purchased</p> <ul style="list-style-type: none">• Pasteurized fluid cow's milk<ul style="list-style-type: none">- Nonfat (fat free, skim)- 1% Lowfat (light)- 2% Reduced fat- Whole-Single gallons or gallon twin pack (For "1 ½ gallon" FI, must buy one full gallon and one ½ gallon• Lactose free cow's milk<ul style="list-style-type: none">-If specified for purchase on the FI-1/2 gallon container• Acidophilus milk<ul style="list-style-type: none">-If specified for purchase on the FI-1/2 gallon container• Evaporated milk<ul style="list-style-type: none">-12 oz. can• Powdered dry milk<ul style="list-style-type: none">- Nonfat or Lowfat only-9.6 oz. to 25.6 oz. box	<p>Cannot buy</p> <ul style="list-style-type: none">• Raw (unpasteurized) milk• Non-dairy substitutes• UHT milk (shelf-stable)• Quart or pint sizes• Evaporated "filled" milk• Sweetened condensed milk• Soy beverage (soy milk)• Buttermilk• Goat's milk• Organic milk• Chocolate milk• Flavored milk

California WIC Authorized Food List
August 2008

Eggs	
<p><i>Can buy</i></p> <p>Any brand Dozen size carton</p> <ul style="list-style-type: none">• Grade AA white chicken eggs• Small, medium, or large eggs	<p><i>Cannot buy</i></p> <ul style="list-style-type: none">• Other grades of eggs• Jumbo or extra large eggs• Low cholesterol eggs• Powdered or liquid eggs• Specialty eggs such as: cage free, stress free, vitamin enriched, organic, or Egglands best• Brown eggs• Egg substitutes• Ungraded eggs• Vitamin enriched

California WIC Authorized Food List
August 2008

Cheese

Can buy

Any brand
Block or round $\frac{3}{4}$ pound (12 oz.) or larger

- Regular, reduced fat, nonfat or low sodium
- **Natural Cheddar cheese** (mild, medium, sharp, extra sharp, or white)
- **Jack cheese**
- **Mozzarella cheese**
- **Process American cheese**
- Domestic cheese ONLY
- Kosher cheese varieties are OK

At the deli:

- Can get block cheese sliced if no extra charge
- Can buy cheese from a manufacturer's pre-sliced block in deli

Cannot buy

- Marbled cheese
- Process cheese food
- Cream cheese or Parmesan cheese
- Cheese spreads or cheese products
 - Velveeta
- Cheese with added hot peppers or spices
- Any other variety of cheese, such as Colby or Muenster
- Cheese made outside the USA
- Organic cheese
- Pre-packaged sliced cheese, individual slices wrapped or not
- String cheese
- Diced, grated, or shredded cheese

California WIC Authorized Food List
August 2008

Peanut Butter

Can buy

Any brand
Most FIs allow 16 oz. to 18 oz. jars
Some FIs may allow 12 or 24 oz. jars

- Plain, creamy, chunky, or super chunky styles
- Honey nut roasted
- Low sodium
- Low sugar or natural
- Any commercial brand

Cannot buy

- Any other size container
- "Grind your own"
- Peanut butter spread
- Organic peanut butter
- Lowfat
- Reduced fat
- Peanut butter with added jams, jellies, chocolate, or honey

Peas, Beans, or Lentils

Can buy

Any brand, any variety
Pre-sealed packaged or in bulk

- Uncooked dry beans, peas, and lentils
- Plain, mixed beans, peas, and/or lentils

ONLY if printed on FI

- 14-16 oz. plain canned beans (any variety)
- Canned baked beans (plain, vegetarian, with pork, with bacon)
- Canned black-eye peas or chickpeas

Cannot buy

- Organic beans
- Green or wax beans
- Canned green peas
- Frozen beans, peas, or lentils
- Canned baked beans with beef or franks
- Canned refried, Cajun style, Bar-B-Que, or Ranch style beans
- Bean soup mixes with flavoring packets or spices

EXHIBIT 5

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77340519
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.</p> <p>Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.</p> <p>A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.</p> <p>In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.</p> <p>Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.</p> <p>Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_6310711720-170958826 . WIC Food List.pdf

CONVERTED PDF FILE(S) (15 pages)	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0002.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0003.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0004.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0005.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0006.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0007.JPG
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	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0016.JPG
ORIGINAL PDF FILE	evi_6310711720-170958826_.Flyer.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0017.JPG
ORIGINAL PDF FILE	evi_6310711720-170958826_.Advertisement.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0018.JPG
ORIGINAL PDF FILE	evi_6310711720-170958826_.Brochure.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0019.JPG
DESCRIPTION OF EVIDENCE FILE	the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for	

pregnant women, new mothers, and young children	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
TRACKED TEXT DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children; <u>Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.</u>	
FINAL DESCRIPTION	
Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	04/15/2009
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Wed Apr 15 17:12:54 EDT 2009
TEAS STAMP	USPTO/ROA-63.107.117.20-2 0090415171254689913-77340 519-4303a2293bc83347c3301 7e7cf4e7cd6cd-N/A-N/A-200

Response to Office Action
To the Commissioner for Trademarks:

Application serial no. **77340519** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.

Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.

A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.

In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.

Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.

Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.

EVIDENCE

Evidence in the nature of the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services has been attached.

Original PDF file:

[evi_6310711720-170958826_.WIC_Food_List.pdf](#)

Converted PDF file(s) (15 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

Original PDF file:

[evi_6310711720-170958826_.Flyer.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

Original PDF file:

[evi_6310711720-170958826_.Advertisement.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

Original PDF file:

[evi_6310711720-170958826_.Brochure.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

Proposed:

Tracked Text Description: ~~Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children;~~ Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.

Class 035 for Retail grocery stores that exclusively provide groceries in connection with a federally

funded nutrition program for pregnant women, new mothers, and young children.

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

SIGNATURE(S)

Declaration Signature

I hereby elect to bypass the submission of a signed declaration, because I believe a declaration is not required by the rules of practice. I understand that the examining attorney could still, upon later review, require a signed declaration.

Response Signature

Signature: /jessica c. bromall/ Date: 04/15/2009

Signatory's Name: Jessica C. Bromall

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 77340519

Internet Transmission Date: Wed Apr 15 17:12:54 EDT 2009

TEAS Stamp: USPTO/ROA-63.107.117.20-2009041517125468

9913-77340519-4303a2293bc83347c33017e7cf

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California WIC Authorized Food List (WAFL, August 2008)



California WIC Authorized Food List
August 2008

Breastfeeding Women	
<p>Carrots</p> <p>Can buy</p> <p>Any brand Pre-packaged only</p> <ul style="list-style-type: none">• Fresh, large, whole	<p>Cannot buy</p> <ul style="list-style-type: none">• Canned, shredded, frozen, or baby carrots• Bulk (not packaged)
<p>Tuna</p> <p>Can buy</p> <p>Any brand 5 oz. or 6 oz. cans</p> <ul style="list-style-type: none">• Chunk light water-packed• Dietetic tuna• Low-sodium tuna	<p>Cannot buy</p> <ul style="list-style-type: none">• Solid white or Albacore tuna• Tuna with soy protein added• Oil-packed tuna• Prime fillet

Ways to Buy up to 36 oz. of Cereal

- 12 oz. + 12 oz. + 12 oz. = 36 oz.
- 20 oz. + 15 oz. = 35 oz.
- 17.3 oz. + 17.3 oz. = 34.6 oz.
- 17.5 oz. + 17.3 oz. = 34.8 oz.
- 17.5 oz. + 17.5 oz. = 35 oz.
- 18 oz. + 18 oz. = 36 oz.
- 14.5 oz. + 19 oz. = 33.5 oz.
- 20 oz. + 14 oz. = 34 oz.
- 21.5 oz. + 13 oz. = 34.5 oz.
- 20.4 oz. + 12 oz. = 32.4 oz.

California WIC Authorized Food List
August 2008

Cereals for Women

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for store brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- Malt-o-Meal
 - **Malt-O-Meal Original** (plain)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
 - **Premium Bran Flakes**
- Quaker
 - **Life** (plain)
 - **Oatmeal Squares** (blue box)
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz. or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Cereals for Children

Can buy

Any cereal specified on the food instrument
Box or bags – 12 oz. package or larger except for brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
 - **Kix** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- B&G Foods
 - **Cream of Wheat** (1 minute, 2-1/2 Minute, 10 minute)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
- Quaker
 - **Life** (plain)
 - **Crunchy Corn Bran**
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Store Brand Cereals

Can buy

Crisp(y) Rice box or bags
12 oz. packages or larger

- Albertsons
- American Fare
- Best Yet
- Favorite
- Great Value
- Home & Garden
- Hospitality
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Instant Oatmeal – Regular plain, unflavored
11.8 oz. or 12 oz. box of individual serving
packets

- Albertsons
- Best Yet
- Favorite
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt clusters/pieces

California WIC Authorized Food List
August 2008

Juice – Frozen Concentrate

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**

- **Pineapple**

- Must state "100% Juice" **and** "120% Vitamin C" on the front label

- Added calcium if the FI does **not** state: "No added calcium allowed"

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Orange juice**

- Must state "100% Juice" on the front label

- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Orange juice that does not state 100% juice on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Juice - Bottled

Can buy

Any brand of ready-to-drink
64 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**
- **Vegetable Cocktail**
-Low sodium allowed
- Must state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice, or Vegetable Cocktail that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Infant Formula

MUST BUY THE NUMBER OF CANS OF FORMULA PRINTED ON THE FOOD INSTRUMENT (FI)

Can Buy

Infant Formula specified on FI
Can size and quantity specified on the FI

- **Enfamil LIPIL with Iron**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil ProSobee LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil LactoFree LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil Gentlease LIPIL**
12 oz. powder only
- **Enfamil A.R. LIPIL**
12.9 oz. powder only
- Other formula allowed ONLY if it is printed on the WIC FI. (For example: Nutramigen LIPIL; Similac NeoSure; Enfamil Enfacare LIPIL; Alimentum; PediaSure, vanilla flavor only.)

