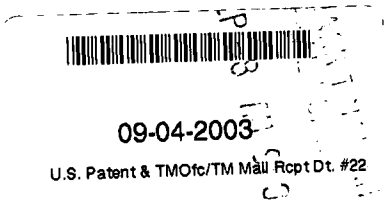
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

FTC, INC.	
Potential Opposer,	
v.	**Opposition No. _____**
LANDRY'S TRADEMARK, INC.	
Applicant.	



In the Matter of Application of:	**Landry's Trademark, Inc.**
Serial No.:	**76-413,909**
Application Filed:	**May 31, 2002**
Mark:	**"GOT CRABS?"**
Published:	**May 13, 2003**

MOTION TO SUSPEND TIME
WITHIN WHICH TO FILE A NOTICE OF OPPOSITION
PENDING RULING ON LETTER OF PROTEST

Box TTAB – NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Dear Sir:

Applicant, FTH, Inc., hereby moves that the time within which to file a Notice of Opposition be suspended, pending a ruling on a Letter of Protest, submitted on June 2, 2003, and now before the Commissioner (the "Letter of Protest"). A copy of the Letter of Protest

requesting withdrawal of Trademark Application Serial No. 76-413,909 from publication and remand to the Examining Attorney for further consideration is attached hereto as TAB A.

Pursuant to Trademark Rule 2.117(a),

> Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.

In addition, proceedings may also be suspended, for good cause, upon motion approved by the Board. Trademark Rule 2.117(c). As indicated by the contents of the Letter of Protest, the issues presented in the pending Letter of Protest have a definite "bearing on the case." Potential Opposer in its Letter of Protest has pointed out that the Applicant did not submit any evidence that demonstrates that consumers view the phrase "GOT CRABS?" as an indicator of source or origin, and therefore should not have overcome the Examining Attorney's refusal for ornamental use. If the Commissioner remands the Application back to the Examining Attorney as requested in the Letter of Protest, the need for a Notice of Opposition would be removed.

Potential Opposer has filed two Requests to Extend Time to Oppose. It filed its Letter of Protest promptly upon learning of the publication of the applied-for mark and within the first 30 days after such publication. The current Extension of Time to Oppose was granted on July 16, 2003, giving Potential Opposer until September 10, 2003 to file its Notice of Opposition. In a telephone conversation with Jessie Marshall at the Commissioner's office, James M. Pacious, Esq., one of the attorneys for the Potential Opposer, learned that a ruling on the Letter of Protest may not be forthcoming until mid-October. Ms. Marshall suggested that the Potential Opposer request a suspension of time within which to file the Notice of Opposition. Potential Opposer

cannot seek any further extension of time without consent of the Applicant, which Potential Opposer doubts it could obtain. Therefore, suspension of the time within which Potential Opposer can file a Notice of Opposition will provide the Commissioner's office with sufficient time to consider the Letter of Protest and could provide a cost effective means of resolving the issues that otherwise would have to be resolved in an Opposition proceeding.

Accordingly, since the Letter of Protest may negate the necessity of a Notice of Opposition, the Applicant respectfully requests that the time within which to file a Notice of Opposition be suspended until the Commissioner has ruled on the Letter of Protest.

Respectfully submitted,

JOHN P. FELDMAN, ESQ.
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Washington, DC 20007

Attorney for Applicant, FTH, Inc.

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Collier Shannon Scott

June 2, 2003

Via Mail

Commissioner for Trademarks
United States Patent and Trademark Office
2900 Crystal Drive
Arlington, VA 22202-3514

Re: Letter of Protest filed against Trademark Application Serial No. 76/413,909 for the Mark "GOT CRABS?"; Our Reference No.: 54510-00600

Dear Sir:

Pursuant to Trademark Manual of Examining Procedure ("T.M.E.P.") § 1715, FTH, Inc., a Maryland corporation, located at 606 South Broadway, Fells Point, Maryland, hereby submits this letter of protest against Trademark Application Serial No. 76/413,909 for the mark "GOT CRABS?". FTH, Inc. respectfully requests that the Commissioner withdraw the Application from publication and remand it to the Examining Attorney for further consideration pursuant to T.M.E.P. § 1202.03(d).

HISTORY

On May 31, 2002, Landry's Trademark, Inc. ("Landry's") applied to register "GOT CRABS?" (the "Mark") as a mark for clothing, namely T-shirts, hats, and shorts in International Class 25. On September 30, 2002, the Examining Attorney refused registration on the Principal Register stating that the proposed Mark was ornamental and did not function as a trademark.[1] On February 26, 2003, Landry's submitted an affidavit attempting to show that the Mark had acquired distinctiveness. In support of its claim of acquired distinctiveness, Landry's alleged that since January 2000, Landry's had sold more than 79,629 articles of clothing bearing the phrase "GOT CRABS?" and that these sales had generated over $1,061,702 in revenue. On April 23, 2003, the Patent and Trademark Office issued a Notice of Publication.

