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

Proceeding	91178731
Party	Plaintiff Trademark Management Company
Correspondence Address	Timothy P. Fraelich Jones Day North Point, 901 Lakeside Avenue Cleveland, OH 44114 UNITED STATES clkiedrowski@jonesday.com, tfraelich@jonesday.com, pcyngier@jonesday.com
Submission	Reply in Support of Motion
Filer's Name	Carrie L. Kiedrowski
Filer's e-mail	clkiedrowski@jonesday.com, tfraelich@jonesday.com, pcyngier@jonesday.com
Signature	/Carrie L. Kiedrowski/
Date	10/29/2008
Attachments	Reply Brief in Support of Opposer's Rule 56(f) Motion for Additional Discovery.pdf (32 pages)(793284 bytes)

registrations, TMC should be allowed to conduct additional discovery. This is not a case where TMC has conceded that discovery is complete by filing a cross-motion for summary judgment (unlike the *Dyneer Corp.* case relied upon by Agora, 37 USPQ2d 1251 in its Opposition Brief at 2). Instead, TMC filed a Motion to Extend Discovery – which is still pending – even before Agora filed its Memorandum for Summary Judgment.³

I. Agora Has Failed To Provide Relevant Discovery In Its Control.

A. Agora Has Ignored Its Duty To Provide Responsive Documents.

In Applicant's Responses to Opposer's First Set of Document Requests, Agora agreed to produce relevant, non-privileged documents responsive to TMC's document requests.⁴ Agora has produced no documents responsive to a wide range of TMC's requests, despite repeated requests from TMC and Agora's agreement to provide such documents as recently as June 20, 2008. *See* Exhibit EE to Opposer's Rule 56(f) Motion for Additional Discovery ("Rule 56(f) Motion"). Agora has not provided a privilege log or certified in any way that Agora has produced all responsive and relevant documents. Instead, Agora has simply first agreed to provide documents and then ignored the requests. *See* Kiedrowski Aff. to Rule 56(f) Motion at ¶¶ 17-19. The requested documents are relevant to Agora's assertions. Only now, at the last minute, has Agora claimed in their Opposition Brief to have no more documents.

For example, TMC requested documents "relat[ing] or refer[ring] to the channels of trade by and which Applicant offers, sells, markets or distributes . . . any goods or services in

³ Agora improperly attempts to utilize its Rule 56(f) Opposition Brief as yet another opportunity to oppose TMC's Motion for Extension of Discovery and Trial Periods filed on June 18, 2008 (see Opposition Brief at 2 "Agora respectfully asks the Board to deny TMC's Motion for Extending the Discovery Period...."), yet briefing on the June 18, 2008 Motion for Extension has been closed as of July 1, 2008. Agora's underhanded attempt to include requests for additional relief beyond the instant Rule 56(f) Motion is gamesmanship that should not be tolerated. Accordingly, Agora's Opposition Brief statements pertaining to the fully briefed Motion for Extension should be summarily disregarded.

⁴ Agora provided the same boilerplate response for nineteen of the twenty document requests. The exception, the response to the first document request, differed only slightly.

connection with Applicant's Mark." See Exhibit G to Rule 56(f) Motion at 9. The channels of trade used by Agora are directly relevant to the likelihood of confusion with TMC. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In response to a similar Interrogatory, Agora only responded that the current channels of trade were "[i]nstitutional" and that Agora intended in the future to sell or market through "[a]ny, wholesale or retail" channels of trade. See Applicant's Responses To Opposer's First Set Of Interrogatories, attached hereto as **Exhibit A**, at 9.

In addition, TMC requested samples of brochures, marketing materials, and labels related to Applicant's Mark. See Exhibit G to Rule 56(f) Motion at 1-2. The variety of goods on which Applicant's Mark is used is directly relevant to the likelihood of confusion with TMC. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567.

TMC requested documents relating to surveys, polls, or market research related to Applicant's Mark. See Exhibit G to Rule 56(f) Motion at 6. Surveys or market research related to Applicant's Mark are directly relevant to the likelihood of confusion with TMC's Marks. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1435 (TTAB 1993).

To date, Agora has provided but a few invoices, a single page of product packaging and nutritional data, and a search report. See Exhibit F to Agora's Memorandum In Opposition To Opposer's Motion For Extending The Discovery Period. Agora has not in any way certified that all responsive documents have been forwarded. Because TMC's Requests for Documents are directly relevant to the likelihood of confusion between Applicant's Mark and TMC's Marks, TMC's Rule 56(f) Motion should be granted.

