

ESTTA Tracking number: **ESTTA716791**

Filing date: **12/28/2015**

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

Proceeding	92062710
Party	Defendant Steinberg Yoel DBA CupK Kosher Supervision
Correspondence Address	STEINBERG YOEL DBA CUP KOSHER SUPERVISION 1823 53RD STREET BROOKLYN, NY 11204 UNITED STATES YoelHaLevi@juno.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	yoel steinberg
Filer's e-mail	yoelhalevi@juno.com
Signature	/ys/
Date	12/28/2015
Attachments	Motion to dismiss case bothering CupK use this one.pdf(208584 bytes ) Mot2Dismiss cert of service.pdf(8060 bytes )

**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

Cancellation No. 92062710

RESPONDENT'S CONSOLIDATED

MOTION TO DISMISS

Pursuant to Fed. RULE 12 of Civ. Proc.

**RESPONDENT'S CONSOLIDATED MOTION TO DISMISS**

I, Respondent, Yoel Steinberg, in regard to the Petition for Cancellation Proceeding No. 92062710 filed by KOSHER SUPERVISION SERVICES, INC., as dated November 25, 2015, against the Registration of my service mark CUPK, Registration No. 3883012, (henceforth "my mark" or "my service mark"), respectfully Motion that matter be stricken from the pleading, and that (consequently) the Petition be dismissed with prejudice in my favor. If such motion is not granted, then in the alternative, I motion that time be extended for me to formulate an answer plea and counterclaim, and to likewise postpone the date of discovery conference by three months.

**PRELIMINARY STATEMENT**

This consolidated motion seeks to have the petition and complaint dismissed with prejudice in my favor based on several Objections which may be raised by Motion pursuant to Federal Rule 12 of Civil Procedure, and by Rule 8.

**[12(b)(6) Objection]:** That the pleading fails to state a claim upon which relief can be granted. That the pleading of the complaint fails to allege sufficient facts as would, if proved, establish that petitioner has standing to maintain the proceeding; And/or that the pleading fails to allege sufficient facts as would, if proved, establish that a valid ground exists for cancelling the registration: when the pleading is examined in its entirety, and even if construing the allegations therein liberally, and even if all of petitioner's well-pleaded allegations in the petition for cancellation were to be accepted as true and the complaint were to be construed in a light most favorable to petitioner. Specifically, the complaint fails to state a claim to relief that is plausible on its face.

**[12(b)(4) Objection]:** That the record as a whole shows Petitioner does not own the pleaded marks due to errors, omissions, and invalid process; and that the petition itself and the required assignment are fatally defective;

**[12(b)(5) Objection]:** That Petitioner did not service me with the required records and filings;

**[12(b)(1) Objection]:** That matter of the pleading is beyond the jurisdiction of the Board;

**[12(f) Objection]:** That matter of the pleading should be stricken as impermissible, redundant, impertinent, immaterial, or scandalous.

**[12(b)(6) Objection listed in detail]:** That factual contentions asserted within the petition are frivolous in that they are inherently not credible, contradicted by the record, may be dismissed by judicial notice; and/or that Petitioner cannot produce admissible evidence to support the facts it asserts; That even if true, the asserted factual contentions of the pleading do not suffice to establish a plausible ground for likelihood of confusion or dilution; That Petitioner's reasoning is flawed; That Petitioner unreasonably extends legal contentions beyond that of what is well settled and established; That, Petitioner has not sufficiently specified any pertinent material harm that would plausibly be attributable to the continued Registration of my mark; That Petitioner should be barred from pursuing its Complaint due to the inequities inherent within the pleading itself. Specifically, that even without evidence outside the record, and even without deliberation, the Board may determine that the Petitioner's complaint must be dismissed.

RELATED PROCEEDING and PENDING ORDER ON MOTION

Many of the allegations pleaded here by Petitioner in the instance petition were also stated (often verbatim) within the petition for Proceeding No. 92061981. I motioned within that proceeding for matter to be stricken from that petition; Petitioner in its opposition brief to that motion expressed its views of Federal Rule 12(f) of Civil Procedure, and the case law including Iqbal/Twombly, Hilary, and other rulings. In my reply brief, the petition as a whole was also mentioned as to why it may be stricken/dismissed. A determination and order on that Motion is pending.

Subsequently, a Motion for Sanctions was submitted on December 11, 2015 in protest of Petitioner's petitions and Motions which are asserted to have violated Federal Rule 11 of Civil Procedure. The Motion protests Petitioner's factual misrepresentations, its withholding material information, and its attempts to conceal those transgressions. The Motion also protests allegations within the Petition which are frivolous both as to their factual contentions and as to their legal contentions, and which are not in a presumption of good faith. The called for sanctions included dismissing the instance petition (against CupK) with prejudice in my favor. That Motion is yet to be noted by The Board. Also mentioned in the Motion for Sanctions is Petitioner's failure to validly service the petition, and the defects inherent to the petition and the Assignment for the pleaded marks, and Petitioner's misrepresentations of ownership. Those issues

also apply to this instance petition. I therefore respectfully raise my objection to those issues here, and reserve the right to protest and Motion based on those issues later on within these instance proceedings as well.

## LEGAL BACKGROUND

The word “Rule” as used in this brief (unless indicated otherwise) refers to Federal Rules of Civil Procedure.

**Rule 12(b)** ... *a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted;*

**Rule 12(b)(6):** “A motion to dismiss under Rule 12(b)(6) is solely a test ... Regarding whether ... has pleaded a valid ground for cancelling the pleaded registration at issue, Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2) announces does not require detailed factual allegations, but requires more than labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions. See *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009). Indeed, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 678. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility of the allegations asserted. *Id.* In the context of Board *inter partes* proceedings, a claim is plausible on its face when the plaintiff pleads factual content that if proved, would allow the Board to conclude, or draw a reasonable inference that, the petitioner has standing and that a valid ground for cancellation exists. *Cf. Bell Atlantic Corp.*, 550 U.S. at 556. In particular, a plaintiff need only allege enough factual matter to suggest its claim is plausible and “raise a right to relief above the speculative level.” *Id.* at 555-56. Although the Board, in deciding a Rule 12(b)(6) motion, must accept as true all factual allegations in the complaint, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.* at 555 ...”. **Rule 12(f)** A Motion to Strike: is pursuant to TBMP 506.01. **Fed. R. Civ. P. 12(f) Motion to Strike.** *The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.* Petitioner (Proceedings No. 92061981 Brief in Opposition to Strike dated 10/01/2015) expressed/conceded its own view of the case laws for Rule 12(f). I may use them against Petitioner without having researched their veracity. They are included here by reference. **Rule 8(a)(2)** *A pleading that*

states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief; **Rule 8(d)(1)** Each allegation must be simple, concise, and direct. ...**Rule 12(c)(d)**: Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.

**Motion to Extend**: is Pursuant to Fed. R. Civ. P. 6(b), and TBMP § § 310.03(c)

## GROUNDS FOR MOTION

### Lack of Standing, NO CHAIN OF TITLE, Defective Process and Service of Process

The Board may 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, the five year anniversary of the Registration for my service mark CupK has already past (on Nov 30 2015). Therefore, 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. Additionally, even if Petitioner were to later produce documents indicating chain of title, I was not given *fair notice* of this chain of title within the pleading. And I was not serviced those documents in a timely manner at any date prior to the Five year anniversary of the Registration for my service mark CupK.

