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

Proceeding	91235706			
Party	Defendant Ziebarth Holdings, LLC			
Correspondence Address	KELLY K PFEIFFER AMEZCUA-MOLL & ASSOCIATES PC 1122 E LINCOLN AVE STE 203 ORANGE, CA 92865 UNITED STATES Email: kelly@amalaw.net, kelpfeiffer@aol.com			
Submission	Yes, the Filer previously made its initial disclosures pursuant to Trademark Rule 2.120(a); OR the motion for summary judgment is based on claim or issue preclusion, or lack of jurisdiction. The deadline for pretrial disclosures for the first testimony period as originally set or reset: 07/03/2018			
Filer's Name	Kelly K. Pfeiffer			
Filer's email	kelly@amalaw.net			
Signature	/Kelly K. Pfeiffer/			
Date	06/15/2018			
Attachments	Opp and XMotion MSJ - MPA.pdf(236413 bytes) Feuerstein Decl_Redacted.pdf(223788 bytes) Fonseca Decl_Redacted.pdf(374835 bytes) Odell Affidavit_Redacted.pdf(329446 bytes) Ziebarth Decl with Exhibits.pdf(1149274 bytes) Opp and XMotion MSJ - Pfeiffer Dec.pdf(80039 bytes) Pfeiffer Exhs 1 -10.pdf(3947831 bytes) Pfeiffer Exhs 11 -18.pdf(3333983 bytes) Pfeiffer Exhs 19 -20.pdf(4713291 bytes) Pfeiffer Exh 21.pdf(459357 bytes) Pfeiffer Exhs 22-30.pdf(2563898 bytes)			

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

DEL TACO, LLC,)	
Opposer,)	
v.)))	Opposition No. 91235706 Application Serial No. 85040746 Mark: "NAUGLES"
ZIEBARTH HOLDINGS, LI	LC,)	
Applicant.)	CONSOLIDATED WITH
NAUGLES CORP.,)	Petitioner,	
)			Cancellation No. 92064091
)	Registration No. 4261951
v.)	Mark: "NAUGLES"
)	
DEL TACO, LLC, Registrant.)		

OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Petitioner NAUGLES CORP. ("Petitioner") and Applicant ZIEBARTH HOLDINGS, LLC ("Applicant") hereby oppose Registrant/Opposer DEL TACO, LLC's ("Del Taco") motion for partial summary judgment and simultaneously submit their own cross-motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 and TBMP 528. In Cancellation Proceeding No. 92064091 ("the Cancellation Proceeding"), Del Taco has moved for summary judgment on all claims; Petitioner opposes and submits its own cross-motion for summary judgment on Claim I. In Opposition No. 91235706 ("the Opposition Proceeding"), Del Taco has moved for summary judgment on Claims I and III; Applicant opposes and submits its own cross-motion for summary judgment on all Claims.

This opposition and cross-motion for summary judgment is supported by this memorandum, the declaration of Christian M. Ziebarth with exhibits (Ziebarth Decl."), the declaration of Eve Feuerstein with exhibits ("Feuerstein Decl."), the declaration of Carlos Fonseca with exhibits ("Fonseca Decl."), the affidavit of William Odell ("Odell Aff."), the declaration of Kelly K. Pfeiffer with exhibits ("Pfeiffer Decl."), and the pleadings of record.

I. <u>INTRODUCTION</u>

These two consolidated proceedings now mark the *second and third times* these parties have faced off before the TTAB, all over a trademark that Del Taco abandoned over 20 year ago. Del Taco now moves for summary judgment on multiple claims in both proceedings ("Del Taco's Brief"), but its arguments are wholly deficient because it has neglected to address 1) the preclusive effect of this Board's 2015 decision in *Ziebarth v. Del Taco, LLC*, Cancellation No. 92053501 ("the prior cancellation proceeding"), and 2) numerous pieces of material evidence that were exchanged in discovery.

Petitioner's Cancellation Proceeding to cancel Del Taco's NAUGLES registration no. 4261951 ("Del Taco's Clothing Registration") is another necessary step following the prior cancellation proceeding to clean up the USPTO register with regard to ownership of the NAUGLES mark. Ziebarth Decl., ¶ 3. Collateral estoppel dictates that this Board's 2015 prior factual findings used to ultimately conclude that Del Taco abandoned use of its mark NAUGLES for "restaurant services" over 20 years ago are controlling in these proceedings. Pfeiffer Decl., ¶¶ 2, 3 and 4, Exhibits A, C, D and E. Collateral estoppel, the undisputed material facts, and the lack of evidence produced by Del Taco, all establish the necessary elements to prove that Del Taco's use of NAUGLES is merely ornamental, and, therefore, Del Taco's Clothing Registration should be cancelled.

Del Taco's Opposition Proceeding also lacks merit because Del Taco again neglects to address the preclusive effect of the prior cancellation proceeding, as well as ample evidence that Applicant used the NAUGLES mark on March 20, 2012 which includes multiple sworn declarations from witnesses who actually attended the March 20, 2012 event. Because Applicant's use of NAUGLES did, in fact, start as early as March 20, 2012, none of its statements submitted to the USPTO in the procurement of its registration were "false" or "fraudulent." In addition, Del Taco's lack of rights in NAUGLES for restaurant services makes it impossible for it to succeed on its claims of misrepresentation of source and likelihood of confusion. The meritless Opposition should be dismissed with prejudice.

II. BACKGROUND FACTS AND HISTORY BETWEEN THE PARTIES

A. Mr. Ziebarth Successfully Cancelled Del Taco's NAUGLES Registration For "Restaurant Services."

Back in May 2010, Christian M. Ziebarth, Petitioner's President and principal of Applicant ("Mr. Ziebarth") ¹, filed an application to register NAUGLES for "cafeteria and restaurant services," which drew a 2(d) likelihood of confusion refusal² based on the existence of Del Taco's then-active NAUGLES registration for "restaurant services." Ziebarth Decl., ¶ 4; Pfeiffer Decl., ¶ 2, Exhibit 1 at p.15. Although Del Taco had closed its last NAUGLES restaurant back in 1995, it continued to fraudulently file renewals for its registration with the USPTO in 1996 and 2006. Pfeiffer Decl., ¶ 4, Exhibit 1 at p. 13-14, 20, and Exhibits 7 and 8. Mr. Ziebarth then successfully petitioned to cancel Del Taco's blocking registration on the grounds of abandonment - a task that Del Taco drew out for almost five years. Ziebarth Decl., ¶ 2; Pfeiffer Decl., ¶ 2, Exhibit 1 (TTAB Opinion dated March 31, 2015 ordering Del Taco's NAUGLES restaurant services registration to be cancelled); see Ziebarth v. Del Taco, LLC, Cancellation Proceeding No. 92053501, Dkt #1. What should have been a routine proceeding, given that Del Taco abandoned its NAUGLES mark over two decades ago, was twisted by Del Taco into a protracted, expensive and unnecessary battle in an effort to "outspend" Mr. Ziebarth and Petitioner and cripple their budding business. Ziebarth Decl., ¶ 2. After a 4.5-year costly battle, the Board granted Mr. Ziebarth's petition, determining that Del Taco had abandoned its NAUGLES mark for restaurant services at least as early as 1995. Pfeiffer Decl., ¶ 2, Exhibit 1 at p. 31 ("Respondent has abandoned use of its registered mark

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¹ Although Application Serial No. 85040746 was originally filed by Mr. Ziebarth, he later assigned his interests in the trademark and the application to Ziebarth Holdings, LLC. Ziebarth Decl., ¶ 12. For simplicity, all references to "Mr. Ziebarth" as owner of this application include both Mr. Ziebarth and Ziebarth Holdings, LLC.

² The Application also initially drew a surname refusal, which has since been overcome by the acceptance of a 2(f) claim. Ziebarth Decl., ¶ 4.

NAUGLES for 'restaurant services' without an intent to resume") (emphasis added) and Exhibits 3, 4 and 5. Del Taco's NAUGLES restaurant services registration was officially cancelled by the Commissioner of Trademarks on July 29, 2015. *Id.*, Exhibit 2. The lengthy trademark dispute with Del Taco garnered a large amount of media attention, particularly in Southern California. Pfeiffer Decl., ¶ 6, Exhibit 9.

Petitioner Naugles Corp. is the exclusive licensee of Mr. Ziebarth's NAUGLES trademark for cafeteria and restaurant services. Zeibarth Decl., ¶ 5. In 2012, Mr. Ziebarth began offering restaurant services in interstate commerce under the NAUGLES mark. *Id.* at ¶¶ 16, 17. Since that time, they have opened two NAUGLES restaurants in Southern California and are planning additional locations. *Id.* at ¶ 13. Despite the massive, expensive, and very public David vs. Goliath fight with Del Taco, Mr. Ziebarth and Petitioner have slowly but surely successfully grown their business. *Id.* at ¶ 6.

B. Del Taco Has Not Registered NAUGLES Or Used NAUGLES As A Trademark On Any Other Goods or Services.

Del Taco owns no other registrations for NAUGLES other than the one for clothing at issue in the Cancellation Proceeding. Pfeiffer Decl., ¶¶ 9, 14, Exhibit 14 and Exhibit 11 (Del Taco's responses to Admission Requests Nos. 48 and 49). Restaurant services and a few food items are the only "other" goods or services for which Del Taco now claims it uses the NAUGLES mark. Pfeiffer Decl., ¶ 10, Exhibit 12 (Del Taco's response to Interrogatory No. 42); Opposition No. 91235706, Dkt. #1 at ¶ 2.

1. Del Taco's Has Not Used NAUGLES As A Service Mark In Connection With Food Items.

Del Taco argues that it has common law rights in NAUGLES in connection with the sale of a few food items because customers associate those items with NAUGLES. Opposition No. 91235706, Dkt. #1 at ¶¶ 2, 7; Pfeiffer Decl., ¶ 11, Exhibit 13 (Del Taco's response to Interrogatory No. 33). However, Del Taco has asserted no credible evidence to support this argument. Del Taco admits that the word "Naugles" cannot be found anywhere on its food menus located in its restaurants or on its website. Pfeiffer Decl., Exhibit 11 (Del Taco's responses to Admission Requests Nos. 31, 32, 33 and 34). Del Taco admits that, when a customer orders any of these so-called "Naugles" food items, the word

"Naugles" appears nowhere on the receipt and never has. *Id.* (Del Taco's responses to Admission Requests Nos. 2, 3, 5, 6, 8, 9, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 26, 27, 29, and 30). Del Taco also admits that it has <u>no evidence</u> to support its assertion that consumers associate all but three of those food items with NAUGLES. *Id.* (Del Taco's responses to Admission Requests Nos. 4, 7, 10, 13, 16, 19, 25).

In April 2014, before the TTAB rendered its decision in the prior cancellation proceeding, Del Taco briefly ran an unauthorized and infringing promotion which included the word "Naugles" for sale of four food items at three of its Southern California restaurants. Ziebarth Decl., ¶ 7; Pfeiffer Decl., ¶¶ 7, 8, Exhibit 10 (FILED AS CONFIDENTIAL). On April 21, 2014, Mr. Ziebarth, who by this time had already been using the NAUGLES trademark for cafeteria and restaurant services for over two years in conjunction with his business partners, immediately sent Del Taco a cease and desist letter, notifying the company that its advertising material was an infringement on Mr. Ziebarth's trademark rights in the NAUGLES mark and demanding that the ads be removed. Del Taco's Exhibit C. Del Taco admits that, within about a month of receiving Petitioner's letter, it had removed all infringing promotional signs. Pfeiffer Decl., Exhibit 11 (Del Taco's response to Admission Request No. 42: "Registrant admits that the specific signs shown [in Ms. Pfeiffer's April 21, 2014 letter] were removed by Registrant by May 31, 2014."). This infringing ad campaign is the only new "evidence" that Del Taco has produced to support its claim that it uses NAUGLES as a service mark.

Other than that singular, infringing act in April 2014, Del Taco has produced <u>no evidence</u> that it has used the word "Naugles" as a trademark in any advertising or promotions for its restaurants or food items. In fact, in June 2014, Del Taco launched an advertising campaign for its 50th anniversary which featured a "Classic Throwback Menu" featuring three of those same food items contained in the infringing ads that Del Taco had displayed in three of its restaurants only a few months prior. Pfeiffer Decl., ¶ 20, Exhibits 23 and 24 (FILED AS CONFIDENTIAL). Tellingly, that campaign never contained the word "Naugles." *Id.*; Pfeiffer Decl., Exhibit 11 (Del Taco's response to Admission Request No. 39: "Registrant admits that the 50th Anniversary campaign was launched without the word 'NAUGLES' featured.").

2. There Is No Evidence Of A "Naugles Secret Menu."

Del Taco has alleged the existence of a "Naugles Secret Menu" to support its position that it still uses NAUGLES as a service mark. Pfeiffer Decl., Exhibit 13 (Del Taco's response to Interrogatory No. 31). Del Taco admits that its alleged "Naugles Secret Menu" cannot be found anywhere inside its restaurants or on its website. Pfeiffer Decl., Exhibit 11 (Del Taco's responses to Admission Requests Nos. 35, 36, 37 and 38). The only new "evidence" produced by Del Taco in this proceeding regarding "Secret Menus" consist of three media articles and a website. Pfeiffer Decl., ¶ 17, Exhibits 17, 18, 19, and 20. Two of the articles and the website *do not mention "Naugles" at all*, and one article simply states that one Del Taco employed tried to open a "Naugles" restaurant, then Del Taco bought it. *Id.* Even if a "secret menu" exists, Del Taco has produced no evidence that there is any use – by Del Taco or its customers – of the NAUGLES mark itself in connection with the "secret menu."

C. Naugles Corp. Now Petitions To Cancel Del Taco's NAUGLES Registration For Clothing.

In late 2011 during the lengthy prior cancellation proceeding, Del Taco filed two, intent-to-use applications with the USPTO: one to register NAUGLES for restaurant services (stylized) (serial no. 85340660)³, and one to register NAUGLES for clothing. Pfeiffer Decl., ¶ 12. Although by 2011 Del Taco had not operated a Naugles restaurant for at least 16 years, it still fraudulently sought additional registrations for a mark it had long ago abandoned. Pfeiffer Decl., ¶ 12. Unfortunately, back in 2011, Mr. Ziebarth and his business partners were not in a financial position to fight Del Taco on two fronts simultaneously, *i.e.*, seek cancellation of the NAUGLES restaurant services registration and oppose the NAUGLES clothing application at the same time. Ziebarth Decl., ¶ 8; Pfeiffer Decl., ¶ 12. As such, Del Taco's NAUGLES clothing application matured to registration. *Id*.

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³ Del Taco's application for NAUGLES (stylized) for restaurant services is suspended pending the outcome of the Mr. Ziebarth's application because his was filed first. Pfeiffer Decl., ¶ 12.

In 2015, once business had ramped up and Petitioner had plans to sell merchandise for its restaurants, it filed to register NAUGLES for clothing. Ziebarth Decl., ¶ 9; Pfeiffer Decl., ¶ 15, Exhibit 15. When that application was met with the inevitable 2(d) refusal based on Del Taco's NAUGLES Clothing Registration, Petitioner filed this petition to cancel. Pfeiffer Decl., ¶ 16, Exhibit 16. Petitioner began selling its NAUGLES clothing at least as early as October 31, 2015 and currently sells clothing and other merchandise at its two restaurant locations, at the gift shop of the Waterfront Hilton Hotel in Huntington Beach, California, and at various promotional and community events in which it participates. Ziebarth Decl., ¶ 10, Exhibit 1.

III. STANDARD FOR SUMMARY JUDGMENT

A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); TBMP § 528.01. The burden of the moving party may be met by showing "that there is an absence of evidence to support the nonmoving party's case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986) (movant has burden of showing the absence of a genuine issue of fact, but nonmovant is not relieved of its own burden to produce evidence pointing to genuine issue). If the moving party meets its burden, that is, if the moving party has supported its motion with affidavits or other evidence that, if unopposed, would establish its right to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence showing that there is a genuine factual dispute for trial. Fed. R. Civ. P. 56(c)(1); *see Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 U.S.P.Q.2d 1783, 1786 (Fed. Cir. 1990) (nonmoving party's response was not supported by contradictory facts, but merely expressed disagreement with facts).

The Lanham Act states that the equitable principle of estoppel can be used to establish a defense or defect in an otherwise presumed valid registration to obtain cancellation. 15 U.S.C. § 1115 (b) (9). If collateral estoppel applies, then "summary judgment may be rendered for the claimant, or the defendant, as the prior judgment may warrant." *Old Grantian Co. v. William Grant & Sons Ltd.*, 361 F.2d 1018, 1021 (1996). Collateral estoppel and res judicata have been the most frequent basis for successful

summary judgment motions. Krugman, Trademark Trial and Appeal Board Practice and Procedure, § 3.96 ("Summary judgement – Advantages and disadvantages."); see, e.g., Danskin, Inc. v. Dan River, Inc., 498 F.2d 1386, (CCPA 1974).

IV. <u>COLLATERAL ESTOPPEL BARS DEL TACO FROM ARGUING IT USES THE</u> NAUGLES MARK FOR RESTAURANT SERVICES AND FOOD ITEMS.

As a preliminary matter, and because it is a pivotal issue in both proceedings, it must be firmly established that collateral estoppel applies herein. Collateral estoppel mandates that prior factual findings from the first cancellation proceeding are controlling in the present cases. This Board made multiple findings of fact in 2015, resulting in its ultimate holding that Del Taco made no service mark use of NAUGLES after 1995 and therefore, due to abandonment 23 year ago, **Del Taco no longer holds rights** in **NAUGLES for restaurant services.** Pfeiffer Decl., <u>Exhibit 1</u> at p.p. 28-29, 31. Because this issue was fully adjudicated in the prior cancellation proceeding, it has been decided and cannot now be raised or relitigated by Del Taco.

This Board recognizes the res judicata and collateral estoppel preclusive effect of its own decisions. *In re Kent G. Anderson*, 101 U.S.P.Q.2d 1912, 1917 (TTAB 2012) ("The doctrine of collateral estoppel, or 'issue preclusion,' applies when 'a matter has been litigated and decided.""). Under the rule of collateral estoppel – the facet of res judicata most often applicable in trademark disputes – once a factual issue has been conclusively determined in a suit, that factual issue is regarded as settled between the parties in all later suits, even on different "claims." *See* Restatement Second of Judgments § 27 (1982).

[The Supreme Court] has long recognized that the determination of a question directly involved in one action is conclusive as to that question in a second suit. The idea is straightforward. Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts. In short, a losing litigant deserves no rematch after a defeat fairly suffered.

B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S. Ct. 1293, 1302-1303 (2015) (internal quotation marks omitted) (citations omitted).

Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.

Id. at p. 1298-1299.

There are four factors that must be satisfied for a prior factual finding to control: 1) identity of an issue in a prior proceeding; 2) the identical issue was actually litigated; 3) determination of the issue was necessary to the judgment in the prior proceeding; and 4) the party defending against preclusion had a full and fair opportunity to litigate the issue in the prior proceeding. *Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 1232, 76 U.S.P.Q.2d 1310 (Fed. Cir. 2005). As illustrated below, all four factors are satisfied.

A. The Issue Of Whether Del Taco Uses NAUGLES For "Restaurant Services" Was Identified In The Prior Cancellation Proceeding.

The prior cancellation proceeding involved one claim: abandonment. The crucial issue identified and litigated in that proceeding was whether Del Taco had lost rights in NAUGLES for restaurant services due to abandonment of the mark. The Board ultimately and conclusively determined that Del Taco had, in fact, abandoned the mark at least as early as 1995.

The record establishes that Respondent made no service mark use of NAUGLES after the closure of the last Naugles restaurant on October 25, 1995 for far longer than three consecutive years. Petitioner has therefore made a prima facie case of abandonment. The burden of production thus shifted to Respondent to prove that it either used the mark during the statutory period or intended to resume use. Since Respondent's evidence shows no service mark use of NAUGLES, we next focus on whether Respondent intended to resume use. . . . Petitioner has shown by a preponderance of the evidence that Respondent has abandoned use of its registered mark NAUGLES for "restaurant services" without an intent to resume. DECISION: The petition for cancellation is granted on Petitioner's claim of abandonment, and Registration No. 1043729 will be cancelled . . ."

Pfeiffer Decl., Exhibit 1 at pp. 28-29, 31.

The existence of a "Naugles Secret Menu" is another issue this Board has already considered and ruled upon, dismissing Del Taco's argument that its sale of a few food items that used to be sold in Naugles restaurants equates to use of NAUGLES as a service mark:

Respondent was unable to point to any further testimony [other than that of Noah Chillingworth, Del Taco's Vice President of Marketing] or documentary evidence regarding the "secret" Naugles menu. There is thus no evidence of the appearance of the NAUGLES mark on a secret menu or advertising materials showing Del Taco's promotion of a Naugles "secret menu." Nor did Respondent provide evidence of any advertising expenditures devoted to promoting NAUGLES or a Naugles "secret menu." In any event, even if the record did support use of a "secret menu," it is not at all clear that there is any use — by Respondent or its customers — of the NAUGLES mark itself in connection with the secret menu. Mr. Chillingworth testified that customers in Respondent's current restaurants sometimes ask for items from the old Naugles restaurants, such as the "bun taco," "MACHO bacon and egg burrito," or "cheese burrito." But there is no testimony or other evidence that the word NAUGLES is actually written or uttered in these transactions. Thus the current sale of food items that were previously served at the now-defunct Naugles restaurant establishments cannot be construed as service mark use of NAUGLES for restaurant services.

Id. at pp. 27-28 (emphasis added). Given the foregoing, this first factor for application of issue preclusion has been established.

B. The Identical Issue Was Actually Litigated.

It cannot be denied that this identical issue was actually litigated. In issue in the prior cancellation proceeding, indeed the *main* issue, was whether Del Taco made service mark use of NAUGLES after its last Naugles restaurant closed in 1995 or whether it had abandoned the mark. *See generally* Pfeiffer Decl., Exhibit 1. In the present proceedings, the issue of whether Del Taco can assert rights for NAUGLES as a service mark is a key element that both Petitioner and Applicant must address to prevail. This issue was actually and fully litigated in the prior cancellation proceeding. *Id.* As such, this second factor for application of issue preclusion has been established.

C. Determination Of The Issue Was Necessary To The Judgment In The Prior Proceeding.

In the prior cancellation proceeding, whether Del Taco made use of NAUGLES as a service mark after 1995 was a threshold determination the Board needed to make before it could reach its conclusion that Del Taco had abandoned the mark. *See* Pfeiffer Decl., Exhibit 1. Indeed, determination of that issue

controlled the ultimate outcome, making it not only "necessary," but vital and pivotal to the Board's decision. *Id.* As such, this third factor for application of issue preclusion has been established.

D. The Party Defending Against Preclusion Had A Full And Fair Opportunity To Litigate The Issue In The Prior Proceeding.

Del Taco had more than ample time and opportunity to offer evidence to rebut Mr. Ziebarth's claim that it had abandoned NAUGLES for restaurant services at least as early as 1995. The prior cancellation proceeding constituted almost 5 years of litigation, with the discovery period, alone, lasting 18 months. Ziebarth Decl., ¶ 2; see generally Ziebarth v. Del Taco, LLC, Cancellation No. 92053501. By any standard, Del Taco most certainly had a full and fair opportunity to present to the Board all of the evidence that could support its contention that it was still making use of NAUGLES as a service mark. As such, the fourth factor for the application of issue preclusion has been established.

E. There Has Been No Material Change In The Facts Since The Prior Cancellation Proceeding.

Approximately three years have passed since the 2015 TTAB decision was issued in the prior cancellation proceeding. *See Test Masters Educational Services, Inc. v. Singh*, 428 F.3d 559 (5th Cir. 2005) (holding that, when only three years had passed since the earlier decision, that was not long enough to find a significant change in the fact sufficient to overcome the preclusion of collateral estoppel). During that short window, there has been no material change in the facts. *See Application of Superior Outdoor Display, Inc.*, 478 F.2d 1388, 178 U.S.P.Q. 151 (CCPA 1973). All of the pertinent facts, testimony and documents that Del Taco has produced in these proceedings are the same facts, testimony and documents, or variations thereof, that it presented in the prior cancellation proceeding.

As recounted above in Section II. B., back in April 2014, Del Taco briefly ran an unauthorized promotion for sale of food items at three of its Southern California restaurants which included the word "Naugles," then quickly removed it after receiving a cease and desist letter from Mr. Ziebarth. Ziebarth Decl., ¶ 7; Pfeiffer Decl., 7, Exhibit 11 (Del Taco's response to Admission Request No. 42); Del Taco's Exhibit C. Since that singular, infringing act in April 2014, Del Taco has produced no evidence that it has used the word "Naugles" as a trademark in any advertising or promotions for its restaurants or food items.

Del Taco's one instance of infringement back in April 2014 is not valid "use" that can now be asserted by Del Taco to establish common law rights in this mark for restaurant services or food items. 15 U.S.C. § 1114. To allow an infringer to benefit from its unauthorized use of another's mark would result in an injustice, to say the least. Even if, for the sake of argument, Del Taco's single instance of infringement could be considered "valid" use, it occurred over three years ago, and Del Taco has produced no evidence showing that it has used "Naugles" in connection with its restaurant services or food items since that time. As such, even this hypothetically valid use still lands Del Taco right back into the familiar position of having abandoned a mark due to nonuse for over three years coupled with no intent to resume. Trademark Act § 45, 15 U.S.C. § 1127.

"There must be an end to all things," and res judicata is the legal rule which brings certain disputes to a final end and prevents endless re-litigation. *See* McCarthy on Trademarks, § 32:78 (2017). Rules of res judicata are not just procedural technicalities, but are essential to a legal system built on due process and fairness to litigants. The Supreme Court has stated:

We have stressed that '[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts" The language used by this Court half a century ago is even more compelling in view of today's crowded dockets.

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981).

Given the foregoing, collateral estoppel applies in these two proceedings, and the prior factual findings that supported this Board's determination that Del Taco abandoned its rights in NAUGLES for restaurant services control herein and bar Del Taco from re-litigating them now.

NAUGLES CORP. V. DEL TACO, LLC - CANCELLATION NO. 92064091:

(Registrant Del Taco moves for Summary Judgment on All Claims)
(Petitioner Naugles Corp moves for Summary Judgment on Claim I and Opposes Summary Judgment on Claims II, III and IV)

In the Cancellation Proceeding, Petitioner opposes Del Taco's motion for summary judgment on all four Claims and submits its own cross motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 and TBMP Section 528 on Claim I seeking cancellation of Del Taco's Clothing Registration

on the grounds of mere ornamental use/failure to function as a trademark. 5 U.S.C. § 1127; *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 34 U.S.P.Q.2d 1161 (1995); *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 86 U.S.P.Q.2d 1369 (Fed. Cir. 2008); TBMP § 309.03 (c).

CLAIM I: DEL TACO'S USE OF "NAUGLES" FOR CLOTHING IS MERELY ORNAMENTAL/FAILS TO FUNCTION AS A TRADEMARK AND, THEREFORE, ITS REGISTRATION SHOULD BE CANCELLED.

On Claim I, Del Taco seeks summary judgment; Petitioner opposes and submits its own crossmotion for summary judgment as follows:

Claim I is ideal for disposal on summary judgment because there is no dispute of the material facts – the parties agree that they both are selling clothing items bearing the word NAUGLES. The only issue that must be decided herein is whether Del Taco's use of NAUGLES on clothing legally constitutes trademark use or whether it is merely ornamental/fails to function as a trademark. Given the undisputed facts, the application of collateral estoppel, and the lack of evidence produced by Del Taco, no reasonable person can conclude that Del Taco's use of NAUGLES on clothing constitutes trademark use. The very essence of trademark law is that a mark must serve as an indicator of the source of the goods or services, identifying and distinguishing them from those of others. *See* 15 U.S.C. §1127; TMEP §1202. "Del Taco" is the source of Del Taco's clothing items, not "Naugles" (Pfeiffer Decl., ¶ 4, Exhibit 6 at 24:3-25), and Del Taco offers no other goods or services under the NAUGLES mark which could transform its use on clothing into a secondary source. Del Taco has produced no credible evidence to support its assertion that consumers associate "Naugles" with Del Taco. As such, Petitioner is entitled to judgment as a matter of law on Claim I.

A. Petitioner Has Standing to Bring This Petition To Cancel.

As a threshold matter, Petitioner can prove it has standing to bring this action. When a plaintiff in a Board proceeding pleads and later proves that it has been refused registration of its mark because of the defendant's registration, it has established a "reasonable belief" of damage, thereby satisfying the standing requirement. *Saddlesprings Inc. v. Mad Croc Brands Inc.*, 104 U.S.P.Q.2d 1948, 1950 (TTAB 2012). On October 20, 2015, Petitioner filed Application Serial No. 86793165 for NAUGLES for

"Clothing, namely, polo shirts, t-shirts, sweatshirts, socks, hats and headbands." Pfeiffer Decl., <u>Exhibit</u>

15. On February 10, 2016, Petitioner's application was refused registration because of an alleged likelihood of confusion with Del Taco's Clothing Registration. *Id.*, <u>Exhibit 16</u>.

Prior to filing its application for clothing, Petitioner took concrete steps towards using the mark by developing designs for its merchandise and contacting printing companies to set up accounts for products soon to be produced. Ziebarth Decl., ¶ 11. Petitioner also advertised in its Naugles restaurant and to its customers that NAUGLES clothing would soon be available. *Id.* Based on the foregoing, Petitioner had a *bona fide* intent to use the mark prior to filing its application and is therefore entitled to rely upon the ownership of its refused application to prove standing.

B. Del Taco's Use Of "Naugles" For Clothing Is Merely Ornamental/Fails To Function As A Trademark.

Because Del Taco's Clothing Registration has not become incontestable, the registration is only prima facie evidence of Del Taco's exclusive right to use the mark. 15 U.S.C. § 1115(a). The Lanham Act is clear that this evidentiary effect "shall not preclude an opposing party from proving any legal or equitable defense or defect, including those set forth in subsection (b), which might have been asserted if such mark had not been registered." *Id.* Failure of a designation to function as a trademark as well as collateral estoppel are well-recognized legal grounds upon which to seek cancellation of a mark. 15 U.S.C. § 1115(b); *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 34 U.S.P.Q.2d 1161 (1995); *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 86 U.S.P.Q.2d 1369 (Fed. Cir. 2008); TBMP § 309.03 (c).

In general, a designation that is solely "ornamental" cannot be a trademark. *Bobosky v. Adidas AG*, 843 F. Supp. 2d 1134, 1143 (D. Ore. 2011). A designation is merely ornamental if it is not inherently distinctive and does not function as a source identifier. *See In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 U.S.P.Q. 345, 347 (CCPA 1975); *see also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 U.S.P.Q.2d 1681, 1687 (Fed. Cir. 2010). If inherent distinctiveness or acquired distinctiveness cannot be shown, the only way to show that such matter serves as a trademark is by showing that the party has used

or registered the designation in a nonornamental manner for other goods or services. *In re Lululemon Athletica Canada Inc.*, 105 U.S.P.Q.2d 1684, 1686 (TTAB 2013); TMEP § 1202.03(c). The TTAB has long held that ornamentation on apparel, including shirts manufactured by third parties, qualify as trademark use only if the particular ornamentation serves as an indication of a secondary source of origin. *See, e.g., In re Olin Corp.*, 181 U.S.P.Q. 182 (1973). For example, in *In re Olin Corp.*, the applicant held a registration for "O" for use on its skis as a trademark. As such, the TTAB found that the mark could be registered for use on t-shirts. *Id.*

1. Del Taco's Use of "NAUGLES" Cannot Be Distinctive.

A designation that fails to function as a trademark is not inherently distinctive. See, e.g., In re Chippendales USA, Inc., 622 F.3d 1346, 96 U.S.P.Q.2d 1681, 1687-1688 Fed. Cir. 2010); see also In re Soccer Sport Supply Co., 507 F.2d 1400, 184 U.S.P.Q. 345, 347 (CCPA 1975). The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public. In re Eagle Crest Inc., 96 U.S.P.Q.2d 1227, 1229 (TTAB 2010). The manner in which the party has employed the asserted mark must be carefully considered. In re Bose Corp., 546 F.2d 893, 192 U.S.P.Q. 213, 216 (CCPA 1976). The size, location, dominance and significance of the alleged mark as applied to the goods are all relevant factors in determining whether it performs the function of a trademark. In re Hulting, 107 U.S.P.Q.2d 1175, 1177 (TTAB 2013) (citation omitted). On Del Taco's hat, the word "Naugles" is displayed prominently across the front in large letters; on Del Taco's shirt, the word "Naugles" appears prominently on the front, in the center, and is part of a larger design. Pfeiffer Decl., ¶ 18, Exhibit 21 (Del Taco's webstore showing its one "Naugles" hat and one "Naugles" shirt for sale). This type of display of a word and design is consistent with an ornamental feature or every day phrase which do not indicate the source of goods or identify and distinguish them from others. 15 U.S.C. \$\\$1051-1052, 1127; see In re Villeroy & Boch S.A.R.L., 5 U.S.P.Q.2d 1451, 1454 (TTAB 1987).

A review of Del Taco's webstore shows that the word "Naugles" is not being used as trademark on the website as well. Pfeifer Decl., <u>Exhibit 21</u>. Each listing for a clothing item on this site is formatted the same: a picture of the product with its description immediately above in a non-descript, black font. *Id.*

For example, the first item shown for sale is a grey hoodie with the words "Del Taco" and its logo on the front, pocket area. *Id.* at DELTACO 000371. Immediately above that picture is this description in black, non-descript lettering: "DEL TACO GREY HOODIE – 2XL." *Id.* The listing for the "Naugles" hat follows the exact format – a picture of the hat with this description immediately above: "Naugles Original Baseball Cap – Brown." *Id.* at DELTACO000373. The listing for the "Naugles" shirt is no different- a picture of the shirt under the description "Naugles Piped Tshirt-Brown Medium." *Id.* On this webstore site, the name of the section under which these "Naugles" products are listed is "Del Taco Apparel & Headwear." *See, e.g., id.* at the top of DELTACO000371. The descriptions above the hat and shirt are the only two places where the word "Naugles" is seen on these pages, other than on the products themselves. The listings for the two "Naugles" products are not separated from the other products, nor do their descriptions appear in bigger, brighter or different fonts than any other product on the page.

Contrary to the assertion in Del Taco's Brief that "Naugles" is used on its website "as a source identifier and brand to identify the source of the clothing being sold" (Del Taco's Brief, p. 11), the word "Naugles" on this Del Taco Webstore is not displayed separately or prominently in any part of the store in the traditional way a trademark would be. Mere assertions in a brief, without evidentiary support, are insufficient. *In re Bookbinder's Rest., Inc.*, 240 F.2d 365, 112 U.S.P.Q. 326, 328 (CCPA 1957). The word "Naugles" is only used twice for descriptive, information purposes. Taken together, Del Taco's use of "Naugles" as a large word on its hat and as part of a large design on its shirt, coupled with its informational and sparse use on its website, fails to function as a trademark. Therefore, it cannot be inherently distinctive. *See, e.g., In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 U.S.P.Q.2d 1681, 1687-1688 Fed. Cir. 2010); *see also In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 U.S.P.Q. 345, 347 (CCPA 1975).

Alternatively, "Naugles" is not an entirely invented or "fanciful" term, a fact that Del Taco flatly admits in its Brief. Del Taco's Brief, p. 4 (". . . NAUGLES is a surname and the name of the original owner of the [old] NAUGLES restaurant chain."). The USPTO agrees with Del Taco's conclusion that NAUGLES is a surname and, from 2010 through 2015, the USPTO has deemed it so. *See, e.g.*, Pfeiffer

Decl., Exhibit 16 and Del Taco's Exhibit E (office actions issuing surname refusals against registration of "Naugles" for clothing and cafeteria and restaurant services). Because the USPTO has a permanent Consistency Initiative which seeks to prevent inconsistent practice within the office (Pfeiffer Decl., ¶ 19, Exhibit 22), it is presumed that the only reason Del Taco's application for NAUGLES for clothing failed to draw a surname refusal while both of Mr. Ziebarth's and Petitioner's nearly identical applications did, was because, during the application process, Del Taco claimed ownership of its now-defunct restaurant services registration. Pfeiffer Decl., ¶ 13; Del Taco's Exhibit DD. Although the registration was still technically live at the time Del Taco filed its application in 2011, it had already closed its last "Naugles" restaurant and abandoned the mark 16 years prior. Had Del Taco offered this material fact to the USPTO, the Consistency Initiative would have no doubt spurred the examining attorney to assert the USPTO's position that "Naugles" has been deemed by its office as primarily a surname for clothing and restaurant services.

Further, the term "Naugles" has not acquired distinctiveness as applied to Del Taco's clothing, and Del Taco has produced no evidence to show otherwise. Del Taco has not enjoyed substantially exclusive and continuous use of the term "Naugles" in commerce for the requisite five years. Ziebarth Decl., ¶ 10 (Petitioner's sale of its NAUGLES-branded clothing began at least as early as October 31, 2015). As such, Del Taco does not enjoy a presumption of acquired distinctness that could come with 5 years of registration with substantially exclusive use.

Not every designation that a party places on goods or packaging, or uses in connection with services, is an inherently distinctive source indicator, regardless of the party's intentions when adopting the designation. *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229 (TTAB 2010); *In re Vertex Grp., LLC*, 89 U.S.P.Q.2d 1694, 1701 (TTAB 2009) ("As is the case with any trademark, mere intent that a word, name, symbol or device function as a trademark or service mark is not enough in and of itself."). Del Taco has produced no testimony, consumer surveys, documents or discovery that would establish that the principal function of "Naugles" on its clothing is to identify the source of its clothing and distinguish it from that of others. In short, the only thing Del Taco can point to that supports its assertion that its

registration is valid is the piece of paper itself. By a preponderance of the evidence, Petitioner has rebutted the prima facie validity of Del Taco's Clothing Registration.

2. Del Taco Has Not Registered or Used NAUGLES In A Nonornamental Manner For Other Goods Or Services.

As detailed above in Section II. B., Del Taco does not hold any other registrations for NAUGLES. As detailed above in Section IV., collateral estoppel applies herein and bars Del Taco from asserting rights in NAUGLES as a service mark for restaurant services or food items.

All things taken together, there is no genuine dispute of material fact that Del Taco's use of "Naugles" on its clothing is merely ornamental and, thus, fails to function as a trademark. Del Taco has produced no evidence to show that the primary significance of the term NAUGLES in the minds of the consuming public is Del Taco and, as such Del Taco's Clothing Registration is invalid. No reasonable trier of fact could find other than for Petitioner on Claim 1. As such, Petitioner should be granted summary judgment as a matter of law on this Claim.

CLAIM II: A GENUINE DISPUTE OF MATERIAL FACT EXISTS AS TO WHETHER DEL TACO'S CONDUCT HAS CAUSED THE MARK TO LOSE ITS SIGNIFICANCE AS A TRADEMARK AND, THEREFORE, DEL TACO'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED.

On Claim II, Del Taco seeks summary judgment; Petitioner opposes as follows:

Del Taco's bare-bones argument for summary judgment on Claim II consists of its assertion that "there is not a single piece of evidence" of third party use of the Naugles mark. Del Taco's Brief, pp. 12-13. In reality, multiple pieces of evidence do, in fact, exist.

A. Del Taco's Own Vice President Of Marketing Testified That He Was Aware Of Third-Party Sales Of "Naugles" Products Dating Back To 2011.

In the prior cancellation proceeding, Mr. Chillingworth testified that he was aware of third-party sales of "Naugles" clothing:

Q: So you are not aware of anybody else selling clothing items bearing the Naugles mark other than Del Taco?

A: I know that we had seen others try, and I believe we had sent cease and desist letters.

Q: Okay. And was that on more than one occasion?

A: I don't believe so. Just once.

. . .

Q: Do you recall when that was?

. . .

A: I believe late 2011.

Pfeiffer Decl., ¶ 4, Exhibit 25 at 50:10-51:4. Mr. Chillingworth also testified that it was either he, himself, or someone in his marketing department that made this discovery:

Q: How did you become aware that somebody else was selling clothing?

. .

A: I don't remember for sure if I had stumbled upon it or somebody who worked for me had found it.

Id. at 51:5-15. Mr. Chillingworth further testified that someone within Del Taco "probably" handled this issue of a third-party seller in addition to his lawyer, but he has no personal knowledge of whether the issue was ever followed-up on or how it was resolved:

Q: Other than your legal counsel, did anybody within Del Taco deal with this?

A: Probably, but I don't know for sure.

Q: You know that a cease and desist letter was sent?

A: I believe so.

Q: Did you ever see that letter?

A: No. My lawyer would have.

Q: So somebody informed you that a cease and desist letter was sent?

A: Yes.

Q: Do you know what came of this whole – what the resolution was?

A: I do not.

Id. at 52:11-24. Mr. Chillingworth's testimony constitutes evidence of third-parties using "Naugles" in connection with clothing.

B. Petitioner Produced Evidence of Third-Party Uses in Discovery.

Petitioner produced documents in discovery showing that redbubble.com and overstock.com are selling "Naugles" shirts, as well as documents showing that zazzle.com is selling coffee mugs bearing the NAUGLES mark. Pfeiffer Decl., ¶ 21, Exhibit 26. These documents constitute evidence of third-parties using "Naugles" in connection with clothing. *Id*.

C. Del Taco's Own Exhibits Show "Naugles" Clothing Purchased From Third-Party Sellers.

Del Taco claims that <u>Exhibit AA</u> attached to its moving papers is a hat sold by Petitioner. Del Taco's Brief, p. 11. In reality, this hat was purchased by Mr. Ziebarth off of Ebay in 2011. Ziebarth Decl., ¶ 14. Del Taco also claims that its <u>Exhibit BB</u> is a shirt sold by Petitioner. Del Taco's Brief at pp. 11-12. Again, the shirt in this picture was purchased by Mr. Ziebarth from a third-party vendor. *Id.* Petitioner has never represented to Del Taco that it sold the hat or shirt seen in these exhibits, and neither was included with the batch of photos that Petitioner provided to Del Taco in discovery illustrating its NAUGLES products. Pfeiffer Decl., ¶ 22. Del Taco's <u>Exhibits AA and BB</u> constitute evidence of third-party sales of "Naugles" clothing.

Despite Del Taco's assertions otherwise, at least three types of evidence exist showing that multiple third-parties use "Naugles" in connection with clothing. Del Taco has produced no evidence that it has attempted to police the use of NAUGLES on clothing sold by these third-party vendors. As such, a genuine dispute of material fact exists as to whether Del Taco's failure to police NAUGLES has caused the mark to lose its significance as a trademark. Therefore, Del Taco's summary judgment motion should be denied.

CLAIM III: A GENUINE DISPUTE OF MATERIAL FACT EXISTS AS TO WHETHER DEL TACO COMMITTED FRAUD IN THE PROCUREMENT OF ITS CLOTHING REGISTRATION AND, AS SUCH, DEL TACO'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED.

On Claim III, Del Taco seeks summary judgment; Petitioner opposes as follows:

On Claim III, material facts are in dispute, rendering disposition of this claim on summary judgment inappropriate. Evidence does exist that supports the inference that Del Taco willfully and intentionally deceived the USPTO during the application process for its NAUGLES Clothing Registration by failing to apprise the Trademark Office of a material fact, namely, that the NAUGLES mark for restaurant services had been abandoned. During the prosecution of its NAUGLES Clothing Registration, Del Taco had already closed its last Naugles restaurant <u>16 years prior</u>. Pfeiffer Decl., ¶¶ 2, 3 <u>Exhibit 1</u> at pp. 13-14 and Exhibits 3, 4 and 5. Mr. Chillingworth has been working for Del Taco in the marketing

department since February 2009. Del Taco's Exhibit A, ¶ 1. Del Taco's counsel Dinsmore & Shohl LLP, who filed its 2011 application for NAUGLES for clothing, has been counsel of record for Del Taco and its registrations and applications at the USPTO since 2007. Pfeiffer Decl., ¶ 23, Exhibit 27. During the entire time that both Mr. Chillingworth has worked for Del Taco and Dinsmore & Shohl LLP has been counsel for Del Taco, Del Taco has never operated a Naugles restaurant. Pfeiffer Decl., ¶¶ 2, 3 Exhibit 1 at pp. 13-14 and Exhibits 3, 4 and 5. As such, when Del Taco claimed ownership of the NAUGLES registration for restaurant services, neither party can be considered to have had a good-faith belief that the mark was still being actively used for restaurant services. Judging by the sheer amount of time that passed between when Del Taco closed its last Naugles restaurant and when it filed to register NAUGLES for clothing, it can be inferred that failing to tell the Trademark Office that the mark was no longer in use for restaurant services was not an honest mistake made with a reasonable belief that it was true. The Federal Circuit has held that "[t]here is no fraud if a false representation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive." Embarcadero Techs., Inc. v. Delphix Corp., 2016 TTAB LEXIS 11 at *10-11 (TTAB) (citing In re Bose Corp., 580 F.3d 1240 (Fed. Cir. 2009)).

Del Taco's argument that there is a difference between the validity of the registration and the validity of the underlying mark is splitting hairs. Del Taco's Brief, p. 15 ("Del Taco did not fraudulently assert to the Trademark Office that it was actively using the NAUGLES trademark in connection with restaurant services . . . Del Taco merely claimed ownership in its trademark registration . . . "). Del Taco's assertion that the registration was active even if the underlying mark itself had been abandoned is a distinction without a difference. In reality, no discernable difference exists or should exist to maintain the integrity of the USPTO Register. It is a logical fallacy that, even if Del Taco knew it had abandoned NAUGLES for restaurant services 16 years prior when it filed its clothing application, it was technically not "fraud" to claim ownership of the registration because its inevitable cancellation had not yet happened. This rationale is duplicitous and fails to account for the key factor here – intent. Del Taco knew

the mark itself had been abandoned yet purposely withheld that material fact from the USPTO during the application process.

Once a trademark has been abandoned, a registration based on that mark becomes invalid, *i.e.*, one cannot own a "trademark registration" if it no longer owns the underlying trademark. By claiming ownership of the invalid restaurant services registration, Del Taco intentionally withheld a material fact.

