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

Proceeding	92056067
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Case AVARU-009M/010M  
Trademark Registration

**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 CENTER
Respondent.	

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**PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET &  
KITCHEN'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY  
JUDGMENT BASED ON LACHES, CROSS-MOTION FOR SUMMARY  
ADJUDICATION OF NO LACHES**

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## I. INTRODUCTION

Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen (hereinafter "Petitioner") hereby opposes Respondent Mother's Nutritional Center, Inc.'s ("Respondent") motion for summary judgment based on laches. In summary, Respondent claims laches based on the passage of nearly fifteen years from the date of a cease and desist letter sent by Petitioner to Respondent in February of 1998, and over three years after Respondent's "Mother's Nutritional Center" and "Mother's" trademark applications were published for opposition. While admitting that Respondent through its counsel expressly rejected Petitioner's claims of likelihood of confusion, Respondent contends that Petitioner's allegedly "unreasonable delay" in seeking to cancel Respondent's registration by expanding from 58 stores to 73 stores and spending in excess of \$7 million dollars to promote Respondent's marks and grocery services between July 2009 and August 2012 resulted in prejudice to Respondent.

Respondent's motion should be denied and judgment should be entered in favor of Petitioner on Respondent's defense of laches based on the following grounds:

- (1) The earliest date from which laches can accrue is when Petitioner could have filed an opposition to the registration of Respondent's marks. The time before June 16, 2009 is therefore wholly irrelevant to the issue of whether Petitioner's "delay" is inexcusable or unreasonable;
- (2) Petitioner's "delay" was reasonable;
- (3) Petitioner's "delay" was excusable; and
- (4) Respondent's advertising expenditures and the opening of new stores are completely unrelated to Petitioner's alleged "delay".

## II. BACKGROUND

On February 5, 1998, Petitioner's then counsel sent a letter to Respondent regarding Respondent's use of the "name 'Mother's Nutritional Center'". The letter demanded that Respondent cease all further use of the "name 'Mother's'" based on a belief that there is a likelihood of confusion between Mother's Nutritional Center and Mother's Market & Kitchen.<sup>1</sup> Notably, the letter does not threaten to oppose or cancel any registrations owned by Respondent for "Mother's Nutritional Center" or "Mother's", nor does it claim any awareness of the existence of trademark applications or registrations owned by Respondent. See Respondent's Motion, Ex. "A".

On February 13, 1998, Respondent's counsel Scott Zolke responded on behalf of Respondent, rejecting Petitioner's contention that its trademark registration for Mother's Market & Kitchen vests Petitioner with nationwide exclusive rights to use the "Mother's" trademark, states that trademark office records reveal the existence of "several registered marks incorporating the term 'Mother's'", and concludes by rejecting Petitioner's claims that the Mother's Nutritional Center name is confusingly similar to Mother's Market & Kitchen. See Respondent's Motion, Ex. "B".

On January 10, 2008, Respondent filed a domestic trademark application for the Mother's Nutritional Center mark. See Defendant's Motion, Ex. "D". On November 29, 2007, Respondent filed a domestic trademark application for the "Mother's" mark. See Respondent's Motion, Ex. "C". The Mother's Nutritional Center and Mother's trademark

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<sup>1</sup> The letter does not specifically state that Respondent has used the designation "Mother's Nutritional Center" as a trademark (as distinguished from a trade name), nor does it specifically state that Respondent has used the designation "Mother's" alone, either as a trade name or as a trademark.

applications published for opposition on May 27, 2009. See Respondent's Motion, Exs. "D" and "F".

On September 1, 2009, the Trademark Office granted Reg. No. 3,675,056 for the mark Mother's Nutritional Center in class 35 and for the mark Mother's, Reg. No. 3,675,027, also in class 35. The Mother's Nutritional Center and Mother's marks claim dates of first use in commerce of May 9, 2007. See Respondent's Motion, Exs. "G" and "H".

In late 2003, Petitioner discovered that Respondent had previously abandoned an application for the Mother's Nutritional Center trademark. See Rubino Decl., ¶9.

In or about August of 2011, Petitioner first discovered that Respondent was using the name "Mother's". See Rubino Decl., ¶10.

In or about December of 2011, Petitioner first discovered that Respondent had filed a lawsuit against a "Mother Market" entity in the United States District Court for the Central District of California, styled *Mother's Nutritional Center, Inc. v. Mother Market, et al.*, case no. 2:11-cv-09030, wherein Respondent plead the existence of a likelihood of confusion between its Mother's Nutritional Center and Mother's trademarks and the Defendants' use of the Mother Market trademark. See Rubino Decl., ¶11.

In or about January of 2012, Petitioner first received evidence of an instance of actual confusion between its own Mother's Market & Kitchen trademark and Respondent's Mother's Nutritional Center mark. See Rubino Decl., ¶12.

In early 2012, Petitioner first discovered that Respondent was using the Mother's Nutritional Center mark to market and promote healthy and nutritional foods and eating habits. See Rubino Decl., ¶13.

### III. ARGUMENT

#### A. Legal Standard

TBMP Rule 528 adopts Fed. R. Civ. P. 56 as the standard for assessing motions for summary judgment.

Fed. R. Civ. P. 56(a) states in pertinent part:

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

...

Fed. R. Civ. P. 56(c)(1) goes on to state:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

...

(4) an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56.

A party moving for summary judgment based on laches has the burden of proving by a preponderance of the evidence the absence of any genuine disputed material fact that (1) the petitioner's "delay" was an unreasonable and inexcusable length of time; and (2)

the respondent experienced material prejudice due to or as a result of the delay. *Gasser Chair Co., Inc. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 34 USPQ2d 1822, 1824 (Fed. Cir. 1995); *Copeland's Enterprises, Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 USPQ2d 1295, 1298-99 (Fed. Cir. 1991). A fact is material if it “may affect the decision, whereby the finding of that fact is relevant and necessary to the proceedings.” *Opryland USA, Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992) (dispute is genuine if evidence could lead a reasonable finder of fact to decide question in favor of non-movant.) The non-moving party **must** be given the benefit of all reasonable doubt as to whether genuine disputes and material facts exist; and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, **must** be viewed in the light most favorable to the non-moving party. *Opryland USA, Inc.*, 23 USPQ2d at 1472; *Gasser Chair Co. Inc.*, 34 USPQ2d at 1825 (all reasonable inferences in favor of non-movant that would have shortened the delay period and/or may have shown that the delay was reasonable must be drawn in favor of the movant).

The application of laches is discretionary in the Board. In considering the propriety of a motion for summary judgment based on laches, the Board **may not** resolve issues of material fact against the non-moving party; it may only ascertain whether such issues exist. *Fish King Processors, Inc. v. Fisher King Seafoods, Ltd.*, 83 USPQ2d 1762, 1764 (TTAB 2007). **Even if** the movant has shown the existence of inexcusable/unreasonable delay and material prejudice due to the delay, as an equitable manner, the Board **must** look to all of the facts and circumstances of the case and weigh the equities of the parties in deciding whether to exercise its discretion in finding laches. *Gasser Chair Co. Inc.*, 34 USPQ2d at 1824.

If the Board concludes that there is no genuine disputed material fact, but that the non-moving party is the one entitled to judgment as a matter of law, the Board may, after giving notice and a reasonable time to respond, grant summary judgment in favor of the

non-moving party. Fed. R. Civ. P. 56(f); *Medinol Ltd. v. NeuroVASX, Inc.*, 67 USPQ2d 1205, 1209, n. 10 (TTAB 2003).

**B. Any “Delay” By Petitioner Must Be Measured From the Date of Registration Of Respondent’s Marks.**

In the context of a trademark opposition or cancellation proceeding, the defense of laches must be tied to a party’s registration of a mark rather than merely to the use of the mark. *Fish King Processors, Inc.*, 83 USPQ2d at 1765. This is consistent with the underlying purpose of an opposition or cancellation proceeding, namely to give a party an opportunity to object to the rights which flow from the registration of a mark as distinguished from its use. *National Cable Television Association, Inc. v. Americana Cinema Editors, Inc.*, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991). As such, in a proceeding pending before the Board, laches begins to run **no earlier** than from the time action could be taken against the acquisition by another of a set of rights to which objection is later made. *Id.* Otherwise, the trademark owner would be obligated to bring suit to stop *use* upon learning of a possible conflicting mark or suffer the possibility of being barred by the passage of time from later opposing or cancelling *registration* of the mark. *Id.* Because a petition to cancel cannot be filed until a registration exists, the laches clock for cancellation actions does not begin to run until the date of registration of the subject mark and, because of the constructive notice resulting from registration of the mark on the

principal register, does not begin to run at any point after registration. *Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 USPQ2d 1203, 1210 (TTAB 2006).<sup>2</sup>

In this case, Respondent's registrations issued on September 1, 2009. Therefore Petitioner was put on constructive notice of Respondent's trademarks on that date, which is the operative date for calculating laches.

**C. Petitioner's "Delay" Was Reasonable**

There is no presumption under trademark law that a delay exceeding a specific length of time should be presumed to be unreasonable for purposes of evaluating a claim of laches.<sup>3</sup> Accordingly, the length of time that may be deemed unreasonable depends entirely on the circumstances of each case. *Motorvac Technologies, Inc. v. Norco Industries, Inc.*, 69 USPQ2d 1691, 1693 (C.D. Cal. 2004).<sup>4</sup>

Petitioner filed its petitions for cancellation against the Mother's Nutritional Center and Mother's trademark registrations on August 21, 2012. This is approximately two years and eleven months from September 1, 2009, the registration dates for Respondent's subject marks. The Board has previously found that "delays" in the filing of opposition or cancellation actions comparable to or exceeding three years were not deemed *unreasonable* under the circumstances, as a matter of law. *Alfacell Corp. v. Anti Cancer, Inc.*, 71 USPQ2d 1301 (TTAB 2004) (no laches following 7-year delay in filing

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<sup>2</sup> There is no evidence whatsoever in the record that Petitioner was aware that the Mother's Nutritional Center and Mother's trademark applications had been allowed to register, let alone that they were registered, prior to their September 1, 2009 registration dates. See Rubino Decl., ¶10.

<sup>3</sup> This is contrary to patent law, where a delay of over six years in pursuing a claim of patent infringement is presumed unreasonable, which presumption is rebuttable. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992).

<sup>4</sup> It is instructive to also look to patent cases involving claims of laches in evaluating whether a specified delay in pursuing a claim has been deemed reasonable or not.

cancellation); *Motorvac Technologies, Inc.*, 69 USPQ2d at 1693 (no laches after 3.5 year delay in filing suit); *Gasser Chair Co., Inc.*, 34 USPQ2d at 1825 (no laches after 5 year delay in filing suit); *Jansen Enterprises, Inc. v. Rind*, 85 USPQ2d 1104, 1114 (TTAB 2007) (no laches following the five year delay in filing of petition for cancellation); *Manpower, Inc. v. Manpower Information, Inc.*, 190 USPQ 18, 23 (TTAB 1976) (no laches following 3-4 year delay following filing of opposition); *Plymouth Cordage Co. v. Solar Nitrogen Chemicals, Inc.*, 152 USPQ 202, 204 (TTAB 1966) (no laches following less than 3 year delay in filing of cancellation action); and *VIP Foods, Inc. v. V.I.P. Food Products*, 200 USPQ 105, 110 (TTAB 1978) (no laches following 2-3 year delay in filing of cancellation action).

In this case, Petitioner took seriously counsel for Respondent's claims in February of 1998 that there was no likelihood of confusion between the Mother's Market & Kitchen trademark and Petitioner's use of the name Mother's Nutritional Center. See Rubino Decl., ¶8. Furthermore, Petitioner was aware of no evidence that Respondent had begun using the Mother's mark until approximately of August 2011. See Rubino Decl., ¶10. As of August 2011, Petitioner was under the belief that Respondent's use of the Mother's Nutritional Center was very limited. See Rubino Decl., ¶10. In view of Respondent's first use of the Mother's Nutritional Center and Mother's marks on May 9, 2007, it is not surprising that Respondent's use could have gone "under the radar". In December of 2011, Petitioner first discovered that Respondent was taking the position that "Mother Market" was confusingly similar to Mother's Nutritional Center in third-party litigation. . See Rubino Decl., ¶11. In January of 2012, Petitioner first discovered instances of actual confusion between Petitioner's mark and Respondent's mark. As in *Motorvac Technologies*, Petitioner took Respondent's claims of no likelihood of confusion very seriously and waited for further evidence of Respondent's use and registration of its "Mother's" trademarks, and/or instances of actual confusion before pursuing claims against Respondent.

