

ESTTA Tracking number: **ESTTA714080**

Filing date: **12/11/2015**

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

Proceeding	92061981
Party	Defendant Yoel Steinberg
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Submission	Motion for Sanctions
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Date	12/11/2015
Attachments	Certification of service for SANCTIONS dec 11.pdf(7725 bytes) Protest and Motion for SANCTIONS dec 11.pdf(165460 bytes)

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Protest and Motion for Sanctions, in regard to the Proceedings of Cancellation No. 92061981, has been served on opposing counsel, MICHAEL R FRISCIA, of MCCARTER & ENGLISH, LLP by mailing said copy on December 11, 2015, via First Class Mail, postage prepaid to:

MICHAEL R FRISCIA
MCCARTER & ENGLISH, LLP
FOUR GATEWAY CENTER, 100 MULBERRY STREET
NEWARK, NJ 07102-4056 UNITED STATES

Signature Yoel Steinberg

Date: December 11, 2015

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

Kosher Supervision Services, Inc.

Petitioner,

v.

Yoel Steinberg,

pro se` Respondent/Registrant.

Cancellation No. 92061981

RESPONDENT'S PROTEST AND

MOTION FOR SANCTIONS

Pursuant to TBMP 527.02
and Fed. R. Civ. P. 11

REGISTRANT'S PROTEST AND MOTION FOR SANCTIONS

I, Yoel Steinberg, Registrant for Registration No. 3830599, in regard to the Cancellation Proceedings 92061981 filed by KOSHER SUPERVISION SERVICES, INC., against registration of my trademark K (AND DESIGN) (K disclaimed), [henceforth "my mark"], and in regard to Petitioner's Motion to Amend, Filing date: 12/02/2015, and in regard to its petition of Aug 07 2015, and in regard to Petitioner's Brief in Opposition to Motion dated Oct 01 2015, and in regard to Petitioner's actions throughout the Proceedings in general, respectfully protest Petitioner's actions, And if warranted, respectfully Motion for Sanctions against Petitioner.

LEGAL BACKGROUND

[Citation of TMEP. emphasis added, ellipses deleted] TBMP 527.02 Motion for Fed. R. Civ. P. 11 Sanctions

Fed. R. Civ. P. 11...

(b) Representations to Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the

best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and ...

*(c) **Sanctions. (1) In General.** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate or employee.*

*(2) **Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served..., but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time as the court sets. ...*

*(3) **On the Court's Initiative.** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).*

*(4) **Nature of a Sanction.** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives...*

37 CFR § 11.18 Signature and certificate for correspondence filed in the Patent and Trademark Office.

(a) For all documents filed in the Office in patent, trademark, and other non-patent matters, ... except for correspondence that is required to be signed by the applicant or party, each piece of correspondence filed by a practitioner in the Office must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1) of this chapter.

(b) By presenting to the Office ... (whether by signing, filing, submitting, or later advocating) any paper, the party presenting such paper, whether a practitioner or non-practitioner, is certifying that-

(1) All statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or knowingly and willfully makes any false, fictitious or fraudulent statements or representations, or knowingly and willfully makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and any other applicable criminal statute, and violations of the provisions of this section may jeopardize the probative value of the paper, and

(2) To the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(i) The paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of any proceeding before the Office;

(ii) The other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified,

are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;
and

(c) Violations of any of paragraphs (b)(2)(i) through (iv) of this section are, after notice and reasonable opportunity to respond, subject to such sanctions or actions as deemed appropriate by the USPTO Director, which may include, but are not limited to, any combination of-

(1) Striking the offending paper;

(2) Referring a practitioner's conduct to the Director of Enrollment and Discipline for appropriate action;

(3) Precluding a party or practitioner from submitting a paper, or presenting or contesting an issue;

(4) Affecting the weight given to the offending paper, or

(5) Terminating the proceedings in the Office.

(d) Any practitioner violating the provisions of this section may also be subject to disciplinary action.

The quoted provisions of Fed. R. Civ. P. 11 are applicable to pleadings, motions, and other papers filed in inter partes proceedings before the Board. [Note 1.] Thus, if a paper filed in an inter partes proceeding before the Board violates the provisions of Fed. R. Civ. P. 11, any party to the proceeding may file a motion for the imposition of an appropriate sanction. The Board may find a Fed. R. Civ. P. 11 violation, and impose an appropriate sanction, not only upon motion, but also upon its own initiative, following issuance of an order to show cause and an opportunity for the party to be heard. [Note 2. omitted]. ...

However, the Board may enter other appropriate sanctions, up to and including the entry of judgment, against a party that violates Fed. R. Civ. P. 11. [Note 5. omitted,]

Fed. R. Civ. P. 11(c)(2) provides a "safe harbor" provision allowing the party or attorney an opportunity to withdraw or correct a challenged submission. This provision delays filing of a motion for sanctions before the Board for twenty-one days after service of the challenged submission and allows the motion to be filed

only if the challenged submission is not withdrawn or appropriately corrected. The Board will deny motions for Fed. R. Civ. P. 11 sanctions which fail to comply with this requirement.

