

1 McAfee & Taft A Professional Corporation
Clifford C. Dougherty, III (OBA #11290) (*admitted pro hac vice*)
2 Robert W. Dace (OBA # 10263) (*admitted pro hac vice*)
Jennifer B. Rader (OBA # 19198) (*admitted pro hac vice*)
3 Tenth Floor, Two Leadership Square
211 North Robinson
4 Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621
5 Facsimile: (405) 235-0439
Email: bob.dace@mcafeetaft.com

6
7 CARR, McCLELLAN, INGERSOLL, THOMPSON & HORN
Professional Law Corporation
8 Lori A. Lutzker, Esq. (Bar No. 124589)
216 Park Road
9 P.O. Box 513
Burlingame, California 94011-0513
10 Telephone: (650) 342-9600
Facsimile: (650) 342-7685
11 Email: llutzker@carr-mcclellan.com

12 Attorneys for Defendant
WINDSOR QUALITY FOOD COMPANY, LTD.

13
14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17

18 MONTEREY GOURMET FOODS, INC.,
a Delaware corporation,

19
20 Plaintiff,

21 vs.

22 WINDSOR QUALITY FOOD
COMPANY LTD., a Texas Limited
23 Partnership; and DOES 1 through 20,
inclusive,

24 Defendants.
25

Case No. C08-01316 (JCS)
**DEFENDANT’S OPPOSITON TO
PLAINTIFF’S MOTION TO DISMISS
COUNTERCLAIM FOR FAILURE TO
STATE A CLAIM PURSUANT TO RULE
12(b)(6) AND OPPOSITION TO
PLAINTIFF’S REQUEST FOR JUDICIAL
NOTICE**

Date: June 6, 2008
Time: 9:30 a.m.
Courtroom A (Hon. Joseph C. Spero)

26 Defendant and Counterclaimant, Windsor Quality Food Company Ltd. (“Windsor”), by
27 and through its undersigned attorneys, files its Opposition to Motion by Plaintiff Monterey
28

1 Gourmet Foods, Inc. (“MGF”) to Dismiss Counterclaim Pursuant to Rule 12(b)(6). Windsor also
2 asks the Court to deny MGF’s request for judicial notice because the “facts” for which MGF
3 requests notice are not relevant to the pending motions and are not appropriate for judicial notice.
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24 FRCP 44(a)(1)(B) 4

25 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition,*

26 (4th ed. 2008) 5,9

27

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1 falls short of the pleading standard of Fed. R. Civ. P. 8(a)(2), MGF attempts to try the
2 Counterclaim by motion through *judicial notice* as well as *unsubstantiated hypotheses* directed to
3 the examining procedure of its Registration in the USPTO.

4 In response, Windsor will first address the standards of a 12(b)(6) motion as well as
5 MGF's arguments with respect to this claim. Second, Windsor will attempt to address the
6 remaining extraneous and irrelevant matter set forth in MGF's memorandum in support of its
7 Motion to Dismiss.

8
9 **I. Windsor's Counterclaim states a claim upon which relief can be granted**
10 **pursuant to Fed. R. Civ. P. 12(b)(6) and complies with the pleading standards set**
11 **forth in both Fed. R. Civ. P. 8(a)(2) and (9)(b).**

12 Windsor brought its Counterclaim under 15 U.S.C. § 1120, which states in totality:

13 Any person who shall procure registration in the Patent and
14 Trademark Office of a mark by a false or fraudulent declaration or
15 representation, oral or in writing, or by any false means, shall be
16 liable in a civil action by any person injured thereby for any
17 damages sustained in consequence thereof.

18 Citing and applying this statute in a case with similar facts, the district court in *T.A.D.*
19 *Avanti, Inc. v. Phone-Mate, Inc.*, 1978 WL 21444, 199 U.S.P.Q. 648 (C.D. Cal. 1978) made the
20 following conclusion of law:

21 An applicant for registration of a trademark is required to exercise
22 uncompromising candor in his communications with the United
23 States Patent and Trademark Office, lest any registration he obtains
24 will be invalid and/or unenforceable. He must not only refrain
25 from making false representations to the United States Patent and
26 Trademark Office, but must make full disclosure of all facts to his
27 knowledge which might bear in any way on the Office's decision
28 to grant the registration sought.

