ESTTA Tracking number:

ESTTA1273082

Filing date:

03/20/2023

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

| Proceeding no. | 92081574 |
|------------------------|---|
| 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 |
| Filer's email | mikew@novaiplaw.com |
| Signature | /Michael C. Whitticar/ |
| Date | 03/20/2023 |
| Attachments | Motion to Dismiss or stay TTAB petition with Exhibit A.pdf(1334314 bytes) |



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

NATHAN M. KIGHT,

Petitioner,

v. : Cancellation No.: 92081574

ESTTA Tracking Number for Petition: ESTTA1265293

CRUNCHY TOBACCO, INC.,

Respondent.

MOTION TO DISMISS OR STAY

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

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 169 582 * 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, or use or other

conduct by the LLC, Funnels, LLC. See Petition §§ 3-5, 13-14, 16, 24-25 and 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. 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. Thus, both the petition and registration are improper, and

Mr. Kight's Petition fails to state a claim on which relief may be granted.

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 Colombia (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. A:

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.

Respectfully Submitted This 20th Day of March, 2023:

By: /s/ Michael C. Whitticar

Counsel

Michael C. Whitticar, Esq. (VSB No. 32968)

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Counsel for Respondent Crunchy Tobacco, Inc.

ESTTA/ECF FILING CERTIFICATE

I hereby certify that on this 20th Day of March, 2023, I caused the foregoing motion to dismiss or stay 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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Attorney for the Petitioner

/s/ Michael C. Whitticar Michael C. Whitticar



EX.A.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FUNNELS, LLC, et al.,

Plaintiff,

v.

Civil Actio

: Civil Action No. 21-cv-03189 CKK

CRUNCHY TOBACCO, INC.,

Defendant.

PLAINTIFFS' ANSWER TO DEFENDANT'S COUNTERCLAIM

COME NOW, Plaintiffs and Counterclaim Defendants Nathan M. Kight and Funnels,

LLC, by counsel, and respectfully submit their Answer and Defenses to

Defendant's/Counterclaim Plaintiff's Counterclaim, as follows:

PARTIES

COMPLAINT:**

1. Crunchy is a Virginia corporation with its principal place of business in Arlington, Virginia.

ANSWER:

Admitted.

COMPLAINT:

2. Nathan Kight is a resident, citizen and domiciliary of the State of Maryland. Kight has directed, supervised and personally participated in the tortious conduct of Funnels, LLC which is described in this Complaint.

ANSWER:

Admitted in Part. Denied in Part. Plaintiffs admit that Nathan Kight is a resident, citizen



1

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