STATEMENT OF FACTS

This Protest and Motion for Sanctions is triggered by (but not limited to) ESTTA Tracking number: ESTTA711935 Filing date: 12/02/2015. Although the Interlocutory Attorney Ms. Faint already issued an order on September 16, 2015 that (other than the Motion to Strike) the Proceedings are suspended, and that Petitioner's instance Motion, due to it being premature to that order, will likely not be noted, I am concerned that a protest against Petitioner's Motion must nonetheless be brought to the attention of The Board. I also note and protest that I did not receive fair notice and service of the new nunc pro tunc Assignment records which Petitioner refers to within Petitioner's Motion to Amend. (I therefore refer to the records as they appear on my computer showing the website run by the Trademark Office).

GROUNDS FOR PROTEST

I protest that Petitioner's Motion to Amend, at least plausibly, appears to further a ruse used as *a device to trick and conceal the material information* that the petition contained fatal defects and omissions at the time it was submitted and filed. Petitioner's Motion to Amend, if granted, would remove from consideration and divert The Board's attention away from whether Petitioner Kosher Supervision Services [without comma] is a corporation. And whether the assertions by Petitioner's counsel that Kosher Supervision Services is a corporation were *false, fictitious or fraudulent*. And whether Petitioner *knowingly and willfully made any false, fictitious or fraudulent statements or representations*.

Petitioner's Surreptitious Attempt to Conceal Lack of Standing

As previously protested -over 21 days ago- in my brief (entered/dated October 15 2015), in support of Motion to Strike (pages 1 through 6) , Mr. Michael Friscia, counsel for Petitioners withheld material

information that in addition to there being a problem with what Mr. Friscia identified (in footnote 1 of the petition and of his Opposition brief) as “the spelling of the owner name within the Registration”, Petitioner rather did not own the Registration at all and did not have standing at the date the petition was submitted. This is because an Assignment was required from the original owner of record, so that Petitioner did not have authority on its own to have the spelling of the name “corrected” within the Registration. Petitioner would rather need to solicit an assignment from the original owner, who may or may not have consented to do so. Mr. Friscia did not make any mention within the petition that Petitioner is not the original owner of the pleaded mark(s).

The defect of Petitioner not having standing, and additional defects of the petition as filed were already pointed out in my Brief (entered/dated October 15 2015), in support of Motion to Strike (pages 1 through 6). Even though a determination and order from The Board is pending on that Motion to Strike, And even though The Board may have already decided to terminate these proceedings with prejudice in my favor, I refer to that motion here, so that The Board may further determine whether sanctions are warranted.

Fair Notice of a Subsequent Assignment Omitted Within Pleading

Mr. Friscia made no mention within the petition that Petitioner is not the original owner of the pleaded marks(s). Even if Mr. Friscia might not have known this, his law firm did know because Robert W. Smith of McCarter and English is the attorney of record who worked on the first Assignment (reel/frame 2788/0358). The petition (in footnote and in petition as a whole) gave an impression that Kosher Supervision Services, Inc. [with comma] was the original owner, And that the spelling discrepancy was merely a clerical error which could be “corrected“. The petition did not state that Petitioner needed to solicit an Assignment from the original owner -who at the time may or may not have consented. I had to find out this information on my own, and point it out in my brief in support of Motion to Strike. Mr. Friscia made no mention in the

petition that Petitioner even intended to request of the original owner to Assign ownership. The petition did not state that a new legal transaction of transfer for Ten (10) Dollars would be required (see Reel/Frame 5667/0314) . Regardless of whether the second Assignment is now filed as nunc pro tunc, I was not given “fair notice” of Petitioner’s intentions within the pleading that Petitioner would later on solicit Assignment of the Registration. I also was not serviced with this new Assignment data which only came to exist after the Petition was submitted, and after the Five year anniversary of my mark’s Registration has past. The Board may therefore find that Petitioner’s actions violate the Rules of Federal Procedure which require that “fair notice” be given within the pleading, and that a pleading must be validly serviced. The Board may also find that Petitioner failed to comply with **37 C.F.R. §3.73(b)(1)** which requires the Assignment data to have been presented. 37 C.F.R. §3.73(b) states in part:

- *(1) In order to request or take action in a patent or trademark matter, the assignee must establish its ownership of the patent or trademark property of paragraph (a) of this section to the satisfaction of the Director. The establishment of ownership by the assignee may be combined with the paper that requests or takes the action. Ownership is established by submitting to the Office a signed statement identifying the assignee, accompanied by either:*
 - *(i) Documentary evidence of a chain of title from the original owner to the assignee (e.g., copy of an executed assignment). For trademark matters only, the documents submitted to establish ownership may be required to be recorded pursuant to §3.11 in the assignment records of the Office as a condition to permitting the assignee to take action in a matter pending before the Office. ... ; or*
 - *(ii) A statement specifying where documentary evidence of a chain of title from the original owner to the assignee is recorded in the assignment records of the Office (e.g., reel and frame number). [emphasis added].*

Furthermore, since any vital amendments to the petition, or vital subsequent servicing of an appendix containing the Assignment data would be untimely, the petition must be dismissed and the proceedings terminated with prejudice in my favor.