B. Agora's Failure To Provide Responsive Documents Has Frustrated TMC's Ability To Depose Mark Sosebee.

As discussed above, Agora has failed to provide responsive documents, or to certify that they do not exist. In its limited responses to TMC's Interrogatories, Agora identified Mark Sosebee as the *only* person that participated in the adoption of Applicant's Mark. See **Exhibit A** at 5. Agora additionally identified Mark Sosebee as the *only* individual other than attorneys who participated in responding to TMC's Interrogatories. See **Exhibit A** at 18. Accordingly, Mark Sosebee is the person with the most knowledge related to those relevant categories of documents requested, but not received from Agora, such as channels of trade, use of Applicant's Mark on goods, or any market research related to Applicant's Mark. TMC has been unable to depose Mark Sosebee, however, due to Agora's failure to respond to TMC's Requests for Documents. Because Mark Sosebee is the person with the most knowledge related to Agora's channels of trade, surveys, and goods using the Mark, and because those items are directly relevant to the likelihood of confusion between Applicant's Mark and TMC's Marks, TMC's Rule 56(f) Motion should be granted. Despite Agora's attempts to convince the Board otherwise, the documents and the person with the most knowledge relevant to the likelihood of confusion are in the control of Agora.

C. TMC Has Been Diligent In Pursuing Discovery.

On June 18, 2008, two days before Agora again promised to copy and forward responsive documents, TMC filed a Motion To Extend Discovery And Trial Periods ("Motion for Extension"). Rather than file a Motion To Compel, TMC has attempted to extend the discovery period in good faith reliance of Agora's claims that Agora would copy and forward all responsive documents. TMC's attempts to cooperate with Agora through the normal discovery

process, rather than to immediately file a Motion To Compel, should be lauded rather than penalized.

II. Agora Overstates The Facts.

A. The Goods Are Not Fundamentally Different.

Agora claims that none of TMC's Goods are included in Agora's identification of goods, and that TMC has admitted as much. Agora's application no. 77/033,797 identifies "[p]repared pancake wrapped sausage; [s]andwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; [p]ancake batter wrapped meat with syrup or syrup flavor in breading or batter; [f]oodstuffs in the nature of a meatball coated primarily with pancake batter infused with syrup; [p]repared breakfast meat pies; [p]repared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese." TMC's application nos. 78/287041 and 78/287014 identify "[f]rozen appetizers consisting primarily of vegetables, meat and/or cheese." Agora does not, and cannot, explain how a dough-based pocket with filling consisting primarily of sausage is fundamentally different from an appetizer consisting primarily of meat. Nor does Agora explain how a foodstuff consisting of batter and filled with meat and cheese is different from an appetizer consisting of meat and cheese. Agora's identification of goods is not fundamentally different from TMC's. Indeed, both parties' goods overlap. This overlap is made even more obvious by a recipe from a website cited by Agora, which includes a recipe including *pancake batter*, sausage, cheese, and *jalapenos*. See Armadillo Eggs Recipe, attached hereto as **Exhibit B**.

B. Agora Overstates Other Oppositions.

Agora has attempted to make much of the fact that TMC's application nos. 78/287014 and 78/287041 were opposed by Rich Products Corp. See Agora's Memorandum for Summary Judgment at 9, 21; Opposition Brief at 17. In light of this, TMC would like to bring to Agora's

attention, that the Board very recently, on October 21, 2008, issued an Order dismissing Rich Product's Opposition against TMC's pending POPPERS' applications due to Rich Product's failure to assert a cognizable claim. *See* TTAB Order, October 21, 2008, Opposition No. 91183501, Rich Products Corporation v. Trademark Management Company, available on ESTTA, stating "...we find that opposer has failed to assert a cognizable claim." Rich Products did not argue priority as an issue in that case and, in fact, did not even claim trademark rights, but instead asserted "its right to use terminology to identify the products it sells...." *See* Rich Products Brief in Support of its Motion to Strike, at 5, available on ESTTA.

Although the Rich Products TTAB case was cited by Agora as one of the 25 compelling reasons why Agora should be entitled to its registration, *see* Exhibit 25 to Agora's Memorandum For Summary Judgment at 19, Rich Products itself failed to claim it had trademark rights. Thus it follows that third-party registrations and oppositions may be irrelevant as to the Applicant's Mark, and discovery is clearly necessary to show such.