Cannot buy

- Any other brand, type, or size not printed on the FI
- Low iron infant formula or formula with no iron

California WIC Authorized Food List
August 2008

Infant Cereal	
MUST BUY THE NUMBER OF BOXES OF CEREAL PRINTED ON THE FOOD INSTRUMENT (FI)	
Can buy Gerber Infant Cereal only 8 oz. boxes <ul style="list-style-type: none">• Dry pack cereal with iron• May buy any combination of allowed cereals:<ul style="list-style-type: none">- Barley- Rice- Oatmeal- Mixed	Cannot buy <ul style="list-style-type: none">• Other types, brands, flavors or sizes of infant cereal• Infant cereal with added fruit• Single servings cups• 6 oz. variety packages

California WIC Authorized Food List
August 2008

Milk	
<p data-bbox="305 390 440 426">Can buy</p> <p data-bbox="305 468 764 558">Any brand Container size determined by type of milk purchased</p> <ul data-bbox="347 596 781 1566" style="list-style-type: none"><li data-bbox="347 596 781 848">• Pasteurized fluid cow's milk<ul data-bbox="415 632 708 848" style="list-style-type: none"><li data-bbox="415 632 708 667">- Nonfat (fat free, skim)<li data-bbox="415 695 708 730">- 1% Lowfat (light)<li data-bbox="415 758 708 793">- 2% Reduced fat<li data-bbox="415 821 708 848">- Whole<li data-bbox="347 1052 781 1178">• Lactose free cow's milk<ul data-bbox="415 1087 764 1178" style="list-style-type: none"><li data-bbox="415 1087 764 1142">-If specified for purchase on the FI<li data-bbox="415 1148 764 1178">-1/2 gallon container<li data-bbox="347 1213 781 1339">• Acidophilus milk<ul data-bbox="415 1249 764 1339" style="list-style-type: none"><li data-bbox="415 1249 764 1304">-If specified for purchase on the FI<li data-bbox="415 1310 764 1339">-1/2 gallon container<li data-bbox="347 1375 781 1440">• Evaporated milk<ul data-bbox="415 1411 781 1440" style="list-style-type: none"><li data-bbox="415 1411 781 1440">-12 oz. can<li data-bbox="347 1476 781 1566">• Powdered dry milk<ul data-bbox="415 1512 708 1566" style="list-style-type: none"><li data-bbox="415 1512 708 1539">- Nonfat or Lowfat only<li data-bbox="415 1545 708 1566">-9.6 oz. to 25.6 oz. box	<p data-bbox="829 390 1013 426">Cannot buy</p> <ul data-bbox="854 468 1243 1230" style="list-style-type: none"><li data-bbox="854 468 1243 495">• Raw (unpasteurized) milk<li data-bbox="854 531 1243 558">• Non-dairy substitutes<li data-bbox="854 594 1243 621">• UHT milk (shelf-stable)<li data-bbox="854 663 1243 690">• Quart or pint sizes<li data-bbox="854 732 1243 760">• Evaporated "filled" milk<li data-bbox="854 802 1243 829">• Sweetened condensed milk<li data-bbox="854 871 1243 898">• Soy beverage (soy milk)<li data-bbox="854 940 1243 968">• Buttermilk<li data-bbox="854 1010 1243 1037">• Goat's milk<li data-bbox="854 1079 1243 1106">• Organic milk<li data-bbox="854 1148 1243 1176">• Chocolate milk<li data-bbox="854 1218 1243 1245">• Flavored milk

California WIC Authorized Food List
August 2008

Eggs	
<p><i>Can buy</i></p> <p>Any brand Dozen size carton</p> <ul style="list-style-type: none">• Grade AA white chicken eggs• Small, medium, or large eggs	<p><i>Cannot buy</i></p> <ul style="list-style-type: none">• Other grades of eggs• Jumbo or extra large eggs• Low cholesterol eggs• Powdered or liquid eggs• Specialty eggs such as: cage free, stress free, vitamin enriched, organic, or Egglands best• Brown eggs• Egg substitutes• Ungraded eggs• Vitamin enriched

California WIC Authorized Food List
August 2008

Cheese

Can buy

Any brand
Block or round $\frac{3}{4}$ pound (12 oz.) or larger

- Regular, reduced fat, nonfat or low sodium
- **Natural Cheddar cheese** (mild, medium, sharp, extra sharp, or white)
- **Jack cheese**
- **Mozzarella cheese**
- **Process American cheese**
- Domestic cheese ONLY
- Kosher cheese varieties are OK

At the deli:

- Can get block cheese sliced if no extra charge
- Can buy cheese from a manufacturer's pre-sliced block in deli

Cannot buy

- Marbled cheese
- Process cheese food
- Cream cheese or Parmesan cheese
- Cheese spreads or cheese products
 - Velveeta
- Cheese with added hot peppers or spices
- Any other variety of cheese, such as Colby or Muenster
- Cheese made outside the USA
- Organic cheese
- Pre-packaged sliced cheese, individual slices wrapped or not
- String cheese
- Diced, grated, or shredded cheese

California WIC Authorized Food List
August 2008

Peanut Butter

Can buy

Any brand
Most FIs allow 16 oz. to 18 oz. jars
Some FIs may allow 12 or 24 oz. jars

- Plain, creamy, chunky, or super chunky styles
- Honey nut roasted
- Low sodium
- Low sugar or natural
- Any commercial brand

Cannot buy

- Any other size container
- "Grind your own"
- Peanut butter spread
- Organic peanut butter
- Lowfat
- Reduced fat
- Peanut butter with added jams, jellies, chocolate, or honey

California WIC Authorized Food List
August 2008

Peas, Beans, or Lentils

Can buy

Any brand, any variety
Pre-sealed packaged or in bulk

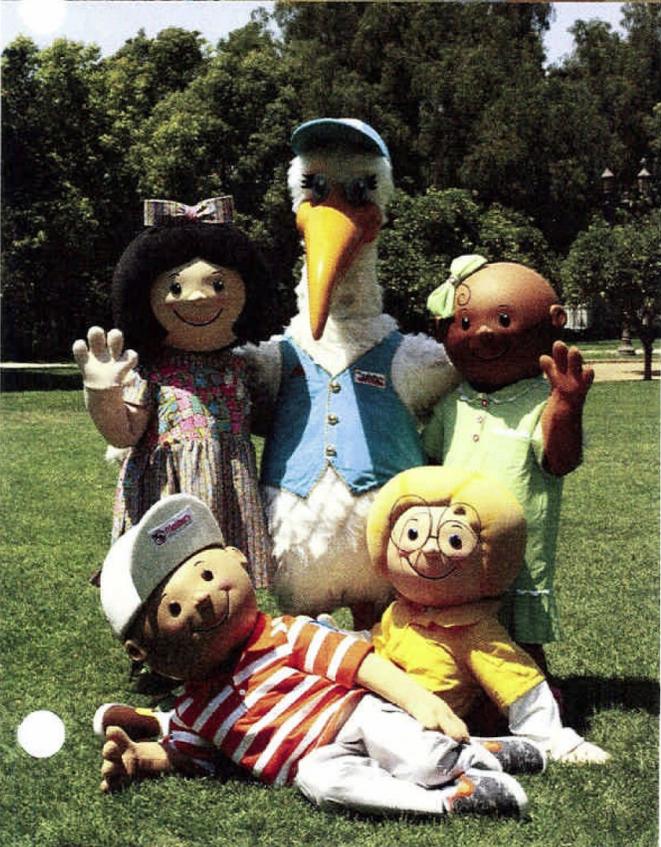
- Uncooked dry beans, peas, and lentils
- Plain, mixed beans, peas, and/or lentils

ONLY if printed on FI

- 14-16 oz. plain canned beans (any variety)
- Canned baked beans (plain, vegetarian, with pork, with bacon)
- Canned black-eye peas or chickpeas

Cannot buy

- Organic beans
- Green or wax beans
- Canned green peas
- Frozen beans, peas, or lentils
- Canned baked beans with beef or franks
- Canned refried, Cajun style, Bar-B-Que, or Ranch style beans
- Bean soup mixes with flavoring packets or spices



Mother's
NUTRITIONAL CENTER

Mother's Nutritional Center is a group of redemption centers that exclusively serve participants of the women, children and infant voucher program.

Summary of Operations

With over 50 locations, Mother's Nutritional Center is Southern California's largest women, children and infants redemption center.

The women, children and infants voucher program is a state health and food assistance program, offering its participants nutritional education and supplemental foods.

Vouchers are issued by the Department of Health Services and can be redeemed at Mother's Nutritional Center to buy health foods such as milk, juice, eggs, cheese, cereal, dry beans and peas and peanut butter. All customers must qualify at a local state office.

Mother's Nutritional Center serves participants of the program. We carry all food products included in the program.

Community Service

Mother's Nutritional Center is committed to giving back to the community. Throughout each year, Mother's donates and gives support to many organizations such as schools, community youth centers, food banks, and The Boys and Girls Club of America to name just a few. We also sponsor and participate in health fairs and countless other community events.

For more information, call:

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9. Professionally Trained Staff
10. Over 50 Locations in Southern California

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924 Highland Ave.
(619) 477-9904
- ☐ **SAN DIEGO**
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- HUNTINGTON PARK**
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(323) 581-1406
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(213) 487-7447
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(323) 258-5048
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4110 S. Figueroa St.
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Saturday
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EXHIBIT 6



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Mother's Latest News

[Snack Like an Olympian!](#) July 31, 2012
 Posted July 29, 2012 by the Detroit Free Press Are you ready for some Olympics? If so, don't be a couch potato. Snack like an athlete.

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EXHIBIT 7

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)

Subject: TRADEMARK APPLICATION NO. 77368478 - MOTHER'S NUTRITIONAL - 66309-1006

Sent: 3/11/2008 3:41:26 PM

Sent As: ECOM107@USPTO.GOV

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/368478

MARK: MOTHER'S NUTRITIONAL

77368478

CORRESPONDENT ADDRESS:

ROD S. BERMAN
JEFFER MANGELS BUTLER & MARMARO
LLP
1900 AVENUE OF THE STARS FL 7
LOS ANGELES, CA 90067-4308

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: MOTHER'S NUTRITIONAL
CENTER, INC.

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

66309-1006

CORRESPONDENT E-MAIL ADDRESS:

trademarkdocket@jmbm.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 3/11/2008

The assigned trademark examining attorney has reviewed the referenced application and has determined the following.

Search Results

Registration Refused – Registration of Confusingly Similar Mark Exists

Registration of the proposed mark is refused because of a likelihood of confusion with the marks in U.S. Registration Nos. 0552693, 0560717, 0581646 and others. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* See the enclosed registrations.

Principles Governing Section 2(d) Refusals

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods and/or services. TMEP §1207.01. The Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and/or services. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).

The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein. *See also In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984), wherein the Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard (at least in the absence of a consent agreement, which applicant has not submitted in this case).

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

Applicant has applied to register the mark "MOTHER'S NUTRITIONAL CENTER". The registrants are using the mark "MOTHER'S", "MOTHER'S" with design, "MAMACITA'S", translated to "mother's", "MOTHER'S COOKIES SINCE 1941" and "MOTHER'S MARKET & KITCHEN, with design.

Comparison of the Marks

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).

Applicant's proposed mark "MOTHER'S NUTRITIONAL CENTER" is confusingly similar to the registrants' marks because the marks of the respective parties share the common wording "MOTHER'S". Further, the term "MOTHER'S" is either the sole term in the registrant's marks, or the first term and thus creates the dominant commercial impression in all the cited marks and the applicant's mark.

With respect to all registered marks comprised of the sole literal element "mother", applicant's mark consists merely of the additional of descriptive matter to a registered mark.

The mere addition of a term to a registered mark does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Section 2(d). *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) ("GASPAR'S ALE and "JOSE GASPAR GOLD"); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975) ("BENGAL" and "BENGAL LANCER"); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (C.C.P.A. 1967) ("THE LILLY" and "LILLI ANN"); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988) ("MACHO" and "MACHO COMBOS"); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" and "CREST CAREER IMAGES"); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) ("CONFIRM" and "CONFIRMCELLS"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE"); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) ("HEAD START" and "HEAD START COSVETIC"); TMEP §1207.01(b)(iii).

As a general rule, consumers are more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). The first term "MOTHER'S" in applicant's mark is either the single term of the registrants' marks, or the first term of the registrants' marks.

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

The dominant literal portions of both applicant's mark and the registrants' marks are identical or nearly identical in appearance, sound and meaning. The addition of the design element does not obviate the similarity between the marks in this case. *In re Shell Oil Company*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975); TMEP §1207.01(c)(ii).

