

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

EDIBLE ARRANGEMENTS	:	CIVIL ACTION NO.
INTERNATIONAL, LLC, <i>et al.</i> ,	:	3:14-cv-01744 (MPS)
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
1-800-FLOWERS.COM, INC., <i>et al.</i> ,	:	
	:	
Defendants.	:	JUNE 5, 2015

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Plaintiffs, Edible Arrangements International, LLC and Edible Arrangements, LLC (“Edible Arrangements”), hereby submit this memorandum of law in support of their motion to dismiss Counts One, Two and Three of the Amended Counterclaim (doc. # 75) filed by defendants 1-800-Flowers.com, Inc. and 1-800-Flowers, Inc. (the “18F Defendants”).

I. INTRODUCTION

Nothing in the Amended Counterclaim changes the conclusion that the 18F Defendants’ antitrust-based claims are barred by the *Noerr-Pennington* doctrine and should be dismissed. The 18F Defendants’ allegations remain fundamentally the same - they continue to allege plaintiffs’ attempt to police and protect their registered and incontestable trademarks and distinctive design against the pervasive infringement committed by the 18F Defendants and their distribution network violates the antitrust laws of the United States and the Connecticut unfair trade practices statute. They continue to allege that this action is a part of a pattern of baseless lawsuits and legal claims, each of which concerns plaintiffs’ assertion of rights in registered and incontestable marks. (*E.g.*, Amended Counterclaim, ¶ 98) They now also claim that Edible Arrangements, LLC’s legitimate petitioning of the United States Patent and

Trademark Office (“USPTO”) to register and protect its trademarks is a part of that “pattern” and amounts to “misconduct.”

The 18F Defendants thus seek to impose liability on plaintiffs for protecting rights that the USPTO has authorized them to protect in the forums that Congress has charged with protecting such interests. Because such core petitioning activity is protected by the First Amendment, United States Supreme Court authority holds that it cannot form the basis for antitrust liability. No exception to this immunity applies here. The 18F Defendants have not, and cannot, allege that this suit or any other attempts by the plaintiffs to protect their valuable trademarks is a sham and therefore the conduct that forms the basis for the 18F Defendants’ counterclaim is immune from antitrust liability under the *Noerr-Pennington* doctrine. Accordingly, Counts One, Two and Three of the Amended Counterclaim should be dismissed.¹

II. BACKGROUND

A. Plaintiffs’ Claims

Plaintiffs allege that the 18F Defendants have infringed their registered trademarks and distinctive Six Petal Daisy Design (Counts One & Two), diluted the famous EDIBLE ARRANGEMENTS Mark (Count Three), induced others to infringe plaintiffs’ marks (Count Four), breached their contractual obligations (Count Five) and engaged in unfair competition and unfair trade practices (Counts Six & Seven). The asserted marks appear on Exhibits A, B and C to the Second Amended Complaint (doc. # 31) (the “EA Marks”).²

¹ The Court should, for the same reasons, strike the 18F Defendants’ affirmative defenses that are based on a claimed antitrust violation. Fed. R. Civ. P. 12(f)(1).

² The EA Marks have all been registered with the USPTO, many for over five years, and several are incontestable. Of the forty-seven marks asserted in this action, ten have been registered on the supplemental register. The remainder are registered on the principal register.

1. The EDIBLE Marks

There are sixteen asserted EDIBLE Marks, including EDIBLE, EDIBLE ARRANGEMENTS and the EDIBLE ARRANGEMENTS Mark and Logo. (Second Amended Complaint, Ex. A) No “family” of EDIBLE Marks is asserted in this action. The registrations for EDIBLE ARRANGEMENTS, Reg. No. 2,934,715, the EDIBLE ARRANGEMENTS Mark and Logo, Reg. No. 3,141,566, GET FRESH WITH EDIBLE ARRANGEMENTS!, Reg. No. 3,452,283, and EDIBLE BRANDS, Reg. No. 3,654,276, are each incontestable. Plaintiffs allege that the 18F Defendants infringed the EDIBLE Marks by using identical or confusingly similar terms. For example, plaintiffs allege that the 18F Defendants are using the incontestable EDIBLE ARRANGEMENTS Mark as a keyword in their advertising on all major search engines. (*Id.*, ¶¶ 126-128)

