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

Proceeding	91256413
Party	Defendant Cerveza Citrus L.L.C.
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Submission	Other Motions/Submissions
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Date	10/21/2021
Attachments	Motion_to_Amend.pdf(57754 bytes )

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

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In the Matter of Application Serial No. 88/646,951

Mark: OLE' CHAMOYLE

Filing Date: 10/08/2019

Published: 02/18/2020

For: Packaged combinations consisting of chamoy and chile lime seasoning in separate compartments.

Class: International Class 030

OLÉ MEXICAN FOODS, INC.,	)	
	)	
Opposer,	)	
	)	Opposition No. 91256413
v.	)	
	)	
CERVEZA CITRUS L.L.C.,	)	
	)	
Applicant-Respondent.	)	

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MOTION TO AMEND TRADEMARK

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Applicant-Respondent CERVEZA CITRUS L.L.C. (the "Applicant") of the above-identified trademark application hereby moves the Board to amend the Applicant's drawing as set forth below.

As set forth in the proceedings on file with the Board, the Applicant filed an application to register its mark OLE' CHAMOYLE in Class 30 (the "Applicant's Mark") for use with "packaged combinations consisting of chamoy and chile lime seasoning in separate

compartments” (the “Applicant’s goods”). Applicant’s Mark has been previously identified in all of the papers filed by both the Applicant and Opposer OLÉ MEXICAN FOODS, INC. (the “Opposer”) as OLÉ CHAMOYLE. Applicant hereby moves the Board to amend the trademark drawing to OLÉ CHAMOYLE.

The current mark and the proposed mark are set forth below:

OLE’ CHAMOYLE  
(Current)

OLÉ CHAMOYLE  
(Proposed)

In the proceedings before the Board and in all communications with the Opposer, the Applicant has referenced its mark as OLÉ CHAMOYLE, the proposed Mark. To the best of Applicant’s knowledge, in the present Opposition neither the Applicant nor the Opposer have referred to Applicant’s mark as being OLE’ CHAMOYLE. For instance, the Opposer referenced the mark as OLÉ CHAMOYLE in its original Notice of Opposition dated June 16, 2020 and its Motion for Leave to Amend Notice of Opposition and First Amended Notice of Opposition, both dated July 22, 2021. Likewise, in its Answer to Notice of Opposition dated July 24, 2020 and its Answer to First Amended Notice of Opposition dated September 23, 2021, the Applicant referenced its mark as OLÉ CHAMOYLE. Throughout the Opposer’s discovery requests, namely its First Request for Admissions and its First Request for Production of Documents, the Opposer referenced Applicant’s mark as OLÉ CHAMOYLE. Throughout its responses to Opposer’s discovery requests, the Applicant also referenced its mark as OLÉ CHAMOYLE. For instance, the following Admissions were requested:

**REQUEST NO. 5:**

Admit that Appendix 1 is a true and correct copy of the Home Page of Applicant's website at <https://olechamoyle.com>.

**REQUEST NO. 6:**

Admit that the statements made and pictures shown in Appendix 1 accurately describe and depict Applicant's OLÉ CHAMOYLE Product.

The Applicant admitted that the website was a true and accurate copy and the statements made and pictures accurately describe and depict Applicant's OLÉ CHAMOYLE product. Both the website and pictures of Applicant's products identified by the Opposer used the mark OLÉ CHAMOYLE. No discussion or examples of OLE' CHAMOYLE were included in the example website or pictures. Very early, the Applicant also provided Opposer with pictures of its goods using the OLÉ CHAMOYLE mark.

With regard to Request No. 10 the Opposer asked the following: .

**REQUEST NO. 10:**

Admit that "olé" rhymes with "chamoyle."

The Applicant responded, in part:

However, when said how Applicant intends the word "chamoyle" to be pronounced, admitted.