Accordingly, at minimum a genuine issue of material fact exists as to whether a two year and eleventh month delay from the date of registration of Respondent's marks was unreasonable. In fact, the evidence of record supports a finding that Petitioner's "delay" was reasonable, as a matter of law.

**D. Petitioner's Delay Was Excusable**

The progressive encroachment by Respondent in its use of the Mother's Nutritional Center mark in the promotion of healthy foods and eating habits excused any "delay" by Petitioner in the filing of these actions. In *Jansen Enterprises, Inc.*, both the Petitioner and the Respondent offered restaurant services, the former under the mark IZZY'S, the latter under the mark IZZY'S with an accompanying design logo. Petitioner's restaurant services offered primarily Italian food, including pizza. In response to the Petitioner's petition to cancel, the Respondent claimed a defense of laches based on a 5-year delay in the filing of the cancellation proceeding from the date of the Respondent's trademark registration. *Jansen Enterprises, Inc.*, 85 USPQ2d at 1111. The Petitioner had previously requested Respondent in writing to voluntarily cancel its IZZY'S registration. The Respondent responded to the Petitioner's written request for cancellation of the registration with a letter from its counsel refusing to voluntarily cancel the registration and affirmatively stating that there was no likelihood of confusion or actual confusion between the parties' marks. The Board concluded that the almost 5 year period of delay between the registration issuance and the filing of the petition for cancellation was unreasonable.

Importantly, however, the Board found extenuating circumstances in the Respondent's expansion of his menu adding pizza approximately six months before the

filing of the petition to cancel. The Board adopted the doctrine of “progressive encroachment” which states that a trademark owner is not forced by the rule of laches to sue until the likelihood of confusion caused by the accused use presents a **significant danger** to the mark. The senior user has no obligation to sue until “the likelihood of confusion looms large” and that “one cannot be guilty of laches until his right ripens into one entitled to protection.” *Jansen Enterprises, Inc.*, 85 USPQ2d at 1116, citing *Sun Microsystems v. SunRiver Corp.*, 36 USPQ2d 1266, 1271 (N.D. Cal. 1995). But when the accused moves closer to the trademark owner’s area of focus, the doctrine of progressive encroachment requires the trademark owner to remain alert and to promptly challenge the new and significant acts of infringement. *Jansen Enterprises, Inc.*, 85 USPQ2d at 1116, citing *McCarthy on Trademarks and Unfair Competition*, §31:19 (4<sup>th</sup> Ed. Updated 2006). By using the mark in a different manner, a defendant may exceed the scope of the plaintiff’s consent and be exposed to liability for that extra-consensual use. The defense of laches is not available to a defendant who expanded its use of the mark to product lines that are competitive with plaintiff. *Id.* In *Jansen Enterprises, Inc.*, the Respondent’s services were identified as “restaurant services featuring bagels as a main entrée.” Because the respondent had changed the nature of its offered services to include Italian food, which was the focus of Petitioner’s restaurant services, Petitioner’s previous failure to take action against the registration was excused thereby precluding a finding of laches. *Jansen Enterprises, Inc.*, 85 USPQ2d at 1117-18.

Similar to *Jansen Enterprises, Inc.*, in February of 1998, counsel for Respondent herein claimed there was no likelihood of confusion between the Mother’s Nutritional Center mark and Petitioner’s Mother’s Market & Kitchen Mark. At such time, Petitioner was only aware of a single store using Respondent’s mark serving as a redemption center for people receiving food assistance from the federal government. This apparently insubstantial use of the Mother’s Nutritional Center mark purporting to cater to consumers receiving food assistance did **not** trigger an obligation to file suit under

*Jansen Enterprises, Inc.* and certainly did **not** obligate the filing of a petition to cancel given the absence of a trademark registration for the Mother's Nutritional Center mark. Furthermore, it is noteworthy that Respondent's own trademark registrations indicate a date of first use in commerce of May 9, 2007 for both the Mother's Nutritional Center and Mother's marks. Therefore, it would appear that there was **no use** of the Mother's Nutritional Center and Mother's marks for a ten year period from 1998 to at least the middle of 2007, contrary to Respondent's claim of continued use. In view of Respondent's claim in 1998 that there was no likelihood of confusion between the marks, and the absence of significant use (if any) of the Mother's Nutritional Center and Mother's marks on federally subsidized food redemption services until 2007, at the earliest, Petitioner's delay through August of 2011 in the filing of a cancellation proceeding was entirely excusable. Then, in August of 2011, Petitioner first discovered that Respondent also began using the "Mother's" designation on grocery services. See Rubino Decl., ¶10. Approximately four months later in December of 2011, Petitioner discovered that Respondent had completely reversed its position regarding the issue of likelihood of confusion, claiming the mark "Mother Market" was confusingly similar to the Mother's Nutritional Center and Mother's marks.<sup>5</sup> See Rubino Decl., ¶11. Furthermore, in early 2012, Petitioner discovered that Respondent began using the Mother's Nutritional Center and Mother's marks in the promotion of healthy and nutritional food products which are a focus of grocery services offered under Petitioner's mark, namely restaurant and grocery services directed toward natural and health products and food preparations. Petitioner subsequently learned these foods included organic products. See Rubino Decl., ¶13. Also in early 2012, Petitioner began to come across evidence of instances of actual confusion by customers who falsely associated Mother's

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<sup>5</sup> Needless to say, the term Mother Market comprises most of Petitioner's registered mark on which it bases its own claim of likelihood of confusion against Respondent.

Nutritional Center with that of Petitioner's Mother's Market & Kitchen. See Rubino Decl., ¶12.

The foregoing facts set forth a classic example of the doctrine of progressive encroachment as identified by Professor McCarthy and exemplified in *Jansen Enterprises, Inc.* Because Respondent changed the nature of their grocery services to include the promoting and offering of health food products in approximately 2011, Respondent is not entitled to rely on Petitioner's "inaction" prior to that time. This change in focus of Respondent's services, the admission by Respondent of the likelihood of confusion between a highly similar mark to Petitioner's and that of Respondent's mark, Petitioner's discovery of Respondent's use of the "Mother's" mark, and evidence of instances of actual confusion constituted a change in circumstances that does not preclude Petitioner from cancelling Respondent's registrations after learning of these "new" circumstances. As in *Jansen Enterprises*, Petitioner's delay in filing this action is excused, as the petition for cancellation was filed less than 8 months after learning of these facts.

Therefore, at minimum there is a genuine issue of material fact as to whether Petitioner's "delay" was excusable. In fact, the evidence of record supports a finding that Petitioner's "delay" was excusable as a matter of law.

**E. There is No Nexus Between Respondent's Opening of Stores, Marketing Expenditures and Petitioner's "Delay" in Filing a Cancellation Action**

As discussed above, the second necessary element of a claim for laches requires that any prejudice experienced by Respondent be the result of or caused by Petitioner's delay in seeking cancellation of Respondent's marks. Prior decisions by the Board and the Federal Circuit are highly instructive in this regard.

In *Manpower, Inc. v. Manpower Information, Inc.*, 190 USPQ 18, 22 (TTAB 1976), the opposer's attorney had written a cease and desist letter to the applicant claiming that its use of the "Manpower Information Service" mark created a likelihood of confusion with its own "Manpower" trademark. Applicant's counsel responded claiming there was no likelihood of confusion and no infringement of opposer's trademark rights. Even though opposer's notice of opposition was only filed some 3-4 years after applicant's refusal to discontinue use of the questioned mark, the Board found **no viable claim for laches** under the circumstances because the applicant's decision to continue to use the mark was dependent not on opposer's failure to follow up, but rather on applicant's reliance on advice of counsel that there was no likelihood of confusion or infringement. *Manpower, Inc.*, 190 USPQ at 23. Similarly, the Court in *Motorvac Technologies* in finding no laches concluded that the defendant failed to prove the existence of a "nexus" between the plaintiff's delay in filing suit and defendant's investments and expenditures (advertising and sales). *Motorvac Technologies, Inc.*, 69 USPQ2d at 1694, citing *Hemstreet v. Computer Entry Sys. Corp.*, 972 F.2d 1290, 1294 (Fed. Cir. 1992) ("it is not enough that the alleged infringer changed his position. . .the change must be because of and as a result of the delay, not simply a business decision to capitalize on a market opportunity.") (Emphasis added.) The court found there were genuine issues of material fact as to whether defendant's conduct and investments were driven by business considerations or whether they were concerns over the plaintiff's patents, and therefore whether defendant's prejudice was a result of plaintiff's delay.<sup>6</sup> In yet a further example, the Federal Circuit in *Gasser Chair Co.* likewise found on a motion for summary judgment that genuine issues of material fact existed as to whether

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<sup>6</sup> Similar to this case, *Motorvac's* attorneys in response to the cease and desist letter asserted that plaintiff's patents were not infringed and were invalid. *Motorvac Technologies*, 69 USPQ2d at 1693.

the defendant's prejudice resulted from the plaintiff's delay or from a business decision or gamble that the patent owner would not sue. *Gasser Chair Co., Inc.*, 34 USPQ2d at 1825. In *Gasser*, the Court concluded that the defendant was indifferent to whether the plaintiff would sue because of their belief that the patent-in-suit was invalid, and as such constituted a deliberate business decision that was not a result of the plaintiff's delay in filing suit.<sup>7</sup>

In this use, it is undisputed that on February 13, 1998, Respondent's counsel stated in no uncertain terms as follows:

**We reject your claims and find nothing to suggest that the subject marks are confusingly similar.** Our client is well within its rights to exploit the mark MOTHER'S NUTRITIONAL CENTER. Finally, be advised that should you persist in your claims and file what we would characterize as baseless litigation against our client, we are prepared to fully defend our client's rights and will take whatever affirmative action against you and your client which may be necessary or appropriate under the circumstances. See Respondent's Motion, Ex. "B".

Based on this fact alone, Petitioner's decision to use the Mother's Nutritional Center and Mother's marks and subsequently seek registration of these marks had nothing to do with Petitioner's failure to file an earlier cancellation action but rather on Respondent's asserted belief based on advice of counsel that there was no likelihood of confusion with

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<sup>7</sup> See also, *Hershey Foods Corporation v. Cerreta*, 195 USPQ 246, 252 (TTAB 1977) (equitable defense of estoppel by laches cannot be sustained where applicant's decision to continue to use marks was dependent not upon opposer's failure to follow up but rather on advice of counsel that there was no likelihood of confusion); *VIP Foods, Inc.*, 200 USPQ at 110 (respondent's continued use and registration of the subject mark was based not on the petitioner's failure to take action to preclude such use but rather on its asserted belief through advice of counsel that confusion was not likely to occur); *Fish King Processors, Inc.*, 83 USPQ2d at 1766 (genuine issue of material fact regarding whether Respondent's prejudice was because of and as a result of Petitioner's delay in seeking cancellation of the subject marks).

Petitioner's Mother's Market & Kitchen marks. Respondent has not shown any nexus between its decision to open more stores and to increase its marketing expenditures during the "delay" period and Petitioner's failure to file a petition to cancel sooner. It is obvious that based on counsel for Respondent's letter, Respondent would have pursued the same course irrespective of what Petitioner did or did not do.

In summary, there is at minimum a genuine issue of material fact as to whether Respondent's claimed prejudice was driven by its independent business considerations or whether it was based on concerns over Petitioner's claims of likelihood of confusion. In fact, Respondent's February 13, 1998 letter indicates that any subsequent expenditures by Respondent were based entirely on a belief that its mark did not create confusion in the marketplace with Mother's Market & Kitchen. Therefore, Respondent's claimed prejudice was not due to, the result of, or caused by Petitioner's "delay" in seeking cancellation of its marks, as a matter of law.

**F. Petitioner Requests Discovery Under Fed. R. Civ. Proc. 56(d)**

Fed. R. Civ. Proc. 56(d) recognizes that "if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. Proc. 56(d). The federal courts recognize that a party must be afforded discovery needed for responding to a summary judgment motion. *Opryland USA, Inc.*, 23 USPQ2d at 1475. Petitioner has substantial need to take discovery in order to be able to fully respond to Respondent's motion for summary judgment of laches. *Dyneer Corp. v. Auto. Products plc*, 37 USPQ2d 1251, 1253 (TTAB 1995).

