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

Proceeding	92060308
Party	Defendant Corcamore, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SFM, LLC,		}	
	Petitioner,	}	Cancellation No: 92 060308
v.		}	
		}	
Corcamore, LLC		}	Registration No. 3708453
		}	
	Respondent-Registrant.	}	

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ELECTRONICALLY SERVED

**REPLY OF RESPONDENT-REGISTRANT  
IN FURTHER SUPPORT OF MOTION TO DISMISS.**

Corcamore LLC replies for the purposes of refining the legal and related issues, and to respond about key concessions and admissions, which were made in the petitioner’s opposition.

**Procedural Reply.**

Petitioner superseded its original filing with its Amended Petition. Now, in opposition to the motion to dismiss that Amended Petition, the petitioner endeavors to recharacterize or restate its amended averments. Petitioner attaches over two dozen pages of material to its opposition brief, then complains that the motion to dismiss attached materials.<sup>1</sup>

**Reply as to First-Pleaded Facts and Amended Averments.**

In its brief, petitioner backs away from a key averment, added in the Amended Petition and not pleaded initially. That brief, page 8 and referring to the “use” averment in ¶6 of the Amended Petition, states “SFM’s Amended Petition to Cancel incorrectly stated: ‘SFM, through its exclusive licensee’ [used],” which in ¶15 is averred by name as “Sprouts Farmers Markets.”

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<sup>1</sup> “Determining whether a complaint states a plausible claim for relief is a very `context-specific task.’ *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Thus, the district court was required to analyze the facts plead in the amended complaints and all documents attached thereto with reference to the elements of a cause of action .... to determine whether R+L’s claims ... were in fact plausible.” *In re Bill of Lading Transmission & Processing System Patent Litigation*, 681 F.3d 1323, 1337 (Fed.Cir.2012).

That key averment of use in ¶6, being “incorrectly stated” in the Amended Petition, was it fact a correction to the initial averment in ¶1 of the petition where unknown “predecessors in interest” were averred. Now, petitioner’s brief in opposition wants a 3<sup>rd</sup> restatement of that averment into SFM “and its related companies.”

The averment of “use” started with SFM “and its [*unidentified*] predecessors in interest,” which was negated and superseded by the Amended Petition pleading use by “SFM, through its exclusive licensee” Sprouts Farmers Markets, and now by a footnote in an opposition brief wants to supersede that with use by SFM “and its [*unidentified*] related companies.”

The petitioner’s current brief further wishes to further change the key averment of “similarity.” The original petition pleaded the case was about “similar” goods or the “same goods.” parag 6 & 7. The averment of “similar” or “same” goods was restated in the Amended Petition. Now, on page 1, the opposition brief tries to slip in an averment of “a similar channel of trade,” which nowhere was found in the original Petition, and nowhere in the Amended Petition.

### **Reply Arguments.**

Movant’s brief set forth the *Twombly-Iqbal* standards for a motion to dismiss.<sup>2</sup> In opposition, petitioner relies on a case in F.2d that was decided at least ten years before *Twombly*. The opposition fails to connect the legal standards with specific averments, preferring to ‘cite it and forget it.’ The threadbare, formulaic recitations in the Amended Petition are “merely consistent with” an elemental recitation of the law, and fail to reach past the “line between possibility and plausibility,” and so, the Amended petition fails to state a claim cognizable under Section 14. *Iqbal, id.*, 556 U.S. 662.

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<sup>2</sup> “In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” to state a claim plausible on its face. *Iqbal*, 556 U.S. 662 (citing *Twombly*, 550 U.S. at 555).” *Johnson & Johnson v. Obschestvo s Ogranitchennoy*, 104 USPQ2d 2037, 2038 (TTAB 2012).

### **The Amended Petition Does Not Relate Back.**

Petitioner lauds, then ignores, authority from the same Circuit on the effect of *Mayle v. Felix*.<sup>3</sup> In its opposition, petitioner relies heavily on a non-Lanham Act decision of the 3<sup>rd</sup> Circuit in *Bensel v. Allied Pilots*<sup>4</sup>, which cites to the 1945 Supreme Court decision in *Tiller v. Atlantic Coast Line R. Co.*<sup>5</sup> Then, petitioner ignores that the 3<sup>rd</sup> Circuit rejected the same argument it offers here. Here, petitioner claims that “Mayle is limited to the context of federal habeas proceedings,” and petitioner’s opposition cites an unreported E. D. Virginia case.<sup>6</sup> In doing so, petitioner ignores what the 3<sup>rd</sup> Circuit stated in *Anderson v. Bondex Int’l, Inc.*<sup>7</sup> That Circuit decision followed a Magistrate’s ruling that what “the Court decided in *Mayle* in the context of habeas corpus ...’applies equally here’ because it is predicated on the relevant subsection of Rule 15(c).” That appellant again argued that “the standard expounded in *Mayle* ...is more stringent than the standard for ordinary civil cases ...[and argued] the proper inquiry is set out in *Tiller*.” The 3<sup>rd</sup> Circuit held “We are not persuaded.” The “Supreme Court’s analysis in *Mayle* was consistent with – not more exacting than- its application of Rule 15(c) in other contexts.” Thus the 3<sup>rd</sup> Circuit in *Bondex* rejected the very same relation back argument, and same argument based on *Tiller*, which petitioner has recycled here.<sup>8</sup>

Averments in the Amended petition so “differ in both time and type from those the original pleading set forth” that the amendment does not relate back to the date the original petition was filed. *Mayle v. Felix, supra*. In the original petition, SFM, LLC and “predecessors” were the averred party using the mark, then the Amended petition totally changed that to SFM’s

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<sup>3</sup> *Mayle v. Felix*, 545 U.S. 644, 650, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005).