C. Agora's Third-Party Evidence Has Not Been Tested.

Agora has claimed that it is relying on the existence of third-party registrations merely to show that the word POPPER is descriptive, and that as a result, no discovery is warranted. *See* Opposition Brief at 13. This claim is flawed. If Agora's purpose is to show that POPPER is descriptive, then Agora is conceding that the mark PANCAKE POPPERS is unregistrable. The word PANCAKE is a generic term for prepared foodstuffs consisting of pancake batter or pancake batter and syrup. The word PANCAKE is no more than descriptive for a foodstuff composed of batter wrapped around fillings. Either Agora is conceding that Applicant's Mark is purely descriptive and therefore unregistrable, or Agora is relying on the third-party registrations for more than the meaning of the word POPPER. Agora has submitted practically no additional evidence regarding a likelihood of confusion other than third-party registrations.

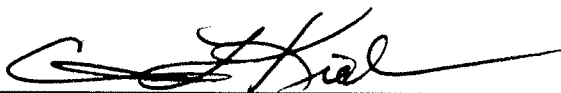
Consequently, assuming Agora is not attempting to eradicate its own mark, Agora is relying on the third-party registrations for more than the meaning of the word POPPER and TMC should be allowed to conduct discovery related to the probative value of the cited third-party registrations.

Conclusion

TMC is not required to accept Agora's recitation of the facts without being able to test their veracity. Agora should provide the documents they agreed to provide and allow their most knowledgeable individual, Mark Sosebee, to be deposed regarding the channels of trade, goods labeled with Applicant's Mark, and other matters related to the likelihood of confusion that TMC has been unable to test due to Agora's failure to cooperate during discovery. In addition, TMC should be allowed to conduct discovery related to the dozens of third-party registrations Agora has submitted. Accordingly, TMC's Rule 56(f) Motion should be granted.⁵

⁵ Even if the TTAB denies TMC's Rule 56(f) Motion, the TTAB should provide TMC additional time to respond on the merits to Applicant's Motion. *See* 37 CFR § 2.127(e)(1); *see also* *Diaz v. Servicios de Franquicia Pardo's S.A.C.* Opposition No. 91159871 (Nov. 29, 2005).

Dated this 29th day of October, 2008.

By: 

Timothy P. Fraelich
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Carrie L. Kiedrowski
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
Telephone: (404) 521-3939
Facsimile: (404) 581-8330

ATTORNEYS FOR OPPOSER
Trademark Management Corporation

CERTIFICATE OF SERVICE

A copy of the foregoing REPLY BRIEF IN SUPPORT OF OPPOSER'S RULE 56(f)
MOTION FOR ADDITIONAL DISCOVERY was served on this 29th day of October, 2008, via
First Class U.S. Mail, upon:

Robert M. Ward, Esq.
Sandra M. Drummond, Esq.
Myers & Kaplan
Intellectual Property Law, L.L.C.
Cumberland Center II
3100 Cumberland Boulevard
Suite 1400
Atlanta, Georgia 30339



Attorney for Opposer

EXHIBIT A

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

TRADEMARK MANAGEMENT)	
COMPANY,)	Opposition No. 91178731
)	
Opposer,)	Application Serial No. 77/033,797
v.)	
)	Mark: PANCAKE POPPER
)	
AGORA, INC.)	Published in the <i>TRADEMARK</i>
)	<i>OFFICIAL GAZETTE</i> on
Applicant.)	June 5, 2007

**APPLICANT'S RESPONSES TO
OPPOSER'S FIRST SET OF INTERROGATORIES**

Applicant Agora, Inc. (hereinafter "Applicant") provides its Responses and Objections to its Responses and Objections to Opposer's First Interrogatories, as follows:

GENERAL OBJECTIONS

Applicant hereby incorporates by reference, as if set forth fully therein, each of the following General Objections in its response to each separate paragraph of Opposer's Interrogatories.

1. Applicant objects to providing any information in response to the Interrogatories that is protected by the attorney-client privilege, the attorney work-product doctrine and any other applicable privilege, immunity, protection or restriction, or which is otherwise not discoverable under the Federal Rules of Civil Procedure and federal statutes and/or common law.

2. Applicant objects to the Interrogatories to the extent they are overly broad, vague, ambiguous, oppressive, unduly burdensome, or would require an unreasonable investigation on the part of the Applicant.