The following sets forth the specific facts that Petitioner would seek through discovery and the reasons why Petitioner maintains these facts are reasonably expected to create further genuine issues of material fact:

(a) the claim of continuous use by Respondent and in particular its CFO Juan-Carlos Monnaco that the Mother's and Mother's Nutritional Center marks have been used on grocery store services since 1995, in view of the dates of first use and use in commerce for these trademark registrations being May 9, 2007. Further discovery of Respondent including a deposition of Mr. Monnaco is needed to address this inconsistency, whose explanation will create a genuine issue of material fact concerning when Petitioner began to use its marks, whether such use was continuous, whether Mr. Monnaco is competent to offer admissible testimony on the issue<sup>8</sup>, and whether Respondent's lack of awareness of the nature and extent of Petitioner's use of these marks at different times from 2009 onward establishes a reasonable and excusable basis for not seeking earlier cancellation of these marks.

(b) Respondent's assertion through its counsel in its February 13, 1998 letter that the Mother's Nutritional Center mark was not confusingly similar to Petitioner's Mother's Market & Kitchen mark and Respondent's refusal to discontinue using the Mother's Nutritional Center "name". Further discovery of Respondent including a deposition of Mr. Monnaco is needed to determine whether Mr. Monnaco has personal knowledge of why Respondent increased its advertising expenditures and opened new stores, which will create genuine issues of material fact concerning whether Mr.

---

<sup>8</sup> See Petitioner's Evidentiary Objections to Declarations of Juan-Carlos Monnaco and Jessica Bromall, filed concurrently herewith.

Monnaco is competent to offer admissible testimony on the issue and whether Respondent's decision to increase its store count and ad expenditures (Respondent's alleged claim of "prejudice") was due to or a result of concerns regarding Petitioner's cease and desist demand and Petitioner's "delay" in filing a cancellation action, or whether Respondent's conduct and investments were an independent business decision based on the advice of counsel that no likelihood of confusion existed between Respondent's Mother's marks and the Mother's Market & Kitchen service mark.

(c) The amounts spent by Respondent on advertising and its expansion of grocery stores under the Mother's and Mother's Nutritional Center marks. Further discovery of Respondent including a deposition of Mr. Monnaco is needed to determine whether Mr. Monnaco has personal knowledge of the amounts spent by Respondent on advertising and the expansion of Respondent's store count at different points in time, which will create genuine issues of material fact concerning whether Mr. Monnaco is competent to offer admissible testimony on these issues, the amount of advertising and number of stores opened by Respondent at different times to establish when Petitioner filed its cancellation of Respondent's marks was reasonable and excusable in view thereof, whether Mr. Monnaco is competent to offer admissible testimony on the issue, and whether the amounts spent on advertising were directly related to the Mother's and Mother's Nutritional Center marks as opposed to tangential matters.

(d) When Respondent began to transition to the greater promotion of health foods and healthier eating habits. Further discovery of Respondent including a deposition of Mr. Monnaco and perhaps other witnesses is needed on this topic, which will create a genuine issue of material fact concerning whether Respondent's use of its

Mother's marks constitutes progressive encroachment, thereby supporting a finding that any "delay" by Petitioner in seeking cancellation of its marks was reasonable and excusable.

(e) The claim in late 2011 by Respondent that the "Mother Market" mark was confusingly similar to its Mother's Market & Kitchen mark. Further discovery of Respondent including a deposition of Mr. Monnaco and perhaps other witnesses is needed on this topic, which will create a genuine issue of material fact concerning whether any "delay" by Petitioner in seeking cancellation of its marks was reasonable and excusable.

See Vegh Decl., filed concurrently herewith.

The foregoing facts are solely or largely in the custody, possession, or control of Respondent, as they concern the basis for Respondent's decisions regarding the use of the Mother's and Mother's Nutritional Center, positions taken by Respondent against third-parties in litigation regarding issues of likelihood of confusion with similar marks, the timing and nature of its claimed advertising and new store openings, and the qualifications and knowledge of Mr. Monnaco to speak to these issues. Petitioner is unable to adequately address these issues in its Opposition to Respondent's motion for summary judgment, as the underlying facts and documents concerning these issues have not been turned over by Respondent in discovery conducted to date and they are not

satisfactorily disclosed in Mr. Monnaco's declaration.<sup>9</sup> See Vegh Decl.

#### IV. CONCLUSION

Based on all of the foregoing, Petitioner submits there are, at minimum, genuine issues of material fact concerning whether Petitioner's "delay" in pursuing the cancellation of Respondent's Mother's Nutritional Center and Mother's marks was reasonable and excusable. Furthermore, there at least genuine issues of material fact regarding whether Respondent's alleged prejudice characterized by advertising expenditures and opening of stores was due to, the result of, or caused by Petitioner's "delay" in seeking cancellation of Respondent's marks. In fact, the evidence of record supports a finding that Petitioner's "delay" was reasonable and excusable as a matter of law, and that there is no nexus between Respondent's alleged prejudice and the alleged "delay" in the filing of these actions.

///

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<sup>9</sup> On October 10, 2013, Petitioner's counsel asked Respondent's counsel to provide dates of availability for deposition of some of Respondent's corporate representatives. The individuals identified in counsel's request did not provide declarations in support of Respondent's Motion for Summary Judgment. This request predated the receipt by Petitioner's counsel of Respondent's motion for summary judgment. Respondent's Mr. Monacco is not identified as a fact witness in Respondent's supplemental responses to interrogatories, but rather as someone who assisted in the preparation of Respondent's responses to discovery. See Vegh Decl.

Accordingly, Petitioner requests that Respondent's motion for summary judgment of laches be DENIED, and that Petitioner's cross-motion for summary adjudication be granted. In the alternative, Petitioner requests leave to seek discovery under Fed. R. Civ. Proc. 56(d) for the reasons stated above in order to enable Petitioner to fully respond to Respondent's motion.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: November 12, 2013

By: /s/Stephen Z. Vegh

Stephen Z. Vegh, Reg. No. 48,550  
75 Enterprise, Suite 250  
Aliso Viejo, CA 92656  
(949) 855-1246  
Counsel for Petitioner

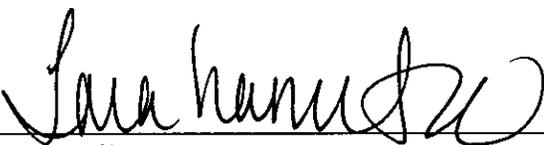
**PROOF OF SERVICE**

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 **November 12, 2013**, the attached **PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACHES, CROSS-MOTION FOR SUMMARY ADJUDICATION OF NO LACHES** 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  
7<sup>th</sup> Floor  
Los Angeles, CA 90067

Executed on **November 12, 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.:
	)
Petitioner,	) 92056067 for Registration No. 3675027
	) For the Mark MOTHER'S (stylized)
	)
vs.	) And
	)
Mother's Nutritional Center, Inc.,	) 92056080 for Registration No. 3675056
	) For the Mark MOTHER'S NUTRITIONAL CENTER
Respondent.	

**DECLARATION OF DEBORAH RUBINO IN SUPPORT OF PETITIONER AVA  
RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S  
OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT  
BASED ON LACHES, CROSS-MOTION FOR SUMMARY ADJUDICATION OF  
NO LACHES**

I, Deborah Rubino, declare as follows:

1. I am the Secretary for Ava Ruha Corporation dba Mother's Market & Kitchen (hereinafter "Petitioner"). I have been with Petitioner since 1990. I have been a member of Petitioner's Board of Directors since August of 1991. At all relevant times, my responsibilities have included customer service, marketing/advertising, food service oversight, the oversight of the third-party usage of "Mother's" trade names or trademarks in the marketplace, the enforcement of Petitioner's rights in the Mother's

Market & Kitchen service mark against users of “Mother’s” trade names or trademarks, and the monitoring of instances of actual confusion between the Mother’s Market & Kitchen service mark and “Mother’s” trade names or trademarks used by others in the marketplace, including but not limited to the Respondent in this proceeding, Mother’s Nutritional Center (hereinafter “Respondent”).

2. I have personal knowledge of the facts stated herein and if called upon as witness, I could and would competently testify to the below facts which are personally known to me.

3. I offer this declaration in support of Petitioner’s Opposition to Respondent’s motion for summary judgment for laches, and Petitioner’s cross-motion for Summary Adjudication thereon.

4. In early 1998, Petitioner became aware that Respondent was using the name “Mother’s Nutritional Center” at a grocery store location in southern California. Following discussions I had with Petitioner’s president Bruce F. Macgurn and Sally Ann Kawamoto, Petitioner concluded that Respondent’s use of the name “Mother’s Nutritional Center” might create a likelihood of confusion in the marketplace with Petitioner’s Mother’s Market & Kitchen registered service mark as used on grocery store services.

5. On or about February 5, 1998, Petitioner’s counsel Richard B. Macgurn contacted Respondent regarding its use of the name “Mother’s Nutritional Center.” The letter in summary notified Respondent of Petitioner’s federally registered trademark and requested Respondent to stop using the name “Mother’s” in its business affairs, because “the consuming public is likely to believe that there is some affiliation or connection

between Mother's Nutritional Center and Mother's Market and Kitchen." However, at this time, Petitioner was not aware of any trademark applications filed by or trademark registrations issued to Respondent that included the word "Mother's." Attached hereto as Exhibit "A" is a true and correct copy of the letter sent to Respondent by Petitioner's counsel in February of 1998, a copy of which I received on or about the time of its sending.

6. Later in February of 1998, I was provided a copy of a letter sent by counsel for Mother's Nutritional Center to Petitioner's counsel responding to Petitioner's letter. Attached hereto as Exhibit "B" is a true and correct copy of this letter.

7. In Exhibit "B", Respondent's counsel states amongst others that "we reject your claims and find nothing to suggest that the subject marks are confusingly similar. Our client is well within its rights to exploit the mark MOTHER'S NUTRITIONAL CENTER. Finally, be advised that should you persist in your claims and file what we would characterize as baseless litigation against our client, we are prepared to fully defend our client's rights and will take whatever affirmative action against you and your client which may be necessary or appropriate under the circumstances."

8. Following receipt of this response from Respondent's counsel, I recall discussing these matters with Petitioner's president Bruce F. Macgurn and Sally Ann Kawamoto. Petitioner took seriously Respondent's claims that there was no likelihood of confusion between the marks. In view of Respondent's understanding that the Mother's Nutritional Center name was being used at only one store location in southern California and the absence of any instances of actual confusion up to that time, along with Petitioner's lack of awareness of any trademark application having been filed by

Petitioner or the allowance for registration of the Mother's Nutritional Center trademark by the United States Patent and Trademark Office, Petitioner did not pursue further action against Respondent at that time.

9. In late 2003, I discovered that Respondent had abandoned an application for registration of the Mother's Nutritional Center mark with the United States Patent and Trademark Office.

10. In August of 2011, I became aware that Respondent had begun using the name "Mother's" on its grocery services. As of this time, Petitioner was unaware that Respondent had used the "Mother's Nutritional Center" mark or the "Mother's" mark by itself, other than on the single store location discussed above, nor was Petitioner aware that Respondent had filed trademark applications with the Patent and Trademark Office for the "Mother's Nutritional Center" and "Mother's" marks for which registrations had been allowed.

11. In December of 2011, it further came to my attention that Respondent had filed a suit on October 31, 2011 for trademark infringement against "Mother Market" in the Central District of California, wherein it alleged that the "Mother Market" designation created a likelihood of confusion with its Mother's Nutritional Center and Mother's trademark registrations. Prior to this time, Petitioner was unaware that Respondent had a registration for the trademarks Mother's Nutritional Center or Mother's. In view of Respondent's earlier position that Mother's Nutritional Center was not confusingly similar to Petitioner's Mother's Market & Kitchen trademark, this new information appeared to completely contradict Respondent's earlier statement in its counsel's February 13, 1998 letter that there was no likelihood of confusion between the

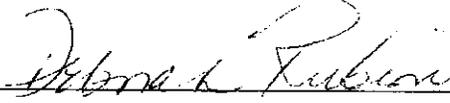
Mother's Nutritional Center mark and the Mother's Market & Kitchen service mark. Attached hereto as Exhibit "C" is a true and correct copy of the Complaint filed by Mother's Nutritional Center against Mother Market et al in the Central District of California, case no. 2:11-cv-09030, which I was provided in December of 2011.