Disclaimed matter is typically less significant or less dominant when comparing marks. Although a

disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986). The registrant in U.S. Reg. Nos. 3287272 and 1440871 also contains descriptive material that has been disclaimed. The applicant's mark contains the descriptive material "NUTRITIONAL CENTER" which applicant will be required to disclaim. However, the dominant portion of all these marks is the term "mother's" which would likely be the term consumers would use to call for the services in the marketplace.

Finally, with respect to U.S. Reg. No. 2258873, the mark MAMACITA is translated as MOTHER'S. The English translation of the mark is identical to "MOTHER'S", the term in applicant's mark that creates the dominant commercial impression. According to the doctrine of foreign equivalents, an applicant may not register foreign words or terms if the English-language equivalent has been previously registered for related products or services and the consumer would be likely to translate the foreign word(s) into its English equivalent. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *In re Ithaca Industries, Inc.*, 230 USPQ 702 (TTAB 1986); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983); TMEP §1207.01(b)(vi). As a corollary to this principle, the applicant cannot register the English language equivalent of a registered mark.

Comparison of the Goods/Services

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

With respect to U.S. Reg. No. 1440871, registrant is using the mark with restaurant and grocery services directed toward natural and health products and food preparations. Applicant's services are "retail grocery stores."

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. TMEP §1207.01(a)(iii).

With respect to all of the other cited registrations, the goods are common food items that would be sold in any grocery store, including applicant's retail grocery stores. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii). There are no limitations as to trade channels or classes of purchasers with respect to the registrants' goods. Therefore, all are common items that would be sold in applicant's grocery stores.

Customers shopping in applicant's grocery store would encounter food items provided by the registrants bearing the MOTHER'S trademark. Confusion as to source is likely to occur because the customers would naturally assume that the goods comprised a group of items from a house brand emanating from applicant, because "mother's" creates such a strong commercial impression in applicant's mark. Therefore, confusion as to source would be inevitable.

Accordingly, since there is no overriding factor to distinguish applicant's mark from the marks already registered, registration must be refused because the average purchaser would be likely to conclude that applicant's goods/services and registrants' goods/services emanate from a common source of origin. Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If applicant chooses to respond to the refusal(s) to register, then applicant must also respond to the following requirement(s).

Requirements

Disclaimer Required

Applicant must disclaim the descriptive wording "nutritional center" apart from the mark as shown because it merely describes the applicant's services. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.03(a).

The definition of "nutritional" is "containing a food substance your body can use". The definition of the term "center" is "a place where a particular activity or service is concentrated: a medical center." See attached dictionary definitions. It is clear from applicant's specimen that applicant's retail grocery store services comprise a place where the service of providing groceries is concentrated and that the entire subject of applicant's services is the selling of food substances.

The computerized printing format for the Office's *Trademark Official Gazette* requires a standardized format for a disclaimer. TMEP §1213.08(a)(i). The following is the standard format used by the Office:

No claim is made to the exclusive right to use "nutritional center" apart from the mark as shown.

See *In re Owatonna Tool Co.*, 231 USPQ 493 (Comm'r Pats. 1983).

If applicant has questions about its application or needs assistance in responding to this Office action,

please telephone the assigned trademark examining attorney directly at the number below.

/bluken/
Bonnie Luken
Trademark Examining Attorney
Law Office 107
Phone (571)272 8807
Fax (571)273 9107

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office action should be filed using the form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

DESIGN MARK

Serial Number

71572371

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0552693

Date Registered

1952/01/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: SWEET AND SOUR
FISH. First Use: 1948/12/15. First Use In Commerce: 1948/12/15.

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE FOLLOWING COLORS: TOP AND BOTTOM
EDGES-VERTICAL AND HORIZONTAL CROSS HATCHING FOR BLACK; FIELD-SLANTING
LINES FOR GREEN; CENTER-BROKEN VERTICAL AND HORIZONTAL CROSS HATCHING
FOR YELLOW.

Filing Date

1949/01/18

Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

71575421

DESIGN MARK

Serial Number

71575421

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0560717

Date Registered

1952/07/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: BORSCHT. First
Use: 1949/02/09. First Use In Commerce: 1949/02/09.

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE COLORS YELLOW, GREEN AND BLACK.

Filing Date

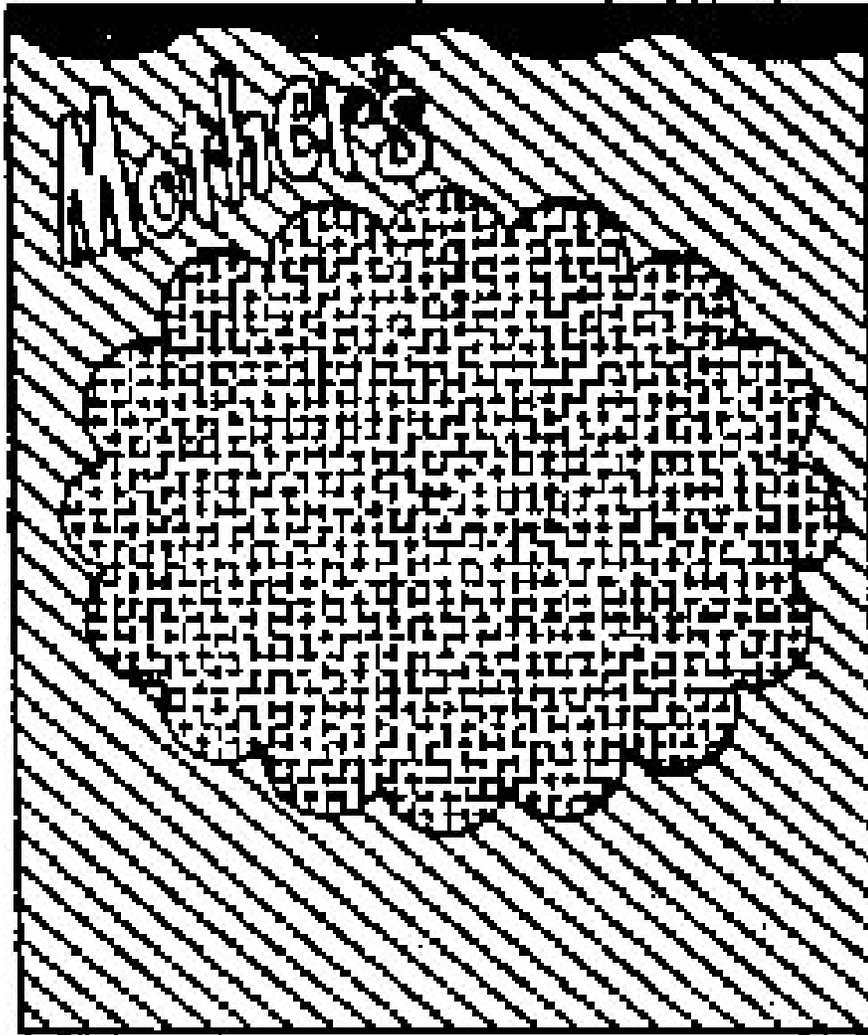
1949/03/14

Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

71640470

DESIGN MARK

Serial Number

71640470

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0581646

Date Registered

1953/10/27

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: SAUERKRAUT. First
Use: 1952/10/17. First Use In Commerce: 1952/10/17.

Prior Registration(s)

0540298;0552693;0560717;0565172

Filing Date

1953/01/07

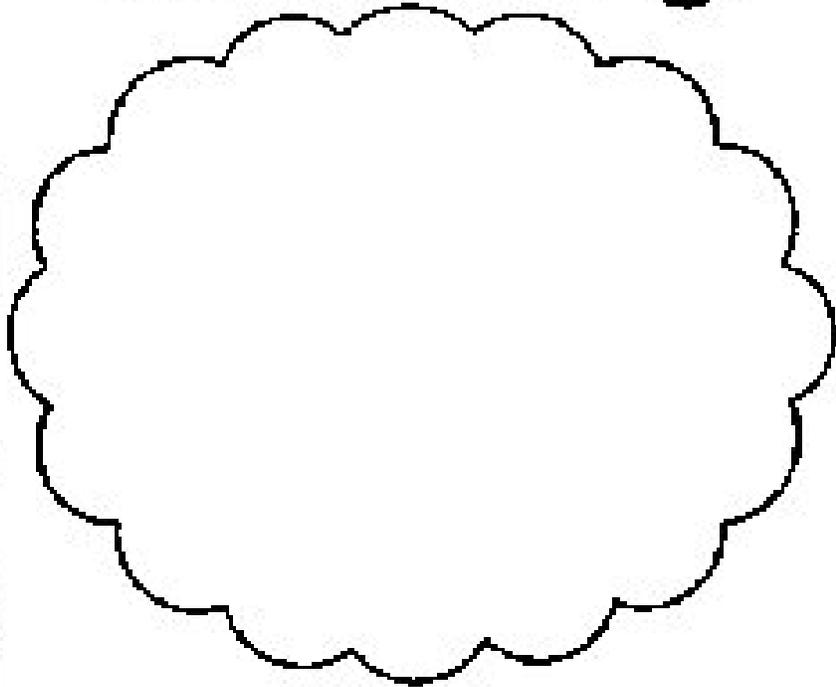
Examining Attorney

UNKNOWN

Attorney of Record

GERALD E. HESPOS

Mother's



Print: Mar 11, 2008

71642982

DESIGN MARK

Serial Number

71642982

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0589652

Date Registered

1954/05/11

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: OLEOMARGARINE.
First Use: 1953/02/13. First Use In Commerce: 1953/02/13.

Prior Registration(s)

0540298;0552693;AND OTHERS

Disclaimer Statement

THE YELLOW BACKGROUND SHOWN ON THE DRAWING IS DISCLAIMED.

Lining/Stippling Statement

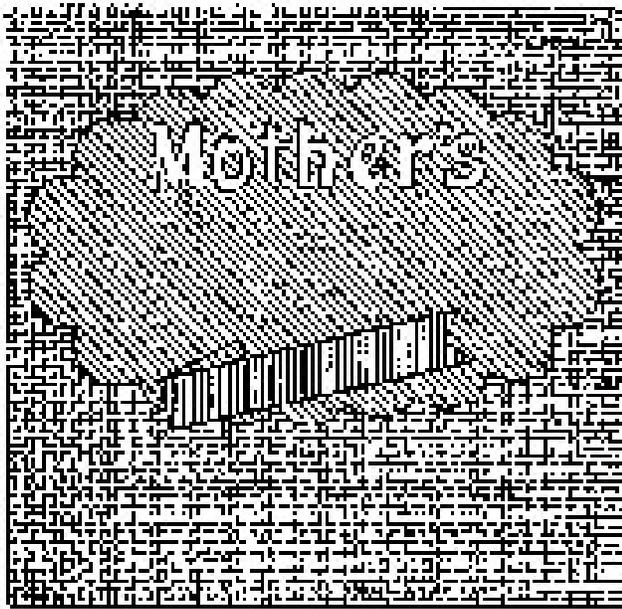
THE DRAWING IS LINED FOR THE COLORS GREEN, YELLOW, AND RED.

Filing Date

1953/03/02

Examining Attorney

UNKNOWN



DESIGN MARK

Serial Number

71674719

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0617961

Date Registered

1955/12/20

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029. US 046. G & S: MAYONNAISE AND
SALAD DRESSING. First Use: 1954/08/09. First Use In Commerce:
1954/08/09.

Prior Registration(s)

0540298;0565172;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR GREEN AND YELLOW.