[T]he law does not require "smoking gun" evidence of deceptive intent but instead has long recognized that direct evidence of deceptive intent is rarely available and **deceptive intent may be inferred from the surrounding facts and circumstances**. We may infer deceptive intent where the involved conduct, viewed in light of all the evidence . . . indicate[s] sufficient culpability to require a finding of intent to deceive. Specifically, we have inferred culpable intent in cases where we have found an accused party's testimony to lack credibility.

Nationstar Mortgage LLC v. Ahmad, 112 U.S.P.Q.2d 1361, 1365 (TTAB 2014) (internal citations omitted) (internal quotations omitted) (emphasis added).

Del Taco's argument that, when it filed its clothing application, it offered a few food items that were originally sold at Naugles restaurants does not bolster its position. Del Taco knew it was not advertising those food items as "Naugles" items. Pfeiffer, Exhibit 1 at p. 28 ("[T]he current sale of food items that were previously served at the now-defunct Naugles restaurant establishments cannot be construed as service mark use of NAUGLES for restaurant services.").

In sum, Del Taco's allegation that "there is not a single piece of evidence, not even circumstantial, that could satisfy Petitioner's high evidentiary burden" is insufficient without evidentiary support. Del Taco's Brief, p. 15; *In re Bookbinder's Rest.*, *Inc.*, 240 F.2d 365, 112 U.S.P.Q. 326, 328 (CCPA 1957). Because Del Taco knew its last restaurant had closed 16 years prior and it was not advertising food items as "Naugles" food items, there is more than sufficient evidence to support the inference that Del Taco willfully and intentionally deceived the USPTO by failing to inform it that the NAUGLES mark for restaurant services had been abandoned. As such, dismissing Claim III on summary judgment is not appropriate, and Del Taco's motion should be denied.

CLAIM IV: A GENUINE DISPUTE OF MATERIAL FACT EXISTS AS TO WHETHER DEL TACO MISREPRESENTED THE SOURCE OF ITS GOODS AND, AS SUCH, DEL TACO'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED.

On Claim IV, Del Taco seeks summary judgment; Petitioner opposes as follows:

A genuine dispute of material fact exists because there is sufficient evidence to support the inference that Del Taco misrepresented the source of its goods. Specifically, Del Taco blatantly capitalized on the media attention Naugles Corp. has received and the hype it has created with its NAUGLES restaurants by selling shirts and hats bearing the word NAUGLES.

A. Del Taco Is Not The "Senior User" Of The NAUGLES Trademark Because It Has Not Used NAUGLES As A Trademark.

First, as illustrated above in Claim I, Del Taco has not used NAUGLES as a trademark for clothing; instead, its use of the word is merely ornamental and therefore fails to function as a trademark.

As such, Del Taco cannot be the "senior user" of the mark because it is not using NAUGLES as a trademark.

B. The Timing Of Del Taco's Decision To Capitalize On NAUGLES Is Suspect.

Mr. Ziebarth and Petitioner have received nationwide media attention for their efforts to get their NAUGLES restaurants off the ground. Pfeiffer Decl., ¶ 6; Ziebarth Decl., ¶ 2. Del Taco was well aware of Petitioner's efforts and the resulting media attention, as evidenced by multiple letters sent to Petitioner and Mr. Ziebarth by Del Taco's counsel, demanding it cease and desist use of the NAUGLES mark. See., e.g., Pfeiffer Decl., ¶ 6, Exhibit 30 (FILED AS CONFIDENTIAL). It was only after Mr. Ziebarth filed his application for NAUGLES for restaurant services that Del Taco sought a registration for NAUGLES for clothing. It was only after Mr. Ziebarth filed a Petition to Cancel Del Taco's now-cancelled NAUGLES registration for restaurant services that Del Taco sought a registration for NAUGLES for clothing. At the time it filed its clothing application, Del Taco had actual knowledge that Petitioner and Mr. Ziebarth had a bona fide intent to use the NAUGLES mark in connection with their restaurants and related promotional items, such as clothing and hats. At the time it filed its application, Del Taco had already abandoned the NAUGLES mark at least as early as 1995. Del Taco's motivation for selling shirts

and hats bearing the NAUGLES mark and for seeking the registration at issue in this petition was to trade on the ever-growing media coverage devoted to Petitioner and Mr. Ziebarth in connection with their NAUGLES restaurants.

C. Mr. Chillingworth "Saw A Business Opportunity" At The Exact Time Petitioner Was Gaining Momentum.

Mr. Chillingworth testified that, in 2011, it was his idea to start selling "Naugles" clothing. Pfeiffer Decl., ¶ 4, Exhibit 28 at 21:22-25 and 22:9-17. When asked why he thought this was a good idea, he stated that it was because he "saw a business opportunity." *Id.* The "business opportunity" he presumably saw in 2011, but had never seen before, was the excitement and goodwill Petitioner was building in the NAUGLES mark. Del Taco's "business opportunity" was to capitalize on Petitioner's growing notoriety. The timing of Del Taco's idea to capitalize on a new "business opportunity" is suspect, as it coincided with Petitioner's efforts to use the mark.

Del Taco's above-described actions constitute blatant misuse of the mark and evidence Del Taco's intentions to capitalize on Petitioner's revival of the NAUGLES mark. Because facts do exist that support Petitioner's claim, a genuine dispute of material fact exists and, therefore, Del Taco's summary judgment motion should be denied.

<u>DEL TACO, LLC v. ZIEBARTH HOLDINGS, LLC - OPPOSITION NO. 91235706:</u> (Opposer Del Taco moves for Summary Judgment on Claims I and III) (Applicant Ziebarth Holdings, LLC opposes and moves for Summary Judgment on All Claims)

In the Opposition Proceeding, Applicant opposes Del Taco's motion for summary judgment on Claims I and III and submits is own cross motion for summary judgment on all Claims pursuant to Federal Rule of Civil Procedure 56 and TBMP Section 528.

I. ADDITIONAL FACTS SPECIFIC TO THE OPPOSITION PROCEEDING

After this Board handed down its decision in the prior cancellation proceeding in 2015, Applicant's application process resumed a few months later. Del Taco's <u>Exhibit H</u>. Because the Application was initially filed in 2010 then relatively quickly suspended as the result of the petition to cancel Del Taco's blocking registration, much had happened with regard to use of Applicant's trademark,

licensing of the mark, and various other business opportunities and ventures. Ziebarth Decl., ¶ 15. Between the dates of September 29, 2015 and April 6, 2017, Applicant engaged in multiple back and forths with the Trademark Office, a practice which is quite common during any application process. Pfeiffer Decl., ¶ 24. All correspondence and responses to Office Actions submitted to the Trademark Office were accurate and made in good-faith. *Id.*; Ziebarth Decl., ¶ 15. Applicant never missed a deadline to file a response. *Id.* Applicant was never cited by the Trademark Office for an improper response. *Id.* On the contrary, Applicant was diligent in following the Trademark Rules of Examining Procedure and all applicable guidelines to a "T" to ensure that the Application remained on track. *Id.*

A. Mr. Ziebarth Began Using The NAUGLES Mark As Early As March 20, 2012, A Fact That Two Independent Witnesses Who Attended The March 20, 2012 Event Have Corroborated In Supporting Declarations.

On March 20, 2012, Mr. Ziebarth offered cafeteria and restaurant services under the NAUGLES mark in Huntington Beach, California. Ziebarth Decl., ¶ 16; see generally Feuerstein Decl.; see generally Fonseca Decl.; see generally Odell Aff.; Pfeiffer Decl., ¶ 26, Exhibit 29 (Applicant's response to Interrogatory No. 2). In discovery, Applicant provided to Del Taco the sworn statements of two people, Eve Feuerstein and Carlos Fonseca, who were in attendance at this event and remember it well. Id.; Pfeiffer Decl., ¶ 25. At the event, Mr. Ziebarth provided his customers with a NAUGLES menu, which is the same menu submitted with Applicant's Statement of Use. Ziebarth Decl., ¶¶ 16, 17; Del Taco's Exhibit I. Ms. Feuerstein and Mr. Fonseca distinctly remember seeing this menu on March 20, 2012. Feuerstein Decl., ¶ 6, Exhibit A; Fonseca Decl., ¶ 5, Exhibit A. Applicant also provided to Del Taco a sworn statement from Mr. Bill Odell who remembers Mr. Ziebarth telling him about his March 20, 2012 event around the time that it happened and showing him the menu that he used. Pfeiffer Decl., ¶ 25; Odell Aff. ¶ 3. Further, on March 20, 2012, Mr. Ziebarth uploaded a picture of this same menu onto Flickr. Ziebarth Decl., ¶ 16, Exhibit 2 (screenshot reflecting Flickr upload date of March 20, 2012 for NAUGLES menu). Mr. Ziebarth had offered NAUGLES food on occasions prior to this event, but, because this event was the first one for which Mr. Ziebarth had photographic evidence and could solidly document that it happened, this was the date he chose to use on his Statement of Use. Ziebarth Decl., ¶

17; Odell Aff., ¶¶ 3, 4; Pfeiffer Decl, Exhibit 29 (Applicant's response to Interrogatories Nos. 10 and 11). This pop-up event or preview meal was performed with the understanding that Mr. Ziebarth was actively and diligently building his business of offering cafeteria and restaurant services under the NAUGLES mark. *Id.*; Feuerstein Decl., ¶ 5; Fonseca Decl., ¶ 4; Odell Aff., ¶ 6.

From 2012 forward, Mr. Ziebarth and Naugles Corp diligently and consistently continued to offer cafeteria and restaurant services under the NAUGLES mark. Ziebarth Decl., ¶ 18; Pfeiffer Decl., Exhibit 29 (Applicant's responses to Interrogatories Nos. 2, 3, 4, 5, 15, and 16). For example, Applicant's services were offered under the NAUGLES mark throughout 2012 and 2013 at various special events and pop-up locations; at Coach's Bar & Grill in Lancaster, CA in July of 2014; at Pig & Parsley in Fountain Valley, CA in October and December of 2014; at LA Weekly's Tacolandia event in Downtown Los Angeles, CA in June 2015; at the Fountain Valley NAUGLES restaurant location beginning in July 2015; and at a wedding in Huntington Beach, CA, on August 29, 2015. Ziebarth Decl., ¶ 18; Pfeiffer Decl., Exhibit 29 (Applicant's responses to Interrogatories Nos. 2, 3, 4, and 5). Applicant and Naugles Corp currently operate NAUGLES restaurants in Fountain Valley, California and Huntington Beach, California, with additional locations in the works. Ziebarth Decl., ¶ 18; Pfeiffer Decl., Exhibit 29 (Applicant's responses to Interrogatories Nos. 5, 6, 7, 15, and 16).

CLAIM I: THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT APPLICANT DID NOT KNOWINGLY MAKE A FALSE, MATERIAL REPRESENTATION OF FACT IN CONNECTION WITH HIS APPLICATION WITH THE INTENT TO DECEIVE THE USPTO; AS SUCH, SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF APPLICANT.

On Claim I, Del Taco seeks summary judgment; Applicant opposes and submits its own crossmotion for summary judgment as follows:

"Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application." *Galleon S.A. v. Havana Club Holding, S.A.* 2004 TTAB LEXIS 38 at *52 (TTAB 2004) (*citing Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46 (Fed. Cir. 1986)). The standard by which fraud must be proven is clear and convincing

evidence, and any doubt must be resolved against a finding of fraud. *Krause Publications, Inc. v. Krause*, 2007 TTAB LEXIS 656 at *35 (TTAB 2007).

Del Taco's fraud claim boils down to two allegations: 1) Applicant's March 20, 2012 date of first use submitted to the USPTO was a false, material representation of fact made with the intent to deceive the Trademark Office and, 2) Applicant took too long to complete the application process, submitted a 2(f) declaration and overcame a surname refusal, which somehow equates to fraud on the USPTO. The first allegation can be conclusively negated by witness testimony and evidence, along with no ability by Del Taco to prove the "intent" requirement. The second allegation fails to allege any rules or guidelines broken by Applicant, and again, Del Taco has no ability to prove the "intent" requirement. Del Taco simply cannot prove its case.

A. Applicant's Statement Of Use Was Not Fraudulent.

There is a wealth of facts that prove that the March 20, 2012 event actually took place, including sworn declarations from three witnesses and proof that Mr. Ziebarth uploaded his NAUGLES menu onto Flickr on this date. Ziebarth Decl., ¶ 16, Exhibit 2; see generally Feuerstein Decl.; see generally Fonseca Decl.; see generally Odell Aff.. Del Taco was given all of this information in discovery, yet failed to address it in its motion.

Applicant does not dispute that its Statement of Use was material to the examining attorney's approval of the Application for publication. The Statement, however, was not "false" because the mark was actually used on March 20, 2012, as illustrated above. Further, even if somehow the asserted date could be construed as "false" by disregarding the witness testimony and the Flickr upload date, the Statement still was not made "with the intent to deceive the USPTO," because Applicant did, in fact, make use of its NAUGLES mark on this date. It, therefore, had a reasonable belief that its statement was true. See Krause Publications, Inc. v. Krause, 2007 TTAB LEXIS 656 at *35 (TTAB 2007) (Even if a statement is false, if that statement was made with a reasonable belief that it was true, the statement is not considered fraudulent). Any way you slice it, Del Taco simply cannot prove that Applicant's Statement of Use was "false" and "knowing" and "made with the intent to deceive," let alone prove it "to the hilt" as is

the required standard. *Slaska Wytwornia Woodek Gatunkowtch "Polmos" SA v. Stawski Distrib. Co.*, 2010 TTAB LEXIS 342 at *11-12 ("The very nature of the charge of fraud requires that it be proven to the hilt with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.") (internal quotations omitted).

B. Nothing "Fraudulent" Occurred During The Application Process.

Although Del Taco attempts to paint Applicant's correspondence with the Trademark Office between September 29, 2015 and April 6, 2017 as nefarious, the reality is that Applicant did nothing wrong. Del Taco is attempting to view the Application's prosecution history, in hindsight, and twist it into something sinister. However, within the numerous pages of Del Taco's Brief devoted to re-hashing the Application's prosecution history, **Del Taco has not cited one rule or guideline Applicant failed to follow, nor one false statement submitted to the PTO.**

First, all of the submissions made to the Trademark Office in connection with the Application were made in good faith and were accurate as of the date they were made. Ziebarth Decl., ¶ 15; Pfeiffer Decl., ¶ 24. As such, none of Applicant's representations of fact made to the Trademark Office were knowingly false, and Del Taco has not produced evidence otherwise, let alone enough to meet its high burden to satisfy this prong of a fraud claim. Second, Del Taco is attempting to substitute its judgment for that of the USPTO in arguing that Applicant's responses to Office Actions between September 29, 2015 and April 6, 2017 were "deficient." As the application process takes place between Applicant and the USPTO, decisions regarding the adequacy of Applicant's responses fall squarely on the shoulders of the USPTO, not a third party looking back in hindsight. Del Taco does not have the standing to raise this issue, as all determinations regarding the sufficiency of Office Action responses start and stop with the USPTO. See Century 21 Real Estate v. Century Life of America, 10 USPQ2d 2034 (TTAB 1989) (Asserted error by an examining attorney is not a proper ground for opposing an application). The reality is that Del Taco is making this allegation because it is unable to raise any law, rule or guideline that Applicant has failed to follow. In the absence of any actual allegation of wrong-doing, all Del Taco is left with is a bald allegation.

Here are the material facts that are <u>not</u> in dispute: Applicant's Statement of Use was not "false" and there is ample proof to support the veracity of the date alleged; all of the submissions made to the Trademark Office in connection with the Application were made in good faith and were accurate as of the date they were made; and Del Taco has failed to cite any law, rule or guideline that Applicant failed to follow during the application process. Based on these material facts that are not in dispute, for the Board to adopt Del Taco's position, it would have to completely disregard eye-witness testimony as well as proof that Mr. Ziebarth uploaded his NAUGLES menu on the date of March 20, 2012. Even if the Board were to question the credibility of a witness, the hard evidence does not lie. No reasonable person could conclude that Applicant committed fraud during the application process. Given the foregoing, Del Taco has not, and cannot, make a case for fraud against Applicant. Instead, because there is no genuine dispute of material fact, summary judgment should be granted in Applicant's favor.

Although Applicant feels confident that the arguments and facts asserted above are enough to prove it is entitled to summary judgment on this Claim, in an abundance of caution, it herein addresses some of the other allegations made in Del Taco's Brief. Del Taco uses multiple pages to discuss statements and testimony made by Mr. Ziebarth in the prior proceeding to cloud the issue and impugn his credibility. However, none of the statements or testimony raised by Del Taco were made in connection with the Application, and therefore should be irrelevant to Del Taco's claim of fraud in the procurement of a trademark registration. Nevertheless, Applicant herein addresses them because Del Taco's allegations are either misleading or have been taken out of context.

C. Mr. Ziebarth's Statements and Testimony Throughout the Years are Not As "Conflicting" as Del Taco Twists Them To Be.

The prior cancellation proceeding on abandonment concerned *Del Taco's use of "Naugles" as a mark (or lack thereof)*, not Mr. Ziebarth's. Any testimony or responses given by Mr. Ziebarth were focused on establishing his intent to use prior to filing his application in 2010. Beyond that, Mr. Ziebarth's actual use was not fully explored or explained. Del Taco's Brief contains multiple instances where one of Mr. Ziebarth and/or Applicant's statements or discovery responses are cited to "prove" that

the Statement of Use date was fraudulent. However, the responses do not actually say what Del Taco alleges they do. Del Taco has picked and chosen specific words or phrases and presented them in a vacuum, failing to take them in the context of the entire response or the statement as a whole.

First, Mr. Ziebarth stated clearly in discovery responses in the prior cancellation proceeding that he used the mark on March 20, 2012. Del Taco claims that Mr. Ziebarth's written discovery responses from the first proceeding reflect that "he did not offer cafeteria and restaurant services under the NAUGLES mark." Del Taco's Brief, p. 5 (citing Del Taco's Exhibit K at Admission Request No. 6). In reality, a read of Mr. Ziebarth's cited discovery response clearly states in the third paragraph, "Petitioner has provided preview meals under the Naugles mark. On or around March 20, 2012, Petitioner catered lunch at his place of employment serving Naugles menu items and created a Naugles menu for that lunch." Del Taco's Exhibit K at p. 8. This same statement is contained in Mr. Ziebarth's responses to Admission Requests Nos. 1-4, 6, 7, 11-24, 27-32, 35, 40, 52, 57 and 62. Id. Mr. Ziebarth and his attorney, whether or not they were well-versed in the definition of "use" under trademark law at the time, gave those responses in good-faith, and the responses clearly state that Mr. Ziebarth used the mark on March 20, 2012. Id. (Mr. Ziebarth's responses to Admission Requests Nos. 1, 3 and 6); Ziebarth Decl., ¶ 19. Regardless of the presence of the word "admit," Mr. Ziebarth's discovery responses do reflect that use was made of NAUGLES as early as March 20, 2012. Id.

Second, Mr. Ziebarth never swore he was not using NAUGLES in 2012. Del Taco claims Mr. Ziebarth "admitted . . . in sworn testimony under oath" that he didn't own a NAUGLES restaurant in 2012, and cites to "Dkt. 76 I the Prior Cancellation at p. 80-90." Del Taco's Brief, p. 5. The pages that Del Taco cites, however, consist of two pages of testimony from the prior cancellation proceeding wherein Del Taco's counsel is asking Mr. Ziebarth to confirm that no NAUGLES restaurants *operated by Del Taco* still exist. *Id.* Del Taco has taken a statement out of context and twisted its meaning.

Third, Mr. Ziebarth's Twitter post has been misconstrued. Del Taco alleges that an informational phrase which appeared at the top of Mr. Ziebarth's @Naugles Twitter account in February 2013 stating that he was "working on brining Naugles back" is "proof" that there was no use of NAUGLES. However,

to date, Applicant and Naugles Corp. are *still* "working to bring Naugles back," *i.e.*, working to build a large, thriving chain of restaurants just like the original Naugles chain in the 1980's and 1990's – a task that is always ongoing. Ziebarth Decl., ¶ 18. This Twitter post does not carry any kind of proof of "intent to deceive," as Del Taco claims.

Fourth, Mr. Ziebarth's testimony and Applicant's discovery responses only state that Mr. Ziebarth, *as an individual*, was not offering NAUGLES services alone, without business partners or Naugles Corp. Del Taco alleges that Mr. Ziebarth's testimony in the prior cancellation proceeding and Applicant's discovery responses are contrary to Applicant's March 20, 2012 Statement of Use date. Del Taco's Brief, p. 6. In reality, these questions and discovery only asked what Mr. Ziebarth, *as an individual*, was offering and never asked about Naugles Corp. or his work with his business partners. *Id.*

Fifth, Del Taco's Assertion that Applicant and Naugles Corp. did not open their first restaurant until 2016 is patently false. Del Taco alleges "Mr. Ziebarth and Applicant did not actually open an actual restaurant under the NAUGLES mark until May 2016." Del Taco's Brief, p. 6 (citing its own Exhibit N – an article on the opening of the Huntington Beach, California Naugles location). This statement is made without a good-faith belief in its truth, as, not only was Del Taco provided with proof that Applicant and Naugles Corp. opened its Fountain Valley Naugles restaurant location prior to the Huntington Beach location, but the article's title, itself, states that this Naugles restaurant is the first location *in Huntington Beach*, not the first location ever. Del Taco's Exhibit N; Pfeiffer Decl., Exhibit 29 (Applicant's responses to Interrogatories Nos. 5, 6 and 7). Once again, Del Taco has not given an accurate representation of the facts.

None of the five statements cited above were submitted in connection with the Application and, as such, they cannot be considered as "fraud in the procurement of a trademark registration." Any confusion or conflict between discovery responses and testimony (which have spanned from 2011 to 2018) were not the result of any intentional or knowing deceit, but were honest mistakes or misstatements. Ziebarth Decl., ¶ 19. "There is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive." *Embarcadero Techs., Inc. v.*

Delphix Corp., 2016 TTAB LEXIS 11 at *10-11 (TTAB) (citing In re Bose Corp., 580 F.3d 1240 9Fed. Cir. 2009)).

All things considered, Del Taco has not met its high burden of proving fraud. The material facts that are <u>not</u> in dispute are 1) Applicant's statement of use is not "false;" 2) all of Applicant's responses to Office Actions were submitted in good-faith and were accurate at the time they were submitted; and 3) Del Taco can cite to no law, rule, regulation or guideline that Applicant failed to follow during its application process. Del Taco's "facts" are nothing more than bald allegations that have no evidentiary support. As such, Del Taco's high burden for fraud on summary judgment cannot be met. The undisputed facts, however, *do* support summary judgment in Applicant's favor, as no reasonable person could conclude that Applicant committed fraud on the USPTO during the application process. As such, Del Taco's motion for summary judgment on this Claim should be denied, and Applicant's cross-motion for summary judgment on this Claim should be granted.

CLAIM II: THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT APPLICANT HAS NOT MISREPRESENTED THE SOURCE OF ITS GOODS; THEREFORE APPLICANT SHOULD BE GRANTED SUMMARY JUDGMENT.

On Claim II, Applicant seeks summary judgment as follows:

Based on all facts and arguments already presented herein, there is no dispute of material fact that Del Taco cannot establish any of the allegations of misrepresentation of source alleged in the Notice of Opposition. Misrepresentation of source under Section 14(3) of the Trademark Act "refers to situations where it is deliberately misrepresented by or with the consent of the registrant that the goods and/or services originate from a manufacturer or other entity when in fact those goods and/or services originate from another party." *Osterreichischer Molkerei-und Kasereiverband Registriete GmbH v. Marks and Spencer Limited*, 203 U.S.P.Q. 793, 794 (TTAB 1979). To support its case, Del taco must show "blatant misuse of the mark by respondent in a manner calculated to trade on the goodwill and reputation of petitioner." *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 47 (TTAB 1985).

To establish "misuse of its mark," Del Taco first must actually *have* an underlying mark. As detailed above, Applicant is the *only* user of the NAUGLES trademark for restaurant services. Collateral estoppel bars Del Taco from arguing herein that it has any rights in NAUGLES for restaurant services after 1995. Because Del Taco does not own a trademark for NAUGLES, it is illogical that Applicant's use of its own NAUGLES mark could be "misrepresenting the source" of its services. Indeed, Applicant and Naugles Corp. are the *only* "source" of services under the NAUGLES mark.

The Notice of Opposition alleges that Applicant is attempting to trade off of the "goodwill and reputation of Opposer's predecessor in interest." Opposition No. 91235706, Dkt # 1 at ¶ 69. However, this Board in its 2015 Opinion specifically declined to recognize that Del Taco had any residual goodwill in the NAUGLES trademark. Pfeiffer Decl., Exhibit 1 at p. 28 ("The Board has never found residual goodwill to be a defense to abandonment, and we decline to do so here.").

Del Taco has not produced evidence to support its claim of misrepresentation of source against Applicant. Considering the lack of evidence coupled with the fact that Del Taco does not own a mark for NAUGLES for restaurant services, no reasonable person could conclude that Applicant has misrepresented the source of its services. As such, Applicant should be granted summary judgment on this claim.

CLAIM III: THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT APPLICANT'S MARK IS NOT LIKELY TO CAUSE CONFUSION WITH DEL TACO'S "MARK," BECAUSE DEL TACO DOES NOT OWN A NAUGLES MARK.

On Claim III, Del Taco seeks summary judgment; Applicant opposes and submits its own crossmotion for summary judgment as follows:

There is no evidence to support Del Taco's three-sentence argument that it should be granted summary judgment on its claim of likelihood of confusion. To succeed on a claim of likelihood of confusion, Del Taco must prove "That defendant's <u>mark</u> so resembles <u>a mark registered in the Office</u>, <u>or a mark or trade name previously used in the United States by another and not abandoned</u>, as to be likely, when used on or in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive." Trademark Act § 2(d), 15 U.S.C. § 1052(d). To prove likelihood of

confusion, Del Taco first must actually have an underlying mark. As detailed above, Applicant is the only

user of the NAUGLES trademark for restaurant services. Collateral estoppel bars Del Taco from arguing

herein that it has any rights in NAUGLES for restaurant services after 1995. Because Del Taco does not

own a trademark for NAUGLES for restaurant services, it is illogical that Applicant's mark could likely

be confused with Del Taco's non-existent NAUGLES mark for restaurant services.

Del Taco has not produced the requisite evidence to meet the standard necessary to succeed on

summary judgment. As such, its motion should be denied. Due to Del Taco's lack of evidence and the

application of collateral estoppel barring Del Taco from arguing it has rights in NAUGLES for restaurant

services, there is no genuine dispute of material fact and no reasonable person could conclude that Del

Taco can make a case for likelihood of confusion against Applicant. As such, summary judgment should

be granted in Applicant's favor.

CONCLUSION

In sum, Petitioner Naugles Corp. asks that summary judgment be entered in its favor on Claim I

of the Cancellation Proceeding and that Del Taco's Clothing Registration be ordered cancelled. In the

alternative, Petitioner asks that Del Taco's motion for summary judgment on Claims I, II, III and IV be

denied.

Applicant Ziebarth Holdings, LLC asks that summary judgment be entered in its favor on all

Claims in the Opposition Proceeding and that the proceeding be dismissed with prejudice. In the

alternative, Applicant asks that Del Taco's summary judgment motion be denied as to Claims I and III.

Dated: June 15, 2018

Respectfully submitted,

By: /s/_Kelly K. Pfeiffer_

Kelly K. Pfeiffer

Amezcua-Moll & Associates, P.C.

1122 E. Lincoln Ave., Suite 203

Orange, CA 92865

Attorneys for Petitioner NAUGLES CORP. and

Applicant ZIEBARTH HOLDINGS, LLC

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served upon DINSMORE & SHOHL LLP, counsel for Del Taco, by emailing one copy on June 15, 2018 to the following individuals listed as counsel of record for Registrant Del Taco, LLC in this proceeding:

April Besl april.besl@dinsmore.com Govinda Davis govinda.davis@dinsmore.com Ashley Earle ashley.earle@dinsmore.com

DINSMORE & SHOHL LLP 255 E 5th Street, Ste. 1900 Cincinnati, Ohio 45202-1971

/s/_Kelly K. Pfeiffer
Kelly K. Pfeiffer
AMEZCUA-MOLL & ASSOCIATES
1122 E. Lincoln Ave., Suite 203
Orange, CA 92865
Attorneys for Petitioner NAUGLES CORP. and
Applicant ZIEBARTH HOLDINGS, LLC

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

In the matter of United States Trademark Application Serial No. 85040746 Mark: "NAUGLES"

DEL TACO, LLC,)	
Opposer,)	Opposition No. 91235706
)	
V.)	
)	
ZIEBARTH HOLDINGS, LLC,)	
Applicant,)	

DECLARATION OF EVE FEUERSTEIN

I, Eve Feuerstein, swear as follows:

- My name is Eve Feuerstein. I live at Huntington Beach, CA 92646. I have personal knowledge of the facts stated herein.
- During 2011 and 2012, I worked for a company in Huntington Beach, California called Page One Priority as a contract writer. My job included internet writing search engine optimization.
- 3. At the time I worked for Priority One, Christian Ziebarth was a co-worker of mine, Mr. Ziebarth was also a contractor and performed a lot of the behind-the-scenes programming for Priority One.
- 4. During the time that Mr. Ziebarth and I were co-workers, I talked with Mr. Ziebarth numerous times about his Naugles venture and his intentions to offer restaurant services under the NAUGLES name. I remember that, in or about approximately March 2012, Mr. Ziebarth was very excited after a meeting he had with a member of the Naugle family. At this meeting, Mr. Ziebarth obtained some Naugles sauces and was hopeful he could eventually obtain the original recipes for the sauces that had been used at the original Naugles restaurant chain when it was owned by the Naugles family.
- 5. On March 20, 2012, Mr. Ziebarth served Naugles food restaurant-style for me and various other co-workers and friends. Mr. Ziebarth made sure everyone knew that it was being done for the purpose of promoting his Naugles restaurant business. I remember that the food Mr. Ziebarth served did, in fact, taste like the food I remember eating at the original Naugles fast-food restaurants back in the 1980's.
- 6. At the March 20, 2012 event, Mr. Ziebarth has signs on display indicating that this was a Naugles event. Mr. Ziebarth also had menus he circulated at this event listing the Naugles food items that were being served. Attached here to as <u>Exhibit A</u> is a copy of the menu I remember Mr. Ziebarth circulating at his March 20, 2012 event.
- 7. Mr. Ziebarth's March 20, 2012 Naugles event took place at our work offices of Priority One in Huntington Beach, California during lunchtime. Mr. Ziebarth did not charge attendees for the food he served at this event. To the best of my recollection, at least 7 to 10 people were present at the same time I was.
- I, Eve Feuerstein, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 35 U.S.C. 25 and 18 U.S.C. 1001 of the United States Code, and that such willful false statements may jeopardize the validity of the foregoing statements, declare that all statements are made of my own knowledge and are true, and all statements made on information and belief are believed to be true.

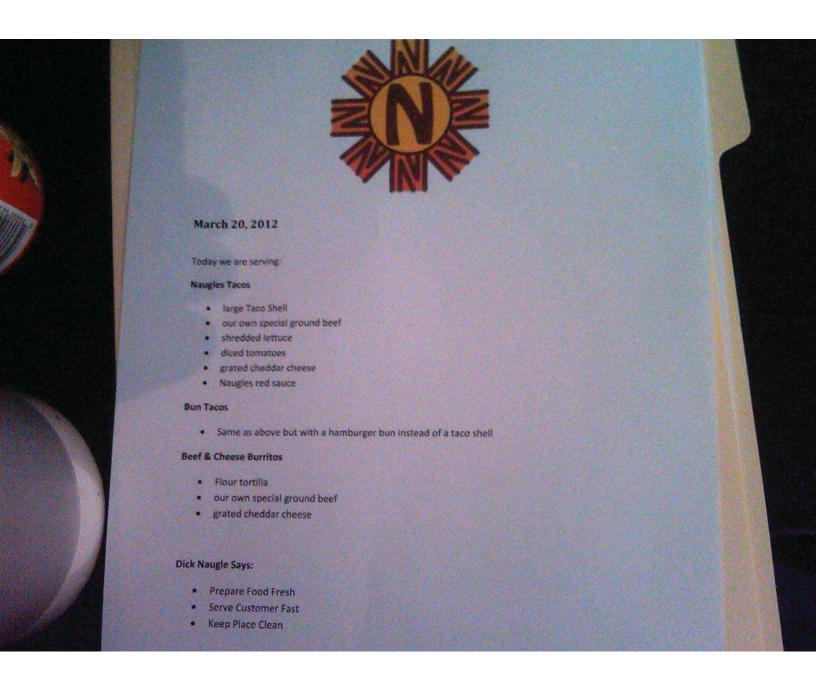
Executed on April 17, 2018 in Huntington Beach alifornia

Lue Fenerstein

Eve Feuerstein

2 -Feuerstein Declaration

EXHIBIT A



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

In the matter of United States Trademark Application Serial No. 85040746

Mark: "NAUGLES"

DEL TACO, LLC,)	
Opposer,)	Opposition No. 91235706
)	
V.)	
)	
ZIEBARTH HOLDINGS, LLC,)	
Applicant.)	

DECLARATION OF CARLOS FONSECA

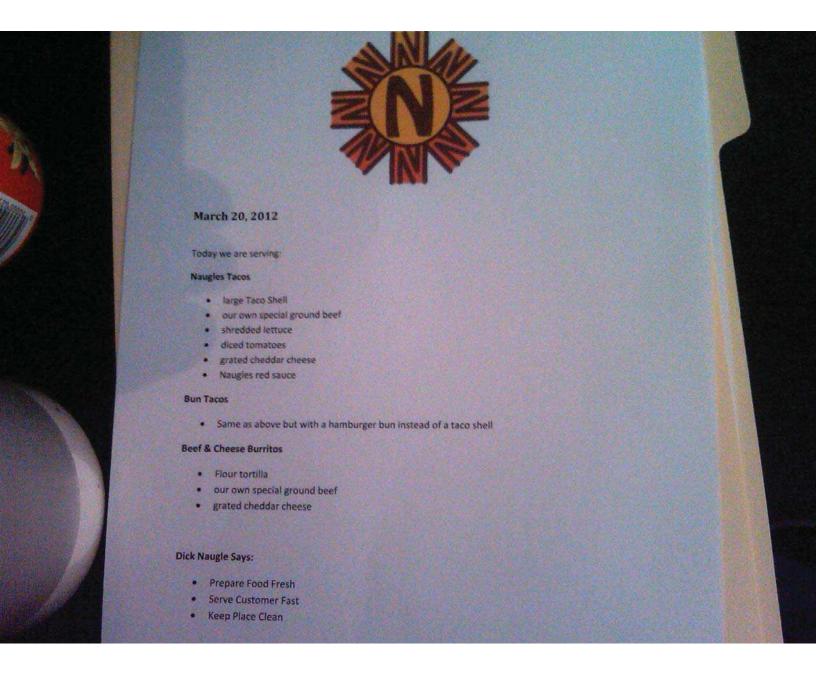
- I, Carlos Fonseca, swear as follows:
- 1. My name is Carlos Fonseca. I live at have personal knowledge of the facts stated herein.
- 2. Beginning in approximately 2011, my father owned an online marketing search engine optimization company called Priority One in Huntington Beach, CA. I worked there as a supervisor from 2011 through 2015. I knew Christian Ziebarth back then because he was a freelance worker for the company. He would come into the office often for specific assignments or meetings.
- 3. Prior to 2012, I remember Mr. Ziebarth talking openly about his intentions of opening Naugles restaurants and the Naugles business venture he was starting. I also remember a particular time when Mr. Ziebarth became incredibly excited because he had obtained some Naugles sauces and was hopeful he could eventually get the original recipes for those sauces which had been used at the original Naugles restaurants.

- 4. I remember Mr. Ziebarth holding an event at the Priority One offices sometime in approximately mid-March of 2012. At this event, Mr. Ziebarth served Naugles food for me, employees of Priority One, employees from other businesses in the building, and friends. Mr. Ziebarth made sure everyone knew that this event was to promote his Naugles restaurant business. I tried everything on the menu. In particular, I remember that the hot sauce Mr. Ziebarth served did, in fact, taste like the sauce I remember eating at the original Naugles fast-food restaurants back when I was a child.
- 5. At this March 2012 event, Mr. Ziebarth also had menus he circulated which listed the Naugles food items that were being served. Attached to this affidavit as Exhibit A is a copy of the menu I remember Mr. Ziebarth circulating at his event. I distinctly remember this menu because, when I saw the sun with a bunch of "N's" surrounding it, I remember thinking it was clever.
- Approximately 16 people were present at the same time I was during Mr. Ziebarth's March 2012 Naugles event.
- I, Carlos Fonseca, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 35 U.S.C. 25 and 18 U.S.C. 1001 of the United States Code, and that such willful false statements may jeopardize the validity of the foregoing statements, declare that all statements are made of my own knowledge and are true, and all statements made on information and belief are believed to be true.

Executed on April 12, 2018 in Lang Beach, California

Carlos Fonseca

EXHIBIT A



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

In the matter of United States Trademark Application Serial No. 85040746

Mark: "NAUGLES"

DEL TACO, LLC,)	
Opposer,)	Opposition No. 91235706
v.)	
ZIEBARTH HOLDINGS, LLC,)	
Applicant.)	

AFFIDAVIT OF WILLIAM (BILL) ODELL

I, William (Bill) Odell, swear as follows:

- I am a long-time, personal acquaintance of Christian Ziebarth. Since prior to 2010, Mr.
 Ziebarth has shared information about and discussed with me his Naugles venture.
- Although I was not present for the Naugles event that Mr. Ziebarth held on March 20,
 in Huntington Beach, CA, I remember Mr. Ziebarth telling me about it when it happened
 and seeing the menu he had printed for it.
- 4. The March 20, 2012, Naugles event was not the first time that Mr. Ziebarth served food restaurant-style under the Naugles mark. There were occasions prior to March 20, 2012, as well as after, wherein Christian offered food under the Naugles mark. On some of these occasions, the Naugles food was sold for profit; on other occasions, the Naugles food was offered free of charge as a promotion of the Naugles brand. While I was not present for all of these early

1 -Odell Affidavit

CONFIDENTIAL ZH005226

Naugles food events (although I was present for some), I was generally aware that they were occurring through my conversations with Mr. Ziebarth.

- 5. In February 2010, prior to Mr. Ziebarth's March 20, 2012, event, I traveled with Mr. Ziebarth to meet with a member of the Naugle family who had been involved with the original Naugles restaurant chain in the 1970's and 80's. At this meeting and at subsequent such meetings with the same Naugle family member, Mr. Ziebarth obtained food components made using original recipes used by the Naugle family back in the 1980's. The food Mr. Ziebarth served at the March 20, 2012, Naugles event, as well as other Naugles food events, utilized those components.
- 6. Every time Mr. Ziebarth offered food under the Naugles mark, including for the March 20, 2012, event, Mr. Ziebarth made sure everyone knew that it was being done for the purpose of promoting his Naugles restaurant business.
- I, William Odell, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 35 U.S.C. 25 and 18 U.S.C. 1001 of the United States Code, and that such willful false statements may jeopardize the validity of the foregoing statements, declare that all statements are made of my own knowledge and are true, and all statements made on information and belief are believed to be true.

Executed on March 22, 2018 in westminster, California

William (Bill) Odell

State of California County of OrnuGE

Subscribed and sworn	to (or affirmed) before me on this	day of
2018, by	, who provided to me on the	basis of satisfactory evidence
to be the person who a		
(seal)	Signature: See —	attached _

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document. State of California County of Orange Subscribed and sworn to (or affirmed) before me on this 22 nd day of March, 2018, by William Lee proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me. SHOBHANA M. SHAH Comm. #2207048 Notary Public - California Orange County Comm. Expires Aug 21, 2021 (Seal) Signature)

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

In the matter of United States Registration No. 4261951

Mark: "NAUGLES"

DEL TACO, LLC,)	
Opposer,)	
)	Opposition No. 91235706
v.)	Application Serial No. 85040746
)	Mark: "NAUGLES"
ZIEBARTH HOLDINGS, LLC,)	
Applicant.)	
	,	CONSOLIDATED WITH
NAUGLES CORP.,)	
Petitioner,)	Cancellation No. 92064091
ŕ)	Registration No. 4261951
v.)	Mark: "NAUGLES"
)	
DEL TACO, LLC,)	
Registrant.	,	

DECLARATION OF CHRISTIAN M. ZIEBARTH FILED IN SUPPORT OF OF THE OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

- I, Christian M. Ziebarth, swear as follows:
- 1. I am the President of Petitioner NAUGLES CORP. ("Petitioner") in cancellation proceeding no. 92064091 against Registrant DEL TACO, LLC ("Del Taco") wherein Petitioner is seeking the cancellation of Del Taco's registration no. 4261951 for the mark NAUGLES in connection with clothing ("the Cancellation Proceeding"). I am a principal of Applicant ZIEBARTH HOLDINGS, LLC ("Applicant"), owner of Application serial no. 85040746, which is being opposed by Del Taco in opposition proceeding no. 91235706 ("the Opposition Proceeding). I have personal knowledge of the facts stated herein.

- 2. Back in 2010, I, as an individual, successfully petitioned to cancel Del Taco's NAUGLES registration for restaurant services on the grounds of abandonment in *Ziebarth v. Del Taco, LLC*, Cancellation No. 92053501 ("the prior cancellation proceeding") a task that Del Taco drew out for almost five years. The discovery period alone lasted 18 months. What should have been a routine proceeding, given that Del Taco abandoned its NAUGLES mark over two decades ago, was twisted by Del Taco into a protracted, expensive and unnecessary battle in an effort to "outspend" both Naugles Corp. and me and to cripple our budding business. Petitioner and I have gained nationwide media attention for our efforts to get NAUGLES off the ground and seek cancellation of Del Taco's NAUGLES restaurant services registration.
- 3. Petitioner's petition to cancel is another necessary step to clean up the USPTO register with regard to ownership of the NAUGLES mark. Petitioner now seeks to cancel Del Taco's last remaining invalid registration for clothing to clear the way for it to operate its business and freely enjoy the use of its trademarks.
- 4. In May 2010, I filed an application to register NAUGLES for "cafeteria and restaurant services," which drew a 2(d) likelihood of confusion refusal based on the existence of Del Taco's then-active NAUGLES registration no. 1043729 for "restaurant services." My application also initially drew a surname refusal, which has since been overcome by the acceptance of a 2(f) claim.
- 5. Naugles Corp. is the exclusive licensee of the NAUGLES trademark for cafeteria and restaurant services.
- 6. Despite the massive, expensive, and very public David vs. Goliath fight with Del Taco, Naugles Corp. and I have slowly but surely successfully grown our business.

- 7. In April 2014, before the TTAB rendered its decision in the prior cancellation proceeding, Del Taco briefly ran an unauthorized and infringing promotion for sale of food items which included the word NAUGLES. I saw this ad campaign at a Southern California location, took a few photographs, and sent them to my attorney, Ms. Pfeiffer. At that point, Naugles Corp. and I had already been using the NAUGLES mark for restaurant services for over two years, at least as early as March 2012.
- 8. In late 2011 during the prior cancellation proceeding, Del Taco filed two, intent-to-use applications with the USPTO: one to register NAUGLES for restaurant services (stylized) (serial no. 85340660), and one to register NAUGLES for clothing. Unfortunately, back in 2011, my business partners and I were not in a financial position to fight Del Taco on two fronts simultaneously, *i.e.*, seek cancellation of the NAUGLES restaurant services registration and oppose the NAUGLES clothing application at the same time. As such, Del Taco's NAUGLES clothing application matured to registration.
- 9. In 2015, once business had ramped up and Naugles Corp. had plans to sell merchandise for its restaurants, we filed a trademark application to register NAUGLES for clothing.
- 10. Naugles Corp. currently sells clothing and other merchandise bearing its NAUGLES trademark not only at its two restaurants but also at the gift shop of the Waterfront Hilton Hotel in Huntington Beach, California and various promotional and community events in which it participates. Naugles Corp. has been selling clothing bearing its Naugles mark to promote its Naugles restaurants since at least as early as October 31, 2015. Attached as Exhibit 1 is a true and correct copy of a post I made on Facebook on October 31, 2015 showing Naugles Corp. offering shirts and hats for sale.

- 11. Prior to filing the Application, Petitioner took concrete steps towards using the mark by developing designs for its merchandise and contacting printing companies to set up accounts for products soon to be produced. Petitioner advertised in its Naugles restaurant and to its customers that Naugles clothing would soon be available.
- 12. Although I initially filed application serial no. 85040746 as an individual, I later assigned my interests in the NAUGLES mark for cafeteria and restaurant services and the application to Ziebarth Holdings, LLC.
- 13. Naugles Corp. currently has two NAUGLES restaurants open in Southern California and are planning additional locations.
- 14. The hat seen in Del Taco's <u>Exhibit AA</u> was purchased by me off of Ebay in 2011. The shirt seen in Del Taco's <u>Exhibit BB</u> was purchased by me from another third-party vendor.
- 15. After the Board granted my petition to cancel Del Taco's NAUGLES clothing registration, my own application to register NAUGLES for cafeteria and restaurant services resumed the application process in August 2015. Because my Application was initially filed in 2010 then relatively quickly suspended as the result of the petition to cancel Del Taco's blocking registration, much had happened with regard to use of my trademark, licensing of the mark, and various other business opportunities and ventures. Between the dates of September 29, 2015 and April 6, 2017, all correspondence and responses to Office Actions submitted to the Trademark Office were accurate to the best of my knowledge and made in good-faith. Applicant never missed a deadline to file a response. Applicant was never cited or by the Trademark Office for an improper response. On the contrary, Applicant was diligent in following the Trademark Rules of Examining Procedure and all applicable guidelines to a "T" to ensure that the Application remained on track.