12. On or about January of 2012, it came to my attention through the "contact us" section of our website, [www.mothersmarket.com](http://www.mothersmarket.com), that there was an apparent instance of actual confusion by a member of the consuming public between the Mother's Nutritional Center trademark and Petitioner's Mother's Market & Kitchen service mark. Prior to such time, Petitioner was not aware of earlier instances of actual confusion between the marks. Attached hereto as Exhibit "D" is a redacted version of the e-mail forwarded to my attention.

13. In early 2012, I also first became aware that Respondent began promoting and marketing healthy and nutritional food products under Respondent's Mother's Nutritional Center trademark. I subsequently learned that these foods also included organic products. It is precisely these types of health food products that Petitioner offers to the consuming public in its retail grocery stores operating under the Mother's Market & Kitchen service mark. Attached hereto as Exhibit "E" is a true and correct copy of an exemplar specimen of Respondent's promotional materials from 2011 promoting healthy food products and healthy eating habits.

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 12 day of November, 2013 at Costa Mesa, California.

A handwritten signature in cursive script, appearing to read "Deborah Rubino", is written over a solid horizontal line.

Deborah Rubino  
Declarant

# Exhibit A

*Law Offices of Richard B. Macgurn*

1015 CHESTNUT AVENUE, SUITE E3  
CARLSBAD, CA 92008  
(760) 729-7162  
FAX (760) 729-2860

February 5, 1998

Mother's Nutritional Center  
5015 West Edinger Avenue  
Santa Ana, CA 920704

Attn: Susan Urzua

Dear Ms. Urzua:

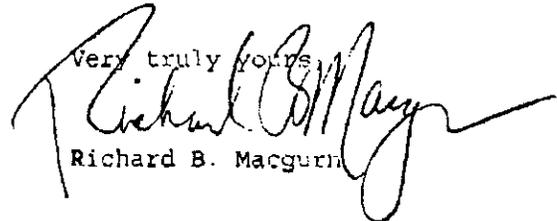
This is a follow up to our telephone conversation. I represent Ava Ruha Corporation dba Mother's Market & Kitchen. Since May 1, 1978 Mother's Market & Kitchen has operated stores in Orange County under their trademark. My client recently became aware that you are using the name "Mother's Nutritional Center" in connection with your business. As set forth below, this letter is a demand for written assurance that you will cease all use of the name "Mother's".

Mother's Market & Kitchen is the owner of a Federal Service Mark Registration covering its trademark for use in connection with restaurant and retail store services. This registration provides Mother's Market & Kitchen with the nationwide right to exclusive use of the distinctive name "Mother's". A trademark is infringed under both Federal and State statutes by any use of a name which is likely to cause confusion among the consuming public. It is our position that you infringed on my client's trademark. The consuming public is likely to believe that there is some affiliation or connection between Mother's Nutritional Center and Mother's Market and Kitchen.

Accordingly, on behalf of my client we demand that within fourteen (14) days of receipt of this letter we have your written assurance that you have ceased all use of the confusingly similar name. If you persist in using the name in spite of my client's objections, we will be forced to view your use as an obvious attempt to trade on the established goodwill associated with my client's well known name.

Should this matter not be resolved amicably and immediately we will be forced to consider bringing an action for injunctive relief, full damages and attorney fees, all as provided for by State statutes and the Lanham Act. I look forward to your prompt response.

Very truly yours,



Richard B. Macgurn

RBM:em  
cc: F. Bruce Macgurn

MNC000294

# Exhibit B

# Heenan Blaikie

Jeffrey Berkowitz  
Daniel H. Black\*  
Fred A. Fenster  
Eric G. Lardiere  
Daniel B. Leon  
Mark K. Li  
Jody Simon\*  
Deborah F. Sirias  
B. J. Yankowitz\*  
Scott B. Zolke†

A California Professional  
Corporation

Suite 1100  
9401 Wilshire Boulevard  
Beverly Hills  
California 90212-2924

Telephone (310) 275 3600  
Facsimile (310) 724-8340

\*Also admitted in New York

†Also admitted in Georgia & Illinois

February 13, 1998

File No. ELT 1.04

VIA FACSIMILE - (760) 729-2860

Richard B. Macgurn, Esq.  
2026 Chestnut Avenue  
Suite E3  
Carlsbad, California 92008

Re: *Mother's Nutritional Center*

Dear Mr. Macgurn:

This firm and the undersigned are counsel to Mother's Nutritional Center and are writing to you in that capacity. Your letter dated February 5, 1998 respecting Ava Ruha Corporation dba Mother's Market & Kitchen has been forwarded to the undersigned for response.

We have reviewed the assertions contained in your letter. Quite frankly, we find question begging your claim that the registration of MOTHER'S MARKET & KITCHEN vests your client with the nationwide right to exclusive use of the distinctive name "Mother's." Indeed, our search of the United States Patent & Trademark Office records reflects several registered marks incorporating the term "Mother's." In addition, there exist numerous common law uses of the term "Mother's."

As we are certain you are aware, a federal registration serves as constructive notice of your client's claim of exclusive rights *in the mark*. As a result, subsequent users of *the mark* or a mark confusingly similar to it are prohibited from using a defense of innocent adoption and use. We are not aware of any provision in the Lanham Act or any case law that would support your proposition that registration of MOTHER'S MARKET & KITCHEN would effectively preempt third parties from incorporating the term "Mother's" in trademarks or service marks. Moreover, we can find no authority whatsoever to support your claim that the term "Mother's" is a distinctive term solely adoptable by your client.

AFFILIATED WITH THE LAW OFFICES OF HEENAN BLAIKIE IN CANADA

MONTRÉAL  
Suite 2500  
1250 René-Lévesque Blvd. West  
Montréal, Québec  
Canada H3B 4Y1

Telephone (514) 846 1212  
Facsimile (514) 846 3427

TROIS-RIVIÈRES  
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Canada G9A 6E6

Telephone (819) 373 7000  
Facsimile (819) 373 0943

TORONTO  
Suite 2600  
South Tower, Royal Bank Plaza  
Toronto, Ontario  
Canada M5J 2J4

Telephone (416) 360 6336  
Facsimile (416) 360 8425

VANCOUVER  
Suite 600  
1199 West Hastings Street  
Vancouver, British Columbia  
Canada V6E 3T5

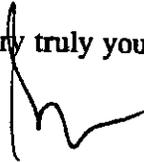
Telephone (604) 669 0011  
Facsimile (604) 669 00376

Richard B. Macgurn, Esq.  
February 13, 1998  
Page 2

Accordingly, we reject your claims and find nothing to suggest that the subject marks are confusingly similar. Our client is well within its rights to exploit the mark MOTHER'S NUTRITIONAL CENTER. Finally, be advised that should you persist in your claims and file what we would characterize as baseless litigation against our client, we are prepared to fully defend our client's rights and will take whatever affirmative action against you and your client which may be necessary or appropriate under the circumstances.

Nothing herein contained shall be deemed to be an admission of any facts or a waiver of any right by our client with respect to the subject matter hereof, all of which rights and remedies hereby are expressly reserved. Govern yourself accordingly.

Very truly yours,



Scott B. Zolke

SBZ:dgc

cc: Mr. Larry Flores

Ms. Susan Urzua

Jeff Berkowitz, Esq.

F:\DATA\SZ\ELTAPAT\LETTERS\Macgurn.L01.wpd

Heenan Blaikie

MNC000377

# Exhibit C

FILED

1 JEFFER, MANGELS, BUTLER & MITCHELL LLP  
2 DAN P. SEDOR, P.C. (Bar No. 139091), *dps@jmbm.com*  
3 AMY LERNER HILL (Bar No. 216288), *akl@jmbm.com*  
4 1900 Avenue of the Stars, Seventh Floor  
Los Angeles, California 90067-4308  
Telephone: (310) 203-8080  
Facsimile: (310) 203-0567

2011 OCT 31 PM 3:33

CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

BY \_\_\_\_\_

5 Attorneys for Plaintiff  
6 MOTHER'S NUTRITIONAL CENTER, INC.

7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SOUTHERN DIVISION

11  
12 MOTHER'S NUTRITIONAL CENTER,  
INC., a California corporation

CASE NO. **CV 11-9030** - *DDW*  
*(JLG)*

13 Plaintiff,

COMPLAINT FOR:

14 v.

15 MOTHER MARKET, a business entity  
16 of unknown form; and DOES 1-10,  
Inclusive,

1. FEDERAL TRADEMARK INFRINGEMENT, VIOLATION OF 15 U.S.C. 1125(a)
2. UNFAIR BUSINESS PRACTICES, CAL. BUS. & PROF. CODE § 17200 ET SEQ.
3. COMMON LAW TRADE NAME AND TRADEMARK INFRINGEMENT

17 Defendants.

18  
19  
20 DEMAND FOR JURY TRIAL

CONFORM

JMBM | Jeffer Mangels Butler & Mitchell LLP

21  
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MNC000351

1 Plaintiff Mother's Nutritional Center, Inc., for its Complaint, alleges as follows:  
2

3 **JURISDICTION**

4 1. Plaintiff Mother's Nutritional Center, Inc. brings this action for  
5 injunctive relief and damages for, *inter alia*, federal trade dress and trademark  
6 infringement in violation of 15 U.S.C. 1125(a), California State unfair business  
7 practices in violation of Cal. Bus. & Prof. Code § 17200 *et seq.*, and common law  
8 trade name and trademark infringement. This Court has subject matter jurisdiction  
9 over the federal question claims pursuant to 28 U.S.C. §§ 1331 and 1338(a). This  
10 Court has supplemental jurisdiction over the claims alleging violations of state law  
11 pursuant to 28 U.S.C. §§ 1338(b) and 1367(a).  
12

13 **THE PARTIES**

14 2. Plaintiff Mother's Nutritional Center, Inc. ("MNC") is a California  
15 corporation doing business at 13635 Freeway Dr., Santa Fe Springs, CA 90670.

16 3. MNC is informed and believes, and on that basis alleges that, defendant  
17 Mother Market ("Defendant") is a business entity of unknown form doing business in  
18 Santa Ana, California. MNC further alleges that Defendant, at all relevant times  
19 hereto, has been and is doing business in this judicial district.

20 4. The true names and capacities of defendants named herein as Does 1  
21 through 10, inclusive, are presently unknown to MNC who therefore sues those  
22 defendants by such fictitious names. MNC will seek leave of Court to amend this  
23 Complaint to allege the true names and capacities of the fictitiously named  
24 defendants when that information is obtained.

25 5. Defendant and Does 1 through 10, inclusive, are collectively referred to  
26 herein as the "Defendants."

27 6. MNC is informed and believes, and on that basis alleges, that each of the  
28 Defendants, including the Doe defendants and each of them, conspired and acted in

JMBM | Jeffrey Margels  
Bardar & Mitchell LLP

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1 concert with the others to commit the wrongs against MNC alleged herein and, in  
2 doing so, were at all relevant times the agents, servants, employees, principals, joint  
3 venturers, alter egos, and/or partners of each other. MNC is further informed and  
4 believes, and on that basis alleges, that in doing the things alleged in this Complaint,  
5 each of the Defendants was acting within the scope of authority conferred upon that  
6 defendant by the consent, approval and/or ratification of the other Defendant, whether  
7 said authority was actual or apparent.

8  
9 **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

10 **MNC's Business**

11 7. Established in 1995, MNC is a growing chain of over 70 "WIC Only"  
12 grocery stores in Southern California. In other words, each of MNC's grocery stores  
13 sell groceries exclusively as part of the federally funded Special Supplemental  
14 Program for Women, Infants and Children ("WIC"). Most of MNC's stores are  
15 located in strip malls.

16 8. The WIC program is a federally funded program, similar to the food  
17 stamps program, that is available to new and expecting mothers, infants, and children  
18 aged 5 and under, that meet certain income guidelines. Qualified participants may  
19 obtain vouchers which can be redeemed for specific food items at licensed and  
20 designated WIC vendors, such as MNC.

21 9. Mothers and expectant mothers obtain vouchers from one of the state-  
22 run WIC offices. Under the original rules of the WIC program, mothers and  
23 expectant mothers were, at the time they obtained their vouchers, required to select  
24 the specific WIC vendor at which they would redeem their vouchers. The name of  
25 that WIC vendor was then placed on the vouchers, and those vouchers were  
26 redeemable only at the listed WIC vendor.