3. Applicant objects to the Interrogatories to the extent they are not relevant and/or material to any claim or defense of any party to this action and are not reasonably calculated to lead to the discovery of admissible evidence.

4. Applicant objects to the Interrogatories and definitions contained therein, and made a part thereof, to the extent that they attempt to alter the plain meaning or understanding of any term or attempt to impose obligations on Applicant that are inconsistent with and/or in addition to those required under the Federal Rules of Civil Procedure.

5. Applicant objects to producing any documents or information responsive to the Interrogatories to the extent that they seek the production of documents or information which are public and, therefore, equally accessible and available to Opposer. Such discovery is oppressive and unduly burdensome and unreasonably expensive.

6. Applicant objects to producing any documents or information responsive to the Interrogatories to the extent that they seek the production of documents or information which are in the possession of Opposer and thus are equally accessible and available to Opposer

7. Applicant objects to ambiguous and/or inconsistent Interrogatories and, more specifically, to producing any documents or information responsive to the Interrogatories to the extent that the definitions and interpretations Opposer would ascribe to the Interrogatories and the documents and/or information responsive thereunder differ from those of Applicant's. Applicant's responses hereto are based on Applicant's interpretation of the Requests and terms contained therein. Applicant objects to the extent the Opposer's interpretation of such responses would differ from that of Applicant's.

8. Without waiving or limiting the foregoing General Objections, or any of the specific objections set forth herein, Applicant provides the responses below, preserving and intending to preserve:

- (i) the right to object to the relevancy, materiality, privilege or admissibility of evidence for any purpose in the trial of this or any other action;
- (ii) the right to object to the use of evidence and/or the information contained therein in any proceeding, including the trial of this or any other action(s);
- (iii) the right to object, upon any ground, to any demand for further responses to the Requests or to any other discovery request involving or relating to the subject matter of the Requests to which answers are herein or hereafter given; and
- (iv) the right at any time to revise, correct, supplement, clarify and/or amend any responses furnished.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify all documents in the possession of Applicant that relate or refer to (a) Opposer; (b) this Opposition proceeding; (c) Opposer's Marks; or (d) any products or services sold, marketed or distributed by Opposer in connection with its marks.

RESPONSE:

None, other than those documents that have been sent from his attorneys that are deemed "attorney/client privilege" and/or work product immunized.

INTERROGATORY NO.2:

Identify all documents in the possession of Applicant that relate or refer to Applicant's intentions or business plans regarding the use of Applicant's Mark in connection with any product or service.

RESPONSE:

None.

INTERROGATORY NO.3:

Describe in detail any market study, survey (formal or informal) or public opinion poll performed by or for Applicant referring or relating to Applicant's Mark in connection with any product or service.

RESPONSE:

None.

INTERROGATORY NO.4:

Identify all documents that mention, relate or refer to Applicant's adoption of Applicant's Mark in connection with any product or service, including, without limitation, all documents that evidence or demonstrate the first time that Applicant used Applicant's Mark as a trademark or service mark.

RESPONSE:

None.

INTERROGATORY NO.5:

Identify the last twenty customers to whom Applicant sold any product or service which bore or was connected to Applicant's Mark, and for each such customer, state the date of purchase, the product or service purchased by said customer, and the amount paid by each such customer for the product or service.

RESPONSE:

Such requested documents are enclosed.

INTERROGATORY NO. 6:

Identify each person that participated in the adoption of Applicant's Mark as a trademark or service mark; and for each such person, state whether he or she is currently employed by Applicant.

RESPONSE:

Mark Sosebee

INTERROGATORY NO.7:

If Applicant has ever considered, or is presently considering, expanding the products and/or services in connection with which it uses Applicant's Mark:

- a. Identify the products and/or services Applicant was or is considering offering in connection with Applicant's Mark;
- b. Identify the person or persons making such consideration, and the date such consideration was made; and
- c. State the outcome of such consideration.

RESPONSE:

None.

INTERROGATORY NO. 8:

Identify each and every product or service ever offered or provided by Applicant in commerce in the United States in connection with Applicant's Mark; and for each product or service state:

- a. The manner in which Applicant's Mark relates or refers to each product or service;
- b. The date on which Applicant commenced offering or providing such product or service;
- c. The dates on which Applicant discontinued offering or providing any such product or service in commerce and the dates, if any, on which Applicant resumed offering any previously discontinued product or service;
- d. The products with which Applicant's products are compatible;
- e. The sales of each product or service offered or provided in connection

with said word, by quantity and the total dollar value of sales of each product or service for each year since the first use thereof;

- f. The target customer for each such product and service;
- g. The location(s) (by city, county and state) in which such products or services are or were, as applicable, offered and provided; and
- h. The average price of each such product or service for each year it has been offered for sale.