Additionally, I was not either validly serviced with the correct petition and certification of service. Petitioner (erroneously) mailed me instead its receipt from ESTTA which is not the same document at TTABVue of the petition. The document that arrived in the mail was titled "Receipt". So I must have been sent Petitioner's receipt from ESTTA

for the petition rather than the correct papers. Significantly, the design of Marks Cited as Basis for Cancellation are shown as 72389770#TMSN.png and 86713509#TMSN.png (respectively). And, Description of Mark is “NONE” for U.S. Registration No. 927067. I was therefore not validly serviced with the required process. And (technically, at least) I was not given fair notice of what design marks are pleaded. The Board might also find the submitted certification of service to be invalid because the certification was uploaded before the stated service took place.

Waiver of Standing: Within Referenced Pleading of Previous Proceedings

Additionally, In the petition for Proceeding No. 92061981, which Petitioner has already integrated into the plea of this instance petition (paragraph 10), Petitioner pleaded and averred that I am the owner of this instance Registration for CupK. Petitioner made no indication or fair notice within that previous petition that Petitioner intended, or reserved the right, to expand its pleas to include the service mark CupK as a cause for complaint. Petitioner in this instance petition does not assert otherwise. As such, The Board may find –even as stated within this instance petition, and even if this instance petition were interpreted most favorably for Petitioner- that the filing of this instance petition and the pleas contained therein were waived by Petitioner when these issues were not brought up back then in the previous petition. The Board may therefore find that Petitioner has not sufficiently asserted standing to petition a claim for relief against the registration of CupK.

Petitioner expanding its plea only now, over three months later, comes an ambush which The Board may find to be impermissible in light of the purpose of Federal Rule 8 of Civil Procedure which requires that a plea must give *fair notice* to the party it is addressed. Furthermore, Petitioner has unfairly used my actions taken during the proceedings of No. 92061981 as a means to educate itself as how to formulate and/or amend its pleas for the instance Proceedings, or to otherwise devise litigation strategy. For example, Petitioner was educated by my brief in Support of Motion to strike that an Assignment would be required from the pleaded mark’s original owner. Petitioner used that education to seek such an Assignment before filing this instance petition.

Moreover, pursuant to Lanham Act 15 U.S.C. §1125(c) of which Petitioner (purportedly) asserts as the legal grounds for its complaint, the (sub) section (1) states in effect and in part that Injunctive relief [for asserted harm due to] Dilution by blurring; dilution by tarnishment... must be “Subject to the principles of equity..”. Petitioner should therefore be barred by Equity (waiver, acquiescence, laches estoppel etc.) from changing its position of not petitioning against CupK, to only now expand the scope of the complaint to include CupK. Although Equity issues such as

estoppel might ordinarily be premature to a 12(b)(6) Motion to Dismiss for failure to state a claim, [and I fully reserve the right to affirm these and all Equity defenses to a fuller degree and in more detail later on during the Proceeding if needed], in this case the situation of inequity is reasonably implied by the plea itself as put forward by Petitioner -even without my having affirmed any defense. Petitioner here in this petition avers a reference to the previous proceeding, and demands that I admit or deny that averment. Petitioner has in effect incorporated the implications of that previous proceeding into its plea in this proceeding. Even as asserted by Petitioner in this proceeding, and even if the pleas of this instance petition were interpreted most favorably for Petitioner, the instance petition does not assert –even in brief- that Petitioner should not be barred by Equity from petitioning against CupK, in light of the inequities which are implied to exist as put forward by the petition.

Similarly, the equitable defense of laches is also inherent to the pleading of the complaint. Petitioner waited over three months since the prior petition to file the instance petition. Furthermore, Petitioner fully concedes within the petition that (until Aug 2015) it has not filed an Application to register the pleaded mark of the Application despite the mark being over 40 years old. Petitioner’s negligence and the egregious delay should not be rewarded. One might have reasonably concluded that Petitioner’s delay in Applying for a trademark was an acquiescence to bequeath all common law rights it may have had in the mark to the public domain. Petitioner should then be estopped from changing its position of acquiescence to one of reserving rights for itself. Nowhere in the petition does Petitioner assert how its complaint can plausibly overcome the inherent inequities that are evident within its pleading -even without my having affirmed them.

### **GROUNDS FOR OBJECTIONS TO THE ALLEGATIONS**

**Paragraph 2 of the petition:** [Rule 12(b)(4) Objection],[Rule 12(b)(5) Objection]: The allegation does not comply with Rule listed in TBMP 309.02(a) . Petitioner did not specify whether I am being sued as an individual or as a corporation. Arguably, the service of Process would likewise be defective, since it was not delivered to me as an individual.

**Paragraph 3 of the petition:** [Rule 12(b)(6) Objection], [12(b)(4) Objection], [12(f) Objection]: The allegation is *conclusory* in that no fact is specified as to why Petitioner believes it is the owner of the Registration (and Application). Petitioner does not sufficiently specify the chain of title to the marks' original owner(s). Furthermore, Petitioner's *frivolous* conclusion that it owns the Registration is incorrect, and is contradicted by the record: There is a

break in the chain of title. The last owner/assignee of record prior to Petitioner Kosher Supervision Services, Inc. [with comma] CORPORATION, is not the Assignor of record, INDIVIDUAL "Senter d/b/a/ Kosher Supervision Services Inc. [no comma] Harvey". (And as the record is spelled, neither is Harvey Senter the owner since Harvey is only listed as the d/b/a.). Additionally, the Assignment is also defective because it was not validly notarized. The notary leaves out who signed and/or swore before her. [Even within a 12(b)(6) Motion, The Board may take judicial notice of public record implicitly referenced by the pleading. The records are at Reel/Frame 2788/0358 and onward and at Reel/Frame 5667/0312 and onward][ "While Opposer argued that the TTAB was required to take its pleaded allegations as true, the TTAB held that this was not the case where the allegations were contradicted by the PTO records, and, therefore the TTAB granted applicant's motion to dismiss for failure to state a claim". (-See 89 U.S.P.Q.2d 1251 (T.T.A.B. 2009) and *id* at 1256).

Petitioner's frivolous assertion that it owns the mark of the Application does not meet even the speculative level. The Petition (and Application) asserts/concedes that the mark was in use since 1972, yet there is no assignment data at all for the mark. Furthermore, the Public Record of Corporations for State of New Jersey does not show Petitioner as existing at any time prior to 1986. Petitioner does not sufficiently assert –even in brief- that it ever existed all the way back to 1972, nor even to 1986. Furthermore, Petitioner was not assigned, and did not own the mark at the time the Application was filed, rendering the Application a nullity. There are also additional grounds to disqualify the Application -as will be explained later in this brief.

[Rule 12(f) Objection. Motion to Strike]: Additionally, allegations that Petitioner Applied for a trademark at a date subsequent to that of the registration for my mark, is immaterial and/or impertinent. My mark is of presumptive first use despite the Application claiming a prior first use date. These issues were discussed in more detail within my Motion for Sanctions dated December 11, 2015 of the related Proceeding No. 92061981. I include that discussion here by reference.