U.S.P.Q. at 656.

As regards the pleading of such a claim, the notice pleading standard of Fed. R. Civ. P.
8(a)(2) requires only a "short and plain statement of the claim." In addition, the fraud pleading
standard of Fed. R. Civ. P. 9(b) only requires that "the circumstances constituting fraud or

1 mistake shall be stated with particularity” but goes on to say, “Malice, intent, knowledge, and
2 other condition of mind of a person may be averred generally.”

3 The elements for fraud on the USPTO are enumerated in *Federal Treasury Enterprise*
4 *Sojuzplodoimport v. Spirits Int’l N.V.*, 425 F. Supp. 2d 458, 467-68 (S.D.N.Y. 2006): (1) false
5 representation regarding material fact; (2) knowledge or belief that representation is false; (3)
6 intention to induce listener to act or refrain from acting in reliance upon misrepresentation; (4)
7 reasonable reliance upon misrepresentation; and (5) damage proximately resulting from such
8 reliance. Windsor more than adequately pled each of these elements in its Counterclaim. As to
9 the first element, Paragraph 8 of Windsor’s Counterclaim states that “the USPTO was not made
10 aware by Applicant of the geographically descriptive (or in the alternative geographically
11 misdescriptive) nature of the term ‘Monterey’ during the prosecution of the Application.”
12 Paragraph 13 states “MGF knew or should have known of the fraud perpetrated on the USPTO,”
13 satisfying the second *scienter* element, which as previously noted, may be averred *generally*. As
14 to the third and fourth elements, Paragraph 11 of Windsor’s Counterclaim states, “The
15 withholding of the geographically descriptive (or in the alternative geographically misdescriptive)
16 and merely descriptive nature of the terms ‘Monterey Pasta Company’ from the USPTO
17 constitutes fraud on the USPTO because the USPTO would not have granted a trademark
18 registration for the terms ‘Monterey Pasta Company’ without proof of secondary meaning.”
19 Finally, Paragraph 14 of the Counterclaim addresses the damage caused by such reliance, stating
20 that “Windsor has suffered, and continues to suffer, irreparable harm as a result of the fraud
21 perpetrated on the USPTO. . .”

22 Based on the aforementioned authorities and the averments set forth in the Counterclaim,
23 Windsor has clearly alleged facts sufficient to state a claim upon which relief can be granted
24 under 15 U.S.C. § 1120 and has easily met the pleading standards of both Fed. R. Civ. P. 8(a)(2)
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1 and Fed. R. Civ. P. 9(b). Therefore, MGF's Motion to Dismiss based on Fed. R. Civ. P. 12(b)(6)
2 must be denied.

3 **II. The arguments and requests for judicial notice set forth in MGF's Motion to**
4 **Dismiss are inappropriate at this stage of the proceeding and must be denied.**

5 As to the remaining material in its Motion to Dismiss, although MGF purports to request
6 dismissal based on Fed. R. Civ. P. 12(b)(6), the bulk of its supporting memorandum relies upon a
7 vast amount of improperly introduced extraneous information and baldly conclusive statements
8 that at times refer to Fed. R. Civ. P. 12(b)(6), at times to Fed. R. Civ. P. 9(b), and at other times to
9 Fed. R. Evid. 201, all the while resembling a motion for summary judgment. Before any
10 discovery has occurred, this is not the time or the avenue for requesting that the Court make a
11 determination as to the ultimate validity of the Counterclaim. Each of these issues is addressed
12 below in the order set forth in MGF's memorandum.

