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

Proceeding	91232427
Party	Plaintiff International Dairy Foods Association
Correspondence Address	BRIAN G GILPIN GODFREY & KAHN SC 833 EAST MICHIGAN ST STE 1800 MILWAUKEE, WI 53202-5615 UNITED STATES bgilpin@gklaw.com, zwillenbrink@gklaw.com 414-273-3500
Submission	Opposition/Response to Motion
Filer's Name	Zachary R. Willenbrink
Filer's email	zwillenbrink@gklaw.com
Signature	/zachary r. willenbrink/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

INTERNATIONAL DAIRY FOODS
ASSOCIATION,

U.S. DAIRY EXPORT COUNCIL,

ATALANTA CORPORATION, and

INTERCIBUS INC.,

Opposers,

v.

INTERPROFESSION DU GRUYÈRE and
SYNDICAT INTERPROFESSIONEL DU
GRUYÈRE,

Applicants.

Opposition No. 91232427

Consolidated with Opposition Nos.
91232442, 91232446, and 91232448

**OPPOSERS' RESPONSES TO
APPLICANTS' STATEMENT OF OBJECTIONS TO OPPOSERS' EVIDENCE**

Brian G. Gilpin
Zachary R. Willenbrink
GODFREY & KAHN, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Phone: (414) 273-3500
Fax: (414) 273-5198
bgilpin@gklaw.com
zwillenbrink@gklaw.com

Counsel for Opposers

Opposers submit this response to the Applicants' Statement of Objections to Opposers' Evidence, which the Board should wholly reject. Applicants spend 28 pages indiscriminately lodging countless evidentiary objections. (*See generally* TTABVUE #48.) None of those objections are outcome-determinative and, in many instances, they would not even prevent the evidence from coming in through another means. For instance, Applicants object to Shawna Morris' declaration but lodge no objection (or lodge much more limited objections) to the same evidence when it is presented as part of a Notice of Reliance. (*E.g. compare id.* at 6, lines 30-33, *with id.* at 10, lines 85-88.) Applicants objected to the declarations of John Umhoefer and Matthias Kunz to the extent they were made part of a Notice of Reliance, but not to the declarations themselves. (*See id.* at 21-24 (not addressing TTABVUE #20-#22).)

The broadest point to be made here is that the Board need not even address the countless objections individually. In these circumstances, where Applicants have offered indeterminate and largely undifferentiated objections to a significant portion of the evidence, the Board need not even rule on them, and can instead simply weigh the evidence in its discretion. TBMP § 707.01 ("The Board has the discretion on how it considers evidentiary objections, especially in cases where numerous objections have been lodged or the objections are not outcome determinative.") (citing *RxD Media, LLC v. IP Application Development LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018) ("the Board is capable of weighing the relevance and strength or weakness of the objected to testimony

and evidence, including any inherent limitations"); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1478 (TTAB 2017) (where parties devoted more than 30 pages of their briefing at final hearing to numerous detailed evidentiary objections, the Board exercised discretion to rule explicitly only on major objections); *Poly-America, L.P. v. Illinois Tool Works Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017) ("we choose not to make specific rulings on each and every objection"); *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017), *appeal dismissed per stipulation*, No. 17-00345 (E.D. Va. August 24, 2017); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1737 (TTAB 2014); *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013), *aff'd*, 565 Fed. Appx. 900 (Fed. Cir. 2014) (mem.); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007); *U.S. Playing Card Co. v. Harbro LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006) ("[B]ecause an opposition is akin to a bench trial, the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence.").

Also worth pointing out, Applicants' objections do not reference the TTABVUE system and their brief cites it sparingly (never with a pin cite); this has made preparing Opposers' response and reply needlessly difficult and is contrary to TBMP §§ 106.03 and 801.01 as well as the Board's guidance on the topic. *RXD Media*, 125 USPQ2d at 1804 (quoting *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014)).