**Paragraph 4 of the petition:** [Rule 12(b)(6) Objection, Rule 12(f) Objection, Rule 8(d)(1) Impermissibility]

1. **Paragraphs 4, 12, 13, 17, 18, 19, 20, 21, 22 and 23 of the petition** which seek to build a case for similarity in the marks, and a likelihood of confusion or dilution, do not give *fair notice* of what the allegation is. Petitioner asserts a factual contention that "Petitioner's Marks are referred to in spoken language as", but does not indicate using words commonly found in English what this spoken language is. The allegation does not say how the words "Kof" or "Kof K" (or even "CupK") are pronounced. Even if the petition is liberally interpreted, a spelling of "kof" is not enough to

indicate what pronunciation is asserted to be spoken. It is well settled that there is no set correct pronunciation of words not commonly found in English language. The Board might agree that it would be unfair –and even Kafkaesque- for a defendant to have to wait until an oral hearing after the trial to find out what the allegation was in the first place.

2. The allegation of similarity in appearance is a **frivolous conclusion** that is obviously incorrect. CupK as a printed graphic does not look like  or  . [citation: Jeffrey Handelman, Guide to TTAB Practice §16.09. “In another case, the Board found that the visual differences alone were so significant as to preclude likelihood of confusion as a matter of law”. And notes 69 through 71.] The allegation of similarity in impression is likewise frivolously incorrect. CUP is not a Hebrew letter; And כ is not something to pour with or drink from. The K within CupK (even as impermissibly dissected by Petitioner) is on the right; The K within the pleaded marks is on the left. CupK is a unitary string of four letters; the pleaded mark(s) are a stylized (or design decorated) single letter K. CUPK has a secondary meaning SEE YOU PEE K suggestive of inspection (The rabbi "sees" and "peeks" to inspect for purposes of certification). K (without stylization) is descriptive/generic of Kosher, without any presumed secondary meaning.

3. Petitioner **frivolously** confuses the sound of a commercial impression of a mark, for sound of the mark itself. The allegation of similarity in sound is therefore also frivolous because KOF (however that may be pronounced) is not the sound of כ. A letter (even when claimed as a literal element) is not pronounced as a three letter syllable. Even if the allegation is generously interpreted it will only go so far as to assert that KOF is a transliteration of the word in Hebrew which is the name for the letter. It does not assert that KOF is how the letter itself is pronounced. Additionally, if as Petitioner contends that letters (other than K) are sounded as their names, then the sound of CupK is SEE YOU PEE K, (or "See you peek" when said fast) and is very distinct from and not at all similar in sound to Kof K.

4. The allegations are also **frivolous** in that they must unreasonably extend the duPont factor of "sound" to go beyond pronunciation. Notice that Petitioner avoids directly averring that the pleaded marks are actually pronounced as Kof K. How a mark is merely described or "referred to in spoken language" is not the "sound" of the mark. Additionally, "Referred to in spoken language as" is too vague a formulation to mean anything material or pertinent. Even if the petition must be broadly interpreted, it must not be interpreted too broadly. Federal Rule 8(d)(1) of Civil Procedure requires that “*Each allegation must be simple, concise, and direct*” [underline added]. Competing marks might also both be “referred to in spoken language as” "a kosher symbol" but that is impertinent to similarity in sound.

5. The allegation is also *frivolous* in that it must unreasonably extend the Doctrine of Foreign Equivalents. This doctrine may apply to the meaning of a foreign language word, but it does not apply to how a design might be interpreted and then described (or "referred to") in an arbitrarily chosen foreign language. (It is well established that there is no set correct pronunciation for a design or for a foreign word). Furthermore, Petitioner did not assert that anyone who encountered the pleaded marks would *stop and translate* כ to mean anything other than a Hebrew letter. Additionally, Petitioner has not asserted any plausible reason why consumers who encounter CupK should arbitrarily drop the K and then *stop and translate* CUP in reverse from English into Hebrew or any other language. And even if they would, Petitioner does not assert the absurd contention that כ is a one letter word in Hebrew meaning CUP. [The legal background for this Paragraph 5 is based in part on TMEP 1207.01(b)(vi)]

6. Additionally, the allegation is frivolous because a doctrine of equivalence can only be used to establish equivalence between the marks themselves. Doctrines cannot be used to link a chain of marks going from CupK, to Cup K, to Kof K, to K Kof, to  or . And even that chain would be missing a link because Cup K is argued by Petitioner to be merely similar to but not equivalent to Kof K.

If as Petitioner seems to argue, that a chain of assorted doctrines of equivalence and arbitrary interpretations and (mis)pronunciations may be used to establish a similarity between marks, then with enough creativity and linguistic skills just about any mark can arguably also be similar to Petitioner's mark (at least in theory). A registration does not offer such broad protection. And conversely, by Petitioner's overly extended reasoning the pleaded marks are already diluted by those other similar marks to the threshold of being generic, so that my marks pose no further harm to Petitioner's marks.

7. The allegation is further *impertinent and immaterial*, in that the pleaded Registration and Application simply do not claim rights to a Hebrew letter as a literal element. And the Assigned rights do not go beyond that of "K stylized" (see Appendix A of the Assignment data). TMEP 807.03 cites/quotes 37 C.F.R. §2.52(a) which says: *Applicants who seek to register words, letters, numbers, or any combination thereof without claim to any particular font style, size, or color must submit a standard character drawing that shows the mark in black on a white background. An applicant may submit a standard character drawing if: (1) The application includes a statement that the mark is in standard characters and no claim is made to any particular font style, size, or color; (2) The mark does not include a design element; (3) All letters and words in the mark are depicted in Latin characters;* [emphasis

added]. To the extent that the allegation describes the pleaded marks, the allegation is *redundant*. A drawing of the marks is supposed to already be included with the petition. To the extent that the allegation says any more than that, the allegation is *frivolous and impertinent* in that Petitioner unreasonably extends the limited protection awarded for a stylization/design to include the rights of a literal element. (To the contrary, if the pleaded marks did claim K and a Hebrew letter as literal elements, K would have required a disclaimer as dictionary defined descriptive and generic for KOSHER. And "kof" would have required statutory disclosure of the translation and significance in trade of the non-Latin letter element). (See 37 C.F.R. §§2.32(a), 2.61(b); TMEP §809.).

Petitioner frivolously fails to understand that the pleaded marks claim no rights to any sound, or any other feature beyond the given stylization/design of K. So that even a competing mark which likewise "consists of" K and the Hebrew letter "kof", but in a stylization/design sufficiently dissimilar, would still not pose a likelihood of confusion or dilution with the pleaded marks. For example: Rabbi Shapiro's  and **K** kosher certification mark (U.S. Registration No. 1719226 LIVE) was specifically noted and then acknowledged within its Application file record by the Examining Attorney to not pose a Likelihood of Confusion with the mark of Registration No. 927067 which Petitioner pleads. And all the more so would CupK not pose confusion or dilution with the pleaded marks since CupK does not contain  at all. And CupK does not contain even K as a sole letter element.

8. Furthermore, the allegation is *not of plausible* pertinence because it fails to specify -even in brief- whether the asserted spoken language "Kof K" ever pertinently took place prior to my mark's registration; whether this spoken language is/was spoken by the pertinent individuals who might confuse CupK for the pleaded marks; and whether this spoken language is/was pertinently spoken within United States.