Mr. Friscia's Puzzling Behavior Supports Knowledge and Will

Mr. Friscia's past actions within this proceeding seem puzzling: If Petitioner Kosher Supervision Services, Inc. [with comma] really was an owner of the Registration, with standing at the date the Petition was submitted, then Mr. Friscia could have simply limited the listed Petitioners to Kosher Supervision Services, Inc. , as Mr. Friscia attempts to do now with this Motion to Amend. It should have been enough for Mr. Friscia to indicate within the petition that "Kosher Supervision Services, Inc. and Kosher Supervision Services Inc. "are one and the same". However Mr. Friscia could not do that because Kosher Supervision Services, Inc. [with comma] was NOT a party of standing when the petition was submitted. (Mr. Friscia did point out, that "Kosher Supervision Services, Inc. is not the name spelled within the Registration, but he did not explicitly indicate that standing itself was lacking at the time). Additionally, Kosher Supervision Services Inc. [without comma] was not and is NOT a juristic person. So that Petitioner -even "collectively"- did not have standing at the date the petition was submitted. Rather it seems that, in order to give an appearance of standing for his client, Mr. Friscia had to *knowingly and willfully* add the phantom entity Kosher Supervision Services Inc. [without comma] as a co-Petitioner, and pretend that it is a Corporation so that The Board would be misled into presuming that two corporations were filing the petition. Mr. Friscia went so far as to pay two fees instead of just one. My brief in support of Motion to Strike lists more irregularities within the petition's filing data which further indicate that Mr. Friscia was misrepresenting that Kosher Supervision Services Inc. [without comma] is a corporation. The brief details how Mr. Friscia signed his name to information which he must have known to be incorrect. I therefore bring this to the attention of the Board so

that they may decide if Mr. Friscia *knowingly and willfully made any false, fictitious or fraudulent statements or representations.*

Petitioner's Material Misrepresentation

Contrary to what is implied/stated by Mr. Friscia's statements and ESTTA filings, the results of a search of listed corporations at the Public record for The State of NJ reveals that there is no such corporation as Kosher Supervision Services Inc. [without comma]. Mr. Friscia had *notice* from me, *and a reasonable opportunity to respond.* He had ample opportunity to come clean with the fact that Kosher Supervision Services Inc. is not a corporation. Yet Mr. Friscia has failed to do so. In his instance Motion to Amend, Mr. Friscia rather continues the ruse from the petition, And pretends that Kosher Supervision Services Inc. is still a juristic person who has now decided to withdraw from the Petition. I regretfully must bring up the issue of Sanctions since the repeated use of this ruse even as late as Petitioner's instance Motion to Amend seems to indicate that Mr. Friscia's statements within the petition are not merely isolated incidents but are rather consistent with a pattern of behavior of concealment. I now protest out of caution to protect myself so that my position within these Proceedings will not be prejudiced by the charade which seems to be played here. If Petitioner is acting improperly it should not be rewarded for doing so, And its improper behavior should not be allowed to set an example for others to follow.

Mr. Friscia's Attempt to Cover Past Misrepresentations

Petitioner's Motion to Amend is the latest step of this charade: It now attempts to cover up past misrepresentations by rendering them presumably moot. If Petitioner's Motion to Amend is granted, it will render moot whether Kosher Supervision Services Inc. is a corporation, and will result in preventing interrogations as to whether Mr. Friscia intentionally concealed material information in regard to Kosher Services Inc. , and whether Mr. Friscia willfully and knowingly stated and submitted incorrect material

information.

Mr. Frisca's Attempt to Conceal Lack of Standing

Furthermore, the instance Motion to Amend appears to be a *device to trick and conceal* that Petitioner Kosher Supervision Services, Inc. [with comma] did not have any standing at the time the petition was submitted. The Motion to Amend furthers the ruse presented by the petition in footnote 1 and in the submission data for the petition . These defects in the petition in regard to Petitioner not having standing are also already detailed in my Brief (entered October 15 2015) in support of Motion to Strike. By Mr. Friscia's now presenting the facts as if a nunc pro tunc Assignment can give his client standing retroactively, And by Mr. Friscia's couching the formulation of the Motion to Amend as if it were a Motion to withdraw a petitioner, Mr Friscia is *covering up* that his Motion actually seeks to rather add a new Petitioner who did not previously have standing to petition. This concealment is material and of pivotal significance since the Five year anniversary of my mark's Registration has already past, and any Motion to Amend the petition to add a Plaintiff to the original Petition must be rejected as untimely. (This is especially so since no other juristic person would remain as plaintiff).