2. The BOUQUET Marks

There are twenty-eight BOUQUET Marks at issue in this action. (*Id.*, Ex. B) BERRY BOUQUET and BERRY TREE BOUQUET, Reg. Nos. 3,429,717 and 3,429,718, are incontestable. Plaintiffs claim rights both in the BOUQUET Marks individually and in their BOUQUET family of marks. (*Id.*, ¶¶ 60-67) Additionally, plaintiffs allege infringement of these marks both individually and as a family of marks based on the 18F Defendants’ use of confusingly similar designations, such as, for example, “Make Their Day Bouquet” and “Cheer Me Up Bouquet.” (*Id.*, ¶¶ 60-67, 142-144)

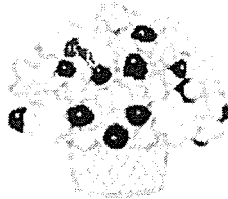
3. The DO FRUIT Marks

There are three DO FRUIT Marks at issue: DO FRUIT, WE DO FRUIT and I DO FRUIT. (*Id.*, Exhibit C) DO FRUIT, Reg. No. 3,198,965, is incontestable. Plaintiffs allege

the 18F Defendants have infringed these marks by using identical or confusingly similar designations in connection with sale and advertising of Fruit Bouquet products, alleging, for example, that the 18F Defendants have used DO FRUIT on the www.fruitbouquets.com website and in coupon advertising on third party websites. (*Id.*, ¶¶ 150, 158)

4. The Iconic Six Petal Daisy Design.

Plaintiffs assert rights in the Six Petal Daisy Design. (*Id.*, ¶¶ 72-84). On September 8, 2014, plaintiffs filed an application to register the Six Petal Daisy Design with the USPTO, Serial No. 86388189.³ In addition, that design is a central component of Edible Arrangements' incontestable design mark, Reg. No. 3,343,733:



Plaintiffs claim that the 18F Defendants have infringed the Six Petal Daisy Design by copying that design on the www.fruitbouquets.com website and in their Fruit Bouquet products. (*E.g.*, Second Amended Complaint, ¶¶ 151-154)

B. The 18F Defendants' Claims

1. Plaintiffs' Purported Lack of Trademark Rights and Alleged Fraud Before the USPTO

The 18F Defendants' repeated claim that plaintiffs' policing of their registered trademark rights and distinctive design is "objectively baseless" is founded on the allegation:

Edible Arrangements has threatened to bring objectively baseless lawsuits, has asserted

³ 1-800-Flowers.com, Inc. filed an opposition to that application on May 18, 2015. *See* Opposition No. 91221983.

objectively baseless claims against others, and filed, in the instant action, an objectively baseless trademark infringement action. Edible Arrangements has based its claims on unsubstantiated “families of marks,” generic terms, descriptive terms for which it has developed no secondary meaning, a non-protectable functional design long used by others, and fraudulently obtained registrations, none of which supports its claims. It has, contrary to law, claimed it has protectable trademark rights that enable it to prevent others from making fair use, as expressly permitted by law, of “Edible,” “Bouquet,” and “Edible Fruit Arrangements.”

(Amended Counterclaim, ¶ 162). In sum, they claim that the “claims asserted in this action that 1-800-Flowers has infringed approximately forty-four (44) different federally registered trademarks containing the terms ‘Bouquet,’ ‘Edible,’ or ‘Edible Arrangements’ are *all* objectively baseless.” (*Id.* at 92 (emphasis added)) This remarkable assertion--that Edible Arrangements has *no* protectable trademark rights at all in any of its federally registered marks--is belied not only by common sense but also by the specific allegations in the Amended Counterclaim concerning those marks.

a. The Six Petal Daisy Design

With regard to the Six Petal Daisy Design, the 18F Defendants now seek to buttress their allegations that the mark is “functional [and] has long been used by multiple others in the industry” (Counterclaim, ¶ 80) by adding that the:

number and shape of the ‘petals’ affects the cost and quality of the product, among other things, utilizing a standard cutter readily available in the marketplace, properly sized for a pineapple, and resulting in less waste and superior yield, stability, strength and sizing.

