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

Proceeding	91267373
Party	Plaintiff Nature's Bakery, LLC
Correspondence Address	BRAM SCHUMER BRAUNHAGEY & BORDEN LLP 351 CALIFORNIA STREET, 10TH FLOOR SAN FRANCISCO, CA 94104 UNITED STATES Primary Email: tmadmin@braunhagey.com Secondary Email(s): shadow@braunhagey.com, schumer@braunhagey.com 415-599-0210
Submission	Opposition/Response to Motion
Filer's Name	Dane D. Jones
Filer's email	tmadmin@braunhagey.com, shadow@braunhagey.com, jones@braunhagey.com
Signature	/Dane D. Jones/
Date	06/04/2021
Attachments	NB Rule 56 Motion.pdf(203353 bytes ) Affidavit ISO NB Rule 56 Motion.pdf(185514 bytes ) EXA - Affidavit ISO NB Rule 56 Motion.pdf(272979 bytes ) EXB - Affidavit ISO NB Rule 56 Motion.pdf(424480 bytes )

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

In the Matter of Application Serial No. 88812151

Mark : NATURE’S FYND  
Applicant : THE FYNDER GROUP, INC.  
Application Date : February 26, 2020

NATURE’S BAKERY, LLC,  
a Delaware limited liability company,  
Opposer,

v.

THE FYNDER GROUP, INC.,  
a Delaware corporation,  
Applicant.

Opposition No. 91267373

**MOTION FOR DISCOVERY TO RESPOND TO  
SUMMARY JUDGMENT MOTION  
PURSUANT TO FED. R. CIV. P 56(d)**

Opposer Nature’s Bakery, LLC, (“Opposer” or “Nature’s Bakery”) respectfully submits this Motion for Discovery to Respond to Summary Judgment Motion Pursuant to Fed. R. Civ. P. 56(d) and TBMP § 528.06.

**INTRODUCTION**

The Board should deny Applicant’s premature Motion for Summary Judgment or at minimum defer consideration of the Motion until after the close of fact discovery so that Nature’s Bakery can obtain relevant information regarding the likelihood of confusion and dilution. Applicant’s Motion is a transparent attempt to short-circuit discovery in this opposition and avoid any inquiry into relevant facts, including multiple percipient witnesses and many categories of relevant documents disclosed by Applicant *on the same day* it filed its motion for summary

judgment. The practical result would be to entirely deprive Nature’s Bakery of any discovery regarding relevant documents and information that are uniquely in the possession of Applicant. Under such circumstances, Rule 56(d) “provides nonmovants with protection from being ‘railroaded’ by premature summary judgment motions.” *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992). The Board should deny Applicant’s premature summary judgment motion or, in the alternative, defer consideration of the Motion until after Nature’s Bakery has had a full and fair opportunity to obtain discovery on the schedule ordered by the Board.

## **FACTS**

### **A. The Opposition**

Nature’s Bakery is a successful nationally and internationally popular bakery based in Reno, Nevada. *See* Declaration of Vilma Livas (“Livvas Decl.”) ¶ 2. It extensively promotes and markets its popular bakery products throughout the United States. *Id.* ¶ 3. In 2020, Nature’s Bakery’s total U.S. sales were \$163 million, including sales to consumers in all 50 U.S. states. *Id.* ¶ 3. Some of Nature’s Bakery’s most popular products are its line of fruit-filled grain bars (the “Nature’s Bakery Bars”), which come in 7 varieties and are sold in all 50 states. *Id.* ¶ 3.

Nature’s Bakery is the owner of the trademark “NATURE’S BAKERY”, as represented by the incontestable trademark registrations for the NATURE’S BAKERY & Design (U.S. Reg. No. 3917078), NATURE’S BAKERY (U.S. Reg. No. 3917217) and NATURE’S BAKERY & Design (U.S. Reg. No. 5874205) (the “NATURE’S BAKERY Marks”). Every single product sold by Nature’s Bakery bears the NATURE’S BAKERY® trademark. *Id.* ¶ 2.

Nature's Bakery filed this Opposition to prevent consumer confusion and dilution arising from Applicant's intended use of the confusingly similar mark NATURE'S FYND to market bar products similar to the Nature's Bakery Bars. Dkt. No. 1.