- 16. On March 20, 2012, I offered cafeteria and restaurant services under the NAUGLES mark in Huntington Beach, California. On this same date, I uploaded to Flickr a picture of the NAUGLES menu I had created and used at this event. Attached hereto as Exhibit 2 is a true and correct copy of a Flickr screenshot reflecting that I uploaded a picture of this menu on March 20, 2012.
- 17. I offered food under the NAUGLES mark on other occasions prior to March 20, 2012 but cannot recall the exact dates. However, because this March 20, 2012 event was the first event for which I had photographic evidence and could solidly document that it happened, this was the date I chose to use for the Application's Statement of Use. This pop-up event or preview meal was performed with the understanding that I was actively and diligently building a business of offering cafeteria and restaurant services under the NAUGLES mark.
- 18. From 2012 forward, Naugles Corp. and I diligently and consistently continued to offer cafeteria and restaurant services under the NAUGLES mark. For example, Applicant's services were offered under the NAUGLES mark throughout 2012 and 2013 at various special events and pop-up locations, at Coach's Bar & Grill in Lancaster, CA in July of 2014, at Pig & Parsley in Fountain Valley, CA in October and December of 2014, at LA Weekly's Tacolandia event in Downtown Los Angeles, CA in June 2015, at the Fountain Valley NAUGLES restaurant location beginning in July 2015, and at a wedding in Huntington Beach, CA, on August 29, 2015.

 Naugles Corp. and Applicant currently operate restaurants in Fountain Valley, California and Huntington Beach, California, and we are planning additional locations.
- 19. All discovery responses and testimony given by me in the prior cancellation proceeding were produced and given in good- faith and with a reasonable belief that they were true at the time I gave them. Any confusion or conflict between discovery responses and testimony was not

the result of any intentional or knowing deceit, but were honest mistakes or misstatements made either by my counsel at the time or by me.

I, Christian M. Ziebarth, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 35 U.S.C. 25 and 18 U.S.C. 1001 of the United States Code, and that such willful false statements may jeopardize the validity of the foregoing statements, declare that all statements are made of my own knowledge and are true, and all statements made on information and belief are believed to be true.

Executed on June 4, 2018 in TUSFIN, California

Christian Ziebarth

CHRISTIAN ZIEBARTH'S EXHIBITS

Naugles Corp.'s October 31, 2015 Facebook post

Exhibit 1

Mr. Ziebarth's March 20, 2012 upload of NAUGLES menu to Flickr

Exhibit 2

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECLARATION OF CHRISTIAN M. ZIEBARTH FILED IN SUPPORT OF THE OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served upon DINSMORE & SHOHL LLP, counsel for Del Taco, by emailing one copy on June 15, 2018 to the following individuals listed as counsel of record for Registrant Del Taco, LLC in this proceeding:

April Besl
april.besl@dinsmore.com
Govinda Davis
govinda.davis@dinsmore.com
Ashley Earle
ashley.earle@dinsmore.com

DINSMORE & SHOHL LLP 255 E 5th Street, Ste. 1900 Cincinnati, Ohio 45202-1971

/s/_Kelly K. Pfeiffer

Kelly K. Pfeiffer AMEZCUA-MOLL & ASSOCIATES 1122 E. Lincoln Ave., Suite 203 Orange, CA 92865 Attorneys for Petitioner NAUGLES CORP. and Applicant ZIEBARTH HOLDINGS, LLC

EXHIBIT 1

(to the Declaration of Christian Ziebarth filed in support of the Opposition/Cross-Motion for Summary Judgment)

Q





Christian Ziebarth

October 31, 2015

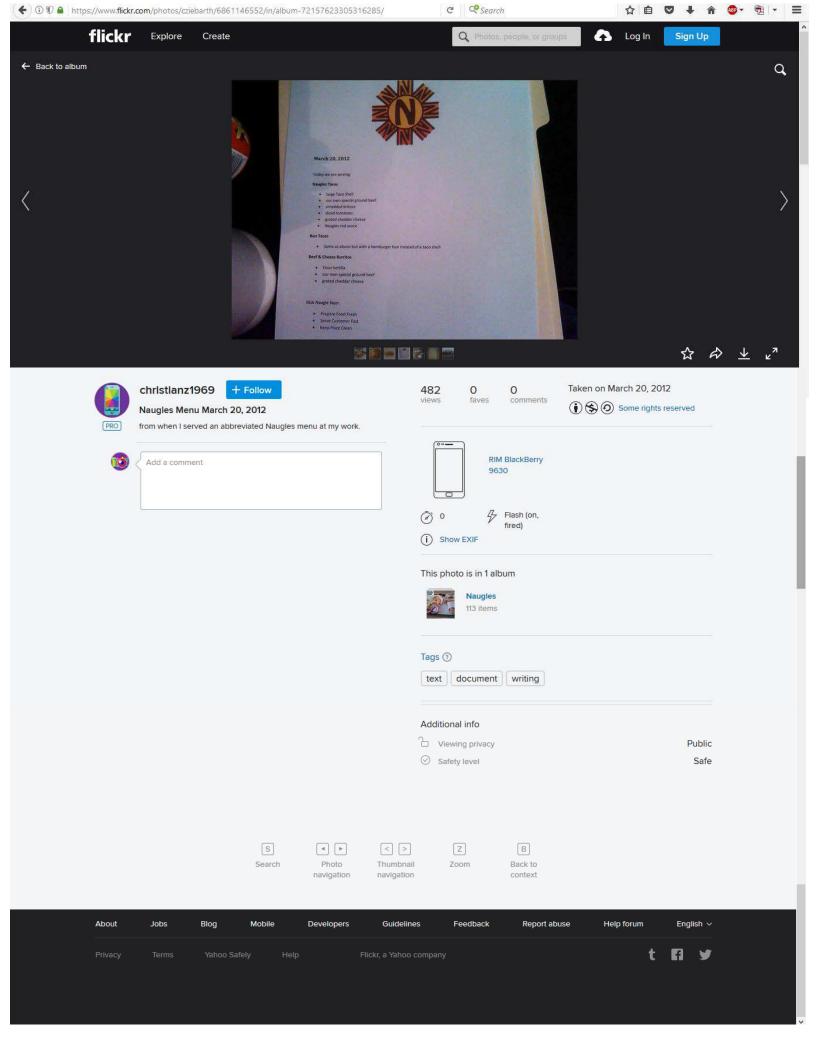
Hats: \$15

Shirts: \$20



EXHIBIT 2

(to the Declaration of Christian Ziebarth filed in support of the Opposition/Cross-Motion for Summary Judgment)



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

In the matter of United States Registration No. 4261951

Mark: "NAUGLES"

DEL TACO, LLC,)	
Opposer,)	
)	Opposition No. 91235706
v.)	Application Serial No. 85040746
)	Mark: "NAUGLES"
ZIEBARTH HOLDINGS, LLC,)	
Applicant.)	
		CONSOLIDATED WITH
NAUGLES CORP.,)	
Petitioner,)	Cancellation No. 92064091
)	Registration No. 4261951
v.)	Mark: "NAUGLES"
)	
DEL TACO, LLC,)	
Registrant.	•	

DECLARATION OF KELLY K. PFEIFFER FILED IN SUPPORT OF THE OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

- I, Kelly K. Pfeiffer, swear as follows:
- 1. I am the attorney of record for Petitioner NAUGLES CORP. ("Petitioner") in Cancellation No. 92064091 ("the Cancellation Proceeding), and I am attorney of record for Applicant ZIEBARTH HOLDINGS, LLC ("Applicant") in Opposition No. 91235706 ("the Opposition Proceeding"). I have personal knowledge of the facts stated herein.
- 2. In December 2010, Christian M. Ziebarth ("Mr. Ziebarth") petitioned to cancel DEL TACO, LLC's ("Del Taco") then-active registration no. 1043729 for NAUGLES for "restaurant services" after his own Application No. 85040746 to register NAUGLES for "cafeteria and

restaurant services" was refused based on a Section 2(d) likelihood of confusion with Del Taco's registration. On March 31, 2015, the TTAB issued an opinion in *Ziebarth v. Del Taco, LLC*, Cancellation No. 92053501 ("the prior cancellation proceeding") determining that Del Taco had abandoned the NAUGLES mark for restaurant services at least as early as 1995 and ordering Del Taco's restaurant services registration cancelled. Attached hereto as Exhibit 1 is a true and correct copy of the March 31, 2015 TTAB Opinion ordering Del Taco's NAUGLES restaurant services registration to be cancelled on the grounds of abandonment. Attached hereto as Exhibit 2 is a true and correct copy of the Order by the Commissioner for Trademarks cancelling Del Taco's NAUGLES restaurant services registration.

3. In order to reach its decision, the TTAB made various findings of fact, including that Del Taco's "last restaurant named Naugles closed on approximately October 25, 1995, and [Del Taco] has not re-opened or operated any Naugles 'branded' restaurants since then." Exhibit 1 attached hereto at pp. 13-14. To support this finding of fact, the TTAB cited to three pieces of evidence submitted in the prior cancellation proceeding: the Affidavit of Noah Chillingworth, ¶ 2, Del Taco's Admissions, Nos. 1-17, 22, and 23, and the Cross-Examination testimony of Noah Chillingworth at 54:1-24, 85. Exhibit 1 attached hereto at pp. 13-14. All three of these pieces of evidence were produced in discovery in the present proceedings. Attached hereto as Exhibit 3 is a true and correct copy of the Affidavit of Noah Chillingworth from the prior cancellation proceeding (without the confidential exhibits). Attached hereto as Exhibit 4 is a true and correct copy of Del Taco's Responses to Admissions Nos. 1-17, 22, and 23 from the prior cancellation proceeding.

- 4. On March 24, 2014, I took the live Cross- Examination testimony of Noah Chillingworth, Del Taco's Vice President of Marketing, in the prior cancellation proceeding. Attached hereto as <u>Exhibit 5</u> is a true and correct copy of the Cross-Examination testimony of Noah Chillingworth at 54:1-24 from the prior cancellation proceeding. Attached hereto as <u>Exhibit 6</u> is a true and correct copy of Noah Chillingworth's Cross-Examination testimony from the prior proceeding at 24:3-25. Attached hereto as <u>Exhibit 25</u> is a true and correct copy of Noah Chillingworth's Cross-Examination testimony from the prior proceeding at pp. 50-52. Attached hereto as <u>Exhibit 28</u> is a true and correct copy of Noah Chillingworth's Cross-Examination testimony from the prior proceeding at pp. 21-22.
- 5. Although Del Taco had closed its last NAUGLES restaurant back in 1995, it continued to fraudulently file renewals for its registration with the USPTO in 1996 and 2006. Attached hereto as Exhibit 7 is a true and correct copy of Del Taco's 1996 USPTO renewal documents for its now-defunct NAUGLES registration for "restaurant services." Attached hereto as Exhibit 8 is a true and correct copy of Del Taco's 2006 USPTO renewal documents for its now-defunct NAUGLES registration for "restaurant services."
- 6. Mr. Ziebarth's 2010 petition to cancel Del Taco's NAUGLES registration for restaurant services and the ensuing trademark dispute garnered a large amount of media attention, particularly in Southern California. Attached hereto as Exhibit 9 are true and correct copies of a sampling of media articles covering the prior cancellation proceeding. Attached hereto as Exhibit 30 is a true and correct copy of a letter I received from Del Taco's counsel in 2013 demanding that Mr. Ziebarth cease and desist use of the NAUGLES mark. Exhibit 30 has been filed as Confidential to honor Del Taco's designation of "Confidential." This letter is only one example

of multiple letters I received from Del Taco's counsel alleging that Mr. Ziebarth and/or Naugles Corp. was infringing on Del Taco's NAUGLES "trademark."

- 7. In April 2014, before the TTAB rendered its decision in the prior cancellation proceeding, Del Taco briefly ran an unauthorized and infringing promotion for sale of food items at three of its Southern California restaurants which included the word "Naugles." I sent a cease and desist letter to for Del Taco, notifying the company that its advertising material was an infringement on Petitioner and Mr. Ziebarth's trademark rights in the NAUGLES mark and demanding that the ads be removed. A copy of my April 21, 2014 letter to Ms. April Besl, counsel for Del Taco, which includes pictures of the infringing ads is Del Taco's Exhibit C.
- 8. In discovery, Del Taco produced documents indicating that Del Taco's advertising campaign seen by Mr. Ziebarth in April 2014 only ran at three Del Taco locations in Southern California. Attached hereto as Exhibit 10 is a true and correct copy of three documents produced by Del Taco in discovery which have been designated as "Confidential-Outside Attorneys Eyes Only." These documents have been filed under seal to honor Del Taco's designation of "Confidential-Outside Attorneys Eyes Only."
- 9. Attached hereto as <u>Exhibit 11</u> is a true and correct copy of Del Taco's responses to Petitioner's Admissions Requests which was served on me on May 18, 2018. Only the responses cited in Applicant/Petitioner's brief have been included.
- 10. Attached hereto as <u>Exhibit 12</u> is a true and correct copy of Del Taco's second supplemental responses to Petitioner's Interrogatories, Set One, which was served on me on March 29, 2018.

- 11. Attached hereto as <u>Exhibit 13</u> is a true and correct copy of Del Taco's second supplemental and amended responses to Applicant's Interrogatories which was served on me on March 26, 2018 in the Opposition Proceeding. Only the responses cited in Applicant/Petitioner's brief have been included.
- 12. In late 2011 during the lengthy prior cancellation proceeding, Del Taco filed two, intent-to-use applications with the USPTO: one to register NAUGLES for restaurant services (stylized) (serial no. 85340660), and one to register NAUGLES for clothing (serial no. 85281037). Del Taco's application for NAUGLES (stylized) for restaurant services is currently suspended pending the outcome of the Application because the Application was filed first. Although it is obvious that Del Taco no longer offers restaurant services under the NAUGLES mark, a fact that has been conclusively determined by this Board, Del Taco still fraudulently sought additional registrations for a mark it long ago abandoned. Unfortunately, back in 2011, Mr. Ziebarth and his business partners were not in a financial position to fight Del Taco on two fronts simultaneously, *i.e.*, seek cancellation of the NAUGLES restaurant services registration and oppose the NAUGLES clothing application at the same time. As such, Del Taco's NAUGLES clothing application matured to registration.
- 13. On August 9, 2011, during the application process for its NAUGLES clothing application, Del Taco claimed ownership of its now-defunct NAUGLES registration for restaurant services.
- 14. I searched the USPTO's TESS database for "naugles" and found that the only registration owned by Del Taco is the clothing registration at issue in the Cancellation Proceeding. Attached hereto as <u>Exhibit 14</u> is a true and correct copy of a TESS print out showing the results of my search.

- 15. In 2015, once business had ramped up and Petitioner had plans to sell merchandise for its restaurants, Petitioner filed a trademark application to register NAUGLES for clothing. Attached hereto as <u>Exhibit 15</u> is at true and correct copy of Petitioner's application to register NAUGLES for clothing.
- 16. When Petitioner's application was met with the inevitable 2(d) refusal based on Del Taco's NAUGLES clothing registration, it promptly filed this petition to cancel on the following grounds: 1) Del Taco's use of the mark on clothing is merely ornamental; 2) abandonment (failure to police the mark); 3) fraud (failure to inform the PTO of a material fact during the application process, *i.e.*, Del Taco had abandoned the NAUGLES mark for restaurant services back in 1995, and therefore was not and is not using NAUGLES in a non-ornamental manner for other services or products); and 4) misrepresentation of source (capitalizing on the notoriety Petitioner and Mr. Ziebarth have garnered in using the NAUGLES). Attached as Exhibit 16 is a true and correct copy of the Office Action issued on February 10, 2016 against Petitioner's application for NAUGLES for clothing, asserting a 2(d) refusal based on the existence of Del Taco's NAUGLES clothing registration.
- 17. The only "new" evidence produced by Del Taco regarding "Secret Menus" that was not in existence during the prior cancellation proceeding are three media articles and pages from a website. Attached hereto as Exhibit 17 is a true and correct copy of an article produced by Del Taco in discovery entitled "Del Taco Has a Secret Menu, These Two Words at the Register Will Grant You Access" which appears to have been originally published on foodbeast.com on March 5, 2014 then posted on Facebook by FoodBeast on May 9, 2015. Attached hereto as Exhibit 18 is a true and correct copy of an article produced by Del Taco in discovery entitled "Del Taco

Celebrates 50 Years with Historical Menu" which appears to have been published on the QSR Magazine website on June 18, 2014. Attached hereto as Exhibit 19 is a true and correct copy of an article produced by Del Taco in discovery entitled "13 Things You Didn't Know About Del Taco" which appears to have been published on thrillist.com on May 5, 2015. Attached hereto as Exhibit 20 is a true and correct copy of pages which purport to be from the website www.secretmenus.com which were produced by Del Taco in discovery.

- 18. Attached hereto as Exhibit 21 is a true and correct copy of a group of documents produced to me by Del Taco on June 7, 2017 which shows its deltacostore.com website which sells one shirt and one hat bearing the word "Naugles." On this webstore site, the name of the category the under which these two "Naugles" products are found is "Del Taco Apparel & Headwear."
- 19. Attached hereto as <u>Exhibit 22</u> is a true and correct copy of the USPTO's permanent Consistency Initiative downloaded from the uspto.gov website.
- 20. On December 7, 2017, Del Taco produced the document attached hereto as <u>Exhibit 23</u> in connection with the Opposition Proceeding. Highlighting has been added to the document for ease of reference. On November 3, 2017 Del Taco produced the document attached hereto as <u>Exhibit 24</u>, which has been filed under seal to honor Del Taco's designation of "Confidential-Outside Attorneys Eyes Only."
- 21. On July 7, 2017, Petitioner produced to Del Taco in connection with the Cancellation Proceeding the documents attached hereto as <u>Exhibit 26</u> evidencing third-party use of NAUGLES.

- 22. The hat and shirt seen in Del Taco's Exhibits AA and BB have never been sold by Petitioner, and pictures of these items were not included with the assortment of photos provided to Del Taco in discovery illustrating Petitioner's NAUGLES products.
- 23. Attached hereto as <u>Exhibit 27</u> is a true and correct copy of a USPTO record appointing Disnmore & Shohl, LLP as counsel of record for Del Taco in connection with Del Taco's now defunct- registration for NAUGLES for restaurant services.
- 24. Between the dates of September 29, 2015 and April 6, 2017, I engaged in multiple back and forths with the Trademark Office on behalf of Applicant, a practice I have found to be quite common during any application process. All correspondence and responses to Office Actions submitted to the Trademark Office were accurate to the best of my knowledge and made in goodfaith. Applicant never missed a deadline to file a response and was never cited by the Trademark Office for an improper response. On the contrary, Applicant was diligent in following the Trademark Rules of Examining Procedure and all applicable guidelines to a "T" to ensure that the Application remained on track
- 25. On April 19, 2018, I produced to Del Taco in discovery in connection with the Opposition proceeding the following documents: the declaration of Eve Feuerstein with exhibits which has been filed in support of Petitioner and Applicant's Opposition and Cross-Motion for Summary Judgment; the declaration of Carlos Fonseca with exhibits which has been filed in support of Petitioner and Applicant's Opposition and Cross-Motion for Summary Judgment; and the declaration of William Odell which has been filed in support of Petitioner and Applicant's Opposition and Cross-Motion for Summary Judgment.

26.	Attached hereto as Exhibit 29 is a true and correct copy of Applicant's responses to
Interro	ogatories which was served on Del Taco on December 19, 2017 in connection with the
Oppos	sition Proceeding.

I, Kelly K. Pfeiffer, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 35 U.S.C. 25 and 18 U.S.C. 1001 of the United States Code, and that such willful false statements may jeopardize the validity of the foregoing statements, declare that all statements are made of my own knowledge and are true, and all statements made on information and belief are believed to be true.

Executed on June 15, 2018 in Aliso Viejo, California

Kelly K. Pfeiffer

EXHIBITS TO PFEIFFER DECLARATION

TTAB March 31, 2014 Opinion in <i>Ziebarth v. Del Taco, LLC</i> , Cancellation No. 92053501	Exhibit 1
Order from Commissioner of Trademarks Cancelling Del Taco's NAUGLES restaurant services registration	Exhibit 2
Affidavit of Noah Chillingworth from the prior cancellation proceeding (without the confidential exhibits)	Exhibit 3
Del Taco's Responses to Admissions Nos. 1-17, 22, and 23 from the prior cancellation proceeding	Exhibit 4
Cross-Examination testimony of Noah Chillingworth at 54:1-24 from the prior cancellation proceeding	Exhibit 5
Cross-Examination testimony of Noah Chillingworth at 24:3-25 from the prior cancellation proceeding	Exhibit 6
Del Taco's 1996 USPTO renewal documents for its now-defunct NAUGLES registration for "restaurant services"	Exhibit 7
Del Taco's 2006 USPTO renewal documents for its now-defunct NAUGLES registration for "restaurant services"	Exhibit 8
Sampling of media articles covering the prior cancellation proceeding	Exhibit 9
DELTACO 4460-4462 (FILED AS CONFIDENTIAL)	Exhibit 10
Del Taco's responses to Petitioner's Admissions Requests	Exhibit 11
Del Taco's second supplemental responses to Petitioner's Interrogatories, Set One	Exhibit 12
Del Taco's second supplemental and amended responses to Applicant's Interrogatories in Opposition No. 91235706	Exhibit 13
TESS print	Exhibit 14
Petitioner's application to register NAUGLES for clothing	Exhibit 15
February 10, 2016 Office Action issued against Petitioner's application for NAUGLES for clothing, asserting a 2(d) refusal based on Del Taco's NAUGLES clothing registration	Exhibit 16

"Del Taco Has a Secret Menu, These Two Words at the Register Will Grant You Access"	Exhibit 17
"Del Taco Celebrates 50 Years with Historical Menu"	Exhibit 18
"13 Things You Didn't Know About Del Taco"	Exhibit 19
Pages from <u>www.secretmenus.com</u>	Exhibit 20
Del Taco's Webstore	Exhibit 21
USPTO's Permanent Consistency Initiative	Exhibit 22
Del Taco's 50 th anniversary "Classic Throwback Menu" ad	Exhibit 23
Del Taco Document (FILED AS CONFIDENTIAL)	Exhibit 24
Cross-Examination testimony of Noah Chillingworth at 50-52 from the prior cancellation proceeding	Exhibit 25
Evidence of Third Party sales of "Naugles" Products	Exhibit 26
Appt of Dinsmore & Shohl, LLP in 2007	Exhibit 27
Cross-Examination testimony of Noah Chillingworth at 21-22 from the prior cancellation proceeding	Exhibit 28
Applicant's Reponses to Interrogatories	Exhibit 29
September 16, 2013 letter from A. Besl to K. Pfeiffer (FILED AS CONFIDENTIAL)	Exhibit 30

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECLARATION OF KELLY K. PFEIFFER FILED IN SUPPORT OF THE OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT IN RESPONSE TO DEL TACO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served upon DINSMORE & SHOHL LLP, counsel for Del Taco, by emailing one copy on June 15, 2018 to the following individuals listed as counsel of record for Registrant Del Taco, LLC in this proceeding:

April Besl april.besl@dinsmore.com Govinda Davis govinda.davis@dinsmore.com Ashley Earle ashley.earle@dinsmore.com

DINSMORE & SHOHL LLP 255 E 5th Street, Ste. 1900 Cincinnati, Ohio 45202-1971

Kelly K. Pfeiffer

AMEZCUA-MOLL & ASSOCIATES

1122 E. Lincoln Ave., Suite 203

Orange, CA 92865

Attorneys for Petitioner NAUGLES CORP. and

Applicant ZIEBARTH HOLDINGS, LLC

EXHIBIT 1

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

This Opinion is Not a Precedent of the TTAB

Mailed: March 31, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Christian M. Ziebarth v. Del Taco, LLC

Cancellation No. 92053501 against Registration No. 1043729

Kelly K. Pfeiffer of Amezcua-Moll Associates PC for Christian M. Ziebarth.

April L. Besl and Joshua A. Lorentz of Dinsmore Shohl LLP for Del Taco, LLC.

Before Mermelstein, Lykos and Adlin, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On December 20, 2010, Christian M. Ziebarth ("Petitioner") filed a petition to cancel Del Taco's ("Respondent" or "Del Taco") registration on the Principal Register for the mark **NAUGLES**, in typed format, for "restaurant services" in

¹ Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure ("TMEP") § 807.03(i) (January 2015).

International Class 35.² As set forth in the petition to cancel, Petitioner asserts a claim of abandonment alleging, in relevant part:

- 4. Upon information and belief, Respondent has abandoned the NAUGLES mark shown in Respondent's Registration pursuant to Section 14(3), 15 U.S.C. § 1064(3).
- 5. Upon information and belief, Respondent is not currently using the NAUGLES mark as shown in Respondent's Registration in connection with "restaurant services."
- 6. Upon information and belief, Respondent discontinued use of the NAUGLES mark as shown in Respondent's Registration in connection with "restaurant services" many years ago.
- 7. Upon information and belief, for at least the last three consecutive years, Respondent has not used the NAUGLES mark as shown in Respondent's Registration in connection with "restaurant services," thereby constituting prima facie evidence of abandonment of the NAUGLES mark as shown in Respondent's Registration.
- 8. Although Respondent filed Sections 8 & 9 Affidavits to renew Respondent's Registration on May 18, 2006 ("2006 Renewal"), upon information and belief, Respondent had, at the time of the 2006 Renewal, previously discontinued and abandoned use of the NAUGLES mark as shown in Respondent's Registration in connection with "restaurant services." The specimen submitted to support such renewal was a website printout that does not demonstrate bona fide use of the NAUGLES mark in connection with "restaurant services." The website merely discusses the prior history of the Naugles restaurants and nothing more. (See Exhibit 1). In addition, upon information and belief, "restaurant services" were not being provided by Respondent under the NAUGLES mark as shown in Respondent's registration at the time of the 2006 Renewal.

² Registration No. 1043729, issued July 13, 1976, alleging December 13, 1970 as the date of first use anywhere and in commerce; Sections 8 and 15 affidavits accepted and acknowledged; renewed on July 13, 2006.

³ With the exception of a petitioner's pleaded registration, materials submitted with a petition to cancel are not of record unless properly introduced at trial. *See* Trademark Rule 2.122(d); 37 C.F.R. § 122(d).

9. In addition, although Respondent filed sections 8 & 9 Affidavits to renew Respondent's Registration on July 8, 1996 ("1996 Renewal"), upon information and belief, Respondent had at the time of the 1996 Renewal, previously discontinued and abandoned use of the NAUGLES mark as shown in Respondent's Registration in connection with "restaurant services." In addition, upon information and belief, "restaurant services" were not being provided by Respondent under the NAUGLES mark as shown in Respondent's Registration at the time of the 1996 Renewal.

Respondent, in its answer to the petition to cancel, denied the salient allegations therein.⁴

The case is now fully briefed.

I. The Record⁵

The parties are commended for stipulating to the option of submitting witness testimony in affidavit form, with the proviso that the non-submitting party reserves the right to conduct live cross-examination of the affiant while the submitting party reserves the right to conduct live redirect examination.⁶ See "Parties Stipulation to

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⁴ Respondent also asserted the affirmative defense of failure to state a claim upon which relief may be granted in its pleading. Insofar as Respondent neither filed a formal motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) during the interlocutory phase of this proceeding, nor argued this asserted affirmative defense in its brief, it is hereby deemed waived. See Alcatraz Media v. Chesapeake Marine Tours Inc., 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), aff'd, 565 Fed. Appx. 900 (Fed. Cir. 2014) (mem.).

⁵ Portions of the record have been designated confidential and have been treated as such. All citations to the record refer to the redacted, publicly available versions of each submission.

⁶ With the exception of the provisions regarding motions in *limine* which are prohibited under Board practice, the parties' stipulation (filed October 4, 2013) which also includes, among other items, provisions regarding the right to make objections, is approved. *See* Trademark Trial and Appeal Board Manual ("TBMP") § 527.01(f) (2014).

Submit Testimony in Affidavit Form" filed October 4, 2013; 56 TTABVUE.⁷ See also Trademark Trial and Appeal Board Manual ("TBMP") § 702.04(e) ("Utilizing Stipulations in Non-ACR Board cases") (2014).

Pursuant to Trademark Rule 2.122, the record includes the file of Respondent's involved registration and the pleadings. The parties also submitted the following evidence:

A. Petitioner's Evidence

Petitioner submitted a Notice of Reliance (filed September 20, 2013) consisting of the following items:

- Petitioner's First Set of Interrogatories and certain responses thereto;
- Petitioner's First Set of Requests for Admissions and certain responses thereto;8 and
- Article entitled "Adios to Naugles; Fast Food Chain to switch to Del Taco" from the *Orange County Register* dated May 17, 1989.

Petitioner also submitted the following:9

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⁷ TTABVUE refers to the Board's publicly available online docket system. For the citations to the record in TTABVUE throughout the decision, the number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry.

⁸ Denials of requests for admission are inadmissible under notice of reliance. Trademark Rule 2.120(j)(3)(i). "[U]nlike an admission (or a failure to respond which constitutes an admission), the *denial* of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial. *Cf.* Fed. R. Civ. P. 36(b)." *See e.g.*, *Life Zone Inc.* v. *Middleman Group Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008) (denials to requests for admission inadmissible).

⁹ In an interlocutory order dated August 12, 2013 (49 TTABVUE), the Board applied the estoppel sanction to preclude Petitioner from submitting the testimony of Mr. William Odell, who was first identified in Petitioner's pretrial disclosures. See Fed. R. Civ. P. 37(c)(1) and Trademark Rule 2.116(a). See e.g., Great Seats, Inc. v. Great Seats, Ltd., 100 USPQ2d 1323, 1326-27 (TTAB 2011) and TBMP § 527.01(e) (2014) ("Estoppel Sanction").

- Affidavit of Petitioner Christian M. Ziebarth, with Exhibits A-Q attached thereto ("Ziebarth Affidavit");
- Affidavit of Rob Hallstrom, a third-party witness, with Exhibit H attached thereto ("Hallstrom Affidavit");
- Affidavit of Daniel Dvorak, a third-party witness ("Dvorak Affidavit"); and
- Cross-Examination Testimony Deposition of Noah Chillingworth ("Chillingworth Cross-Examination Testimony").

B. Respondent's Evidence

Respondent submitted a notice of reliance (filed January 15, 2014) consisting of the following:

- Respondent's uninvolved Registration No. 4261951, issued December 18, 2012 based on an application filed March 30, 2011 for the mark **NAUGLES** in standard character format for "[c]lothing, namely, shirts, t-shirts, hats, and jackets" in International Class 25, alleging September 15, 2011 as the date of first use anywhere and in commerce;
- Petitioner's First Response to Respondent's First Set of Interrogatories and Requests for Production of Documents and Things and Supplemental Responses thereto; and
- Petitioner's First Response to Respondent's First Set of Requests for Admission and Supplemental Responses Thereto. 10

Respondent also introduced the following:

- Affidavit of Noah Chillingworth, Respondent's Vice President of Marketing, with exhibits attached thereto ("Chillingworth Affidavit");
- Cross-Examination Testimony Deposition of Petitioner Christian M. Ziebarth ("Ziebarth Cross-Examination Testimony");
- Cross-Examination Testimony Deposition of Rob Hallstrom ("Hallstrom Cross-Examination Testimony"); and

¹⁰ See note 9.

• Cross-Examination Testimony Deposition of Daniel Dvorak ("Dvorak Cross-Examination Testimony").

II. Evidentiary Issues

Before turning to the substantive claims before us, we address various evidentiary issues and motions. At the outset we observe that the discovery phase of this case was contentious, and that discovery disputes continued to be an issue at trial, notwithstanding the parties' decision to stipulate to trial efficiencies. We further note that the trial record in this case is voluminous, and both parties have interposed numerous evidentiary objections. To the extent, if any, an objection has not been specifically addressed below, we have considered the objected-to evidence, keeping in mind the objections, and have accorded it whatever probative value it merits.¹¹

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¹¹ Respondent's motion (filed October 13, 2014, 95 TTABVUE) to strike the declaration and exhibits of Petitioner's legal counsel Kelly K. Pfeiffer ("Pfeiffer Declaration") submitted with Petitioner's reply brief is granted to the extent, if any, that Petitioner relies on the declaration and exhibit in support of his case-in-chief (either to establish his standing to bring the present suit or prove his claim of abandonment). Respondent's alternative motion pursuant to Trademark Rule 2.120(g) for discovery sanctions in the form of judgment is denied as untimely. The events in question occurred in November of 2013, and had Respondent believed that Petitioner's conduct warranted the ultimate sanction of judgment, Respondent should not have delayed filing a motion until final briefing of the case.

A. Petitioner's Objections¹² to Noah Chillingworth's Testimony Concerning Events Prior to February 2009

Petitioner objects to and has moved to strike certain testimony of Respondent's sole witness, Noah Chillingworth, Vice President of Marketing, as well as any attendant exhibits, regarding "all events and actions taken by Del Taco prior to February 2009" on the ground that Mr. Chillingworth lacks personal knowledge of Respondent's business prior to that date. Mr. Chillingworth testified that he commenced working for Respondent in February 2009, and that prior to that date he worked for a competitor, Taco Bell, from 2004-2009. Chillingworth Cross-Examination Testimony 8:24-11:5; 85 TTABVUE 12-15. His affidavit states that "[T]he NAUGLES brand has been owned and used by Del Taco and its predecessors since 1988 in connection with Del Taco's restaurant services." Chillingworth Affidavit ¶ 2; 78 TTABVUE 2. However, Mr. Chillingworth's cross-examination testimony makes clear that his knowledge of relevant events prior to February 2009 is based largely on his conversations with Respondent's legal counsel and others he was unable to name. Chillingworth Cross-Examination Testimony 40:7-43:22, 85

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¹² Respondent contends that because Petitioner improperly filed his evidentiary objections in the form of a motion to strike appended to his main trial brief, and not within Petitioner's main trial brief, the objections are waived. Substantive objections to trial testimony, whether taken live or in affidavit form, may be maintained in a party's main brief on the case, as an appendix to its brief on the case or in a separate statement of objections filed with its brief on the case. Trademark Rule 2.128(b) ("[E]videntiary objections that may properly be raised in a party's brief on the case may instead be raised in an appendix or by way of a separate statement of objections. The appendix or separate statement is not included within the page limit."). See Anthony's Pizza & Pasta International, Inc. v. Anthony's Pizza Holding Co., 95 USPQ2d 1271, 1273 n.4 (TTAB 2009) (objection to testimony raised in deposition may be maintained in appendix to brief or by separate statement of objections), aff'd, 415 Fed. Appx. 222 (Fed. Cir. 2010). See also, Alcatraz Media, 107 USPQ2d at 1753. Accordingly, Petitioner's separate "motion to strike" does not result in waiver of the objections.

TTABVUE 44-7 Mr. Chillingworth testified that "I know through conversations with fellow employees as well through – with my legal counsel that I am informed and believe." *Id.* at 42:12-15, 85 TTABVUE 46.

Federal Rule of Evidence 60213 provides that "[a] witness may not testify to matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." General references to conversations with others do not constitute the proper foundation to establish personal knowledge. See City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc., 106 USPQ2d 1668, 1674-75 (TTAB 2013) (testimony of in-house legal counsel regarding events employment with defendant that pre-existed his not considered). Chillingworth's testimony is based upon his general recollection of conversations that took place with various unidentified individuals during the course of his employment with Respondent since 2009, and with Respondent's counsel, and as such the testimony is not based on Mr. Chillingworth's personal knowledge.

However, the Board does not ordinarily strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, such objections are considered in evaluating the probative value (if any) of the testimony. See Krause v. Krause Publications Inc., 76 USPQ2d 1904, 1907 (TTAB 2005). See also, Marshall Field & Co. v. Mrs. Fields Cookies, 25 USPQ2d 1321, 1326 (TTAB 1992). In accordance with this practice, we have not stricken any of Mr. Chillingworth's testimony about events prior to February 2009, but we have

¹³ Trademark Rule 2.122(a) provides that the Federal Rules of Evidence apply to Board *inter partes* proceedings.

accorded his testimony the appropriate probative weight in light of the above. to the extent it is inadmissible. See Coach Services Inc. v. Triumph Learning LLC, 96 USPQ2d 1600, 1603 (TTAB 2010), aff'd in relevant part, 668 F.3d 1356, 1010 USPQ2d 1713, 1730 (Fed. Cir. 2012) (sustaining objection to testimony about business matters prior to the witness' employment and for which she did not otherwise have personal knowledge).

B. Petitioner's Objection to Exhibit 11 (menu) to the Chillingworth Affidavit

Petitioner moved to strike Exhibit 11 to the Chillingworth Affidavit which consists of a menu displaying the phrase "Viva Naugles Viva Del Taco," on the ground that Mr. Chillingworth lacks personal knowledge of the exhibit, cannot authenticate it and is unable to lay the proper foundation for its introduction into the record. In his testimony, Mr. Chillingworth described the menu as "an example of advertising previously used by Del Taco in connection with its restaurant services prominently featuring the NAUGLES mark." Chillingworth Affidavit ¶ 3; 78 TTABVUE 2. However, upon cross-examination, he testified that since he began working for Del Taco in February 2009, he had not seen the menu actually used in marketing Respondent's restaurant services. Chillingworth Cross-Examination Testimony 60:11-14; 85 TTABVUE 64. In addition, he was unable to indicate when Del Taco used the menu, testifying only that he believed it was used in marketing Respondent's NAUGLES-branded restaurant services because it was kept in Del Taco's archives. *Id.* at 57:19-25; 59:1-3; 85 TTABVUE 61, 63.

Petitioner's motion to strike is overruled, *see* Fed. R. Evid. 803(6) (business record exception to the hearsay rule), but we are unable to give this evidence any significant probative value because of Mr. Chillingworth's inability to provide exact, or even approximate dates of use, as well as his admission that since being employed with Del Taco, he has not personally observed the menu in actual use.

C. Petitioner's Objection to Exhibit 29 (Photographs of Clothing Articles) to the Chillingworth Affidavit

Mr. Chillingworth introduced as Exhibit 29 to his affidavit photographs of articles of clothing sold by Respondent bearing the term NAUGLES. Petitioner has moved to strike the exhibit on the ground that Mr. Chillingworth lacks personal knowledge, cannot authenticate the exhibit and is unable to lay the proper foundation for its introduction into the record. During his cross-examination, Mr. Chillingworth testified that he did not take either photograph, that he could not identify the person who did. He further testified that prior to executing his affidavit, he had never seen the photographs, and that he could not identify who provided them. Chillingworth Cross-Examination Testimony 15:18-16:18; 85 TTABVUE 20. In view thereof, Petitioner's objection is sustained. Mr. Chillingworth was unable to authenticate and provide the proper foundation for the exhibit.

D. Petitioner's Objection to Testimony elicited by Respondent during his Cross-Examination on the Subjects of Respondent's Clothing Registration and the sale of "Naugles"-Branded Clothing

Petitioner objects to all testimony elicited by Respondent during crossexamination of Petitioner on the subject of Respondent's clothing registration, as well as any statements regarding the actual sales of "Naugles"-branded clothing on the ground that these subjects were not included in Petitioner's testimonial affidavit. Federal Rule of Evidence 611(b) states "Cross-examination should not go beyond the subject matter of direct examination." Petitioner's affidavit, which took the place of Petitioner's live direct testimony, is silent on these particular subjects, and therefore Petitioner's objection is sustained.

E. Petitioner's Objection to Respondent's Twitter Posts Made after the Filing of His Application

Petitioner objects on the ground of relevancy to all testimony Respondent elicited from Petitioner during cross-examination on the subject of posts Petitioner made to his "Senor Naugles" Twitter account after the filing of Petitioner's intent-to-use application. Petitioner contends that the only "tweets" that are relevant to the issue of standing are those which took place prior to the filing of Petitioner's application. Respondent maintains that the evidence is relevant not to Petitioner's standing but rather to consumer perceptions and the "goodwill" associated with the NAUGLES mark, which Respondent claims is directly relevant to abandonment.

The testimony elicited on cross-examination concerns Petitioner's Twitter postings which took place in 2013, after the filing of the petition to cancel and are such are not relevant to the issue of standing. *See* Fed. R. Evid. 401. Petitioner's objection is therefore sustained.

F. Respondent's Objections to Alleged Statements Made by Third-Parties to Petitioner

Respondent objects to all testimony by Petitioner pertaining to alleged statements made by non-parties to this proceeding as inadmissible hearsay. More

specifically, Petitioner testified as to alleged conversations with the following individuals: Barbara Caruso, Jeff Naugle, John Joseph Naugle, Bill Naugle and William O'Dell. Insofar as the out of court statements are black letter hearsay and Respondent has not established that any exceptions to the hearsay rule apply, these objections are sustained. See Fed. R. Evid. 801.

G. Respondent's Objection to Article Entitled "Adios to Naugles; Fast Food Chain to Switch to Del Taco"

Respondent objects to an article entitled "Adios to Naugles; Fast Food Chain to switch to Del Taco" from the *Orange County Register* dated May 17, 1989 on the ground of hearsay. Respondent maintains that Petitioner relies on the article for the truth of the matter asserted therein, namely that Respondent has abandoned use of its registered NAUGLES mark in connection with restaurant services with no intent to resume.

We agree with Respondent that the article is hearsay if relied upon for the truth of the statements in it, Fed. R. Evid. 801, and can only be used to demonstrate what the article shows on its face, in other words, that the article was published and available to the public on that particular date. See Syngenta Crop. Prot. Inc. v. Bio-Chek LLC, 90 USPQ2d 1112, 1117 n. 7 (TTAB 2009). It is therefore of little, if any, probative value in proving Petitioner's claim of abandonment. Respondent's objection is therefore sustained.

¹⁴ As noted earlier (footnote 9), Petitioner is estopped from submitting the testimony of William O'Dell.

¹⁵ In view thereof, Respondent's objection to Petitioner's testimony regarding alleged conversations and interactions with Jeff Naugle based on documents and evidence not produced during discovery is moot.

H. Respondent's Objection to Petitioner's Opinion Testimony

Pursuant to Federal Rule of Evidence 701, Respondent objects to all opinion testimony offered by Petitioner regarding ultimate conclusions of law as to his claim of abandonment and the sufficiency of Respondent's 2006 renewal of its involved registration. With or without his testimony, we assume Petitioner's belief in the merit of his claims. Nonetheless, it is the Board which must determine the issues in this case, and Petitioner's legal opinions are not helpful in that task. Respondent's objection is sustained to the extent that we have disregarded any opinion testimony regarding the ultimate disposition of the abandonment claim asserted herein as well as any opinions concerning Respondent's registration renewal. See, e.g., Alcatraz Media v. Chesapeake Marine Tours Inc., 107 USPQ2d at 1753 n.6; Steiger Tractor, Inc. v. Steiner Corp., 221 USPQ 165, 169 (TTAB 1984); Mennen Co. v. Yamanouchi Pharm. Co., 203 USPQ 302, 305 (TTAB 1979). 16

III. Background

Commencing in the 1970s, Naugles, Inc. operated a chain of restaurants in California under the NAUGLES service mark. In 1988, Respondent purchased all assets of the Naugles restaurant business, including the NAUGLES brand name. Chillingworth Affidavit ¶ 2; 78 TTABVUE 2. The last restaurant named Naugles

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¹⁶ See also Jones & Laughlin Steel Corp. v. Jones Eng'g Co., 292 F.2d 294, 130 USPQ 99, 100 (CCPA 1961) ("The witnesses did not cite any instances of actual confusion but merely expressed an opinion as to the origin of the goods. Such opinions are not controlling."); Quaker Oats Co. v. St. Joe Processing Co., 232 F.2d 653, 109 USPQ 390, 391 (CCPA 1956) ("[W]e deem it necessary to comment on the weight to be given the witnesses' opinions that the marks would be likely to cause confusion. In this respect it has been held that such testimony amounts to nothing more than an expression of opinion by the witness, which obviously is not binding upon either the tribunals of the Patent Office or the courts.").

closed on approximately October 25, 1995, and Respondent has not re-opened or operated any Naugles "branded" restaurants since then. Chillingworth Affidavit ¶ 2; 78 TTABVUE 2. Respondent's Admission Nos. 1-17, 22, and 23; Chillingworth Cross-Examination Testimony 54:1-24, 85 TTABVUE 58.

Petitioner is an online blogger who writes about the topic of food in Orange County, California. Ziebarth Affidavit ¶ 2; 757 TTABVUE 2. Petitioner posted a blog entry in 2008 reminiscing about the "old" Naugles Southern California restaurants. Id. at ¶ 2; 57 TTABVUE 2-3. He testified that he originally intended the blog entry to be a "remembrance" of the chain, but noticed that "the entry got a lot of attention by way of people posting responses, indicating how much they liked the Naugles food and wished it would return." Id.; Ziebarth Cross-Examination Testimony 16:17-17:17 (discussing statistics regarding visits to Petitioner's food blog); 76 TTABVUE 19-20. Petitioner then arranged a meeting with Ms. Barbara Caruso, whom he believed was the "long-time public relations representative for Del Taco," and whom he first became acquainted with after she sent him information to post on his blog about Del Taco menu items. Ziebarth Affidavit ¶ 6; 57 TTABVUE 4. He suggested to Ms. Caruso that Del Taco bring back the food items that were served in the former Naugles restaurants. Id. He further testified that despite his efforts to follow-up with an additional meeting, no further meetings occurred, with Ms. Caruso or anyone else affiliated with Respondent. Id. at ¶¶ 6-7; 57 TTABVUE 4-5. Believing that Respondent no longer had any interest in using the NAUGLES mark and that Respondent had legally abandoned the mark, Petitioner decided that he would open his own restaurant under the name NAUGLES. *Id.* at $\P\P$ 3 and 12; 57 TTABVUE 2, 7.

Petitioner then filed on May 17, 2010 Application Serial No. 85040746 for the mark NAUGLES in standard-character format for "cafeteria and restaurant services" in International Class 43, alleging a *bona fide* intent to use the mark in commerce. After the Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act citing the involved registration,¹⁷ Petitioner filed the complaint in this proceeding on December 20, 2010. Examination of Petitioner's application was suspended pending the outcome of this proceeding.

On March 30, 2011, Respondent filed its own application to register NAUGLES in standard character format for "Clothing, namely, shirts, t-shirts, hats, and jackets" in International Class 25, alleging a date of first use in commerce of September 15, 2011. The application successfully registered on December 18, 2012 as Registration No. 4261951.

IV. Standing

A plaintiff in a Board proceeding must prove standing as a threshold matter in order to be heard on its substantive claims. See, e.g., Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). The purpose of the standing requirement is to prevent mere intermeddlers from initiating proceedings, and derives from Section 14 of the Trademark Act which provides in relevant part "[a] petition to cancel a registration of a mark. . . may be filed . . . by any person who

¹⁷ A surname refusal was made as well.

believes that he is or will be damaged" by the registration. The Court of Appeals for the Federal Circuit has enunciated a liberal threshold for determining standing, namely, whether a plaintiff's belief in damage has a reasonable basis in fact and reflects a real interest in the case. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1028 (Fed. Cir. 1999). *See also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988).