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[1] *See* Office Action (Sept. 30 2002) citing 15 U.S.C. §§ 1051, 1052, and 1127 (2003).

DISCUSSION

An applicant may overcome an ornamental refusal by submitting evidence that the proposed mark has become distinctive of the applicant's goods in commerce. As the Examining Attorney noted, evidence submitted to show that the mark has acquired distinctiveness as an indicator of the source of the applicants goods may consist of: (a) examples of advertising and promotional materials that specifically promote the subject of the application as a mark; (b) dollar figures for advertising devoted to such promotion; (c) dealer and consumer statements of recognition of the subject matter of the application as a mark; and (d) any other evidence that establishes recognition of the matter as a mark for the goods.[2]

Landry's did not submit *any* evidence that demonstrates that consumers view the phrase "GOT CRABS?" as an indicator of source or origin. We note that Landry's did not submit *any* examples of advertising or promotional materials promoting the phrase "GOT CRABS?" as a mark; Landry's did not submit *any* evidence of dollar figures for advertising designed to promote "GOT CRABS?" as a mark; and Landry's did not submit dealer or consumer statements demonstrating that people recognize "GOT CRABS?" as a mark. Instead, Landry's *merely* submitted evidence of sales of items on which the "GOT CRABS?" phrase was printed. The only realistic indicator of source or origin on these items is the mark "JOE'S CRAB SHACK."[3]

The Trademark Trial and Appeal Board (the "T.T.A.B.") has repeatedly held that sales figures alone are not enough to demonstrate secondary meaning. For example, when considering whether a tire tread pattern could be registered, the T.T.A.B. noted that: "At best, applicant's sales figures may be said to demonstrate a growing degree of popularity or commercial success for its tires, but such evidence does not demonstrate recognition by the purchasing public of its [tire tread design] as a trademark."[4] Indeed, for the T.T.A.B. to find otherwise "would provide . . . protection for any successful product, or

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[2] *See* T.M.E.P. § 1202.03(d) (2003).

[3] U.S. Reg. No. 1955196.

[4] *Goodyear Tire and Rubber Co. v. Interco Tire Corp.*, 49 U.S.P.Q.2d 1705 (T.T.A.B. 1998) (citing *In re Bongrain International (American) Corp.*, 13 U.S.P.Q.2d 1727, 1729 (Fed. Cir. 1990) (noting that sales may be indicative of the popularity of a product itself rather than recognition of a term as denoting origin); *WLWC Centers, Inc. v. Winners Corp.*, 221 U.S.P.Q. 701, 707 (M.D. Tenn. 1983) (noting that popularity in sales alone cannot establish secondary meaning)).

for the packaging of any successful product."[5] Therefore it is clear that *evidence of sales alone is not sufficient to overcome an ornamental refusal.*

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Because there is insufficient evidence in the record to overcome the ornamental refusal, FTH, Inc. respectfully requests that the Commissioner withdraw Application No. 76/413,909 from publication and remand it to the Examining Attorney for further consideration pursuant to T.M.E.P. § 1202.03(d).

Sincerely,

John P. Feldman
Gonzalo E. Mon

Attorneys for FTH, Inc.

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[5] *Yankee Candle Co. v. Bridgewater Candle Co.*, 59 U.S.P.Q.2d 1720 (1st Cir. 2001) (citing *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977).

09/11/2003 TTAB

TTAB

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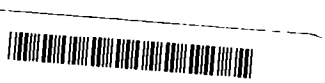
September 2, 2003



09-04-2003
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

VIA FIRST-CLASS MAIL

BOX TTAB – NO FEE
Commissioner for Trademarks
United States Patent and Trademark Office
2900 Crystal Drive
Arlington, VA 22202-3514

Re: Motion to Suspend Time Within Which to File a Notice of Opposition Pending Ruling on Letter of Protest; Serial No.: 76/413.909; Our Reference No.: 54510-00600

Dear Sir:

Submitted herewith is a Motion to Suspend Time Within Which to File a Notice of Opposition Pending Ruling on Letter of Protest.

Also, enclosed please find a self-addressed postcard (postage prepaid) identifying the document being filed. Please date-stamp the card, acknowledging receipt of the paper, and return it to us.

Respectfully submitted,

JOHN P. FELDMAN
GONZALO E. MON

Enclosures

09/17/2003 TTAS

CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of September, 2003, a copy of the foregoing Motion to Suspend Time Within Which to File a Notice of Opposition Pending Ruling on Letter of Protest was deposited with the United States Postal Service, First-Class Mail, postage prepaid, addressed as follows:

Commissioner for Trademarks
United States Patent and Trademark Office
2900 Crystal Drive
Arlington, VA 22202-3514

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