**B. Applicant Filed for Summary Judgment on the Same Day it Served Initial Disclosures**

Discovery in this Opposition opened on April 12, 2021. Dkt. No. 2 at 3. On May 5, 2021, Applicant served initial disclosures identifying many witnesses and documents with information relevant to this dispute. Livas Decl. Ex. B. The same day, without affording Nature's Bakery the opportunity to seek discovery regarding these witnesses and documents, Applicant filed a motion for summary judgment. Dkt. No. 6. The motion for summary judgment and accompanying exhibits are 644 pages long. *Id.*

Applicant's Motion does not contain a single supporting declaration or factual averment from the witnesses identified by Applicant as possessing relevant information. It does not disclose any of the numerous documents identified by Applicant as containing information relevant to this dispute. Instead, the Motion focuses largely on alleged third-party registration evidence. Defendant does not provide any of factual detail about the supposed use or non-use of the various marks identified, despite its claim to be in possession of such information in its Initial Disclosures. Mot. at 3-10. To the extent the Motion touches upon the core factual issues relevant to confusion and dilution, it relies on the *absence* of evidence. For instance, Applicant claims there is "no evidence of record" that Applicant intentionally targeted Nature's Bakery when it planned to use the similar mark NATURE'S FYND in connection with bar products. Mot. at 22. Applicant does not explain how Nature's Bakery was supposed to have obtained such evidence without the opportunity to take discovery of Applicant's documents and percipient witnesses.

**C. Applicant Is in Possession of the Material Relevant to Its Motion**

Relevant information regarding each of the controlling *Du Pont* and 15 U.S.C. § 1125(c)(B) factors governing likelihood of confusion and dilution is overwhelmingly in the possession of Applicant. As detailed in the accompanying Declaration of Vilma Livas, Nature's Bakery lacks access to the most important sources of relevant evidence regarding each of these factors. Applicant admitted in its Initial Disclosures that it is aware of multiple percipient witnesses and possess numerous categories of documents relevant to these issues. Yet, Applicant's premature summary judgment motion and resulting stay of discovery threatens to prevent Nature's Bakery from obtaining this information before this proceeding is decided.

**ARGUMENT**

Nature's Bakery will be prejudiced and effectively prevented from opposing Applicant's summary judgment motion if it is not allowed to proceed with discovery on the controlling *Du Pont* and 15 U.S.C. § 1125(c)(B) factors governing likelihood of confusion and dilution. Applicant has disclosed that it is in possession of extensive information and documents regarding each of these factors, yet moved for summary judgment *on the same day* as its initial disclosures, preventing Nature's Bakery from inquiring into these sources of evidence. Applicant's gambit threatens to deprive Nature's Bakery of the opportunity to conduct any discovery in this Opposition. Rule 56(d) is designed to guard against such gamesmanship and permit the opposing party from being "railroaded" by a premature motion for summary judgment.

"Summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery." *Dunkin' Donuts of Am., Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988). Accordingly, Fed. R. Civ. P. 56(d) and TBMP § 528.06 provide that, "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts

essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” This Rule “provides nonmovants with protection from being ‘railroaded’ by premature summary judgment motions.” *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)); *Anand K. Chavakula v. Praise Broadcasting AKA Praise FM* (Cancellation No. 92071482), 2020 WL 4365810, at \*2 (July 28, 2020) (same).

Accordingly, summary judgment is regularly denied where it would have the effect of depriving the opposing party of evidence relevant to its claims, including the likelihood of confusion factors collected in *In re E.I. duPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See Chavakula* 2020 WL 4365810, at \*2-\*3 (granting Rule 56(d) motion and deferring summary judgment because moving party had not yet provided discovery regarding its use of the mark in commerce, similarity of the marks, channels of trade, and target consumers); *Dunkin*, 840 F.2d at 919 (reversing summary judgment on opposition because plaintiff “has not had any opportunity to gather evidence through discovery on [applicant’s] intent); *Opryland*, 970 F.2d at 852-53 (reversing summary judgment on opposition because “[t]he Board erred in denying [plaintiff] the right, in accordance with Rule 56(f)<sup>1</sup>, to obtain evidence on the material facts of public perception and actual confusion”). The Board should deny Applicant’s premature summary judgment motion or, in the alternative, defer consideration of the Motion until after Nature’s Bakery has had a full and fair opportunity to obtain discovery on the schedule ordered by the Board.

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<sup>1</sup> The present Rule 56(d) was formerly numbered Rule 56(f). *See* Advisory Committee Notes to 2010 Amendment.