27 10. On or about October 30, 2006, the WIC program altered its procedures  
28 for redeeming vouchers. Program participants are no longer required to select a

1 specific WIC vendor at the time they obtain their vouchers. Instead, WIC vouchers  
2 are now issued without regard to a particular vendor and can be redeemed at any  
3 licensed WIC vendor.

4 11. MNC began as a family business. As the company has grown, MNC has  
5 striven to maintain a family sensibility in each of its stores. From its beginning,  
6 MNC has diligently worked to distinguish itself from other WIC vendors in this  
7 sense, in the spirit of their mottos, "Come Home to Mother's" and "Experience the  
8 Difference." A primary goal of MNC is that all customers enjoy a pleasant shopping  
9 experience in MNC's familiar settings. MNC's stores have come to be known as  
10 exceptionally clean, with helpful and friendly employees. MNC's employees help  
11 customers to their cars and each MNC's store features a learning and play area for  
12 children.

#### 13 MNC's Protected Trade Marks

14 12. Since at least as early as May 2, 1996, MNC has adopted and  
15 continuously used MOTHER'S NUTRITIONAL CENTER as a trademark for and in  
16 connection with its retail grocery store services; and, since at least as early as that  
17 time, MNC has adopted and continuously used MOTHER'S NUTRITIONAL  
18 CENTER as and for its trade name.

19 13. As a result of its adoption and continuous use of the MOTHER'S  
20 NUTRITIONAL CENTER mark and trade name, MNC is the owner of trademark  
21 registration numbers 77368478 (for the "Mother's Nutritional Center" trademark) and  
22 77340519 (for the MOTHER'S Word Mark and Design). MNC is also the common  
23 law owner of the MOTHER'S Mark and trade name (collectively, the MOTHER'S  
24 Mark").

25 14. The MOTHER'S Mark is widely known among participants in the WIC  
26 program.

27 15. MNC advertises its services extensively in both English and Spanish.  
28 MNC advertises in print, including regional magazines, as well as local radio and on

1 television, including on such shows as Oprah and the Tyra Banks Show. In the past  
2 several years alone, MNC has spent millions of dollars on its marketing media  
3 campaigns. MNC's print and television advertisements feature its MOTHER'S Mark.  
4 Although there are hundreds of other WIC Only stores in California, MNC is the only  
5 WIC Only store or chain that advertises on television.

6 16. As a result of its extensive advertising and continuous and ever-  
7 expanding presence, MNC has accumulated significant goodwill in its trademarks,  
8 and consumers have come to identify MNC with clean, pleasant, high-quality stores.

9 Defendants' Infringing Conduct

10 17. Defendants are using the name "MOTHER MARKET" (the "Infringing  
11 Mark") in connection with a grocery store located at 305 East 17th Street, Santa Ana,  
12 California 92706. Defendants use the Infringing Mark in connection with the same  
13 types of business activities as MNC does in connection with its MOTHER'S Mark.  
14 MNC's first use of the Infringing Mark was subsequent to May 2, 1996, and long  
15 after MNC first adopted the MOTHER'S Mark as and for its trade name and  
16 trademark. Defendants' use of the Infringing Mark infringes upon MNC's rights in  
17 the MOTHER'S Mark.

18 18. Based on the confusing similarity between Defendants' use of the  
19 Infringing Mark, when customers encounter Defendants' store, they are likely to be  
20 confused into believing that Defendants' store is authorized, sponsored by, or  
21 somehow affiliated with MNC, which is not the case.

22 19. As a result of the Defendants' misappropriation of the trademarks used  
23 by Mothers' to identify its stores, the harm to MNC is direct and palpable. The  
24 reputation, goodwill, and standards of excellence that MNC has worked so diligently  
25 to achieve are in jeopardy. MNC has no way to control the quality of Defendants'  
26 stores or services, and any problems arising in connection with Defendants' stores or  
27 services may well negatively and detrimentally impact the reputation and goodwill  
28 MNC has gained among its customers.

1 **FIRST CLAIM FOR RELIEF**

2 (Federal Trademark Infringement in Violation of 15 U.S.C. 1125(a))

3 20. MNC incorporates by reference Paragraphs 1 through 20 above as  
4 though fully set forth herein.

5 21. For many years, MNC has used its distinctive MOTHER'S Mark in  
6 commerce in connection with its chain of WIC Only stores. The MOTHER'S Mark is  
7 either inherently distinctive or has acquired secondary meaning whereby the relevant  
8 consuming public and the trade associate these features with a single source.

9 22. Defendants are using the Infringing Mark in commerce and that  
10 Infringing Mark is confusingly similar to the MOTHER'S Mark.

11 23. MNC is informed and believes, and based thereon alleges, that in  
12 adopting the previously described Infringing Mark, Defendants intended to and did  
13 confuse, mislead, and/or deceive the public into believing that MNC somehow  
14 authorized, sponsored, approved, or licensed Defendants' use of the Infringing Mark  
15 and the use of such mark in connection with Defendants' business activities.

16 24. These impressions created by Defendants were and are false. In fact,  
17 MNC has not authorized, sponsored, licensed, or given permission to Defendants to  
18 use the MOTHER'S Mark, or the Infringing Mark, or any mark similar thereto, in any  
19 manner whatsoever.

20 25. MNC is informed and believes, and based thereon alleges, that  
21 Defendants' conduct as alleged herein was willful and undertaken with knowledge  
22 that the Infringing Mark as used by Defendants is confusingly similar to MNC's  
23 MOTHER'S Mark and that their use would confuse, mislead, and/or deceive the  
24 public into believing that MNC somehow authorized, sponsored, approved, or  
25 licensed Defendants' conduct.

26 26. As a direct and proximate result of Defendants' actions as described  
27 herein, MNC has suffered and will continue to suffer irreparable damage to its  
28 business, reputation and good will.

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Jaffer Mangels  
Butler & Mitchell LLP

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Butler & Mitchell LLP

**THIRD CLAIM FOR RELIEF**

(Common Law Trademark and Trade Name Infringement)

33. MNC incorporates by reference Paragraphs 1 through 32 above as though fully set forth herein.

34. Defendants' conduct constitutes trademark and trade name infringement under California law.

35. By reason of Defendants' conduct MNC has sustained and will continue to sustain substantial injury, loss and damage.

36. Further irreparable harm and injury to MNC is imminent as a result of Defendants' conduct, and MNC is without an adequate remedy at law. MNC is entitled to an injunction restraining Defendants, their agents, employees, representatives and all persons acting in concert with them from engaging in further acts of trademark and trade name infringement.

37. MNC is further entitled to recover from Defendants the damages sustained by MNC as a result of Defendants' acts of trademark and trade name infringement, in an amount to be proven at trial.

38. MNC is informed and believes, and on that basis alleges, that Defendants' conduct was willful, fraudulent and malicious and MNC is thereby entitled to punitive damages.

**PRAAYER FOR RELIEF**

WHEREFORE, MNC prays for judgment against Defendants as follows:

A. For permanent injunctive relief against Defendants, enjoining and restraining Defendants, and all their officers, directors, stockholders, owners, agents, representatives, servants and employees, and all those acting in concert or privity therewith, from directly or indirectly:

1. infringing MNC's trademark or trade name rights in any way, including, without limitation, MNC's MOTHER'S Mark;

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1           2.     using any false or misleading designation of origin, or any false or  
2 misleading description or statement, including, without limitation, MNC's  
3 MOTHER'S Mark, that can, or is likely to, lead the consuming public or individual  
4 members thereof, to believe that any product or service provided by Defendants is in  
5 any manner associated or connected with MNC, or is sponsored, approved or  
6 authorized by MNC;

7           3.     engaging in any unfair business practices or acts of unfair  
8 competition in any manner with respect to the MOTHER'S Mark.

9           B.     Ordering Defendants to file with the Court and to serve on counsel for  
10 MNC, within thirty (30) days from entry of an injunction, a report setting forth the  
11 manner and form in which Defendants have complied with the injunction.

12          C.     For an order that, by the acts complained of herein, Defendants have  
13 infringed MNC's rights in and to the MOTHER'S Mark, in violation of 15 U.S.C.  
14 1125(a).

15          D.     For an order that, by the acts complained of herein, Defendants have  
16 engaged in unlawful, unfair and/or fraudulent business acts or practices, in violation  
17 of Cal. Bus. & Prof. Code § 17200 *et seq.*

18          E.     For an order that, by the acts complained of herein, Defendants have  
19 infringed MNC's common law trademark and trade name rights.

20          F.     For an order awarding MNC general and/or specific damages, in an  
21 amount to be fixed by the Court in accordance with proof, including enhanced and/or  
22 exemplary damages, as appropriate, as well as all of Defendants' profits or gains of  
23 any kind from Defendants' acts of trademark infringement and unfair competition;  
24 and further for an order that such acts were willful and wanton, thereby justifying an  
25 award, where appropriate, of treble or enhanced damages.

26          G.     For an order awarding MNC restitution of all amounts obtained by  
27 Defendants by means of their wrongful acts described herein;

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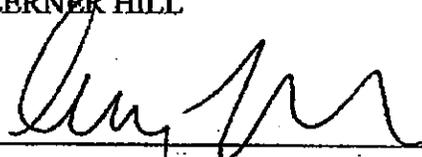
H. For an order awarding MNC its costs and attorneys' fees incurred in prosecuting this action.

I. For an order awarding MNC pre-judgment interest.

J. For an order awarding MNC such other and further relief as the Court deems just and proper.

DATED: October 28, 2011

JEFFER, MANGELS, BUTLER & MITCHELL LLP  
DAN SEDOR  
AMY LERNER HILL

By: 

AMY LERNER HILL  
Attorneys for Plaintiff MOTHER'S  
NUTRITIONAL CENTER, INC.

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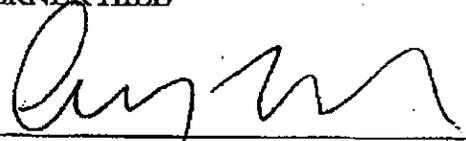
**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff  
Mother's Nutritional Center, Inc hereby demands trial by jury on all issues raised by  
the Complaint.

DATED: October 28, 2011

JEFFER, MANGELS, BUTLER & MITCHELL LLP  
DAN P. SEDOR, P.C.  
AMY LERNER HILL

By: \_\_\_\_\_



AMY LERNER HILL  
Attorneys for Plaintiff MOTHER'S  
NUTRITIONAL CENTER, INC.

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Butler & Mitchell LLP

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Amy Lerner Hill  
Direct: (310) 712-6834  
Fax: (310) 712-3350  
AKL@JMBM.COM

1900 Avenue of the Stars, 7th Floor  
Los Angeles, California 90067-4308  
(310) 203-8080 (310) 203-0567 Fax  
www.jmbm.com

September 28, 2011

**VIA OVERNIGHT MAIL**

Owner  
Mother Market  
305 East 17th Street  
Santa Ana, CA 92706

Re: Infingement of MOTHER'S NUTRITIONAL CENTER Name and  
Trademark

Dear Sir or Madam:

You have not yet responded to our September 7, 2011 letter (attached).

If you do not respond to our demand by the close of business on October 7, 2011, we will proceed with the understanding that you have no interest in resolving this matter amicably without forcing our client to institute and vigorously prosecute a lawsuit against you.

Nothing contained herein or omitted herefrom is intended to be, or may construed as a waiver or relinquishment of any of our client's rights, claims or contentions, whether factual, legal, equitable or otherwise; each and all of which are expressly reserved.

We look forward to your compliance and timely response.

Sincerely,



AMY LERNER HILL for  
Jeffer Mangels Butler & Mitchell LLP

AKL:akl  
Enclosure

Amy Lerner Hill  
Direct: (310) 712-6834  
Fax: (310) 712-3350  
AKL@JMBM.COM

1900 Avenue of the Stars, 7th Floor  
Los Angeles, California 90067-4308  
(310) 203-8080 (310) 203-0567 Fax  
www.jrnbm.com

September 7, 2011

**VIA OVERNIGHT MAIL**

Owner  
Mother Market  
305 East 17th Street  
Santa Ana, CA 92706

Re: Infringement of MOTHER'S NUTRITIONAL CENTER Name and Trademark

Dear Sir or Madam:

Our firm represents Mother's Nutritional Center, Inc. ("MNC"). Since at least as early as May 2, 1996, MNC has adopted and continuously used MOTHER'S NUTRITIONAL CENTER as a service mark for and in connection with its retail grocery store services; and, since at least as early as that time, MNC has adopted and continuously used MOTHER'S NUTRITIONAL CENTER as and for its trade name.