(Amended Counterclaim, ¶ 89) The defendants further add that the “multiple others” to which they refer includes “for example, Fresh Fruit Bouquet Company” (*id.*) a company that the 18F Defendants, themselves, allege is no longer in business (*id.* ¶ 48).

b. The EDIBLE Marks

As an initial matter, the newly-minted claim that plaintiffs have no protectable rights in a family of EDIBLE Marks (“and it knows it”) (*id.* ¶ 87) is irrelevant. Such a claim has not been advanced in this suit and with good reason: the plaintiffs have a presumptively valid federal registration for the mark EDIBLE, Reg. No. 4,319,940. With regard to that mark, defendants continue to allege that the EDIBLE Mark is generic (*id.*, ¶ 78) and the registration was fraudulently obtained because Edible Arrangements, LLC represented to the USPTO that “no other person [had] the right to use the mark in commerce” when it purportedly “knew of other longstanding users of similar marks, including Incredibly Edible Delites and another company that had used “Edible” since the 1980s, Incredible Edibles.” (*Id.*, ¶ 79)

The defendants further claim that the mark EDIBLE ARRANGEMENTS, Reg. Nos. 2,356,362 and 2,934,715, is generic. (*Id.*, ¶¶ 80, 86) Registration No. 2,934,715 is incontestable. With regard to that incontestable mark and the incontestable EDIBLE ARRANGEMENTS Mark and Logo, Reg. No. 3141,566, defendants additionally claim that these registrations were fraudulently obtained because, following the USPTO’s initial refusal of the applications for those marks as “descriptive or generic,” the 18F Defendants allege that “Edible Arrangements submitted sworn declarations to the USPTO that it had made substantially exclusive use of ‘Edible Arrangements’ for the past five years. This statement was false and known by Edible Arrangements to be false because of its own and others’ generic usage.” (*Id.*, ¶¶ 83, 86) The 18F Defendants allege similar claims regarding Registrations No. 3,844,160 (for EDIBLE ARRANGEMENTS) and 3,844,161 (EDIBLE ARRANGEMENTS Mark and Logo). (*Id.*, ¶ 84, 86) The 18F Defendants also now

additionally claim that the EDIBLE TO GO Mark, Reg. No. 4,068,508, is “generic or at most descriptive without secondary meaning” but that Edible Arrangements somehow “nevertheless, contrary to law, obtained Registration No. 4,068,508.” (*Id.* ¶ 85, 86)

Although they claim generally that the term “Edible Arrangements” is generic, the 18F Defendants have not asked this Court to cancel EDIBLE ARRANGEMENTS, Reg. No. 4,328,107, or otherwise alleged that that mark is invalid. (*Id.*, ¶ 86, Prayer for Relief, ¶ E & Exhibit B) Moreover, the 18F Defendants’ counterclaim is devoid of any allegations of invalidity relating to the following marks, each of which is registered on the Principal Register: GET FRESH WITH EDIBLE ARRANGEMENTS!, Reg. No. 3,452,283; EDIBLE BRANDS, Reg. No. 3,654,276; WELCOME TO THE WORLD OF EDIBLE ARRANGEMENTS, Reg. No. 4,273,377; The EDIBLE TO GO Mark and Logo, Reg. No. 4,300,422; EDIBLE CARES, Reg. No. 4,471,794; and EDIBLE NUMBERS, Reg. No. 4,592,970. (*Id.*, Prayer for Relief, ¶ E & Exhibits A & B) The 18F Defendants have thus conceded that plaintiffs have valid registrations for these six marks, each of which is asserted in this action.