9. A factual contention about "kof" being the name for Hebrew letter  would be *frivolous* since it may be dismissed by Judicial notice of the Board's authoritative references such as Dictionary and Encyclopedia. "Kof" is dictionary defined as a transliteration of the name of  the 19th letter of Hebrew Alphabet. (Press "e" key on Hebrew keyboard of computer). [ For convenience: <https://web.archive.org/save/http://dictionary.reference.com/browse/kof> ].  is observably not similar to the design elements of either of the pleaded marks. It has two separated segments: a lowered line segment on the left that is arched over by another curve segment of the right. In contrast,  (press "f" key on Hebrew keyboard) does not look like that. Furthermore, Petitioner's subjective interpretations of the design elements within the pleaded marks to be a Hebrew letter, And Petitioner's subjective pronunciations for  within those

subjective interpretations, *does not rise to even the merely speculative and subjective*. (Because the subjectivity is to the second degree –a.k.a. subjectivity “squared”). It should not be plausibly presumed that even those who are literate in Hebrew would pronounce the name of כּ as "kof" –especially when such an assertion is contraindicated by authoritative reference sources. Furthermore, that the allegation as formulated encloses Kof within quotation marks indicates that Kof is merely an arbitrary construct –even as conceded by Petitioner within the pleading.

10. The allegation of similarity between CupK and Kof K is also *frivolous* because KOF K is not any of the pleaded marks. Furthermore, CupK would *not plausibly* pose a likelihood of confusion (or dilution) even with Kof K itself. And any fame asserted to Kof K would further make confusion not likely. Even by Petitioner's impermissible and *frivolous dissection* of CupK into Cup K, CUP as an English word is a more familiar term than KOF. If the hypothetical mark Kof K is famous then consumers would recall that Kof K does not contain the word CUP.

11. It is also obvious that anyone who actually encounters the mark CupK, will see that it does not contain a Hebrew letter. **A recollection of the specific is perforce also a recollection of the general.** If a consumer recalls the specific information that the pleaded marks contain a Hebrew letter KOF, then s/he would perforce recall the general information that the pleaded marks contain a Hebrew letter. If the consumer does not recall that the pleaded marks contain a Hebrew letter at all, then s/he does not either recall that the pleaded marks contain a Hebrew letter Kof. Either way, **confusion between CupK and the pleaded marks is a logical impossibility.**

12. Additionally, by conceding that the pleaded marks are referred to as "Kof K", the allegation reasonably implies that the pleaded marks are not unitary in their commercial impression. This would make the pleaded marks of little if any distinctiveness, and anemically weak (if not entirely descriptive/generic). The Board may take judicial notice of the dictionary to note that K is dictionary defined as a universal symbol of Kosher certification that is of no indica as to origin. And that it is well settled that K is generic for Kosher. The Hebrew letter Petitioner calls "kof" is likewise merely descriptive (and generic). If the Board might take judicial notice to note that K as used to indicate KOSHER is a transliteration of the Hebrew letter כּ , כּ (appearing in the pleaded marks as conceded by Petitioner) would be even more generic and descriptive of KOSHER than K itself is, since "kof" is K in the word KOSHER (כּוֹשֵׁר) in the original Hebrew. [See, e.g. TMEP 809.01: “... the foreign equivalent of an English term may be regarded in the same way as the English term for purposes of determining descriptiveness, requiring disclaimer, and citing marks under §2(d) of the Act (see, e.g., TMEP §§1207.01(b)(vi) and 1209.03(g)) ”]. [Also see *In re L’Oreal S.A.*, 222 USPQ 925, 925-26

(TTAB 1984) (considering the English translation of the French mark HAUTE MODE (meaning “high fashion” in English), but concluding that contemporaneous use with the HI-FASHION SAMPLER was not likely to cause confusion, because of, *inter alia*, the "less than wholly arbitrary nature of the marks" and the differences in the marks, including the addition of the term SAMPLER in the English-language mark). Source: TMEP 1207.01(b)(vi)(C) ].

12. Additionally, If the Board may take judicial notice of third party Registrations and the included specimen files within the Application files for those marks, it will be evident that Hebrew letter כ (as part of כשר) is disclaimed, and that כ appears in the specimens without indicating the source of the goods or certification. Furthermore, even if the pleaded marks were asserted to be unitary, since both elements within the respective pleaded marks are descriptive/generic of kosher, there is still very little if any strength or distinctiveness to the pleaded marks. It does not take a leap of cognition to interpret the pleaded marks as certifying kosher. To the contrary, creativity and a leap of cognition would be required to interpret the pleaded marks as certifying anything other than kosher.

**Paragraph 5 of the petition:** [Rule 12(b)(6) Objection], [Rule 12(f) Objection], [Rule 8(d)(1) Impermissibility]: Petitioner *frivolously* asserts that its marks have been used by third parties authorized by Petitioner since 1971/1972 [emphasis added]. This is contradicted by both the Assignment Record, and by a search of the Public Record of Corporations for The State of new Jersey. Third parties could not possibly have been authorized by PETITIONER because Petitioner didn't own any mark(s) since 1971 and 1972. The execution date of the purported Assignment was only a few weeks ago in November 2015. And Petitioner didn't even exist prior to 1986. Petitioner could not have authorized anyone to use a mark when Petitioner did not own the mark and when Petitioner did not even exist. The allegation is therefore *frivolous* as a factual contention since it is contradicted by the record as a whole.

The allegation is also contraindicated by the record of specimens submitted during the Registration and renewals of the pleaded Registration, and by the record of specimens submitted for the Application. These records indicate (or at least plausibly suggest) that the mark of the pleaded registration was not in use for decades; and was also already abandoned for other marks even before the date of the Application for that mark; And that the mark of the Application was not in use until a few years after the Registration of my mark. The (purported “kof”) design element showing in the specimens for the pleaded Registration are hollow with 4 thin horizontal lines rather than solid with two thick horizontal lines. The older specimens for the pleaded Application mark are not slanted or italicized. And a specimen that is adequately italicized has a date of “Passover 2015” which is subsequent to the Registration of my

marks. The Board might therefore find that facts of the record as a whole are not sufficient to draw a plausible conclusion that the pleaded marks were in continuous use since 1971/1972. Furthermore, it should be self-evident that the mark of the pleaded Application was graphically designed implementing computer technology -the availability of which did not exist in 1972.

Immaterial as Insufficient: Additionally, Petitioner did not sufficiently specify that these third party usages continuously took place within The United States. Even if a petition is to be interpreted liberally for Petitioner, the petition should not be interpreted too liberally. This is especially so since the mark is asserted to consist of a Hebrew letter. Hebrew is the official language of a country other than United States. The allegation is therefore plausibly open to an interpretation that the marks were used where Hebrew is the Official language, (e.g Israel) rather than in United States.

Redundant =Tautology: Additionally, the sentence about the Application mark "food and other products covered by this mark" is redundant as a tautology. All it says is that the mark was used for whatever it was used for, but does not specifically show what these goods are. [- Also see Objection which follows in regard to Paragraph 7 of the petition].