Filing Date

1954/09/20

Examining Attorney

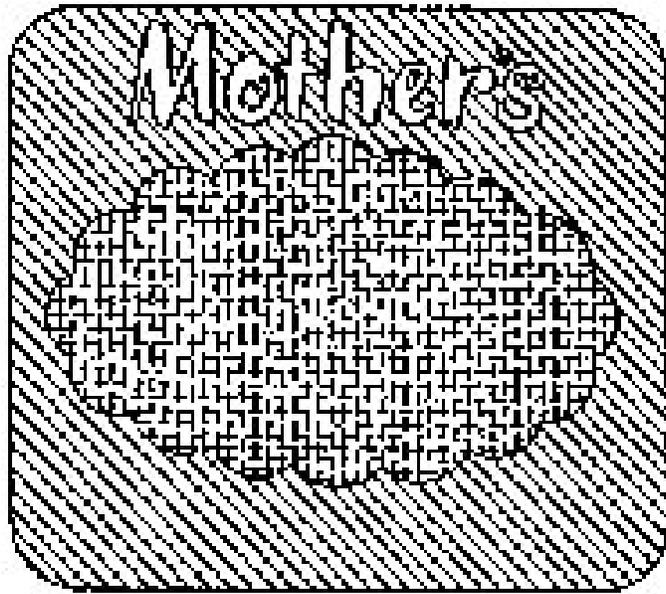
UNKNOWN

Attorney of Record

Print: Mar 11, 2008

71674719

GERALD E. HESPOS



Print: Mar 11, 2008

72129027

DESIGN MARK

Serial Number

72129027

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0739469

Date Registered

1962/10/16

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029 030. US 046. G & S: Pickles, Sliced
Pickles, Gherkins, Pickled Tomatoes, and Sweet Mixed Pickles. First
Use: 1952/04/25. First Use In Commerce: 1952/04/25.

Prior Registration(s)

0540298;0560717;AND OTHERS

Lining/Stippling Statement

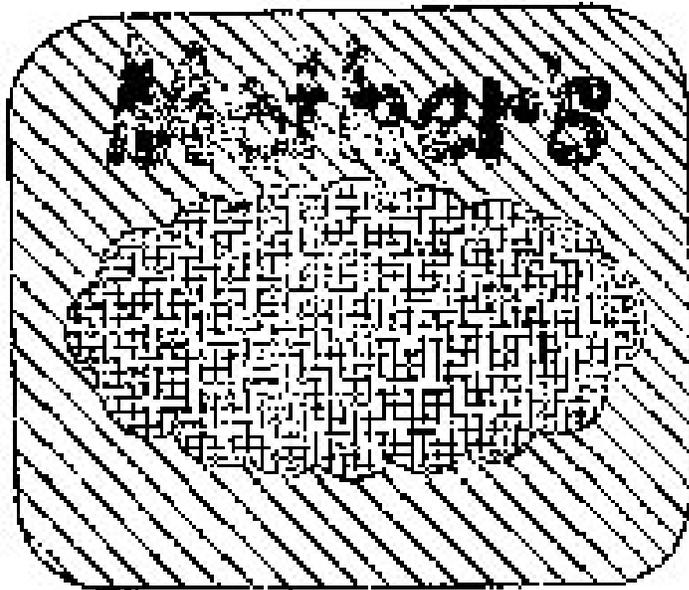
The center scalloped edge medallion is lined for yellow and the
background is lined for green in the drawing.

Filing Date

1961/10/02

Examining Attorney

UNKNOWN



Print: Mar 11, 2008

72298026

TYPED DRAWING

Serial Number

72298026

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0867634

Date Registered

1969/04/01

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 029 031 032. US 046. G & S: GEFILTE
FISH, BORSCHT, [SWEET PEPPERS, CUCUMBER SALAD,] OLEOMARGARINE, [HOT
CHERRY PEPPERS, PICKLES,] MAYNONNAISE, [HORSE RADISH;] SCHAV
(BEVERAGE MADE FROM SOUR-GRASS, WHICH IS SORREL, WATER, SALT AND
EGGS), FISH D'OEUVRES (FISHBALLS), [SAUERKRAUT (PICKLED COUNTRY
DELUXE AND PICKLED COUNTRY CABBAGE),] AND MATZO BALLS. First Use:
1946/12/20. First Use In Commerce: 1946/12/20.

Prior Registration(s)

0540298;0777505;AND OTHERS

Filing Date

1968/05/13

Examining Attorney

UNKNOWN

Print: Mar 11, 2008

72298026

Attorney of Record
ANTHONY J. CASELLA

DESIGN MARK

Serial Number

72300879

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0862099

Date Registered

1968/12/17

Type of Mark

TRADEMARK

Register

PRINCIPAL

Concurrency

CONCURRENT USE

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

WACHOVIA CAPITAL FINANCE CORPORATION(NEW ENGLAND) , AS AGENT
CORPORATION MASSACHUSETTS ONE POST OFFICE SQUARE BOSTON MASSACHUSETTS
02109

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1967/12/02. First Use In Commerce: 1967/12/02.

Concurrent Use Statement

NOW, THEREFORE, IT IS ORDERED THAT SAID REGISTRATION BE, AND THE SAME
HEREBY IS, RESTRICTED TO THOSE STATES LYING GENERALLY WEST OF THE
MISSISSIPPI RIVER INCLUDING ALASKA, ARIZONA, ARKANSAS, CALIFORNIA,
COLORADO, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON,
SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WYOMING IN ACCORDANCE WITH
SECTION 18 OF THE TRADEMARK ACT OF 1946.

Prior Registration(s)

Print: Mar 11, 2008

72300879

0577159;0840952;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR PURPLE AND RED.

Filing Date

1968/06/20

Examining Attorney

UNKNOWN

Attorney of Record

ANTHONY B. DIEPENBROCK

DESIGN MARK

Serial Number

72300880

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

0862100

Date Registered

1968/12/17

Type of Mark

TRADEMARK

Register

PRINCIPAL

Concurrency

CONCURRENT USE

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

WACHOVIA CAPITAL FINANCE CORPORATION(NEW ENGLAND) , AS AGENT
CORPORATION MASSACHUSETTS ONE POST OFFICE SQUARE BOSTON MASSACHUSETTS
02109

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1968/05/07. First Use In Commerce: 1968/05/07.

Concurrent Use Statement

NOW, THEREFORE, IT IS ORDERED THAT SAID REGISTRATION BE, AND THE SAME
HEREBY IS , RESTRICTED TO THOSE STATES LYING GENERALLY WEST OF THE
MISSISSIPPI RIVER INCLUDING ALASKA, ARIZONA, ARKANSAS, CALIFORNIA,
COLORADO, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OLKAHOMA, OREGON,
SOUTH DAKATO, TEXAS, UTAH, WASHINGTON AND WYOMING IN ACCORDANCE WITH
THE PROVISIONS OF SECTION 18 OF THE TRADEMARK ACT OF 1946.

Prior Registration(s)

Print: Mar 11, 2008

72300880

0577159;0840952;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR PURPLE AND RED.

Filing Date

1968/06/20

Examining Attorney

UNKNOWN

Attorney of Record

ANTHONY B. DIEPENBROCK

2000-01-01

1000-01-01

1000-01-01

The following information is for your information only. It is not intended to be used for any other purpose. The information is provided for your information only. It is not intended to be used for any other purpose. The information is provided for your information only. It is not intended to be used for any other purpose.

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1000-01-01

1000-01-01
1000-01-01
1000-01-01

1000-01-01
1000-01-01

TYPED DRAWING

Serial Number

72433786

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1065521

Date Registered

1977/05/10

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

KELLOGG NORTH AMERICA COMPANY CORPORATION DELAWARE ONE KELLOGG SQUARE
BATTLE CREEK MICHIGAN 49016

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: COOKIES. First
Use: 1946/00/00. First Use In Commerce: 1946/00/00.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United
States lying generally east of the Mississippi River including
Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana,
Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New
Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania,
Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West
Virginia and Wisconsin pursuant to Concurrent Use Proceeding Nos.
94000392 and 94002153. Concurrent Use with Application Serial Nos.
75572874 and 75070062.

Filing Date

1972/08/25

Print: Mar 11, 2008

72433786

Examining Attorney
UNKNOWN

Attorney of Record
DAVID A. HERDMAN

DESIGN MARK

Serial Number

73472414

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S MARKET & KITCHEN

Standard Character Mark

No

Registration Number

1440871

Date Registered

1987/05/26

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

AVA RUHA CORPORATION DBA MOTHER'S MARKET AND KITCHEN CORPORATION
CALIFORNIA 225 EAST 17TH STREET COSTA MESA CALIFORNIA 92627

Goods/Services

Class Status -- ACTIVE. IC 042. US 100 101. G & S: RESTAURANT AND
GROCERY SERVICES DIRECTED TOWARD NATURAL AND HEALTH PRODUCTS AND FOOD
PREPARATIONS. First Use: 1978/05/01. First Use In Commerce:
1978/05/01.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN"
APART FROM THE MARK AS SHOWN.

Filing Date

1984/03/26

Examining Attorney

MARKS, MARTIN H.

Attorney of Record

KIT M. STETINA



DESIGN MARK

Serial Number

73587697

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1422150

Date Registered

1986/12/23

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

MOTHER'S FOOD PRODUCTS, INC. CORPORATION NEW JERSEY 80 AVENUE K NEWARK
NEW JERSEY 07105

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: MATZO BALLS IN
BROTH. First Use: 1963/02/05. First Use In Commerce: 1963/02/05.

Prior Registration(s)

0739469;0777505;0867634;AND OTHERS

Lining/Stippling Statement

THE DRAWING IS LINED FOR THE COLORS GREEN AND YELLOW.

Filing Date

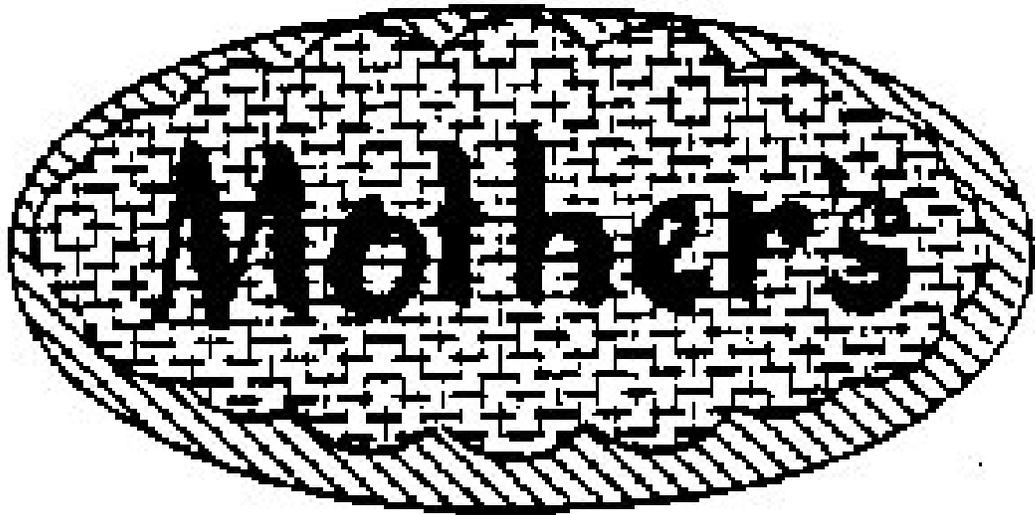
1986/03/13

Examining Attorney

PRICE, JERRY L.