Even more narrowly, addressing the objections by categories, they are flawed in multiple ways. First, with respect to the documents offered by Ms. Morris, she testified that these documents were in the records and routinely collected as part of her role as Vice President of Trade Policy for USDEC; Applicants cite no case law that says these cannot be business records properly admissible under Federal Rule of Evidence 803(6). (TTABVUE #48 at 3-4.) The Board has previously overruled similar objections. *Kohler Co.*, 82 USPQ2d at 1104-06 (rejecting hearsay, personal knowledge, authentication, and best-evidence objections, finding records qualified for Rule 803(6) exception). Additionally, Applicants made no attempt to cross-examine Ms. Morris as permitted by 37 C.F.R. § 2.123 and TBMP § 703.01(a). Regardless, each of those items is separately offered in the First Notice of Reliance, and the only objections Applicants lodged to those are hearsay and relevance (to the extent they raised any at all, which in many instances they did not). (*Id.* at 9-11.) They are neither hearsay nor irrelevant. Indeed sustaining those objections would undermine 37 C.F.R. § 2.122(e)(1-2), which allows submission of books and periodicals, including internet materials. For these reasons, the Board can overrule the objections at Pages 4 through 7 (lines 1 through 43) and Pages 9 through 11 (lines 79 through 94).

Second, the same is true for the remainder of the printed publications and internet materials found at Pages 9 through 10 (lines 74 through 79), Pages 12 through 13 (lines 95 through 108), and Pages 24 through 25 (lines 161 through 165). As publications available to the public, those items are specifically admissible under 37 C.F.R. § 2.122(e)(1-2).

Third, unbelievably, Applicants have objected to the admission of USPTO file documents for previous applications for gruyere-related marks. (*Id.* at 8-9, lines 68 through 73.) These, of course, are official records, specifically permitted by 37 C.F.R. § 2.122(e)(1). Even if not, and far more fundamentally, they can be admitted by simple judicial admission under Federal Rule of Evidence 201.

Fourth, Applicants *have not* objected to the items listed at Pages 13 through 21, lines 109 through 146, even though they included the items in their list of objections; so the Board can ignore those.

Fifth, the Umhoefer and Kunz declarations are not attacked in their standalone capacity—only as part of the Notice of Reliance. The objections are without merit: Mr. Umhoefer and Mr. Kunz are the individuals at their respective firms who would have personal knowledge of the items they submitted and those items are the business records of their firms, admissible for the same reasons outlined above. (Other than indiscriminately placing unsupported objections into the box next to these items, Applicants have not actually argued otherwise.) Finally, as with Ms. Morris, Applicants made no attempt to cross-examine Messrs. Umhoefer or Kunz as permitted by 37 C.F.R. § 2.123 and TBMP § 703.01(a). This takes care of Pages 21 through 24, lines 147 through 160, which should be overruled the same as the other objections noted above.

Sixth, with respect to the Gellert and Jaeckle deposition testimony, Applicants have not even bothered to make an argument to support their objections; they simply

drop the objections in without explanation, and therefore should be deemed to have waived them. The objections are, in any event, meritless. Mr. Gellert and Mr. Jaeckle testified, throughout, based on their extensive experience in the cheese industry, which has involved the sale, production, and packaging of gruyere, among many other things. Beyond this, of course, and as noted above applying broadly to all of the evidence Applicants attack, the testimony is not by itself outcome determinative and the Board is capable of weighing it in its discretion. *See, e.g.,* TBMP § 707.01.

Applicants' objections are, in sum, not adequately supported and meritless. The Board should reject them in their entirety.

Dated this 8th day of April, 2019.

Respectfully submitted,
GODFREY & KAHN, S.C.

By: /s/Zachary R. Willenbrink
Brian G. Gilpin
Zachary R. Willenbrink
GODFREY & KAHN, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Phone: (414) 273-3500
Fax: (414) 273-5198
bgilpin@gklaw.com
zwillenbrink@gklaw.com

Counsel for Opposers

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing OPPOSERS' RESPONSES TO APPLICANTS' STATEMENT OF OBJECTIONS TO OPPOSERS' EVIDENCE was served on counsel for Applicants, by forwarding said copy on April 8, 2019, via email as follows:

Richard Lehv
Susan Upton Douglass
FROSS ZELNICK LEHRMAN & ZISSU, P.C.
4 Times Square, 17th Floor
New York, NY 10036
rlehv@fzlz.com; sdouglass@fzlz.com

/s/Zachary R. Willenbrink _____

Zachary R. Willenbrink

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