The petition to cancel contains the following allegations relevant to Petitioner's standing:

- 1. Petitioner is the owner of U.S. Trademark Application Serial No. 85/040,746 filed on May 17, 2010 for the mark NAUGLES in connection with "cafeteria and restaurant services" ("Petitioner's Application") in International Class 43.
- 2. Petitioner has been, and continues to be, damaged in that Trademark Registration No. 1,043,729 has been cited against Petitioner's Application as a basis for refusal of registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d).

Respondent challenges Petitioner's standing to bring the cancellation proceeding.¹⁸

When a plaintiff in a Board proceeding pleads and later proves that it has been refused registration of its mark because of the defendant's registration, it has established a "reasonable belief" of damage, thereby satisfying the standing requirement. See Saddlesprings Inc. v. Mad Croc Brands Inc., 104 USPQ2d 1948, 1950 (TTAB 2012) (standing adequately alleged by allegation that petitioner's

¹⁸ Petitioner, relying on a non-precedential Board interlocutory order in a different proceeding, asserts that because Respondent failed to amend its answer to assert an affirmative defense that Petitioner lacks standing, Respondent is now barred from arguing that issue. That proposition is contrary to the long-standing principle that standing must be proved by the plaintiff, see *Lipton Industries*, *Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213

USPQ 185 (CCPA 1982), and as such the lack of standing does not need to be pleaded as an affirmative defense.

During the interlocutory phase of this proceeding, the Board informed the parties that "the fact that Petitioner's intent-to-use application was refused registration based on a likelihood of confusion with the involved registration does not preclude Respondent from challenging Petitioner's assertion in his application that he has a bona fide intent to use the mark in commerce. Because Petitioner bears the ultimate burden of proof on the issue of standing, petitioner may be required to go beyond the mere pendency of his applications and establish his entitlement to file the application upon which his standing claim is based." Interlocutory Order dated January 21, 2012; 16 TTABVUE 3-4. This is the precise basis upon which Respondent challenges Petitioner's standing, i.e. that Petitioner did not in fact have a bona fide intention to use the NAUGLES mark, and therefore has no real interest and reasonable belief in damage resulting from the citation of Respondent's mark as a bar to applicant's registration.¹⁹

Here, Petitioner has submitted evidence that his intent-to-use application was refused registration under Section 2(d) of the Trademark Act based on Respondent's registered mark. Ziebarth Affidavit ¶ 4, Exs. A and B; 57 TTABVUE 3, 19 (Application Serial No. 85040746 file history). In addition, the record shows that Petitioner took concrete steps towards using the mark, thereby demonstrating a

¹⁹ We hasten to add that standing in a Board *inter partes* proceeding is determined as of the filing date of the complaint, not the filing date of a plaintiff's pleaded application. For this reason, Petitioner's actions before and after the filing date of his application up to the filing date of the complaint are also relevant to the issue of standing.

bona fide intent to use sufficient to support his application. Petitioner testified that he discussed his ideas with Rob Hallstrom, owner of a public relations marketing agency which specializes in the restaurant industry and co-owner of three restaurants in Orange County, California. Mr. Hallstrom corroborated Petitioner's testimony by explaining that in January 2010, Petitioner approached him about helping him "make this idea of opening restaurants under the NAUGLES name a reality." Hallstrom Affidavit ¶ 2 and Ex. H; 59 TTABVUE 2 and 8-25 (Petitioner and Hallstrom email exchange). He further testified that he and Petitioner met in person to talk about Petitioner's idea, that they had several follow-up discussions about potential properties for restaurant locations and that he and Petitioner actually looked at a few properties, including one that was formerly a Naugles restaurant. Hallstrom Affidavit ¶3; 59 TTABVUE 3.

The record also shows that Petitioner recruited Daniel Dvorak, the Lead Industrial Designer/Product Designer for Alco Designs and owner of his own design consulting business Protodraft Designs, who offered to handle marketing for Petitioner's venture. Dvorak Affidavit ¶ 1, 4; 60 TTABVUE 3. Mr. Dvorak testified that between February and September 2010 he met regularly with Petitioner, and corroborated Petitioner's testimony that Petitioner was actively seeking financing for his planned business as well as scouting potential locations. Dvorak Affidavit ¶¶ 3 and 5; 60 TTABVUE 3.

Petitioner submitted evidence of his presence on the Internet and in social media to identify planned, upcoming restaurant services under the NAUGLES name based on activities which took place prior to filing his intent to use application. For example, he submitted evidence that on January 13, 2010, he purchased the domain name www.nauglestacos.com and currently operates a website entitled "Naugles Tacos and Burgers" under that domain name. Ziebarth Affidavit ¶ 17, Exs. K (domain name order confirmation from GoDaddy.com) and Ex. L; 57 TTABVUE 9 and 133. Prior to filing his intent to use application, Petitioner also opened a Twitter account "@Naugles" and actively "tweeted" under the handle "Señor Naugles." Ziebarth Affidavit ¶ 18, 57 TTABVUE 10.

The aforementioned evidence shows that Petitioner had a *bona fide* intent to use the mark and is therefore entitled to rely upon the ownership of his refused application to prove standing. In other words, the record shows that he is not a mere intermeddler, but has a real interest, that is to say, "a direct and personal stake" in the outcome of this proceeding and reasonable belief in damage, and therefore has standing. *See Ritchie v. Simpson*, 50 USPQ2d at 1027.

V. Petitioner's Abandonment Claim

We now consider Petitioner's abandonment claim. Section 1127 of the Trademark Act, 15 U.S.C. § 1127 provides, in pertinent part, that a mark is abandoned

[w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for three consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of that mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

As explained by our primary reviewing court, the Court of Appeals for the Federal Circuit:

A showing of a prima facie case creates a rebuttable presumption that the trademark owner has abandoned the mark without intent to resume use. The burden then shifts to the trademark owner to produce evidence that he either used the mark during the statutory period or intended to resume use. The burden of persuasion, however, always remains with the [challenger] to prove abandonment by a preponderance of the evidence.

Crash Dummy Movie LLC v. Mattel Inc., 601 F.3d 1387, 94 USPQ2d 1315, 1316 (Fed. Cir. 2010) (internal citations omitted). "Use in commerce" for services is defined as:

The bona fide use of a mark in the ordinary course of trade.... [A] mark shall be deemed to be in use in commerce —... on services when [1] it is used or displayed in the sale or advertising of services and [2] the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

15 U.S.C. § 1127 (emphasis and numbering added). Respondent cannot rely on the mere existence of its federal registration or subsequent renewals to defend against Petitioner's claim of abandonment. If it could do so, a contested cancellation based on abandonment could never be successful, despite the fact that such claims are clearly contemplated by statute. See Trademark Act § 14.

Noah Chillingworth, Respondent's Vice President of Marketing, averred that "Del Taco stopped using the NAUGLES trademark as the actual name of a restaurant on October 25, 1995." Chillingworth Affidavit ¶ 2; 78 TTABVUE 2. During cross-examination, he specifically explained that as part of transitioning the Naugles brand to Del Taco, "all Naugles restaurants were closed down as of October

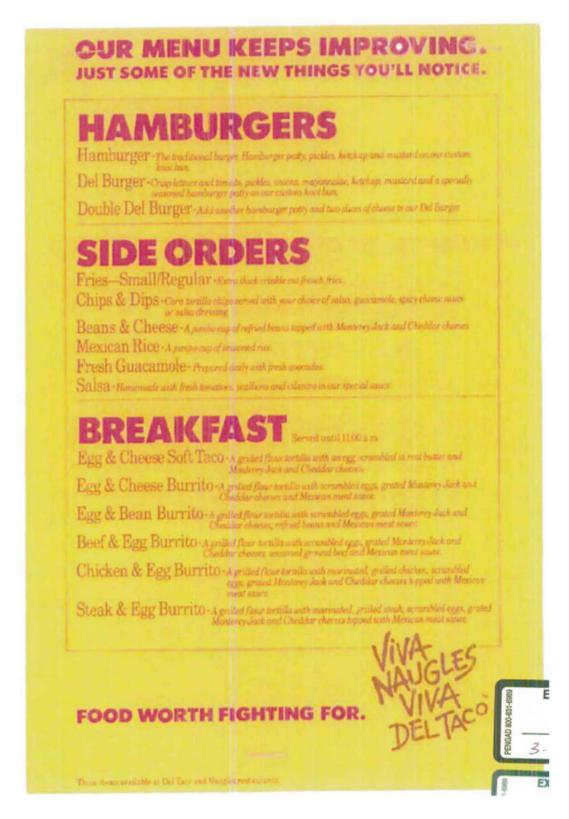
25, 1995." Chillingworth Cross-Examination Testimony 65:21-25; 85 TTABVUE 69. Respondent admitted that for the years 1995-2010 it "did not own a restaurant to the public [sic] named 'Naugles," which corroborates Mr. Chillingworth's testimony. See Respondent's Answers to Requests for Admissions Nos. 1-16; 53 & 54 TTABVUE. Respondent further admitted that it currently does not own a restaurant named Naugles in the United States, nor does it have any plans to operate a restaurant under the name Naugles within the next five years. Respondent's Answers to Requests for Admission Nos. 17 and 23; 53 TTABVUE 7, 14. Thus, the record unequivocally shows that Respondent ceased operating the last restaurant bearing the NAUGLES name on October 25, 1995.

Notwithstanding the uncontroverted evidence above, Respondent in its brief asserts that it continued to use the NAUGLES mark "immediately" following the closure of the last free-standing Naugles restaurant. Respondent's Brief p. 9. More specifically, Mr. Chillingworth averred that Del Taco "has never stopped using the mark in connection with its restaurant services," and "that since 1995 Del Taco has used the NAUGLES mark in advertising and on clothing." Chillingworth Affidavit ¶ 2; 78 TTABVUE 2.

We focus first on Mr. Chillingworth's statements regarding Respondent's use of the NAUGLES mark in connection with clothing. To be clear, use of a mark on collateral or promotional goods such as clothing does not constitute service mark usage for the identified services. Use of a mark in connection with services requires that the mark be "used or displayed in the sale or advertising of services" and that

"the services are rendered in commerce." Trademark Act § 45, 15 U.S.C. § 1127. "Use" of a service mark requires more than mere advertisement. Thus, even if Respondent's clothing could be considered an advertisement for restaurant services, the mark is not in use in connection with restaurant services if restaurant services are no longer "rendered" or, in other words, no longer provided. Couture v. Playdom, Inc., — F.3d —, — USPQ3d —, No. 2014–1480, slip op. at 5 (Fed. Cir. March 2, 2015) ("rendering of services" to obtain a trademark registration requires the actual provision of such services). See Imperial Tobacco, Ltd. v. Philip Morris, Inc., 899 F.2d 1575, 14 USPQ2d 1390, 1395 (Fed. Cir. 1990) (promotional use of mark in sales of "incidental" items such as whiskey, pens, watches, sunglasses, and food did not constitute use of mark for cigarettes). For this reason, Respondent cannot rely on any purported sale of clothing items bearing the NAUGLES mark to refute Petitioner's abandonment claim because NAUGLES restaurants have been defunct since 1995 and Respondent has not rendered restaurant services under the mark since that time.

We turn our attention now to a one page food menu displaying the phrase "Viva Naugles Viva Del Taco," which Respondent contends constitutes documentary evidence of continuous use of its registered mark for restaurant services. Chillingworth Affidavit ¶ 3, Ex. 11; 78 TTABVUE 2 and 7-8.



Respondent argues in its brief that the menu is illustrative of its "Viva Naugles Viva Del Taco" marketing campaign. However, on cross-examination, when asked to

provide a date or dates when this particular menu was used, Mr. Chillingworth responded "I can't tell you the date exactly it was used, but I believe it was used, since it was kept in our archive information." Chillingworth Cross-Examination Testimony 58:22-59:3, 85 TTABVUE 62-63. He also stated that he did not know when this piece of advertising was created, id. at 66:1-8; 85 TTABVUE 70, and further testified that since working for Del Taco in 2009, he has not seen this particular menu in use. Id. at 60:11-15; 85 TTABVUE 64. Mr. Chillingworth speculated that the advertising material was designed to "facilitate the two brands coming together." Id. at 60:8-10; 85 TTABVUE 60. Use of a mark on a menu clearly is an acceptable method of service mark usage for an actively operating restaurant. Nonetheless, Mr. Chillingworth's testimony is insufficient to show use within the last three years or on any particular date, much less continuous use since the closure of the last free standing Naugles restaurant in 1995, or even an intent to resume use.

Mr. Chillingworth also averred that Respondent has maintained use of the NAUGLES mark on the "official Del Taco website advertising its restaurant services." Chillingworth Affidavit ¶ 4; 78 TTABVUE 3. In support thereof, Respondent submitted thirteen screenshots from the Wayback Machine purporting to show use by Del Taco of the phrase "Viva Naugles Viva Del Taco" on the history page of its www.deltaco.com website over the three-year time period of 2003-2006 Respondent's Notice of Reliance Exs. 16-28; 77 TTABVUE. Although the dates vary, the content of each screenshot is identical. Upon review, however, the web pages

merely recount the history of the merger of the Naugles and Del Taco chains. The web pages are clearly not advertisements for contemporaneously-rendered restaurant services. Again, advertising a service is not synonymous with rendering a service. *Couture*, slip op. at 4-5 (an "open and notorious public offering alone" is insufficient to establish use in commerce).

We hasten to add that even if we could construe the web pages as evidence of service mark usage of the registered term NAUGLES for restaurant services (and we cannot), there is no evidence of record of Respondent's use or intent to resume use prior to 2003, leaving unrebutted Petitioner's prima facie claim of abandonment for the years 1995-2003. Respondent's activities in 2003 are not evidence of the use or the intent to resume use necessary to overcome the presumption of abandonment. Subsequent use of a mark cannot retroactively cure past abandonment. See Hornby v. TJX Companies Inc., 87 USPQ2d 1411, 1422 (TTAB 2008). Cf. General Motors Corp. v. Aristide & Co., Antiquaire de Marques, 87 USPQ2d 1179, 1182 (TTAB 2008) (citing Silverman v. CBS Inc., 870 F.2d 40, 9 USPQ2d 1778, 1783 (2d Cir. 1989)).

Respondent also argues that it incorporates into its current Del Taco restaurants "other aspects" of the now defunct Naugles restaurants relying primarily on the purported existence of a Naugles "secret menu." Respondent's Brief, p. 9. Indeed, Respondent asserts that the "secret menu" is "one of the most successful examples of the ongoing use and consumer recognition of the NAUGLES trademark, brand, and business as part of Del Taco's restaurant services that has continued to the

present even after closure of the NAUGLES branded restaurants." Respondent's Brief, p. 10; 92 TTABVUE 15 (emphasis in original). The "secret menu" is not an actual, physical menu but rather, as Mr. Chillingworth explained, refers to the concept that consumers have the ability to request food items previously offered in Naugles restaurants:

[S]ince 1988, Del Taco has consistently offered menu items that were originally sold in NAUGLES named restaurants owned by the prior owner Naugles, Inc. I am informed and believe that consumers recognize these items as part of a "NAUGLES Secret Menu" within Del Taco's restaurant services.

Chillingworth Affidavit ¶ 6; 78 TTABVUE 3. To further clarify the "secret menu" concept, Petitioner elicited the following testimony from Mr. Chillingworth upon cross-examination:

- Q. ...What are these secret items you are referring to? What are they?
- A. They are items you could previously buy at Naugles and that now you can buy at Del Taco.
- Q. Okay. What are they?
- A. As an example, the bun taco would be one.
- Q. Anything else?
- A. MACHO bacon and egg burrito, I believe. And the others that guests come up and ask us for that we in some cases try to make or can make for them.
- Q. Like a special order, almost?
- A. Yes, exactly if they request it.
- Q. Okay.
- A. So a cheese burrito or something to that effect.

. . .

- Q. I'm trying to establish what you what your testimony considers Naugles secret menu items. So I understand what you're saying, that there was kind of a fusion of the menus.
- A. Yeah.
- Q. But we're talking about customers' perception of Naugles items.
- A. Yeah.
- Q. So could you please other than the bun taco and the MACHO bacon and egg burrito, are there other items that you're referring to that you consider part of the Naugles secret menu?
- A. I would say mainly those two items.
- Q. Okay. Is there any place online, flyers, in the restaurants itself, where Del Taco informs the customers that the bun taco or the MACHO bacon and egg burrito are old Naugles items?
- A. Not specifically.

Chillingworth Cross-Examination Testimony 85:12-87:12; 85 TTABVUE 89-91. Respondent was unable to point to any further testimony or documentary evidence regarding the "secret" Naugles menu. There is thus no evidence of the appearance of the NAUGLES mark on a secret menu or advertising materials showing Del Taco's promotion of a Naugles "secret menu." Nor did Respondent provide evidence of any advertising expenditures devoted to promoting NAUGLES or a Naugles "secret menu." In any event, even if the record did support use of a "secret menu," it is not at all clear that there is any use — by Respondent or its customers — of the NAUGLES mark itself in connection with the secret menu. Mr. Chillingworth testified that customers in Respondent's current restaurants sometimes ask for

items from the old Naugles restaurants, such as the "bun taco," "MACHO bacon and egg burrito," or "cheese burrito." But there is no testimony or other evidence that the word NAUGLES is actually written or uttered in these transactions. Thus the current sale of food items that were previously served at the now-defunct Naugles restaurant establishments cannot be construed as service mark use of NAUGLES for restaurant services.

In another attempt to show continuous use of its mark, Respondent in its brief asserts that it ran commercials featuring the NAUGLES mark to advertise restaurant services. Respondent's Brief, p. 9. The record, however, is utterly devoid of such evidence. Mere assertions in a brief, without evidentiary support, are insufficient. *In re Bookbinder's Rest.*, *Inc.*, 240 F.2d 365, 112 USPQ 326, 328 (CCPA 1957).

Lastly we note that Respondent contends that it holds "considerable goodwill" in the Naugles mark, sufficient to defeat Petitioner's claim of abandonment. The Board has never found residual goodwill to be a defense to abandonment, and we decline to do so here. The continued existence of enthusiasts of the old Naugles food items does not negate the statutory presumption of abandonment.

The record establishes that Respondent made no service mark use of NAUGLES after the closure of the last Naugles restaurant on October 25, 1995 for far longer than three consecutive years. Petitioner has therefore made a *prima facie* case of abandonment. The burden of production thus shifted to Respondent to prove that it either used the mark during the statutory period or intended to resume use. Since

Respondent's evidence shows no service mark use of NAUGLES, we next focus on whether Respondent intended to resume use.²⁰

Mr. Chillingworth averred that prior to the institution of this proceeding, Respondent began planning a new advertising campaign called "NAUGLES Secret Menu" for restaurant services designed to "play on the consumer driven 'NAUGLES Secret Menu." Chillingworth Affidavit ¶ 7; 78 TTABVUE 2. As documentary support, Mr. Chillingworth submitted and attested to the authenticity of copies of two separate internal marketing presentations made in April 2009 and June 2010 discussing "the details of the 'NAUGLES Secret Menu' campaign." Id. and Confidential Exs. 30 & 31. Because these materials are designated confidential, we cannot discuss their contents. Suffice to say, however, even if the materials showed an intent to resume use commencing in 2009, this is much too late to save Respondent's registration. Once a mark has been abandoned, the abandonment cannot be undone, and a registration of the mark can be cancelled on that basis notwithstanding any later use or intent to resume use. "Merely because a party used a mark a long time ago and it could use the mark in the future is not sufficient to avoid abandonment." Hornby v. TJX, 87 USPQ2d at 1421 (citing Silverman v. CBS Inc., 870 F.2d 40, 9 USPQ2d 1778 (2d Cir. 1989)). In Silverman v. CBS Inc., the Court of Appeals for the Second Circuit addressed the issue of whether the statutory phrase "intent not to resume use" means "intent never to resume use or

²⁰ Because it constitutes hearsay and cannot be used to prove the truth of the matter asserted, the article "Adios Naugles" does not establish that Respondent had no intent to resume use of NAUGLES.

does it merely mean intent not to resume use within the reasonably foreseeable future?" *Id.* at 1782.

We conclude that the latter must be the case. The statute provides that intent not to resume may be inferred from circumstances, and two [now three] consecutive years of non-use is prima facie abandonment. Time is thereby made relevant. Indeed, if the relevant intent were intent never to resume use, it would be virtually impossible to establish such intent circumstantially. Even after prolonged non-use, and without any concrete plans to resume use, a company could almost always assert truthfully that at some point, should conditions change, it would resume use of its mark.

We do not think Congress contemplated such an unworkable standard. More likely, Congress wanted a mark to be deemed abandoned once use has been discontinued with an intent not to resume within the reasonably foreseeable future. This standard is sufficient to protect against the forfeiture of marks by proprietors who are temporarily unable to continue using them, while it also prevents warehousing of marks, which impedes commerce and competition.

Id.

Respondent also attempts to rely on its use of the mark NAUGLES commencing in 2011 in connection with clothing as evidence of an intent to resume use in connection with restaurant services. Chillingworth Cross-Examination 19:10-17, 22:18-24:2, 24:3-15; 85 TTABVUE 23, 26-28.²¹ Again, for the reasons stated above, the use of Respondent's mark on promotional items almost two decades after closure of the last restaurant does not fall within the "reasonably foreseeable future," and such long-after-the-fact evidence cannot be relied upon as evidence of an intent to resume use.

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²¹ We further observe that Respondent filed its application which eventually matured into Registration No. 4261951 after this proceeding was instituted.

"[T]he Lanham Act was not intended to provide a warehouse for unused marks." Imperial Tobacco v. Philip Morris, 14 USPQ2d at 1394. See 15 U.S.C. § 1064(3) (a claim for cancellation of a registration may be filed at any time if the registered mark has been abandoned). An inchoate wish to use a mark after a lengthy hiatus is an insufficient basis for maintaining a registration. Such is the case here where Petitioner has shown by a preponderance of the evidence that Respondent has abandoned use of its registered mark NAUGLES for "restaurant services" without an intent to resume.

DECISION: The petition for cancellation is granted on Petitioner's claim of abandonment, and Registration No. 1043729 will be cancelled in due course.

EXHIBIT 2

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

U. S. DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE

Christian M. Ziebarth

v.

Del Taco, LLC

Cancellation No. 92053501

Kelly K. Pfeiffer of Amezcua-Moll & Associates, P.C. for Christian M. Ziebarth.

April L. Besl and Joshua A. Lorentz of Dinsmore & Shohl LLP for Del Taco, LLC.

The petition of Christian M. Ziebarth having been granted on March 31, 2015, Registration No. 1043729 is hereby cancelled.

Mary Boney Denison

Mary Boney Danison

Commissioner for Trademarks

EXHIBIT 3

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN M. ZIEBARTH,

Petitioner.

VS.

DEL TACO LLC

Reg. No. 1,043,729 Cancellation No. 92053501

Respondent.

TESTIMONY AFFIDAVIT OF NOAH CHILLINGWORTH

- I, Noah Chillingworth, first being duly sworn and cautioned, solemnly and truly declare as follows:
- I am the Vice President of Marketing for the Respondent, Del Taco LLC ("Del Taco"). I have been employed with Del Taco since February of 2009 and previously served as the Senior Director of Brand Marketing and Advertising. I have personal knowledge of the facts stated herein.
- 2. I am informed and believe that the NAUGLES brand has been owned and used by Del Taco and its predecessors since 1988 in connection with Del Taco's restaurant services. I am informed and believe that while Del Taco stopped using the NAUGLES trademark as the actual name of a restaurant on October 25, 1995, it has never stopped using the mark in connection with its restaurant services. I am informed and believe that since 1995 Del Taco has used the NAUGLES mark in advertising and on clothing.
- Attached hereto and previously marked as Exhibit 11 is an example of advertising previously used by Del Taco in connection with its restaurant services prominently featuring the NAUGLES mark.

- I am informed and believe that Del Taco has also used the NAUGLES mark on the official Del Taco website advertising its restaurant services.
- 5. As noted previously, Del Taco also uses the mark NAUGLES in connection with clothing items. Attached as Respondent's Exhibit 29 is a true and accurate copy of articles of clothing sold by Del Taco in connection with its use of the NAUGLES mark for restaurant services.
- 6. I have personal knowledge of and am informed and believe that since 1988, Del Taco has consistently offered menu items that were originally sold in NAUGLES named restaurants owned by the prior owner, Naugles, Inc. I am informed and believe that consumers recognize these items as part of a "NAUGLES Secret Menu" within Del Taco's restaurant services.
- 7. In April 2009, prior to the filing of this action by Petitioner Christian Ziebarth,
 Del Taco began planning a new advertising campaign called "NAUGLES Secret Menu" for
 its restaurant services. This campaign would play on the consumer driven "NAUGLES
 Secret Menu." Attached hereto as Exhibits 30 (CONFIDENTIAL) and 31 (CONFIDENTIAL)
 are true and accurate copies of marketing presentations made in April 2009 and June 2010
 discussing the details of the "NAUGLES Secret Menu" campaign among other items.
- 8. Given Del Taco's longstanding history and use of the NAUGLES trademark, I am informed and believe that the public recognizes the NAUGLES brand as associated with Del Taco's restaurant services and that Del Taco is the owner of the NAUGLES trademark and brand.
- 9. I am personally aware of Petitioner Christian Ziebarth. I know him as a food blogger who has attempted to contact me through Barbara Caruso. Del Taco has a policy against accepting outside solicitations and ideas with respect to its intellectual property, brands, and marketing campaigns.

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that all statements made of his knowledge are true and that all statements made on information and belief are believed to be true.

Executed on January 10, 2014 in _____, California.

NOAH CHILLINGWORTH

State of California

County of Orange

NOTARY PUBLIC

MIRYAM HERNANDEZ
Commission # 1925838
Notary Public - California
Orange County
My Comm. Expires Feb 17, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by first-class mail, with courtesy copy via email, on this 16th day of January, 2014, to Kelly K. Pfeiffer, Amezcua-Moll Associations PC, Lincoln Professional Center, 1122 E. Lincoln Ave. Suite 203, Orange, CA 92865.

/ April L Besl /
April L Besl

OUR MENU KEEPS IMPROVING. JUST SOME OF THE NEW THINGS YOU'LL NOTICE.

HAMBURGERS

Hamburger-The traditional burger Hamburger patty, pickles, ketchup and mustard on our custom knot bun.

Del Burger-Crisp lettuce and tomato, pickles, onions, mayonnaise, ketchup, mustard and a specially seasoned hamburger patty on our custom knot bun.

Double Del Burger-Add another hamburger patty and two slices of cheese to our Del Burger

SIDE ORDERS

Fries-Small/Regular-Extra thick crinkle cut french fries.

Chips & Dips -Corn tortilla chips served with your choice of salsa, guacamole, spicy cheese sauce or salsa dressme.

Beans & Cheese-A jumbo cup of refried beans topped with Monterey Jack and Cheddar cheeses.

Mexican Rice-A jumbo cup of seasoned rice.

Fresh Guacamole-Prepared daily with fresh avocados.

Salsa-Homemade with fresh tomatoes scallions and ciliatro in our special souce.

BREAKFAST

Served until 11:00 a.m.

Egg & Cheese Soft Taco-A grilled flour tortilla with an egg scrambled in real butter and Monterey Jack and Cheeddar cheeses.

Egg & Cheese Burrito-A grilled flour tortilla with scrambled eggs, grated Monterey Jack and Cheddar cheeses and Mexican meat souce

Egg & Bean Burrito-A grilled flour tortilla with scrambled eggs, grated Monterey Jack and Chedilar cheeses, refried beans and Mexican meat source.

Beef & Egg Burrito-A grilled flour tortilla with scrambled eggs, grated Monterey Jock and Cheddar cheeses, seasoned ground beef and Mexican meat sauce.

Chicken & Egg Burrito-A grilled flour tortilla with marinated, grilled chicken, scrambled
eggs, grated Monterey Jack and Cheddar cheeses topped with Mexican
meat saure.

Steak & Egg Burrito-A grilled flour tortilla with marinated, grilled steak, scrambled eggs, grated Monterey Jack and Cheddar cheeses topped with Mexican meat sauce.

FOOD WORTH FIGHTING FOR.

VIVATO DEL TACO

These items available at Del Taco and Naugles restaurants



EXHIBIT 29





EXHIBIT 4

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN M. ZIEBARTH,

Petitioner,

vs.

DEL TACO LLC

Reg. No. 1,043,729 Cancellation No. 92053501

Respondent.

DEL TACO LLC'S RESPONSES TO PETITIONER'S FIRST SET OF REQUESTS FOR ADMISSIONS NOS. 1-17

In accordance with Rule 36 of Federal Rules of Civil Procedure and Rule 407.03 of the Trademark Rules of Practice, Respondent Del Taco LLC ("Respondent" or "Del Taco") hereby submits the following Answers to Petitioner Christian M. Ziebarth's ("Petitioner" or "Ziebarth") First Set of Requests for Admissions Nos. 1-17.

PRELIMINARY STATEMENTS AND GENERAL OBJECTIONS

- 1. These responses are based upon the best information presently available but without prejudice to the right to make modified or additional answers should better or further information become available.
- 2. Except for the explicit facts stated herein, no incidental admissions are intended hereby. The fact that Respondent responded to any of the Requests for Admission is not an admission that it accepts or admits the existence of facts set forth or assumed by any Request, or that such responses constituted admissible evidence.
- 3. As this proceeding moves forward, Respondent anticipates other facts, documents or witnesses may be discovered or identified by it. Respondent reserves the

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right to alter, supplement, amend, or otherwise modify these responses in any way at any time.

- 4. Respondent objects generally to Petitioner's admission requests to the extent that they:
 - Seek information which is neither relevant to the subject matter of the pending action, nor reasonably calculated to lead to the discovery of relevant or admissible evidence;
 - Seek information as to the knowledge of Respondent as an entity, where a complete response would require inquiries to be made of each and every one of Respondent's officers, agents, and employees;
 - c. Are overly broad and unduly burdensome;
 - d. Require Respondent to do more than that which is required under the Federal Rules of Civil Procedure and the Trademark Rules of Practice;
 - e. Misstate or provide inaccurate or misleading description of facts.
- 5. Respondent specifically objects to the definition of "own" or "owned" put forth by Petitioner as overly broad, vague, and unduly burdensome and requires Respondent to speculate and answer as to independent third-party businesses.

SPECIFIC RESPONSES

Reg. for Admission. 1:

Admit that as of December 31, 1995, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is

used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. *See e.g. In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); *In re Kentucky Fried Chicken* Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 1995 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 2:

Admit that as of December 31, 1996, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken

Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 1996 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 3:

Admit that as of December 31, 1997, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 1997 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 4:

Admit that as of December 31, 1998, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 1998 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 5:

Admit that as of December 31, 1999, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive.

Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 1999 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 6:

Admit that as of December 31, 2000, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See

e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2000 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 7:

Admit that as of December 31, 2001, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2001Respondent did not itself own a restaurant named "Naugles" in the

United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Reg. for Admission. 8:

Admit that as of December 31, 2002, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. *See e.g. In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); *In re Kentucky Fried Chicken* Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2002 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 9:

Admit that as of December 31, 2003, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2003 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 10:

Admit that as of December 31, 2004, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive.

Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2004 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 11:

Admit that as of December 31, 2005, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See

e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2005 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Reg. for Admission. 12:

Admit that as of December 31, 2006, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2006 Respondent did not itself own a restaurant named "Naugles" in the

United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Reg. for Admission. 13:

Admit that as of December 31, 2007, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2007 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 14:

Admit that as of December 31, 2008, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2008 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 15:

Admit that as of December 31, 2009, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive.

Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. *See e.g. In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); *In re Kentucky Fried Chicken* Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that as of December 31, 2009 Respondent did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurant services.

Req. for Admission. 16:

Admit that as of December 31, 2010, Respondent did not own a restaurant named "Naugles" in the United States.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further specifically objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Without waiving the foregoing, Respondent admits that as of December 31, 2010 Respondent did not itself own a restaurant named

"Naugles" in the United States but denies that no use of the name "Naugles" was made at that time in connection with restaurants.

Req. for Admission. 17:

Admit that Respondent does not currently own a restaurant open to the public named "Naugles."

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent admits that it currently did not itself own a restaurant named "Naugles" in the United States but denies that no use of the name "Naugles" is currently being made in connection with restaurant services.

Dated: October 21, 2011

PoriVL Best

Joshua A. Lorentz

DINSMORE & SHOHL LLP

255 East Fifth Street

Cincinnati, Ohio 45202

(513) 977-8527-direct

(513) 977-8141-fax

april.besl@dinslaw.com

Attorneys for Respondent Del Taco LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by overnight mail, on this 21st day of October, 2011, to Susan M. Natland and Gregory Phillips, Knobbe Martens Olson & Bear LLP, 2040 Main Street, 14th Floor, Irvine, California 92614.

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

CHRISTIAN M. ZIEBARTH,

Petitioner.

VS.

DEL TACO LLC

Reg. No. 1,043,729 Cancellation No. 92053501

Respondent.

DEL TACO LLC'S SUPPLEMENTAL RESPONSES TO PETITIONER'S SECOND SET OF REQUESTS FOR ADMISSION NOS. 18-25

In accordance with Rule 36 of Federal Rules of Civil Procedure and Rule 407.03 of the Trademark Rules of Practice, Respondent Del Taco LLC ("Respondent" or "Del Taco") hereby submits the following supplemental responses to Petitioner Christian M. Ziebarth's ("Petitioner" or "Ziebarth") Second Set of Requests for Admission Nos. 18-25.

PRELIMINARY STATEMENTS AND GENERAL OBJECTIONS

- These responses are based upon the best information presently available but without prejudice to the right to make modified or additional answers should better or further information become available.
- These responses are in accordance with the instructions set forth in Petitioner's Second Set of Requests for Admissions Nos. 18-25, which do not incorporate expressly or by reference, any other instructions previously set-forth in Petitioner's First Set of Requests for Admissions Nos. 1-17.
- 3. Except for the explicit facts stated herein, no incidental admissions are intended hereby. The fact that Respondent responded to any of the Requests for Admission is not an admission that it accepts or admits the existence of facts set forth or assumed by any Request, or that such responses constituted admissible evidence.

Request No. 22.

Admit that Del Taco has not operated a physical restaurant in the United States under the trademark "Naugles" since late 1995.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken

Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Furthermore, the definition of "late 1995" is a vague and undefined time-period. For purposes of this response, Respondent shall define "late 1995" as the last day of the year, specifically, December 31, 1995. Without waving the foregoing, Respondent admits that since December 31, 1995 it has not operated a restaurant under the name "Naugles" in the United States but denies that it has not used the NAUGLES trademark in connection with restaurant services during that time period.

Request No. 23.

Admit that Del Taco does not plan to operate a physical restaurant in the United States under the trademark "NAUGLES" in the next 5 years.

ANSWER:

Respondent reiterates its General Objections and specifically objects to this discovery request as unreasonable, unduly burdensome, oppressive, and expensive. Respondent further objects to the extent this discovery request calls for Respondent to speculate as to the activities of independent third parties and/or speak on behalf of such independent third parties. Moreover, Respondent objects to the extent that this response is used against Respondent at all because there are many ways to use a mark in connection with restaurant services apart from usage of the mark as the name of the restaurant. See e.g. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (menu specimen accepted as use of mark for restaurant services); In re Kentucky Fried Chicken Corporation, 170 USPQ 51, 54 (TTAB 1971) (usage of mark on bags carrying food identifies restaurant services). Without waiving the foregoing, Respondent states that its marketing and businesses plans are subject to change over the next five year period and

Respondent has specific plans to use Respondent's NAUGLES mark in connection with its restaurant services on menus and in marketing campaigns, but admits that it currently does not plan to operate a restaurant under the name "Naugles" within the next five years.

1980's. Respondent denies all other facts, statements, and allegations contained in Request No. 25.

Dated: October 26, 2012

April L. Best
Joshua A. Lorentz
DINSMORE & SHOHL LLP
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8527-direct
(513) 977-8141-fax
april.besl@dinslaw.com

Attorneys for Respondent Del Taco LLC

A Best

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a copy of the foregoing was sent by certified first-class mail, on this 26th of October, 2012, to Richard F. Christesen, 6905.S 1300, E #233, Midvale, Utah, 84047.

EXHIBIT 5

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN M. ZIEBARTH,

Petitioner,

NS.

Reg. No. 1,043,729

Cancellation No. 92053501

Respondent.

CROSS-EXAMINATION DEPOSITION OF:

NOAH CHILLINGWORTH

Monday, March 24, 2014

Reported by:

Stephanie Leslie CSR No. 12893

Page 1

REGAL COURT REPORTING, INC. 866-228-2685

1	Q Okay. Let's look back at your affidavit,
2	please. Rose kind of got into this a little bit, but
3	in paragraph 2 I just want to make sure that your
4	testimony today is consistent with your sworn affidavit
5	that Del Taco stopped using the Naugles trademark as
6	the actual name of a restaurant on October 25th, 1995.
7	Is that accurate?
8	MS. BESL: Objection. It calls for a legal
9	conclusion.
10	You can answer.
11	BY MS. PFEIFFER:
12	Q That's your testimony. Is that still your
13	testimony today?
14	A Yes.
15	Q Is it true that after, to your knowledge,
16	October 25th, 1995, the restaurant Naugles, which, at
17	that time, was owned and operated by Del Taco, were no
18	longer in existence?
19	A I believe so.
20	Q Is it true that on October 25th, 1995, the
21	last Naugles restaurant was closed?
22	MS. BESL: Just objection that it calls for a
23	legal conclusion.
24	THE WITNESS: Again, I believe so.
25	

Page 54

EXHIBIT 6

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN M	1. ZIEBARTH,)
	Petitioner,)
vs.) Reg. No. 1,043,729
DEL TACO LI	c,) Cancellation No. 92053501
	Respondent.)

CROSS-EXAMINATION DEPOSITION OF:

NOAH CHILLINGWORTH

Monday, March 24, 2014

Reported by:

Stephanie Leslie CSR No. 12893

Page 1

REGAL COURT REPORTING, INC. 866-228-2685

1	2011; correct?
2	A Correct.
3	Q This may seem kind of like a basic question,
4	but is Del Taco the entity that sells these clothing
5	items bearing the Naugles mark as seen in Exhibit 29?
6	A What do you mean "the entity"?
7	Q Who sells the clothes seen and hats seen i
8	Exhibit 29?
9	A The Web site is DelTacoWebStore.com, which is
10	our which is an affiliate of Del Taco.
11	Q So Del Taco is responsible for selling these?
12	A Yes.
13	Q Naugles is not the name of the entity selling
14	these clothing items; correct?
15	A Correct.
16	Q So it's accurate to say that Del Taco is the
17	source of these clothing items bearing the word
18	"Naugles," not a company or source named "Naugles";
19	correct?
20	MS. BESL: Objection to the extent it calls
21	for a legal conclusion.
22	Go ahead.
23	BY MS. PFEIFFER:
24	Q You can answer.
25	A As far as I know, correct.

Page 24

REGAL COURT REPORTING, INC. 866-228-2685

EXHIBIT 7

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

POST REGISTRATION REVIEW ... JRKSHEET

creen E			The correction (fert editing), the EDITED column should be checked. RETAIN IN FILE			
	rror Edit	Enor	bund during review requiring amendment of:			
мк		AM	Mark: Word Drawing Code New Drawing: Yes No			
		AM	Mark Type:			
		AM	Register:			
		AM	Amended Register: Date Register Amended:			
		CL	Prime Classification:			
CL		CL	Class Status Active Inactive Class Status Date:			
		CL	International Class: AddDelete Reclassify			
_		CL	U.S. Class: AddDelete Reclassify			
		GS	Goods and Services:			
	1 10	DL	Deleted Goods () sss Goods (())			
	1./	AT	Attorney Name:			
CD		CD	Correspondence: Name SI. Address City/SVCntry Zip			
		IDR	Domestic Representative:			
AC		AO	Amended/Registration Statement:			
		BO	Certification of Correction Statement:			
-		PY30l Registrant: Name				
-		PY	Entity Type			
-		PY	Citizenship/State of Inc.			
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UNITED STATES DEPARTMENT OF COMMERCE Patent and Tradema Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

REGISTRATION NO. 1043729 SERIAL NO. 73/057402

PAPER NO.

MAILING DATE: 09/11/96

MARK: NAUGLES

REGISTRANT: DEL TACO, INC.

CORRESPONDENCE ADDRESS: WILLIAM P. CHRISTIE CHRISTIE, PARKER & HALE, LLP P.O. BOX 7068 PASADENA, CA 91109-7068

Please furnish the following in all correspondence:

- Your phone number and zip code.
 Mailing date of this action.
 Affidavit-Renewal Examiner's name.
 The address of all correspondence not containing fees should include the words "Box 5".
 Registration No.

RECEIPT IS ACKNOWLEDGED OF THE SUBMITTED REQUEST UNDER:

SECTION 9 OF THE TRADEMARK ACT AND 37 CFR SECS. 2.181-2.184.

YOUR REQUEST FULFILLS THE STATUTORY REQUIREMENTS AND RENEWAL HAS BEEN GRANTED.

> BARBARA HARPER AFFIDAVIT-RENEWAL EXAMINER TRADEMARK EXAMINING OPERATION (703) 308-9500 EXT. 131



SERVICE MARK Docket No. 25457/WPC

THE UNITED STATES PATENT AND TRADEMARK OFFICE RENEWAL APPLICATION TRANSMITTAL

July 8, 1996

Box POST REG FEE Assistant Commissioner for Trademarks 2900 Crystal Drive Arlington, Virginia 22202-3513

Commissioner:

Enclosed for filing are:

1. A renewal application for the following registration:

Mark : NAUGLES Reg. No. : 1,043,729

Reg. Date : July 13, 1976

Class(es) : 35

Registrant : Del Taco, Inc.

- 2. One specimen of the mark as used for each class.
- 3. A check for \$300.00 for the filing fee.

Any deficiency in or overpayment of fees for this transaction should be charged or credited to Deposit Account No. 03-1728. Please show our docket number with any Deposit Account transaction. A copy of this letter is enclosed.

Please address all correspondence to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, California 91109-7068.

"Express Mail" mailing label number EM247285218US

Date of Deposit: July 8, 1996

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" under 37 CFR § 1.10 on the date indicated above and is addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Aprington, VA 22202-3513

Mary L. Morley

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

William P Christie

818/795-9900; 213/681-1800





SERVICE MARK Docket No. 25457/WPC

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE RENEWAL APPLICATION TRANSMITTAL

July 8, 1996

Box POST REG FEE Assistant Commissioner for Trademarks 2900 Crystal Drive Arlington, Virginia 22202-3513

Commissioner:

Enclosed for filing are:

A renewal application for the following registration:

Mark NAUGLES Reg. No. 1,043,729 : Reg. Date July 13, 1976 : Class(es) 35

Registrant : Del Taco, Inc.

- 2. One specimen of the mark as used for each class.
 - 3. A check for \$300.00 for the filing fee.

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Please address all correspondence to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, California 91109-7068.

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

"Express Mail" mailing label number EM247285218US

Date of Deposit: July 8, 1996 I hereby certify that this paper or fee is being deposited

with the United States Postal Service "Express Mail Post Office to Addressee" under 37 CFR § 1.10 on the date indicated above and is addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Aplington, VA 22202-3513

William P. Christie

818/795-9900; 213/681-1800

300/365

#3

SERVICE MARK 25457/WPC

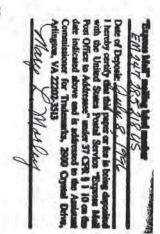
THE UNITED STATES PATENT AND TRADEMARK OFFICE APPLICATION FOR RENEWAL OF REGISTRATION

MARK : NAUGLES

REG. NO. : 1,043,729

REG. DATE : July 13, 1976

CLASS(ES) : 35



ASSISTANT COMMISSIONER FOR TRADEMARKS:

The applicant for renewal of the above-identified registration is Del Taco, Inc., a California corporation, with offices at 1800.

W. Katella Avenue, Orange, California 92667.

The renewal applicant requests that the above-identified registration, granted on July 13, 1976, which renewal applicant now owns, as shown by records in the U.S. Patent and Trademark Office by means of an Assignment recorded on May 6, 1988 (Reel 0604, Frame 0858), and Changes of Name recorded on December 21, 1993 (Reel 1081, Frame 0396) and on December 22, 1993 (Reel 1084, Frame 0316), be renewed in accordance with the provisions of Section 9 of the Act of July 5, 1946.

I, Michael L. Annis, the undersigned, declare that I am Vice President and General Counsel of renewal applicant and am authorized to make this declaration for and on behalf of said applicant; and that the mark shown in the registration is still in

A 345

300100 CK

150 TT 07/19/96 1043729

Registration No. 1,043,729

use in interstate commerce on or in connection with the following services encompassed by the identification of services recited in the registration: RESTAURANT SERVICES, the attached specimen showing the mark as currently used.

The renewal applicant hereby appoints the following attorneys:

R. W. Johnston
D. Bruce Prout
Hayden A. Carney
Richard J. Ward, Jr.
Russell R. Palmer, Jr.
LeRoy T. Rahn
Richard D. Seibel
Walter G. Maxwell
John P. Grinnell
William P. Christie
David A. Dillard
Carl Kustin
Thomas J. Daly

Roderick G. Dorman Vincent G. Gioia Felix L. Fischer Theodore A. Pianko Edward R. Schwartz John D. Carpenter William J. O'Brien David A. Plumley Wesley W. Monroe Grant T. Langton Syed A. Hasan R. Dabney Eastham Jeffrey P. Wall Patrick J. S. Inouye
Constantine Marantidis
John W. Eldredge
Yar R. Chaikovsky
Paul W. Fish
Kyle L. Elliott
Marilyn R. Khorsandi
Craig A. Gelfound
Gregory S. Lampert
Jeffrey A. Fehervari
Marc Morris
Stephen P. Skabrat

all members or associates of or of counsel to the law firm Christie, Parker & Hale, LLP, as principal attorneys with power to appoint associate attorneys, to prosecute this application for renewal, and to transact all business in the Patent and Trademark Office connected with this registration and the renewal application.

The authority under this Power of Attorney of each person named above shall automatically terminate and be revoked upon such person ceasing to be a member or associate of or of counsel to that law firm.

Registration No. 1,043,729

Please address all correspondence and the renewal certificate to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, California 91109-7068.