13
14 After first attempting to summarize its claims and Windsor's counterclaims, MGF cites
15 Fed. R. Evid. 201 and various cases for the uncontroversial proposition that the Court may take
16 judicial notice of trademark registrations. However, the Ninth Circuit case relied upon by MGF,
17 *Metro. Pub., Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640-41 (9th Cir. 1993), held that
18 "Certified copies of trademark registrations from the principal register fall within this category [of
19 facts judicially noticeable under Fed. R. Evid. 201(b)(2)]." [emphasis added]. MGF has failed to
20 properly authenticate (and Windsor objects to the admission of) the documentation underlying its
21 proposed facts by not complying with Fed. R. Civ. P. 44(a)(1)(B) (proof of official record), Fed.
22 R. Evid. 902(4) (self-authentication of public documents), or even Fed. R. Evid. 901(b)(1) (sworn
23 testimony of witness with knowledge).

24
25 MGF then goes on to cite everything from dictionaries to excerpts from the Wikipedia®
26 website. Of course, MGF has not properly authenticated any of these documents by sworn
27 testimony either, and more importantly, even judicially noticed facts must still be *relevant*.
28

1 *California v. Sup. Ct. of California, San Bernardino County*, 482 U.S. 400, 408 (1987) (noting
2 that even if taking judicial notice otherwise proper, facts must still be relevant to issue before the
3 court). MGF cites various dictionaries and web pages in an apparent attempt to get the Court to
4 take judicial notice of the fact that Monterey, California and pasta have no relationship in the
5 minds of consumers. It is curious that MGF would rely upon dictionaries for this assertion and
6 even more strange that it would make the argument at all. In so doing, MGF merely drives home
7 the fact that no secondary meaning can be ascribed to its use of the terms and therefore
8 “Monterey” is merely geographically descriptive and not subject to trademark protection, either
9 now or at the time the application was filed.

11 For purposes of trademark law, a term merely describing the geographic origin of a
12 product will not receive trademark protection absent proof of secondary meaning. *See* 2 J.
13 Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 14:9, at 14-32 (4th ed.
14 2008). MGF goes out of its way to try to prove that it is impossible for Monterey pasta to have
15 acquired a secondary meaning (and thus deserving of trademark protection) because, according to
16 dictionaries and the internet web pages it asks the Court to recognize, no one has ever associated
17 Monterey with pasta. Perhaps MGF is attempting to prove that its use of the term “Monterey”
18 was completely arbitrary, but this seems inconsistent in light of the fact that in Paragraph 6 of its
19 very own Complaint, MGF states that it has a principal place of business in Monterey County,
20 California and in its Motion to Dismiss, MGF argues that the USPTO somehow knew of this
21 geographical association in the examining process, even though the application for the
22 Registration in the database records upon which MGF relies make no mention of the fact that the
23 trademark owner’s business is located in Monterey.

26 MGF then makes what amounts to its primary argument – that it filed an Incontestability
27 Declaration on November 13, 2001 and, therefore, the mark is no longer contestable based on a
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1 claim of descriptiveness or misdescriptiveness. The Counterclaim is based upon *fraud on the*
2 *United States Patent and Trademark Office*. As is set forth in 15 U.S.C. § 1115 and as the Courts
3 have recognized, “Fraud on the Patent and Trademark Office is an exception to incontestability
4 and grounds for canceling a registration.” *Federal Treasury Enterprise Sojuzplodoimport v.*
5 *Spirits Int’l N.V.*, 425 F. Supp. 2d 458, 467 (S.D.N.Y. 2006). The geographically descriptive
6 nature of the term “Monterey” was not the counterclaim itself, but rather the fact that the nature
7 of the mark was misrepresented or not disclosed to the USPTO.

9 MGF’s second main argument, that the allegations of the Counterclaim do not meet the
10 requirements of Fed. R. Civ. P. 9(b), which requires that fraud be alleged with particularity, was
11 controverted in the first part of this memorandum and the fact that MGF had fair notice of the
12 claim is further bolstered by the authority cited by MGF itself in this portion of its memorandum.
13 MGF correctly cites the language of *Stack v. Lobo*, 903 F. Supp. 1361, 1367 (N.D. Cal. 1995),
14 although it neglects to mention the case was a class action securities fraud case, a type of suit that
15 has since merited special pleading requirements under the Private Securities Litigation Reform
16 Act. In fact, even the case relied upon by the *Stack* court, *Moore v. Kayport Package Express,*
17 *Inc.*, 885 F.2d 531, 540 (9th Cir. 1980), involved claims under Section 10(b) and Rule 10b-5 and
18 the application of Rule 9(b) thereto.

