

VIA EXPRESS MAIL
#ET34677400US

Atab

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

In the matter of Application Serial No. 76/204,746, 3-D CHEESE
Published in the *Official Gazette* on May 14, 2002

U.S. Patent & TMO/TM Mail Rcpt. Dt. #57



08-30-2002

-----X
 RECOT, INC. :
 :
 Opposer, :
 :
 vs. :
 :
 DAIRY FARMERS OF AMERICA, INC., :
 :
 Applicant. :
 :
 -----X

Opposition No.

TRADEMARK TRIAL AND
APPEAL BOARD
02 SEP 11 AM 12:10

NOTICE OF OPPOSITION

Opposer, Recot, Inc., a Delaware corporation, having a place of business at 5000 Hopyard Road, Suite 460, Pleasanton, California 94588, believes it will be damaged by the issuance of a registration to Dairy Farmers of America, Inc. (hereinafter "Applicant"), a Kansas corporation, with an address at P.O. Box 909700, Kansas, City, Missouri 64190-9700, upon its Application Serial No. 76/204,764 for the mark 3-D CHEESE in International Class 29 for "natural cheeses and pasteurized process cheeses", filed on February 5, 2001 and based on an intent-to-use the mark.

The grounds for opposition are as follows:

1. Opposer, Recot, Inc. through its predecessors in interest and title, and through its related company Frito-Lay, Inc. (hereinafter collectively "Opposer"), has been engaged in the manufacture and sale of snack foods for over fifty years and is now one of the largest manufacturers of snack foods in the United States.

09/09/2002 EPINR1 00000045 76204746

01 FC:377

300.00 OP

2. Opposer's snack foods are marketed and sold in tremendous quantities on a nationwide basis, supported by many millions of dollars of advertising and promotion each year. Opposer's food products are sold in almost every supermarket in the United States as well as in numerous convenience stores, vending machines, mass merchandise stores, schools and other outlets.

3. Opposer has used the mark 3D'S and variants thereof on and in connection with snack foods and related products, including corn chips and puffed corn snacks since at least as early as September 10, 1995. Moreover, many of Opposer's 3D'S snack foods are cheese flavored. Since a date long prior to the filing date of the above identified application and continuing through the present, the mark 3D'S has been identified with Opposer and has appeared on a tremendous amount of product packaging, advertising, national television commercials, in-store display racks, trucks, signage, point-of purchase material, etc.

4. Opposer has, by virtue of incredibly extensive usage, advertising and promotion built up a very high level of consumer and trade recognition symbolized by its mark 3D'S and variants. Due to extensive public exposure to, and awareness by, consumers and the trade, the 3D'S mark is famous and has acquired and now possesses an extremely favorable reputation and distinctiveness with an invaluable amount of goodwill, solely signifying Opposer as the source of food products of high quality.

5. Each year since 1996, Opposer has sold tens of millions of dollars worth of products bearing the mark 3D'S. By virtue of its tremendous sales success, and extensive and popular advertising and promotional efforts, Opposer's 3D'S trademark has long enjoyed strong brand recognition and distinctiveness which has resulted in a highly favorable reputation and goodwill among the trade and consumers as identifying high quality snack food products manufactured and exclusively sold by Opposer.

6. Since first introducing 3D'S corn chips and puffed corn snacks, Opposer has expanded its use of the mark 3D'S to identify other snack food products, styles or flavors, including cheese flavor, manufactured and sold exclusively by Opposer.

7. Opposer is also the owner of valid and subsisting U.S. registrations and applications for the following marks:

MARK	REG./SER. NUMBER.	REG/FILE DATE	GOODS/FIRST USE
3D'S	1,971,956	04/30/96	corn chips and puffed corn snacks (First Use September 10, 1995)
3D'S and Design	2,197,450	10/20/98	corn based snacks and puffed corn based snacks (First Use September 1995)
3D'S	2,239,855	04/13/99	tortilla chips (First Use January 1996)
3D'S and Design	2,258,160	06/29/99	corn chips and tortilla chips (First Use September 11, 1995)
DORITOS 3D'S and Design	2,511,845	11/27/01	corn-based snack foods, namely, tortilla chips (First Use November 1999)
DORITOS 3D'S and Design	76/000,257	03/14/00	corn-based snack foods, namely, tortilla chips (First Use November 1999)

The above registrations are valid and in force, and Registration No. 1,971,956 is incontestable. Hereinafter the above marks, including those registered and/or used in commerce by Opposer, are referred to individually and collectively as the "3D'S Marks" which are inherently distinctive.