c. The BOUQUET Marks

The defendants’ allegations concerning the BOUQUET Marks have not substantially changed. They continue to allege that the BERRY CHOCOLATE BOUQUET Mark, Reg. No. 3,296,243, is generic or “at best, merely descriptive and Edible Arrangements had not developed secondary meaning for it.” (*Id.* ¶ 59) They allege that the incontestable BERRY TREE BOUQUET Mark and plaintiffs’ SWEETHEART BOUQUET Mark, Reg. Nos. 3,429,718 and 3,503,964, were fraudulently obtained because “[n]otwithstanding Edible Arrangements’ multiple admissions of non-exclusive rights in ‘bouquet,’ for two applications

filed in 2007, Edible Arrangements represented to the USPTO that it had made substantially exclusive use of the term ‘bouquet’ in those applications. (*Id.*, ¶ 62)

The 18F Defendants also claim, with respect to a number of plaintiffs’ BOUQUET applications filed “from June, 2011 through 2014,” that Edible Arrangements purportedly “began trumping up its claimed ‘family’ of marks by swearing it had substantially exclusive use of the term ‘bouquet’ in connection with eight of these new applications.” (*Id.*, ¶ 69) Defendants claim that “Edible Arrangements swore it had substantially exclusive use, when it [allegedly] did not ...” and thus, among other things, Registration No. 4,635,801 (JOYOUS BOUQUET) “issued as a result of fraud and is also void and invalid.” (*Id.*, ¶¶ 71-72)

With respect to the BOUQUET Marks on the supplemental register,⁴ the 18F Defendants claim that the plaintiffs have admitted that they “lacked trademark rights in those 6 terms at that time.” (*Id.*, ¶ 61) Moreover, two of those marks are allegedly generic. (*Id.*, ¶ 60 (CHOCOLATE BANANA BOUQUET), ¶ 73 (DIPPED FRUIT BOUQUET)).

The 18F Defendants have alleged no facts regarding the plaintiffs’ incontestable BERRY BOUQUET Mark, Reg. No. 3,429,717, their A BIRTHDAY BOUQUET Mark, Reg. No. 3,760,678, their SWEET ANNIVERSARY BOUQUET Mark, Reg. No. 3,853,513, or their MERRY GINGERBREAD MEN BOUQUET mark, Reg. No. 4,322,954, in Counts One, Two or Three of the Counterclaim. The allegations concerning these registrations are limited to the cancellation claim, where the 18F Defendants cursorily assert that “Registration Nos. ... 3,429,717 ... 3,760,678, ... 3853,513, ... and 4,322,954 for putative ‘Bouquet’ marks for use

⁴ Those marks are: CHOCOLATE BANANA BOUQUET, Reg. No. 3,393,667, DIPPED FRUIT BOUQUET, Reg. No. 3,396,702, BREAST CANCER AWARENESS BOUQUET, Reg. No. 3,464,761, PEANUT BUTTER BOUQUET, Reg. No. 3,694,410, FRUIT TRUFFLES BOUQUET, Reg. No. 3,750,846, PEANUT BUTTER CHOCOLATE BOUQUET, Reg. No. 3,815,967, and BLACK CAT BOUQUET, Reg. No. 4,169,485.

in connection with edible fruit arrangements are invalid and unenforceable because the terms are generic” and further claim that the marks are “merely descriptive” and none of the marks had “achieved secondary meaning or acquired distinctiveness among relevant consumers at the time the Registrations were issued by the USPTO.” (*Id.*, ¶ 203)

Moreover, there are thirteen BOUQUET Marks that remain completely unchallenged by the 18F Defendants, each of which is registered on the Principal Register of the USPTO.⁵ With respect to these thirteen marks, the 18F Defendants allege that the plaintiffs disclaimed the term “BOUQUET” in the application process and have therefore purportedly admitted that the term BOUQUET “was generic or descriptive and that [they] could not claim exclusive rights in the term alone, or at all except as used in the specific mark for which it was applying.” (*Id.*, ¶ 61; Prayer for Relief, ¶ E & Exhibit A) The 18F Defendants have thus conceded for purposes of the antitrust, CUTPA and cancellation claims that plaintiffs have valid registrations for these thirteen marks.⁶