**I. NATURE’S BAKERY NEEDS DISCOVERY TO RESPOND TO APPLICANT’S MOTION FOR SUMMARY JUDGMENT AS TO CONFUSION**

Nature’s Bakery needs discovery to respond to Applicant’s premature summary judgment motion as to likelihood of confusion. The vast majority of relevant evidence regarding Applicant’s planned use of the NATURE’S FYND mark and the resulting likelihood of confusion is in the possession of Applicant, while Nature’s Bakery lacks access to this information.

**A. Applicant is Uniquely in Possession of Material Evidence Regarding the *Du Pont* Factors**

Likelihood of confusion is assessed using the factors listed in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973); see *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015) (recognizing that *Du Pont* factors continue to govern registration disputes). The factors that “must be considered” in evaluating likelihood of confusion include:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).

- (10) The market interface between applicant and the owner of a prior mark [...].
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion, i.e., whether de minimis or substantial.
- (13) Any other established fact probative of the effect of use

*Du Pont*, 476 F.2d at 1361.

Here, critical evidence regarding at least 9 of the 13 *Du Pont* factors is predominantly in the possession of Applicant, while Nature’s Bakery lacks access to such materials. Applicant apparently has not yet launched its bar products under the NATURE’S FYND trademark and its website does not provide any information regarding how these products will appear when the mark is used in commerce, the marketing channels that will be used, or other information. Livas Decl. ¶¶ 5-8, 12, 14. Nature’s Bakery therefore lacks access to critical sources of evidence in Applicant’s possession including:

1. The manner in which Applicant intends to use the “NATURE’S FYND” trademark on its bar products. *Id.* ¶ 5.
2. The nature of the bar products that Applicant intends to market under the “NATURE’S FYND” trademark. *Id.* ¶ 6.
3. The trade channels through which Applicant intends to market its bar products under the “NATURE’S FYND” trademark. *Id.* ¶ 7.
4. The conditions under which Applicant intends to sell its bar products under the “NATURE’S FYND” trademark to consumers or Applicant’s anticipated pricing of such products. *Id.* ¶ 8.



5. The alleged extent of actual use of the trademarks named in the various trademark registration documents submitted with Applicant’s Motion for Summary Judgment. *Id.* ¶ 9.

6. Documents and information in Applicant’s possession showing misdirected inquiries to Applicant or other evidence regarding the extent to which Applicant’s use of the “NATURE’S FYND” trademark has created actual consumer confusion. *Id.* ¶ 10.

7. The extent, nature, and history of Applicant’s use in commerce of the “NATURE’S FYND” trademark, for purposes of evaluating “concurrent use.” *Id.* ¶ 11.

8. The variety of goods on which Applicant uses or intends to use its “NATURE’S FYND” trademark and whether Applicant’s mark will be a “house mark,” “family” mark,” or “product mark.” *Id.* ¶ 12.

9. How Applicant conceived of and developed “NATURE’S FYND” trademark, including the extent to which Applicant adopted the mark with knowledge of the “NATURE’S BAKERY” trademark and intended to capitalize on the goodwill and fame of the “NATURE’S BAKERY” mark and brand. *Id.* ¶ 13.

By contrast, Nature’s Bakery is informed and believes that Applicant possesses extensive information regarding each of the subjects listed above. Livas Decl. ¶ 16. Relevant documents in Applicant’s possession likely include communications regarding Applicant’s creation, selection and adoption of the “NATURE’S FYND” mark, business plans, product plans, sales and marketing documents, branding documents, communications with third parties such as design, marketing, and advertising agencies, product packaging mock-ups, specifications, and designs, communications with distributors and retailers with respect to marketing channels, consumer

qualitative and quantitative research, market research and analysis, pricing strategy documents, and consumer inquiries and communications relevant to consumer confusion. *Id.*

Applicant's Initial Disclosures confirm that Applicant is in possession of such information., For example, Applicant has stated that it is aware of witnesses and documents related to:

- (a) Applicant's creation, selection and adoption of the NATURE'S FYND mark ("Applicant's Mark");
- (b) the third party use and registration of marks containing the word "NATURE'S" for food products;
- (c) the nature of Applicant's goods;
- (d) Applicant's trade and marketing channels;
- (e) Applicant's sales and sales conditions;
- (f) the goods on which Applicant's Mark are used;
- (g) the differences [or lack thereof] in Applicant's and Nature's Bakery, LLC's ("Opposer") market interface;
- (h) the differences [or lack thereof] in Applicant's and Opposer's consumers and target consumers;
- (i) the time, money and effort spent by Applicant in using Applicant's Mark and in promoting the goods offered thereunder; and
- (j) the differences in Applicant's goods and Opposer's goods.