**Paragraph 6 of the petition**: [Rule 12(b)(1) Objection], [Rule 12(b)(6) Objection], [Rule 12(f) Objection]: Paragraph 6 is *redundant*. It merely repeats what is stated elsewhere in the petition that the pleaded marks were in use for 40 years , or since 1971/1972. The allegation specifies no other pertinent material fact. The rest of the allegation is merely Petitioner's speculative and unfounded contentions which Petitioner attempts to derive as conclusions based on incorrect presumptions and faulty reasoning. The allegation specifies no facts from which to draw a plausible conclusion that there is any commercial awareness of the pleaded marks -despite the marks being used for 40 years.

1. No number figure is given -even in rough estimate - as to how many products/goods ever bore the pleaded marks, or for how long any individual good used the mark. Petitioner merely concludes that the "promotion [etc.]" was "extensive". It does not specify the pertinent circumstances existing prior or near to the time my mark was Registered.

2. That the goods were of "high quality" is also merely a speculative conclusion. No criteria are specified -even in brief- as to what makes those goods of "high" quality -kosher or otherwise.

3. Moreover, the allegation does not pertinently specify –even in brief- that the "high quality goods" were ever marketed as kosher, or that there was any plausible reason for the certification mark to have ever been noticed, And even if noticed that the mark should have been interpreted by the consumer to be a kosher certification mark.

4. Furthermore, Petitioner does not sufficiently assert any plausible reason to presume that even kosher consumers who might have noticed the pleaded marks would have not dismissed them as simply descriptive. [In re Franklin County Historical Society, 104 USPQ2d 1085 (TTAB 2012). The Board affirmed a Section 2(e)(1) refusal to register CENTER OF SCIENCE AND INDUSTRY, finding it to be merely descriptive of ... despite 35 years of use of the alleged mark, millions of museum visitors, and the receipt of national awards... since it “directly and easily” conveys information about the services] [Text copied from a TTAB decision, ellipses deleted].

5. The allegation is also *frivolous* due to Petitioner's misunderstanding and unreasonable extension of the nature of a certification mark. A certification mark does not represent the owner of the mark's registration. And goods do not “signify Petitioner” or “its standards”.

6. Petitioner’s reasoning and the conclusion it draws is also *frivolously flawed*. Use of a mark on high quality goods is *immaterial* toward what “industry and trade” “recognize” about the “standards” of a mark or of the mark’s owner, because what matters is whether the mark selectively refuses to certify goods of low quality. Petitioner does not sufficiently assert –even in brief- that the pleaded marks were used *exclusively* for high quality goods. For all the allegation asserts, Petitioner may have also allowed use of the pleaded marks to certify goods of which the Kosher quality is unacceptable to a major portion of the Kosher observant population.

7. Additionally, [12(b)(1) Objection]: Whether or not goods were of a "High" Kosher quality, or meet the "highest standards of Kosher law" is a matter of Religious Doctrine which is beyond the jurisdiction of the Board to determine. Furthermore, whether a “standard” of Kosher law even exists, rather than Kosher being a binary quality that is or is not present, is itself a matter of Religious Doctrine of which The Board may not determine.

8. [Rule 12(f) Objection]: It is also beneath the dignity of the Board to allow Petitioner to use these proceedings as a platform for puffery and (arguably false) advertising.

Also notable to mention is that the scope of the allegation as directly stated and averred must be limited by Rule 8(d)(1) to assertions regarding standards of kosher. Fame is not directly stated within the allegation –even as an unsupported conclusion. [-See my brief dated Oct 11, 2015 of the related Proceeding in support of Motion to Strike].

**Paragraph 7 of the petition:** [Rule 12(f) Objection:] [Rule 12(b)(6) Objection:] The introductory clause of the allegation is *redundant*. Petitioner already asserted prior use. Assertions that Petitioner has “extensive prior rights”, is merely Petitioner’s (incorrect) conclusion. Additionally, the allegation may be of scandalous nature since it imputes

that my behavior in Applying for a trademark should have been ‘withstood’. There was nothing untoward about my Applying for a trademark application. If the Board may take judicial notice of the Application records for my certification mark, and service mark, it would be evident that my behavior was beyond exemplary, even providing to Examining Attorney a long list of existing certification symbols with K in them, which included that of the pleaded Registration. [Exhibit G6 of 3/17/2010 Response to Office Action for serial No. 77794539]. And Examining Attorney did give clearance. It is also evident that my choice of using K [and (cup) design], and CupK would have taken place regardless of whether Petitioner existed or not, and regardless of whether the pleaded marks were in use by anyone [Exhibit C of same].

[Rule 12(b)(6) Objection:], [Rule 12(b)(4) Objection:][Rule 12(b)(1) Objection]: Additionally, the allegation is frivolous because petitioner unreasonably extends the rights awarded by the Application and Registration to term them “extensive” and “prior”. Petitioner misunderstands that the Application would not provide any “prior” rights since the Application did not exist at the time I applied for a trademark. -So that my marks are of presumptive first use.

DEFECTIVE PROCESS: Additionally, (as previously noted within this Motion), the processing of the Application, and the assignments for both the pleaded marks are defective. Additionally, classification of goods for “food” as it is formulated within the pleaded registration and Application seems too general and broad for it to provide any protection. Also note that the 275\$ fee paid by Petitioner arguably should be not enough to get protection for so many classes and categories of goods within the Application. Also, “Kosher foods, beverages, and food products;” is plausibly a defective listing of the Application because one presumably does require expertise and in depth knowledge of the relevant field to determine whether a good is kosher or not. [citation/quote source: TMEP. 1402.01 with emphasis and omissions. “Specifying the Goods and/or Services - in General... A written application must specify the particular goods ... the applicant uses... the mark in commerce. 15 U.S.C. §§1051(a)(2) and 1051(b)(2); 37 C.F.R. §2.32(a)(6). To “specify” means to name in an explicit manner. ... The language used to describe goods and/or services should be understandable to the average person and should not require an in-depth knowledge of the relevant field. The accuracy of identification language in the original application is important because the identification cannot later be expanded. See 37 C.F.R. §2.71(a); TMEP §§1402.06 et seq. and 1402.07 et seq.; In re M.V Et Associates, 21 USPQ2d 1628 (Comm’r Pats. 1991). [etc.]” end of citation/quote]. (Also see the Application’s standards specification sheet about Petitioner deferring to rabbis as to what may be acceptable as kosher).

Furthermore, whether or not a specific good is kosher or not is a matter of Religious Doctrine of which the Board may not determine. By choosing the words “kosher food, beverages, and food products;” within its Application filing, Petitioner has arguably rendered the Application unenforceable. Similarly, the specimens submitted within the Application cannot validate use of the mark on “KOSHER foods, beverages, and food products;” without an extra-jurisdictional presumption on part of Examining Attorney that those foods are actually kosher.

**Paragraph 8 of the petition:**[Rule 12(b)(6) Objection][Rule 12(b)(4) Objection] [Rule 12(b)(5) Objection] Petitioner frivolously misunderstands the nature of a Registration. A Registration’s owner does not assert anything within a Registration. The registration is rather a document issued by The United States. Additionally, Petitioner should have had the courtesy to address me as a person –not as an “it”. Furthermore, If Petitioner is suing me as a corporation, then the petition and its service were defective.

**Paragraph 10 of the Petition:** is itself a matter of dispute within the related proceeding. In my Motion for Sanctions, I protested that the petition of the related proceeding was defective, and other issues.