⁵ Those marks are: EXTRA EFFORT BOUQUET, Reg. No. 3,499,017; FRUITFUL ACHIEVEMENT BOUQUET, Reg. No. 3,501,780; MORNING MOTIVATOR BOUQUET, Reg. No. 3,501,785; YOU'RE THE BEST BOUQUET, Reg. No. 3,501,786; THE ACCOMPLISHMENT BOUQUET, Reg. No. 3,501,781; THE RECOGNITION BOUQUET, Reg. No. 3,501,782; ROCK A BYE BOUQUET, Reg. No. 3,527,476; SWEET LIBERTY BOUQUET, Reg. No. 3,527,505; JOB WELL DONE BOUQUET, Reg. No. 3,527,515; WELCOME ABOARD BOUQUET, Reg. No. 3,527,514; AMBITION BOUQUET, Reg. No. 3,543,593; PATRIOTIC APPRECIATION BOUQUET, Reg. No. 3,615,353; PEARADISE BOUQUET, Reg. No. 3,704,604.

⁶ The 18F Defendants do, however, cursorily assert a blanket request for “cancellation of Edible Arrangements registrations of Bouquet marks” in the event that the Court concludes that “a party is entitled to exclusive rights in ‘Bouquet’” and the Court concludes that there is a likelihood of confusion and the Court finds that the 18F Defendants have superior rights. (Amended Counterclaim, Count Six, ¶ 209)

d. The DO FRUIT Marks

The 18F Defendants' Amended Counterclaim continues to omit any reference to the DO FRUIT Marks. The 18F Defendants do not claim that the DO FRUIT Marks are invalid or that the assertion of those marks in this action is objectively baseless. The 18F Defendants have thus conceded that those registrations are valid.

2. Plaintiffs' Purported Pattern of "Objectively Baseless Lawsuits"

The 18F Defendants' claim of a "pattern of objectively baseless lawsuits" initially was based on four actions litigated by plaintiffs or their affiliates against third parties over the past thirteen years, and six cease-and-desist letters allegedly sent to third parties in 2013. (Counterclaim, doc. # 39, ¶¶ 42-50) The 18F Defendants have now added to that tally the claims asserted here against the Delaneys, a settlement reached with Harry & David, LLC in 2014, the six opposition proceedings regarding the Fruit Bouquet applications filed with the TTAB and certain undefined "misconduct before the USPTO," which appears to be the purportedly fraudulent statements made in registering eight of plaintiffs' over forty asserted marks.⁷ (Amended Counterclaim, ¶¶ 43-55, 149) Three of the lawsuits brought against third parties involved a number of claims completely unrelated to plaintiffs' trademarks. Moreover, with respect to the trademark infringement claims, each of those purportedly "baseless"

⁷ The 18F Defendants apparently also seek to rely on a newly asserted claim that Edible Arrangements made "intentional misrepresentations to ... this Court, and other courts in executing on its scheme to disrupt competition by asserting trademark rights in these generic or merely descriptive terms" (Amended Counterclaim, ¶ 161; *see also id.* ¶¶ 112-113 (referring to undefined "representations in this action, before other courts, and in administrative actions that its [sic] owns exclusive rights in generic terms and merely descriptive terms ..."). Not only is this incendiary claim unwarranted, it is also (unsurprisingly) wholly unsupported by any specific factual allegation or identification of any allegedly fraudulent statements in the manner that is required by Fed. R. Civ. P. 9(b). As such, the Court should not consider these conclusory and inappropriate allegations in deciding this motion.

proceedings and efforts were aimed at the policing and protection of plaintiffs' federally registered marks.