21 In addition, the *Stack* court held that “Rule 9(b) does not necessitate pleading of detailed
22 evidentiary matter.” *Stack*, 903 F. Supp. at 1367. Rather, the focus, as it always is at the pleading
23 stage, remains upon giving the opposing fair notice of the claim against it. The *Stack* court held,
24 “The plaintiff must include statements regarding the time, place and nature of the alleged
25 fraudulent activities, and must specifically identify what was misrepresented or concealed *so as to*
26 *give the opposing party notice of the particular conduct which is alleged to constitute the fraud.*”
27 *Id.* [emphasis added]. The last thing MGF can argue is that it does not have notice of the conduct
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1 alleged to constitute fraud as it devoted almost its entire brief to addressing why it believed its
2 actions did not constitute fraud.

3 As concerns *eCash Technologies, Inc. v. Guagliardo*, 127 F. Supp. 2d 1069 (C.D. Cal.
4 2000), the case had nothing to do with the application of Fed. R. Civ. P. 9(b). Rather, the court
5 dismissed the claim for fraud in procurement of the trademark based upon its legal conclusion
6 that “a registration applicant has no duty to investigate and report to the PTO all other possible
7 users of the same or a similar mark.” MGF urges no such applicable legal principle here. Rather,
8 it merely located one reported opinion that dismissed a counterclaim of fraud on the USPTO from
9 another judicial district in this State, and urges the Court to dismiss Windsor’s counterclaim as
10 well apparently for no other reason than it was a similar claim in the same state.

11
12 As for Fed. R. Civ. P. 9(b), MGF is incorrect in its conclusions as to Windsor’s
13 insufficiency in pleading. MGF says that Windsor had to allege the “time, place and nature of the
14 alleged fraudulent activities” in order for MGF to have fair notice of the counterclaim. MGF
15 need only look to paragraphs 9-14 of the Counterclaim to gain an understanding of these precise
16 averments. It is aware of the *time* the application was made, June 17, 1994, as well as the
17 subsequent prosecution period; these allegations are set forth in Paragraph 12 of the Counterclaim
18 and reflected in MGF’s own memorandum in support of its Motion to Dismiss. As for the place,
19 the application was filed in the USPTO as alleged in Paragraph 9 of the Counterclaim. As to the
20 nature of MGF’s fraudulent activities, Windsor alleged, “The withholding of the geographically
21 descriptive (or in the alternative geographically misdescriptive) and merely descriptive nature of
22 the terms “Monterey Pasta Company” from the USPTO constitutes fraud on the USPTO” in
23 Paragraph 11 of the Counterclaim. Apparently, this information gave MGF fair notice of the
24 fraud allegations. In submitting to the Court the documents contained in its request for judicial
25 notice, MGF is apparently keenly aware of the nature of the claims. In fact, nearly its entire
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1 memorandum in support of its Motion to Dismiss is devoted to addressing these allegations.
2 Generally, when a party files a motion under Fed. R. Civ. P. 9(b), the idea is that the allegations
3 of fraud in the complaint have not given it fair notice of the claim and it should not be required to
4 respond absent a more definite statement. Here, not only has Windsor pleaded the Counterclaim
5 with particularity, MGF seems to understand the claim perfectly.
6

7 MGF next argues that dismissal is warranted because the allegation that Monterey Pasta
8 Company is a geographically descriptive term is a conclusion of law. However, the factual
9 allegations made by plaintiff in its own complaint show that Monterey Pasta Company is a
10 geographically descriptive term.