As a result of its adoption and continuous use of the MOTHER'S NUTRITIONAL CENTER mark and trade name (the "MOTHER'S Mark"), our client is the owner of trademark registration numbers 77368478 (for the "Mother's Nutritional Center" trademark) and 77340519 (for the MOTHER'S Word Mark and design). MNC is also the common law owner of the MOTHER'S Mark and trade name.

MNC has recently become aware that you currently operate or intend to operate a market under the name "MOTHER MARKET". We understand that your store will direct its sales activities to the same kind of customers and market as MNC does.

We are advised that your first use of MOTHER MARKET was subsequent to May 2, 1996, and long after our client first adopted the MOTHER'S Mark as and for its trade name and service mark. We invite you to provide any evidence to the contrary for our review. In the absence of receiving any such evidence from you, we shall assume that you have no such evidence.

The purpose of this letter is to notify you that your use of MOTHER MARKET constitutes, among other things, infringement of MNC's trademark and related rights, and to demand that you cease and desist from your unlawful conduct.

Owner, Mother Market  
September 7, 2011  
Page 2

The law is well-established that the fundamental test of trademark infringement is likelihood of confusion, which includes not only likelihood of confusion as to the source or origin of the services, but also confusion as to the existence of an affiliation or some connection between two businesses. Under the law, there is no need for MNC to prove actual confusion, and a mere likelihood of confusion is more than sufficient to establish your infringement of MNC's rights.

In light of the fact that MOTHER MARKET is or will be used by you in connection with services which are directly competitive with the services offered by MNC, there is no doubt that the requisite of likelihood of confusion can be readily established. Therefore, your business use of the name MOTHER MARKET, which is confusingly similar to the MOTHER'S Mark, constitutes, among other things, unlawful service mark and trade name infringement.

Your use of such a confusingly similar name is an attempt on your part to capitalize on, benefit from, and unlawfully exploit and misappropriate for your own benefit the notoriety, goodwill and commercial value of MNC's trademarks, and thus constitutes, among other things, unlawful unfair competition on your part. Your use of MOTHER MARKET also is in direct violation of Section 43(a) of the federal Lanham Trademark Act, and California Business & Professions Code Section 17200, et. seq.

Under the law, MNC's legal remedies for your unlawful conduct include recovery of its damages, and but also injunctive relief in the form of a court order against you requiring you to cease and desist from further use of your infringing name. MNC may be entitled to recover your profits, if it can be shown that your adoption and use of your infringing name was made willfully, intentionally and deliberately. Your continued use of your infringing name after receipt of this letter can only be considered to be willful, deliberate and intentional. Finally, among other remedies, MNC may be entitled to recover from you its attorneys' fees and costs incurred in pursuing legal action against you.

On behalf of MNC, we demand that you immediately cease and desist from using the name MOTHER MARKET and any other confusingly similar designation including, but not limited to, any name that includes, whether singular or plural or possessive, "MOTHER," "MOM," or "MOMMY."

We further demand that you provide us within ten (10) days of the date of this letter with your written assurance that you are in compliance with our demand, and describe to us with specificity and particularity exactly what you have done to so comply.

If we do not hear from you by such time, we will proceed with the understanding that you have no interest in resolving this matter amicably without forcing MNC to institute and vigorously prosecute a lawsuit against you.

Owner, Mother Market  
September 7, 2011  
Page 3

Nothing contained herein or omitted herefrom is intended to be, or may construed as a waiver or relinquishment of any of our client's rights, claims or contentions, whether factual, legal, equitable or otherwise; each and all of which are expressly reserved.

We look forward to your compliance and timely response

Sincerely,



AMY LERNER HILL for  
Jeffer Mangels Butler & Mitchell LLP

AKL:aki

# Exhibit D

---

**From:** Deborah Rubino  
**Sent:** Monday, December 12, 2011 12:05 PM  
**To:** 'Mother's Market Customer'  
**Subject:** RE: New Contact Submission

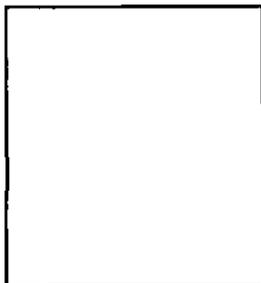
I believe the store coming to Hemet is Mother's Nutritional Center which is a WIC store. Mother's Market & Kitchen has no plans for Hemet at this time.

Have a great day!

Deborah Rubino  
Mother's Market & Kitchen  
*Corporate Office*  
100 Kalmus Drive  
Costa Mesa, CA 92627  
(714) 549-6400 ext. 1047  
[deborahr@mothersmarket.com](mailto:deborahr@mothersmarket.com)

---

**Sent:** Friday, December 09, 2011 7:54 PM  
**To:** Deborah Rubino  
**Subject:** New Contact Submission



12/12/2011

## New Contact Submission

---

**Time:** 2011-12-09 21:53:52

**Store:** Anaheim Hills

**Type:** Other

**Comments:** I live in Perris and recently saw a billboard stating that Mother's Market was now in Hemet but on this website I find no address for it. Is it there or coming there in the future?

# Exhibit E



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[Harvest](#)

[Recipes](#)

[Contact](#)



## Great tasting and refreshing recipes for a Healthy Family:

Click on the links below to download our Healthy Recipes

[Download Fruit Smoothie Recipe](#)

[Download Asian Chicken Salad Recipe](#)

[Download Bulgur LentilSoup Recipe](#)

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#### NEW THIS MONTH:

**Now Open:**

Anaheim, San Diego

- Now Accepting EBT at all store locations

- We now carry Organic Baby Food



#### NEW FRESH PRODUCE IN STORE

Come & visit our new produce department. We offer a wide selection of the best quality of fresh produce available in your community!

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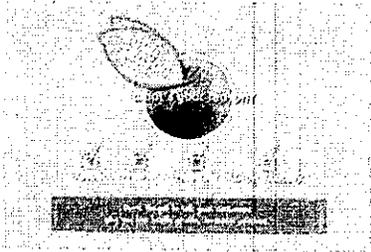
[Contact](#)



## Harvest of the Month

### Program Goals:

Mother's continues to be a strong supporter of the Harvest of the Month program. The program's goal is to support local farmers and to increase accessibility to locally grown fresh produce to the community. Each month Mother's features a locally grown fresh produce that is in season.



### Why buy local produce?

Buying local means fresher, better quality and more flavorful produce. They are picked ripe and immediately delivered to Mother's!

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**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 **November 12, 2013**, the attached **DECLARATION OF DEBORAH RUBINO IN SUPORT OF PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACHES, CROSS-MOTION FOR SUMMARY ADJUDICATION OF NO LACHES** 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  
7<sup>th</sup> Floor  
Los Angeles, CA 90067

Executed on **November 12, 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.:
	)	
Petitioner,	)	92056067 for Registration No. 3675027
	)	For the Mark MOTHER'S (stylized)
	)	
vs.	)	And
	)	
Mother's Nutritional Center, Inc.,	)	92056080 for Registration No. 3675056
	)	For the Mark MOTHER'S NUTRITIONAL CENTER
Respondent.	)	

---

**DECLARATION OF STEPHEN Z. VEGH IN OPPOSITION TO RESPONDENT'S**

**MOTION FOR SUMMARY JUDGMENT OF LACHES**

I, Stephen Z. Vegh, declare as follows:

1. I am an attorney duly admitted to practice law before all the 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 "Nirve") 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. I offer this declaration in support of Petitioner's Opposition to

Respondent's motion for summary judgment for laches, and Petitioner's cross-motion for Summary Adjudication thereon.

3. Petitioner has substantial need to take discovery in order to be able to fully and adequately respond to Respondent's motion for summary judgment of laches.

4. The following sets forth the specific facts that Petitioner would seek through discovery and the reasons why Petitioner maintains these facts are reasonably expected to create further genuine issues of material fact:

(a) the claim of continuous use by Respondent and in particular its CFO Juan-Carlos Monnaco that the Mother's and Mother's Nutritional Center marks have been used on grocery store services since 1995, in view of the dates of first use and use in commerce for these trademark registrations being May 9, 2007. Further discovery of Respondent including a deposition of Mr. Monnaco is needed to address this inconsistency, whose explanation will create a genuine issue of material fact concerning when Petitioner began to use its marks, whether such use was continuous, whether Mr. Monnaco is competent to offer admissible testimony on the issue, and whether Respondent's lack of awareness of the nature and extent of Petitioner's use of these marks at different times from 2009 onward establishes a reasonable and excusable basis for not seeking earlier cancellation of these marks.

(b) Respondent's assertion through its counsel in its February 13, 1998 letter that the Mother's Nutritional Center mark was not confusingly similar to Petitioner's Mother's Market & Kitchen mark and Respondent's refusal to discontinue using the Mother's Nutritional Center "name". Further discovery of Respondent including a deposition of Mr. Monnaco is needed to determine whether Mr. Monnaco has

personal knowledge of why Respondent increased its advertising expenditures and opened new stores, which will create genuine issues of material fact concerning whether Mr. Monnaco is competent to offer admissible testimony on the issue and whether Respondent's decision to increase its store count and ad expenditures (Respondent's alleged claim of "prejudice") was due to or a result of concerns regarding Petitioner's cease and desist demand and Petitioner's "delay" in filing a cancellation action, or whether Respondent's conduct and investments were an independent business decision based on the advice of counsel that no likelihood of confusion existed between Respondent's Mother's marks and the Mother's Market & Kitchen service mark.

(c) The amounts spent by Respondent on advertising and its expansion of grocery stores under the Mother's and Mother's Nutritional Center marks. Further discovery of Respondent including a deposition of Mr. Monnaco is needed to determine whether Mr. Monnaco has personal knowledge of the amounts spent by Respondent on advertising and the expansion of Respondent's store count at different points in time, which will create genuine issues of material fact concerning whether Mr. Monnaco is competent to offer admissible testimony on these issues, the amount of advertising and number of stores opened by Respondent at different times to establish when Petitioner filed its cancellation of Respondent's marks was reasonable and excusable in view thereof, whether Mr. Monnaco is competent to offer admissible testimony on the issue, and whether the amounts spent on advertising were directly related to the Mother's and Mother's Nutritional Center marks as opposed to tangential matters.

(d) When Respondent began to transition to the greater promotion of health foods and healthier eating habits. Further discovery of Respondent including a

deposition of Mr. Monnaco and perhaps other witnesses is needed on this topic, which will create a genuine issue of material fact concerning whether Respondent's use of its Mother's marks constitutes progressive encroachment, thereby supporting a finding that any "delay" by Petitioner in seeking cancellation of its marks was reasonable and excusable.

(e) The claim in late 2011 by Respondent that the "Mother Market" mark was confusingly similar to its Mother's Market & Kitchen mark. Further discovery of Respondent including a deposition of Mr. Monnaco and perhaps other witnesses is needed on this topic, which will create a genuine issue of material fact concerning whether any "delay" by Petitioner in seeking cancellation of its marks was reasonable and excusable.

5. The foregoing facts are solely or largely in the custody, possession, or control of Respondent, as they concern the basis for Respondent's decisions regarding the use of the Mother's and Mother's Nutritional Center, positions taken by Respondent against third-parties in litigation regarding issues of likelihood of confusion with similar marks, the timing and nature of its claimed advertising and new store openings, and the qualifications and knowledge of Mr. Monnaco to speak to these issues. Petitioner is unable to adequately address these issues in its Opposition to Respondent's motion for summary judgment, as the underlying facts and comments concerning these issues have not been turned over by Respondent in discovery conducted to date and they are not satisfactorily disclosed in Mr. Monnaco's declaration.

6. On October 10, 2013, I asked Respondent's counsel to provide dates of availability for deposition of some of Respondent's corporate representatives. The

individuals identified in my request did not provide declarations in support of Respondent's Motion for Summary Judgment. This request predated the receipt by my office of Respondent's motion for summary judgment. Attached hereto as Exhibit "F" is a true and correct copy of my October 10, 2013 e-mail to opposing counsel, which in the last paragraph requests the availability for deposition of Respondent's representatives Richard Flores and Gloria Martinez.

7. Mr. Monaco is not identified as a fact witness in Respondent's supplemental responses to interrogatories, but rather as someone who assisted in the preparation of Respondent's responses to discovery. Attached hereto as Exhibit "G" is a true and correct copy of Respondent's Supplemental Responses to Interrogatories.