8. As a result of the extensive and continuous advertising, sale, use and promotion of products bearing Opposer's 3D'S Marks for over six (6) years and their high quality, said marks have acquired substantial public and consumer recognition throughout the United States, enjoy valuable goodwill, have become famous and have become assets of considerable value to Opposer.

9. On information and belief, on February 5, 2001, Applicant filed Application Serial No. 76/204,764 to register 3-D CHEESE for "natural cheeses and pasteurized process cheeses" in International Class 29, based on an intent-to-use the mark for such goods.

10. Opposer has priority over Applicant because its use and/or registration dates precede the Applicant's filing date for its intent-to-use application or on information and belief, any claimed use of the purported mark 3-D CHEESE.

11. Applicant's alleged 3-D CHEESE mark and Opposer's 3D'S Marks are similar in their overall appearance, sound and commercial impression. The first two elements of the applied for mark, "3-D", are very similar to Opposer's 3D'S Marks. The disclaimer of "cheese" by Applicant establishes that the dominant component of the applied for mark is "3-D", thus, further supporting the similarities between the marks and the likelihood of confusion that would arise from the use and registration of the applied for mark.

12. On information and belief, the goods to which Applicant's alleged 3-D CHEESE trademark will be applied and the goods upon which Opposer's 3D'S Marks are registered and/or extensively used are or are likely to be related and/or complementary products. On information and belief, they appeal or will appeal to the same class of purchasers, and are goods of a type which are often sold through the same channels of trade.

13. Applicant's alleged 3-D CHEESE mark is confusingly similar to the 3D'S Marks owned by Opposer; it falsely suggests a connection with Opposer; and its use and registration contemporaneously with Opposer's 3D'S Marks is likely to cause consumer confusion, mistake and deception as to the source of Applicant's goods, all within the meaning of 15 U.S.C. §1052(d).

14. Further, registration and use of Applicant's purported mark would likely dilute the distinctive quality of Opposer's famous and highly distinctive 3D'S Marks, pursuant to 15 U.S.C. §1125(c).

15. Applicant's alleged mark 3-D CHEESE so resembles Opposer's 3D'S Marks as to be likely, when applied to Applicant's goods, to constitute a false representation that Applicant's goods are approved or sponsored by Opposer or that Applicant's business is connected or affiliated with Opposer or that 3-D CHEESE is a version of Opposer's 3D'S mark, thereby deceiving the public and causing damage to Opposer within the meaning of 15 U.S.C. §1063.

16. In view of the foregoing, Opposer would be damaged by the registration of Applicant's claimed mark 3-D CHEESE within the meaning of 15 U.S.C. §1063.

WHEREFORE, Opposer prays that this opposition be sustained and that registration be denied to Applicant on its Application Serial No. 76/204,764.

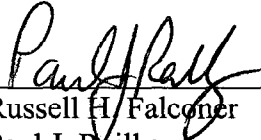
The original and one copy of this Notice of Opposition is enclosed herewith along with a check in the amount of \$300 for the filing fee for the Notice of Opposition. If the fee is found inadequate, please draw the amount from Opposer's undersigned attorneys' deposit account No. 02-4377.

Respectfully submitted,

BAKER BOTTS, L.L.P.

Date: August 30, 2002

By: _____


Russell H. Falconer
Paul J. Reilly
30 Rockefeller Plaza, 44th fl.
New York, NY 10112-0228
Tel: (212) 408-2500
Fax: (212) 408-2501
Attorneys for Opposer, RECOT, INC.

CERTIFICATE OF MAILING

I hereby certify that this paper is being deposited on the date indicated below with the United States Postal Service "Express Mail Post Office To Addressee Service," in an envelope addressed to: Box TTAB FEE, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513

Paul J. Reilly
Attorney Name

August 30, 2002
Date of Deposit


Signature

August 30, 2002
Date of Signature