I, the undersigned, declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the aforesaid registration and this renewal application.

DEL TACO, INC.

Date 6/25/90

Michael L. Annis

Vice President & General Counsel

25457.Rnw

OUR MENU KEEPS IMPROVING. JUST SOME OF THE NEW THINGS YOU'LL NOTICE.

HAMBURGERS

Hamburger - The traditional burger. Hamburger patty, pickles, ketchup and mustard on our custom knot bun.

Del Burger-Crisp lettuce and tomato, pickles, onions, mayonnaise, ketchup, mustard and a specially seasoned hamburger patty on our custom knot bun.

Double Del Burger-Add another hamburger patty and two slices of cheese to our Del Burger.

SIDE ORDERS

Fries-Small/Regular-Extra thick crinkle cut french fries.

Chips & Dips-Corn tortilla chips served with your choice of salsa, guacamole, spicy cheese sauce or salsa dressing

Beans & Cheese-A jumbo cup of refried beans topped with Monterey Jack and Cheddar cheeses.

Mexican Rice-A jumbo cup of seasoned rice

Fresh Guacamole-Prepared daily with fresh avocados.

Salsa-Homemade with fresh tomatoes, scallions and cilantro in our special sauce.

BREAKFAST Served until 11:00 a.m.

Egg & Cheese Soft Taco-A grilled flour tortilla with an egg scrambled in real butter and Monterey Jack and Cheddar cheeses.

 $Egg \& Cheese \ Burrito- \textit{A grilled flour tortilla with scrambled eggs, grated Monterey Jack and Cheddar cheeses and Mexican meat sauce.}$

Egg & Bean Burrito-A grilled flour wrilla with scrambled eggs, grated Monterey Jack and Cheddar cheeses, refried beans and Mexican meat sauce.

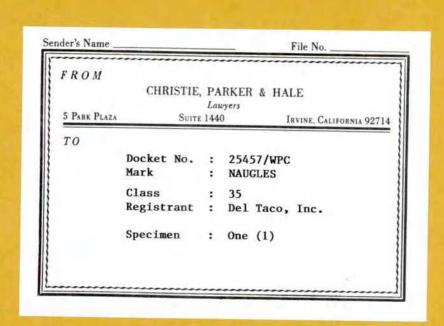
Beef & Egg Burrito-A grilled flour tortilla with scrambled eggs, grated Monterey Jack and Cheddar cheeses, seasoned ground beef and Mexican meat sauce.

Chicken & Egg Burrito-A grilled flour tortilla with marinated, grilled chicken, scrambled eggs, grated Monterey Jack and Cheddar cheeses topped with Mexican meat sauce.

Steak & Egg Burrito-A grilled flour tortilla with marinated, grilled steak, scrambled eggs, grated Monterey Jack and Cheddar cheeses topped with Mexican meat sauce.

FOOD WORTH FIGHTING FOR.

These items available at Del Taco and Naugles restaurants



Date of Deposit: As this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" under 37 CPR § 1 10 on the date indicated above and is addressed to the Assistant Commissioner for Trademarka, 2900 Crystal Drive, Arlington, VA 22202-3513

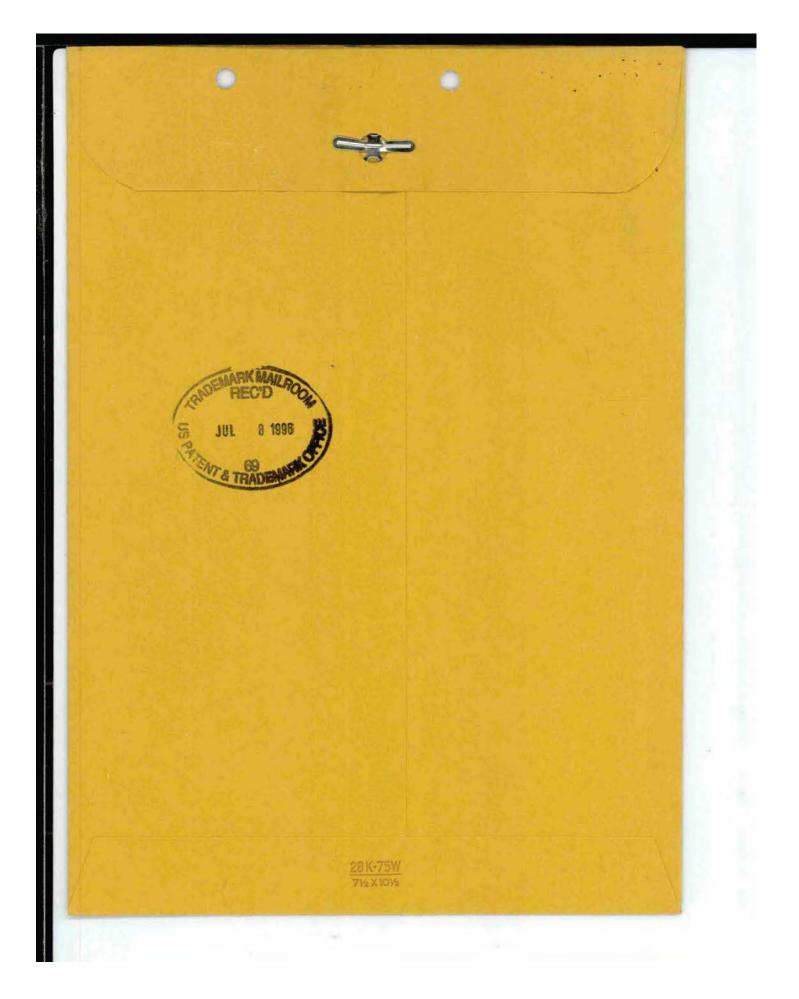


EXHIBIT 8

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE COMBINED RENEWAL APPLICATION AND DECLARATION OF USE TRANSMITTAL

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on May 18, 2006.

Kristen M. Geraci

Commissioner for Trademarks P.O. Box 1451 Alexandria, VA 22313-1451 May 18, 2006

Commissioner:

Enclosed for filing are:

A combined renewal application and declaration of use for the following registration:

Mark

NAUGLES

Reg. No.

1,043,729

Registered Class(es) July 13, 1976 35

Registrant

: Del Taco LLC

- One specimen of the mark as used.
- A check for \$500 for the filing fee.

Any deficiency in or overpayment of fees for this transaction should be charged or credited to Deposit Account No. 03-1728. Please show our docket number with any Deposit Account transaction. A copy of this letter is enclosed.

Please address all correspondence to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, California 91109-7068.

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

William P. Christie

626/795-9900

WPC/kmg KMG IRV1096287.1-*-05/18/06 11:14 AM

05-22-2006

U.S. Patent & TMOfc/TM Mail Ropt Dt. #72

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE COMBINED RENEWAL APPLICATION AND DECLARATION OF USE TRANSMITTAL

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on May 18, 2006.

Kristen M. Geraci

Commissioner for Trademarks P.O. Box 1451 Alexandria, VA 22313-1451

May 18, 2006

Commissioner:

Enclosed for filing are:

A combined renewal application and declaration of use for the following registration:

Mark

NAUGLES

Reg. No.

1,043,729

Registered

July 13, 1976

Class(es)

: 35

Registrant

Del Taco LLC

- 2. One specimen of the mark as used.
- 3. A check for \$500 for the filing fee.

Any deficiency in or overpayment of fees for this transaction should be charged or credited to Deposit Account No. 03-1728. Please show our docket number with any Deposit Account transaction. A copy of this letter is enclosed.

Please address all correspondence to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, California 91109-7068.

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

William P. Christie 626/795-9900

WPC/kmg KMG IRV1096287.1-*-05/18/06 11:14 AM

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

COMBINED APPLICATION FOR RENEWAL OF REGISTRATION UNDER SECTION 9, AND DECLARATION OF USE UNDER SECTION 8

Mark : NAUGLES

Registration No. : 1,043,729

Registered: July 13, 1976

Class(es) : 35

COMMISSIONER FOR TRADEMARKS:

The applicant for renewal of the above-identified registration is Del Taco LLC, a California limited liability company, with offices at 25521 Commercentre Drive, Lake Forest, California 92630. The applicant requests that the above-identified registration, granted on July 13, 1976, and renewed for ten years as of July 13, 1996 which applicant now owns, as shown by records in the U.S. Patent and Trademark Office by means of an Assignment from Naugles, Inc. (California Corporation) to DTI Acquisition Corporation (California Corporation) recorded on May 6, 1988 (Reel 0604, Frame 0858), Change of Name from DTI Acquisition Corporation to AWR II, Inc. (California Corporation) recorded on December 21, 1993 (Reel 1081, Frame 0396), Change of Name from AWR II, Inc. to Del Taco, Inc. (California Corporation) recorded on December 22, 1993 (Reel 1084, Frame 0316), and Change of Name from Del Taco, Inc. (California Corporation) to Del Taco LLC (California Limited Liability Company) on April 25, 2006 (Reel 3296, Frame 0898), be renewed in accordance with the provisions of Section 9 of the Act of July 5, 1946.

I, Michael L. Annis, the undersigned, declare that I am Vice President and General Counsel of renewal applicant and am authorized to make this declaration for and on behalf of said applicant; and that the mark shown in the registration is still in use in commerce in connection with the following services identified in the registration: RESTAURANT SERVICES, the attached specimen (Attachment 1) is a web page showing the mark as currently used.

Registration No. 1,043,729

POWER OF ATTORNEY

Applicant hereby appoints the following members of the Bar and attorneys of the law firm Christie, Parker & Hale, LLP, with full power of substitution and revocation, to transact all business in the Patent and Trademark Office in connection with this Registration, including the electronic filing of this document, the facts stated in this document, or any other document, on registrant's behalf:

D. Bruce Prout	Robert A. Green	Gary S. Dukarich	Fariba Siriani
Richard J. Ward, Jr.	Howard A. Kroll	Jun-Young E. Jeon	John W. Peck
Walter G. Maxwell	Richard A. Wallen	Stephen D. Burbach	Deidra D. Ritcherson
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Syed A. Hasan	Raymond R. Tabandeh	Richard T. Jackson	Richard J. Paciulan

The authority under this Power of Attorney of each person named above shall automatically terminate and be revoked upon such person ceasing to be a member or associate of or of counsel to that law firm.

Please address all correspondence and the renewal certificate to CHRISTIE, PARKER & HALE, LLP, P.O. Box 7068, Pasadena, CA 91109-7068.

DECLARATION

I, the undersigned, declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the aforesaid registration and this renewal application.

Del Taco LLC

Date

. .

WPC/kmg KMG IRV1096035.1-*-05/11/06 2:57 PM Michael L. Annis

Vice President and General Counsel



The first Del Taco opened in 1964 in Barstow, California with a concept that caught on quickly — freshly prepared, made to order Mexican/American food, fast service and value. In more than 36 years, Del Taco has grown to become a major player in the Mexican-style quick-service category. With over 400 restaurants across the country, Del Taco is the second largest Mexican/American chain in the United States.

Building the Concept

The success of the first restaurant, in 1964, quickly led to expansion. Months after the first, a second restaurant opened in Corona, California with a significant addition — a drive-thru window which was to become an enduring feature of the Del Taco chain. Two years later, Red-E-Foods Systems, Inc. was formed and Del Taco became a hot Southern California franchise. In 1972, a modernized, 28-seat restaurant opened in Newport Beach, the largest Del Taco at that time. This updated Del Taco was the epitome of the modern, efficient fast-food outlet and became the design prototype for Del Taco restaurants to come.

In 1973 Red-E-Foods Systems, Inc. officially changed its name to Del Taco, Inc. and it also marked the first year that Del Taco opened units at an average rate of one per month.

Three years after changing the name to Del Taco, Inc. founders Ed Hackbarth and David Jameson sold their stock to an independently held firm. The new management team set their sights on further expansion throughout Southern California. The 50th Del Taco restaurant opened in February, 1977 with the 100th restaurant opening just 19 months later.

Naugles, another quality Mexican fast-food chain, was established in 1970 and quickly gained in popularity. In 1971, Harold Butler bought the three Naugles restaurants and began rapid expansion, growing the chain to 225 restaurants. In December 1985, Butler sold Naugles to Collins Food International.

In March 1988, Del Taco and Naugles, two of the most successful Mexican fastfood restaurant chains, combined to become one of the strongest competitors in

ATTACHMENT 1

http://www.deltaco.com/content history.html

5/3/2006

the then \$60 billion fast-food industry.



Strengthening the Concept

In 1990, Kevin K. Moriarty joined the company as Chief Executive Officer and it proved to be a watershed year for Del Taco. In the ensuing years, the chain redoubled its efforts to ensure customer value and operator opportunity. CEO Kevin K. Moriarty and his management team became owners of the company and took the necessary measures to ensure their concept continued its growth momentum. They launched an aggressive program of brand marketing and promotions; improved operating efficiencies for better and faster customer service; re-acquired out-of-state trademark rights to the Del Taco name; reorganized and strengthened the company's balance sheet.

Particularly significant to the chain was the unveiling of Del Taco's new Concept 2000 restaurant design. The Concept 2000 design provided a unique, fun, festive, experience at a fast-food value that the whole family could enjoy.

The Road to Expansion

In an industry pervasive with speed, Del Taco has successfully positioned itself for accelerated expansion nationwide. Spreading its advantageous concept and growth momentum across the nation, Del Taco recently has signed 50+ development agreements that will increase the Del Taco chain by an additional 300+ franchised restaurants over the next few years. These new agreements represent the largest franchise growth in the history of the company and will expand Del Taco's presence to over 14 states.

The Lake Forest, CA - based chain offers menu items that appeal to a broad range of tastes with a strong emphasis on quality and value. The menu includes tacos, burritos, quesadillas, nachos, world famous crinkle cut fries, Double Del Cheeseburgers, shakes and breakfast burritos with new tastes introduced regularly. Each item is made to order only when the customer orders it with many quality ingredients including lard-free beans made from scratch daily, real cheddar cheese grated on site, chicken grilled fresh every hour, and fresh produce. Del Taco, Inc. is a privately held company.

EXHIBIT 9

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

BUSINESS

Naugles comeback: Local food blogger wins trademark case against Del Taco

By NANCY LUNA | nluna@scng.com | Orange County Register April 2, 2015 at 7:05 am

0 COMMENTS

In a blow to Del Taco, an Orange County food blogger has won a trademark battle that could bring back Naugles, the defunct Mexican fast-food chain.

Since 2010, Christian Ziebarth, a Huntington Beach resident, has been fighting for the Naugles trademark, a brand that merged with Del Taco in 1988. In a petition with the U.S. Patent and Trademark agency, Ziebarth argued Del Taco abandoned the brand years ago, legally allowing him to make a claim.

The Lake Forest-based company has been fighting him ever since. On Tuesday, a federal panel said Del Taco was unable to prove they had kept the trademark alive since closing the last restaurant in 1995.

"The record unequivocally shows that respondent (Del Taco) ceased operating the last restaurant bearing the Naugles name on October 25, 1995," the panel stated in an order filed Tuesday. As a result, the panel granted Ziebarth's "claim of abandonment."

Ziebarth said he was thankful the correct decision was made. He and his investors plan to move forward with plans to revive the chain with at least one Naugles restaurant.

"We look forward now to ramping up our existing efforts to bring Naugles food, a perennial favorite that appeals to all demographics, to the thousands of fans who remember it and love it from its first iteration as well as to a new generation," he said in a statement to the Register.

In court documents and previous statements to the Register, Del Taco has argued that Naugles is part of the company's heritage, and it has kept the brand alive by consistently offering a secret Naugles menu at its restaurants.

Del Taco, recently acquired by a Chicago investment firm, declined to comment.

Naugles fans have been rooting for a Ziebarth victory.

Over the last several months, the food blogger has thrown a few parties for super fans. At the events, which have drawn interest from hundreds, Ziebarth has served classic Naugles items: beef and bean combo burritos and the bean cup – all served with the classic red and green sauces.

Fans who attended swooned, saying Ziebarth and his team of cooks nailed the Naugles flavors they remember from their childhood.

Ziebarth first became interested in reviving Naugles after mentioning the brand on his blog, Orange County Mexican Restaurants. In 2009, Ziebarth launched the Naugles Twitter handle and the Nauglestacos.com website.

Both sites promised a brand comeback.

With Del Taco changing ownership in recent weeks, Ziebarth said he's not sure if the chain will appeal the decision. In early March, Chicago restaurant tycoon Larry Levy announced plans to buy Del Taco in a deal valued at \$500 million.

"It's a wait and see now," Ziebarth said.

When Del Taco and the Orange-based parent company of Naugles merged in 1988, Naugles had 171 restaurants. Del Taco had 202. Within a year, many Naugles restaurants were converted to Del Tacos.

Contact the writer: niuna@ocregister.com and follow the Fast Food Maven on Twitter, Facebook and Instagram.

Tags: Fast Food, Opinion Columns, Restaurants



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illy OnStar:



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Fast Food Nancy Luna

Nancy Luna is an award-winning journalist with more than 25 years reporting experience. She's been the Register's restaurant beat writer since 2005, covering some of the biggest players in the industry. In-N-Out, Chipotle, McDonald's and Taco Bell. Luna also covers dining trends from food halls to food trucks. She writes with a programmer is a programmer of the consideration of the co

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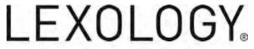
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Register

Del Taco loses rights to its Naugles trademark

Knobbe Martens

USA May 27 2015

Del Taco acquired the chain of 225 Naugles Mexican fast food restaurants in 1988 and subsequently began closing them down. The last Naugles restaurant was closed in 1995. An individual named Christian Ziebarth petitioned to cancel Del Taco's federal trademark registration for NAUGLES on the ground that the mark had been abandoned. Del Taco failed in its attempt to convince the TTAB that it had not abandoned its rights in the Naugles trademark for restaurant services and its registration was cancelled.

Under the Trademark Act, a trademark is considered abandoned if use has been discontinued with intent not to resume such use.

Nonuse for three consecutive years is prima facie evidence of abandonment.

Del Taco claimed it continued to use the Naugles mark in connection with restaurant services since 1995 because it had used the mark in advertising and on clothing. The TTAB explained that use of a mark in connection with services requires that the mark be used in the sale or advertising of the services and that the services are being rendered in commerce. Thus, use on clothing does not constitute service mark use for restaurant services when there are no restaurants operating under the Naugles name. To support its contention that it had not abandoned the NAUGLES mark, Del Taco submitted a one-page food menu displaying the phrase "Viva Naugles Viva Del Taco." Unfortunately, however, Del Taco's witness could not recall when the menu was created or used and testified that since working for Del Taco in 2009, he had not seen that particular menu. Del Taco also submitted web pages showing use of the "Viva Naugles Viva Del Taco" phrase on the history section of its website. The Board held that those pages merely described the history of the merger of the Naugles and Del Taco chains, and found they were clearly not advertisements for contemporaneously-rendered restaurant services. Finally, Del Taco claimed continued use of the mark because there is a "secret menu" at Del Taco restaurants whereby consumers can order food items previously offered in Naugles restaurants. The TTAB found that even if the record supported use of a secret menu, there was no evidence that the Naugles mark was used in connection with that secret menu. Rather, the evidence suggested that consumers would just order a particular food item. The TTAB concluded there was no evidence of continued use.

Del Taco also argued it did not abandon the mark because it intended to resume use. The only evidence of that intent, however, was two internal marketing presentations made in April 2009 and June 2010 which the TTAB held was "much too late to save [Del Taco's] registration." The TTAB cited to Silverman v. CBS Inc. (9 USPQ2d 1778 (2nd Cir. 1989), in which the 2nd Circuit concluded that the statutory phrase "intent not to resume use" does not mean "intent never to resume use" but, rather, means "intent not to resume use within the reasonably foreseeable future."

Christian M. Ziebarth v. Del Taco LLC, Case No. 92053501 (TTAB April 2, 2015) [not precedential].

Knobbe Martens - Diane M. Reed

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1 of 1 DOCUMENT

Copyright 2012 Orange County Register
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Orange County Register (California)

June 2, 2012 Saturday

SECTION: BUSINESS; Pg. D

LENGTH: 162 words

HEADLINE: Twitter talk suggests comeback for Naugles fast-food brand

BYLINE: Nancy Luna Register writer, The Orange County Register

BODY:

Does anyone remember **Naugles**? The Mexican fast-food chain - famous for its bun taco and Naugleburger - disappeared years ago after it merged with Del Taco in 1988.

Well, it appears Naugles might be making a comeback. One of my Twitter followers alerted me late Wednesday to say she stumbled upon a Twitter account called Naugles. The active site describes itself as a "quasi-unofficial" social-media account for the popular food chain from the 1970s and '80s.

The Twitter site, and its companion Naugles website, declares that the brand is "getting ready" for a comeback.

I messaged the Naugles Twitter account, asking if the comeback was legitimate.

The response: "We are a group of Naugles fans working to bring the beloved chain back; this is a serious, bona fide business venture, nothing less."

No other disclosures were provided, including names of the parties involved.

A year after the merger, Del Taco announced plans to convert 171 Naugles restaurants into Del Tacos.

LOAD-DATE: June 3, 2012

RESTAURANTS &



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Mexi Meals

Naugles, Legendary SoCal Mexican Fast-Food Chain, is Trying to Make a Comeback, and We Have the Proof

By Gustavo Arellano Tue., Jul. 9 2013 at 11:30 AM

54 Comments

Categories: Mexi Meals

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The sauce in all its thick, spicy, sweet glory...

As I've gone around Southern California lecturing about Taco USA: How Mexican Food Conquered America, one name that always comes up is Naugles, a former fast-food chain that at its height numbered around 250 outposts but was bought out by Del Taco in the 1980s and disappeared. I never had a chance to eat there, but fans speak of it in mythical terms, rave about their taco sandwich (still available via Del Taco's secret menu as a "bun taco"), their taco sauce, their superior quality to the dreck that passes as fast-food Mexican nowadays, their everything.

May those fans start drooling anew now: a mysterious consortium is trying to bring Naugles back, and they gave me some of the chain's legendary taco sauce to prove it.

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From the Vault

9/15/2013 4:01 PM 1 of 7

A couple weeks back, some Naugles taco sauce was dropped off at the offices of this infernal rag. A paper slip referred me to this website, and I made contact with the people. Let's just say for right now that this effort isn't sponsored by Del Taco (which still owns the trademark to the Naugles name and hawks Naugles T-shirts and caps) but is a fascinating effort in nostalgia, consumer demand, and damn good cooking. I'll have more on the effort to bring back Naugles in September in a cover story, insha'allah, so other reporters: LAY OFF. This one's mine, and I've sworn the parties involved to secrecy under penalty of a lifetime of chinga tu madres directed at them.

As for the sauce, prepared according to the specifications of founder Dick Naugle? For what it is--not a salsa, but a taco sauce--it's spectacular. Thick, sweet, a bit like Del Taco's Del Scorcho but with an actual scorch-o. Objectively, it's also great: would be like a Cal-Mex Sriracha. You can't buy it anywhere right now, so if you want to try some, let's just say you should root for these Naugles fans to succeed in bringing the chain back. I have seen the light, and I want Naugles NOW!

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Jul 10, 2013

BTs Buns & Torts in Visalia gets 4.5 stars on both Yelp and Urban Spoon. Rumored to be run by Dick's nephew and has same menu as Naugles.





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9/15/2013 4:01 PM

Naugles returns to Fountain Valley

By KTLA

JULY 30, 2015, 10:03 AM



fter a 20-year hiatus, Naugles, a popular Mexican restaurant that once had a cult-like following, reopened Tuesday in Fountain Valley.

The Naugles rebirth was met with joy which resonated over social media. Fans of the restaurant posted exclamations of excitement and anticipation and shared their love of Naugles.

One user said he'd missed the restaurant's cheese burritos for "far too long."

Another fan of the chain said the reopening was a big deal because "Naugles is to Mexican food as In-N-Out is to hamburgers."

Still other lovers of the restaurant said the reopening brought back good memories.

Tuesday's opening at 18471 Mt Langley St. came after years of hard work from Naugles devotee Christian Ziebarth. After working with partners to recreate the iconic menu featuring Mexican and American dishes, Ziebarth served popular recipe items at pop-ups in Southern California before the restaurant opened.

The grand opening was so popular, the restaurant was over run by customers ran out of food, co-owner Christian Ziebarth to told the Orange County Register.

"I was inspired by seeing how many other people there were that wanted Naugles to return. They all had very vivid memories of it and it seemed clear that there was a demand to fill," Ziebarth told CNNMoney. "Naugles is fast food done right."

His favorite menu item? The "Ortega burger," which isn't yet available but will be soon.

Ziebarth, a web developer and food blogger, took on Del Taco for the rights to the Naugles trademark, arguing that Del Taco had allowed its claim to the trademark to lapse.

Naugles merged with Del Taco in 1988, and by 1995 all of its locations had been shut down and replaced with Del Taco restaurants. However, Del Taco claimed it had maintained a secret menu with Naugles items and still advertised for the defunct Mexican restaurant chain.

The U.S. Patent and Trademark Office sided with Ziebarth. On March 31, Ziebarth won the right to register for the Naugles trademark and reopen the restaurant.

The first Naugles location was opened in 1970 by Dick Naugle, a former Del Taco employee. It eventually grew from the one restaurant in Riverside to 225 restaurants in the U.S.

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Lawlnc » Intellectual Property » Legendary Mexican Fast Food Chain, Naugles, Revived After Del Taco Trademark Battle

Trademark

Other Services

Legendary Mexican Fast Food Chain, Naugles, Revived After Del Taco Trademark Battle

Articles

Learning Center



Corporation





by Jenny Kim April 21, 2015

On March 31, the U.S. Patent and Trademark Office's Trademark Trial and Appeal Board decided that Del Taco could not prove that it had not abandoned the Naugles trademark, effectively opening the doors for web developer by day and food blogger by night Christian Ziebarth (44) to register the trademark.

Ziebarth has been fighting to register the Naugles trademark with the U.S. Patent and Trademark Office since 2010.

Naugles first started out in 1970 as a fast food restaurant of the Mexican-American persuasion on 14th Street and Brockton Avenue in Riverside by Dick Naugle, a former Del Taco employee. Del Taco, a fast food Mexican restaurant chain, merged with the parent company of Naugles in 1988.

At the time, Naugles had 171 restaurants, while Del Taco had 202. Within a year of the merger, most Naugles restaurants were either converted to Del Taco restaurants or shut down. Del Taco closed the last restaurant bearing the Naugles name, located in Nevada, in 1995.



1 of 3 7/11/17, 2:13 PM

Ziebarth became interested in reviving the Naugles trademark and its signature foods after garnering much interest in the defunct restaurant chain through his blog, Orange County Mexican Restaurants. Over the past several months, Ziebarth has hosted pop-up restaurants, bringing back Naugles menu items from Del Taco abandonment.

When Ziebarth first applied to register the trademark in 2010, it was denied because of Del Taco's registration of the mark. Thereafter, Ziebarth petitioned with the U.S. Patent and Trademark Office that Del Taco had abandoned the brand many years ago.

The Trademark Trial and Appeal Board agreed with Ziebarth and granted his claim of Del Taco's legal abandonment of the trademark. The Board cancelled Del Taco's nearly forty year-old federal registration of the Naugles trademark for "restaurant services."

The Lanham Act, which created a national system of trademark registration, states that when an owner stops using a trademark with an intent not to resume use, the trademark is legally abandoned. A person who seeks to challenge the registration of a trademark has the initial burden of proof.

However, the challenger can establish a presumption of abandonment by showing that the owner failed to use the mark for three consecutive years.

This then shifts the burden of proof to the owner. The owner can overcome this rebuttable presumption by proving that the mark was used during those three years or that he has a genuine intent to resume use in the reasonably foreseeable future.

The Board concluded that Ziebarth showed by a preponderance of the evidence that Del Taco abandoned use of its registered mark and that Del Taco's evidence did not overcome this rebuttable presumption of abandonment.

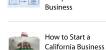
Del Taco presented apparel merchandise, previous website formats, secret menus, as well as print menus that mention Naugles. The Board did not find that any or all of the evidence was sufficient to disprove abandonment.

Noach Chillington, the Vice President of Marketing at Del Taco, submitted an affidavit that included secret Naugles menu items at Del Taco stores, a print menu that reads, "Viva Naugles Viva Del Taco," and mentions of the Naugles mark in previous versions of the Del Taco website.

The Board refused to recognize these things as evidence of non-abandonment. The Board said, "The Lanham Act was not intended to provide a warehouse for unused marks. An inchoate wish to use a mark after a lengthy hiatus is an insufficient basis for maintaining a registration."

Del Taco could have avoided this war with Ziebarth. In August 2006, Ziebarth wrote a blog entry about Naugles on his food blog. Encouraged by the attention it received, Ziebarth eventually petitioned Del Taco to bring back Naugles menu items. Ziebarth landed a meeting with a Del Taco PR representative in 2008, where he suggested that Del Taco reboot Naugles items.











2 of 3 7/11/17, 2:13 PM

The representative said that she would present the idea to those higher up in Del Taco, but nothing happened. He then took matters into his own hands, acquiring business partners, reverse-engineering the Naugles menu, and applying to register the Naugles trademark.

With Del Taco's registration of Naugles cancelled, Ziebarth can now move to register the Naugles trademark with the U.S. Patent and Trademark Office. Registration will be finalized once the trademark is shown to be in use by Ziebarth.



Topics: Trademark, Trademark Disputes

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EXHIBIT 10

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

THIS EXHIBIT HAS BEEN FILED AS CONFIDENTIAL

EXHIBIT 11

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

NAUGLES CORP.,	Petitioner,)))
-VS-		Cancellation No.: 92064091 U.S. Registration No.: 4261951
DEL TACO, LLC	Registrant.) Mark: NAUGLES)

REGISTRANT'S FIRST SET OF ANSWERS TO PETITIONER'S REQUEST FOR ADMISSIONS

In accordance with Rules 26 and 36 of Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Del Taco LLC ("Registrant" or "Del Taco") hereby submits the following responses to Petitioner Naugles Corp. ("Petitioner") First Set of Requests for Admission Nos. 1-51.

PRELIMINARY STATEMENTS AND GENERAL OBJECTIONS

- 1. These responses are based upon the best information presently available but without prejudice to the right to make modified or additional answers should better or further information become available.
- 2. Except for the explicit facts stated herein, no incidental admissions are intended hereby. The fact that Registrant responded to any of the Requests for Admission is not an admission that it accepts or admits the existence of facts set forth or assumed by any Request, or that such responses constituted admissible evidence.
- 3. Registrant objects generally to Petitioner's admission requests to the extent that they:

Admission Request No. 2:

Admit that, when a customer orders a "bun taco" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items, like the "bun taco," originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 3:

Admit that, between January 1, 2000 and the present, when a customer ordered a "bun taco" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant was required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that at Del Taco restaurants between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items, like the "bun taco," originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 4:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "Macho combo burrito" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that it has produced no evidence in connection with this opposition proceeding showing that consumers associate the "Macho combo burrito" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 5:

Admit that, when a customer orders a "Macho combo burrito" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 6:

Admit that, between January 1, 2000 and the present, when a customer ordered a "Macho combo burrito" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 7:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "Macho beef burrito" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that it has produced no evidence in connection with this opposition proceeding showing that consumers associate the "Macho beef burrito" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 8:

Admit that, when a customer orders a "Macho beef burrito" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 9:

Admit that, between January 1, 2000 and the present, when a customer ordered a "Macho beef burrito" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 10:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "Macho chicken burrito" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that has produced no evidence in connection with this opposition proceeding showing that consumers specifically associate the "Macho chicken burrito" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 11:

Admit that, when a customer orders a "Macho chicken burrito" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 12:

Admit that, between January 1, 2000 and the present, when a customer ordered a "Macho chicken burrito" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that at Del Taco restaurants between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 13:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "Macho sized beverages" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that it has produced no evidence in connection with this opposition proceeding showing that consumers associate the "Macho sized beverages" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 14:

Admit that, when a customer orders "Macho sized beverages" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 15:

Admit that, between January 1, 2000 and the present, when a customer ordered "Macho sized beverages" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 16:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "crinkle-cut fries" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that has produced no evidence in connection with this opposition proceeding showing that consumers associate the "crinkle-cut fries" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 17:

Admit that, when a customer orders "crinkle-cut fries" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 18:

Admit that, between January 1, 2000 and the present, when a customer ordered "crinkle-cut fries" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 19:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "Macho sized crinkle-cut fries" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that has produced no evidence in connection with this opposition proceeding showing that consumers associate the "Macho sized crinkle-cut fries" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 20:

Admit that, when a customer orders "Macho sized crinkle-cut fries" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 21:

Admit that, between January 1, 2000 and the present, when a customer ordered "Macho sized crinkle-cut fries" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 22:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "orange shake" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant denies Admission Request No. 22.

Admission Request No. 23:

Admit that, when a customer orders the "orange shake" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 24:

Admit that, between January 1, 2000 and the present, when a customer ordered the "orange shake" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant was required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 25:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "cheese burrito" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. As mentioned above, Registrant objects to this Request to the extent that Applicant use vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor, Naugles Inc. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that has produced no evidence in connection with this opposition proceeding showing that consumers associate the "cheese burrito" sold at Del Taco restaurants with NAUGLES. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 26:

Admit that, when a customer orders the "cheese burrito" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this

Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 27:

Admit that, between January 1, 2000 and the present, when a customer ordered the "cheese burrito" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and

control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 28:

Admit that Del Taco has produced no evidence in connection with this cancellation proceeding showing that consumers associate the "taco salad" sold at Del Taco restaurants with NAUGLES.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "associate" "taco salad" and "NAUGLES"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other

privilege. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "NAUGLES." Therefore, Registrant limits this response to its predecessor Naugles Inc. As mentioned above, Registrant objects to this Request to the extent that Applicant uses the vague and ambiguous undefined term "taco salad." The menu item offered by Registrant is called the "small taco salad." Therefore, Registrant limits this response to the "small taco salad." Naugles Inc. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant denies Admission Request No. 28.

Admission Request No. 29:

Admit that, when a customer orders the "taco salad" at a Del Taco restaurant today, the word Naugles appears nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appears"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant is required to print the NAUGLES trademark on its receipts

given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that as of May 11, 2018, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 30:

Admit that, between January 1, 2000 and the present, when a customer ordered the "taco salad" at a Del Taco restaurant, the word Naugles appeared nowhere on the receipt given to the customer in connection with said order.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "appeared"). Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to this Request to the extent that it implies that Registrant was required to print the NAUGLES trademark on its receipts given with its food items. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that between January 1, 2000 and the present, when customers order a particular food item at a Del Taco restaurant, the word NAUGLES is not printed on receipts given to the customer in connection with the order. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 31:

Admit that the word "Naugles" cannot be found anywhere on Del Taco's food menu featured on its website as it exists today.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "food menu"). Registrant further objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to the extent this Request implies that the word "Naugles" is used as the name of a specific item of food sold at Del Taco branded restaurants. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that as of May 11, 2018, the word NAUGLES is not found on Del Taco's website at the URL https://deltaco.com/menu. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants. Registrant denies Admission Request No. 31 to the extent it implies that Del Taco does not use the NAUGLES trademark on its website as a whole as of May 11, 2018.

Admission Request No. 32:

Admit that, between January 1, 2010 and the present, the word "Naugles" could not be found anywhere on Del Taco's food menu featured on its website.

ANSWER:

Registrant objects to this Request because it seeks discovery that is not relevant to any party's claim or defense, that is not proportional to the needs of the case, and for which the burden and expense outweighs any benefit. As written, this Request purports to require Registrant to provide information about every iteration of its website for nearly two decades. Registrant limits its response to the current version of its website. Registrant further objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "food menu"). Registrant further objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by

the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to the extent this Request implies that the word "Naugles" is used as the name of a specific item of food sold at Del Taco branded restaurants. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that as of May 11, 2018, the word NAUGLES is not found on Del Taco's website at the domain https://deltaco.com/menu.Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants. Registrant denies Admission Request No. 32 to the extent it implies that Del Taco does not use the NAUGLES trademark on its website as a whole as of May 11, 2018.

Admission Request No. 33:

Admit that the word "Naugles" cannot be found anywhere on Del Taco's food menus located inside Del Taco restaurants as they exist today.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "food menu"). Registrant limits its response to menu boards. Registrant further objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including

information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Registrant further objects to the extent this Request implies that the word "Naugles" is used as the name of a specific item of food sold at Del Taco branded restaurants. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that as of May 11, 2018, the NAUGLES trademark is not found on menu boards located inside Del Taco branded restaurants. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 34:

Admit that, between January 1, 2010 and the present, the word "Naugles" could not be found anywhere on Del Taco's food menus located inside Del Taco restaurants.

ANSWER:

Registrant objects to this Request because it seeks discovery that is not relevant to any party's claim or defense, that is not proportional to the needs of the case, and for which the burden and expense outweighs any benefit. As written, this Request purports to require Registrant to provide information about every iteration of its menu board that was used inside Registrant's restaurant for nearly two decades. Registrant limits its response to menu boards used today in Registrant's restaurants. Registrant further objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "food menu"). Registrant further objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES

mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that as of May 11, 2018, the NAUGLES trademark is not found on menu boards located inside Del Taco branded restaurants. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants.

Admission Request No. 35:

Admit that Del Taco's alleged "Secret Naugles Menu" is not located anywhere on Del Taco's website as it exists today.

ANSWER:

Registrant objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that the words "Secret Naugles Menu" is not present as of May 11, 2018 on Del Taco's website located at www.deltaco.com. Registrant further admits that the consuming public recognizes the existence of a "Secret Naugles Menu" at Registrant's restaurants and that such menu items originally sold in Naugles branded restaurants can be purchased in Del Taco branded restaurants.

Admission Request No. 36:

Admit that, between January 1, 2010 and the present, Del Taco's alleged "Secret Naugles Menu" could not be found anywhere on Del Taco's website.

ANSWER:

Registrant objects to this Request because it seeks discovery that is not relevant to any party's claim or defense, that is not proportional to the needs of the case, and for which the burden and expense outweighs any benefit. As written, this Request purports to require Registrant to provide information about every iteration of its website for nearly two decades. Registrant limits its response to the current version of its website. Registrant further objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that the words "Secret Naugles Menu" is not present as of May 11, 2018 on Del Taco's website located at www.deltaco.com. Registrant further admits that the consuming public recognizes the existence of a "Secret Naugles Menu" at Registrant's restaurants and that such menu items originally sold in Naugles branded restaurants can be purchased in Del Taco branded restaurants.

Admission Request No. 37:

Admit that Del Taco's alleged "Secret Naugles Menu" cannot be found on any menu inside any Del Taco restaurant as the restaurants exist today.

ANSWER:

Registrant objects to this Request because it is vague and ambiguous in its use of undefined terms or phrases (e.g., "menu"). Registrant objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that the words "Secret Naugles Menu" are not present as of May 11, 2018 on menu boards inside Del Taco branded restaurants. Registrant further admits that the consuming public recognizes the existence of a "Secret Naugles Menu"

at Registrant's restaurants and that such menu items originally sold in Naugles branded restaurants can be purchased in Del Taco branded restaurants.

Admission Request No. 38:

Admit that, from January 1, 2010 to the present, Del Taco's alleged "Secret Naugles Menu" could not be found on any menu inside any Del Taco restaurant.

ANSWER:

Registrant objects to this Request because it seeks discovery that is not relevant to any party's claim or defense, that is not proportional to the needs of the case, and for which the burden and expense outweighs any benefit. As written, this Request purports to require Registrant to provide information about every iteration of its menu board that was used inside Registrant's restaurant for nearly two decades. Registrant limits its response to menu boards used today in Registrant's restaurants. Registrant objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objection, Registrant responds as follows:

Registrant admits that the words "Secret Naugles Menu" are not present as of May 11, 2018 on menu boards inside Del Taco branded restaurants. Registrant further

admits that the consuming public recognizes the existence of a "Secret Naugles Menu" at Registrant's restaurants and that such menu items originally sold in Naugles branded restaurants can be purchased in Del Taco branded restaurants.

Admission Request No. 39:

Admit that Del Taco's advertising campaign for its 50th anniversary which began June of 2014 and featured a "Classic Throwback Menu" never contained the word NAUGLES.

ANSWER:

Registrant objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that the 50th Anniversary campaign was launched without the word "NAUGLES" featured. Registrant further admits that it offers menu items originally sold in Naugles branded restaurants in Del Taco branded restaurants, including in connection with its 50th Anniversary campaign.

information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing, Registrant responds as follows:

Registrant denies Admission Request No. 41.

Admission Request No. 42:

Admit that the signs seen in the pictures sent by Kelly Pfeiffer along with her letter to April Besl on April 21, 2014 were removed from Del Taco restaurants by May 31 2014. A copy of said letter and pictures is attached hereto as Exhibit A for ease of reference.

ANSWER:

Registrant objects to this Request to the extent that it implies that Registrant does not have a bona fide intent to use the NAUGLES mark in commerce with restaurant services. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that the specific signs shown in Exhibit A were removed by Registrant by May 31, 2014. Registrant denies the remainder of Admission Request No. 42.

product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that the signs shown in Exhibit A had been removed by Registrant by October 31, 2014. However, Registrant states that it continued to offer menu items previously sold by Naugles restaurants in Del Taco restaurants after October 31, 2014.

Admission Request No. 48:

Admit that Del Taco owns no active, current or live registrations for the mark NAUGLES in any country other than the United States.

ANSWER:

Registrant objects to this Request because it seeks discovery that is not relevant to any party's claim or defense, that is not proportional to the needs of the case, and for which the burden and expense outweigh any benefit, particularly given that it purports to seek information on foreign trademark registrations for the NAUGLES trademark. Registrant's trademark activities outside of the United States are not at issue in this case and not relevant to any claim or defense in this case. Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC.

Registrant admits that it does not own active, current or live registrations for the mark NAUGLES in any country other than the United States.

Admission Request No. 49:

Admit that Del Taco owns no active, current or live registrations for the mark NAUGLES in any individual state in the United States.

ANSWER:

Registrant objects to this Request to the extent that it implies that Registrant does not have common law rights in its NAUGLES trademark in commerce with restaurant services.

Registrant further objects to this Request because Applicant attempts to define "Del Taco" to include persons and entities other than Del Taco LLC and to seek information outside the custody and control of Del Taco LLC, including information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or other privilege. Registrant limits this response to Del Taco LLC. Notwithstanding the foregoing objections, Registrant responds as follows:

Registrant admits that it does not currently own active, current or live registrations for the word NAUGLES in any individual state in the United States.

Admission Request No. 50:

Admit that Del Taco no longer sells shirts bearing the word NAUGLES.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent via email to Kelly K.

Pfeiffer at kpfeiffer@amalaw.net on this 18th day of May, 2018.

/Ashley J. Earle/ Ashley J. Earle

EXHIBIT 12

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

NAUGLES CORP.,) Canadiation No. 102064001
	Petitioner,) Cancellation No.: 92064091
-VS-) Registration No.: 4261951
DEL TACO, LLC)) Mark: NAUGLES
	Respondent.)

RESPONDENT'S SECOND SUPPLEMENTAL RESPONSES TO PETITIONER'S FIRST SET OF INTERROGATORIES

In accordance with Rule 33 of Federal Rules of Civil Procedure and Rule 405.04 of the Trademark Rules of Practice, Respondent Del Taco LLC ("Respondent" or "Del Taco") hereby submits the following second supplemental responses to Petitioner Naugles Corp.'s ("Petitioner") First Set of Interrogatories.

PRELIMINARY STATEMENTS AND GENERAL OBJECTIONS

- 1. These Second Supplemental Responses are based upon the best information presently available but without prejudice to the right to make modified or additional answers should better or further information become available to Del Taco.
- 2. Del Taco generally objects to Applicant's Interrogatories on the grounds that they seek disclosure of information protected by the attorney-client, work product, and any other applicable privileges. To the extent that Del Taco inadvertently discloses information that may arguably be protected from discovery under attorney-client privilege, the work product doctrine, or any other applicable privilege, such inadvertent disclosure does not constitute a waiver of any such privilege. To the extent that these Interrogatories seek disclosure of information protected by privilege, Del Taco will produce information in a privilege log.

Noah Chillingworth has information regarding Del Taco's use of its NAUGLES mark as a source identifier for its clothing.

INTERROGATORY NO. 42: Describe in detail all instances where Del Taco has used or registered the NAUGLES mark in a non-ornamental manner for goods or services other than those identified in the NAUGLES Clothing Registration from 2010 to the present.

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 42 as overly broad and unduly burdensome in requiring that Del Taco identify "all instances." Additionally, Del Taco objects to this interrogatory on the grounds that it seeks information regarding other goods or services that are not relevant to the clothing at issue in this proceeding and also seeks information outside of the time period that is relevant in this cancellation.

SUPPLEMENTAL RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 42 as overly broad and unduly burdensome in requiring that Del Taco identify "all instances." Additionally, Del Taco objects to this interrogatory on the grounds that it seeks information regarding other goods or services that are not relevant to the clothing or restaurant services at issue in this proceeding. Subject to and without waiving the forgoing objections, Del Taco states that it offers and has offered menu items that were originally sold in NAUGLES branded restaurants owned by its predecessor in interest, Naugles, Inc., it launched an advertising campaign called "NAUGLES Secret Menu"; it used the NAUGLES trademark on its website located at deltaco.com; and the NAUGLES trademark is used in advertising on Del Taco's Twitter page. Del Taco further states that Petitioner is aware of Del Taco's use in connection with food items advertised bearing the NAUGLES trademark since

counsel for Petitioner sent Del Taco's counsel a cease and desist letter regarding such use on April 21, 2014.

INTERROGATORY NO. 43: Identify all witnesses with information regarding instances where Del Taco has used or registered the NAUGLES mark in a non-ornamental manner for goods or services other than those identified in the NAUGLES Clothing Registration from 2010 to the present.

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 43 as overly broad and unduly burdensome in requiring that Del Taco identify "all witnesses." Additionally, Del Taco objects to this interrogatory on the grounds that it seeks witnesses with information regarding other goods or services that are not relevant to the clothing at issue in this proceeding and information that is outside of the time period that is relevant in this cancellation.

SUPPLEMENTAL RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 43 as overly broad and unduly burdensome in requiring that Del Taco identify "all witnesses." Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth, Mr. Jack Tang and Ms. Karen Ring have information regarding Del Taco's use and registration of the NAUGLES trademark.