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 12th day of November, 2013 at Aliso Viejo, California.

/s/Stephen Z. Vegh

Stephen Z. Vegh

Declarant

# Exhibit F

## Stephen Z. Vegh

---

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

**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 G

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

Ava Ruha Corporation dba Mother's Market &  
Kitchen,

Petitioner,

v.

Mother's Nutritional Center, Inc.,

Respondent.

Cancellation No. 92/056,067  
(Cancellation No. 92/056,080 consol)

Reg. No. 3,675,056

Mark: MOTHER'S NUTRITIONAL  
CENTER

Reg. No. 3,675,020

Mark: MOTHER'S (Stylized)

Registration Date: September 1, 2009

**RESPONDENT'S SUPPLEMENTAL RESPONSE TO PETITIONER'S FIRST SET OF**  
**INTERROGATORIES (REG. NO. 3,675,056)**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure ("FRCP") and Rule 2.120 of the Trademark Rules of Practice (37 C.F.R. § 2.120), respondent Mother's Nutritional Center, Inc. ("Respondent"), by and through its attorneys, hereby provides these supplemental responses to petitioner Ava Ruha Corporation dba Mother's Market & Kitchen's ("Petitioner") First Set of Interrogatories.

**PRELIMINARY STATEMENT**

A. These responses are given solely for the purpose of, and in relation to, this action. Each response is given subject to all appropriate objections (including but not limited to objections concerning competency, relevancy, materiality, propriety and admissibility) which would require the exclusion of any statement contained herein if made by a witness present and testifying in court. All such objections and grounds therefore are reserved and may be interposed at the time of trial.

B. Respondent is pursuing its investigation of the facts and law relating to this case and has not completed its discovery or its preparation for trial. Therefore, the responses set forth herein are provided without prejudice to Respondent's right to produce evidence of any subsequent facts or interpretations thereof, or to add to, modify or otherwise change or amend the responses herein. The information hereinafter set forth is true and correct to Respondent's best knowledge as of this date, and is subject to correction for inadvertent errors, mistakes or omissions if any such errors, mistakes or omissions should be found to exist. These responses are based upon documents and information presently available to Respondent. References in a response to a preceding or subsequent response incorporate both the information and objections set forth in the referenced response.

C. Respondent reserves the right to introduce at trial any and all evidence heretofore or hereinafter produced by all parties in this action or by any third party that supports or tends to support Respondent's contentions at trial or in support of or in opposition to any motion in this case. To the extent that Respondent produces any documents in response to a request herein, it does so without prejudice to produce additional documents and to establish at a later date any additional facts that may be discovered as a result of any additional investigation and discovery.

D. Any response contained herein does not constitute a waiver of any applicable privilege, nor does any response contained herein waive any objection, including relevance, to the admission of such responses or responsive documents in evidence.

E. The fact that an interrogatory has been responded to herein should not be taken as an admission, or a concession of the existence of any facts set forth or assumed by the interrogatory, or that such response constitutes evidence of any fact. In addition, the fact that Respondent has responded to part or all of any interrogatory is not intended and shall not be construed to be a waiver by Respondent of all or any part of any objection to any interrogatory.

#### **GENERAL OBJECTIONS**

The following general objections apply to each interrogatory propounded by Petitioner and are incorporated into each response thereto by Respondent:

1. Respondent objects to each definition, instruction, and interrogatory to the extent that it purports to impose any requirement or discovery obligation upon Respondent that exceeds the permissible scope of the Federal Rules of Civil Procedure or the Trademark Rules of Practice.

2. Respondent objects generally to each interrogatory to the extent that the interrogatory seeks information that is neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.

3. Respondent objects generally to each interrogatory to the extent that it calls for information that is subject to the attorney-client privilege, the attorney work-product doctrine or any other privilege, immunity or protection available under law. Inadvertent disclosure of any information subject to any applicable privilege or doctrine, including, but not limited to, the attorney-client privilege and the work-product doctrine, is not intended to be, and shall not operate as, a waiver of such privilege or doctrine, in whole or in part. Nor is any such inadvertent disclosure intended to be, nor shall it constitute, a waiver of the right to object to any use of such information.

4. Respondent objects generally to each Interrogatory to the extent that it seeks confidential business information or trade secrets. Respondent will produce information which it deems to embody material that is private, business confidential, proprietary, or trade secret only subject to the terms of an appropriate protective order.

5. Respondent objects generally to each interrogatory insofar as the interrogatory may be construed as calling for information and/or the identification of documents which are subject to the rights of privacy of Respondent, or of third parties. Respondent will not produce such information only subject to the terms of an appropriate protective order.

6. Respondent objects to each interrogatory insofar as each interrogatory is overly broad, unduly burdensome, and oppressive, and to the extent that it seeks information that is irrelevant, already in Petitioner's possession, and/or is equally available to both parties.

7. Respondent objects to each interrogatory to the extent it is overly broad and undefined as to time.

8. Respondent objects to each interrogatory to the extent that it seeks a statement of "all" or "each" facts, or the identification of "all," "each" or "any" document or individual that relates to a subject or event because such interrogatories are overly broad, oppressive and harassing and, if interpreted literally, potentially impossible to answer.

9. Respondent objects to Petitioner's definition of the terms "You," "Your," and "Respondent" in that Petitioner's definition is overly broad, burdensome and harassing, in that Petitioner purports to include in that definition "Respondent, Respondent's predecessors, successors, assignees, divisions, subsidiaries, licensees, franchisees or affiliates, and includes Respondent's present and former officers, directors, partners, agents, employees, attorneys, and all other persons acting or purporting to act on behalf of the Respondent, or entities related to Respondent." Respondent further objects to the definition as seeking to include information beyond the scope of discovery, and information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

10. Respondent objects to Petitioner's definition of the terms "identify," "identity," and "identification," in that Petitioner's definition is overly broad, unduly burdensome and harassing, and seeks information that is beyond the permissible scope of discovery, and is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

11. Respondent objects generally to each interrogatory insofar as each interrogatory is vague, ambiguous, and/or not stated with sufficient particularity. Respondent objects and responds on the basis of its understanding and interpretation of each interrogatory. If Petitioner understands or interprets any interrogatory or part of any interrogatory differently, Respondent reserves the right to supplement any of these responses, either with additional objections or otherwise.

Subject to the foregoing Preliminary Statement and General Objections, which are hereby incorporated by reference into each individual response below, and without waiving same, Respondent responds as follows to Petitioner's interrogatories.

### **RESPONSES TO INTERROGATORIES**

#### **INTERROGATORY NO. 1:**

State when Respondent adopted and first used in commerce in the United States Respondent's Mark on Respondent's Services, identify all person(s) with knowledge of the subject matter of this request, identify all documents sufficient to support Your response to this request.

#### **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1:**

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including in that it seeks identification of "all" individuals with knowledge of the subject matter of the interrogatory. Respondent further objects to this Interrogatory on the grounds and to the extent that it calls for information that is protected from disclosure by the attorney-client privilege, work-product doctrine and/or any

other applicable privilege or protection from discovery. Respondent further objects to this interrogatory on the grounds and to the extent that it calls for information that is confidential, proprietary and/or trade secret information. Respondent further objects to this interrogatory on the grounds that it calls for information which is protected by Respondent's and/or third parties' rights of privacy. Respondent further objects to this interrogatory on the grounds that it contains multiple discrete subparts, and constitutes at least three separate interrogatories.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Respondent has been using the MOTHER'S and MOTHER'S NUTRITIONAL CENTER names and marks since at least as early as May 2, 1996.

Richard Flores has knowledge of Respondent's adoption and first use in commerce of Respondent's Mark. Additionally, Larry Flores, Arthur Flores, David Flores, and Dennis Rodriguez were involved in Respondent's adoption and first use of Respondent's Mark. All of the foregoing can be contacted through Respondent's counsel.

Respondent will produce documents sufficient to evidence its first use of Respondent's Mark in commerce, to the extent it has such documents in its possession, custody, or control.

INTERROGATORY NO. 2:

Identify each person who participated in the adoption of Respondent's Mark, identify all person(s) with knowledge of the subject matter of this request, identify all documents sufficient to support Your response to this request.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including in that it seeks identification of "all" individuals with knowledge of the subject matter of the interrogatory. Respondent further objects to this interrogatory on the grounds and to the extent that it calls for information that is confidential, proprietary and/or trade secret information. Respondent further objects to this interrogatory on the grounds that it calls for information which is protected by Respondent's and/or third parties' rights of privacy. Respondent further objects to this Interrogatory on the grounds and to the extent that it calls for information that is protected from disclosure by the attorney-client privilege, work-product doctrine and/or any other applicable privilege or protection from discovery. Respondent further objects to this interrogatory on the grounds that it contains multiple discrete subparts, and constitutes at least three separate interrogatories.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Richard Flores has knowledge of Respondent's adoption of Respondent's Mark. Additionally, Larry Flores, Arthur Flores, David Flores, and Dennis Rodriguez were involved in Respondent's adoption and first use of Respondent's Mark. All of the foregoing can be contacted through Respondent's counsel.

Respondent will produce documents in its possession, custody, or control, relating to its adoption of Respondent's Mark.

INTERROGATORY NO. 7:

Identify all channels in which Respondent's Services are advertised, e.g., newspaper, on-line, magazine, radio, television, mailers, fliers, etc., identify all person(s) with knowledge of the subject matter of this request, identify all documents sufficient to support Your response to this request.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including in that it seeks identification of “all” individuals with knowledge of the subject matter of the interrogatory. Respondent further objects to this interrogatory on the grounds that it contains multiple discrete subparts, and constitutes at least three separate interrogatories.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Respondent utilizes television, radio, online, and print advertising. Richard Flores has knowledge of Respondent’s advertising and promotion of Respondent’s services offered under Respondent’s Mark. Gloria Martinez is the director of marketing at Respondent. She may be contacted through respondent’s counsel. Respondent will produce a representative sample of its advertising and promotional materials.

INTERROGATORY NO. 9:

Identify all searches conducted by Respondent in relation to Respondent’s Mark.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive. Respondent further objects to this Interrogatory on the grounds and to the extent that it calls for information that is protected from disclosure by the attorney-client privilege, work-product doctrine and/or any other applicable privilege or

protection from discovery. Respondent further objects to this interrogatory on the grounds and to the extent that it calls for information that is confidential, proprietary and/or trade secret information.

Notwithstanding the foregoing objections, and subject thereto, Respondent responds as follows: Respondent will produce copies of trademark searches relating to its Respondent's Mark in its possession, custody, or control.

INTERROGATORY NO. 12:

Identify all persons responsible for the marketing or intended marketing of services and/or services offered under Respondent's Mark.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 12:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including in that it seeks identification of "all" individuals with knowledge of the subject matter of the interrogatory. Respondent further objects to this interrogatory on the grounds and to the extent that it calls for information that is confidential, proprietary and/or trade secret information. Respondent further objects to this interrogatory on the grounds that it calls for information which is protected by Respondent's and/or third parties' rights of privacy.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Respondent utilizes television, radio, online, and print advertising. Richard Flores has knowledge of Respondent's advertising and promotion of Respondent's services offered under Respondent's Mark. Gloria Martinez is the director of marketing at Respondent. She may be

contacted through Respondent's counsel. Respondent will produce a representative sample of its advertising and promotional materials.

INTERROGATORY NO. 15:

Identify the quantity (in units) and generated revenue (in dollars) in the United States from the offering of Respondent's Services and goods sold under Respondent's Mark to the present, identify all person(s) with knowledge of the subject matter of this request, identify all documents sufficient to support Your response to this request.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 15:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including in that it seeks identification of "all" individuals with knowledge of the subject matter of the interrogatory. Respondent further objects to this Interrogatory on the grounds and to the extent that it calls for information that is protected from disclosure by the attorney-client privilege, work-product doctrine and/or any other applicable privilege or protection from discovery. Respondent further objects to this interrogatory on the grounds and to the extent that it calls for information that is confidential, proprietary and/or trade secret information. Respondent further objects to this interrogatory on the grounds that it calls for information which is protected by Respondent's and/or third parties' rights of privacy. Respondent further objects to this interrogatory on the grounds that it contains multiple discrete subparts, and constitutes at least three separate interrogatories. Respondent further objects to this interrogatory on the grounds that it is vague, ambiguous, and not stated

with sufficient particularity, including with respect to the phrase “quantity (in units) . . . from the offering . . .”.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Pursuant to Fed. R. Civ. P. 33(d), Respondent will produce documents showing its annual revenues from 2005 through the present.