Petitioner's Awareness of Its Misrepresentation

Furthermore, In my previously noted brief in support of Motion, I already pointed out that the petition cannot be rectified retroactively. The Five (5) year anniversary of the Registration of my certification mark (which is the subject of these proceedings) has already past on August 10, 2015. This date precedes the date of execution of the asserted Assignment nunc pro tunc, as it shows on the Assignments information webpage (Reel/Frame 5667/0312 and onward). Mr. Friscia's having been already apprised of these facts via my previous brief, makes his now ignoring them all the more disconcerting.

Additionally, Even if a nunc pro tunc assignment might award ownership back to the date of nunc pro

tunc, STANDING can NOT be assigned retroactively. Rather the Assignment record must reflect the date of execution.

Besides that, An assignment can NOT assign rights to sue beyond the rights previously owned by the Assignor. As of August 10, 2015, Assignor Harvey Senter had no right to sue me, nor to petition against the Registration of my certification mark on the grounds stated within the petition. Petitioner Kosher Supervision Services, Inc. may not petition against my mark because it was never VALIDLY assigned these rights to do so by Harvey Senter. Harvey Senter cannot assign what he himself no longer owned.

Even though issues of standing were raised in my previous brief, Mr. Friscia seems to be ignoring them in his Motion to amend as if they aren't there. It is one thing to have made sloppy mistakes. But Petitioner's apparent attempts to cover them up with ruses and devices after the mistakes were already pointed out suggests that something else is going on here.

Misrepresenting the New Assignment as a "Correction" of the Name Within the Registration

In a further attempt to hide lack of Standing at the date the petition was submitted, Mr. Friscia further misrepresents by stating in the instance Motion to Amend that "to correct this error, a ... assignment... was filed and recorded" [ellipses omitted]. A new Assignment is NOT a corrective document. It is merely a new Assignment. Filing and recording a new Assignment does NOT correct the original Registration. It merely gives it a new owner. Rather, to effect a correction of the spelling within the Registration, the procedures of TMEP 503.06 (and 37 C.F.R. 3.34. etc.) must be followed. If as Mr. Friscia persistently asserts, Petitioner Kosher Supervision Services Inc. [without comma] is a corporation, then there is no *error apparent when the cover sheet is compared with the recorded document to which it pertains* (see 37 C.F.R. 3.34 (1)). At the date the petition was submitted, both the (first) Assignment data and the Registration contained the same name of Kosher Supervision Services Inc. [without comma]. Kosher Supervision Services Inc. [without

comma] would have been Assigned the registration and there would not have been any error that may be corrected.

Notarization Missing and/or NOT VALID

I also call shenanigans and protest against the purported "notarized" statement which shows on the Assignment record at Trademark Office website. In Reel/Frame 5667/0315 (and onward). As it appears on-line, The Notarization does NOT say that Harvey Senter signed and swore before the Notary. The notarization as it shows on the webpage/record does not say who came before the Notary, and who made an oath that Harvey Senter ever actually signed the statement. The space for this is simply left blank. Was this intentional? Is there reason to suspect that Harvey Senter did not really sign? Was the Assignment not actually Notarized but misrepresented as if it were? Did Mr. Friscia notice this yet knowingly and willingly attempted to slip it by due to the time pressure to file yet another frivolous petition to Cancel my service mark CupK? I leave it to The Board to draw their Own conclusions. But bottom line, The Notary did not do it right. At least in the copy showing on the webpage. The Board might therefore find the Notarization to be VOID and NOT VALID. Consequently, the Assignment may also be VOID and NOT VALID. So that **Petitioner still does NOT own any mark(s)**. And Petitioner does not have standing to petition because there is no *chain of title* linking the original owner to Petitioner.

Faxes but NOT Original Documents

The Board might also find significant that the Assignment pages (for the new assignment) as they show on the records contain Fax headers. If the pages submitted to the Assignment Office via ESTTA are only fax copies but not originals, then The Board might find that the Assignment documents were required to include a Declaration that the fax copies are true copies of the original. The Board might further find this to be justification to invalidate and void the Assignment.

Defective Servicing

I also protest that service of the Petition was not valid because the copy I received is different than the copy shown on the TTABVUE website. I am referring to Document of ESTTA tracking number ESTTA68428 filing date 08/07/2015 that was mailed to me. This document titled "Receipt" lists the mark Cited by Petitioner as Basis for Cancellation. In the copy serviced to me, the "Design Mark" for Registration No. 927067 is given as " 72389770#TMSN.png ". Similarly, the the "Design Mark" for Application No. 86713509 is given as " 86713509#TMSN.png ". That is not what shows on the TTABview version of the petition. ESTTA Tracking number: ESTTA688428 Filing date: 08/07/2015. which shows designs for the marks as opposed to numerals, letters, and # and a dot. Additionally, the version showing on the website is NOT titled "Receipt".

It would seem that the computer browser at McCarter and English is set to not show png files, And that they sent me the wrong papers. The ramifications of this is that I was not validly serviced with the Petition; I was (technically) not given fair notice as to what is the appearance of the marks being pleaded. And that since the 5 year anniversary of the registration of my marks has past, Petitioner cannot rectify the defective service by doing it over.