a. Policing Efforts Directed At Third Parties

Of the four lawsuits initially alleged by the 18F Defendants, the first, dating back to 2002, was a suit brought *against* Edible Arrangements, LLC and one of its affiliates by Incredibly Edible Delites, Inc. *See Incredibly Edible Delites, Inc. v. Edible Arrangements, LLC*, No. 3:02-cv-1529 (D. Conn.). That suit concerned claims against Edible Arrangements for, among other things, trademark infringement; Edible Arrangements counterclaimed for breach of a settlement agreement, breach of the covenant of good faith and fair dealing, abuse of process, violation of CUTPA and trademark infringement. *Id.*, doc. #147 (Settlement Agreement and Release) at 1 (Attached hereto as Exhibit A); *see also* Amended Counterclaim, ¶ 45 (“In the Settlement Agreement entered in the Court case record in December 2005”). As defendants allege, that suit settled. (Amended Counterclaim, ¶ 44) Incident to that settlement, Incredibly Edible Delites, Inc. agreed, among other things, that it would not use EDIBLE ARRANGEMENTS or confusingly similar designations. (Exhibit A, at 4, ¶ 2(a)).

The second suit alleged as part of the “pattern” was brought by Edible Arrangements, LLC and one of its affiliates against two individuals and their company, Fresh Fruit Bouquet Company, Inc., in 2005. *Edible Arrangements Franchise Group, Inc. v. Fresh Fruit Bouquet Co.*, No. 3:05-cv-197-WWE (D. Conn.), doc. # 1 (Verified Complaint). That suit alleges that the individuals approached Edible Arrangements about becoming a franchisee, obtained trade secret and other confidential information from Edible Arrangements and then formed their own company to compete with Edible Arrangements on the basis of that information and using

Edible Arrangements’ intellectual property. *Id.*, doc. # 1 (Verified Complaint) & doc. # 170 (Amended Complaint). The only mark asserted by Edible Arrangements in that suit was EDIBLE ARRANGEMENTS. *Id.*, doc. #1, ¶ 16; doc. #170, ¶ 46(b). With respect to the trademark claim, Edible Arrangements alleged that the defendants “improperly and intentionally us[ed] the trademarks ‘Edible Arrangements,’ ‘edible’ and ‘arrangements’ as keywords and in such frequency and combination in the metatags and text of the website www.ffbc.com to mislead consumers and divert potential customers away from EA’s website.” *Id.*, doc. #170, at ¶ 46(b). As alleged by the 18F Defendants, that case also resulted in a settlement, memorialized by a consent judgment in which the parties recognized, among other things, that “because of certain post-suit modifications by [defendants], the designs on and content of [defendants’] ... websites ... do not violate any legal rights of the Plaintiffs.” *Id.*, doc. # 208 (Attached hereto as Exhibit B) (*See also* Amended Counterclaim, ¶ 47)

The alleged “pattern” did not continue until nine years later, when the plaintiffs filed suit against Tom Drummond and his company, Edible Creations, LLC, alleging copyright infringement, unfair competition and infringement of the EDIBLE Marks (as well as certain other EDIBLE formative marks). *Edible Arrangements, LLC v. Drummond*, No. 1:14-cv-315 (N.D. Ind.), doc. # 1 (Complaint). The case was reported settled on December 23, 2014, and the suit was dismissed without prejudice. *Id.*, doc. # 15 (minutes of telephonic hearing), doc. # 18 (motion for voluntary dismissal), doc. # 19 (stipulation of dismissal).

The next suit in the alleged “pattern,” also filed in 2014, was brought by plaintiffs against Provide Commerce, Inc. *See Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-cv-250-VLB (D. Conn.). That suit asserts unfair competition, dilution,

cybersquatting and infringement of the EDIBLE ARRANGEMENTS Mark and the EDIBLE ARRANGEMENTS Mark and Logo. *Id.*, doc. #32 & ¶ 9 (Amended Complaint). Provide Commerce filed its answer and has not asserted that those marks are generic, were fraudulently obtained or are otherwise invalid. *Id.*, at doc. # 35.

