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Filing date: **03/22/2023**

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

Proceeding no.	92081569
Party	Defendant Crunchy Tobacco Inc
Correspondence address	CRUNCHY TOBACCO INC P. O. BOX 6028 ARLINGTON, VA 22206 UNITED STATES Primary email: crunchytobacco@gmail.com 7035933511
Submission	Motion to Dismiss - Rule 12(b)
Filer's name	Michael C. Whitticar
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Signature	/Michael C. Whitticar/
Date	03/22/2023
Attachments	Motion to Dismiss with Exhibits for Registration No 6662925.pdf(2098302 bytes )

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

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NATHAN M. KIGHT,	:	
	:	
Petitioner,	:	Cancellation No.: 92081569
	:	
v.	:	Registration No.: 6662925
	:	
	:	ESTTA Tracking Number for
	:	Petition: ESTTA1265237
CRUNCHY TOBACCO, INC.,	:	
	:	
Respondent.	:	

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**MOTION TO DISMISS, STAY OR SUSPEND**

Respondent respectfully submits this motion to dismiss, stay or suspend Petitioner’s Petition for failure to state a claim on which may be granted, or in the alternative, to stay or suspend this proceeding pending resolution of the related case now pending the United States District Court for the District of Columbia.

Mr. Kight’s Petition is due to be dismissed for failure to state a claim based on improper group pleading. Group pleading which fails to specify the conduct or rights of the relevant parties is insufficient, and such a petition or complaint is due to be dismissed. *Plusgrade L.P. v. Endava Inc.*, 20230 U.S. Dist. LEXIS 39114 \*\* 7-8 (S.D.N.Y. 2023); *Magruder v. Halliburton Co.*, 359 F. Supp. 2d 452, 466 (N.D. Tex. 2018) (“management” constitutes insufficient group pleading); *Jien v. Perdue Farms, Inc.* 2020 U.S. Dist. LEXIS 169582, fn. 9 (D. Md. 2020) (“Averages are more or less another form of inappropriate group pleading, lumping the parties together” without specifying the conduct or rights of the separate parties).

Mr. Kight personally and individually is the registrant and Petitioner. Funnels, LLC is a separate legal and commercial entity. However, the Petition repeatedly refers to Petitioner as “it”

and “its,” failing to distinguish between use or other conduct by Mr. Kight, and use or other conduct by the LLC, Funnels, LLC. *See* Petition §§ 4-5, 13-15, 24-25, 30.

Petitioner’s petition and registration improperly lists the petitioner as Nathan M. Kight, d/b/a Funnels, LLC. This is improper because an LLC is a different and separate legal and commercial entity from its owner. *See* Exs. A and B. An individual person can “do business as” or “d/b/a” a brand name or trade name, but he cannot “do business as” or “d/b/a” a separate legal and commercial entity such as a corporation or an LLC. Neither Mr. Kight nor Funnels, LLC is registered with the state of Maryland as a d/b/a or fictitious name of the other. (Exs. A & B). Neither of them is registered as a fictitious name of any other person or entity. And neither of them has registered any fictitious names whatsoever for himself or itself. (Exs. A & B). This is because logic and Maryland Law do not permit one legal and commercial person or entity to be registered as the fictitious name or d/b/a of a separate and distinct legal and commercial person or entity. That would be nonsense. Thus, both the petition and registration are improper, and Mr. Kight’s Petition fails to state a claim on which relief may be granted. *See* TMEP § 803.02(a) (individuals can register as a d/b/a of a corporation or company only when allowed under relevant state law).

For the foregoing reasons, Mr. Kight’s petition is due to be dismissed for failing to state a claim on which relief may be granted.

In addition, a related case is now pending in the United States District Court for the District of Columbia (Case No. 1:21-cv-03189-CKK: *Kight v. Crunchy Tobacco*). Infringement and validity of the parties’ marks is currently at issue and being litigated in that case. *See* Ex. C: Answer to Counterclaim (Defense No. 1). Therefore, in the interests of justice and judicial

economy, this case and proceedings on Plaintiff's Petition should be stayed pending litigation and completion of the D.C. District Court civil action.

Therefore, this proceeding should be stayed and suspended in favor of the previously filed and pending Federal District Court case. *See* TBMP § 510.02(a) (“the Board’s policy to suspend in favor of a civil action has not changed” and “judicial economy is usually served by suspension”).

Respectfully Submitted This 22<sup>nd</sup> Day of March, 2023:

By: /s/ Michael C. Whitticar  
Counsel

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### **ESTTA/ECF FILING CERTIFICATE**

I hereby certify that on this 22<sup>nd</sup> Day of March, 2023, I caused the foregoing motion to dismiss, stay or suspend to be served by email and transmitted through the TTAB’s ESTTA case filing system to the following counsel of record:

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/s/ Michael C. Whitticar  
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