Signing and Submitting Before the Attested Facts Took Place

McCarter and English presumably may have switched the documents in error. A lawyer obviously does not want to forfeit the case for his client by serving the wrong papers. What might be of greater concern though is that Mr. Friscia (or his associate or employee) submitted to ESTTA the petition and the accompanying certificate of service, even though these documents were not yet serviced to me. They had to submit the Petition to ESTTA before downloading and printing their receipt which they (mistakenly) mailed to me and which came along with the petition in the same envelope. This shows that someone at Mr.

Frischia's firm is uploading certificates of service even before the servicing happens.

Apology

If my interpretations of the above noted events and observations are incorrect, or if none of those events matter, then I offer my sincerest apologies to both Petitioner and The Board. I humbly apologize. I do not mean to be rude. However, since I must defend my case without counsel, I must bring all these issues to the attention of The Board as I understand them in good faith. And if I am correct, then this Motion for Sanctions is of Merit

Nobody Owns Registration No. 927067 and Application No. 86713509

The Board should also note that as of now, there is no juristic person who is owner of the Registration which Petitioner presumes it owns. Since Petitioner's counsel has not formally renounced its averment that Kosher Supervision Services Inc. [without comma] is a corporation, it would turn out that the previous Assignment, recorded in Reel/Frame 2788/0358 (and onward) was not reverted to a nullity. Accordingly, Petitioner Kosher Supervision Services Inc. [without comma] would by Petitioner's previous assertions still have been the owner even as late as November 2015. And Harvey Senter (INDIVIDUAL) would have no longer been the owner at the date of execution for the second Assignment. The second Assignment showing in subsequent frames, Reel/Frame 5667/0312 (an after) shows the second assignment was recorded and signed on date Nov. 12, 2015 SUBMISSION TYPE: NEW ASSIGNMENT [It does NOT say that the previous Assignment is being replaced as a nullity by this new assignment]. [And It does not say nunc pro tunc to any date prior to the Previous Assignment]. This new Assignment was NOT filed as a correction to the spellings of the names. The First Assignment was sold for One (1) Dollar. The second Assignment, Headed "New Assignment" was sold for TEN (10) DOLLARS. These are two different Assignments and two different transactions. It is NOT simply a "correction" in the name spelling.

Invalid Assignment

By the implications of Petitioner's own assertions, Harvey Senter (INDIVIDUAL) had no authority to make the second assignment, nunc pro tunc or otherwise. The second Assignment must then be disqualified as INVALID since the purported Assignor did not own the Registration being Assigned. The assignment would have rather still belonged to Kosher Supervision Services Inc. [without comma] listed in the Assignment record as a CORPORATION. But now that Kosher Supervision Services Inc. is stated to have withdrawn from the petition, there is no longer any Plaintiff who owns the Registration. And neither party has any standing to petition against my mark.

More than that, since Kosher Supervision Services, is actually NOT a corporation, and is not a juristic person, NOBODY owns Registration No . 927067

Nobody owns Application No. 86713509 either. Since the purported Assignment of the mark for Application No. 86713509 was never Assigned by the previous owner to Applicant Kosher Services, Inc. , and on the date the Application was submitted, Kosher Supervision Services, Inc. was NOT the owner of the mark, the Application must be rejected as a nullity. (As already said in my brief in support of Motion to Strike, The public records for Corporations of The State of NJ show that even Kosher Services, Inc. [with comma] did not exist at any date prior to 1986. An Assignment would be required form the mark's as of yet unidentified original owner from 1972).

If the current owner of the mark and its Registration is/was not a juristic person, it would come out that The Board should therefore disqualify Registration of the pleaded trademark K and design Registration No . 927067 Registration Date 01/11/1972. Similarly, The Board should issue final refusal of the pleaded Application for trademark K and design Application No. 86713509 Application date 08/03/2015.

This would be justified and within Equity even if Petitioner's counsel did not commit actions worthy

of sanction. Petitioner simply does not own any marks. However, since I did not yet file a Counterclaim and pay the fee, The Board may find it proper that Petitioner's marks be cancelled as a sanction, so that a cancellation Proceeding Counterclaim and fee would not be necessary. If not that, then at least the petitions submitted by petitioner to cancel my two trademarks (including 92062710 against my service mark CupK) should be dismissed and terminated with prejudice in my favor.

PETITIONER'S ASSERTIONS ARE FRIVOLOUS ON THE MERITS

Petitioner's assertions of fact, and the reasoning it argues within the petition, are so specious and defective that one might wonder whether Petitioner initiated the litigation in good faith, Or did Petitioner rather do so to harass so that I would be pressured into settlement negotiations.

Paragraphs 1 and 3 of Petition: were discussed above.