The 18F Defendants now additionally allege that the claims asserted against the Delaneys in this action are part of the alleged “pattern.” (Amended Counterclaim, ¶ 51) The claims asserted are not, however, “simply because June Delaney is the shareholder of a corporation that sold fruit bouquets and used the phrase ‘edible fruit arrangements’ to describe those products” (*Id.*) Rather, the claims against the Delaneys arise out of the allegation that, among other things, those two individuals used the incontestable EDIBLE ARRANGEMENTS Mark in the metadata for their website www.fruitbouquetstatenisland.com in order to intentionally mislead consumers. (Amended Complaint, ¶ 165)

The 18F Defendants also add the allegation that Edible Arrangements demanded that Harry and David, LLC “a company that does not even sell fruit bouquets” cease using the EDIBLE and EDIBLE ARRANGEMENTS Marks in promoting its products. (Amended Counterclaim, ¶ 53) As is alleged in the Amended Complaint, a dispute arose in 2013 between Edible Arrangements and Harry and David, LLC (a competitor of Edible Arrangements) “concerning Harry and David LLC’s use of Edible Arrangements’ trademarks in keywords and metadata in its Internet advertising.” (Amended Complaint, ¶ 103) That dispute was resolved through a Settlement Agreement, a copy of which is attached as Exhibit D to the Second Amended Complaint. (*Id.*, ¶ 104) As part of that Settlement Agreement, Harry and David, LLC agreed, among other things, that it and its affiliates would not “bid on or purchase any

EA Mark or phrase that includes the terms ‘Edible’ or ‘Edible Arrangements’ (including, but not limited to, ‘Edible Fruit Arrangements’) as keywords in search engines.” (*Id.* ¶ 106)

b. The TTAB Actions

Having previously excluded reference to the numerous pending TTAB proceedings, the 18F Defendants now allege that six oppositions filed by Edible Arrangements, LLC in 2012 were objectively baseless and part of a “pattern” by the plaintiffs of filing baseless proceedings. (Amended Counterclaim, ¶ 55) They now also claim they were “forc[ed] ... to file oppositions and other proceedings respecting Edible Arrangements applications and registrations to try to protect itself.” (*Id.*, ¶ 69) In fact, there are numerous cancellation and opposition proceedings that are currently pending before the TTAB.⁸ Nineteen concern challenges to marks asserted here, each of which was pending prior to the filing of this action.⁹

i. Edible Arrangements Opposes the Fruit Bouquet Applications

The 18F Defendants allege that Edible Arrangements filed six oppositions “seeking to prevent 1-800-Flowers.com from registering its Strawberry Design Fruit Bouquet Marks” and self-servingly assert that Edible Arrangements could have all relief to which it would have

⁸ The Court may properly take judicial notice of those actions in deciding this motion to dismiss. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. N.Y. 1991) (“The practice of taking judicial notice of public documents is not new.... In the instant matter, the Offer to Purchase and the Joint Proxy Statement were part of public disclosure documents filed with the SEC, and the plaintiff was put on notice by the defendants' proffer of the documents that the district court might consider them.”); *Nextdoor.com, Inc. v. Abhyanker*, No. C-12-5667 EMC, 2013 U.S. Dist. LEXIS 101440, at *27 (N.D. Cal. July 19, 2013) (“As courts ‘may take judicial notice of court filings and other matters of public record,’ the state court, and TTAB filings are the proper subject of judicial notice here.”).

⁹ Those proceedings are: Cancellation No. 92056225, 92057836, 92057865, 92057864, 92057863, 92058129, 92058131, 92058142, 92058233, 92057945, 92057860, 92057862, 92058241, 92058614, 92058668, 92058669, 92058714, 92060296, Opposition No. 91221983. Each of those proceedings is currently suspended pending resolution of this action.

been entitled by agreement but “insisted on proceeding with those actions [and] prolonged the proceedings for almost three years and then decided it would ask to have them suspended.” (Amended Counterclaim, ¶ 55) As is reflected in the TTAB record, on February 13, 2012, Edible Arrangements, LLC opposed defendants’ six “Fruit Bouquets” applications, asserting its two incontestable BOUQUET Marks. *See Edible Arrangements, LLC v. 1-800-Flowers.com, Inc.*, Opposition Nos. 91203846, 91203866, 91203868, 91203873, 91203891, 91203907 (TTAB). Those proceedings were consolidated as one action, which was suspended pending resolution of a declaratory judgment action filed by 1-800-Flowers.com, Inc.¹⁰ (Opposition No. 91203846, doc. no. 5, 7) The consolidated proceeding was ultimately resumed and proceeded until the filing of this action, at which time it was suspended with 1-800-Flowers.com, Inc.’s consent. (Opposition No. 91203846, doc. no. 37).

