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

Proceeding no.	91242432
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Attachments	FS_Opposition to Growmark Motion to Amend.pdf(125170 bytes ) FS_DECL of C Eze ISO Opposition to Motion to Amend.pdf(1717531 bytes ) Exhibits A-G.pdf(4619565 bytes ) Exhibits I-K.pdf(5600347 bytes )

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

Growmark, Inc.,

Opposer,

v.

FS.COM Limited,

Applicant.

Opposition No. 91242432 (Parent)

Opposition No. 91246792

Opposition No. 91249698

Opposition No. 91264369



**APPLICANT’S OPPOSITION TO OPPOSER’S MOTION FOR LEAVE TO FILE FIRST  
AMENDED CONSOLIDATED NOTICE OF OPPOSITION**

Applicant, FS.COM Limited (“Applicant” or “FS.COM”), hereby opposes Growmark, Inc.’s (“Opposer” or “Growmark”) Motion for Leave to File First Amended Consolidated Notice of Opposition. Applicant requests that the Trademark Trial and Appeal Board (“Board”) deny Opposer’s Motion to Amend because, *inter alia*, the motion lacks sufficient evidence and factual information for the basis of the proposed Amended Notice of Opposition, the proposed Amended Notice of Opposition contains material misrepresentations, and allowing Opposer to amend its complaint at this late stage would be prejudicial to Applicant.

In the interest of avoiding further delays in these proceedings, Applicant requests that the Board issue an order and reset trial dates as provided in Applicant’s concurrently filed Opposition to Opposer’s Embedded Request to Reset Pre-trial and Trial Dates.<sup>1</sup>

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<sup>1</sup> Proposed order: (1) allow these proceedings to proceed to trial, (2) require Opposer to serve its pretrial disclosures on Applicant within 7 days of the Board order (being that Opposer’s pretrial disclosures due date expired on January 31, 2022), (3) prohibit any further pretrial motions (including summary judgment motion) or reopening of the discovery, and (4) reset trial dates by 30 days from the current schedule.

## **I. FACTUAL BACKGROUND AND RELEVANT PROCEDURAL HISTORY**

On July 11, 2018, Opposer filed the first Opposition No. 91242432 in these proceedings against Applicant's Application No. 87/463,513, and subsequently filed three more oppositions against Applicant's Application Nos. 87/953,770 (ITU), 88/040,265, 88/683,524, 88/740,525, 88/740,527, 88/740,533, and 88/740,540. Declaration of Chike Eze ("Eze Decl.") ¶ 2.

On March 19, 2020, Opposer served its Revised First Set of Requests for Production in Opposition No. 91242432. Eze Decl. ¶ 3, Ex. A. Applicant produced documents responsive to the requests on April 9, 2020, including responsive documents to Opposer's Request for Production No. 9: "All Documents relating to the first use of Your Marks."<sup>2</sup> Eze Decl. ¶ 4, Ex. B. Five months after production, on September 5, 2020, Opposer's counsel requested that Applicant supplement its responses to Opposer's discovery requests, including Opposer's Revised First Set of Requests for Production. Eze Decl. ¶ 5. On September 29, 2020, Applicant supplemented its responses to Opposer's Revised First Set of Requests for Production. Eze Decl. ¶ 6, Ex. C.

On November 13, 2020, Applicant filed a Motion to Amend requesting that the Board "defer its decision on Applicant's Motion to Amend until final decision." 34 TTABVUE; 36 TTABVUE 6-7. As requested, the Board DEFERRED Applicant's Motion to Amend its involved Applications until final disposition of these proceedings. 37 TTABVUE 3-4. The Board's order specifically noted "Applicant's motion makes clear that it seeks to amend its involved Applications as an alternate defense 'if the Board ultimately finds that Applicant is not entitled to registration[ ] of the opposed applications without the Proposed Restrictions.'" 37 TTABVUE 3.