SECOND SUPPLEMENTAL RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 43 as overly broad and unduly burdensome in requiring that Del Taco identify "all witnesses." Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth, Mr. Jack Tang and Ms. Karen Ring, all of whom are currently employed by Del Taco and may only be contacted through Del Taco's

that Del Taco identify "all witnesses." Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth, Mr. Jack Tang and Ms. Karen Ring have information regarding Del Taco's use and registration of the NAUGLES trademark.

Respectfully submitted,

April L. Besl

Govinda M. Davis

DINSMORE & SHOHL LLP

255 East Fifth Street

Cincinnati, Ohio 45202

Phone: (513) 977-8200

Fax: (513) 977-8141

E-mail: april.besl@dinsmore.com

govinda.davis@dinsmore.com

Attorneys for Respondent

Del Taco, LLC

CERTIFICATE OF SERVICE

Dated: March 29, 2018

I hereby certify that a copy of <u>Respondent's Second Supplemental Responses to</u>

<u>Petitioner's First Set of Interrogatories</u> was served on Petitioner's attorney of record by electronic mail on March 29, 2018, addressed as follows:

Ms. Kelly K. Pfeiffer, Esq. - kpfeiffer@amalaw.net

Jovinua IVI. Davis

EXHIBIT 13

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

DEL TACO, LLC,)
	Opposer,) Opposition No.: 91235706
-VS-))
		U.S. Serial No.: 85040746
ZIEBARTH HOLDINGS,))
	Applicant.) Mark: NAUGLES

OPPOSER DEL TACO, LLC'S SECOND SUPPLEMENTAL AND AMENDED RESPONSE TO APPLICANT'S FIRST SET OF INTERROGATORIES

In accordance with Rules 26 and 33 of the Federal Rules of Civil Procedure, 37 C.F.R. § 2.120 of the Trademark Rules of Practice and TMBP § 405, Opposer Del Taco, LLC (hereinafter "Opposer" or "Del Taco") by and through its counsel, hereby submits its supplemental and amended objections and responses, to Applicant Naugles Corp.'s (hereinafter "Applicant") First Set of Interrogatories.

GENERAL OBJECTIONS

- 1. Del Taco generally objects to Applicant's Interrogatories on the grounds that they seek disclosure of information protected by the attorney-client, work product, and any other applicable privileges. To the extent that Del Taco inadvertently discloses information that may arguably be protected from discovery under attorney-client privilege, the work product doctrine, or any other applicable privilege, such inadvertent disclosure does not constitute a waiver of any such privilege. To the extent that these Interrogatories seek disclosure of information protected by privilege, Del Taco will produce information in a privilege log.
 - 2. Del Taco generally objects to Applicant's Interrogatories to the extent that

Additionally, Del Taco objects to Interrogatory No. 30 to the extent it requests that Del Taco provide information protected by the attorney-client privilege. Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth and Mr. Jack Tang, Esq. have knowledge of Del Taco's effort in advertising and promoting its NAUGLES trademark.

AMENDED RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 30 as overly broad and unduly burdensome as requesting that Del Taco provide information regarding "all witnesses" and as to the time frame requested. Additionally, Del Taco objects to Interrogatory No. 30 to the extent it requests that Del Taco provide information protected by the attorney-client privilege. Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth and Mr. Jack Tang, Esq. have knowledge of Del Taco's effort in advertising and promoting its NAUGLES trademark.

INTERROGATORY NO. 31: Provide all facts and explain all circumstances that support Del Taco's allegation in paragraph 5 of the Notice of Opposition that "Opposer's NAUGLES mark has become distinctive of, and associated in the minds of the trade and purchasing public with Opposer as a well-known provider of goods and services listed above and offered by Opposer under the NAUGLES mark."

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 31 as overly broad and unduly burdensome in requiring that Del Taco provide "all facts and explain all circumstances." Subject to and without waiving the forgoing objections, Del Taco states that its registration for the NAUGLES trademark for clothing is *prima facie* evidence of the validity of the registered mark as a source identifier and is

evidence that Del Taco's mark functions as a source identifier for its clothing. Furthermore, Del Taco has long been connected to the NAUGLES mark for restaurant services through its recent use of the mark (as known to Applicant through Mr. Ziebarth), the "Secret NAUGLES Menu" attributable by the public to Del Taco, and through Del Taco's known purchase of Naugles Inc. Del Taco will further supplement this response as more information becomes available.

INTERROGATORY NO. 32: Identify all witnesses with information regarding Del Taco's allegation in paragraph 5 of the Notice of Opposition that "Opposer's NAUGLES mark has become distinctive of, and associated in the minds of the trade and purchasing public with Opposer as a well-known provider of goods and services listed above and offered by Opposer under the NAUGLES mark."

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 32 as overly broad and unduly burdensome in requiring that Del Taco identify "all witnesses." Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth has information regarding Del Taco's use of its NAUGLES mark as a source identifier for its goods and services.

INTERROGATORY NO. 33: Provide all facts and explain all circumstances that support Del Taco's allegation in paragraph 7 of the Notice of Opposition that "Opposer continues to sell menu items associated with NAUGLES in Opposer's restaurants today."

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 33 as overly broad and unduly burdensome in requiring that Del Taco provide "all facts and explain all circumstances." Subject to and without waiving the

forgoing objections, Del Taco's discovery is ongoing and we will supplement this response as we complete our search.

SUPPLEMENTAL RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 33 as overly broad and unduly burdensome in requiring that Del Taco provide "all facts and explain all circumstances." Subject to and without waiving the forgoing objections, Del Taco states that it currently offers items that are associated with NAUGLES in Del Taco's restaurants today. Such food items include the following items on the Del Taco menu: Macho combo burrito, Macho sized crinkle-cut fries and Macho sized beverages, as well as the following items that can be ordered by restaurant customers: Macho beef burrito, Macho chicken burrito and the bun taco.

INTERROGATORY NO. 34: Identify all witnesses with information regarding Del Taco's allegation in paragraph 7 of the Notice of Opposition that "Opposer continues to sell menu items associated with NAUGLES in Opposer's restaurants today."

RESPONSE: In addition to the General Objections asserted above, Del Taco further objects to Interrogatory No. 34 as overly broad and unduly burdensome as requesting that Del Taco provide information regarding "all witnesses." Additionally, Del Taco objects to Interrogatory No. 34 to the extent it requests that Del Taco provide information protected by the attorney-client privilege. Subject to and without waiving the forgoing objections, Del Taco states that Mr. Noah Chillingworth and Mr. Jack Tang, Esq. have knowledge of Del Taco's sale of menu items associated with NAUGLES.

<u>INTERROGATORY NO. 35:</u> Provide all facts and explain all circumstances that support Del Taco's allegation in paragraph 11 of the Notice of Opposition that "[s]ince filing the

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing <u>Second Supplemental and Amended</u>

<u>Responses to Applicant's First Set of Interrogatories</u> were served on Applicant's attorney of record by electronic mail on March 26, 2018, addressed as follows:

Kelly K. Pfeiffer, Esq. - kpfeiffer@amalaw.net

Govinda M. Davis

EXHIBIT 14

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)



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2	85281037	4261951	NAUGLES	TSDR	LIVE
3	85040746		NAUGLES	TSDR	LIVE
4	85340660		NAUGLES	TSDR	LIVE
5	73057402	1043729	NAUGLES	TSDR	DEAD
6	73479163	1334828	NAUGLES 24 HR. DRIVE THRU	TSDR	DEAD
7	73350235	1220400	NAUGLES	TSDR	DEAD

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| .HOME | SITE INDEX| SEARCH | eBUSINESS | HELP | PRIVACY POLICY

1 of 1 6/5/2018, 4:59 AM

EXHIBIT 15

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

Trademark/Service Mark Application, Principal Register

Serial Number: 86793165 Filing Date: 10/20/2015

The table below presents the data as entered.

Input Field	Entered		
SERIAL NUMBER	86793165		
MARK INFORMATION			
*MARK	NAUGLES		
STANDARD CHARACTERS	YES		
USPTO-GENERATED IMAGE	YES		
LITERAL ELEMENT	NAUGLES		
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.		
REGISTER	Principal		
APPLICANT INFORMATION			
*OWNER OF MARK	Naugles Corp.		
*STREET	18471 Mt. Langley Drive, #M		
*CITY	Fountain Valley		
*STATE (Required for U.S. applicants)	California		
*COUNTRY	United States		
*ZIP/POSTAL CODE (Required for U.S. applicants)	92708		
WEBSITE ADDRESS	www.NauglesTacos.com		
LEGAL ENTITY INFORMATION			
ТҮРЕ	corporation		
STATE/COUNTRY OF INCORPORATION	Delaware		
GOODS AND/OR SERVICES AND BASIS INFORMATION			
INTERNATIONAL CLASS	025		
*IDENTIFICATION	Clothing, namely, polo shirts, t-shirts, sweatshirts, socks, hats and headbands		
FILING BASIS	SECTION 1(b)		
ATTORNEY INFORMATION			
NAME	Kelly K. Pfeiffer		
FIRM NAME	Amezcua-Moll & Associates, P.C.		
STREET	1122 E. Lincoln Ave., Suite 203		
CITY	Orange		

STATE	California	
COUNTRY	United States	
ZIP/POSTAL CODE	92865	
PHONE	714-288-2826	
FAX	714-464-4536	
EMAIL ADDRESS	kelly@amalaw.net	
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes	
CORRESPONDENCE INFORMATION		
NAME	Kelly K. Pfeiffer	
FIRM NAME	Amezcua-Moll & Associates, P.C.	
STREET	1122 E. Lincoln Ave., Suite 203	
СІТУ	Orange	
STATE	California	
COUNTRY	United States	
ZIP/POSTAL CODE	92865	
PHONE	714-288-2826	
FAX	714-464-4536	
*EMAIL ADDRESS	kelly@amalaw.net	
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes	
FEE INFORMATION		
APPLICATION FILING OPTION	TEAS RF	
NUMBER OF CLASSES	1	
FEE PER CLASS	275	
*TOTAL FEE DUE	275	
*TOTAL FEE PAID	275	
SIGNATURE INFORMATION		
SIGNATURE	/Kelly K. Pfeiffer/	
SIGNATORY'S NAME	Kelly K. Pfeiffer	
SIGNATORY'S POSITION	Attorney of Record, California bar member	
SIGNATORY'S PHONE NUMBER	714-288-2826	
DATE SIGNED	10/20/2015	

Trademark/Service Mark Application, Principal Register

Serial Number: 86793165 Filing Date: 10/20/2015

To the Commissioner for Trademarks:

MARK: NAUGLES (Standard Characters, see mark)
The literal element of the mark consists of NAUGLES.
The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Naugles Corp., a corporation of Delaware, having an address of 18471 Mt. Langley Drive, #M
Fountain Valley, California 92708
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 025: Clothing, namely, polo shirts, t-shirts, sweatshirts, socks, hats and headbands
Intent to Use: The applicant has a bona fide intention, and is entitled, to use the mark in commerce on or in connection with the identified goods/services.

For informational purposes only, applicant's website address is: www.NauglesTacos.com

The applicant's current Attorney Information:

Kelly K. Pfeiffer of Amezcua-Moll & Associates, P.C. 1122 E. Lincoln Ave., Suite 203
Orange, California 92865
United States

The applicant's current Correspondence Information:

Kelly K. Pfeiffer
Amezcua-Moll & Associates, P.C.
1122 E. Lincoln Ave., Suite 203
Orange, California 92865
714-288-2826(phone)
714-464-4536(fax)
kelly@amalaw.net (authorized)

E-mail Authorization: I authorize the USPTO to send e-mail correspondence concerning the application to the applicant or applicant's attorney at the e-mail address provided above. I understand that a valid e-mail address must be maintained and that the applicant or the applicant's attorney must file the relevant subsequent application-related submissions via the Trademark Electronic Application System (TEAS). Failure to do so will result in an additional processing fee of \$50 per international class of goods/services.

A fee payment in the amount of \$275 has been submitted with the application, representing payment for 1 class(es).

Declaration

The signatory believes that: if the applicant is filing the application under 15 U.S.C. § 1051(a), the applicant is the owner of the trademark/service mark sought to be registered; the applicant is using the mark in commerce on or in connection with the goods/services in the application; the specimen(s) shows the mark as used on or in connection with the goods/services in the application; and/or if the applicant filed an application under 15 U.S.C. § 1051(b), § 1126(d), and/or § 1126(e), the applicant is entitled to use the mark in commerce; the applicant has a bona fide intention, and is entitled, to use the mark in commerce on or in connection with the goods/services in the application. The signatory believes that to the best of the signatory's knowledge and belief, no other persons, except, if applicable, concurrent users, have the right to use the

mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other persons, to cause confusion or mistake, or to deceive. The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

Declaration Signature

Signature: /Kelly K. Pfeiffer/ Date: 10/20/2015

Signatory's Name: Kelly K. Pfeiffer

Signatory's Position: Attorney of Record, California bar member

RAM Sale Number: 86793165 RAM Accounting Date: 10/20/2015

Serial Number: 86793165

Internet Transmission Date: Tue Oct 20 12:26:28 EDT 2015

TEAS Stamp: USPTO/BAS-XX.XXX.XXX.XXX-2015102012262859

 $2846 - 86793165 - 540bc215233a6d41aadaf6bf5a\\c177ee84adc30c1219e5086289733568d14055d6$

-CC-10887-20151020121427747063

NAUGLES

EXHIBIT 16

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment) To: Naugles Corp. (kelly@amalaw.net)

Subject: U.S. TRADEMARK APPLICATION NO. 86793165 - NAUGLES - N/A

Sent: 2/10/2016 3:34:33 PM

Sent As: ECOM112@USPTO.GOV

Attachments: Attachment - 1

Attachment - 2 Attachment - 3 Attachment - 4 Attachment - 5 Attachment - 6 Attachment - 7

Attachment - 8
Attachment - 9
Attachment - 10
Attachment - 11

Attachment - 12 Attachment - 13 Attachment - 14 Attachment - 15

Attachment - 16 Attachment - 17 Attachment - 18 Attachment - 19 Attachment - 20

Attachment - 21 Attachment - 22 Attachment - 23

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 86793165

MARK: NAUGLES

86793165

CORRESPONDENT ADDRESS:

KELLY K. PFEIFFER AMEZCUA-MOLL & ASSOCIATES, P.C. 1122 E. LINCOLN AVE., SUITE 203

ORANGE, CA 92865

CLICK HERE TO RESPOND TO THIS LETTER: http://www.uspto.gov/trademarks/teas/response_forms.jsp

VIEW YOUR APPLICATION FILE

APPLICANT: Naugles Corp.

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

kelly@amalaw.net

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

COMPLETE RESPONSE TO THIS LETTER WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE BELOW.

ISSUE/MAILING DATE: 2/10/2016

The assigned trademark examining attorney has reviewed the referenced application and has determined the following. Questions regarding the Office Action should be directed to the trademark examining attorney at kyle.peete@uspto.gov.

Section 2(d) - Likelihood of Confusion Refusal

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration No. 4261951. Trademark Act Section 2(d), 15 U.S.C. §1052(d); see TMEP §§1207.01 et seq. See the enclosed registration.

The applicant's mark is:

NAUGLES for "Clothing, namely, polo shirts, t-shirts, sweatshirts, socks, hats and headbands" in International Class 025.

The registrant's mark is:

NAUGLES for "Clothing, namely, shirts, t-shirts, and hats" in International Class 025.

Similarity of the Marks

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

In the present case, applicant's mark is NAUGLES and registrant's mark is NAUGLES. Thus, the marks are identical in terms of appearance and sound. In addition, the connotation and commercial impression of the marks do not differ when considered in connection with applicant's and registrant's respective goods and/or services.

Therefore, the marks are confusingly similar.

Similarity of the Goods/Services

The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc.* v. *Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc.* v. *Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."); TMEP §1207.01(a)(i).

The respective goods and/or services need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Here, the applicant's "polo shirts, t-shirts, sweatshirts, hats and headbands" are identical to or encompassed by the registrant's "shirts, t-shirts, and hats." With respect to applicant's and registrant's goods and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

Absent restrictions in an application and/or registration, the identified goods and/or services are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the identification set forth in the application and registration(s) has no restrictions as to nature, type, channels of trade, or classes of

purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers. Further, the registration uses broad wording to describe the goods and/or services and this wording is presumed to encompass all goods and/or services of the type described, including those in applicant's more narrow identification.

The applicant's remaining goods of "socks" are closely related to the registrant's clothing items. Decisions regarding likelihood of confusion in the clothing field have found many different types of apparel to be related goods. Cambridge Rubber Co. v. Cluett, Peabody & Co., 286 F.2d 623, 624, 128 USPQ 549, 550 (C.C.P.A. 1961) (women's boots related to men's and boys' underwear); Jockey Int'l, Inc. v. Mallory & Church Corp., 25 USPQ2d 1233, 1236 (TTAB 1992) (underwear related to neckties); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991) (women's pants, blouses, shorts and jackets related to women's shoes); In re Pix of Am., Inc., 225 USPQ 691, 691-92 (TTAB 1985) (women's shoes related to outer shirts); In re Mercedes Slacks, Ltd., 213 USPQ 397, 398-99 (TTAB 1982) (hosiery related to trousers); In re Cook United, Inc., 185 USPQ 444, 445 (TTAB 1975) (men's suits, coats, and trousers related to ladies' pantyhose and hosiery); Esquire Sportswear Mfg. Co. v. Genesco Inc., 141 USPQ 400, 404 (TTAB 1964) (brassieres and girdles related to slacks for men and young men).

Additionally, neither the application nor the registration(s) contains any limitations regarding trade channels for the goods and therefore it is assumed that registrant's and applicant's goods are sold everywhere that is normal for such items, i.e., clothing and department stores. Thus, it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to seeing them sold under the same or similar marks. *See Kangol Ltd. v. KangaROOS U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); TMEP §1207.01(a)(iii).

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Accordingly, registration is denied on the Principal Register. Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

Prior Pending Applications

The filing dates of pending U.S. Application Serial Nos. 85040746 and 85340660 precede applicant's filing date. See attached referenced applications. If one or more of the marks in the referenced applications register, applicant's mark may be refused registration under Trademark Act Section 2(d) because of a likelihood of confusion with the registered mark(s). See 15 U.S.C. §1052(d); 37 C.F.R. §2.83; TMEP §\$1208 et seq. Therefore, upon receipt of applicant's response to this Office action, action on this application may be suspended pending final disposition of the earlier-filed referenced applications.

In response to this Office action, applicant may present arguments in support of registration by addressing the issue of the potential conflict between applicant's mark and the marks in the referenced applications. Applicant's election not to submit arguments at this time in no way limits applicant's right to address this issue later if a refusal under Section 2(d) issues.

Surname Refusal

Registration is refused because the applied-for mark is primarily merely a surname. Trademark Act Section 2(e)(4), 15 U.S.C. §1052(e)(4); see TMEP §1211. The primary significance of the mark to the purchasing public determines whether a term is primarily merely a surname. In re Kahan & Weisz Jewelry Mfg. Corp., 508 F.2d 831, 832, 184 USPQ 421, 422 (C.C.P.A. 1975); In re Binion, 93 USPQ2d 1531, 1537 (TTAB 2009); see TMEP §§1211, 1211.01.

The following five factors are used to determine whether a mark is primarily merely a surname:

- (1) Whether the surname is rare;
- (2) Whether anyone connected with applicant uses the term as a surname;
- (3) Whether the term has any recognized meaning other than as a surname;
- (4) Whether the term has the structure and pronunciation of a surname; and
- (5) Whether the term is sufficiently stylized to remove its primary significance from that of a surname.

See In re Binion, 93 USPQ2d 1531, 1537 (TTAB 2009); In re Benthin Mgmt. GmbH, 37 USPQ2d 1332, 1333-34 (TTAB 1995); TMEP

§1211.01.

Please see the attached evidence establishing the surname significance of NAUGLE/NAUGLES. This evidence shows the applied-for mar appearing over 100 (NAUGLES) and 4000 (NAUGLE) times as a surname in a nationwide phone directory of names. Presentation of a surname i its plural or possessive form does not diminish its surname significance. TMEP §1211.01(b)(v); see, e.g., In re Binion, 93 USPQ2d 1531, 153 (TTAB 2009) (BINION'S); In re Woolley's Petite Suites, 18 USPQ2d 1810, 1812 (TTAB 1991) (WOOLLEY'S); In re Luis Caballero, S.A., 22 USPQ 355, 357 (TTAB 1984) (BURDONS).

Further, a term that is the surname of an individual applicant or that of an officer, owner, or principal of applicant's business is probative evidence of the term's surname significance. TMEP §1211.02(b)(iv); see, e.g., In re Etablissements Darty et Fils, 759 F.2d 15, 16, 225 USPQ 652, 653 (Fed. Cir. 1985) (holding DARTY primarily merely a surname where "Darty" was the surname of applicant's corporate president); Mitchell Miller, P.C. v. Miller, 105 USPQ2d 1615, 1620-21 (TTAB 2013) (holding MILLER LAW GROUP primarily merely a surname where "Miller" was the surname of the applicant and the term "law group" was found generic and disclaimed); In re Cazes, 21 USPQ2d 1796, 1796-97 (TTAB 1991) (holding BRASSERIE LIPP primarily merely a surname where "Lipp" was the surname of the restaurant's founder and the term "brasserie" (translated as "brewery") was found merely descriptive and disclaimed). The attached evidence shows that the founder of the original company was named Dick Naugle.

An intent-to-use applicant who has used the same mark on related goods and/or services may file a claim of acquired distinctiveness under Trademark Act Section 2(f) before filing an allegation of use, if applicant can establish that, as a result of applicant's use of the mark on other goods and/or services, the mark has become distinctive of the goods and/or services in the intent-to-use application, and that this previously created distinctiveness will transfer to the goods and/or services in the intent-to-use application when use in commerce begins. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1347, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001); *In re Nielsen Bus. Media, Inc.*, 93 USPQ2d 1545, 1547 (TTAB 2010); *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009); TMEP §1212.09(a).

The Trademark Trial and Appeal Board has set forth the following two requirements for showing that a mark in an intent-to-use application has acquired distinctiveness:

- (1) Applicant must establish that the same mark has acquired distinctiveness as to the other goods and/or services, by submitting evidence such as ownership of a prior registration for the same mark for related goods and/or services, a *prima facie* showing of acquired distinctiveness based on five years' use of the same mark with related goods and/or services, or actual evidence of acquired distinctiveness for the same mark with respect to the other goods and/or services.
- (2) Applicant must show sufficient relatedness of the goods and/or services in the intent-to-use application and those for which the mark has acquired distinctiveness to warrant the conclusion that the previously created distinctiveness will transfer to the goods and/or services in the application upon use. The showing necessary to establish relatedness will be decided on a case-by-case basis and will depend upon the nature of the goods and/or services involved and the language used to identify them in the application.

See Kellogg Co. v. Gen. Mills Inc., 82 USPQ2d 1766, 1770-71 (TTAB 2007); In re Rogers, 53 USPQ2d 1741, 1744-45 (TTAB 1999); TMEP §1212.09(a).

Although an amendment to the Supplemental Register would normally be an appropriate response to this refusal, such a response is not appropriate in the present case. The instant application was filed under Trademark Act Section 1(b) and is not eligible for registration on the Supplemental Register until an acceptable amendment to allege use meeting the requirements of 37 C.F.R. §2.76 has been timely filed. 37 C.F.R. §2.47(d); TMEP §§816.02, 1102.03.

If applicant files an acceptable allegation of use and also amends to the Supplemental Register, the effective filing date of the application will be the date on which applicant met the minimum filing requirements of 37 C.F.R. §2.76(c) for the amendment to allege use. 37 C.F.R. §2.75(b); TMEP §§816.02, 1102.03. In addition, the undersigned trademark examining attorney will conduct a new search of the USPTO records for conflicting marks based on the later application filing date. TMEP §§206.01, 1102.03.

Although registration on the Supplemental Register does not afford all the benefits of registration on the Principal Register, it does provide the following advantages:

- The registrant may use the registration symbol ®;
- The registration is protected against registration of a confusingly similar mark under Trademark Act Section 2(d);
- The registrant may bring suit for infringement in federal court; and
- The registration may serve as the basis for a filing in a foreign country under the Paris Convention and other international agreements.

See 15 U.S.C. §§1052(d), 1091, 1094; TMEP §815.

TEAS PLUS OR TEAS REDUCED FEE (TEAS RF) APPLICANTS – TO MAINTAIN LOWER FEE, ADDITIONAL REQUIREMENTS MUST BE MET, INCLUDING SUBMITTING DOCUMENTS ONLINE: Applicants who filed their application online using the lower-fee TEAS Plus or TEAS RF application form must (1) file certain documents online using TEAS, including responses to Office actions (see TMEP §§819.02(b), 820.02(b) for a complete list of these documents); (2) maintain a valid e-mail correspondence address; and (3) agree to receive correspondence from the USPTO by e-mail throughout the prosecution of the application. See 37 C.F.R. §§2.22(b), 2.23(b); TMEP §§819, 820. TEAS Plus or TEAS RF applicants who do not meet these requirements must submit an additional processing fee of \$50 per international class of goods and/or services. 37 C.F.R. §§2.6(a)(1)(v), 2.22(c), 2.23(c); TMEP §§819.04, 820.04. However, in certain situations, TEAS Plus or TEAS RF applicants may respond to an Office action by authorizing an examiner's amendment by telephone without incurring this additional fee.

/Kyle Christopher Peete/ Trademark Attorney [Law Office 112] (571) 272-8275 (Phone) (571) 273-8275 (Fax) kyle.peete@uspto.gov (Preferred)

TO RESPOND TO THIS LETTER: Go to http://www.uspto.gov/trademarks/teas/response_forms.jsp. Please wait 48-72 hours from the issue/mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For technical assistance with online forms, e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned trademark examining attorney. E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at http://tsdr.uspto.gov/. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at TrademarkAssistanceCenter@uspto.gov or call 1-800-786-9199. For more information on checking status, see http://www.uspto.gov/trademarks/process/status/.

TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS: Use the TEAS form at http://www.uspto.gov/trademarks/teas/correspondence.jsp.

Print: Feb 10, 2016

85040748

DESIGN MARK

Serial Number

85040746

Status

NON-FINAL ACTION - MAILED

Word Mark

NAUGLES

Standard Character Mark

Yes

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(4) STANDARD CHARACTER MARK

Owner

Ziebarth, Christian M. INDIVIDUAL UNITED STATES 208 19th St., #1 Huntington Beach CALIFORNIA 92648

Goods/Services

Class Status -- ACTIVE. IC 043. US 100 101. G & S: Cafeteria and restaurant services. First Use: 2012/03/20. First Use In Commerce: 2012/03/20.

Section 2f Statement

2(F) ENTIRE MARK

Filing Date

2010/05/17

Examining Attorney

CASE, LEIGH CAROLINE

Attorney of Record

Kelly K. Pfeiffer

NAUGLES

Print: Feb 10, 2016

85281037

DESIGN MARK

Serial Number

85281037

Status

REGISTERED

Word Mark

NAUGLES

Standard Character Mark

Yes

Registration Number

4261951

Date Registered

2012/12/18

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(4) STANDARD CHARACTER MARK

Owner

Del Taco LLC LIMITED LIABILITY COMPANY CALIFORNIA 25521 Commercentre Drive Lake Forest CALIFORNIA 92630

Goods/Services

Class Status -- ACTIVE. IC 025. US 022 039. G & S: Clothing, namely, shirts, t-shirts, and hats [, jackets]. First Use: 2011/09/15. First Use In Commerce: 2011/09/15.

Prior Registration(s)

1043729

Filing Date

2011/03/30

Examining Attorney

SAPPENFIELD, ANN E.

Attorney of Record

April L. Besl

NAUGLES

Print: Feb 10, 2016

85340660

DESIGN MARK

Serial Number

85340660

Status

REPORT COMPLETED SUSPENSION CHECK - CASE STILL SUSPENDED

Word Mark

NAUGLES

Standard Character Mark

No

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

Del Taco LLC LIMITED LIABILITY COMPANY CALIFORNIA 25521 Commercentre Drive Lake Forest CALIFORNIA 92630

Goods/Services

Class Status -- ACTIVE. IC 043. US 100 101. G & S: Restaurant services.

Prior Registration(s)

1043729

Description of Mark

The mark consists of a design of five adjacent lines above and below the word "NAUGLES" with the letter "N" cutting into the design.

Colors Claimed

Color is not claimed as a feature of the mark.

Filing Date

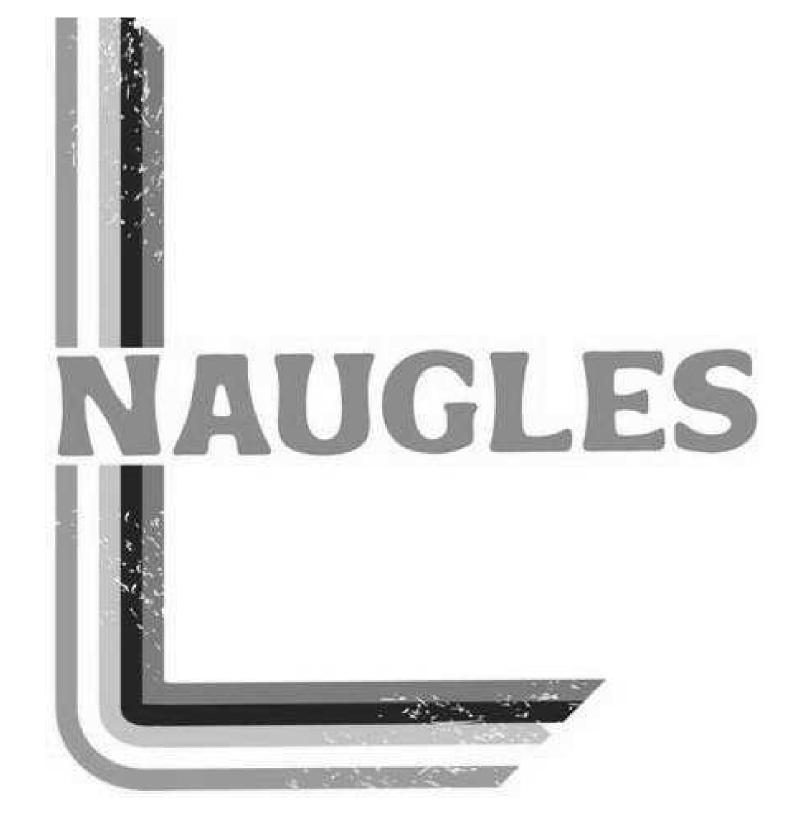
2011/06/08

Examining Attorney

MICKLEBURGH, LINDA

Attorney of Record

Joshua A. Lorentz



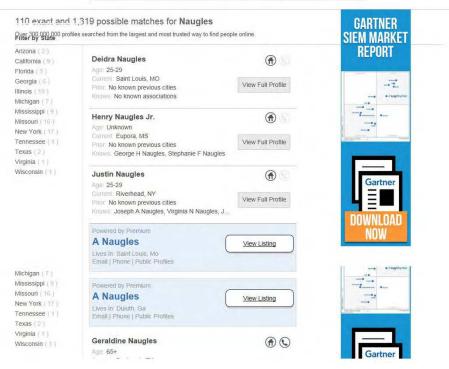


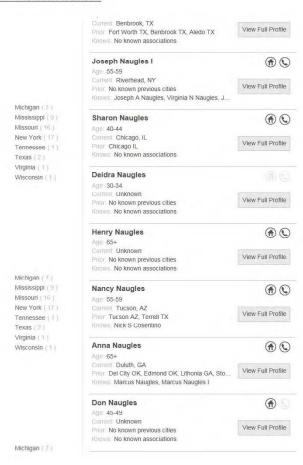








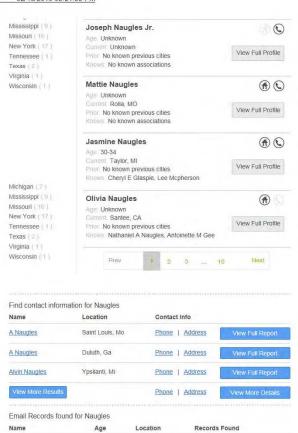






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A Naugles



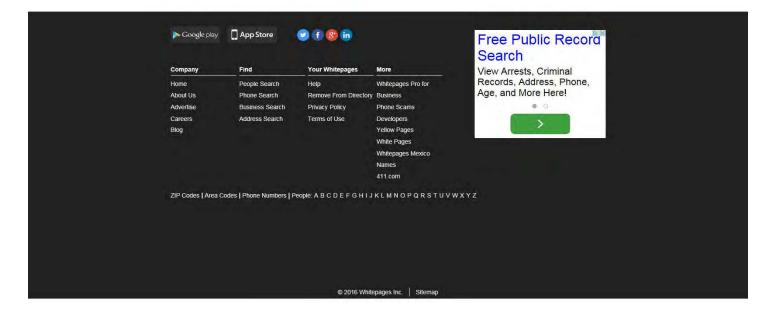
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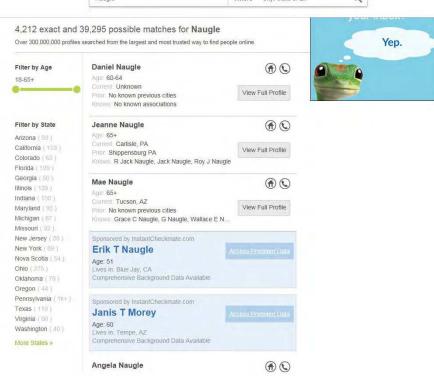


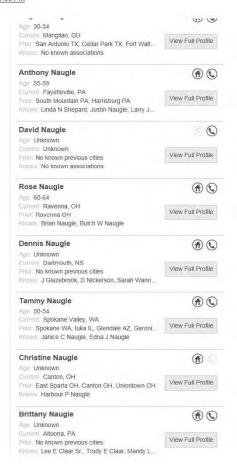


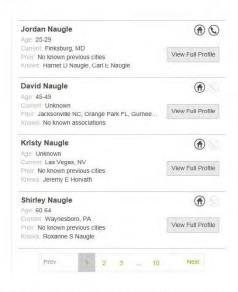
A Naugles	Duluth, Ga		View All Details
Alvin Naugles	Ypsilanti, Mi		View All Details
Alvin Naugles	Romulus, Mi	-	View All Details
Background Records found	d for Naugles		
Naugles	P	ublic Records	Get Records
Naugles	2	Court Records	Get Records
Naugles	Dr	iving Records	Get Records
Naugles	Bankru	ptcy Records	Get Records

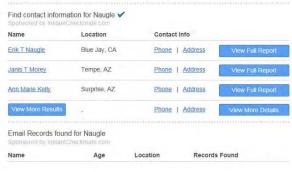




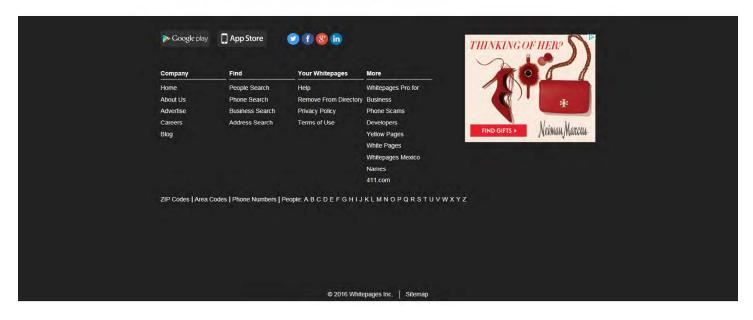


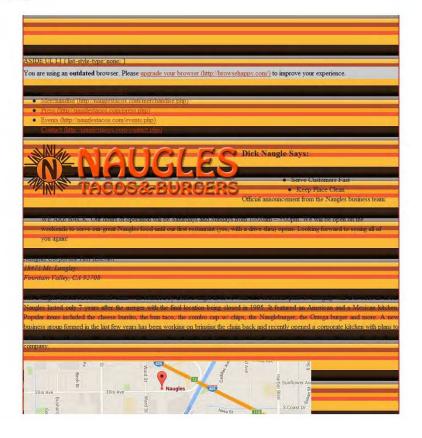


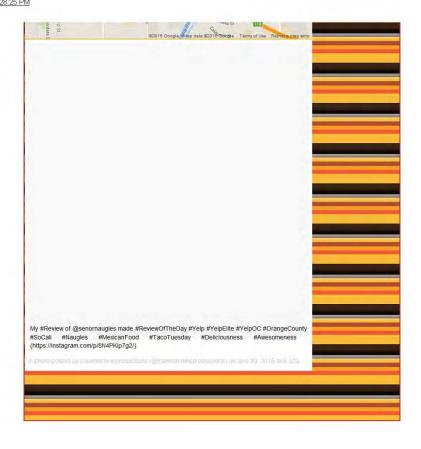


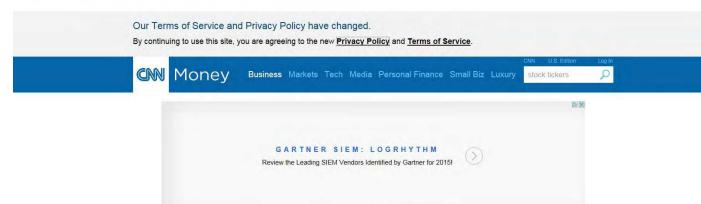


Erik T Naugle	51	Blue Jay, CA		View All Details
Janis T Morey	60	Tempe, AZ	-	View All Details
Ann Marie Kelly	51	Surprise, AZ	2	View All Details
Vital Records found for Spansored by TruthFind				
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Naugle		Mam	age Records	Get Records
Naugle		Dive	orce Records	Get Records
Naugle		1	Birth Records	Get Records









Fans waited 20 years for this restaurant to reopen





It's risen from the ashes.

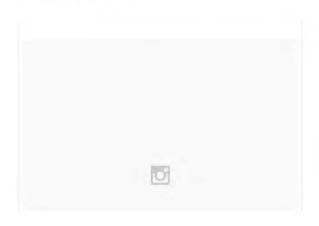
reopened this week in southern California.

The Naugles rebirth was met with joy which resonated over social media. Fans of the restaurant posted exclamations of excitement and anticipation and shared their love of Naugles.

One user said he'd missed the restaurant's cheese burritos for "far too long."

Where exactly is the new @naugles that opened Monday in Fountain Valley? I have missed those cheese burritos for far too long. #yummy

- Mike Petry (@DecoyFlyer) July 29, 2015







If you grew up in Southern California then you remember Naugles. I can't wait until they bring the burgers back. Those were my fave. #Naugles

Another fan of the chain said the reopening was a big deal because "Naugles is to Mexican food as In-N-Out is to hamburgers."

Naugles is to mexican food as In-N-Out is to hamburgers. Yes this is a big deal. https://t.co/EIB4k6FAga

- danr929 (@danr929) July 29, 2015

WOOHOO! @naugles is back. Now we are cooking @mfigroid http://t.co/lcTwnx4Wg4

- Daniel Johnson (@powdertraitor) July 29, 2015

Wonder if it will taste the same as long ago! Loved Naugles!! https://t.co/YXkWnTpDci

- KingsfanLaurie (@KingsfanLaurie) July 29, 2015

Rejoicel #Naugles is back in Southern Californial Get the scoop here ----> http://t.co/mYZbQV8Q3x

- Heather Froglear (@KFRGHeather) July 29, 2015



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Still other lovers of the restaurant said the reopening brought back good memories.

Do you remember #Naugles from the 80s/90s in the OC? So awesome to see its comeback - brings back good #memories https://t.co/aC6bdqEDL3

- Lisa Preuss (@lpreuss) July 29, 2015

http://t.co/uFfnD9K7fR Going!!:)

- Traci Baez (@TraciKBaez) July 29, 2015

I loved #Naugles growing up in the 80's! I hope they bring back all of the original menu items (and then some!) <3 http://t.co/cficWNF75z

- Sandie Jones (@Tweet_JoJo) July 29, 2015

Tuesday's opening at a location in Fountain Valley, Calif., came after years of hard work from Naugles devotee Christian Ziebarth. After working with partners to recreate the iconic menu featuring Mexican and American dishes, Ziebarth served popular recipe items at pop-ups in southern California before the restaurant opened.

"I was inspired by seeing how many other people there were that wanted Naugles to return. They all had very vivid memories of it and it seemed clear that there was a demand to fill," Ziebarth told CNNMoney. "Naugles is fast food done right."

His favorite menu item? The "Ortega burger," which isn't yet available but will be soon.

Ziebarth, a web developer and food blogger, took on Del Taco for the rights to the Naugles trademark, arguing that Del Taco had allowed its claim to the trademark to lapse.

Naugles merged with Del Taco in 1988, and by 1995 all of its locations had been shut down and replaced with Del Taco restaurants. However, Del Taco claimed it had maintained a secret menu with Naugles items and still advertised for the defunct Mexican restaurant chain.



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The U.S. Patent and Trademark Office sided with Ziebarth. On March 31, Ziebarth won the right to register for the Naugles trademark and reopen the restaurant.

The first Naugles location was opened in 1970 by Dick Naugle, a former Del Taco employee. It eventually grew from the one restaurant in Riverside, Calif., to 225 restaurants in the U.S.

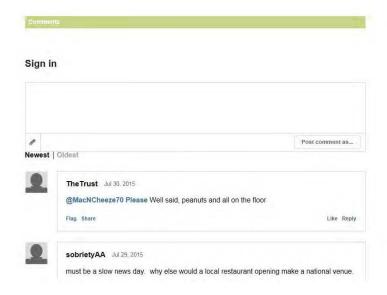
Correction: An earlier version of this article incorrectly stated how long Naugles had been closed.

CNNMoney (New York) First published July 29, 2015; 1,22 PM ET

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Daniel Laney Jul 31, 2015

@sobrietyAA It wasn't just a local food dive, it was a chain that was 225 stores strong. Del Taco bought them (but their food does not compare), they recently reconfirmed the OK to trademark the name, so it's very likely they will start franchising again, based on the success of that stores re-opening. (You might notice this is CNN-money).





Smackykins Jul 29, 2015

Del Taco did not maintain a "secret" menu with Naugles items. I know... I live near a few and would ask every so often. I loved the cheese burritos.

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To: Naugles Corp. (kelly@amalaw.net)

Subject: U.S. TRADEMARK APPLICATION NO. 86793165 - NAUGLES - N/A

Sent: 2/10/2016 3:34:35 PM

Sent As: ECOM112@USPTO.GOV

Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

IMPORTANT NOTICE REGARDING YOUR U.S. TRADEMARK APPLICATION

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED ON 2/10/2016 FOR U.S. APPLICATION SERIAL NO. 86793165

Please follow the instructions below:

(1) TO READ THE LETTER: Click on this link or go to http://tsdr.uspto.gov, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

(2) **TIMELY RESPONSE IS REQUIRED:** Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from 2/10/2016 (or sooner if specified in the Office action). For information regarding response time periods, see http://www.uspto.gov/trademarks/process/status/responsetime.jsp.

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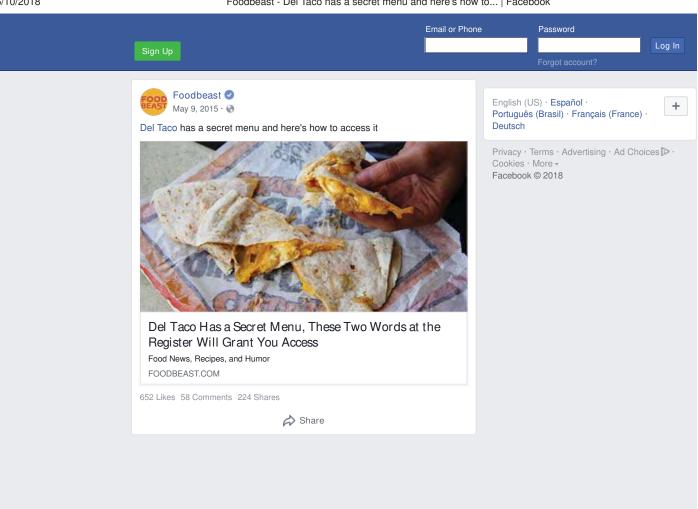
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(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)



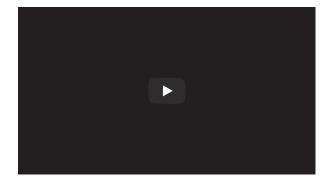
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FOOD NEWS

Del Taco Has a Secret Menu, These Two Words at the Register Will Grant You Access





This week, our boy Marc dropped some heavy news during a 3 am drunken munchie run to Del Taco.

Apparently, you can add "secret sauce" and fries to any item on the Del Taco menu by simply asking the cashier to "Go Bold" on your order. Meaning, we've been depriving our chicken soft tacos of fry-stuffed brilliance this entire time. Meaning, our lives have been a secret sauce-less lie void of meaning until now.

Not one to take the state of our fast food affairs lightly, we ventured to a local Del Taco to seek the truth. Upon arrival at the drive-thru, we asked the gentleman working the speaker box about this curious Go Bold rumor. He swiftly confirmed its existence and at that point, all hell broke loose. We promptly went, er, BOLD on the

following: a quesadilla, a crispy shrimp burrito, three chicken soft tacos, a Double Del Cheeseburger, and a vanilla shake.

Needless to say, it was a hotmess. It was glorious. It was extreme bubble guts a few hours later but so, so worth it.

Check out the best spoils of our labor below.

Chicken Soft Taco + BOLD





Cheesy Quesadilla + BOLD



Double Del Cheeseburger + BOLD

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Crispy Shrimp Taco + BOLD



Vanilla Milkshake + BOLD

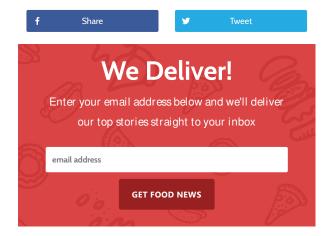
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The receipt: 39 cents charge per BOLD item

bold-reciept0

Fun fact: The secret sauce is made of the same magic mysterious-ness that appears on the coveted chicken soft taco.





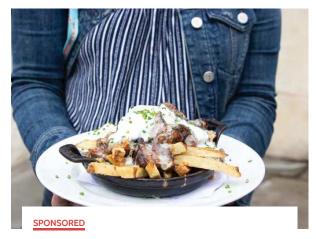
The Foods Moms Want Delivered The Most Right After Giving Birth





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EXHIBIT 18

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)









Del Taco Celebrates 50 Years with Historical Menu

INDUSTRY NEWS > JUNE 18, 2014











Del Taco is celebrating its 50th anniversary in 2014. The company, which served its first taco in Barstow, California, now has 546 locations nationwide. To celebrate, Del Taco is making a number of classic menu items available for a limited time beginning June 19.