Paragraph 4 of Petition: Petitioner's entire claim is hinged on what Petitioner asserts (in paragraph 4 of the petition) that the "... Marks consist of K and the Hebrew letter "kof" "are referred to in spoken language as "Kof K" ", so that there would be an assertion of similarity in "sound" between the conflicting marks. The Board may have already found that paragraph 4 of the petition fails to give *fair notice* as to what the allegations are, because the petition does not identify using *words commonly found in English language* what this "spoken language" of "kof", "Kof K" and "Cup K" is, and what do those words sound like. Petitioner did not include a MP3 file or even a phonetic equivalent of how "kof" and "Kof K" (and even "Cup K") are asserted to be spoken as. It is not fair for me to have to wait until an oral hearing after the trial to only then find out what the allegation was in the first place. Although the allegation may have already been stricken, what we add here is to show why The board might find these allegation to also be sanctionable.

כ vs ק

Petitioner's *factual contention* that the design element within its marks is a Hebrew letter is "kof" is simply incorrect. The Board may take judicial notice of Their dictionaries and encyclopedias to see that "kof" as defined to be the 19th letter of Hebrew alpha-bet, and which looks like ק does not look like the design element within either of the marks pleaded by Petitioner. (Press "e" key on Hebrew computer keyboard to see ק "kof". Press "f" key to see כ). Kof, (being transliteration of Hebrew word for MONKEY) can be seen to have a tail like line on the lower left, and an arched body like curve to the right of and over the tail. The design element of the marks pleaded by Petitioner do not have these calligraphic features. Mr. Friscia, as an attorney with a law firm at his disposal, should not have asserted false *factual contentions* that do not *have evidentiary support*. If Mr. Friscia cannot bring evidence contradicting these authoritative references such as the dictionary, then this allegation within paragraph 4 of the petition is simply *frivolous* and would have *needlessly increase the cost of litigation*; I might have had to endure significant legal expenses just to point out to The Board something that even schoolchildren are aware of. And even now as *pro se*: researching, writing and editing this brief has taken up way too much time. If Petitioner's objective is to *harass* me, then it should not be rewarded for this harassment, and its actions should not be allowed to set an example for others.

Stylization or Design but not a Hebrew Letter

It should also be noted that the allegation as formulated is self-contradictory. How could Petitioner have *believed it to be true* that both design elements within the mark are the Hebrew letter "kof" when the two designs are so different? One looks like a dyslectic (stylized) C, The other looks like a dyslectic (stylized) g. Petitioner's couching the allegation as if the כ or ג designs within the Registration and Application are as literal elements, conceals that a letter "kof" is merely how Petitioner merely subjectively

describes and interprets the two different designs.

The Board may also find that the allegation misrepresents the fact that the pleaded Registration and Application as formulated claim no rights to any Hebrew literal element, and not even to a *stylized* Hebrew letter. To the contrary, if the Registration and Applications were seeking rights to a Hebrew letter element, a statutory disclosure would have been required as to the translation of the non-Latin letter element and its significance in commerce. Also, the K should have required a disclaimer since it is generic and dictionary defined as a universal kosher certification symbol without indicia to origin.

Even Identical Letters Within A Competing Design Mark Would NOT pose a Conflict

The Board may therefore find that Petitioner's *legal contentions are unwarranted, or frivolous*. Furthermore, even if my mark hypothetically were to contain a Hebrew letter as an element, And even if that letter were to be a stylization/design of כ , the hypothetical כ within my mark would still not be similar in its stylization/design to that of the pleaded marks. Not only is my mark sufficiently DISsimilar to P's marks, so as NOT to pose any conflict, even the kosher certification mark  (U.S. Registration Number 1719226 LIVE) was specifically noted by the Examining Attorney within its Application file record to NOT pose a Likelihood of Confusion with the mark of Registration No. 927067 which Petitioner pleads. (Petitioner references the Registration of my mark CupK within paragraph 10 the petition without a declaration or exhibit, so I may do same here for Reg. No. 1719226).

Petitioner's allegations rather comes across as an attempt to trick. It would take some knowledge of Trademark practice to be aware of the clear statutory distinction between a (Hebrew) wordmark "without regard to stylization color or design" versus a design element of a (generic/descriptive) letter which cannot bar a sufficiently dissimilar design. This is so despite the dissimilar design being a stylization of even an identical letter. And all the more so when the design of the competing mark (such as mine) is not of a letter at

all.

No Similarity Between Respective Dominant Elements

The Board may find that it should have also been obvious to Petitioner that the (disclaimed) generic K elements within the competing marks do not at all have any “strength” and offer little if any “distinctiveness” (paragraph 22 of petition). And that it should have also been obvious to Petitioner that the dominant element, the design , within my certification mark, is sufficiently dissimilar to  and to , so as to not pose any confusion or dilution. Any allegation (paragraph 13 of petition) of similarity, in appearance or in commercial impression is simply ludicrous. And even in regard to “sound”, the Registration and Application pleaded by Petitioner should not have the right to bar the sound of a Hebrew literal element because no Hebrew literal element is claimed. I should even be allowed to use  itself if the stylization were sufficiently dissimilar (just as Registration Number 1719226 does). And for all the pleaded Registration or Application claims, those design may as well be interpreted to be a profile of a mouth or any other subjective interpretation. Moreover, Petitioner never disclosed what the “sound” of “kof” actually is.