On May 27, 2021, the Board issued an order consolidating the oppositions under Opposition No. 91242432 (parent). 40 TTABVUE 4. Subsequently, on October 2, 2021, Opposer served its Second Set of Requests for Production of Documents which included, in part, duplicate and cumulative requests, for

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<sup>2</sup> Of note, Applicant objected to this request as overbroad and burdensome due to the scope of "all documents."

example, Request for Production No. 9 to which Applicant had previously responded. Eze Decl. ¶ 7, Ex. D. On November 1, 2021, Applicant responded by providing specific objections, producing responsive documents, and supplementing its response to Opposer’s Request for Production No. 9. Eze Decl. ¶ 8, Ex. E (Responses to Opposer’s 2<sup>nd</sup> Set of RFPs) and Ex. F (Supplemental Responses to Opposer’s Revised 1<sup>st</sup> Set of RFPs); *see also* Applicant’s produced documents included in 52 TTABVUE 210-572 (Decl. of Navdeep Singh (“Navdeep Decl.”), Ex. D). Applicant’s production of documents in response to Request for Production No. 9 included specimens of record for Applicant’s opposed use-based applications, Bates-stamped FSD002253 - FSD002359. Eze Decl. ¶ 8; 52 TTABVUE 454-562 (Navdeep Decl., Ex. D).

Between September 29, 2020, when Applicant supplemented its responses to Opposer’s first set of discovery requests, and October 2, 2021, when Opposer served its second set of discovery requests, Applicant did not receive any further correspondence from Opposer regarding the sufficiency of Applicant’s production of documents. Eze Decl. ¶ 11. Opposer has not filed any motion to compel with respect to Applicant’s production of documents in these proceedings. *Id.*

On November 19, 2021, Opposer served its Amended Notice of 30(b)(6) Deposition of Applicant. 52 TTABVUE 573-580 (Navdeep Decl., Ex. E). The amended notice did not include, nor did Opposer notify Applicant prior to the deposition of, any topics regarding authentication of specific documents or general categories of documents in Applicant’s possession or previously served on Opposer relating to Applicant’s use or intent to use its marks. Eze Decl. ¶ 12; 52 TTABVUE 573-580.

Opposer’s counsel deposed Applicant’s 30(b)(6) witness, Tao Zhang, on December 3, 2021. Eze Decl. ¶ 13. Mr. Zhang is the General Manager of FS.COM’s North American branch. *Id.* During the deposition, Mr. Zhang testified – based on his personal knowledge and discussions with FS.COM’s CEO, Wei Xiang – to Applicant’s first use and intent to use its FS marks in connection with the goods and services claimed in the opposed applications. Eze Decl. ¶ 14.

- Mr. Zhang testified that he spoke with Mr. Xiang (who is the signatory on the opposed applications) in 2020 about “all the trademark applications” including Application No. 87463513. Mr. Zhang testified that Mr. Xiang confirmed he understood the meaning of first use of Applicant’s trademark. Based on that conversation, Mr. Zhang testified that he confirmed that as of January 15, 2016, all the goods claimed in Application No. 87463513 were being sold in conjunction with the FS.COM trademark. Id., Ex. G at P. 40-43.
- Mr. Zhang testified that the statements made in Applicant’s Answer to Opposition 91246792 to oppose Application No. 88040265 (including Applicant’s admission that Applicant’s allegations in the application file) are true. Id., Ex. G at P. 37-38.
- Mr. Zhang testified about the meaning of 1B basis claimed in Applicant’s Application No. 87953770 (ITU): at the time of filing, we had not started using the business services but we had a plan to do so. Id., Ex. G at P. 206.
- Mr. Zhang testified that he had multiple meetings with Mr. Xiang and other FS.COM managers in early 2018 to discuss Applicant’s plans to offer all the services claimed in Application No. 87953770 (ITU). Id., Ex. G at P. 205-210.
- Mr. Zhang testified that he joined FS.COM in 2016, and, based on his personal knowledge, Applicant had already started selling FS-branded cabinets (shown in Applicant’s produced document, Bates-stamped FSD003000) to U.S. customers in 2016. Eze Decl. ¶ 14, Ex. G at P. 61; Ex. H at P. 62 (Confidential deposition testimony); Eze Decl. ¶ 15, Ex. I at 1 (Applicant’s produced documents, Bates-stamped FSD003000 – FSD003013). He provided the name of at least one U.S. customer who purchased the FS-branded cabinet(s) from Applicant in 2016. Eze Decl. ¶ 14, Ex. H at P. 62 (Confidential

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