Attorney of Record

GERALD E. HESPOS



Print: Mar 11, 2008

73820569

TYPED DRAWING

Serial Number

73820569

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

1584991

Date Registered

1990/02/27

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

QUAKER OATS COMPANY, THE CORPORATION NEW JERSEY QUAKER TOWER 321 NORTH CLARK STREET CHICAGO ILLINOIS 60610

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: PROCESSED HOT AND COLD CEREALS; GRAIN CAKES. First Use: 1895/07/01. First Use In Commerce: 1895/07/01.

Prior Registration(s)

0075622;0143143;0539986;1288064;AND OTHERS

Filing Date

1989/08/21

Examining Attorney

STEINMAN, KEVIN PAUL

TYPED DRAWING

Serial Number

75070062

Status

REGISTERED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

3287270

Date Registered

2007/09/04

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Mother's Cake & Cookie Co. CORPORATION CALIFORNIA 520 Lake Cook Road
Suite 520 Deerfield ILLINOIS 60015

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: cakes, cookies,
crackers and other bakery goods. First Use: 1914/06/01. First Use In
Commerce: 1914/06/01.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United
States lying generally west of the Mississippi River including,
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa,
Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New
Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah,
Washington and Wyoming pursuant to Concurrent Use Proceeding No.
94000392 and 94002153. Concurrent Registration with Registration No.
1065521.

Prior Registration(s)

0577159;0635300;0862099;0862100;AND OTHERS

Print: Mar 11, 2008

75070062

Filing Date

1996/03/11

Examining Attorney

CHOE, KELLY

Attorney of Record

Robert T. Johnson, Jr.

TYPED DRAWING

Serial Number

75395778

Status

CANCELLATION TERMINATED - SEE TTAB RECORDS

Word Mark

MAMACITA'S

Standard Character Mark

No

Registration Number

2258873

Date Registered

1999/07/06

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

CASA DE ORO FOODS LLC LTD LIAB CO DELAWARE 3701 WEST MAGNOLIA AVENUE
LOUISVILLE KENTUCKY 40211

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: Tortillas. First
Use: 1995/10/00. First Use In Commerce: 1995/10/00.

Prior Registration(s)

1075615;1829935;AND OTHERS

Translation Statement

The word "MAMACITA" is a Spanish term of endearment for "MOTHER".

Filing Date

1997/11/25

Examining Attorney

UNKNOWN

Attorney of Record

JEFFREY E. FINE

Print: Mar 11, 2008

75453614

DESIGN MARK

Serial Number

75453614

Status

SECTION 8 & 15-ACCEPTED AND ACKNOWLEDGED

Word Mark

MOTHER'S

Standard Character Mark

No

Registration Number

2226184

Date Registered

1999/02/23

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Quaker Oats Company, The CORPORATION NEW JERSEY 555 West Monroe
Chicago ILLINOIS 60661

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: READY-TO-EAT
CEREAL. First Use: 1998/03/16. First Use In Commerce: 1998/03/16.

Prior Registration(s)

0143143;0538157;0539986;1277240;1278200;1279122;1584991;1584992;AND
OTHERS

Filing Date

1998/03/20

Examining Attorney

LORENZO, ROBERT

Attorney of Record

JANET L SILVERBERG



DESIGN MARK

Serial Number

75572874

Status

REGISTERED

Word Mark

MOTHER'S COOKIES SINCE 1914

Standard Character Mark

No

Registration Number

3287272

Date Registered

2007/09/04

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Mother's Cake & Cookie Co. CORPORATION CALIFORNIA 810-81st Avenue
Oakland CALIFORNIA 946212583

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: cookies. First
Use: 1998/01/05. First Use In Commerce: 1998/01/05.

Order Restricting Scope Statement

Registration limited to the area comprising those states of the United
States lying generally west of the Mississippi River including,
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa,
Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New
Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah,
Washington and Wyoming pursuant to Concurrent Use Proceeding No.
94000392 and 94002153. Concurrent Registration with Registration No.
1065521.

Prior Registration(s)

0577159;0635300;0862099;0862100;1065521;1195834;1212613;2087140;AND
OTHERS

Print: Mar 11, 2008

75572874

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COOKIES" and "SINCE 1914" APART FROM THE MARK AS SHOWN.

Colors Claimed

Color is not claimed as a feature of the mark.

Filing Date

1998/10/19

Examining Attorney

SHARPER, SAMUEL E.

Attorney of Record

Robert T. Johnson, Jr.



Cambridge Dictionary of American English



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Definition

nutrition

[Show phonetics]
noun [U]

the process by which the body takes in and uses food, esp. food that it needs to stay healthy, or the scientific study of this process

Nutrition experts have been urging people to eat less fatty food.

nutritional, nutritive

[Show phonetics]
adjective [not gradable]

Resources

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- Top 40 words
- Word of the day
- Data for Language Researchers
- About the corpus

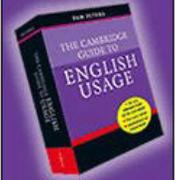
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adjective [not gradable]
relating to nutrition, or containing a food substance your body can use
Artificial sweeteners have no nutritional value.

nutritious

[\[Show phonetics\]](#)

adjective
(of food or drink) containing substances your body needs and can use to stay healthy

In general, raw vegetables are more nutritious than cooked vegetables.

(from [Cambridge Dictionary of American English](#))

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The American Heritage® Dictionary of the English Language: Fourth Edition. 2000.

center

SYLLABICATION: cen·ter

PRONUNCIATION: sĕn'tĕr

NOUN: **1.** A point or place that is equally distant from the sides or outer boundaries of something; the middle: *the center of a stage.* **2 a.** A point equidistant from the vertices of a regular polygon. **b.** A point equidistant from all points on the circumference of a circle or on the surface of a sphere. **3.** A point around which something rotates or revolves: *The sun is the center of our solar system.* **4.** A part of an object that is surrounded by the rest; a core: *chocolates with soft centers.* **5 a.** A place where a particular activity or service is concentrated: *a medical center.* **b.** A point of origin, as of influence,

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ideas, or actions: *a center of power; a center of unrest*. **c.** An area of dense population: *a metropolitan center*. **6.** A person or thing that is the chief object of attention, interest, activity, or emotion. **7.** A person, object, or group occupying a middle position. **8.** often **Center** A political group or a set of policies representing a moderate view between those of the right and the left. **9. Physiology** A group of neurons in the central nervous system that control a particular function: *the vasomotor center*. **10. Sports** A player who holds a middle position on the field, court, or forward line in some team sports, such as football and basketball. **11. Baseball** Center field. **12a.** A small conical hole made in a piece of work with a center punch so that a drill can be accurately positioned within it. **b.** A bar with a conical point used to support work, as during turning on a lathe. **13. Architecture** A centering.

VERB: Inflected forms: **centered, centering, centers**

TRANSITIVE VERB: **1.** To place in or at the center: *centered the vase on the table*. **2.** To direct toward a center or central point; concentrate or focus: *tried to center the discussion on the main issues*. **3. Sports a.** To pass (a ball or puck) toward the center of a playing area. **b.** To play as a center on (a line), as in ice hockey. **4. Football** To pass (the ball) back between the legs to begin a down.

INTRANSITIVE VERB: **1.** To be concentrated; cluster: *The epidemic centered in the urban areas*. **2.** To have a central theme or concern; be focused: *Her novels center on the problems of adolescence*. **3. Sports** To play as a center.

ETYMOLOGY: Middle English *centre*, from Old French, from Latin *centrum*, from Greek *kentron*, center of a circle, from *kentein*, to prick. See **kent-** in Appendix I.

SYNONYMS: *center, focus, headquarters, heart, hub, seat* These nouns refer to a region, person, or thing around which some activity is concentrated: *a great cultural center; the focus of research efforts; the headquarters of a multinational corporation; a town that is the heart of the colony; the hub of a steel empire; the seat of government*.

USAGE NOTE: Traditionally, the verb *center* may be freely used with the prepositions *on*, *upon*, *in*, or *at*; but some language critics have denounced its use with *around* as well as *in* and *at*. For example, *centered around the table* is considered incorrect.

- Health Care Management
- Human Resources Management
- Marketing
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as illogical or physically impossible. But the fact that writers persist in using this phrase in sentences such as *The discussion centered around the need for curriculum reform*, a sentence that 71 percent of the Usage Panel accepts, suggests that many people perceive *center around* to best represent the true nature of what they are trying to say. Indeed, in an example like *A storm of controversy centered around the king*, the only appropriate choice seems to be *around*. Still, if one wishes to avoid the phrase *center around*, the phrase *revolve around* is available as an option. Since *center* can represent various relations involving having, finding, or turning about a center, the choice of a preposition depends on what is intended. There is ample evidence for usages with each preposition listed above. The Panel accepts all of these uses except the one with *at*. Seventy-seven percent reject the sentence *The company has been centered at Atlanta for the last five years*. See Usage Note at [equal](#).

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To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: TRADEMARK APPLICATION NO. 77368478 - MOTHER'S NUTRITIONAL - 66309-1006
Sent: 3/11/2008 3:41:29 PM
Sent As: ECOM107@USPTO.GOV
Attachments:

IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 3/11/2008 FOR
APPLICATION SERIAL NO. 77368478

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77368478&doc_type=OOA& (or copy and paste this URL into the address field of your browser), or visit <http://tportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from **3/11/2008**.

Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

HELP: For *technical* assistance in accessing the Office action, please e-mail TDR@uspto.gov. Please contact the assigned examining attorney with questions about the Office action.

WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**

EXHIBIT 8

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77368478
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney has refused registration of Applicant's mark MOTHER'S NUTRITIONAL CENTER on the basis that Applicant's mark, when used in connection with the identified goods and services, so resembles the following registered marks as to be likely to cause confusion, mistake, or deception pursuant to Trademark Act Section 2(d):</p> <p>(A) Registrations for MOTHER'S and MOTHER'S & Design, for use in connection with various food products (collectively the "MOTHER'S Food Registrations"):</p> <p>(1) In the name of Mother's Food Products, Inc.: Reg. No. 552,693, Reg. No. 560,717, Reg. No. 581,646, Reg. No. 589,652, Reg. No. 617,961, Reg. No. 739,469, Reg. No. 867,634, and Reg. No. 1,422,150;</p> <p>(2) In the name of Quaker Oats Company: Reg. No. 1,584,991 and Reg. No. 2,226,184;</p> <p>(3) In the name of Kellogg North America Company: Reg. No. 1,065,521; and</p> <p>(4) In the name of Mother's Cake & Cookie Co.: Reg. No. 3,287,272, Reg. No. 3,287,270, Reg. No. 862,099, Reg. No. 862,100, all for use in connection with cookies;</p> <p>(B) Reg. No. 2,258,873 for MAMACITA in the name of Casa de Oro Foods LLC for use in connection with tortillas (the " '873 Reg").</p>	

(C) Reg. No. 1,440,871 for MOTHER'S MARKET & KITCHEN & Design in the name of Ava Ruhn Corporation dba Mother's Market and Kitchen for use in connection with restaurant and grocery store services directed toward natural and health products and food preparations (the " '871 Reg. ")

For the reasons set forth below, Applicant respectfully disagrees with the Examining Attorney's position and requests that the refusal be withdrawn and Applicant's Mark be allowed to proceed to publication.