"Del Taco began as a single restaurant in 1964, and our success these past 50 years is due to providing our guests with fresh, made-to-order, great tasting food at a tremendous value," says Paul Murphy, president and CEO, Del Taco. "We are grateful to our loyal guests and franchise partners who have played a significant role in Del Taco's growth and prosperity."

Anniversary Throwback Menu

Bun Taco: features seasoned beef, freshly hand-grated cheddar cheese, lettuce, and a tomato slice in a sesame seed bun.

Small Taco Salad: features seasoned beef, freshly hand-grated cheddar cheese, diced tomatoes, and Del Taco's secret sauce, served on a bed of lettuce with tortilla chips.

Orange Shake: an orange and vanilla milk shake topped with whipped cream.

Collector's Cups

The company is also introducing a series of Collector's Cups, which feature four commemorative designs, available for purchase at any Del Taco restaurant nationwide through September 3 or until supplies last. The cups are free with any Macho Drink purchase.

"As we celebrate this significant milestone in Del Taco's history, we hope to spark fond memories for our guests across the country, and excite new fans that will help us celebrate future milestones for years to come," says John Cappasola, chief brand officer, Del Taco.

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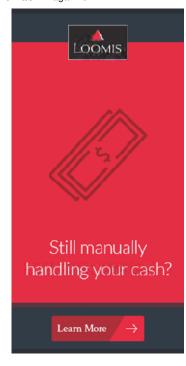
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EXHIBIT 19

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)



JEFF MILLER/THRILLIST

Things you DIDN'Tknow about (?)

FOOD & DRINK

13 THINGS YOU DIDN'T KNOW ABOUT DEL TACO

By JEFF MILLER By JEFF MILLER @jeffmillerla
Published On 05/05/2015 Published On 05/05/2015
@jeffmillerla



If you grew up in SoCal, you already know a LOT about Del Taco, like the fact that it sells tacos. And... dels? Yeah, turns out you don't really know that much, which's why we've assembled this list of 13 kind of mind-blowing facts (three of which are about its SECRET MENU!!!).

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1. The first-ever Del Taco opened in Yermo, CA in 1964

Where's Yermo? Good question: near San Bernardino. What else is in Yermo? Uh, not much. In 1968, the 15 freeway passed it by, closir nearly all the businesses, and apparently inspiring the entire story arc of *Bates Motel*.



FLICKR/RAYMOND SHOP

2. Initially, tacos cost just 19 cents

And now, they're 59 cents. Inflation is the WORST!



DEL TAC

3. One of the founders of Del Taco still works at... uh... Del Taco

Yep: this is Ed Hackbarth, and he is still behind the counter at their Barstow location. For real.



DEL TAC

4. You can get the company's hot sauces delivered

True story: if you want a lifetime supply of Del Inferno, you can order it online. It's just \$4.99 for 50 packets, which also includes a storage bucket... because pedestrian kitchen drawers are no place for 50 packets of Del Inferno.

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All Of Hollywood's Late-Night Hot Dog And Taco Carts, Mapped

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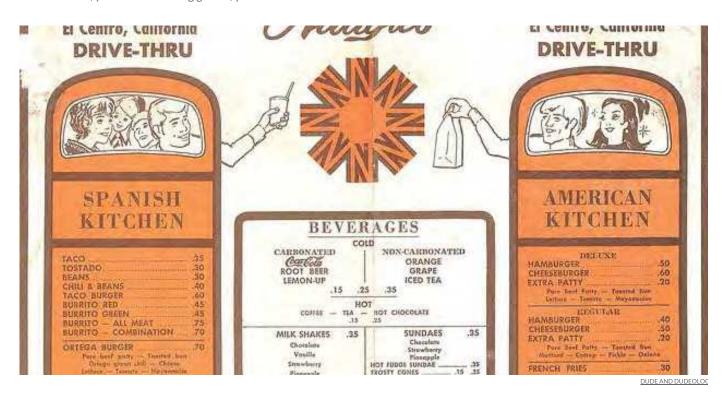
13 Things You Didn't Know About In-N-Out Burger



DEL TAC

5. The company opened its first drive-thru almost a decade before McDonald's did

Ed Hackbarth, you foreshadowing genius, you!



6. One Del Taco employee tried to branch out with his own Mexican chain called Naugles

Eventually, though, it was bought by -- you guessed it -- Del Taco. Naugles' slogan was, "Prepare food fresh, serve customer fast, keep place clean!" Right.



DEL TAC

7. All the cheese is hand-grated

Some hapless employee actually sits there with a 40lb chunk 'o yellow cheddar and grates it every day. And then it melts into your quesadilla, and he is sad.



DELTAC

8. There's actually a secret menu item called the "Stoner Burrito"

Man, do they know their customers. This dude's only order-able by name in the Inland Empire, but when you get it, you'll feel like a genius. It's a 1/2-pound bean-and-cheese burrito-bohemoth with red sauce, special sauce, and crinkle-cut fries. If you order it anywherelse, you gotta just ask for those ingredients, which may be hard if you don't have any short-term memory left.





Taste-Testing The Hell Out Of Del Taco's New 'Epic Burritos'



9. There's ANOTHER secret menu item!

It's called a Bun Taco, and it's basically their classic taco on a burger bun. So, yeah, also basically the best thing ever.



DEL TAC

10. THERE'S A THIRD SECRET MENU ITEM!

Tell them to "go bold", and they'll just toss some fries and secret sauce onto whatever you ordered. No big.



FLICKR/ARTBRO

11. The logo is meant to signify Del Taco's core ingredients

The yellow sun with green mountains and a red backdrop represent cheese (hand-grated, obviously!), lettuce, and tomatoes.



12. Del Taco was sued by the dudes who created Zorro

Back in the day, its mascot was a guy who rode horses, wore a giant hat, and had a face mask so you couldn't see his eyes. So, yeah, they didn't exactly win that battle.

RELATED



All Of Hollywood's Late-Night Hot Dog And Taco Carts, Mapped



YOUTUBE/DINKYDOGT

13. Once the definitely-not-Zorro character was retired, the spokesman became "Del Taco Dan"...

... played by actor Gregg Binkley, who's now the star of Raising Hope. Who ever said a career in fast food wouldn't get you anywhere?

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Jeff Miller is the Senior City Editor of Thrillist LA, and has already ordered some Inferno Sauce. He's <u>@thrillistla</u> on Twitter and <u>@jeffmillerla</u> on Instagram.

This story was originally published on 4/16/2014.



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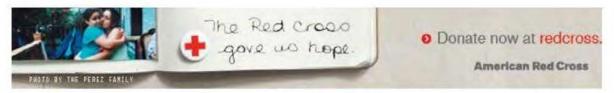


This Giant 1920s Warehouse Is Now a Southern Food Paradise



EXHIBIT 20

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)



<u>Secret Menus</u> > <u>Del Taco Menu Prices, Hours, Locations and Coupons</u> > Del Taco® SECRET Menu *UPDATED* [scroll-down]



- · Home
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 - A&W Restaurants
 - · Arby's
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 - · Chipotle
 - Cinnabon
 - · Dairy Queen
 - · Del Taco
 - · Denny's
 - · Domino's
 - Dutch Bros
 - · Dunkin' Donuts
 - El Pollo Loco
 - Five Guys
 - Hooters
 - In-N-Out Burger
 - · Jack in the Box
 - Jimmy John's
 - Jamba Juice
 - · KFC
 - Little Caesars
 - McDonald's
 - · Nando's
 - · Olive Garden



- Orange Julius
- · Panera Bread
- · Papa John's
- · P.F. Chang's
- · Pizza Hut
- · Popeyes
- · Potbelly
- · Qdoba
- · RA Sushi
- · Red Lobster
- Shake Shack
- Smashburger
- · Sonic
- Starbucks
- · Steak 'n Shake
- · Subway
- Taco Bell
- · TGI Friday's
- Tim Hortons
- · Wendy's
- Whataburger
- White Castle

Menu Prices

- A&W Restaurants
- · Abuelo's
- · Applebee's
- · Arby's
- Auntie Anne's
- · Bahama Breeze
- · Bar Louie
- · Baskin-Robbins
- · Benihana
- Bob Evans
- · Bonefish Grill
- · Boston Market
- · Buffalo Wild Wings
- BurgerFi
- Burger King
- · Carl's Jr.
- · Carrabba's
- · Cheddar's
- · Chevys
- Cheesecake Factory
- · Chick-fil-A
- · Chuck-e-Cheese
- o Chili's
- · Chipotle
- · Cold Stone
- · Corner Bakery



- Costa Coffee
- Cracker Barrel
- · Culver's
- · Dairy Queen
- · Dave and Buster's
- · Denny's
- · Domino's
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- · El Pollo Loco
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- · Freshii
- · Greggs
- · Hardee's
- Hurts Donut
- · IHOP
- · In-n-Out Burger
- · Jack in the Box
- · Jamba Juice
- Jersey Mike's Subs
- · Jimmy John's
- · KFC
- Krispy Kreme
- Little Caesars
- Long John Silvers
- Longhorn Steakhouse
- · McDonald's
- Melting Pot
- · Moe's Southwest Grill
- · Nando's
- Noodles and Company
- Olive Garden
- · Orange Julius
- Outback Steakhouse
- Papa John's
- · Papa Murphy's
- · Peter Piper Pizza
- · P.F. Chang's
- Pita Pit
- Planet Smoothie
- · Pollo Tropical
- · Popeyes
- · Potbelly
- Quiznos
- · Raising Cane's
- Red Lobster
- · Red Robin



- · Ruby Tuesday
- · Shake Shack
- Smashburger
- · Smoothie King
- · Sonic
- · Steak 'n Shake
- Starbucks
- · Subway
- · Taco Bell
- · Taco Bueno
- TGI Friday's
- · Tim Hortons
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 - Chevys
 - · Chick-fil-A
 - · Chipotle
 - Cold Stone
 - · Costa Coffee
 - Cracker Barrel
 - · Culver's
 - · Dairy Queen
 - · Dave and Buster's
 - · Del Taco
 - · Denny's
 - · Domino's
 - · Dunkin' Donuts
 - El Pollo Loco
 - Five Guys
 - Greggs



- · Hardee's
- · IHOP
- In-n-Out Burger
- · Jack in the Box
- Jamba Juice
- Jersey Mike's Subs
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- · Popeyes
- · Potbelly
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- · Raising Cane's
- · Red Lobster
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- · Shake Shack
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 - Bahama Breeze
 - · Bar Louie
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 - · BJ's
 - Bonefish Grill
 - · Brio



- · WingStop
- Buffalo Wild Wings
- Burger King
- Cheesecake Factory
- Chevys
- · Chick-fil-A
- · Chili's
- · Chipotle
- · Claim Jumper
- · Dairy Queen
- Dave And Busters
- · Denny's
- · El Torito
- · Elephant Bar
- · Five Guys
- · Fleming's Steak House
- Hooters
- · In-n-Out Burger
- · Islands Burgers
- · Jack in the Box
- · Jamba Juice
- Kabuki
- KFC
- · Kona Grill
- · Macaroni Grill
- McCormick & Schmicks
- · McDonald's
- · RA Sushi
- · Shake Shack
- · Sonic
- Yard House
- · Catering Menus
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- Food Holidays
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 - · National Wine Day
 - National Donut Day
 - · National Chicken Day
 - National French Fries Day
 - National Cheeseburger Day
 - National Coffee Day
- Panera Bread Menu
- Starbucks Menu Prices
- · Dunkin Donuts Menu Prices







Del Taco® SECRET Menu *UPDATED* [scroll-down]

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The **Del Taco secret menu** is just as diverse as the secret menus offered by the likes of <u>Taco Bell Secret Menu</u>. Make no mistake about it though, this is not a clone of Taco Bell. Not by a long shot. As a result, Del Taco the secret menu, as well as the standard menu, is completely different.

1 Print Dairy Queen Coupons

Free Coupons for Dairy Queen. Latest Coupons - Print, Eat & Save!



befrugal.com

2 Google Chrome -Download Chrome Today

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google.com

Del Taco is open 24 hours a day and 7 days a week. This means that it attracts a certain clientele that other restaurants just don't get. To put it simply, there are a number of blurry-eyed, hungry souls passing through these doors every night. And all of them are eager to get their fill of Mexican food.

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The following Del Taco secret menu items relate both to the "Del Taco Stoner's Secret Menu" and to the "traditional" secret menu, for want of a better word. So, whether you're on the munchies and are seeking something to make the night complete; you're drunk/hungover and have a void to fill; or you're just looking to grab a bite at lunch, the following can help.

Del Taco Secret Menu

The Stoner Burrito



It may not look like the most appetizing burrito, but this tightly-packed, saucy, carb-loaded snack is perfect to get your energy levels up when you're a little worse for wear. The aptly-named "Stoner Burrito" was created by a certain subculture looking to sate their insatiable appetites after a toke too many.



Of course, it's probably best that you don't ask for a "Stoner Burrito". Unless the servers are a certain way inclined, they might not know what you're talking about. Instead, just ask for a bean and cheese burrito that is filled with fries, special sauce, and your choice or red sauce or green sauce.

If you like a little heat, then ask them to throw some extra chilies in there. If you want things a little cooler, then opt for a topping of sour cream instead.





The Stoner Burrito is not just for stoners either. The Stoner Burrito is a meal in a burrito, making it great for when you're on the go. Much like a breakfast burrito really, only for every other time of the day.

Go Bold



Special sauce and fries can make anything better. Your burrito? Add a dollop of sauce, some crispy fries and it's the ultimate Stoner Burrito. Your cheeseburger? That meat and that cheese is just crying out for some fries and some sauce. Your crippling emotional pain? Sure, why not. It's worth a shot.

In Del Taco, the two words that can make this magic happen are "Go Bold". These are the magic words that will get some extra special sauce and fries in anything you order. The picture is of a "Go Bold" Quesadilla, which is a delicious hot mess. But you can also do this with Del Taco burgers, burritos and anything else on the menu.

We wouldn't recommend that you "Go Bold" on your drink or dessert. But if you are feeling that way inclined, then please take a picture of that abomination and send it our way. That's something we just have to see.



The Bun Taco



Some people just aren't cut out for Mexican food. They are the ones who slop everywhere. The ones who can't seem to eat a taco without looking like they're been dragged through a messy kitchen. If this sounds like you, then maybe you would be better off with the Bun Taco.



Simply put, this is a taco in a bun. It has everything you would expect to find in a taco, but instead of oozing out of the side of a crisp shell, it's tucked into a neat bun.

So, whether you want to limit the mess, or you simply prefer burger buns to taco shells, this is the Del Taco secret menu item for you.

The Combo Cup



This is a protein feast in a convenient cup. In essence, the Del Taco Combo Cup is everything you would usually find in a burrito, but in a cup. Why leave out the tortilla? I hear you ask. After all, isn't that the best part? Well yes, but not if you have a food sensitivity or if you're trying to cut back on your carbs.



12/7/2017

The Combo Cup is Atkins friendly, which is a rarity for a menu item in a Mexican fast food restaurant. It's also loaded with protein, which comes courtesy of the cheese, the meat and the beans. Except for the inclusion of quite a bit of fat, this would otherwise be a healthy meal.

To order this, you just need to order a Combo Burrito, asking for the ingredients to be placed into a cup as opposed to a tortilla. You can also get the tortilla or some chips on the side, perfect for dipping and scooping.

The Green Bean Machine



This is another item that will get you nothing but a raised eyebrow if you ask for it at the counter. The Green Bean Machine is just a name that a blogger came up with to describe this secret menu item. It's also one that has been adopted by many Del Taco secret menu fans over the years.

A Green Bean Machine is basically a burrito that is loaded with scrambled egg and beans. This may not sound like the most appetizing burrito on the menu, but don't let that description (or that picture, which looks like something that has already been eaten) fool you. This makes for a great alternative to some of the traditional breakfast burritos on the menu.

To order your own Green Bean Machine, just request an Egg & Cheese Burrito and add some beans and sauce. The "green" part comes from the sauce, which is green instead of red.

The Cheese Burrito





This is a simple cheese burrito, with oodles of the gooey, stringy, fatty stuff that we all love. Let's be honest, the cheese is one of the best things about Mexican food. You can take your beans, your tortillas and your sauce. You can take your meat and your spice. But leave the cheese, because that's what makes this food so comforting, so hearty and so deliciously bad for you.

To get your hands on this simple burrito, just order a burrito with lashings of cheese, a hearty dollop of sour cream and some red sauce. That's all there is to it.

Del Taco Sauces at Home



The sauces are what makes a fast food restaurant. Think about it. KFC wouldn't be KFC without their "Secret Recipe". McDonalds burgers wouldn't taste the same without that tangy sauce. And Popeyes would be decidedly less interesting without their secret Cajun Sparkle seasoning.

And the same applies to Del Taco. In this case, it's the Del Inferno sauce that makes this brand so popular. This sauce can be found in abundance in any Del Taco restaurant, but what if you want it at home? You could try to concoct a similar creation yourself, or you could buy it. Thankfully, Del Taco sells their Del Inferno sauce in bulk. And it's cheap!

On the Del Taco homepage you can order 100 sachets of their Del Inferno sauce for just \$5.99. These sachets come in a storage bucket. If you'd prefer, you can purchase their mild sauces or their superhot sauces. There are also combination packs available.

The Del Taco site sells plenty of other Del Taco merchandise as well. If you're obsessed with this brand, as so many Americans are, then this is where you can declare your allegiance to the Taco.

Recent Del Taco Menu Prices, Hours, Locations and Coupons News

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Most Viewed Secret Menu:



Burger King



Burger King Secret Menu

Category: Fast Food Restaurant

Motto: "Have it your way."

Burger King Menu Prices





Burger King menu

Cheapest Items on Burger King's Menu

Burger King is one of the cheapest fast food restaurants around, but just like any restaurant, some items are a better deal than others. Below is a list of some of their cheaper foods.

Cheapest Foods at Burger King

- · Hamburger \$1.00
- · Double Cheeseburger \$1.49
- WHOPPER JR.® Sandwich \$1.29
- · Onion Rings value \$1.19
- · French Fries value (Salted) \$1.19

Cheapest Meals at Burger King

- WHOPPER JR.® Sandwich \$4.59
- Chicken Nuggets- 4pc \$2.59

Cheapest Breakfast Items at Burger King

- Sausage Breakfast Burrito \$1.00
- BK®Breakfast Muffin Sandwich Sausage and Cheese \$1.00

Cheapest Dessert at Burger King

· Milk Shake - 12 fl oz \$1.99

Burger King Nutrition Info

Low Calories Items

If you are looking for low calories foods at Burger King, get something from the list below.

- Chicken Nuggets- 4pc 190 calories
- · Hamburger 240 calories



- · Cheeseburger 280 calories
- · Soft Serve Cone 160 calories

Low Sodium Items

Are you looking to lower your sodium in take at Burger King? The foods below are good choices for you.

- · Smoothie: Strawberry Banana 12 fl oz 20 mg
- · Chicken Nuggets- 4pc 360 mg
- · Quaker® Oatmeal Original 100 mg
- · Hamburger 460 mg

Low Sugar Items

Lowering your sugar intake is always a good idea. Burger King's best low sugar options are below.

- · WHOPPER JR.® Sandwich 6 grams
- · Home-style Chicken Strips- 3pc 0 grams
- · Chicken Nuggets- 4pc 0 grams
- · French Fries medium 0 grams

Low Carb Items

If you are on a low carb diet and still want to eat at Burger King, gives these menu items a shot.

- · Chicken Nuggets- 4pc 13 grams
- Tacos (2) 18 grams
- · Chicken BLT Garden Fresh Salad 17 grams
- Sausage Breakfast Burrito 21 grams

High Protein Items

Protein is important, especially if you want to feel full. Try these high protein burger king items.

- · TRIPLE WHOPPER® Sandwich 58 grams
- · Texas DOUBLE WHOPPER® Sandwich 52 grams
- · BK® Quad Stacker 46 grams
- · Chicken Nuggets- 20pc 42 grams

Burger King Secret Menu





BK Secret Menu

- I didn't know that the Burger King secret menu existed, but now that I know I order a few
 things from it each month. My favorite menu item is the Suicide Burger. Yummy! It's given a
 lot more adventure to my fast food experiences.
 - ~ Miles Smith, Iowa

Most Popular Secret Menu Items

- 1. Burger King BLT
- 2. Burger King Club
- 3. BK Ham and Cheese
- 4. Frings

History of Burger King

Burger King started in 1953 in Jacksonville, Florida. It was originally called Insta-Burger King, but was rebranded as Burger King several years later.

Locations

Foods

Chick-fil-A Menu Prices





Chick-Fil-A menu prices

Cheapest Items on Chick-fil-A's Menu

Chick-fil-A prices usually land slightly higher than fast food restaurants, but that being said, every restaurant has a
few great deals. Below are some of the cheapest things you can find at Chick-fil-A.

Cheapest Foods at Chick-fil-A

- · Carrot and Raisin Salad \$1.65
- Cole Slaw \$1.65
- Fruit Cup \$1.79
- · Waffle Fries (small) \$1.45
- Waffle Fries (Medium) \$1.65

Cheapest Meals at Chick-fil-A

- · Nuggets (8) \$5.85
- Chicken Sandiwch \$5.85
- Spicy Chicken Sandwich \$6.09
- · Chick-n-Strips (3) \$6.15

Cheapest Breakfast Items at Chick-fil-A

- · Hash Browns \$0.99
- · Hot Buttered Biscuit \$1.55
- · Sunflower Multigrain Bagel \$1.75
- · Cinnamon Cluster \$1.89

Cheapest Dessert at Chick-fil-A

- · IceDream (Cone) \$1.19
- IceDream (Cup) \$1.59
- Fudge Nut Brownie \$1.75

Chick-fil-A Nutrition Info



Low Calories Items

Our detailed tables of <u>Chick-fil-A nutrition info</u> can be a little big and daunting, but no need to hunt for healthy items. We have it covered for you.

Chick-fil-A Secret Menu



Chick-Fil-A Secret Menu

Chick-Fil-A Secret Menu

- Chick-Fil-A makes the best chicken sandwich on the market, but the fried chicken club that I
 tried brought it to the next level. The added veggies created a big crunch and contrasted the
 saltiness perfectly.
 - ~ Sandra Knutson, New Jersey

Costco Food Court

You will enjoy the Costco Food Court menu as much as you enjoy buying truck loads of toilet paper.

Chipotle Menu Prices



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Chipotle menu prices

Cheapest Items on Chipotle's Menu

The Chipotle menu is naturally more expensive than typical fast food prices, due to their massive portions and use
of high quality ingredients. Luckily, every restaurant has its good deals. Just check out the cheapest items on the
menu below!

Cheapest Foods at Chipotle

- · Chicken Burrito or Bowl \$6.25
- · Vegetarian Burrito or Bowl \$6.25
- · 3 Tacos (Vegetarian or Chicken) \$6.25
- · Chicken Salad \$6.25

Cheapest Sides at Chipotle

- Chips \$1.25
- · Chips and Salsa \$1.75
- Guacamole \$1.80

Cheapest Drinks at Chipotle

- · Soda (Regular) \$1.60
- · Soda (Large) \$1.90
- · Bottled Drink (Regular) \$2.10



Chipotle Nutrition Info

Click to view Chipotle nutrition info. and calories listing.

Low Calories Items

Check out some delicious Chipotle options with the lowest calorie counts on the menu.

- Chips 95 calories
- Small Cheese Quesadilla 100 calories
- · Guacamole 170 calories



· Burrito Lowest in Calories: Barbacoa

Low Sodium Items

For anyone watching their sodium, but craving some Mexican food, we've listed some of Chipotle's menu items lowest in sodium below.

- · Small Cheese Quesadilla 190 g
- Guacamole 410 g
- Chips 420 g
- · Burrito Lowest in Sodium: Chicken

Low Sugar Items

Sugar isn't very much of an issue with Chipotle's fresh ingredients, but even then, below we've listed some low sugar options on the menu.

- · Small Cheese Quesadilla: 0 g
- · Guacamole 0 g
- Chips 1 g
- · Burrito Lowest in Sugar: Chicken

Low Carb Items

Anyone fighting to stick to their low-carb diet but craving some Chipotle can relax -- we've listed some of their menu items lowest in carbs below.

- · Guacamole 0 g
- Chips 1 g
- · Burrito Lowest in Carbs: Chicken

High Protein Items

For anyone looking for a little extra protein in their diet, we have Chipotle's menu items highest in protein listed below.

- Chips 27 g
- · Burrito Highest in Protein: Carnitas

Chipotle Secret Menu





Click to view the Chipotle secret menu and hidden prices.

Chipotle Secret Menu

- I have been a Chipotle aficionado since the day they first came to my city. Actually, before that
 because I visited Denver when they were small and loved it. I never thought Chipotle food
 could get better, but apparently I was wrong.
 - ~ Tiffany Brenner, Oregon

Most Popular Secret Menu Items

- 1. Quesarito
- 2. The Burritodilla
- 3. Quesadilla

History of Chipotle

Chipotle was founded in 1993 by Steve Ells. Just five years latter in 1998, McDonads came knocking on the door and invested \$350 million into the small 16 location company. Chipotle now employees more than 45,000 people and has become a huge force in the fast casual category.

Locations

Foods

Dairy Queen Menu Prices





Click to view Dairy Queen menu prices updated for today.

Cheapest Items on Dairy Queen's Menu

Dairy Queen's prices are typically pretty good, competing with the best of the fast food giants, but it's still
extremely difficult to offer meals at the dirt cheap prices that restaurants like McDonald's can afford to. That being
said, DQ has its own set of great deals, so check out their cheapest foods below!

Cheapest Foods at Dairy Queen

- · Original Cheeseburger \$1.99
- · Side Salad \$1.99
- Crispy or Grilled Chicken Wrap \$1.59
- FlameThrower Chicken Wrap \$1.59

Cheapest Meals at Dairy Queen

- · Original Cheeseburger Meal \$4.19
- · Chili Cheese Dog \$4.49
- Original Double Cheeseburger Meal \$5.19

Cheapest Dessert at Dairy Queen

- Small Arctic Rush \$1.69
- · Small Vanilla Cone \$1.99
- · Small Chocolate Cone \$2.39
- · Small Blizzard \$2.49

Dairy Queen Nutrition Info

Click to view <u>Dairy Queen nutrition info.</u> updated for today.

Low Calories Items

Watching your weight, but craving some DQ? Don't worry -- we have some of Dairy Queen's menux items with the least calories listed below.

- · Side Salad 25 calories
- · Applesauce 90 calories
- · Banana 110 calories
- Kids' Strawberry Banana Smoothie 190 calories

Low Sodium Items

Find the best of Dairy Queen menu items low in sodium below.

- Side Salad 15 mg
 Applesauce 30 mg
- · Mini Choco Cherry Love Blizzard 130 mg
- Hot Dog 550 mg

Low Sugar Items

Keep an eye on your sugar intake, and check out some of Dairy Queen's low sugar menu items listed below!

- · 3 Chicken Strips 0 g
- · Kids' Fries 0 g
- · 4 pc. Chicken Strip Basket w/ Gravy 1 g
- Iron Grilled Cheese Sandwich 1 g
- 1/4 lb. Mushroom Swiss GrillBurger 2 g

Low Carb Items

Below we've listed some of Dairy Queen's menu items with the lowest carbs. Check them out!

- · 2 Chicken Strips Kids' Meal 14 g
- Hot Dog 22 g
- · Grilled Chicken Wrap 22 g
- · 3 Chicken Strips 22 g
- · Onion Rings 32 g

High Protein Items

If you're in need of some extra fuel to build muscle, just check out DQ's highest protein menu items listed below!

- · Chicken Strip Basket 6 pc. w/ Gravy 50 g
- 1/2 lb. GrillBurger w/ Cheese 46 g
- DQ Ultimate Burger 45 g
- · Grilled Chicken Salad 36 g

Dairy Queen Secret Menu





Click to view Dairy Queen secret menu updated for today.

DQ Secret Menu

- For decades I have loved Dairy Queen's desserts. Ever since my parents brought me there as a
 little boy. I have pretty much tried the whole menu since then. It's been nice to try something
 new.
 - ~ Neil Bradford, Florida

Most Popular Secret Menu Items

- 1. Coffee Blizzard
- 2. Frozen Hot Chocolate
- 3. Peanut Buster Parfait

History of DQ

Dairy Queen was founded in Kankakee, Illinois in 1940. It was founded by John Fremont McCullough. Baskin-Robbins, Ben & Jerry's, Braum's, Carvel, Culver's, Foster's Freeze, Good Times Burgers & Frozen Custard, McDonald's, and Sonic Drive-In are their main competitors.

Locations

Foods

Denny's Menu Prices





Click to view Denny's menu prices updated for today.

Denny's Nutrition Info.

Click to see **Denny's nutrition info** updated for this month.

Denny's Secret Menu



Click to check out Denny's secret menu updated for this week.

DQ Secret Menu

- Denny's is my favorite place for breakfast. Their service is fast, the food is consistently good, and the coffee is free. But after going there for 10 years, it was time to try something new. That's why I like this secret menu a lot!
 - ~ Scott Baker, New Mexico

Most Popular Secret Menu Items

- 1. French Toast Grilled Cheese Sandwich
- 2. Cheesy Hash Browns
- 3. Tsing Tsing Chicken



History of Denny's

Denny's is a full service coffee and pancake house. It was founded in Lakewood, California in 1953 by Harold Butler and Richard Jezak. In 1963, Denny's started franchising, which propelled a lot of its growth.

Locations

Foods

Dominos Pizza

Domino's Nutrition

Dunkin Donuts

Dunkin Donuts menu prices

Dunkin Donuts SECRET menu

Dunkin Donuts nutrition facts





Five Guys Menu Prices



Click to view all of Five Guys menu prices updated today.



Cheapest Items on Five Guys Menu

The Five Guys full menu is packed with huge, juicy burgers that have earned rave reviews from people across the
country. That quality comes at a premium, with meals usually costing around \$5 - \$8, but rest assured, there are
plenty of inexpensive items on the Five Guys full menu. Below are some of the cheapest.

Cheapest Foods at Five Guys

- · Small Fries \$2.29
- Little Hamburger \$3.99
- · Hot Dog \$4.09
- Little Cheeseburger \$.459

Five Guys Nutrition Info

Click to see the Five Guys nutrition info updated this month.

Five Guys Secret Menu



Click to see the whole Five Guys SECRET menu updated this morning.

Five Guys Secret Menu

- Five Guys popped out of nowhere it seems, but for good reason. Their food is absolutely, authentically American and delicious. One thing I miss about eating at In-N-Out instead though, is their animal fries. Well that's no longer the case because I discovered cheese fries at Five Guys.
 - ~ Lori Davis, Nevada

Most Popular Secret Menu Items

- 1. Cheese Fries
- 2. Patty Melt
- 3. Double Grilled Cheeseburger



History of Five Guys

Five Guys was founded in 1986 and their first location was in Arlington County, Virginia. Between 1986 - 2001, Five Guys maintained five locations, mostly in Washington D.C. In 2003, Five Guys began franchising and in a little over a year, they sold over 300 franchises.

Locations

Foods

In-n-Out Burger Menu Prices



Click to see the whole In-N-Out Burger Menu Prices updated this morning.

Cheapest Items on In-n-Out Burger Menu

The In-n-Out Burger full menu is simple and delicious, offering the same favorites with consistency, since their
founding. Their traditional flavor keeps up with big fast food giants in price, too, offering above-average burgers
for an average price. Check out some of their cheapest options below.

Cheapest Foods at In-n-Out Burger

- · French Fries \$1.60
- · Hamburger \$2.05
- · Cheeseburger \$2.35

Cheapest Meals at In-n-Out Burger

- Hamburger \$5.05
- Cheeseburger \$5.55

Cheapest Dessert at In-n-Out Burger

- · Milkshake \$2.10
- · Root Beer Float \$2.10



In-n-Out Burger Nutrition & Calories

We have released the latest In-N-Out nutrition info updated last night.

In-N-Out Secret Menu



We have released the newest version of the In n Out secret menu updated last evening.

In-N-Out Secret Menu

Jack in the Box Menu Prices



Cheapest Items on Jack in the Box Menu

 The <u>Jack in the Box menu prices</u> are packed with rich entrees, sides, frozen treats and more, offering up a wide variety of late-night snacks for the consumer. Their prices compete with the best, and their cheapest options below certainly show for it.

Cheapest Foods at Jack in the Box

- Hamburger \$1.29
- · Jr. Jack \$1.29
- Chicken Nuggets \$1.49
- Egg Roll \$1.49
- · Small French Fries \$1.79

Cheapest Meals at Jack in the Box

- Chicken Nuggets Meal \$3.29
- Chicken Nuggets Meal \$4.99
- · Jumbo Jack w/ Cheese Meal \$5.29

Cheapest Breakfast Items at Jack in the Box

- · Mini Pancakes \$1.00
- · Breakfast Jack \$1.39
- Sausage, Egg and Cheese Biscuit \$2.69

Cheapest Dessert at Jack in the Box

- · Mini Cookies \$1.00
- Mini Churros 5 pc. \$1.00
- Chocolate Overload Cake \$1.79
- Mini Churros 10 pc. \$1.99

Jack in the Box Nutrition Info

We have published all <u>Jack in the Box nutrition</u> updated every week.

Jack in the Box Secret Menu



Click to check-out the Jack in the Box SECRET menu updated every month.

Jack in the Box Secret Menu



Jack in the Box is always on the top of my list for favorite restaurants to go to, and the secret
menu has only cemented that. I go more often than ever.

~ Maria Little, Washington D.C.

Jamba Juice Menu Prices



View the Jamba Juice menu prices updated every week.

Jamba Juice Nutrition Info

Low Calories Items

Calories typically aren't much of an issue when at Jamba Juice, but we still a list of their low calorie menu items below. View all of Jamba Juice nutrition info and calories on this page.

- Jamba Light Smoothies 150 calories
- · Omega-3 Choc. or Oatmeal Cookie 150 calories
- · Peach Perfection 210 calories
- Plain Oatmeal w/ Brown Sugar 220 calories
- · Strawberry Whirl 220 calories

Low Sodium Items

Sodium isn't highly prevalent in smoothies, but regardless, below we've compiled a list of low sodium items at Jamba Juice.

- · Mega Mango 10 mg
- Berry Yumberry 15 mg
- · Plain Oatmeal w/ Brown Sugar 20 mg
- Pomegranate Pick-Me-Up 35 mg
- Acai Topper 40 mg

Low Sugar Items

Jamba Juice smoothies are sweet, and for good reason. So, for those avoiding sugar, here's a list of options on the Jamba Juice menu with the least sugar.

· Cheddar Tomato Twist - 3 g

- California Flatbread 4-5 g
- Strawberry Nirvana 5 g
- Plain Oatmeal w/ Brown Sugar 12 g

Low Carb Items

Stop worrying about carbs when you eat out -- just order from our list of low carb items on the Jamba Juice menu below!

- · Carrot Juice 22 g
- · Omega-3 Oatmeal Cookie 30 g
- · Strawberry Nirvanan 27 g
- · Berry Fulfilling 32 g

High Protein Items

Find menu items high in protein, even at Jamba Juice, by using our list of high protein items below.

- Four Cheesy California Flatbread 21 g
- Protein Berry Workout w/ Whey 17 g
- Protein Berry Workout w/ Soymilk 15 g
- Hot Chocolate 15 g

Jamba Juice Secret Menu



Check out the <u>Jamba Juice SECRET menu</u> updated every month.

KFC Menu Prices





Read all of the KFC Menu Prices updated daily.

KFC Nutrition Info

Find out about KFC nutrition and calories updated just now.

KFC Secret Menu



KFC Secret Menu

- We can all agree that KFC's fried chicken is finger licking good. Add a little sauce and a side of
 mash potatoes and you have a darn good meal. But I have been wanting more lately. That's
 what the KFC secret menu has done for me.
 - ~ Helen Westrick, Alabama

View the latest KFC SECRET menu updated only here.



McDonald's Menu Prices



Get up to date with McDonald's Menu Prices updated weekly.

Cheapest Items McDonald's Menu

 The McDonald's full menu is revolutionary both in its diversity and in its incredibly low prices. Below we've listed some of the restaurant's cheapest items.

Cheapest Foods at McDonald's

- · Side Salad \$1.00
- · McChicken \$1.00
- McDouble \$1.00
- · BBQ Burger Ranch \$1.00
- Hamburger/Cheeseburger \$1.29
- Any Snack Wrap \$1.59

Cheapest Meals at McDonald's

- · Cheeseburger \$3.69
- · Double Cheeseburger \$4.69
- · Filet-O-Fish \$5.19

Cheapest Breakfast Items at McDonald's

- Fruity 'n Yogurt Parfait \$1.00
- Sausage McMuffin \$1.00
- · Sausage Biscuit \$1.00
- Sausage McGriddles \$2.69
- Egg McMuffin \$2.79

Cheapest Dessert at McDonald's

- · Ice Cream Cone \$1.00
- · Sundae (Fudge, Caramel, Strawberry) \$1.19
- · Snack Size McFlurry \$1.69



McDonald's Nutrition Info

View the latest McDonalds menu nutrition info. calories and facts just refreshed by our staff.

McDonald's Secret Menu



McDonald's Secret Menu

Here you can find the McDonalds SECRET menu filled with hidden menu items for you to try.

Olive Garden Menu Prices



Olive Garden menu prices

Olive Garden Nutrition Info

Before you stop in for some Italian food, see the Olive Garden nutrition menu filled with the facts on calories and carbs.

Olive Garden Secret Menu





Olive Garden Secret Menu

Olive Garden is my favorite place to take my family. It has the perfect vibe for a gathering. I
didn't realize I could customize my meals at Olive Garden until I came across this secret menu.
 Mindy Smith, South Dakota

Don't leave before you check out the Olive Garden secret menu which you will fall in love with.

Papa John's Pizza

Finally, you can view the latest Papa John's menu prices before you order.

P.F. Changs Chinese Food

P.F. Changs happy hour

Sonic Menu Prices



Find the newest <u>Sonic menu prices</u> to see how much you can want to splurge on tater tots and corn dogs.

Sonic Nutrition Facts

X)

Sonic can be healthier than you think, just check out <u>Sonic drive-in nutrition</u> and decide how many carbs and calories you'd like to consume.

Sonic Secret Menu



Sonic secret menu

Sonic Secret Menu

- I grew up with Sonic, since it was literally in my backyard. I know their menu like the back of
 my hand. While they have changed it some over the years, it hasn't been enough for me. That's
 why I have been experimenting with their secret menu!
 - ~ Ricky Ziegler, Indiana

Starbucks Menu Prices



Starbucks menu prices

Cheapest Items on Starbucks Menu

Starbucks has a pristine reputation as America's biggest seller of quality coffee, but sometimes their prices aren't so
quality. Luckily, we have their cheapest options compiled below, so check them out!

Cheapest Drinks at Starbucks

- Espresso Solo \$1.45
- Espresso Doppio \$1.75
- · Fresh Filter Coffee Tall \$1.75
- · Brewed Tea Tall \$1.95
- · Iced Coffee Tall \$1.95

Starbucks Nutrition Info

Have you ever wondered how much calories or sugar are in Starbucks coffee drinks? Check out the <u>Starbucks nutrition</u> info for the facts on how healthy your favorite lattes and frappuccinos really are.

Starbucks Secret Menu



Right here you can find Starbucks secret menu all of the latest hidden menu drinks.

Starbucks Secret Menu

- As a regular Starbucks girl, there's nothing I like better before strolling to class than a
 frappucino. Especially in the summer. But a Twix, Candy Cane, and a Butterbeer frappucino?
 Come on, even the names make them sound delicious. Starbucks will never be the same again
 after reading this secret menu list.
 - ~ Edna Reilly, Rhode Island

Subway

We have recently updated the <u>Subway breakfast</u> prices menu so that you can enjoy your footlong in peace.

View the latest Subway menu prices to match their brand new menu to revitalize sales.

Taco Bell Menu Prices





Yo quiero Taco Bell and you can review <u>Taco Bell menu prices</u> and figure out how much menu items cost.

Taco Bell Nutrition Menu

Our editors just updated the PDF for <u>Taco Bell nutrition</u> so you can know how many calories are on the menu.

Taco Bell Secret Menu



Taco Bell Secret Menu

Taco Bell is everyone's favorite place for Mexican food. With the latest Doritos locos tacos, it's
my new favorite spot. But I never new you could mix things to create something like the Waffle
Taco. Having tried it out, I am amazed by the new flavors the secret menu has given me!
 ~ Connie Gibbs, California

check out the full Taco Bell secret menu and you might enjoy it.

Wendy's

×

Wendy's menu prices

Wendy's SECRET menu

Wendys Nutrition

Whataburger

Whataburger menu prices

Whataburger SECRET menu

Whataburger Nutrition



Get Double Points

Book now to get double points on every stay through December 31st!

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We are the original source for secret menu information, menu prices, and happy hour menus.

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Panera Bread Menu Prices

McDonald's Menu



Menu Resources

All Secret Menus

Menu Prices

Fast Food Nutrition Facts

Happy Hour

McDonald's Breakfast Menu

Fast Food News

Most Popular This Month

Costco Food Court

Dutch Bros Menu

Wendy's Menu

Applebees Happy Hour

In-N-Out Secret Menu

Starbucks Secret Menu

Chili's Happy Hour

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Secret Menus Updates





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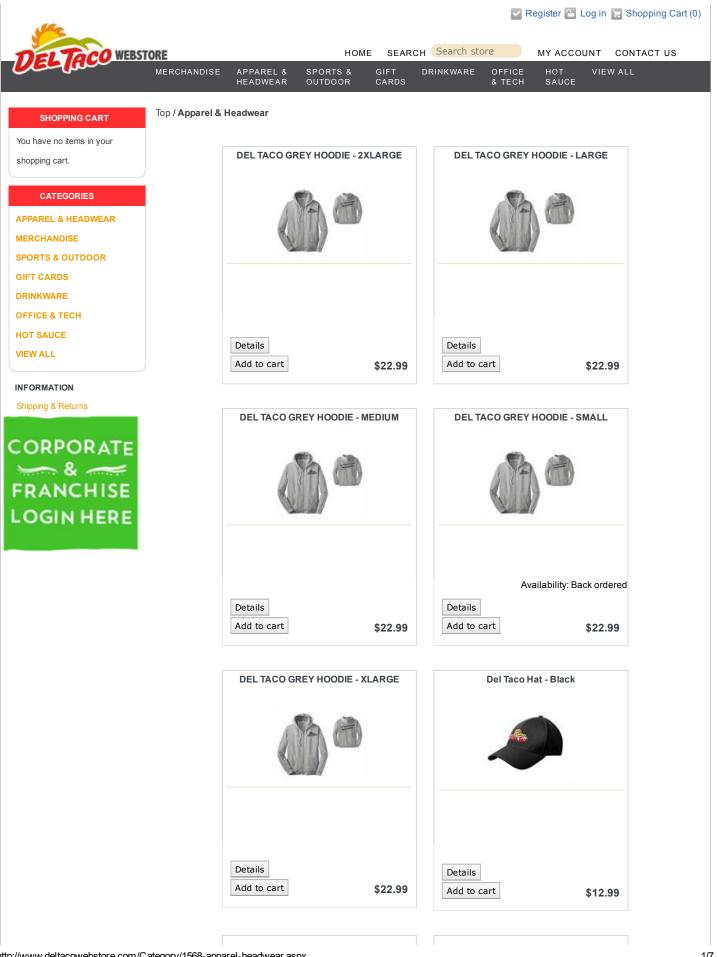
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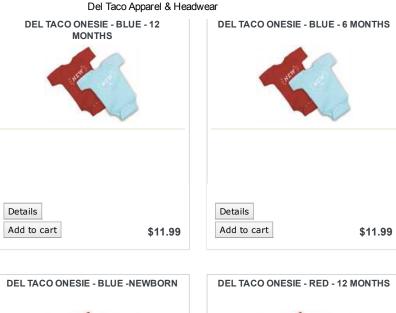
AN ELITE CAFEMEDIA FOOD PUBLISHER



EXHIBIT 21

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)







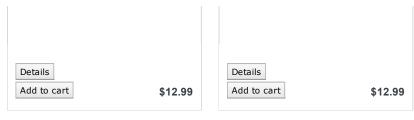












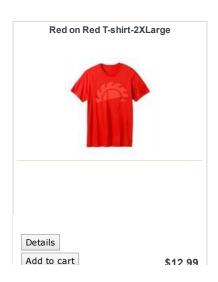
























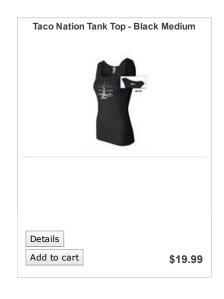
Retro Del Taco T-shirt - Buzz Saw -Brown XLarge Taco Love Tank Top - Yellow Large













Taco Nation Tank Top - Yellow Large

Taco Nation Tank Top - Yellow Medium









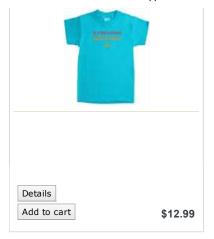




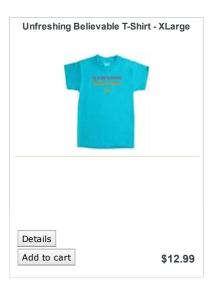
Unfreshing Believable T-Shirt - Medium

Unfreshing Believable T-Shirt - Small

Del Taco Apparel & Headwear





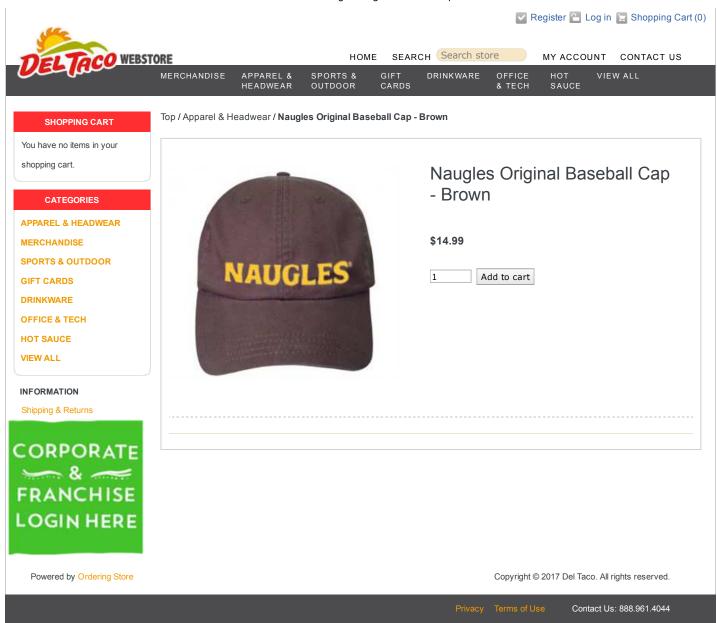


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Contact Us: 888.961.4044



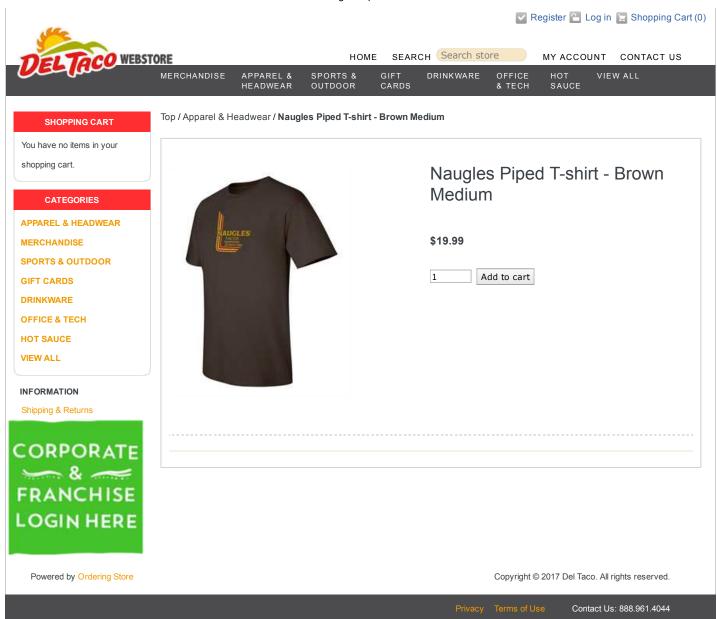


EXHIBIT 22

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)



Consistency Initiative

After a complete review of the Consistency Initiative Pilot Program, the Office has determined that it would be useful to both our customers and the Office to make the Pilot a permanent program. As originally envisioned by the Office, the Consistency Initiative serves as a valuable instrument for applicants to raise concerns about the occasional instances of inconsistent practice within the Office and to promote overall high quality examination.