*Id.* Ex. B.

Thus, Applicant is uniquely in possession of numerous categories of information and documents relevant to the *Du Pont* factors.

**B. Applicant is Withholding Relevant Evidence Regarding the Factors on Which it Relies in its Summary Judgment Motion**

Applicant's Motion for Summary Judgment ignores most of the *Du Pont* factors and instead asserts that the summary judgment is warranted based solely on supposed differences

between the marks and alleged third-party trademark registrations. But at the same time it makes these arguments, Applicant is admittedly withholding entire categories of relevant documents and information that are necessary to allow Nature's Bakery to test these claims. Applicant should not be permitted to seek summary judgment while completely refusing to provide access to relevant materials in discovery.

First, Applicant argues that NATURE'S BAKERY and related marks are somehow "weak" based on alleged third-party trademark registrations. Mot. at 16. This argument is fundamentally flawed because the mere existence of third party registrations is not probative of the strength of a mark. *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 204 (Fed. Cir. 1992) (Reversing summary judgment because "[a]s to strength of a mark [...] registration evidence may not be given any weight" and "cannot support an inference either way") (emphasis in original). Thus, to the extent Applicant bases its Motion on challenging the strength of the NATURE'S BAKERY® marks, it must identify evidence of actual third-party uses of similar marks. But Applicant is withholding whatever information it claims to possess regarding the extent of alleged third-party uses of the marks and has not produced discovery regarding *a single instance* of such use. Nature's Bakery is entitled to test these claims in discovery and take discovery of the actual use of the marks on which Applicant relies.

Second, Applicant argues that there is no dispute of material fact as to difference between the marks in "appearance, sound, connotation, and commercial impression." Mot. at 15. But Applicant has not produced a single document or interrogatory response or made available a single witness capable of shedding light on the "appearance, sound, connotation, and commercial impression" that will be produced by Applicant's bar products. Nature's Bakery has no way of knowing how Applicant plans to use its trademark, the way in which Applicant intends the name

to be pronounced, or the connotation that Applicant seeks to invoke through such use. That is the purpose of discovery. Indeed, the need for discovery is vividly illustrated by Applicant's unusually specific claim that "NATURE'S FYND as a whole creates a commercial impression of products that are supplied by nature or produced from 'young animals or plants, and growth' in nature that were uncovered accidentally." Mot. at 17-18. This claim does not follow intuitively or logically from the words "NATURE'S FYND," and Nature's Bakery is entitled to take discovery to test and evaluate this description of Applicant's commercial impression. That includes discovery of Applicant's own documents identified in its initial disclosures but not yet produced, such as information regarding "Applicant's creation, selection and adoption of the NATURE'S FYND mark." Livas Decl. Ex. B at 1. Applicant is uniquely in possession of documents concerning the commercial impression and sight, sound, and meaning of its mark that it intends to convey, and Nature's Bakery is entitled to test Applicant's contentions regarding its commercial impression in discovery.

Ultimately, Applicant's early motion relies on the notion that all the remaining *Du Pont* factors, including core factors like the nature of the goods, trade channels, and actual confusion, can simply be ignored based on the first *Du Pont* factor with respect to similarity of the marks. Mot. at 15-18. But the similarity of the marks depends on Applicant's intended usage. And the likelihood of confusion requires consideration of *all factors* when they are "of record." *Du Pont*, 476 F.2d at 1361. The Board cannot determine that one factor outweighs all the others without considering the evidence required to assess them. *See Dunkin*, 840 F.2d at 919 (reversing summary judgment on opposition because plaintiff "has not had any opportunity to gather evidence through discovery on [applicant's] intent"); *Opryland*, 970 F.2d at 852-53 (reversing summary judgment on opposition because "[t]he Board erred in denying [plaintiff] the right, in accordance with Rule

56(f), to obtain evidence on the material facts of public perception and actual confusion”). Applicant’s premature summary judgment strategy seeks to prevent Nature’s Bakery from adducing evidence on the remaining factors. Nature’s Bakery is entitled to discovery so that it can present a complete picture to the Board regarding each of the likelihood of confusion factors that must be considered and weighed on the record.