(A) Confusion is Not Likely Between Applicant's Mark and the MOTHER'S Food Registrations

The Examining Attorney argues that confusion is likely to arise because consumers will believe that, upon seeing products in grocery stores bearing the marks in the MOTHER'S Food Registrations, consumer will believe that those products originate from Applicant. However, although, the goods identified in the MOTHER'S Food Registrations may be found in grocery stores, it does not follow that consumers will believe that those goods originate from Applicant. See In re Sentry Drug Center, Inc., 177 U.S.P.Q. 208, 209 (T.T.A.B. 1973).

In In re Sentry Drug Center, Inc., the Examining Attorney refused registration for SENTRY DRUG CENTERS ("drug centers" disclaimed) because of a likelihood of confusion with "existing registrations of the word 'SENTRY' to different parties for an oral antiseptic mouthwash and for vitamins-dietary supplement." See id. There, as here, the examining attorney reasoned that "mouthwashes and vitamin supplements are goods which are commonly sold in drug stores and that applicant has appropriated the dominant element of the registered marks for a retail drug store service." Id.

The applicant, in turn, noted that there were numerous registrations for SENTRY in connection with items that may be sold in an average drug store and argued, *inter alia*, that there is a distinction between retail drug store services and drugs or pharmaceuticals. See id. Just as there is a distinction between drug store services and drug or pharmaceuticals, there is a distinction between grocery store services and groceries.

Further, here, as in In re Sentry Drug Center, Inc., there are numerous registered marks incorporating the term MOTHER'S and used in connection with goods that are

commonly sold in grocery stores. In Classes 29 and 30 alone, there are more than 80 registered marks that contain the element "MOTHER" or "MOTHER'S." The Examining Attorney has identified no less than 15 such registrations for the term MOTHER'S in the name of at least four different registrants. Many of these registrations, including each of the registrations identified by the Examining Attorney, are issued for use in connection with food items commonly found in grocery stores.

In In re Sentry Drug Centers, Inc., the TTAB agreed with applicant that there is an important distinction between the provision of store services and the products stocked in the store, and reversed the examining attorney's refusal to register the mark. See id. Applicant submits, that here, as in In re Sentry Drug Center, Inc., a refusal on the grounds of likelihood of confusion with the MOTHER'S Food Registrations, is not appropriate.

(B) Confusion is Not Likely Between Applicant's Mark and the '873 Reg.

Applicant's mark is MOTHER'S NUTRITIONAL CENTER and the mark in the '873 Reg. is MAMACITA. There are visual and phonetic distinctions between these two marks. Because of the distinctions between Applicant's mark and the mark MAMACITA in the '873 Reg., Applicant's arguments in Section A above apply with even greater force to the '873 Reg. For all of those reasons, and because of the distinctions between Applicant's mark and the mark in the '873 Reg., a refusal on the grounds of likelihood of confusion based on the '873 Reg. is not appropriate.

(C) Confusion is Not Likely Between Applicant's Mark the '871 Reg.

The '871 Reg. for MOTHER'S MARKET & KITCHEN & Design is issued in connection with "restaurant and grocery services directed toward natural and health products and food preparations." The 871 Reg. is limited on its face to "services directed toward natural and health products and food preparations."

Applicant has amended its identification of services to read "retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children." As reflected in its amended identification of goods and services, Applicant is the owner of a chain of groceries stores dedicated exclusively to women, infants, and children under the federally funded Women's, Infant, and Children ("WIC") program. WIC helps to ensure that pregnant women, infants, and children under five receive proper nutrition by providing checks that may be redeemed at authorized

vendors for the purchase certain food items. A copy of the authorized food list is attached hereto as Exhibit "A."

Both Applicant and registrant provide specialized services. Natural and health food stores are specialized, offering health food, organic foods, local produce, and often nutritional supplements. Applicant is also very specialized, providing services only to those women and children in the WIC program and providing only those goods on the WIC authorized food list.

Due to the specialization of both Applicant and registrant, it is unlikely that any confusion will arise between Applicant's WIC grocery stores and registrant's health food store, and a refusal on the grounds of likelihood of confusion is not appropriate.

Concluding Remarks

Applicant has presented arguments demonstrating that there is no likelihood of confusion between Applicant's mark and the marks cited by the Examining Attorney. Accordingly, it is respectfully requested that the Section 2(d) refusal be withdrawn and the application be allowed to proceed to publication.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_6310711710-185122404 . Exh. A - WIC Food List.pdf
CONVERTED PDF FILE(S) (15 pages)	\\TICRS\EXPORT3\IMAGEOUT3\773\684\77368478\xml1\ROA0002.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\684\77368478\xml1\ROA0003.JPG
	\\TICRS\EXPORT3\IMAGEOUT3\773\684\77368478\xml1\ROA0004.JPG
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	\\TICRS\EXPORT3\IMAGEOUT3\773\684\77368478\xml1\ROA0016.JPG
DESCRIPTION OF EVIDENCE FILE	a copy of the WIC Authorized food list
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	035
DESCRIPTION	Retail grocery stores
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
ADDITIONAL STATEMENTS SECTION	
DISCLAIMER	No claim is made to the exclusive right to use NUTRITIONAL CENTER apart from the mark as shown.
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall

SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	09/11/2008
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Sep 11 19:06:39 EDT 2008
TEAS STAMP	USPTO/ROA-63.107.117.10-2 0080911190639254124-77368 478-4307c2515b4dac70f4a8e 19014213e8a9e-N/A-N/A-200 80911185122404357

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/2009)

Response to Office Action To the Commissioner for Trademarks:

Application serial no. **77368478** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has refused registration of Applicant's mark MOTHER'S NUTRITIONAL CENTER on the basis that Applicant's mark, when used in connection with the identified goods and services, so resembles the following registered marks as to be likely to cause confusion, mistake, or deception pursuant to Trademark Act Section 2(d):

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(2) In the name of Quaker Oats Company: Reg. No. 1,584,991 and Reg. No. 2,226,184;

(3) In the name of Kellogg North America Company: Reg. No. 1,065,521;
and

(4) In the name of Mother's Cake & Cookie Co.: Reg. No. 3,287,272, Reg. No. 3,287,270, Reg. No. 862,099, Reg. No. 862,100, all for use in connection with cookies;

(B) Reg. No. 2,258,873 for MAMACITA in the name of Casa de Oro Foods LLC for use in connection with tortillas (the " '873 Reg").

(C) Reg. No. 1,440,871 for MOTHER'S MARKET & KITCHEN & Design in the name of Ava Ruhn Corporation dba Mother's Market and Kitchen for use in connection with restaurant and grocery store services directed toward natural and health products and food preparations (the " '871 Reg.")

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The applicant, in turn, noted that there were numerous registrations for SENTRY in

connection with items that may be sold in an average drug store and argued, *inter alia*, that there is a distinction between retail drug store services and drugs or pharmaceuticals. See id. Just as there is a distinction between drug store services and drug or pharmaceuticals, there is a distinction between grocery store services and groceries.

Further, here, as in In re Sentry Drug Center, Inc., there are numerous registered marks incorporating the term MOTHER'S and used in connection with goods that are commonly sold in grocery stores. In Classes 29 and 30 alone, there are more than 80 registered marks that contain the element "MOTHER" or "MOTHER'S." The Examining Attorney has identified no less than 15 such registrations for the term MOTHER'S in the name of at least four different registrants. Many of these registrations, including each of the registrations identified by the Examining Attorney, are issued for use in connection with food items commonly found in grocery stores.

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EVIDENCE

Evidence in the nature of a copy of the WIC Authorized food list has been attached.

Original PDF file:

[evi_6310711710-185122404 . Exh. A - WIC Food List.pdf](#)

Converted PDF file(s) (15 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Retail grocery stores

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

Proposed: Class 035 for Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

ADDITIONAL STATEMENTS

Disclaimer

No claim is made to the exclusive right to use NUTRITIONAL CENTER apart from the mark as shown.

SIGNATURE(S)

Declaration Signature

I hereby elect to bypass the submission of a signed declaration, because I believe a declaration is not required by the rules of practice. I understand that the examining attorney could still, upon later review, require a signed declaration.

Response Signature

Signature: /jessica c. bromall/ Date: 09/11/2008

Signatory's Name: Jessica C. Bromall

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing

him/her as an associate attorney in this matter.

Serial Number: 77368478

Internet Transmission Date: Thu Sep 11 19:06:39 EDT 2008

TEAS Stamp: USPTO/ROA-63.107.117.10-2008091119063925

4124-77368478-4307c2515b4dac70f4a8e19014

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California WIC Authorized Food List (WAFL, August 2008)



California WIC Authorized Food List
August 2008

Breastfeeding Women	
<p>Carrots</p> <p>Can buy</p> <p>Any brand Pre-packaged only</p> <ul style="list-style-type: none">• Fresh, large, whole	<p>Cannot buy</p> <ul style="list-style-type: none">• Canned, shredded, frozen, or baby carrots• Bulk (not packaged)
<p>Tuna</p> <p>Can buy</p> <p>Any brand 5 oz. or 6 oz. cans</p> <ul style="list-style-type: none">• Chunk light water-packed• Dietetic tuna• Low-sodium tuna	<p>Cannot buy</p> <ul style="list-style-type: none">• Solid white or Albacore tuna• Tuna with soy protein added• Oil-packed tuna• Prime fillet

Ways to Buy up to 36 oz. of Cereal

- 12 oz. + 12 oz. + 12 oz. = 36 oz.
- 20 oz. + 15 oz. = 35 oz.
- 17.3 oz. + 17.3 oz. = 34.6 oz.
- 17.5 oz. + 17.3 oz. = 34.8 oz.
- 17.5 oz. + 17.5 oz. = 35 oz.
- 18 oz. + 18 oz. = 36 oz.
- 14.5 oz. + 19 oz. = 33.5 oz.
- 20 oz. + 14 oz. = 34 oz.
- 21.5 oz. + 13 oz. = 34.5 oz.
- 20.4 oz. + 12 oz. = 32.4 oz.

California WIC Authorized Food List
August 2008

Cereals for Women

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for store brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- Malt-o-Meal
 - **Malt-O-Meal Original** (plain)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
 - **Premium Bran Flakes**
- Quaker
 - **Life** (plain)
 - **Oatmeal Squares** (blue box)
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz. or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Cereals for Children

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
 - **Kix** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- B&G Foods
 - **Cream of Wheat** (1 minute, 2-1/2 Minute, 10 minute)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
- Quaker
 - **Life** (plain)
 - **Crunchy Corn Bran**
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Store Brand Cereals

Can buy

Crisp(y) Rice box or bags
12 oz. packages or larger

- Albertsons
- American Fare
- Best Yet
- Flavorite
- Great Value
- Home & Garden
- Hospitality
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Instant Oatmeal – Regular plain, unflavored
11.8 oz. or 12 oz. box of individual serving
packets

- Albertsons
- Best Yet
- Flavorite
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
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Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt clusters/pieces

California WIC Authorized Food List
August 2008

Juice – Frozen Concentrate

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**

- Must state "100% Juice" **and** "120% Vitamin C" on the front label

- Added calcium if the FI does **not** state: "No added calcium allowed"

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Orange juice**
- Must state "100% Juice" on the front label
- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Orange juice that does not state 100% juice on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Juice - Bottled

Can buy

Any brand of ready-to-drink
64 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**
- **Vegetable Cocktail**
-Low sodium allowed
- Must state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice, or Vegetable Cocktail that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Infant Formula

MUST BUY THE NUMBER OF CANS OF FORMULA PRINTED ON THE FOOD INSTRUMENT (FI)

Can Buy

Infant Formula specified on FI
Can size and quantity specified on the FI

- **Enfamil LIPIL with Iron**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil ProSobee LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil LactoFree LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil Gentlease LIPIL**
12 oz. powder only
- **Enfamil A.R. LIPIL**
12.9 oz. powder only
- Other formula allowed ONLY if it is printed on the WIC FI. (For example: Nutramigen LIPIL; Similac NeoSure; Enfamil Enfacare LIPIL; Alimentum; PediaSure, vanilla flavor only.)