RESPONSE:

- (a) None
- (b) 01/08/2007
- (c) None
- (d) None
- (e) \$20,000
- (f) Institutional facilities
- (g) Douglas, Georgia and Atlanta, Georgia
- (h) \$14.20 and \$29.30

INTERROGATORY NO.9:

State how and when Applicant first obtained knowledge of Opposer's Marks, and/or any use thereof, and identify each person connected or associated with Applicant who first learned of such use.

RESPONSE:

From my attorneys, pursuant to a search report.

INTERROGATORY NO. 10:

If Applicant has ever conducted a comparison between any product or service sold, marketed or distributed by Applicant in connection with Applicant's Mark and a product(s) or service(s) offered by Opposer, or any third party which performs an identical or similar function:

- a. Identify the product(s) or service(s) compared;
- b. Identify all documents relating to such comparison;
- c. Identify the person(s) who performed it;
- d. Identify the date(s) such comparison was made; and
- e. State the outcome of the comparison.

RESPONSE:

None.

INTERROGATORY NO. 11:

If Applicant knows of any instance when a person was, or apparently was, confused, mistaken or deceived as to the source or identity of any products or services as the result of Applicant's use of Applicant's Mark, for each such instance:

- a. Identify each such person who was confused, mistaken or deceived;
- b. State the date and place the incident occurred;
- c. Identify the products or services involved;
- d. State in what way each such person was confused, mistaken or deceived;
- e. State the means by which Applicant or its agent(s) received notice of such instance; and
- f. Identify the person from whom Applicant received notice of such instance.

RESPONSE:

None.

INTERROGATORY NO. 12:

If Applicant has ever asserted rights in Applicant's Mark against a third party, in writing or otherwise, state for each assertion:

- a. The date and manner in which such assertion was made;
- b. Identify the person or entity to whom such assertion was made; and
- c. State the outcome of each assertion.

RESPONSE:

None.

INTERROGATORY NO. 13:

Describe the channel(s) of trade by and through which (a) Applicant presently offers, sells, markets or distributes; (b) intends to offer, sell, market or distribute any products or services in connection with Applicant's Mark; and (c) has previously offered, sold, marketed or distributed, any products or services in connection with Applicant's Mark.

RESPONSE:

- (a) Institutional
- (b) Any, wholesale or retail
- (c) Institutional

INTERROGATORY NO. 14:

As to each and every advertisement and promotional material for Applicant's products or services using or containing Applicant's Mark, for each year from the date of first use and continuing to the present, including without limitation, each interior and exterior signage, advertisements in newspapers, magazines, handbills, promotional flyers, and advertisements on radio, television and/or the Internet, and each catalog, sales literature, brochure, bulletin, flyer, sign, sales display, poster, or other point of sale or promotional material or advertisement using or

containing Applicant's Mark:

- a. Identify the location in which the mark was displayed, broadcast, disseminated, or distributed;
- b. Identify the products or services to which the advertisement/promotional material related;
- c. Identify the trading area (e.g., by city and state) to which advertisement/promotional material was directed;
- d. Identify the type or class(es) of customers to which advertisement/promotional material was directed; and
- e. Identify all persons affiliated with or commissioned, hired or retained by Applicant having knowledge of the advertisement/promotional material.

RESPONSE:

Point-of-sale brochure to existing clients and on the web.

INTERROGATORY NO. 15:

For each year since and including the date of first use, separately specify the total dollar amount expended on advertising and/or promotion of the products or services offered, sold, marketed or distributed by Applicant in connection with Applicant's Mark and identify all documents which relate to such expenditures.

RESPONSE:

\$100.00

INTERROGATORY NO. 16:

Identify all United States trademark registrations and pending applications for trademark registrations owned by, licensed to, assigned to, assigned from or licensed from Applicant and state the date(s) of first use and date(s) of filing for each.

RESPONSE:

Objected to. Irrelevant

INTERROGATORY NO. 17:

Identify all contracts or written agreements between Applicant and any third party referring or relating to products and services sold, marketed or distributed in connection with Applicant's Mark.

RESPONSE:

Maker: Hinsdale Farms.com, located in Indiana.