**Paragraph 11 of the petition:** [Rule 12(b)(6) Objection], [Rule 12(f) Objection]: The allegation is *redundant* insofar as the petition already asserted (in paragraph 5 of the petition) the marks being used since 1971/1972. The allegation is *conclusory* in that it does not specify further facts but merely argues toward an asserted conclusion. The allegation is even formulated prefacing the word “Therefore”. Furthermore, Petitioner’s *frivolous* reasoning is flawed due to mistaken premise: Petitioner invalidly concludes as a fact (rather than a presumption) that my mark was not used prior to 1971. Petitioner mistakenly interprets a first use date within a registration to mean the mark was never used prior to that date. However, TMEP 903.06 Indefinite Dates of Use cites in part that: *In specifying the dates of first use, ... the applicant may use indefinite terms in describing dates...such as ... “prior to,” “before,” ..., these terms are not printed in the Official Gazette or on the certificate of registration. ]*

Additionally, paragraph 11 does not assert continuous use of the pleaded marks since 1971/1972 within The United States. (As previously noted, the allegation is arguably open to interpretation that its marks were rather used in Israel).

Especially noteworthy is that paragraph 11 as formulated is also a concession from Petitioner that the pleaded marks were not used prior to their respective first use dates of 1971/1972. And that the mark of the pleaded Application was not used in 1971. Petitioner in effect concedes that the mark of the pleaded Application is not the same as that of

the pleaded Registration. And that the graphic differences in stylization of “kof” between marks negate a continuance of the original mark of the registration. Consequently, the mark of the pleaded Registration is arguably implicitly conceded as discontinued from use and abandoned for the subsequent marks appearing within the specimen records.

**Paragraph 12 of the petition:** I respectfully repeat and raise the objections previously raised within this brief in regard to the respectively repeated paragraphs of the petition, to the instance allegation.

**Paragraph 13 of the petition:** I respectfully repeat and raise the objections previously raised within this brief in regard to paragraph 4 of the petition, to the instance allegation

**Paragraph 14 of the petition:** [Rule 12(b)(6) Objection:], [Rule 12(f) Objection:], [Rule 8(d)(1) impermissibility:]

1. The allegation is merely conclusory and speculative. Petitioner does not assert any specific facts within this allegation. It *does not show* what specific services CupK is used on [*sic*] or in connection with, Nor does it identify what this “connection” is supposed to be. And it does not show what “certifications” are “provided” by Petitioner.

2. Neither does the allegation give me *fair notice* as to what the allegation is. Petitioner did not clearly state – or even state at all- what a “Class 42” is supposed to mean. 3. Furthermore, Petitioner *frivolously* misunderstands the definition of “certification” and the nature of a certification mark. “Certifications” are not goods “provided” by Petitioner. And the pleaded marks do not signify a service “provided” by Petitioner. The allegation is also impermissible due to it not being clearly stated as to what is being alleged.

4. Additionally, the allegation as formulated is *immaterial*: The empirical facts of what CupK is serviced on does not pertain to the issue on hand. What matters is the information as stated within the respective Registrations. [The following citable quote in support of that legal contention is from Trademark Trial and Appeal Board In re Mark Thomas Mailed: April 24, 2006 Serial No. 78334625, page 5:] As our primary reviewing court has often stated, the question of likelihood of confusion is determined on the basis of the identification of goods and services set forth in the application and registration, rather than on the basis of what evidence might show the actual nature of the goods and services or purchasers to be. See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); and Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). [end of quote].

5. Furthermore, the allegation is *frivolous* because Petitioner unreasonably extends the definition of a certification mark to include the service of providing certifications. Similarly, the allegation regarding “certifications provided” by Petitioner is *impertinent* because the pleaded marks are not service marks.

**Paragraph 15 of the petition:** [Rule 11 protest:] The Board might consider calling Petitioner to sanctions for asserting factual contentions of which it can know nothing about. How could Petitioner know where and to whom I show my business card? (The specimens of record acknowledged as acceptable by Examining Attorney were business cards).

1. [Rule 12(b)(6) Objection:] Petitioner does not specify any facts within this allegation. The petition does not specify –even in brief– a single channel of trade or customer category shared by the conflicting marks.

2. [Rule 12(f) Objection:] Furthermore, the allegation as formulated is *impertinent*: Where and to whom I actually sell and advertise my inspection services is impertinent to the issue on hand. What matters here is: What are the presumptive facts as reflected by what is stated within the respective Registrations. [see the citable quote appearing in the Objections raised to previous paragraph of the petition].

3. Furthermore, by definition, the presumptive facts are that inspection services are sold and promoted to food service providers and food manufacturers/providers. Their commercial role is at the production and supply side of the marketplace. Inspection is presumptively not a retail service. Petitioner did not assert otherwise. (And if it did imply this then the implication is frivolous). In contrast, goods bearing a certification mark are sold and promoted to consumers when the good is ready for use. (Petitioner limits its complaint and assertion of harm to confusion and dilution among consumers).

4. The presumptive point of production/distribution where an inspection service mark is displayed in commerce (i.e. when the rabbi displays his business card to a prospective food producer), is at the head of the channel even before production starts. This is far prior to the point in production/distribution when a certification mark is displayed in commerce (i.e. at the foot of the channel when the consumer is ready to buy the good). Compliance with requirements for kosher must exist for the entire production from the beginning. And the rabbi also needs to be consulted as to which raw materials and ingredients may pass inspection to be certifiable. In contrast, a certification mark is of commercial awareness (to consumers) only when the goods it certifies are ready for sale, which is after all of the production and packaging and shipping to retail point of sale has already taken place. The commercial encounters of the conflicting marks are not presumed to be together or in similar situations, or by people playing the same role in commerce.

5. Additionally, by definition, the presumptive pertinent facts are that the consumer who is commercially aware of a kosher certification mark is a kosher consumer. Whereas a kosher food (service) provider is not necessarily kosher

observant. This distinction is especially relevant because those who encounter my mark CupK as used in commerce would not necessarily know that the pleaded marks are certification symbols –even if they were to have encountered the marks. Similarly, asserted fame (based solely on 40 year of use) for the pleaded marks would not pertain to individuals who don't look for a kosher certification mark when they purchase food. People who don't keep kosher are plausibly not generally presumed to be commercially aware of a Kosher certification mark no matter how long the mark may have been used, and no matter how many goods it may have been used on.

6. And conversely, kosher consumers (as opposed to kosher food suppliers) plausibly are presumed to be very discerning when it comes to kosher certification trademarks and knowing which rabbi owns which marks. So the Kosher consumers are not likely to confuse CupK for a certification mark that is owned by anyone else.

7. In order to qualify as a service, the activity performed must be qualitatively different from anything necessarily done in connection with the sale of the applicant's goods [TMEP 1301.01(a)(3) (In re Canadian Pacific Limited, 754 F.2d 992, 224 USPQ 971 (Fed. Cir. 1985); In re Betz Paperchem, Inc., 222 USPQ 89 (TTAB 1984); In re Integrated Resources, Inc., 218 USPQ 829 (TTAB 1983); In re Landmark Communications, Inc., 204 USPQ 692 (TTAB 1979).] Furthermore, [TMEP 1207.01(a)(ii)(A) To establish likelihood of confusion, a party must show "something more than that similar or even identical marks are used for food products and for restaurant services." In re Coors Brewing Co., 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)]. Petitioner has not asserted –even in brief- any “something more”. And here even the “something more” would not be enough because the service is presumed to not be sold with the goods. Petitioner does not assert –even in brief- an absurd contention that rabbis who inspect for kosher are presumed to be in the grocery business.