Cannot buy

- Any other brand, type, or size not printed on the FI
- Low iron infant formula or formula with no iron

California WIC Authorized Food List
August 2008

Infant Cereal	
MUST BUY THE NUMBER OF BOXES OF CEREAL PRINTED ON THE FOOD INSTRUMENT (FI)	
<i>Can buy</i> Gerber Infant Cereal only 8 oz. boxes <ul style="list-style-type: none">• Dry pack cereal with iron• May buy any combination of allowed cereals:<ul style="list-style-type: none">- Barley- Rice- Oatmeal- Mixed	<i>Cannot buy</i> <ul style="list-style-type: none">• Other types, brands, flavors or sizes of infant cereal• Infant cereal with added fruit• Single servings cups• 6 oz. variety packages

California WIC Authorized Food List
August 2008

Milk	
<p data-bbox="305 390 440 422">Can buy</p> <p data-bbox="305 464 764 558">Any brand Container size determined by type of milk purchased</p> <ul data-bbox="347 596 781 1566" style="list-style-type: none"><li data-bbox="347 596 781 852">• Pasteurized fluid cow's milk<ul data-bbox="415 632 708 852" style="list-style-type: none"><li data-bbox="415 632 708 663">- Nonfat (fat free, skim)<li data-bbox="415 695 708 726">- 1% Lowfat (light)<li data-bbox="415 758 708 789">- 2% Reduced fat<li data-bbox="415 821 708 852">- Whole<li data-bbox="347 1052 781 1178">• Lactose free cow's milk<ul data-bbox="415 1083 764 1178" style="list-style-type: none"><li data-bbox="415 1083 764 1146">-If specified for purchase on the FI<li data-bbox="415 1146 764 1178">-1/2 gallon container<li data-bbox="347 1209 781 1335">• Acidophilus milk<ul data-bbox="415 1241 764 1335" style="list-style-type: none"><li data-bbox="415 1241 764 1304">-If specified for purchase on the FI<li data-bbox="415 1304 764 1335">-1/2 gallon container<li data-bbox="347 1377 781 1440">• Evaporated milk<ul data-bbox="415 1409 781 1440" style="list-style-type: none"><li data-bbox="415 1409 781 1440">-12 oz. can<li data-bbox="347 1472 781 1566">• Powdered dry milk<ul data-bbox="415 1503 708 1566" style="list-style-type: none"><li data-bbox="415 1503 708 1535">- Nonfat or Lowfat only<li data-bbox="415 1535 708 1566">-9.6 oz. to 25.6 oz. box	<p data-bbox="829 390 1013 422">Cannot buy</p> <ul data-bbox="854 464 1243 1230" style="list-style-type: none"><li data-bbox="854 464 1243 495">• Raw (unpasteurized) milk<li data-bbox="854 527 1243 558">• Non-dairy substitutes<li data-bbox="854 590 1243 621">• UHT milk (shelf-stable)<li data-bbox="854 653 1243 684">• Quart or pint sizes<li data-bbox="854 716 1243 747">• Evaporated "filled" milk<li data-bbox="854 779 1243 810">• Sweetened condensed milk<li data-bbox="854 842 1243 873">• Soy beverage (soy milk)<li data-bbox="854 905 1243 936">• Buttermilk<li data-bbox="854 968 1243 999">• Goat's milk<li data-bbox="854 1031 1243 1062">• Organic milk<li data-bbox="854 1094 1243 1125">• Chocolate milk<li data-bbox="854 1157 1243 1188">• Flavored milk

California WIC Authorized Food List
August 2008

Eggs	
<p><i>Can buy</i></p> <p>Any brand Dozen size carton</p> <ul style="list-style-type: none">• Grade AA white chicken eggs• Small, medium, or large eggs	<p><i>Cannot buy</i></p> <ul style="list-style-type: none">• Other grades of eggs• Jumbo or extra large eggs• Low cholesterol eggs• Powdered or liquid eggs• Specialty eggs such as: cage free, stress free, vitamin enriched, organic, or Egglands best• Brown eggs• Egg substitutes• Ungraded eggs• Vitamin enriched

California WIC Authorized Food List
August 2008

Cheese

Can buy

Any brand
Block or round $\frac{3}{4}$ pound (12 oz.) or larger

- Regular, reduced fat, nonfat or low sodium
- **Natural Cheddar cheese** (mild, medium, sharp, extra sharp, or white)
- **Jack cheese**
- **Mozzarella cheese**
- **Process American cheese**
- Domestic cheese ONLY
- Kosher cheese varieties are OK

At the deli:

- Can get block cheese sliced if no extra charge
- Can buy cheese from a manufacturer's pre-sliced block in deli

Cannot buy

- Marbled cheese
- Process cheese food
- Cream cheese or Parmesan cheese
- Cheese spreads or cheese products
 - Velveeta
- Cheese with added hot peppers or spices
- Any other variety of cheese, such as Colby or Muenster
- Cheese made outside the USA
- Organic cheese
- Pre-packaged sliced cheese, individual slices wrapped or not
- String cheese
- Diced, grated, or shredded cheese

California WIC Authorized Food List
August 2008

Peanut Butter

Can buy

Any brand
Most FIs allow 16 oz. to 18 oz. jars
Some FIs may allow 12 or 24 oz. jars

- Plain, creamy, chunky, or super chunky styles
- Honey nut roasted
- Low sodium
- Low sugar or natural
- Any commercial brand

Cannot buy

- Any other size container
- "Grind your own"
- Peanut butter spread
- Organic peanut butter
- Lowfat
- Reduced fat
- Peanut butter with added jams, jellies, chocolate, or honey

Peas, Beans, or Lentils

Can buy

Any brand, any variety
Pre-sealed packaged or in bulk

- Uncooked dry beans, peas, and lentils
- Plain, mixed beans, peas, and/or lentils

ONLY if printed on FI

- 14-16 oz. plain canned beans (any variety)
- Canned baked beans (plain, vegetarian, with pork, with bacon)
- Canned black-eye peas or chickpeas

Cannot buy

- Organic beans
- Green or wax beans
- Canned green peas
- Frozen beans, peas, or lentils
- Canned baked beans with beef or franks
- Canned refried, Cajun style, Bar-B-Que, or Ranch style beans
- Bean soup mixes with flavoring packets or spices

EXHIBIT 9

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77368478
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.</p> <p>Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.</p> <p>A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.</p> <p>In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.</p> <p>Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.</p> <p>Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_6310711720-165214231 . WIC Food List.pdf

CONVERTED PDF FILE(S) (15 pages)	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0002.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0003.JPG
	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0004.JPG
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	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0016.JPG
ORIGINAL PDF FILE	evi_6310711720-165214231_.Flyer.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0017.JPG
ORIGINAL PDF FILE	evi_6310711720-165214231_.Advertisement.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0018.JPG
ORIGINAL PDF FILE	evi_1-6310711720-165214231_.Brochure.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT6\IMAGEOUT6\773\684\77368478\xml1\ROA0019.JPG
DESCRIPTION OF EVIDENCE FILE	the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for	

pregnant women, new mothers, and young children	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
TRACKED TEXT DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children; Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.	
FINAL DESCRIPTION	
Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	04/15/2009
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Wed Apr 15 17:09:00 EDT 2009
TEAS STAMP	USPTO/ROA-63.107.117.20-2 0090415170900794182-77368 478-4305523f16f533554e94e c02d2fbbe543-N/A-N/A-2009

Response to Office Action
To the Commissioner for Trademarks:

Application serial no. **77368478** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.

Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.

A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.

In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.

Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.

Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.

EVIDENCE

Evidence in the nature of the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services has been attached.

Original PDF file:

[evi_6310711720-165214231_. WIC Food List.pdf](#)

Converted PDF file(s) (15 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

Original PDF file:

[evi_6310711720-165214231_. Flyer.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

Original PDF file:

[evi_6310711720-165214231_. Advertisement.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

Original PDF file:

[evi_1-6310711720-165214231_. Brochure.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

Proposed:

Tracked Text Description: ~~Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children;~~ Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.

Class 035 for Retail grocery stores that exclusively provide groceries in connection with a federally

funded nutrition program for pregnant women, new mothers, and young children.

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

SIGNATURE(S)

Declaration Signature

I hereby elect to bypass the submission of a signed declaration, because I believe a declaration is not required by the rules of practice. I understand that the examining attorney could still, upon later review, require a signed declaration.

Response Signature

Signature: /jessica c. bromall/ Date: 04/15/2009

Signatory's Name: Jessica C. Bromall

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

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California WIC Authorized Food List (WAFL, August 2008)



California WIC Authorized Food List
August 2008

Breastfeeding Women	
<p>Carrots</p> <p>Can buy</p> <p>Any brand Pre-packaged only</p> <ul style="list-style-type: none">• Fresh, large, whole	<p>Cannot buy</p> <ul style="list-style-type: none">• Canned, shredded, frozen, or baby carrots• Bulk (not packaged)
<p>Tuna</p> <p>Can buy</p> <p>Any brand 5 oz. or 6 oz. cans</p> <ul style="list-style-type: none">• Chunk light water-packed• Dietetic tuna• Low-sodium tuna	<p>Cannot buy</p> <ul style="list-style-type: none">• Solid white or Albacore tuna• Tuna with soy protein added• Oil-packed tuna• Prime fillet

Ways to Buy up to 36 oz. of Cereal

- 12 oz. + 12 oz. + 12 oz. = 36 oz.
- 20 oz. + 15 oz. = 35 oz.
- 17.3 oz. + 17.3 oz. = 34.6 oz.
- 17.5 oz. + 17.3 oz. = 34.8 oz.
- 17.5 oz. + 17.5 oz. = 35 oz.
- 18 oz. + 18 oz. = 36 oz.
- 14.5 oz. + 19 oz. = 33.5 oz.
- 20 oz. + 14 oz. = 34 oz.
- 21.5 oz. + 13 oz. = 34.5 oz.
- 20.4 oz. + 12 oz. = 32.4 oz.