## **II. NATURE’S BAKERY LACKS ACCESS TO CRITICAL EVIDENCE REGARDING LIKELIHOOD OF DILUTION**

For the same reasons, Nature’s Bakery lacks access to critical evidence regarding likelihood of dilution. The factors relevant to likelihood of dilution by blurring are:

- (i) The degree of similarity between the mark or trade name and the famous mark;
- (ii) The degree of inherent or acquired distinctiveness of the famous mark;
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark;
- (iv) The degree of recognition of the famous mark;
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark; and
- (vi) Any actual association between the mark or trade name and the famous mark

15 U.S.C. § 1125(c)(B)(i)-(vi).

Applicant relies solely on factors (i), (iii), (v), and (vi) in its Motion Mot. at 19-24. But discovery is necessary on these for the same reasons discussed above in the context of confusion. As to factor (i), the degree of similarity between the marks, Applicant is uniquely in possession of information regarding the intended appearance of its NATURE’S FYND mark as it is used in commerce in connection with bar products, yet has sought to prevent inquiry during the discovery process. As to factor (iii), the exclusivity of the senior user’s use, Applicant has declined to produce

any of the supposed information of actual third-party uses to which it alludes, as detailed above.<sup>2</sup> And as to factor (vi), actual confusion, Applicant has sought to frustrate discovery regarding information uniquely in its possession with respect to consumer confusion engendered by its use of the mark, as detailed above. Nature's Bakery is entitled to test Applicant's claims in discovery and is prejudiced in its ability to respond to Applicant's summary judgment motion by the absence of disclosure.

The only unique factor cited by Applicant in its argument with respect to dilution is factor (v), whether Applicant intend to create an association with Nature's Bakery's mark. Applicant offers no evidence of its own, but instead relies on the absence of evidence, claiming without apparent irony that "there is no evidence of record that Applicant had such an intent." Mot. at 22. Of course, Applicant neglects to mention that there is "no evidence of record" precisely because Applicant has prevented Nature's Bakery from obtaining any discovery on this issue. Applicant's initial disclosures admit that it is in possession of evidence concerning "Applicant's creation, selection and adoption of the NATURE'S FYND mark," Livas Decl. Ex. B, but Applicant has not made any such information available and has short-circuited the discovery process. Nature's Bakery should have a fair opportunity to take discovery regarding each of these dilution factors so that it can test Applicant's assertions and acquire evidence necessary to support its summary judgment opposition.

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<sup>2</sup> Moreover, Applicant does not appear contend that any other party or entity has engaged in trademark use of "NATURE'S BAKERY." To the extent Applicant makes such a contention, Nature's Bakery is entitled to test that claim in discovery.







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

In the Matter of Application Serial No. 88812151

Mark : NATURE’S FYND  
Applicant : THE FYNDER GROUP, INC.  
Application Date : February 26, 2020

NATURE’S BAKERY, LLC,  
a Delaware limited liability company,

Opposer,

v.

THE FYNDER GROUP, INC.,

a Delaware corporation,

Applicant.

Opposition No. 91267373

**DECLARATION OF VILMA LIVAS IN SUPPORT OF  
MOTION FOR DISCOVERY TO RESPOND TO SUMMARY JUDGMENT**

I, Vilma Livas, declare:

1. I am employed as Chief Marketing Officer at Nature’s Bakery, LLC, (“Nature’s Bakery”). I make this declaration based on personal knowledge. If called as a witness, I could and would testify competently to the facts stated herein.

2. Nature’s Bakery is a successful nationally and internationally popular bakery based in Reno, Nevada. Nature’s Bakery markets its baked goods under the registered trademark NATURE’S BAKERY® (U.S. Reg. No. 3917217) and related marks. Every single product sold by Nature’s Bakery bears the NATURE’S BAKERY® trademark.

3. Nature’s Bakery extensively promotes and markets its products throughout the United States. In 2020, Nature’s Bakery’s total U.S. sales were \$163 million, including sales to

consumers in all 50 U.S. states. Some of Nature's Bakery's most popular products are its line of fruit-filled grain bars, which come in 7 varieties and are sold in all 50 states.