11 MGF then makes the argument that there is no allegation of scienter, completely ignoring
12 Paragraph 13 of the Counterclaim. Maybe, what MGF meant to say was that there was no
13 “particularized” allegation of scienter. However, this is not a securities fraud case. MGF cites no
14 authority for the proposition that Fed. R. Civ. P. 9(b) requires particularized allegations of
15 scienter. In fact, Fed. R. Civ. P. 9(b) on its face states that with respect to all averments of fraud,
16 “Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”
17

18 MGF next argues, “It is hornbook law that only where a geographic name creates a goods-
19 place association among the relevant purchasing public that it can possibly be geographically
20 descriptive or misdescriptive.” (Motion at 9-10). Not only is this issue an obvious question of
21 fact, it is not clear what exactly MGF is trying to say. The rule at which it appears to be aiming
22 was more aptly stated by the court in the case MGF cites, *Kraft General Foods, Inc. v. BC-USA,*
23 *Inc.*, 840 F. Supp. 344, 349 (E.D. Pa. 1993), in which the court dealt with “Philadelphia” cream
24 cheese:
25

26 The trademark at issue in this case is “Philadelphia,” a geographic
27 designation. *A term that is descriptive of the geographic location of*
28 *origin of goods is not inherently distinctive, i.e. arbitrary or*
suggestive, and is usually protected only upon proof that it has

1 *acquired secondary meaning. If the geographic term is used in an*
2 *arbitrary manner, however, taking into account the type of goods*
3 *involved, then no secondary meaning is required.* 1 McCarthy, §
 14:03.

4 Upon review of the “hornbook law” cited by MGF, *McCarthy on Trademarks and Unfair*
5 *Competition* suggests three relevant questions to aid in determining if a geographic term is used
6 arbitrarily. First, is the mark the name of the place or region where the product is produced? If
7 not, the mark is probably arbitrary. Second, is the geographic term likely to denote to reasonable
8 buyers that the goods come from the place named? If not, this is another indication of
9 arbitrariness. Finally, is the place noted for these particular goods? If not, this is a final
10 indication of arbitrariness. 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair*
11 *Competition* § 14:29, at 14-77-14-80 (4th ed. 2008).

13 MGF apparently believes (although it never comes right out and says it) that its own use
14 of the term “Monterey” was arbitrary; however, under the very authority cited by MGF, this
15 determination cannot be made in MGF’s favor at this (and Windsor believes at any) stage of the
16 litigation. Applying the first question from the “hornbook law” cited by MGF, Monterey is the
17 county in which the corporation is located according to MGF’s own factual statements in its
18 complaint. Therefore, MGF’s mark *is admittedly* geographically descriptive based on this first
19 inquiry. In regard to the second question, whether the use of the term connotes to reasonable
20 buyers that the goods came from Monterey, California, MGF as much as says this in its proposed
21 Fact No. 5 in its Motion to Dismiss at pages 3-4 of which it asks the Court to take judicial notice
22 citing “a label specimen for the mark from [Monterey’s] predecessor (MPC), upon which was
23 printed an association between the label and the City of Monterey, California . . .” Finally, most
24 of MGF’s evidence is directed solely to the third inquiry – an attempt to show that use of
25 “Monterey” was arbitrary because Monterey is not widely known for its pastas and sauces.
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1 However, this factor as well as the second factor, cannot be judicially noticed and must be the
2 subject of discovery and proof before such an important legal determination can be made.

3 As to the third and final argument in its memorandum, i.e., that judicially cognizable facts
4 demonstrate that the USPTO knew of the association of the trademark applicant with Monterey at
5 the time MGF's predecessor filed the application, MGF has not only improperly attempted to
6 enter into the record insufficient, irrelevant evidence and uncertified and incomplete documents
7 scanned from portions of the records of the USPTO database without proper certification or
8 authentication, it baldly imputes numerous assumptions into the thought processes, investigations
9 and considerations of the examining attorney that simply are not factual. What it fails to mention
10 is that at the time the "intent to use" application was filed with supporting declaration, the address
11 was listed as Danville, California and not as Monterey, California. With regard to Registration
12 No. 1,664,278 (a canceled registration) that MGF cites in its brief and relies upon for its assertion
13 that the examining attorney somehow knew of the association between its mark and Monterey,
14 California, the file history is not publicly available for the file history of this mark; moreover, the
15 document relating to the recordation of this registration in the file history of the Registration at
16 issue states that the owner of this mark is located in Danville, California and not in Monterey,
17 California.