Petitioner should have known better than to assert unwarranted legal contentions: It should have known that it is well established that there is no set correct interpretation of a design; That there is no Doctrine of Equivalence between two designs sufficiently dissimilar in appearance and commercial impression; And that a Doctrine of Equivalence can only be applied between marks themselves -not to a chain of intermediary marks such as the wordmarks Cup K vs Kof K. The Board may find that Petitioner’s contentions of similarities between the marks pleaded vs the mark contested is frivolous and/or ludicrous and unwarranted. What Petitioner is doing here is couching an impertinent non-fact of “referred to in spoken language” as if it were a pertinent (duPont) factor of “similarity in sound”. Petitioner’s *frivolous argument*

for extending, modifying, or reversing existing law and Doctrine should not be rewarded.

Impermissible Dissections

Petitioner subtly avoided bringing attention to the fact that the pleaded and contested marks are not asserted as actually pronounced the same or even similarly. Petitioner could not do this because they are NOT pronounced the same or even similarly. Petitioner rather asserts they are “referred to in spoken language” as “Cup K” and “Kof K”. The allegation is a subtle attempt to dissect the marks into their component parts. Petitioner (paragraph 13 of petition) couches its dissection in terms of how “the Marks are referred to in spoken language” . However what matters here is not how “the Marks are referred to in spoken language”, but rather how marks are encountered. Marks are NOT encountered in broken up pieces of CUP and K, or in C and K.

Even amateurs who read websites about introductory Trademark practice should know that a mark is not dissected. Yet Petitioner attempted to do so nonetheless. If Petitioner *knowingly and willingly* asserted *unwarranted contentions* in anticipation that an uneducated defendant would simply admit the allegations, Petitioner should not be rewarded for such behavior. And Petitioner should not be allowed to set an example for others to follow.

Frivolous assertions of similarity between the marks:

Petitioner specifies no similarity between my mark and that of “Petitioner’s Marks”. The only similarity even alleged (in paragraph 13 and 17 of the petition) is that “Cup K” is “similar in sound” to “Kof K”. But by basing its entire claim on “Cup K” vs “Kof K”, Petitioner is in effect pleading a mark it does not own against a mark it isn’t petitioning here to cancel. Petitioner does not identify any specific pertinent feature shared by the marks themselves. If the allegation is an unwarranted legal contention, Petitioner should not be rewarded.

Actual Confusion is a Logical Impossibility

Petitioner alleges (paragraph 17 of petition) that Actual Confusion occurred, but does not specify any facts -even in brief- as to what transpired during that purported incident. Petitioner never alleged that anyone who encountered my mark  ever mistook it to be  or . Petitioner merely “baldly” asserts its conclusion that the incident is one of confusion. And that the confusion was ‘actual’. The allegation therefore fails to meet the required pleading standard (as per Iqbal/Twombly).

But even if Petitioner would have *validly* alleged this far-fetched allegation, the assertion would nevertheless strain credibility as a logical impossibility. For a likelihood of confusion to be even possible, a person (i.e. a consumer) who encounters my mark would need to have at least vague recollection of  or . But if the consumer recalls even vaguely that those marks do contain a Hebrew letter (be it called

“kof” or otherwise), then confusion would not be possible. Even by Petitioner’s contentions, anyone who encounters  would obviously see that it does not contain a Hebrew letter. It just isn’t there -even by a Doctrine of Equivalency. Alternatively, if the consumer does not recall that the pleaded marks contain a Hebrew letter, then the consumer does not either recall that those marks contain a Hebrew letter that sounds like “kof”. **A recollection of the specific must presume a recollection of the general.** And a non-recollection of the general must presume a non-recollection of the specific. Either way there cannot be confusion. It also seems empirically absurd that anyone who is Hebrew literate and knows that  or  is

a Hebrew letter should for any reason even consider that  is a Hebrew letter or anything other than a design or sketch. The allegations of actual confusion, and likelihood of confusion, as asserted by Petitioner

are a frivolous absurdity which Petitioner should not have averred in good faith to believe to be true. Petitioner's behavior in asserting these frivolous allegation should not be allowed to set an example for others to follow.

Frivolous Allegations of Dilution:

Similarly, there is also NO dilution posed by my marks to any rights ascribed by Registration No. 927067 and Application No. 867513509 . The element K appearing in the pleaded marks (even if dissected to be viewed as a lone letter element) is already diluted in the ultimate as generic so that no further dilution is possible. The pleaded marks do not claim any right to the design  appearing in my mark -not even in regard to a subjective pronunciation of the design as CUP. And the Registration for my mark does not claim rights to the designs  or  appearing in the pleaded marks.

Even if the Hebrew letter(s) Petitioner calls “kof” were not already generic, the continued use and Registration of my mark will not make “kof” any less “distinctive”, and will not contribute toward its becoming (more) generic. Petitioner does not even assert that my mark contains a Hebrew letter. There is simply no pertinent overlap for my mark's Registration to encroach on the pleaded marks as they are Registered or Applied. Petitioner futile allegation asserting dilution is simply frivolous.