The guidelines for both Non-ID-Related Requests and ID-Related Requests have set appropriate bounds to address consistency concerns, and they are adopted as the guidelines for the permanent initiative. The guidelines are set forth below for reference.

Non-ID-Related Requests

An applicant may bring to the attention of the Office situations where, in applicant's opinion, the Office has acted inconsistently in its treatment of applicant's pending applications/recent registration(s). For Requests that address substantive or procedural issues (excluding issues involving identifications of goods and services), applicants' Requests may include registrations that have issued within five years. Applicants may submit a Request when a substantive or procedural issue has been addressed in a significantly different manner in different cases, subject to the following provisions: (1) the Request is based on co-pending applications or an application and a registration owned by the same legal entity or a successor in interest (e.g., assignee); (2) the registration(s) involved was issued less than five years prior to the date of the Request; (3) at least one of the applications in the Request is in a pre-publication status at the time of the Request; and (4) the allegedly inconsistent treatment has already occurred. Third parties are prohibited from submitting Requests in this forum, and the Office will not consider or act on such Requests.

ID-Related Requests

Turning to Requests involving identifications of goods and services, applicants may submit a Request when an identification issue(s) has been addressed in a significantly different manner in different cases (excluding applications and registrations based on the Madrid Protocol), subject to the following provisions: (1) the Request is based on co-pending applications or an application and a registration owned by the same legal entity or a successor in interest (e.g., assignee); (2) the registration(s) involved was issued less than two years prior to the date of the Request and since the latest edition of the Nice Agreement Concerning the International Classification of Goods and Services; (3) at least one of the applications in the Request is in a pre-publication status at the time of the Request with a final Office action containing identification and/or classification requirements; and (4) the allegedly inconsistent treatment has already occurred. Third parties are also prohibited from submitting Requests in this forum, and the Office will not consider or act on such Requests.

As stated in the previous notices, the Consistency Initiative is in no way meant to discourage applicants from first contacting the assigned examining attorneys to address consistency issues. On the contrary, applicants are encouraged to do so because of the examining attorneys' familiarity with and knowledge of the issues raised in their Office actions. Applicants should not contact the examining attorney of any application that has already registered unless the examining attorney is also assigned to one of the copending applications at issue. Applicants who are unable to resolve any issue associated with consistency in co-pending applications assigned to more than one examining attorney may always contact the managing attorneys of the law offices involved.

In all Requests, applicants must briefly describe the allegedly inconsistent action, list the application(s) and/or registration(s) involved, and clearly mark at the top of the page the nature of the Request (e.g., . Request for Consistency Review of a Substantive/Procedural Issue, Request for Consistency Review of Identification). All Requests will be scanned into the USPTO's database and will be viewable by the public through Trademark Status and Document Retrieval (TSDR). Applicants may not submit additional evidence. If evidence is submitted, it will not be considered during this process.

The Office will promptly review and consider each Request. The Office will not respond directly to the Request, but action will be taken in

1 of 2

the pending application(s) if the Office deems it appropriate. Requesters can expect that any action taken should occur within four to six weeks of the date of the Request, and requesters may monitor changes in the identified applications through TSDR. Requesters should note, however, that subsequent action taken by the Office may differ from that requested. Alternatively, the Office may determine that different handling of the cases is appropriate, and no action will be taken. Generally, no action can be taken to amend, or cancel and restore to application status any existing registrations as a result of a Request.

Applicants must send requests to TMCONSISTENCY@USPTO.GOV. The filing of a Request does not provide a basis to request suspension of an application or appeal and will not stay the period for replying to an Office action, filing a notice of appeal or submitting any other filing that is due before the Office.

2 of 2 6/1/2018, 1:07 PM

EXHIBIT 23

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

NEWS

2017 2016 DEL TACO INTRODUCES BOWLS FULL OF FRESHNESS FOR JUST \$4

DEL TACO PANKED MUMBER ONE IN VALUE BY NATION'S LEADING CONSUMER REVIEW

DEL TACO CELEBRATES 50 YEARS OF SERVING FRESH MEXICAN AND AMERICAN FAVORITES

STATEMENT REGARDING THE PASSING OF TONY HACKBARTH

DEL TACO'S NEW MENU ITEMS TURN UP THE FLAVOR ON THE BUCK & UNDER MENU

NEW BREAKFAST TACOS & FREE HA AT DEL TACO

IAKES A SPLASH WITH RETURN OF CRISPY SHRIMP

BEL TACO INTRODUCES TURKEY TACOS 2014-01-06

2008

OF SERVING FRESH MEXICAN AND AMERICAN FAVORITES

DEL TACO CELEBRATES 50 YEARS

COMPANY WILL "THROWBACK" WITH CLASSIC MENU ITEMS, PROMOTIONS, COLLECTOR'S CUPS AND INSTORE CELEBRATIONS

Lake Forest, California (June 16, 2014) -- 2014 marks the 50th anniversary of Del Taco, and to commemorate the milestone, Del Taco is offering its guests a variety of exciting promotions and "Throwback Classics Menu"

Beginning June 19th, Del Taco will honor its golden anniversary with the return of three beloved, classic menu items, available for a limited time. These delicious items, being offered on the company's "Throwback classics Menu", will share a taste of Del Tacc's history over the past five decades. The "Throwback Classics Menu" items.

raco featuring seasoned beef, freshly hand-grated cheddar cheese, crisp lettuce and a fresh tomato slice

n a seasme seed oun.

Small Taco Saids featuring seasoned beef, freshly hand-grated cheddar cheese, diced tomatoes and Del

accesses secret sauce, served on a bed of crisp lettuce with torillia chips.

Orange Shake a thick, creamy orange and vanilla milk shake topped with whipped cream.

"We want to thank the generations of loyal customers that have supported us and have helped Del Taco grow over the past five decades," said John Cappasola, chief brand officer, Del Taco, "As we celebrate this significant milestone, we hope our "Throwback Classics Menu" items will spark fond memories for our longtime guests, and engage new fans that will help us celebrate future milestones for years to come."

In addition, Del Taco's 546 restaurants nationwide will host 50th Anniversary parties on Saturday, June 21st at 2 p.m. local time. Enjoy cake and coupons for summertime offers. The parties will help celebrate five decades of tacos, burnitos, burgers and fries.

The company is also introducing a series of Collector's Cups, comprised of four commemorative designs, available at any Del Taco restaurant nationwide through September 3rd or until supplies last. The cups are free with any Macho Drink purchase.

50 Years of Tacos. Burritos, Burgers and Fries Ed Hackbarth opened the first Del Taco in Barstow, California, in 1964. With a menu of 19 cent tacos, tostadas, fries and 24 cent cheeseburgers, Del Taco brought in \$169 in sales on its first day of business. By the 1970s, the company was thriving with 50 restaurants operating by 1977, and by 1978, the company grew to a total of 100 restaurants nationwide. Based on increased customer demand, in 1988. Del Taco began keeping many locations open 24 hours a day. By 2008. Del Taco lackbard with the opening of its 500th restaurant. In 2013. Del Taco launched a rebranding effort, the "UnFreshing Believable" advertising campaign, and its Buck & Under Menu to communicate the lengths the company goes to in order to deliver fresh quality, made-to-order menu terms at an incredible value.

About Del Taco

2014 marks Del Taco's 50th anniversary. At Del Taco, all menu items taste better because they are made to order with fresh ingredients including cheddar cheese grated from 40-pound blocks, handmade pico de gallo salsa, lard-free beans slow-cooked from scratch, and marinated chicken grilled in the restaurant. The menu includes classic Mexican dishes such as tacos, burritos, quesadilias and nachos as well as American favorites including hamburgers, crinide-cut fries and shakes. In 2013, Del Taco announced a rebranding effort and the "UnFreshing Bellevable" advertising campaign to communicate the lengths the company goes to in order to deliver quality, made-to-order menu items created with freshly-prepared ingredients. Del Taco also serves breakfast featuring a full line of breakfast burritos. Del Taco has 545 restaurants in 17 states serving more than better the staturing a full line of breakfast burritos. Del Taco has 546 restaurants in 17 states serving more than at the company of the staturing a full line of breakfast burritos. Del Taco company for fisc for the food by 'liking' Del Taco on Facebook at www.facebook.com/deltaco or joining our Raving Fan eClub at www.Del Taco.com/RavingFan. For more substituted to the stature of the

A TOP

FIND A DEL TACO NEAR YOU

10 mL See MY CURRENT LOCATION

JOIN OUR-RAVING FAN ECLUB

AND GET FREE FOOD AND OTHER INSIDER-ONLY TREATS STRAIGHT TO YOUR INBOX!



2 FREE GRILLED CHICKEN TACOS

FREE PREMIUM SHAKE ON YOUR BIRTHDAY.
Choose Vanilla, Chocolate or Strawberry
(Regular Size)

EXCLUSIVES
Raving Fan eClub members receive exclusive offers like coupons and opportunities to try new products before the general public.

Please allow 24 hours for processing. Birthday item may vary by restaurant.

CONTACT US

BUY GIFT CARD CHECK GIFT CARD BALANCE HISTORY





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EXHIBIT 24

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

THIS EXHIBIT HAS BEEN FILED AS CONFIDENTIAL

EXHIBIT 25

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN N	M. ZIEBARTH,)
	Petitioner,)
vs.) Reg. No. 1,043,729
DEL TACO LI	LC,) Cancellation No. 92053501
	Respondent.)

CROSS-EXAMINATION DEPOSITION OF:

NOAH CHILLINGWORTH

Monday, March 24, 2014

Reported by:

Stephanie Leslie CSR No. 12893

Page 1

REGAL COURT REPORTING, INC. 866-228-2685

1	little bit about control of clothing bearing the
2	Naugles mark. Is it to your knowledge, is it
3	accurate to state that Del Taco has exclusive control
4	over all clothing items sold in the U.S. bearing the
5	Naugles mark?
6	MS. BESL: Objection to the extent it calls
7	for a legal conclusion and for speculation.
8	THE WITNESS: I believe so.
9	BY MS. PFEIFFER:
10	Q So you're not aware of anybody else selling
11	clothing items bearing the Naugles mark other than
12	Del Taco?
13	A I know that we had seen others try, and I
14	believe we had sent cease and desist letters.
15	Q Okay. And was that on more than one occasion?
16	A I don't believe so. Just once.
17	Q You say "we," so it's been since you've worked
18	there in 2009?
19	A Yes.
20	Q And you think it was just once?
21	A I believe so.
22	Q Do you recall when that was?
23	A I don't exactly.
24	Q Could you give me an estimate? 2009? 2010?
25	MS. BESL: Objection. Calls for speculation.

Page 50

REGAL COURT REPORTING, INC. 866-228-2685

1	BY MS. PFEIFFER:
2	Q That you know. Don't speculate. Tell me what
3	you know.
4	A I believe late 2011.
5	Q How did you become aware that somebody else
6	was selling clothing?
7	MS. BESL: Objection, just in case it goes
8	into any attorney-client privilege.
9	BY MS. PFEIFFER:
10	Q Right.
11	A I don't remember.
12	Q You don't know how it came to your attention
13	that somebody else was selling clothing items?
14	A I don't remember for sure if I had stumbled
15	upon it or somebody who worked for me had found it. I
16	honestly don't remember.
17	Q Okay. What items were being sold? Or was it
18	just one?
19	A I think it was a T-shirt.
20	Q A T-shirt that had the Naugles mark on it?
21	A Yes.
22	Q Do you know if it was the word "Naugles" or
23	that old logo?
24	A I don't remember. It might have been just the
25	old logo.

Page 51

REGAL COURT REPORTING, INC. 866-228-2685

1	Q And it was just one T-shirt?
2	A I believe so.
3	Q Do you remember the party who was on the other
4	side?
5	MS. BESL: I'm just going to insert an
6	objection to this line of questioning as being outside
7	the scope of direct.
8	You can answer.
9	THE WITNESS: I do not.
10	BY MS. PFEIFFER:
11	Q Other than your legal counsel, did anybody
12	within Del Taco deal with this?
13	A Probably, but I don't know for sure.
14	Q You know that a cease and desist letter was
15	sent?
16	A I believe so.
17	Q Did you ever see that letter?
18	A No. My lawyer would have.
19	Q So somebody informed you that a cease and
20	desist letter was sent?
21	A Yes.
22	Q Do you know what came of this whole what
23	the resolution was?
24	A I do not.
25	MS. BESL: Again, just in case it goes into

Page 52

EXHIBIT 26

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

- Home
- Sign In
- Sell Your Art

Shop

- T-Shirts & Hoodies
- Stickers
- iPhone & iPod Cases
- Samsung Galaxy Cases
- <u>iPad Cases</u>
- Prints
- Posters
- Cards
- Kids Clothes
- <u>Calendars</u>
- Gift Certificates

<u>r b</u>

- Home
- T-Shirts & Hoodies
- Stickers
- <u>iPhone & iPod Cases</u>
- Samsung Galaxy Cases
- iPad Cases
- Prints
- Posters
- Cards
- Kids Clothes
- Calendars
- Gift Certificates

Sign In

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Search

defunkt > Portfolio > Naugles Tacos Retro T-Shirt



\$2.50

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Stickers Info
Next

Available to buy on...

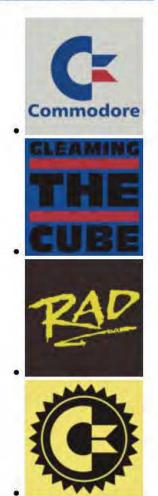
T-Shirts & Hoodies
Stickers

Naugles Tacos Retro T-Shirt by defunkt Follow

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- More Work
- Description
- Comments (0)

defunkt's Portfolio





Retro Shirts



Scoop up this retro t-shirt and hearken back to the 70's and 80's when tacos and burritos were .17 cents!

Colors: Brown, Creme, and White

Tags

naugles, tacos, retro, brown, 1980s, vintage



<u>defunkt</u>

View Full Profile

Good job! How difficult did you find uploading your first work?

Much easier

than expected A little easier

than expected About what

I expected A little harder

than expected Much harder

than expected

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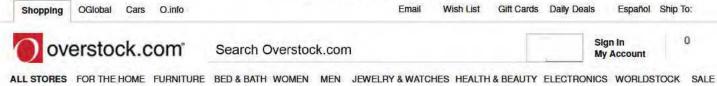
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Product Details



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Los Angeles Pop Art Men's Gun Hooded Sweatshirt Today: \$35.49



Los Angeles Pop Art Men's Pi 100 Digit T-shirt

Today: \$19.49



Los Angeles Pop Art Men's 'John 3:16' T-shirt



Los Angeles Po Men's Irish T-sh

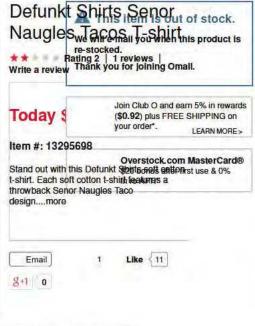
Today: \$18.49

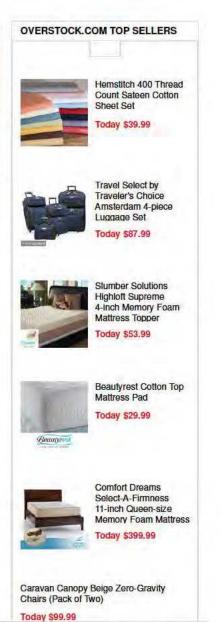
Today: \$20.99



Product Reviews (1)

Product Q&A (0)





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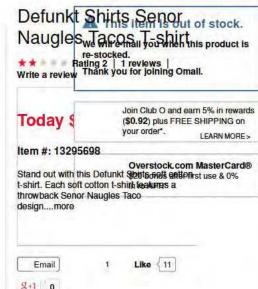
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Photos

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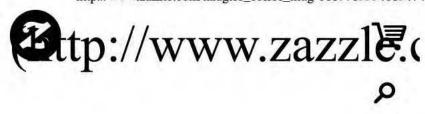
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Product Details

Style: Classic White Mug

Your favorite photo or funniest saying is a great way to start the day. Use our white mug to showcase your creativity. It has a large handle that's easy to hold and comes in 11oz and 15oz sizes. Dishwasher and microwave safe. Makes a great gift!

About the Design

Naugles Coffee Mug

Can't say that I ever had a cup of coffee back

Naugles Coffee \$19.95
Mug \$19.95
Mug \$19.95

Mug \$2.00 more on Ringer Mug \$19.95

Satisfaction \$19.95

Add to \$19.95

Per mug \$19.95

Add to Cart \$19.95

Per mug \$19.95

Per mug \$2.90 more on Ringer Mug \$2.00 more on Ringer Mug \$400 more on Ring

Style: Classic White Mug \$19.95

Color: White



Size: 11 oz

Naugles Coffee Mug from Zazzle.com

when Naugles was around, but if I had I'm sure it would've tasted better if it was served in this cool mug!



Created By GregNoll61

(http://www.zazzle.com/gregnoll61)

/gifts?ch=GregNoll61):

United States | Store

(http://www.zazzle.com/gregnoll61) |

Contact

Report this product





(http://www.zazzle.com

/irwindale_raceway_the_original_tee_shirt-

235611372623013338)

Irwindale Raceway, The Original Tee Shirt



(http://www.zazzle.com

/san_fernand >_drag strip_tshirt-

2350664062(2985838)

San Fernando Dragstrip **Tshirt**





(http://www.zazzle.com/pup_n_taco_travel_mug-168724749245288417)

Pup 'n' Taco Travel Mug (http://www.zazzle.com



(http://www.zazzle.com /licorice_pizza_t_shirt-235925279893520823)

Licorice Pizza T Shirt (http://www.zazzle.com



(http://www.zazzle.com /chuck_landis_country_club_tee_shirts-235908571303906454)

Chuck Landis' Country Club Tee Shirts



(http://www.zazzle.com/pirate_radio_fan_shirt-235885291120892599)

Pirate Radio Fan Shirt (http://www.zazzle.com/pirate_radio_fan_shirt-

Reviews

** 4.8 (2794 reviews)

5 star: 2328
4 star: 326
3 star: 80
2 star: 39
1 star: 21

97% reviewers would recommend this to a friend
This product is most recommended for
Christmas



2,759 results

***** "Awesome Naugles Coffee Mug"

Reviewed by Shane (http://www.zazzle.com/prf/reviews?mbr=238796046171630206) 12/28/2011



(http://www.zazzle.com/naugles_coffee_mug-168576555408547440?size=15oz&lon=90)

Product Quality: Excellent

78-77

Recommended: Yes

Print Quality: Excellent Shipped on time: Yes Recommended for: Friend from So Cal

About the product:

This was a little walk down memory lane for a friend of mine.

About the print:

Perfect

***** "Come and Play Mug"

Reviewed by Elizabeth (http://www.zazzle.com/prf/reviews?mbr=238119473318229417) 1/15/2012



(http://www.zazzle.com

/cr/design

/pt-zazzle_mug?style=basic_mug&

color=white&size=11oz&

lon=270&

design.areas=%5boutside%5d)

(http://www.zazzle.com

/cr/design

/pt-zazzle_mug?style=basic_mug&

color=white&size=11oz&

lon=270&

design.areas=%5boutside%5d)

Product Quality: Excellent

Recommended: Yes

Print Quality: Excellent

Recommended for: Christmas

Shipped on time: Yes

About the product:

The mug was beautiful and well received by the recipient.

About the print:

The printing was clear.

***** "Big mug"

Reviewed by JICo930 (http://www.zazzle.com/prf/reviews?mbr=238076394215996893) 8/9/2012



(http://www.zazzle.com /cr/design /pt-zazzle_mug?style=basic_mug& color=white&size=15oz& lon=270& design.areas=%5boutside%5d) (http://www.zazzle.com /cr/design /pt-zazzle_mug?style=basic_mug& color=white&size=15oz& lon=270& design.areas=%5boutside%5d)

Product Quality: Excellent Recommended: Yes

Print Quality: Good **Recommended for:** Birthdays

Shipped on time: Yes

About the product:

I have bought mugs from Zazzle before and as always the quality is great! I didn't realize the 15oz size (I thought all were 12oz) until the mug came so that was a surprise, but no problem. I love that I can put the mug in the dishwasher.

About the print:

The photo I chose did seem a bit darker, but not a major issue.

***** "I Heart Good but small"

NAUGLES 000255

Reviewed by Quinton Hubbleford (http://www.zazzle.com/prf/reviews?mbr=238527646023378671)



(http://www.zazzle.com /i_love_my_uncle_n.ug-16855366768679747(2lon-)0)

Recommended: Yes Shipped on time: Yes **Product Quality: Good**

Print Quality: Good Recommended for: Christmas

About the product:

The mugs quality and weight are excellent. However, if the lettering and graphics were enlarged to 150% or 200% and the lettering all caps and bolder, I would have rated it 5 stars. I broke a coffee mug that said "I (heart symbol) MY UNCLE!" In replacing it, the best best I could find was the ZAZZLE design I bought it and saw this one and bought it on impulse. They are great coffee mugs, but the graphics and lettering is too understated and timid.

About the print:

The execution and color of the pottery are excellent. However, if the lettering and graphics were enlarged to 150% or 200% and the lettering all caps and bolder, I would have rated it 5 stars. The graphics and lettering is too understated and timid IMHO.

***** "Father's Day Mug"

Reviewed by Cathy (http://www.zazzle.com/prf/reviews?mbr=238238261909251937) 7/10/2012



Naugles Coffee Mug from Zazzle.com

```
(http://www.zazzle.com
/cr/design
/pt-zazzle_mug?style=basic_mug&
color=white&size=15oz&
lon=27o&
design.areas=%5boutside%5d)
(http://www.zazzle.com
/cr/design
/pt-zazzle_mug?style=basic_mug&
color=white&size=15oz&
lon=27o&
design.areas=%5boutside%5d)
```

Product Quality: Excellent Recommended: Yes

Print Quality: Excellent **Recommended for:** Father's Day

Shipped on time: Yes

About the product:

This is one of 6 mugs I made for my husband and father for Father's Day. Although it took a little long for them to be made and shipped, the quality was great and for 12 mugs it cost me about \$90 since there was a sale. A great gift that was liked by both!

About the print:

Fantastic! The photos are high-quality, even the small ones!

2,759 results

Page 1 of 552 > >>

Have you purchased this product? Write a review!

Comments

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Love this product? Add a comment

Tags

Mugs

naugles (http://www.zazzle.com/naugles+mugs), tacos (http://www.zazzle.com/tacos+mugs), san fernando valley (http://www.zazzle.com/san+fernando+valley+mugs), food (http://www.zazzle.com/food+mugs), beverages (http://www.zazzle.com/beverages+mugs), coffee mugs (http://www.zazzle.com/mugs)

Marketplace Category:

Vintage & Historical (http://www.zazzle.com/gifts?cg=103685506664274525)

All Products:

naugles (http://www.zazzle.com/naugles+gifts), tacos (http://www.zazzle.com/tacos+gifts), san fernando valley (http://www.zazzle.com/san+fernando+valley+gifts), food (http://www.zazzle.com/food+gifts), beverages (http://www.zazzle.com/beverages+gifts)

Other Info

Product ID: 168576555408547440

Made on: 12/10/2010 7:54 AM

Rating: **G** Report this product

Reference: Guide Files (http://www.zazzle.com/mk/custom/guidefiles)

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EXHIBIT 27

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	73057402
REGISTRATION NUMBER	1043729
MARK SECTION	
MARK	NAUGLES
ATTORNEY SECTION	
ORIGINAL ADDRESS	WILLIAM P. CHRISTIE CHRISTIE, PARKER & HALE, LLP P.O. BOX 7068 PASADENA, CA 91109-7068
CORRESPONDENCE SECTION	
ORIGINAL ADDRESS	WILLIAM P. CHRISTIE CHRISTIE, PARKER & HALE, LLP P.O. BOX 7068 PASADENA, CA 91109-7068
NEW ATTORNEY ADDRESS	
STATEMENT TEXT	By submission of this request, the undersigned REVOKES the power of attorney currently of record, as listed above, and hereby APPOINTS the following new attorney:
NAME	Joshua A. Lorentz
FIRM NAME	Dinsmore & Shohl LLP
INTERNAL ADDRESS	1900 Chemed Center
STREET	255 East Fifth Street
CITY	Cincinnati
STATE	Ohio
COUNTRY	United States
POSTAL/ZIP CODE	45202
PHONE	513-977-8200
FAX	513-977-8141
NEW CORRESPONDENCE ADDRESS	
NAME	Joshua A. Lorentz
FIRM NAME	Dinsmore & Shohl LLP
INTERNAL ADDRESS	1900 Chemed Center
STREET	255 East Fifth Street
CITY	

CITY	Cincinnati		
STATE	Ohio		
COUNTRY	United States		
POSTAL/ZIP CODE	45202		
PHONE	513-977-8200		
FAX	513-977-8141		
SIGNATURE SECTION			
SIGNATORY FILE	\\TICRS2\EXPORT12\730\574\73057402\xml1\RAA0002.JPG		
SIGNATORY NAME	Shirlene Lopez		
SIGNATORY POSITION	President and CEO		
FILING INFORMATION SECTION			
SUBMIT DATE	Wed Jan 31 13:38:19 EST 2007		
TEAS STAMP	USPTO/RAA-XX.XXX.XXX.X-20 070131133819705811-730475 92-3603587e7416e52d6c4f8a 12fc987a4c4f-N/A-N/A-2007 0131133433680299		

Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative

To the Commissioner for Trademarks:

MARK: NAUGLES

SERIAL NUMBER: 73057402

REGISTRATION NUMBER: 1043729

The original attorney
WILLIAM P. CHRISTIE
CHRISTIE, PARKER & HALE, LLP
P.O. BOX 7068

PASADENA, CA 91109-7068

Original Correspondence Address:

WILLIAM P. CHRISTIE CHRISTIE, PARKER & HALE, LLP P.O. BOX 7068 PASADENA, CA 91109-7068

By submission of this request, the undersigned REVOKES the power of attorney currently of record, as listed above, and hereby APPOINTS the following new attorney:

Newly Appointed Attorney:

Joshua A. Lorentz Dinsmore & Shohl LLP 1900 Chemed Center 255 East Fifth Street Cincinnati, Ohio 45202 United States 513-977-8200 513-977-8141

The following is to be used as the correspondence address:

Joshua A. Lorentz Dinsmore & Shohl LLP 1900 Chemed Center 255 East Fifth Street Cincinnati, Ohio 45202 United States

513-977-8200 513-977-8141

Signatory File Signature

Signatory's Name: Shirlene Lopez Signatory's Position: President and CEO

Serial Number: 73057402

Internet Transmission Date: Wed Jan 31 13:38:19 EST 2007

TEAS Stamp: USPTO/RAA-XX.XXX.XXX.X-20070131133819705

811-73047592-3603587e7416e52d6c4f8a12fc9 87a4c4f-N/A-N/A-20070131133433680299

Signature Section: Signature: micket Date: 1-30-2007

Signatory's Position: President and GEO Serier Vice hesident

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Go Back

EXHIBIT 28

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

CHRISTIAN M.	ZIEBARTH,)				
	Petitioner,)				
)				
VS.)	Reg. No.	1,04	3,72	29
)	Cancellat	ion	No.	92053501
DEL TACO LLC	,)				
)				
	Respondent.)				
)				

CROSS-EXAMINATION DEPOSITION OF:

NOAH CHILLINGWORTH

Monday, March 24, 2014

Reported by:

Stephanie Leslie CSR No. 12893

Page 1

1	Q Where is your vendor located?
2	A St. Louis, Missouri.
3	Q You may have just answered this, but who
4	handles orders that come through the Del Taco Web site
5	for hats or shirts bearing the Naugles mark?
6	A Our vendor partner.
7	Q Directly?
8	A Yes.
9	Q What's the name of your vendor?
10	A T.O.P. Marketing USA.
11	Q Do you know if T.O.P. Marketing USA keeps a
12	stock on hand or if they're made and shipped as
13	ordered?
14	MS. BESL: Again, I'm just going to insert an
15	objection that this is outside the scope of direct.
16	THE WITNESS: I believe they keep a stock on
17	hand.
18	BY MS. PFEIFFER:
19	Q Do you have any knowledge of how often they
20	restock or need to restock?
21	A I do not.
22	Q Do you know why Del Taco made the decision in
23	March of 2011 to start selling clothing bearing the
24	word "Naugles"?
25	A We saw a business opportunity.

Page 21

1	Q Could you elaborate a little, please?
2	A We are always looking for ways to promote the
3	Del Taco brand and knew I have personal knowledge
4	that Naugles was a part of Del Taco through the
5	combining of the two companies. I remember when my
6	Naugles, or the Naugles in my area, converted. I know
7	there's a you know, there's a loyal following out
8	there that we could take advantage of.
9	Q Okay. Was that your decision to your idea
10	to begin selling clothing bearing the Naugles mark?
11	A Yes.
12	Q Do you remember when that decision was made?
13	A Not exactly.
14	Q Could you estimate?
15	A I can't say for sure.
16	Q Do you think it was roughly 2011?
17	A Yes.
18	Q Turning back to your affidavit previously
19	marked as Exhibit T, please look again at paragraph 2
20	on the first page. Again, that last sentence reads "I
21	am informed and believe that since 1995 Del Taco has
22	used the Naugles mark in advertising and on clothing";
23	correct?
24	A Yes.
25	Q Based on your testimony a few minutes ago and

Page 22

EXHIBIT 29

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

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

In the matter of United States Application Serial No. 85040746

Mark: "NAUGLES"

DEL TACO, LLC,		
Opposer,)	
11)	Opposition No. 91235706
v.)	
)	
ZIEBARTH HOLDINGS, LLC,)	
Applicant.)	
)	
	,	

APPLICANT'S RESPONSES TO DEL TACO'S FIRST SET OF INTERROGATORIES

Pursuant to the Rules of Practice of the Trademark Trial and Appeal Board and the applicable Federal Rules of Civil Procedure, Applicant ZIEBARTH HOLDINGS, LCC ("Applicant") hereby responds to Opposer DEL TACO, LLC's ("Del Taco") first set of interrogatories as set forth below.

GENERAL OBJECTIONS TO THE INTERROGATORIES

The following General Objections to Del Taco's Interrogatories are incorporated by reference in response to each Interrogatory set forth below and are not waived with respect to any response.

1. Applicant generally objects to Del Taco's Interrogatories to the extent they seek disclosure of any information protected, privileged or immune or otherwise exempt from discovery pursuant to applicable state and federal statutes, the Federal Rules of Civil Procedure, case law, regulations, administrative orders, or any other applicable rules, decisions or laws,

Application Serial No. 85040746, only services. Applicant further objects to this interrogatory on the grounds that it fails to designate a time frame during which the information is sought and is therefore overbroad and unduly burdensome.

Without waiving the foregoing objections, Applicant responds as follows: Cafeteria and restaurant services are offered under the NAUGLES mark at the multiple NAUGLES restaurant locations as well as various other special events and pop-up events at other locations.

INTERROGATORY NO. 2:

Identify each physical location where Applicant's Services were actually offered and the exact dates such services were offered in 2012.

RESPONSE TO INTERROGATORY NO. 2:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Del Taco's general definitions and instructions define the phrase "Applicant's Services" as "the goods listed in U.S. Application Serial No. 85040746;" Applicant objects to this interrogatory on the grounds that no "goods" are listed in U.S. Application Serial No. 85040746, only services.

Without waiving the foregoing objections, Applicant responds as follows: Christian Ziebarth offered cafeteria and restaurant services under the NAUGLES mark at All Pixels Marketing/Page One Priority (a name change occurred at some point) located on the second floor of Francisco's Auto Repair in Huntington Beach, CA on March 20, 2012. Mr. Ziebarth offered food under the NAUGLES mark on other occasions during 2012 as well but cannot recall the exact dates. All instances described herein were performed with the understanding that Mr. Ziebarth was actively and diligently building his business of offering cafeteria and restaurant services under the NAUGLES mark.

INTERROGATORY NO. 3:

Identify each physical location where Applicant's Services were actually offered and the exact dates such services were offered in 2013.

RESPONSE TO INTERROGATORY NO. 3:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Del Taco's general definitions and instructions define the phrase "Applicant's Services" as "the goods listed in U.S. Application Serial No. 85040746;" Applicant objects to this interrogatory on the grounds that no "goods" are listed in U.S. Application Serial No. 85040746, only services.

Without waiving the foregoing objections, Applicant responds as follows: Mr. Ziebarth offered food under the NAUGLES mark on multiple occasions during 2013 but cannot recall the exact dates. All instances in 2013 were performed with the understanding that Mr. Ziebarth was actively and diligently building his business of offering cafeteria and restaurant services under the NAUGLES mark.

INTERROGATORY NO. 4:

Identify each physical location where Applicant's Services were actually offered and the exact dates such services were offered in 2014.

RESPONSE TO INTERROGATORY NO. 4:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Del Taco's general definitions and instructions define the phrase "Applicant's Services" as "the goods listed in U.S. Application Serial No. 85040746;" Applicant objects to this interrogatory on the grounds that no "goods" are listed in U.S. Application Serial No. 85040746, only services.

Without waiving the foregoing objections, Applicant responds as follows: Applicant's services were offered under the NAUGLES mark at Coach's Bar & Grill in Lancaster, CA in July of 2014. Applicant's services were offered under the NAUGLES mark at Pig & Parsley in Fountain Valley, CA in October and December of 2014. Mr. Ziebarth offered food under the NAUGLES mark on other occasions during 2014 as well but cannot recall the exact dates. All instances described herein were performed with the understanding that Mr. Ziebarth was actively and diligently building his business of offering cafeteria and restaurant services under the NAUGLES mark.

INTERROGATORY NO. 5:

Identify each physical location where Applicant's Services were actually offered and the exact dates such services were offered in 2015.

RESPONSE TO INTERROGATORY NO. 5:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Del Taco's general definitions and instructions define the phrase "Applicant's Services" as "the goods listed in U.S. Application Serial No. 85040746;" Applicant objects to this interrogatory on the grounds that no "goods" are listed in U.S. Application Serial No. 85040746, only services.

Without waiving the foregoing objections, Applicant responds as follows: Applicant's services were offered under the NAUGLES mark at LA Weekly's Tacolandia event in Downtown Los Angeles, CA in June 2015. Applicant's services were offered under the NAUGLES mark at the Fountain Valley NAUGLES restaurant location beginning in July 2015. Food from the Fountain Valley NAUGLES restaurant location was offered under the NAUGLES mark at a wedding in Huntington Beach, CA, on August 29, 2015. In addition to the foregoing,

but on which exact dates cannot be recalled, Applicant's services were offered under the NAUGLES mark at various other locations and events. All instances described herein were performed with the understanding that the business of offering cafeteria and restaurant services under the NAUGLES mark was actively and diligently being built.

INTERROGATORY NO. 6:

Identify the date when and physical address where Applicant first opened a restaurant under the name NAUGLES.

RESPONSE TO INTERROGATORY NO. 6:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: The first NAUGLES brick and mortar restaurant was opened on July 25, 2015 at 18471 Mt. Langley, Fountain Valley, CA 92708. At least as early as March 20, 2012, Applicant has been offering cafeteria and restaurant services under the NAUGLES mark.

INTERROGATORY NO. 7:

Identify the date when and physical address where Applicant first opened a cafeteria under the name NAUGLES.

RESPONSE TO INTERROGATORY NO. 7:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: The first NAUGLES brick and mortar cafeteria was opened on July 25, 2015 at 18471 Mt. Langley,

Fountain Valley, CA 92708. At least as early as March 20, 2012, Applicant has been offering cafeteria and restaurant services under the NAUGLES mark.

INTERROGATORY NO. 8:

Identify the members of Applicant, Ziebarth Holdings, LLC.

RESPONSE TO INTERROGATORY NO. 8:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: Christian M. Ziebarth; Jannette E. Ziebarth. Both individuals can be contacted through counsel of record for Applicant.

INTERROGATORY NO. 9:

Identify the role of each of the members identified in response to Interrogatory No. 8 in Ziebarth Holdings, LLC's business operations.

RESPONSE TO INTERROGATORY NO. 9:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Applicant further objects to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege and/or the attorney work product doctrine.

Without waiving the foregoing objections, Applicant responds as follows: Both Christian Ziebarth and Jannette Ziebarth are members of Ziebarth Holdings, LLC.

INTERROGATORY NO. 10:

On what date did the first "Naugles Preview Night" occur?

RESPONSE TO INTERROGATORY NO. 10:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: Applicant cannot recall the exact date on which Christian Ziebarth first served food under the mark NAUGLES. To the best of Mr. Ziebarth's recollection, the first time was in 2010. There were numerous occasions ranging from in or around February 2010 through approximately mid-2015 on which Mr. Ziebarth and/or Applicant offered cafeteria and restaurant services under the NAUGLES mark to various individuals and groups, all with the understanding that it was part of the developing business to offer cafeteria and restaurant services under the NAUGLES mark. Although not all events and occasions were entitled "Naugles Preview Night," each instance was indeed an occasion wherein restaurant and cafeteria services were offered under the NAUGLES mark.

INTERROGATORY NO. 11:

Describe the first "Naugles Preview Night," including but not limited to, the location of the event, the types of attendees of the event and the number of attendees at the event.

RESPONSE TO INTERROGATORY NO. 11:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: Applicant cannot recall the exact date on which Christian Ziebarth first held an event wherein he served food under the mark NAUGLES. To the best of Mr. Ziebarth's recollection, the first time he served food under the mark NAUGLES was in 2010. Mr. Ziebarth held an event on March 20,

2012 wherein he served food under the mark NAUGLES. While this was not the first time that Mr. Ziebarth had served food under the mark NAUGLES, this was one of the first events at which Mr. Ziebarth diligently took pictures and documented his activities. Mr. Ziebarth has sometimes referred to these early events wherein he served food under the mark NAUGLES as "Naugles Preview Nights." The March 20, 2012 event was held at All Pixels Marketing/Page One Priority (a name change occurred at some point) located on the second floor of Francisco's Auto Repair in Huntington Beach, CA. Naugles fans, friends, friends of friends, co-workers and friends of co-workers were in attendance. To the best of Mr. Ziebarth's recollection, approximately 10-12 people were in attendance at the March 20, 2012 event. Mr. Ziebarth made numerous food items using authentic NAUGLES recipes obtained from a member of the Naugle family. Mr. Ziebarth had advertised his event in advance to all who attended as featuring NAUGLES food. Mr. Ziebarth prepared a menu in advance of the event bearing the NAUGLES mark, and copies of the menu were on display and circulated to attendees at the event. NAUGLES food was served to all attendees at this March 20, 2012 event.

INTERROGATORY NO. 12:

Identify when the "Naugles Preview Night" occurred at Coaches' Restaurant. If more than one "Naugles Preview Night" occurred at Coaches' Restaurant, specify the date of each event.

RESPONSE TO INTERROGATORY NO. 12:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: July 12, 2014.

INTERROGATORY NO. 13:

Describe the relationship between Applicant, Ziebarth Holdings, LLC and Christian Ziebarth.

RESPONSE TO INTERROGATORY NO. 13:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: Christian Ziebarth is one of two Members of Ziebarth Holdings, LLC.

INTERROGATORY NO. 14:

Describe the relationship between Applicant, Ziebarth Holdings, LLC and Naugles, Corp.

RESPONSE TO INTERROGATORY NO. 14:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: Naugles Corp. is the licensee of the NAUGLES mark owned by Ziebarth Holdings, LLC.

INTERROGATORY NO. 15:

Describe the "Naugles Test Kitchen," including but not limited to the location of the test kitchen, whether food is sold or given away at the test kitchen, the types of customers that the test kitchen receives and the number of customers that the test kitchen serves on an average day.

RESPONSE TO INTERROGATORY NO. 15:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Applicant further objects to this interrogatory on the grounds that it seeks information that is proprietary and confidential. Applicant further objects to

this interrogatory on the grounds that it seeks information that is not calculated to lead to the discovery of admissible evidence. Applicant further objects to this interrogatory on the grounds that it constitutes multiple, separate interrogatories, not one.

Without waiving the foregoing objections, Applicant responds as follows: The brick and mortar restaurant location that has been informally dubbed the "Naugles Test Kitchen" is located at 18471 Mt. Langley, Fountain Valley, CA 92708. The official name of this Fountain Valley restaurant is "Naugles Tacos & Burgers." This "Test Kitchen" is a fully-functioning restaurant open to the public and functions in the same way as the other NAUGLES restaurants. This Fountain Valley location was nicknamed the "Test Kitchen" because it was the first NAUGLES location opened. Since the date this Fountain Valley location was opened, food has always been sold, not given away, as with any fast-food, cafeteria-style restaurant. Customers range from locals to those who have travelled from out of state to eat there. Customers consist of every age, gender and race. The Fountain Valley location is open seven days a week as follows: Sunday through Thursday: 10am to 7pm; Friday & Saturday: 10am to 8pm.

INTERROGATORY NO. 16:

Identify on what date Applicant or Applicant's predecessor opened the first permanent physical restaurant location bearing the NAUGLES mark that was not a "Test Kitchen."

RESPONSE TO INTERROGATORY NO. 16:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein.

Without waiving the foregoing objections, Applicant responds as follows: The restaurant location that has informally been dubbed the "Naugles Test Kitchen" in Fountain Valley, California is a "permanent, physical restaurant location bearing the NAUGLES mark." The

official name of this Fountain Valley restaurant is "Naugles Tacos & Burgers." This "Test Kitchen" is a fully-functioning restaurant open to the public and functions in the same way as the other NAUGLES restaurants. This Fountain Valley location was nicknamed the "Test Kitchen" because it was the first NAUGLES location opened. The Fountain Valley located officially opened on July 25, 2015.

INTERROGATORY NO. 17:

Describe in detail any awareness or knowledge You had of Opposer's use of NAUGLES:

(a) at the time You commenced use of the Applicant's Mark in the United States; and (b) at the time of the filing of Your application to register Applicant's Mark with the U.S. Patent & Trademark Office.

RESPONSE TO INTERROGATORY NO. 17:

Applicant incorporates by this reference its General Objections to Del Taco's Interrogatories as if set forth fully herein. Applicant further objects to this interrogatory to the extent that it seeks disclosure of information protected by the attorney-client privilege and/or the attorney work product doctrine. Applicant further objects to this interrogatory on the grounds that it constitutes two separate interrogatories, not one. TBMP § 405.03(d) ("If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory. The propounding party will, to that extent, be bound by its own numbering system, and will not be heard to complain that an interrogatory, although propounded with separately designated subparts, should nevertheless be counted as a single interrogatory because the interrogatory concerns a single transaction, set of facts, etc., or because the division was made for clarification or convenience); *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 U.S.P.Q.2d 1636, 1637 (T.T.A.B. 1990);

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **APPLICANT'S RESPONSES TO DEL TACO'S FIRST SET OF INTERROGATORIES** was served upon DINSMORE & SHOHL LLP, counsel for Del Taco, by emailing one copy on December 19, 2017 to the following individuals listed as counsel of record for Registrant Del Taco, LLC in this proceeding:

April Besl
april.besl@dinsmore.com
Govinda Davis
govinda.davis@dinsmore.com
Leanthony Edwards
Leanthony.edwards@dinsmore.com

DINSMORE & SHOHL LLP 255 E 5th Street, Ste. 1900 Cincinnati, Ohio 45202-1971

By:_

Kelly K. Pfeiffer

AMEZCUA-MOLL & ASSOCIATES

1122 E. Lincoln Ave., Suite 203

Orange, CA 92865

Attorneys for Applicant ZIEBARTH HOLDINGS, LLC

EXHIBIT 30

(to the Declaration of Kelly K. Pfeiffer filed in support of the Opposition/Cross-Motion for Summary Judgment)

THIS EXHIBIT HAS BEEN FILED AS CONFIDENTIAL