California WIC Authorized Food List
August 2008

Cereals for Women

Can buy

Any cereal specified on the food instrument

Box or bags – 12 oz. package or larger except for store brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- Malt-o-Meal
 - **Malt-O-Meal Original** (plain)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
 - **Premium Bran Flakes**
- Quaker
 - **Life** (plain)
 - **Oatmeal Squares** (blue box)
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz. or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Cereals for Children

Can buy

Any cereal specified on the food instrument
Box or bags – 12 oz. package or larger except for brand Instant Oatmeal which may be an 11.8 or 12 oz. box

- General Mills
 - **Cheerios** (plain)
 - **Kix** (plain)
- Kellogg's
 - **Corn Flakes** (plain)
 - **Frosted or Unfrosted Mini-Wheats** (Big Bite or Bite Size)
- B&G Foods
 - **Cream of Wheat** (1 minute, 2-1/2 Minute, 10 minute)
- Post
 - **Honey Bunches of Oats** (Honey Roast)
- Quaker
 - **Life** (plain)
 - **Crunchy Corn Bran**
- Store Brands (See list of authorized labels)
 - **Crisp(y) Rice**
 - **Instant Oatmeal** (Regular unflavored, in 11.8 oz or 12 oz. box of individual serving packets)

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Store Brand Cereals

Can buy

Crisp(y) Rice box or bags
12 oz. packages or larger

- Albertsons
- American Fare
- Best Yet
- Favorite
- Great Value
- Home & Garden
- Hospitality
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Instant Oatmeal – Regular plain, unflavored
11.8 oz. or 12 oz. box of individual serving
packets

- Albertsons
- Best Yet
- Favorite
- Hy Top
- IGA
- Kroger
- Parade
- Raleys
- Ralphs
- Ralston (Military Commissary)
- Red & White
- Safeway
- Special Value
- Springfield
- Stater Brothers
- Sunny Select
- Vons
- Western Family

Cannot buy

- Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods
- Individual serving packets, except for store brand Instant Oatmeal
- Packages smaller than 12 oz., except for store brand Instant Oatmeal
- Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored
- Cereals with chocolate, fruit, nuts, marshmallows, or yogurt clusters/pieces

California WIC Authorized Food List
August 2008

Juice – Frozen Concentrate

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**

- **Pineapple**

- Must state “100% Juice” **and** “120% Vitamin C” on the front label

- Added calcium if the FI does **not** state: “No added calcium allowed”

Can buy

Any brand
11.5 oz. or 12 oz. containers

- **Orange juice**

- Must state “100% Juice” on the front label

- Added calcium if the FI does **not** state: “No added calcium allowed”

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice that does not state “100% Juice” **and** “120% Vitamin C” on the front label
- Orange juice that does not state 100% juice on the front label
- Added calcium if the FI states: “No added calcium allowed”
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John’s Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
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Juice - Bottled

Can buy

Any brand of ready-to-drink
64 oz. containers

- **Apple**
- **Red Grape**
- **Purple Grape**
- **White Grape**
- **Pineapple**
- **Vegetable Cocktail**
-Low sodium allowed
- Must state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI does **not** state: "No added calcium allowed"

Cannot buy

- Other flavors, types, or sizes
- Apple, Grape (red, purple, white), or Pineapple juice, or Vegetable Cocktail that does not state "100% Juice" **and** "120% Vitamin C" on the front label
- Added calcium if the FI states: "No added calcium allowed"
- Juices with the following added ingredients:
 - Caffeine
 - Carnitine
 - Chromium
 - Ginkgo Biloba
 - Ginseng
 - Grape seed extract
 - Guarana
 - St. John's Wort
 - Taurine
 - Wheatgrass

California WIC Authorized Food List
August 2008

Infant Formula

MUST BUY THE NUMBER OF CANS OF FORMULA PRINTED ON THE FOOD INSTRUMENT (FI)

Can Buy

Infant Formula specified on FI
Can size and quantity specified on the FI

- **Enfamil LIPIL with Iron**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil ProSobee LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil LactoFree LIPIL**
13 fl. oz. liquid concentrate or
12.9 oz. powder
- **Enfamil Gentlease LIPIL**
12 oz. powder only
- **Enfamil A.R. LIPIL**
12.9 oz. powder only
- Other formula allowed ONLY if it is printed on the WIC FI. (For example: Nutramigen LIPIL; Similac NeoSure; Enfamil Enfacare LIPIL; Alimentum; PediaSure, vanilla flavor only.)

Cannot buy

- Any other brand, type, or size not printed on the FI
- Low iron infant formula or formula with no iron

California WIC Authorized Food List
August 2008

Infant Cereal	
MUST BUY THE NUMBER OF BOXES OF CEREAL PRINTED ON THE FOOD INSTRUMENT (FI)	
Can buy Gerber Infant Cereal only 8 oz. boxes <ul style="list-style-type: none">• Dry pack cereal with iron• May buy any combination of allowed cereals:<ul style="list-style-type: none">- Barley- Rice- Oatmeal- Mixed	Cannot buy <ul style="list-style-type: none">• Other types, brands, flavors or sizes of infant cereal• Infant cereal with added fruit• Single servings cups• 6 oz. variety packages

California WIC Authorized Food List
August 2008

Milk	
<p>Can buy</p> <p>Any brand Container size determined by type of milk purchased</p> <ul style="list-style-type: none">• Pasteurized fluid cow's milk<ul style="list-style-type: none">- Nonfat (fat free, skim)- 1% Lowfat (light)- 2% Reduced fat- Whole-Single gallons or gallon twin pack (For "1 ½ gallon" FI, must buy one full gallon and one ½ gallon• Lactose free cow's milk<ul style="list-style-type: none">-If specified for purchase on the FI-1/2 gallon container• Acidophilus milk<ul style="list-style-type: none">-If specified for purchase on the FI-1/2 gallon container• Evaporated milk<ul style="list-style-type: none">-12 oz. can• Powdered dry milk<ul style="list-style-type: none">- Nonfat or Lowfat only-9.6 oz. to 25.6 oz. box	<p>Cannot buy</p> <ul style="list-style-type: none">• Raw (unpasteurized) milk• Non-dairy substitutes• UHT milk (shelf-stable)• Quart or pint sizes• Evaporated "filled" milk• Sweetened condensed milk• Soy beverage (soy milk)• Buttermilk• Goat's milk• Organic milk• Chocolate milk• Flavored milk

California WIC Authorized Food List
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Eggs	
<p><i>Can buy</i></p> <p>Any brand Dozen size carton</p> <ul style="list-style-type: none">• Grade AA white chicken eggs• Small, medium, or large eggs	<p><i>Cannot buy</i></p> <ul style="list-style-type: none">• Other grades of eggs• Jumbo or extra large eggs• Low cholesterol eggs• Powdered or liquid eggs• Specialty eggs such as: cage free, stress free, vitamin enriched, organic, or Egglands best• Brown eggs• Egg substitutes• Ungraded eggs• Vitamin enriched

California WIC Authorized Food List
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Cheese

Can buy

Any brand
Block or round $\frac{3}{4}$ pound (12 oz.) or larger

- Regular, reduced fat, nonfat or low sodium
- **Natural Cheddar cheese** (mild, medium, sharp, extra sharp, or white)
- **Jack cheese**
- **Mozzarella cheese**
- **Process American cheese**
- Domestic cheese ONLY
- Kosher cheese varieties are OK

At the deli:

- Can get block cheese sliced if no extra charge
- Can buy cheese from a manufacturer's pre-sliced block in deli

Cannot buy

- Marbled cheese
- Process cheese food
- Cream cheese or Parmesan cheese
- Cheese spreads or cheese products
 - Velveeta
- Cheese with added hot peppers or spices
- Any other variety of cheese, such as Colby or Muenster
- Cheese made outside the USA
- Organic cheese
- Pre-packaged sliced cheese, individual slices wrapped or not
- String cheese
- Diced, grated, or shredded cheese

California WIC Authorized Food List
August 2008

Peanut Butter

Can buy

Any brand
Most FIs allow 16 oz. to 18 oz. jars
Some FIs may allow 12 or 24 oz. jars

- Plain, creamy, chunky, or super chunky styles
- Honey nut roasted
- Low sodium
- Low sugar or natural
- Any commercial brand

Cannot buy

- Any other size container
- "Grind your own"
- Peanut butter spread
- Organic peanut butter
- Lowfat
- Reduced fat
- Peanut butter with added jams, jellies, chocolate, or honey

California WIC Authorized Food List
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Peas, Beans, or Lentils

Can buy

Any brand, any variety
Pre-sealed packaged or in bulk

- Uncooked dry beans, peas, and lentils
- Plain, mixed beans, peas, and/or lentils

ONLY if printed on FI

- 14-16 oz. plain canned beans (any variety)
- Canned baked beans (plain, vegetarian, with pork, with bacon)
- Canned black-eye peas or chickpeas

Cannot buy

- Organic beans
- Green or wax beans
- Canned green peas
- Frozen beans, peas, or lentils
- Canned baked beans with beef or franks
- Canned refried, Cajun style, Bar-B-Que, or Ranch style beans
- Bean soup mixes with flavoring packets or spices



Mother's
NUTRITIONAL CENTER

Mother's Nutritional Center is a group of redemption centers that exclusively serve participants of the women, children and infant voucher program.

Summary of Operations

With over 50 locations, Mother's Nutritional Center is Southern California's largest women, children and infants redemption center.

The women, children and infants voucher program is a state health and food assistance program, offering its participants nutritional education and supplemental foods.

Vouchers are issued by the Department of Health Services and can be redeemed at Mother's Nutritional Center to buy health foods such as milk, juice, eggs, cheese, cereal, dry beans and peas and peanut butter. All customers must qualify at a local state office.

Mother's Nutritional Center serves participants of the program. We carry all food products included in the program.

Community Service

Mother's Nutritional Center is committed to giving back to the community. Throughout each year, Mother's donates and gives support to many organizations such as schools, community youth centers, food banks, and The Boys and Girls Club of America to name just a few. We also sponsor and participate in health fairs and countless other community events.

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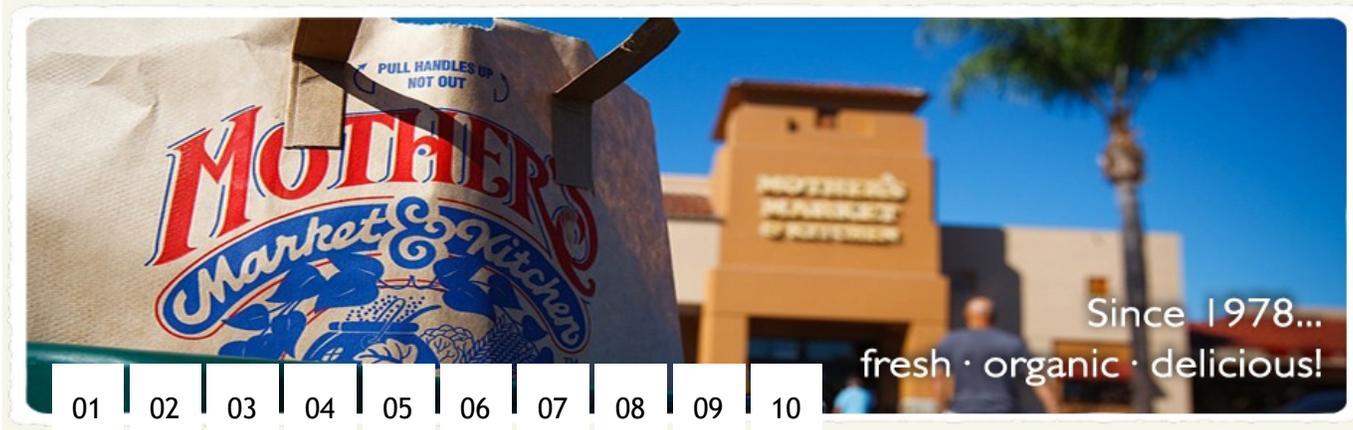
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