INTERROGATORY NO. 18:

If Applicant conducted, or had conducted for it, a search or investigation of any records, such as, but not limited to, the United States Patent and Trademark Office records, state trademark records, trademark or trade publications, electronic databases, business directories or the records of any trademark or service organization, to ascertain the registrability of Applicant's Mark or ascertain whether Applicant's Mark might infringe the trademark rights of others, for each such search or investigation:

- a. State the date it was made;
- b. Identify the person who performed it;
- c. Identify the person who requested it;
- d. Identify the name and/or location of each set of records searched or investigated; and

- e. Provide the registration number or other means of identification of each conflicting mark uncovered that was found possibly to conflict with Applicant's Mark.

RESPONSE:

See enclosed search materials.

INTERROGATORY NO. 19:

Identify each person who objected to or expressed reservation or concern regarding Applicant's use and/or attempt to register Applicant's Mark and describe the nature of the *objection*, reservation and/or concern.

RESPONSE:

None.

INTERROGATORY NO. 20:

Identify all witnesses, both fact and expert, that you expect to call to testify during the Testimony Period or Rebuttal Period for this Opposition proceeding and state the subject matter of each witness's testimony.

RESPONSE:

As of this time, these decisions have not been made. Thus, not known.

INTERROGATORY NO. 21:

State all facts and identify all documents supporting Applicant's assertion that Applicant's Mark carries "considerable goodwill" and "consumer acceptance of its products" as described in Applicant's Affirmative Pleading Paragraph No. 14.

RESPONSE:

Objection; argumentative regarding pleadings.

What is "supporting" or not is a matter of opinion. See Answer.

INTERROGATORY NO. 22:

State all facts and identify all documents supporting Applicant's assertion that Applicant's Mark is distinctive as described in the first sentence of Applicant's Affirmative Pleading Paragraph No. 15.

RESPONSE:

Objection; argumentative regarding pleadings. What is "supporting" or not is a matter of opinion. See relevant records of USPTO; USPTO Examiner states that it is distinctive; See Answer.

INTERROGATORY NO. 23:

State all facts and identify all documents supporting Applicant's assertion that Applicant's goods are not related to Opposer's goods as described in the second sentence of Applicant's Affirmative Pleading Paragraph No. 15.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 24:

State all facts and identify all documents supporting Applicant's assertion that Applicant's consumers and Opposer's consumers are not likely to be confused as to the source of Applicant's goods sold under Applicant's Mark as described in the third sentence of Applicant's

Affirmative Pleading Paragraph No. 15.

RESPONSE:

See Answer to No. 23.

INTERROGATORY NO. 25:

State all facts and identify all documents supporting Applicant's assertion that there is no likelihood of confusion between Applicant's Mark and Opposer's Marks as described in Applicant's Affirmative Pleading Paragraph No. 16.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 26:

State all facts and identify all documents supporting Applicant's assertion that the use of the word POPPERS is not exclusive for food items and snacks as described in Applicant's Affirmative Pleading Paragraph No. 17.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 27:

State all facts and identify all documents supporting Applicant's assertion that there can be no likelihood of confusion between Applicant's Mark and Opposer's Marks given the registrations and applications as described in Applicant's Affirmative Pleading Paragraph No. 17.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 28:

State all facts and identify all documents supporting Applicant's assertion regarding the exclusive use of the word POPPERS as described in Applicant's Affirmative Pleading Paragraph No. 18.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 29:

State all facts and identify all documents supporting Applicant's assertion that Opposer has acquiesced to the use of the word POPPERS as described in Applicant's Affirmative Pleading Paragraph No. 19.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 30:

State all facts and identify all documents supporting Applicant's assertion that Opposer has "attempted" to oppose registrations for marks including the use of the word POPPERS and the outcomes of such "attempts" as described in Applicant's Affirmative Pleading Paragraph No. 20.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 31:

State all facts and identify all documents supporting Applicant's assertion that Opposer has "attempted" to oppose registrations for marks including the use of the word POPPERS and that such attempts had the outcomes as described in Applicant's Affirmative Pleading Paragraph No. 20.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 32:

State all facts and identify all documents supporting Applicant's assertion that Applicant has "attempted" to register marks including the use of the word POPPERS and that such attempts had the outcomes as described in Applicant's Affirmative Pleading Paragraph No. 21.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 33:

State all facts and identify all documents supporting Applicant's assertion that Applicant is entitled to registration of its mark with the restriction as described in Applicant's Affirmative Pleading Paragraph No. 22.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 34:

State all facts and identify all documents supporting Applicant's assertion that Applicant's Mark is used on the goods covered by the present broad recitation of goods as described in Applicant's Affirmative Pleading Paragraph No. 23.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 35:

State all facts and identify all documents supporting Applicant's assertion that there is no likelihood of confusion between Opposer's Marks and Applicant's Mark as used on goods covered by the Applicant's present broad recitation of goods as described in Applicant's Affirmative Pleading Paragraph No. 23.