8. The Board might also find it obvious that a rabbi who sells inspection services will not sit on a supermarket shelf waiting to be taken home by a consumer in a shopping cart. And that a food (service) provider who wants to find a rabbi/inspector will not go to the supermarket to shop for a rabbi. Rather the plausible presumption is that inspection services are sold separately and apart from food. The Board might further presume that inspection services are plausibly marketed by direct solicitation and after quite an amount of time for interviews and negotiations. So that confusion and dilution is not plausibly likely.

9. Similarly, inspection services is not something which can be bought and then sold (“flipped”) to a third party like a consumer good can. The respective channels of distribution and trade for the conflicting marks are very distinct.

10. Furthermore, inspection services are not purchased on impulse. And the prospective client is arguably presumed to want an inspector who possesses expertise and credentials to their satisfaction. Even if a person is not adept at discerning between trademarks, before they go about hiring a kosher inspector they should plausibly want to know who they are hiring before doing so. The Board might therefore find it plausible to presume that prospective clients would undergo due diligence to verify who the rabbi is, and not base their decision merely on his service mark.

**Paragraph 16 of the petition:** I respectfully raise all objection raised previously. Especially, that confusion between CupK and the pleaded marks may be categorically ruled out as a logical impossibility. And in consideration of those Objections, paragraph 16 of the petition is merely a frivolous conclusion based on incorrect presumptions and flawed reasoning.

1. Additionally, if The Board may take notice of Letter of Protests and refusals, Advisory Attorney Jason I Roth replied in a letter Dated December 18, 2015 that “Regarding ... U.S. Registration No. 388012 [of my mark CupK], a determination of likelihood of confusion involves a comparison of the marks and a consideration of the relationship between the applicant’s mark and the cited mark, the marks at issue [CupK vs. mark of the pleaded Application] do not support a reasonable grounds for refusal during ex parte examination.” So at least one objective person out there is not confused. And there is no actual confusion for him. Same goes for the Examining Attorneys who approved my marks.

2. Additionally, Petitioner did not assert –even in brief- that it is the exclusive user of a mark consisting of elements K and “kof” or of K and CUP. Or of K along with other words or designs which might be interpreted in a foreign language and sound like KOF when the translated word for the interpreted design would be pronounced. So that even by Petitioner’s overreaching reasoning, the pleaded marks do not have even an acquired distinctiveness.

3. Additionally, The petition did not assert that the pleaded marks are more famous than CupK and my own certification mark are. So that my new clients are not confused into thinking the CupK service they are subscribing to is being offered by anyone other than myself or by those privy to me. I also repeat paragraph 10 of previous Objection.

Confusion is NOT Likely even by Petitioner’s Assertions as Stated within the Petition

Petitioner fails to assert any likelihood of confusion originating from CupK as the mark appears in its entirety. Petitioner rather seeks to dissect CupK into arbitrary components CUP and K, even though CupK is Registered as, and is encountered in commerce, as a unitary mark consisting of one highly fanciful word with no claim as to stylization (or case). Additionally, CUPK has a secondary meaning of SEE YOU PEE K, which is suggestive of the inspection

service it represents. Petitioner’s reasoning also necessarily requires dissecting  and  into their respective components of K and “kof” for those marks to be “referred to in spoken language as “Kof K””. Petitioner’s asserted reasoning fails in both cases to meet the established standard, that for a mark to be a source of confusion, the marks must as it is encountered in commerce be so similar in sound, appearance and commercial impression [etc.] . Namely, marks are viewed in their entirety, as opposed to one portion at a time. Petitioner’s reasoning may therefore be rejected on its face.

**Paragraph 17 of the petition:** [Rule 12(b)(6) Objection:],[Rule 8 impermissibility:]. In addition to previously raised grounds for objections as stated above, I object to the allegations within paragraph 17 of the petition, on grounds that Petitioner’s assertion that actual confusion took place is a *frivolous* logical impossibility, And accordingly Petitioner fails to state a plausible cause for complaint.

Additionally, the allegation is *merely conclusory*. And fails to give *fair notice* with a *clear and direct statement* as to what is alleged. Petitioner does not assert –even in brief- any specific facts about that incident which would support Petitioner’s conclusions that confusion took place, and that the confusion was actual. Petitioner’s couching the allegation in terms of a spurious “similarity in sound between CupK and “Kof K”” does not specify what was seen or what was heard, and whether anything about the CupK service was even doubted to be what it isn’t.

Moreover, the allegation does not sufficiently specify –even in brief- that CupK was even encountered at all during that purported incident. And the allegation also falls short of asserting that the purportedly confused person vaguely recalled or ever encountered the marks  or  themselves, rather than Kof K. Such incidents of “actual confusion” “due in part to similarity... between CupK and “Kof K”” are *impertinent* to determining whether CupK as encountered in commerce (rather than as referred to in spoken language) would pose a likelihood of confusion with the pleaded marks (as opposed to Kof K).

**Paragraph 18 of the petition:** [Rule 8 impermissibility:][Rule 12(b)(6) Objection:][Rule 12(f) objection]

The allegation is 8 lines long, And is not clearly or directly stated. Furthermore it is *immaterial*. There is no such thing as “certification services”. CupK is not registered for “certification services”. Neither is it registered for certification. That inspection services covered by registration of CupK are limited to those for purposes of kosher certification, would not make the mark any more associated with certification than a general inspection’s service mark would be. Limitations within a Registration do not expand their scope of association.

Furthermore, “certifications” (which are sets of specification standards) cannot be owned as “Petitioner’s”. Similarly, a certification mark does not represent the owner of its Registration. Even if the marks were similar, that in itself should not mislead consumers into believing CupK is a service is provided by Petitioner.

Additionally, Petitioner’s contention that consumers would associate or even be aware of the existence of “goods and services in connection with which Respondent provides these certification services” [*sic*] is unfounded. Inspection is an internal process. CupK is not registered as a certification mark for there to be any presumption that it will be displayed on goods (and services) for consumers to be misled. Part of why the allegation is so unclear (besides the lengthy contortions of syntax, and vague phraseology) is that Petitioner obfuscates the distinctions between the nature of a certification and a certification mark, vs. the nature of a service and a service mark; and a good vs a service vs a certification. Petitioner couches its complaint against my certification mark as if it is a complaint against CupK.

Furthermore, the unwarranted contention that consumers might believe CupK is a service offered by Petitioner, is immaterial. As long as a pleaded mark does not appear on the food, consumers should not presume the food passed inspection to be certified to any of those marks’ specifications. Moreover, Petitioner does not sufficiently assert –even in brief- that the standards of certification which CupK is deployed “for the purpose of”, would not meet and even surpass those of the pleaded certification marks. Similarly, Petitioner does not sufficiently assert –even in brief- that I, or the inspectors I contract, are not affiliated with Petitioner, or at least with the previous owner of the pleaded marks.

**Paragraph 19 of the petition:** [Rule 12 (b)(6) Objection:] is a conclusory statement that is merely Petitioner’s conclusion. And as repeated time and again, Petitioner’s conclusion is drawn incorrectly.