4. To the best of my knowledge, there is virtually no information publicly available about Nature's Fynd's intended use of its "NATURE'S FYND" trademark, especially in connection with the bar products it intends to launch and that are the subject of Nature's Bakery's opposition. For example, Nature's Fynd website lists only two products, neither of which is a bar product. Attached as **Exhibit A** is a true and correct copy of a screenshot of the Nature's Fynd website dated June 3, 2021.

5. Nature's Bakery does not possess or maintain detailed information or documents showing the manner in which Nature's Fynd intends to use the "NATURE'S FYND" trademark on its bar products.

6. Nature's Bakery does not possess or maintain detailed information or documents showing the nature of the bar products that Nature's Fynd intends to market under the "NATURE'S FYND" trademark.

7. Nature's Bakery does not possess or maintain detailed information or documents showing the trade channels through which Nature's Fynd intends to market its bar products under the "NATURE'S FYND" trademark.

8. Nature's Bakery does not possess or maintain detailed information or documents showing the conditions under which Nature's Fynd intends to sell its bar products under the "NATURE'S FYND" trademark to consumers or Nature's Fynd's anticipated pricing of such products.

9. Nature's Bakery does not possess or maintain detailed information or documents showing the alleged extent of actual use of the trademarks named in the various trademark registration documents submitted with Nature's Fynd's Motion for Summary Judgment.

10. Nature's Bakery does not have access to documents or information in Nature's Fynd's possession showing misdirected inquiries to Nature's Fynd or other evidence regarding the extent to which Nature's Fynd's use of the "NATURE'S FYND" trademark has created actual consumer confusion.

11. Nature's Bakery does not possess or maintain detailed information or documents showing the extent of Nature's Fynd's actual use in commerce of the "NATURE'S FYND" trademark.

12. Nature's Bakery does not possess or maintain detailed information or documents showing the variety of goods on which Nature's Fynd uses or intends to use its "NATURE'S FYND" trademark and whether Nature's Fynd's mark will be a "house mark," "family" mark," or "product mark."

13. Nature's Bakery does not possess or maintain detailed information or documents showing how Nature's Fynd conceived of and developed "NATURE'S FYND" trademark, including the extent to which Nature's Fynd adopted the mark with knowledge of the "NATURE'S BAKERY" trademark and intended to capitalize on the goodwill and fame of the "NATURE'S BAKERY" mark and brand.

14. Nature's Bakery does not possess or maintain detailed information or documents showing how Nature's Fynd's mark will be used in the marketplace and what commercial impression it will create, how it will sound or appear, and what connotation it will imply as used by Nature's Fynd. In particular, Nature's Bakery does not possess or maintain detailed information or documents showing whether Nature's Fynd's mark creates a commercial impression of products that are supplied by nature or produced from "young animals or plants, and growth" in nature that were uncovered accidentally as claimed by Nature's Fynd. The only way to test this claim is through discovery.

15. Nature's Bakery does not possess or maintain detailed information or documents showing how and whether third parties use the marks containing the word "NATURE'S" for food products that are identified and relied on in Nature's Fynd's motion for summary judgment.

16. Nature's Bakery is informed and believes that Nature's Fynd possesses extensive information regarding each of the subjects listed above. Based on Nature's Bakery's experience in the consumer packaged goods industry, relevant documents in Nature's Fynd's possession likely include communications regarding Nature's Fynd's creation, selection and adoption of the "NATURE'S FYND" mark, business plans, product plans, sales and marketing documents, branding documents, communications with third parties such as design, marketing, and advertising agencies, product packaging mock-ups, specifications, and designs, communications with distributors and retailers with respect to marketing channels, consumer qualitative and quantitative research, market research and analysis, pricing strategy documents, and consumer inquiries and communications relevant to consumer confusion.

17. Additionally, Nature's Fynd has stated that it had identified multiple witnesses and numerous categories of relevant documents regarding the subjects listed above. For example, Nature's Fynd has stated that it is aware of witnesses and documents related to:

- (a) Applicant's creation, selection and adoption of the NATURE'S FYND mark ("Applicant's Mark");
- (b) the third party use and registration of marks containing the word "NATURE'S" for food products;
- (c) the nature of Applicant's goods;
- (d) Applicant's trade and marketing channels;
- (e) Applicant's sales and sales conditions;
- (f) the goods on which Applicant's Mark are used;
- (g) the differences in Applicant's and Nature's Bakery, LLC's ("Opposer") market interface;
- (h) the differences in Applicant's and Opposer's consumers and target consumers;

(i) the time, money and effort spent by Applicant in using Applicant's Mark and in promoting the goods offered thereunder; and

(j) the differences in Applicant's goods and Opposer's goods.

