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

Proceeding	91200575
Party	Defendant Kenneth B. Wiesen
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Attachments	Opposition to Motion to Strike.pdf (3 pages)(115308 bytes)

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Hershey Chocolate & Confectionery	:	
Corporation and Hershey Company,	:	
	:	Opposition No.: 912005757
Opposers,	:	<u>Opposition to Motion to Strike</u>
v.	:	<u>Portion of Applicant's Answer</u>
	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	

The entire premise for this motion is flawed. Opposer intentionally misclassifies applicant's Affirmative Allegation contained in my Answer as a "fraud defense". This misclassification is designed solely to attempt to preclude disclosure of Opposer's continuing scheme of deceit, misrepresentation and outright fraud. Rather Applicant claims that Opposers Notice of opposition which is grounded in the claim of common law use is part of a long standing scheme of misrepresentations made regarding use of the Milkshake mark.

The dispositive issue in Hershey's Opposition is their claimed prior use of the mark. Applicant has identifiable information that Opposer has in the past and continues to misrepresent their prior use of the milkshake mark. Proof that Opposer's current allegation of common law use of the milkshake mark on the "kit Kat specimen" is false will come from the entirety of Opposer's continuing dishonesty in claims of use of this "milkshake" mark. Applicant does not claim a collateral dishonesty but rather a continuing scheme regarding this very mark.

By labeling my affirmative defence as a "fraud defense", movant attempts to invoke a legal standard that is simply inapplicable here. Applicant does not dispute this well recognized legal canon that a party may rely on their common law rights irrespective of fraud in the acquisition of a prior registration. Rather, Applicant intends to prove that opposer's claims are untrue based upon evidence of Opposer's continuing deceit and fraud. These actions are key pieces of evidence necessary to prove that Hershey's current claim of common law use on the "kit Kat" specimen is simply a part of a continuing

misrepresentation regarding use of the term "milkshake" on candy products. Hershey's continued scheme of deceit and fraud regarding use of the Milkshake term goes to the heart of determining their credibility.

Although discovery has yet to take place, Applicant's investigation reveals a disturbing pattern of deceit and fraudulent conduct. For example, on or about November 8, 2001 Opposer created a staged specimen and label of a milkshake candy product in connection with a section 8 declaration of its use of the term milkshake on their candy products, (reference is to Registration number 1669640). Again on or about June 9, 2003, Opposer created another false and staged specimen and label of a claimed use of the milkshake term on candy products, (reference is to registration number 1273766).

When confronted with their acts of fraud, Hershey Chocolate & Confectionery Corporation precipitously filed on February 22, 2011 section 7 total surrenders of both Milkshake marks (registration numbers 1669640 & 1272766). Opposer surrendered these marks as their continuing acts of deception on the USPTO were poised to be revealed. These acts were not just examples of similar deceit but are part of the very same fraudulent claims. This motion is but another attempt to cover their tracks of deceit and fraud that go to the very heart of their claims here.

Applicant specifically states in the Answer to the Notice of Opposition, paragraph 13, that Opposers claims are "part of a continuing scheme of fraud". These are not prior similar acts but rather part of a single overall scheme. Discovery on this scheme is necessary to prove that opposer's claims of prior use are without merit and truth. Contrary to opposer's allegations this scheme is not just applicable to Hershey's claim of common law rights but go to the very heart of dertermining those rights. Accordingly, it is respectfully requested that that Opposer's motion be denied in all respects.

Dated: August 24, 2011

Carle Place, New York



Kenneth B. Wiesen

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has caused the foregoing opposition to the motion to Strike Portion of applicant's answer to be served this 25th day of August, 2011, by first class mail, postage prepaid, upon the following attorney's of record for opposers:

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A handwritten signature in cursive script, reading "Lori E. Connors", is written over a solid horizontal line.

Lori E. Connors