<sup>4</sup> 387 F. 3d 298 (3<sup>rd</sup> Cir. 2004).

<sup>5</sup> 323 U.S. 574 (1945).

<sup>6</sup> *Tucker v. Sch. Bd., of City of Va. Beach*, 2:13-CV-530 (E.D. Va. 10/31/2014).

<sup>7</sup> 552 Fed.Appx. 153 (3<sup>rd</sup> Cir. 2014).

<sup>8</sup> Odd that petitioner could find the 3<sup>rd</sup> Circuit decision in *Bensel*, but then failed to cite the later, recent 3<sup>rd</sup> Circuit decision in *Bondex*.

“exclusive licensee.” Now, in a footnote the petitioner’s opposition would further change both of those to “its related companies,” viz, not the unnamed predecessors, not the “exclusive” licensee, but may be unidentified “related” entities. Petitioner had not averred “a similar channel of trade” anywhere in the original Petition or the Amended Petition, but adds that now. The original petition did not allege “nominative” use by anyone, then the Amended petition alleges the exclusive “licensee” uses the “SPROUTS and SPROUTS-nominative trademarks in connection with goods.” Now the opposition brief suggests abandoning that and changing it a third time, contending now that “SFM does not aver that its related company made `nominative’ use of the pleaded service marks.” These and other substantive changes do not relate back because those “differ in both time and type from those the original pleading set forth.” *Mayle*. The Amended petition is "divergent" from the superseded averments in the original petition, and what now are inconsistent with assertions in the opposition brief. *Makro Capital of America v. UBS AG*, 543 F.3d 1254, 1258 (11<sup>th</sup> Cir. 2008) (“the widely divergent nature of the two complaints means that the amended complaint would not relate back ...under Rule 15”).

The Amended petition superseded and cancelled the original petition, and that Amended petition contains divergent averments that differ in “time and type.” It should be dismissed as time-barred under the five year limitation in §14 of the Lanham Act.

**Lack of Standing under *Lexmark*.**

Petitioner could not distinguish its Lanham Act claim from that in *Lexmark*<sup>9</sup>, and failed to make a plausible argument about how the modern standard for standing defeats standing here. As in *Lexmark*, petitioner and respondent are not direct competitors. Petitioner does not mark vending machines services with its marks, and respondent is not involved in grocery store

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<sup>9</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1377, 188 L.Ed.2d 392, 109 USPQ2d 2061 (2014).

services. Therefore, petitioner SFM LLS is outside the “zone of interests” protected by the Lanham Act, and so, lacks standing here.

Petitioner acknowledges that under *Lexmark*, “the pleader must allege an injury to a commercial interest in reputation or sales.”<sup>10</sup> Even so, petitioner does not point to any averment that so pleads any such injury. Petitioner diverts off into commentary about consumer recognition, not injury. The distinction was explicated in a recent case, “Meltech has to allege not only that consumers were deceived ..., but also that that deception—...—led consumers to ‘withhold trade’ from Meltech.” *Avalos {Melltech} v. IAC/Interactivecorp*, 2014 WL 5493242 (S.D.N.Y. 2014). This key distinction between confusion and injury, which is lost in petitioner’s opposition, compels the conclusion that standing under *Lexmark* was not pleaded here.

In opposition, Petitioner ignores that *Lexmark* rejects the old standards for standing used in the two cases Petitioner cites: *Ritchie v. O.J. Simpson* and *Jewelers Vigilance Comm.* The “Supreme Court rejected what it referred to as ‘antitrust standing or the [Associated General Contractors] factors,’ the ‘categorical test,’ and the ‘reasonable interest approach.’” *Paleteria La Michoacana, Inc., v. Productos Lacteos Tocumbo S.A. De C.V.*, \_\_\_ F. Supp. 2d \_\_\_, (D.D.C. 2014). The *Lexmark* standard applies here, and the Amended pleading here falls below that.

For all the reasons set forth in the motion to dismiss, respondent urges the Board to adhere to the holding in *Lexmark*.<sup>11</sup> Dismissal of the Amended Petition is proper under the prevailing requirements for Lanham Act standing.

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<sup>10</sup> The actual holding was that one “must plead and ultimately prove a ‘an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations.’” *Lexmark*, 134 S.Ct. at 1395.

<sup>11</sup> Standing is a threshold jurisdictional issue in every case, directed solely to determine the interest of the plaintiff. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982).

**CONCLUSION**

Based on the record and the points and authorities presented, it is respectfully requested that the Amended Petition be dismissed.

Respectfully submitted

Date: 16 JAN 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of January, 2015, I electronically filed the foregoing Points and Authorities in Support of Motion to Dismiss, and mailed a copy to the attorneys for the Petitioner, directed to the email address of the attorney indicated below:

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~ S ~ /Charles L. Thomason/  
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