18. Attached as **Exhibit B** is a true and correct copy of Nature's Fynd's Initial Disclosures listing these documents and categories of information. Nature's Bakery has no access to the witnesses and documents identified by Nature's Fynd on these subjects.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on June 4, 2021

A handwritten signature in cursive script, reading "Vilma Livas", is written above a solid horizontal line.

Vilma Livas

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by email on counsel for applicant  
on June 4, 2021 addressed to:

Miriam D. Trudell  
Sheridan Ross PC  
1560 Broadway, Suite 1200  
Denver, Colorado 80202  
  
mtrudell@sheridanross.com  
phirschman@sheridanross.com  
cbryce@sheridanross.com

By:           /Shawn M. Shadow/



✕ Close

## Products

Dairy-Free Cream Cheese

Meatless Breakfast Patties

Fy Protein™

Origin Story

Who We Are



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

In the Matter of Service Mark Application Serial No. 88/812,151  
For the mark “NATURE’S FYND”  
Published in the *Official Gazette* on December 8, 2020

Nature’s Bakery, LLC	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91267373
	)	
The Fynder Group, Inc.	)	
	)	
Applicant.	)	
	)	

**APPLICANT’S RULE 26(a)(1) INITIAL DISCLOSURES**

The Fynder Group, Inc. (“Applicant”), by and through its attorneys, Sheridan Ross P.C., hereby provides its Rule 26(a)(1) Initial Disclosures as follows:

**A. WITNESSES WHO MAY HAVE KNOWLEDGE:**

The following individuals are likely to have discoverable information that Applicant may use to support its claims or defenses, unless solely for impeachment, as to the identified subjects:

1. One or more representatives of Applicant having knowledge of the following: (a) Applicant’s creation, selection and adoption of the NATURE’S FYND mark (“Applicant’s Mark”); (b) the third party use and registration of marks containing the word “NATURE’S” for food products; (c) the nature of Applicant’s goods; (d) Applicant’s trade and marketing channels; (e) Applicant’s sales and sales conditions; (f) the goods on which Applicant’s Mark are used; (g) the differences in Applicant’s and Nature's Bakery, LLC’s (“Opposer”) market interface; (h) the differences in Applicant’s and Opposer’s consumers and target consumers; (i) the time, money and effort spent by Applicant in using Applicant’s Mark and in promoting the goods offered thereunder; and (j) the differences in Applicant’s goods and Opposer’s goods. These individuals may have information or knowledge of facts relevant to issues in this matter beyond those described above, and the list is therefore not intended to be an exhaustive description of the information Applicant may obtain from such individuals.

Representatives of Applicant may only be contacted through counsel, Sheridan Ross P.C., 1560 Broadway, Suite 1200, Denver, CO 80202.

2. One or more officers, directors, or managing agents of Applicant having knowledge of one or more of the above topics, in accordance with Fed. R. Civ. P. 30(b)(6). These individuals may have information or knowledge of facts relevant to issues in this matter beyond those described



above, and the list is therefore not intended to be an exhaustive description of the information Applicant may obtain from such individuals.

Officers, directors, or managing agents of Applicant may only be contacted through counsel, Sheridan Ross P.C., 1560 Broadway, Suite 1200, Denver, CO 80202.

3. Yuval Avniel, Ph.D.  
Co-Founder, Director of Intellectual Property & Special Projects  
The Fynder Group, Inc.  
815 W Pershing Road, Suite 4  
Chicago, IL 60609

Dr. Avniel may be called upon to discuss one or more of the above topics and may only be contacted through counsel, Sheridan Ross P.C., 1560 Broadway, Suite 1200, Denver, CO 80202.

4. Nicholas Monsees  
General Counsel  
The Fynder Group, Inc.  
815 W Pershing Road, Suite 4  
Chicago, IL 60609

Mr. Monsees may be called upon to discuss one or more of the above topics and may only be contacted through counsel, Sheridan Ross P.C., 1560 Broadway, Suite 1200, Denver, CO 80202.

5. Additionally, Applicant believes there may be additional individuals or third parties that may have information or knowledge of facts relevant to the issues of this matter, but whose names are not presently known to Applicant and will only become known through the course of discovery. Should additional individuals or third parties become known to Applicant, Applicant may seek information from such persons in support of its claims and defenses. Applicant therefore reserves the right to supplement this list as additional information becomes available.