RESPONSE:

See Answer to Nos. 21 & 22

INTERROGATORY NO. 36:

State all facts and identify all documents supporting Applicant's assertion that even if the Board decides that Opposer is entitled to judgment with respect to Applicant's goods on the present broad recitation of goods, that Applicant is entitled to registration of its mark with a restricted identification of goods as described in Applicant's Affirmative Pleading Paragraph No. 23.

RESPONSE:

Objection; argumentative regarding pleadings.

What is "supporting" or not is a matter of opinion. See Answer.

INTERROGATORY NO. 37:

State all facts and identify all documents supporting Applicant's assertion that Opposer fails to state a claim as described in Applicant's Affirmative Pleading Paragraph No. 24.

RESPONSE:

Objection; argumentative regarding pleadings. What is "supporting" or not is a matter of opinion.

See Answer.

INTERROGATORY NO. 38:

Identify all exhibits that you intend to introduce or otherwise rely upon during the Testimony Period or Rebuttal Period of this Opposition proceeding.

RESPONSE:

As of this time, the identity of such exhibits has not been decided upon, and thus the matter is unknown.

INTERROGATORY NO. 39:

With respect to each Interrogatory and Sub-Interrogatory herein, provide the following information:

- a. Identify the person or persons who were consulted about, furnished information for, or participated in the preparation of the answers herein given;
- b. Identify the person who is most knowledgeable with respect to the factual subject matter involved in each Interrogatory or Sub-Interrogatory; and
- c. Identify all files and areas searched in attempting to locate documents requested to be identified in these Interrogatories.

RESPONSE:

None, except for the attorneys and Mark Sosebee.

INTERROGATORY NO. 40:

For each Document Request set forth in Opposer's First Set of Document Requests, identify the person or persons who supplied documents in response to each such Document Request.

RESPONSE:

Mr. Sosebee's assistant, Lynne Nix

Respectfully submitted this 22nd day of January, 2008.

/s/ Robert M. Ward
Robert M. Ward
Georgia Bar No. 775401
Sandra M. Drummond
Georgia Bar No. 668597

Myers & Kaplan
Intellectual Property Law, LLC
Cumberland Center II, Suite 1400
3100 Cumberland Boulevard
Atlanta, Georgia 30339

CERTIFICATE OF SERVICE

A copy of the foregoing *Applicant's Responses to Opposer's First Interrogatories* was served on this 22nd day of January via facsimile and U.S. First Class Mail with proper postage affixed thereto and addressed as follows:

Timothy P. Fraelich
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 579-0212 – fax

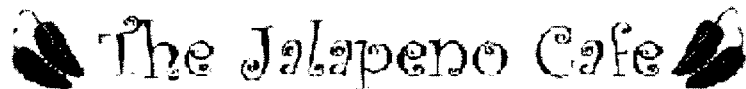
Carrie L. Kiedrowski
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309-3053
(404) 581-8330 – fax

Respectfully submitted this 22nd day of January, 2008.

/s/ Robert M. Ward
Robert M. Ward
Georgia Bar No. 775401
Sandra M. Drummond
Georgia Bar No. 668597

EXHIBIT B

Internet Recipe
from



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Armadillo Eggs

2 Jars whole jalapeno peppers
1 pound bulk sausage, at room temperature
2 cups Bisquick
2 cups shredded cheddar cheese
1 cup shredded monterey Jack cheese
1 package Shake N Bake for pork

Mix Bisquick, sausage and cheddar cheese by hand. Remove stem from peppers and slice lengthwise. Remove stems and stuff peppers with the Monterey Jack Cheese. Pat small pieces of the Bisquick mixture flat and wrap around the stuffed peppers. Roll each one in the Shake N Bake. Bake on an ungreased cookie sheet at 425 degrees for 15 to 20 minutes. Makes 20 to 30 "eggs."

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