INTERROGATORY NO. 16:

Identify by party names, venue, and case number any and all actions, proceedings, lawsuits, between You and any third-party involving Respondent’s Mark.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 16:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: Pursuant to Fed. R. Civ. P. 33(d), Respondent will produce documents identifying proceedings between it and third parties involving Respondent’s Mark.

INTERROGATORY NO. 17:

Identify, by name, address and title, each person who furnished information respecting the answers to the foregoing interrogatories.

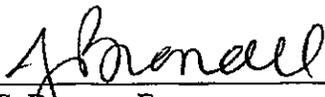
SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 17:

Respondent incorporates by reference its General Objections stated above, as if fully incorporated herein. Respondent further objects to this Interrogatory on the grounds and to the

extent that it calls for information that is protected from disclosure by the attorney-client privilege, work-product doctrine and/or any other applicable privilege or protection from discovery. Respondent further objects to this interrogatory on the grounds that it calls for information which is protected by Respondent's and/or third parties' rights of privacy.

Without waiving the foregoing objections, and subject thereto, Respondent responds as follows: These responses were prepared by counsel in consultation with Richard Flores, and Juan-Carlo Monnaco, Chief Financial Officer of Respondent.

Dated: September 18, 2013

  
\_\_\_\_\_  
Rod S. Berman, Esq.  
Jessica C. Bromall, Esq.  
JEFFER MANGELS BUTLER & MITCHELL LLP  
1900 Avenue of the Stars, Seventh Floor  
Los Angeles, CA 90067  
Telephone: (310) 203-8080  
Facsimile: (310) 203-0567  
E-mail: trademarkdocket@jmbm.com  
Attorneys for Respondent MOTHER'S  
NUTRITIONAL CENTER, INC.

CERTIFICATE OF SERVICE

It is hereby certified that one (1) copy of the foregoing RESPONDENT'S SUPPLEMENTAL RESPONSE TO PETITIONER'S FIRST SET OF INTERROGATORIES (REG. NO. 3,675,056) is being sent via U.S. mail to Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen's attorney of record as follows:

Stephen Z. Vegh  
Stetina Brunda Garred & Brucker  
75 Enterprise, Suite 250  
Aliso Viejo, CA 92656

Dated: September 18, 2013



Esther Silverman

**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 **November 12, 2013**, the attached **DECLARATION OF STEPHEN Z. VEGH IN OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT OF LACHES** 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  
7<sup>th</sup> Floor  
Los Angeles, CA 90067

Executed on **November 12, 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.



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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.:
	)
	) 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 CENTER
Respondent.	

**PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET &  
KITCHEN'S EVIDENTIARY OBJECTIONS TO RESPONDENT'S  
DECLARATION OF JUAN-CARLOS MONNACO**

Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen ("Petitioner") objects to, and moves to strike, the following portions of the declaration of Juan-Carlos Monnaco in support of Respondent's motion for summary judgment on laches:

1. Paragraph 2.

*Respondent has continuously used its MOTHER'S and MOTHER'S NUTRITIONAL CENTER ("Respondent's Marks") for its chain of retail grocery stores focused on the federal supplemental Food Program for Women, Infants and Children (WIC) since 1995.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the use of Respondent's Marks going back to 1995. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and

the foundational basis for his claimed knowledge regarding the continuity of the use of Respondent's Marks. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

2. Paragraph 3.

*Respondent has WIC stores throughout Southern California, and has, since 1995, operated stores in Southern California.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the operation of Respondent's stores going back to 1995. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the continuity of the operation of Respondent's stores. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be

stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

3. Paragraph 4.

*Attached hereto as Exhibit A is a true and correct copy of a letter dated February 5, 1998 that was sent to Respondent by counsel for Petitioner.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding Respondent's receipt of Exhibit A in 1998. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the receipt of a letter in February of 1998, let alone that he was ever previously provided a copy of the letter outside the context of this proceeding. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Also, Mr. Monnaco's testimony regarding this letter is inadmissible hearsay under F.R.E. 801(c) and is an out-of-court statement offered for the truth of the matter stated therein, namely the content of the letter. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602, 801(c), and 901(a) and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

4. Paragraph 5.

*Attached hereto as Exhibit B is a true and correct copy of a letter dated February 13, 1998 that counsel for Respondent sent to counsel for Petitioner in response to the February 5, 1998 letter.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the letter sent by Respondent's counsel in 1998. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the transmission of a letter in February of 1998, let alone that he was ever previously provided a copy of the letter outside the context of this proceeding. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Also, Mr. Monnaco's testimony regarding this letter is inadmissible hearsay under F.R.E. 801(c) and is an out-of-court statement offered for the truth of the matter stated therein, namely the content of the letter. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602, 801(c), and 901(a) and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

5. Paragraph 6.

*Prior to filing the instant cancellation proceedings, Petitioner had not further objected to Respondent's use or registration of MOTHER'S or MOTHER'S NUTRITIONAL CENTER, since Petitioner's counsel sent its February 13, 1998 letter. When Respondent heard nothing further from Petitioner*

*following the February 1998 letter exchange, it assumed that Petitioner had abandoned any objection that it had to Respondent's use of MOTHER'S AND MOTHER'S NUTRITIONAL CENTER. In the 14-plus years between Petitioner's February 1998 letter and the filing of the instant cancellation action, Petitioner took no action to prevent Respondent's use of MOTHER'S or MOTHER'S NUTRITIONAL CENTER: it sent no letters, it filed no lawsuits, and it sought zero injunctions.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding what actions transpired in the form of further exchanges between Petitioner and Respondent or actions taken by Petitioner against Respondent after February 13, 1998, or what Respondent "assumed" about Petitioner's abandonment of its objections after not hearing from Petitioner, and when Respondent made such assumptions. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the continuity of the use of Respondent's Marks. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Furthermore, Mr. Monnaco's testimony regarding Respondent's assumption that Petitioner had abandoned any objection is inadmissible hearsay under F.R.E. 801(c) and is an out-of-court statement offered for the truth of the matter stated therein. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and 801(c) and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

6. Paragraph 7.

*In February 1998, Respondent was operating only 13 grocery stores under its MOTHER'S and MOTHER'S NUTRITIONAL CENTER marks.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the use of Respondent's Marks or the number of stores it was operating in 1998. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the use of Respondent's Marks and the number of stores Respondent operated thereunder. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

7. Paragraph 8.

*In July 2009, Respondent had expanded to at least 55 grocery stores under its MOTHER'S and MOTHER'S NUTRITIONAL CENTER marks.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the use of Respondent's Marks or the number of stores it was operating in 2009. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at

different points in time, and the foundational basis for his claimed knowledge regarding the use of Respondent's Marks and the number of stores Respondent operated thereunder. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

8. Paragraph 9.

*In August 2012, Respondent had added at least 15 more stores, and further expanded to approximately 73 grocery stores under its MOTHER'S and MOTHER'S NUTRITIONAL CENTER marks.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the use of Respondent's Marks or the number of stores it added and how many it expanded to in 2012. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the use of Respondent's Marks and the number of stores Respondent added and operated thereunder in 2012. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ."

F.R.E. 602. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

9. Paragraph 10.

*Between 2009 and 2012, Respondent continued to aggressively promote its MOTHER'S and MOTHER'S NUTRITIONAL CENTER marks and its grocery services offered thereunder. In those years, Respondent spent in excess of \$7.5 million on advertising, including radio and television commercials, print advertisements, signage, flyers, community promotion, and gift with purchase campaigns.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the amount and nature of Respondent's advertising activities concerning Respondent's Marks. There is no evidence indicating when Mr. Monnaco became associated with Respondent, what his responsibilities were at different points in time, and the foundational basis for his claimed knowledge regarding the amount and nature of Respondent's advertising activities under Respondent's Marks. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . ." F.R.E. 602. Furthermore, this testimony is irrelevant because it does not specify that the advertising expenditures totaling \$7.5 million actually promoted and marketed Respondent's Marks as opposed to something else. Accordingly, Mr. Monnaco's testimony is incompetent and inadmissible under FRE 602 and is therefore irrelevant to the adjudication of Respondent's motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence

relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: November 12, 2013

By: /s/Stephen Z. Vegh

Stephen Z. Vegh, Reg. No. 48,550  
75 Enterprise, Suite 250  
Aliso Viejo, CA 92656  
(949) 855-1246  
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 **November 12, 2013**, the attached **PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S EVIDENTIARY OBJECTIONS TO RESPONDENT'S DECLARATION OF JUAN-CARLOS MONNACO** 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  
7<sup>th</sup> Floor  
Los Angeles, CA 90067

Executed on **November 12, 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.:
	)	
Petitioner,	)	92056067 for Registration No. 3675027
	)	For the Mark MOTHER'S (stylized)
	)	
vs.	)	And
	)	
Mother's Nutritional Center, Inc.,	)	92056080 for Registration No. 3675056
	)	For the Mark MOTHER'S NUTRITIONAL CENTER
Respondent.	)	

**PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET &  
KITCHEN'S EVIDENTIARY OBJECTIONS TO RESPONDENT'S  
DECLARATION OF JESSICA C. BROMALL**

Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen ("Petitioner") objects to, and moves to strike, the following portions of the declaration of Jessica C. Bromall in support of Respondent's motion for summary judgment on laches:

1. Paragraph 2.

*Attached hereto as Exhibit A is a true and correct copy of a letter dated February 5, 1998 that was sent to Respondent by counsel for Petitioner.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding Respondent's receipt of Exhibit A in 1998. There is no evidence indicating when Ms. Bromall became associated with Respondent, what her responsibilities were at the company, and the foundational basis for

her claimed knowledge regarding the receipt of a letter in February of 1998 by Respondent, let alone that she was ever previously provided a copy of the letter outside the context of this proceeding. Federal Rule of Evidence 602 states that “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. . .” F.R.E. 602. Relatedly, Respondent has not established that Ms. Bromall is qualified to authenticate the letter under F.R.E. 901(a). Also, Ms. Bromall’s testimony regarding this letter is inadmissible hearsay under F.R.E. 801(c) and is an out-of-court statement offered for the truth of the matter stated therein, namely the content of the letter. Accordingly, Ms. Bromall’s testimony is incompetent and inadmissible under FRE 602, 801(c), and 901(a) and is therefore irrelevant to the adjudication of Respondent’s motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

2. Paragraph 3.

*Attached hereto as Exhibit B is a true and correct copy of a letter dated February 13, 1998 that counsel for Respondent sent to counsel for Petitioner in response to the February 5, 1998 letter.*

Petitioner objects to this evidence on the following grounds: Declarant lacks the requisite personal knowledge under F.R.E. 602 regarding the letter sent by Respondent’s counsel in 1998. There is no evidence indicating when Ms. Bromall became associated with Respondent, what her responsibilities were with the company at different points in time, and the foundational basis for her claimed knowledge regarding the transmission of a letter in February of 1998, let alone that she was ever previously provided a copy of the

letter outside the context of this proceeding. Federal Rule of Evidence 602 states that “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. . .” F.R.E. 602. Relatedly, Respondent has not established that Ms. Bromall is qualified to authenticate the letter under F.R.E. 901(a). Also, Ms. Bromall’s testimony regarding this letter is inadmissible hearsay under F.R.E. 801(c) and is an out-of-court statement offered for the truth of the matter stated therein, namely the content of the letter. Accordingly, Ms. Bromall’s testimony is incompetent and inadmissible under FRE 602, 801(c), and 901(a) and is therefore irrelevant to the adjudication of Respondent’s motion and should be stricken. Fed. R. Evid. 402. To the extent the Court finds this evidence relevant, it should be excluded on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of issues. Fed. R. Evid. 403.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: November 12, 2013

By: /s/Stephen Z. Vegh

Stephen Z. Vegh, Reg. No. 48,550  
75 Enterprise, Suite 250  
Aliso Viejo, CA 92656  
(949) 855-1246  
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 **November 12, 2013**, the attached **PETITIONER AVA RUHA CORPORATION DBA MOTHER'S MARKET & KITCHEN'S EVIDENTIARY OBJECTIONS TO RESPONDENT'S DECLARATION OF JESSICA BROMALL** 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  
7<sup>th</sup> Floor  
Los Angeles, CA 90067

Executed on **November 12, 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