6. One or more representatives of Opposer may be called upon to discuss one or more of the above topics. These individuals may have information or knowledge of facts relevant to issues in this matter beyond those described above, and the list is therefore not intended to be an exhaustive description of the information Opposer may obtain from such individuals. Additionally, Opposer believes there may be additional individuals or third parties that may have information or knowledge of facts relevant to the issues of this matter, but whose names are not presently known to Opposer and will only become known through the course of discovery. Should additional individuals or third parties become known to Opposer, Opposer may seek information from such persons in support of its claims and defenses. Opposer therefore reserves the right to supplement this list as additional information becomes available.

**B. DOCUMENTS AND TANGIBLE THINGS:**

Applicant may be in possession, custody, or control of the following documents, data compilations and tangible things that it may use to support its claims and defenses, unless solely for

impeachment. Because Applicant's review of this matter is ongoing, Applicant reserves the right to identify additional documents as discovery proceed.

DESCRIPTION:

1. Documents evidencing Applicant's use of Applicant's Mark;
2. Documents and things related to the nature of Applicant's goods;
3. Documents and things related Applicant's trade and marketing channels;
4. Documents related to Applicant's sales and sales conditions;
5. Documents related to the goods on which Applicant's Mark is used;
6. Documents evidencing third party use and registrations for marks containing the word "NATURE'S" for food products;
7. Documents related to the differences in Applicant's and the Opposer's market interface;
8. Documents and things related to the differences in Applicant's and Opposer's consumers and target consumers;
9. Documents related to the differences between Applicant's goods and the Opposer's goods.

LOCATION:

The Fynder Group, Inc.  
815 W Pershing Road, Suite 4  
Chicago, IL 60609

and/or

Sheridan Ross P.C.  
1560 Broadway, Suite 1200  
Denver, CO 80202

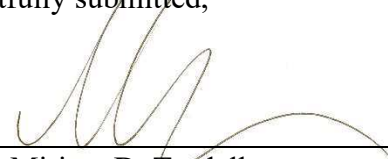
Applicant reserves the right to supplement these disclosures as information becomes available.

Applicant's sales and financial information, and documentation and other information relating to business strategies are highly confidential and proprietary. Such relevant non-privileged information and documentation will be made available subject the TTAB's standardized protective order.

Dated: May 5, 2021

Respectfully submitted,

By:

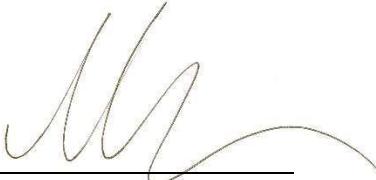


Miriam D. Trudell  
Pamela N. Hirschman  
Autumn R. Hartman  
1560 Broadway, Suite 1200  
Denver, CO 80202  
Tel: 303-863-9700  
Fax: 303-863-0223  
[mtrudell@sheridanross.com](mailto:mtrudell@sheridanross.com)  
[phirschman@sheridanross.com](mailto:phirschman@sheridanross.com)  
[ahartman@sheridanross.com](mailto:ahartman@sheridanross.com)  
Attorneys for Applicant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and complete copy of the foregoing APPLICANT’S RULE 26(a)(1) DISCLOSURES was served by e-mail, as prescribed in 37 C.F.R. § 2.119, on this May 5, 2021, upon Opposer’s current attorney of record:

Bram Schumer  
Braunhagey & Borden LLP  
351 California Street, 10th Floor  
San Francisco, CA 94104  
Phone: (415) 599-0210  
[tmadmin@braunhagey.com](mailto:tmadmin@braunhagey.com)  
[shadow@braunhagey.com](mailto:shadow@braunhagey.com)  
[schumer@braunhagey.com](mailto:schumer@braunhagey.com)

By:   
\_\_\_\_\_  
Miriam D. Trudell  
Pamela N. Hirschman  
Autumn R. Hartman  
1560 Broadway, Suite 1200  
Denver, CO 80202  
Tel: 303-863-9700  
Fax: 303-863-0223  
[mtrudell@sheridanross.com](mailto:mtrudell@sheridanross.com)  
[phirschman@sheridanross.com](mailto:phirschman@sheridanross.com)  
[ahartman@sheridanross.com](mailto:ahartman@sheridanross.com)  
Attorneys for Applicant