**Paragraph 20 of the petition:** [Rule 12 (b)(6) Objection:] Same as above.

**Paragraph 21 of the petition:** I respectfully raise the same Objections which were raised in regard to the correspondingly repeated paragraphs

**Paragraph 22 of the petition:** [Rule 12 (b)(6) Objection:] [Rule 12(f) Objection]. I respectfully raise the same Objections which were raised in regard to paragraph 6 of petition. Additionally, 1. Petitioner does not sufficiently assert –even as an unfounded conclusion- that the pleaded marks “are widely recognized by the general consuming public of the United States as a designation...”. Neither does the petition as a whole assert sufficient facts from which to draw a plausible conclusion that the established criteria for fame [as defined by the pleaded statute] in regard to dilution and/or likelihood of confusion has been met. The criteria given by 15 C.F.R. § 1125 (C)(2)(A) are:

For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties. (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark. (iii) The extent of actual recognition of the mark. .... [emphasis added]

The allegation as formulated does not indicate scale other than “nationwide use” of the marks. But even that is vaguely phrased and obviously cannot mean everyone in the nation produces food and uses the pleaded marks for certification. It must also be borne in mind that a certification mark does not indicate the source of goods. –So that the statutory criteria must be adjusted for relevance. Whatever the intent of this unclear allegation, Petitioner does not sufficiently indicate –even in brief rough estimate (at least not clearly and directly)- A. amount, volume: How many goods the pleaded marks are used on, And how many sell of each; B. advertising and publicity of the mark: Whether any advertisements emphasized the pleaded marks as Kosher certification symbols; or if goods were advertised as kosher (offered under the mark as opposed to with the mark by advertising only the goods themselves); C. duration, extent: How much advertising and publicity was focused on the certification (degree of recognition); for how long, and whether if continuous and pertinently close enough to the date of my Registering CupK. D. degree of recognition: Petitioner does not sufficiently assert –even in brief- that a wide portion of the general population even knows what a kosher certification mark is. And The Board may take judicial notice that most of consuming population does not know about kosher certification symbols. In short, the petition does not specify sufficient facts from which to draw a plausible conclusion that the pleaded marks are famous as kosher certification marks. Additionally, Petitioner's formulation is further conveniently vague as to what parts of the sentence are actually asserted to have taken place prior to the Registration of my mark.

2. Neither does the petition pertinently assert any fame at all for Kof K. Other than to the “spoken language as Kof K”, Petitioner asserts no similarity or dilution posed by my mark CupK. And even that assertion is objectionable and frivolous, as detailed in previous objections. Any fame for the pleaded marks themselves is of **no pertinence** to dilution or confusion from CupK.

3. Furthermore, no matter how famous a  or  might be asserted to be, and even if CupK is impermissibly dissected, **No dilution is posed by CupK**. The K within the pleaded marks are

already diluted to the ultimate as generic. -So that the mark CupK poses no further dilution of the *frivolously* asserted “strength and distinctiveness” of the K element appearing in the pleaded marks. Neither is a Hebrew letter (“kof” or otherwise) used within mark CupK. -So that CupK is not diluting the *frivolously* asserted “strength and distinctiveness” of the כ. And as explained previously, even כ is also merely descriptive of KOSHER (and also generic) so that כ too has no “strength and distinctiveness”. Furthermore, Petitioner never asserts -even in brief-exclusive use the elements K and כ within a kosher certification symbol.

The criteria given by 15 C.F.R. § 1125 (C)(2)(B) *For purposes of paragraph (1), “dilution by blurring” is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following: (i) The degree of similarity between the mark or trade name and the famous mark. (ii) The degree of inherent or acquired distinctiveness of the famous mark. (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark. (iv) The degree of recognition of the famous mark. (v) Whether the user of the mark or trade name intended to create an association with the famous mark.* Petitioner does not validly assert –even in brief- any specific fact to draw a plausible conclusion of such dilution.

4. Additionally, since Petitioner concedes to using two marks they should arguably create their own confusion and plausibly blur each other from even an acquired distinctiveness.

5. The allegation also does not sufficiently assert –even in brief- any fact to plausibly suggest I had any intention to create any association with either of the pleaded marks. Furthermore, the record for the Application of my certification marks shows that I would have chosen the design of my trademarks regardless of what trademark Petitioner purportedly uses. Additionally, given the nature of Kosher inspection business, it would not make business sense to pretend to be anyone but oneself. Selling Kosher inspection is not like selling watches or handbags where one can sell cheap knock-offs to a succession of one time customers. Success in the inspection business is rather built on retaining long term trust and respect of the clients, and on building one’s own good will.

Moreover, Use of a service mark inherently does accrue a commercial awareness for the mark, because the service it represents is being sold. In contrast, use of a certification mark –even for 40 years- would not in itself contribute toward accruing a commercial awareness of the pleaded marks, because the certification itself is not being sold. Petitioner does not assert –even in brief- any fact to draw a plausible conclusion that my Honored Father, Rabbi

Steinberg, Rabbinical Director of CupK, and my mark CupK, were not already quite famous in their own right at the time the Application to Register CupK was filed. –So that there would be no point in riding on anyone else’s coattails.

**Paragraph 23 of the petition:** [Rule 12(6)(b) Objection]: The allegation is merely Petitioner’s own frivolous and incorrectly drawn conclusion, but is not a statement of any specific fact. Additionally, it also fails to specify sufficient facts from which to draw a plausible conclusion that the pleaded marks have any distinctive value to begin with.

Additionally, Paragraph 23 of petition is defectively formulated: [Rule 8 impermissibility].The allegation is conditionally predicated on “if the Lanham Act as amended [etc.]”. It does not clearly state what is alleged. Furthermore, if Petitioner were to be granted leave to amend or to change the spelling or to amend anything else within the petition, then since the 5 year anniversary of the Registration of CupK has already passed, any subsequent petition would be untimely. And as noted in the beginning of this brief, The Board might find that Petitioner violated Equity and also committed actions worthy of sanction. The Board might therefore find that it would not be equitable for Petitioner to be granted leave of untimeliness, especially when the untimeliness itself is due to Petitioner’s own inequity. Moreover, it would not be fair to me to have to prejudice my position within these proceedings. If Petitioner’s complaint may be dismissed, then it should be.

**CONCLUSION.** Accordingly, Petitioner’s complaint and petition to cancel Registration of my mark CupK should be dismissed; These Cancellation Proceedings No. 92062710 should be terminated with prejudice in my favor; And my mark CupK should retain its U.S. Registration No. 3883010. If the preceding requests are not granted then, in the alternative, as much of the petition that may be stricken should be stricken. Additionally, if the preceding requests are not granted, then the time for me to Answer, as well as the date of Discovery conference should be postponed by 90 days.

Respectfully submitted,

By: Yoel Steinberg

Dated December 28, 2105

Yoel Steinberg  
D/B/A CupK Kosher Supervision  
1823 53rd Street  
Brooklyn, NY, 11204  
Phone (718) 232-4275

*Pro se`* Registrant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONDENT'S CONSOLIDATED MOTION TO DISMISS**, in regard to the Proceedings of Cancellation No. 92062710, has been served on opposing counsel, MICHAEL R FRISCIA, of MCCARTER & ENGLISH, LLP by mailing said copy on December 28, 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 28, 2015