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21 In its memorandum, MGF argues that attention was specifically called to the association
22 between the application and the city of Monterey because of a circled notation in a scanned copy
23 of a specimen found in the USPTO online records. What MGF fails to mention is that there is no
24 record of who made the notation, much less when or why it was made. Files of the USPTO were
25 not scanned into the database and made available for public viewing until many years after this
26 application for Registration. Furthermore, even though MGF alleges to have used the mark at the
27 time its application for Registration was made, this application was filed and subsequently
28

New!



José Olé

Especial

CHICKEN MONTEREY PASTA

with broccoli, black beans and tomatoes in a creamy Monterey Jack cheese sauce

Serves Two

Skillet Meal

Ready in 10 minutes!

Made with Grilled Chicken Breast

Nutrition Facts

Serving Size 1/2 Package (340g)
Servings Per Container 2

Amount Per Serving

Calories 540 Calories from Fat 270

% Daily Value*

Total Fat 30g 46%

Saturated Fat 14g 70%

Trans Fat 0g

Cholesterol 90mg 30%

Sodium 1070mg 45%

Total Carbohydrate 47g 16%

Dietary Fiber 5g 20%

Sugars 2g

Protein 22g

Vitamin A 40% • Vitamin C 50%

Calcium 15% • Iron 20%

Not a significant source of Trans Fat.

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

	Calories: 2,000	2,500
Total Fat	Less than 65g	80g
Sat Fat	Less than 20g	25g
Cholesterol	Less than 300mg	300mg
Sodium	Less than 2,400mg	2,400mg
Total Carbohydrate	300g	375g
Dietary Fiber	25g	30g

Calories per gram:

Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: MONTEREY JACK CHEESE SAUCE (WATER, CREAM (CREAM, MILK), MONTEREY JACK CHEESE (PART SKIM MILK, CHEESE CULTURES, SALT, ENZYMES), MARGARINE (LIQUID & PARTIALLY HYDROGENATED SOYBEAN OIL, WATER, SALT, WHEY, SOY LECITHIN, VEGETABLE MONO & DIGLYCERIDES, SODIUM BENZOATES (AS A PRESERVATIVE), NATURAL & ARTIFICIAL FLAVOR, BETA CAROTENE (COLOR), VITAMIN A PALMITATE ADDED), MONTEREY JACK FLAVOR (MONTEREY JACK CHEESE (PASTEURIZED MILK, CHEESE CULTURE, SALT, ENZYMES), WHEY, BUTTERMILK SOLIDS, SALT, SODIUM PHOSPHATE, LACTIC ACID), MODIFIED FOOD STARCH, GARLIC, WHITE PEPPER, CALCIUM SODIUM POLYPHOSPHATE, SODIUM PHOSPHATE, CHILI POWDER (CHILI PEPPER, SPICES, SALT, GARLIC, OREGANO), COOKED ROTINI PASTA (WATER, DURUM WHEAT SEMOLINA, NIACIN, IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID), COOKED SEASONED CHICKEN BREAST (CHICKEN BREAST MEAT, WATER, SEASONING (SALT, GARLIC POWDER, ONION SYRUP SOLIDS, SUGAR, HYDROLYZED SOY PROTEIN, SPICES, ONION POWDER, NATURAL FLAVORS, PAPRIKA EXTRACT, CARAMEL COLOR), SOYBEAN OIL, MODIFIED CORN STARCH, SODIUM PHOSPHATE), BROCCOLI, BLACK BEANS, TOMATOES, PARSLEY.

CONTAINS: MILK, SOY, WHEAT.

Serving Suggestion

KEEP FROZEN

NET WT. 24 OZ. (1 LB 8 OZ) 680g



CHICKEN MONTEREY PASTA

Skillet Meal

EXHIBIT I