Pleading Facts Deceptively Outside of the Pertinent Context:

The Board may find that Petitioner's contention (paragraph 22 petition) that its marks have “strength” and “distinctiveness” is deceptively out of context. It is well established that K as a lone letter element in a kosher certification mark is both generic and dictionary defined as a universal symbol for certifying kosher without any indicia as to the origin of the supervision/certification. . Petitioner should have refrained from alleging “strength” or “distinctiveness” for its marks in light of this knowledge. The Board mat find that Petitioner omitted mention that K is disclaimed within my mark's Registration so that the genericness of K

would not be noticed. Petitioner also omitted a translation of, and the significance in commerce of, the non-Latin Hebrew letter “kof” which Petitioner asserts its “Marks consist of” to the relevant viewer. If Petitioner was pleading in good faith, it should not have alleged a contention of strength and distinctiveness because כ as a Hebrew equivalent of K, and as the first letter of כשר which is the Hebrew word for KOSHER in its original Hebrew language would then be a descriptive, plausibly even generic, element of a certification mark for KOSHER. (The Board may take judicial notice of the dictionary, and of its translation service). If there would be any presumption by a relevant viewer that “Petitioner’s Marks are referred to in spoken language as “Kof K”” (whatever that might sound like) then that presumption would perforce be due the generic and descriptive nature of both of the pleaded marks’ elements signifying the KOSHER quality of the goods that the marks certify. That Petitioner did allege paragraph 22 of petition despite Petitioner’s presumed knowledge that the mark is generic to the relevant viewer is misleading to The Board and a harassment to me.

K and כ as literal elements would require disclaimer and disclosure

As previously noted, a lone and unstylized letter K is generic as an element in a kosher certification trademarks and is also dictionary defined as an universal symbol certifying KOSHER. Although Examining Attorneys and Reviewing Paralegals haven't required Petitioner to disclaim the K, despite K being well established as generic, this is presumably perforce due to the rights of the marks already being limited to only the given stylizations/designs of K as the marks appear in their respective drawings, so that a disclaimer is not necessary. This also explains why Examining Attorneys did not require the necessary disclosures for the non-Latin letter element (which Petitioner calls) "kof". (This is especially significant here since כ as a Hebrew literal element is likewise generic for KOSHER).

However, now that Petitioner seems to concede its marks do consist of a Hebrew Letter, and that its

marks do consist of a lone letter K, And Petitioner further concedes that the "Marks are "referred to in spoken language as "Kof K"", the marks are now implicitly conceded by Petitioner as NOT unitary. By the implications of Petitioner's own assertions, the marks should have been subject to the disqualifications and/or narrow scope of protection which would be a consequence of the the marks' elements being a lone letter K, and a lone Hebrew letter (which Petitioner calls) "kof". But more than that, this means that **the Registration and Application should, or should have been, REMANDED back to Examining Attorney for disclaimer.**

Since Petitioner has in the past withheld from Examining Attorneys and Reviewing paralegals that its "Marks consist of K and Hebrew letter "kof"" as *literal* elements, and that "Petitioner's Marks are referred to in spoken language as "Kof K" ", And since Petitioner only now asserts this in a deceptive manner as a plea , The Board might find it fitting to Sanction Petitioner to bear the consequences of Petitioner's own plea. In other words, the Application and even the Registration should now be remanded back to their respective Examining Attorneys for the required disclaimers and disclosures which Petitioner has only now revealed were always required from the beginning.

Dubious or Defective Extension of Goods covered within Classification of FOOD covered. Fees not Paid

As previously noted, I repeat my apologies if I am mistaken in my Application of the law. However in Paragraph 7 of the petition, Petitioner asserts it has "extensive" and "prior" rights to the goods listed in the Application. I find it puzzling that the Application was allowed to list the wide and varied goods which seem to be beyond the class of "Food". This seems inconsistent with TMEP 1400 et. al. Why wasn't the goods classification corrected by Examining Attorney? And why was the Application accepted through TEAS for a fee of only \$275? If I am correct that the Application should not contain all those goods, then Petitioner has no right to plea "extensive rights". The Board may also find it of relevance that Petitioner asserts that the

Application mark was used since 1972, despite it being self evident that the mark was designed using computer graphics software, the technology of which was not readily available in 1972. I may not at this time allowed speak to Examining Attorney so I raise this issue as an objection within this Motion.

The list of objectionable contentions asserted by Petitioner is not limited to those mentioned here. I reserve the right to support this motion with evidence and to further elaborate in an amendment and/or brief in support, and/or in another motion. However, page constraints require a conclusion.

CONCLUSION

In conclusion, The petition (whether amended or not) to cancel Registration of my mark, should be rejected as untimely and/or otherwise defective (as found by The Board). The Board should terminate this instance cancellation proceeding 92061981 with prejudice in my favor. The Board should also terminate with prejudice in my favor the related proceeding 92062710 initiated by Petitioner against my certification mark CupK. And if warranted, further sanctions should be issued against Petitioner to the full extent that The Board sees fit.

Respectfully submitted,

Dated December 11, 2105

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