On April 4, 2021, the Opposer filed a motion for summary judgment. Throughout its motion and associated memorandum of law, the Opposer only referred to Applicant's mark as

OLÉ CHAMOYLE and referenced that mark in its statements of facts and law in support of its motion for summary judgment. In its reply brief, filed May 21, 2021, the Opposer also only referred to Applicant's mark as OLÉ CHAMOYLE. No reference was made in either brief or other filing pertaining to the motion for summary judgment to the mark on the drawing page of Applicant's application. In fact, Opposer specifically argued:

The parties' marks share the term OLÉ, which has an acute accent over the letter "e." OLÉ is a Spanish word defined in English language dictionaries as an interjection "used to express approval, triumph, joy, etc., as at a bullfight or in flamenco dancing." *Owens Decl.* ¶ 11, Exh. 10, showing the definition in the on-line Collins English dictionary, which cites Webster's New World College Dictionary, 4<sup>th</sup> edition. *See also id.* ¶ 12, Exh. 11 showing the definition of OLÉ as "a cry of approval, joy, etc." in the on-line Lexico website, which is produced by Oxford University Press. The pronunciation of OLÉ is oh-LAY. In addition to appearing and sounding the same, the parties' marks convey the same commercial impression by using a well-known Spanish word to convey a connection with Hispanic foods and culture. (Opposer's Motion for Summary Judgment at pages 14-15.)

Cerveza's OLÉ CHAMOYLE mark incorporates the entirety of Olé's OLÉ Mark. Likelihood of confusion is often found where one party's mark incorporates the entirety of the other. (Opposer's Motion for Summary Judgment at page 15, citations omitted.)

The dominant portion of Cerveza's mark is the shared, arbitrary term OLÉ, which is the first word of the mark. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. (Opposer's Motion for Summary Judgment at page 15, citations omitted.)

Throughout Applicant's opposition to the Opposer's motion for summary judgment, the Applicant also only referenced its mark as OLÉ CHAMOYLE. With regard to the OLÉ portion of Applicant's mark and the similarity to Opposer's OLÉ mark, the Applicant stated:

The Applicant's Mark consists of OLÉ CHAMOYLE, while the Opposer's Mark is OLÉ. The similarity between the marks ends at the word OLÉ. Applicant's Mark also comprises the word CHAMOYLE after the OLÉ, making the visual appearance of the marks dissimilar. In addition, the sound of the two marks is quite different, with the

Opposer's Mark having two syllables and the Applicant's Mark comprising five syllables, including a double rhyming of the "lay" syllable at the ends of the words. (Applicant's Opposition to Motion for Summary Judgment, page 9.)

In its Decision dated July 14, 2021, the Board denied Opposer's motion of Summary Judgment. In footnote 3 of the Decision, the Board noted that the Applicant's mark was comprised of OLE' with an apostrophe instead of the OLÉ CHAMOYLE mark with the accent mark over the "e". The Board noted that the Applicant identified its mark as OLÉ CHAMOYLE and that the parties did not submit any arguments or evidence pertaining to the OLE' portion of the mark.

Applicant hereby moves the Board for permission to amend its mark from the OLE' CHAMOYLE that was inadvertently included with the application to the intended OLÉ CHAMOYLE mark. The Opposer is not prejudiced by Applicant's requested amendment. As set forth above, the Opposer filed its Notice of Opposition, directed discovery and argued in its Motion for Summary Judgment under the same assumption that the Applicant's mark was OLÉ CHAMOYLE mark and not the inadvertently filed OLE' CHAMOYLE. The various examples of Applicant's use of the OLÉ CHAMOYLE mark on its products, which were included in the motion for summary judgment, and Applicant's actual use of the mark all use OLÉ. Therefore, allowing Applicant to amend its mark to OLÉ CHAMOYLE will not in any way prejudice the Opposer and its preparation for trial, will not change the scope of the discovery by Opposer that was directed to and the responded to by the Applicant and does not moot any of the Opposer's or Applicant's arguments or points of law set forth in the various briefs pertaining to Opposer's motion for summary judgment.

In light of the foregoing, the Applicant respectfully requests the Board grant this motion and allow the Applicant to amend its mark to OLÉ CHAMOYLE and for such other and further relief as the Board may find just.

Dated: October 21, 2021

Respectfully submitted,

/Richard A. Ryan/

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**CERTIFICATE OF SERVICE BY EMAIL**

I hereby certify that a true and complete copy of the foregoing MOTION TO AMEND TRADEMARK has been served on Opposer by emailing a copy to Opposer's attorney of record on October 21, 2021 to Paul S. Owens, Esq. (email: psowens@bellsouth.net).

Signature: /Richard A. Ryan/ Dated: October 21, 2021  
Richard A. Ryan, Esq. (PTO Reg. #39,014)