ii. In Response, 1-800-Flowers Seeks to Cancel and Oppose Virtually Every Mark and Application Filed By Edible Arrangements

In response to the filing of the oppositions to the Fruit Bouquet applications, 1-800-Flowers.com, Inc. launched a campaign of proceedings against Edible Arrangements’ marks,

¹⁰ The 18F Defendants mischaracterize that declaratory judgment action as one in which “1-800-Flowers sought to address Plaintiffs assertions of exclusivity with respect to ‘bouquet’” (Amended Counterclaim, ¶ 68) The issue there was actually a “determination whether Plaintiff’s use of its FRUIT BOUQUETS Marks infringes or otherwise interferes with Defendant’s rights in its BERRY Marks [defined as BERRY BOUQUET, BERRY TREE BOUQUET and DIPPEDFRUIT.COM].” *1-800-Flowers.com, Inc. v. Edible Arrangements, LLC*, Docket No. 12-Civ.-1483, doc. # 1, Complaint (attached hereto as Exhibit C) That action was, as successfully advanced by Edible Arrangements in moving to dismiss, premature as no claim of infringement had been advanced at that time and, as also argued by Edible Arrangements, an improper attempt to deprive Edible Arrangements of its choice of forum to exploit a different legal standard. (*Id.* doc. # 13)

filing approximately forty proceedings from August of 2012 until the present.¹¹ Over thirty of those proceedings seek to cancel or oppose registration of Edible Arrangements BOUQUET marks based expressly on the oppositions filed by Edible Arrangements. In each of those retaliatory proceedings, 1-800-Flowers.com, Inc. claimed that because Edible Arrangements had alleged that the Fruit Bouquet marks were confusingly similar to its incontestable BERRY BOUQUET and BERRY TREE BOUQUET marks, there was therefore an admitted likelihood of confusion between any BOUQUET mark used by Edible Arrangements and the BOUQUET OF FRUITS marks obtained by 1-800-Flowers.com, Inc. in 2011.¹² None of these proceedings, filed over the course of two years prior to the filing of this action, alleged genericness, descriptiveness or fraud as a grounds for cancellation or opposition.

In addition to those thirty-one Cancellation and Opposition proceedings, on February 11, 2014, 1-800-Flowers.com, Inc. filed proceedings to cancel Edible Arrangements'

¹¹ The 18F Defendants' hyperbolic and baseless claims against Edible Arrangements thus are simply an attempt to paint the plaintiffs with the same brush to take the focus off of their intentional infringement of plaintiffs' trademark rights. (*E.g.*, Amended Counterclaim ¶ 54 ("But those competitors that have had the audacity to challenge Edible Arrangements' misconduct, such as 1-800-Flowers, have been met with Edible Arrangements' scorched-earth litigation tactics, including a barrage of vexatious and frivolous claims."))

¹² 1-800-Flowers.com, Inc. filed the following thirty-one proceedings, alleging priority and likelihood of confusion: August 1, 2012, Opposition Nos. 91206347, 91206346, 91206345; August 8, 2012, Opposition No. 91206479; September 24, 2012, Cancellation No. 92056225; October 26, 2012, Opposition Nos. 91207723 and 91207722; November 26, 2012, Opposition No. 91208169; November 27, 2012, Opposition Nos. 91208182 and 91208184; July 17, 2013, Opposition No. 91211606; September 9, 2013, Cancellation No. 92057836; September 16, 2013, Cancellation Nos. 92057860, 92057862, 92057863, 92057864 and 92057865; September 23, 2013, Cancellation No. 92057945; November 1, 2013, Cancellation Nos. 92058131, 92058142, 92058233 and 92058129; November 13, 2013, Opposition No. 91213458; November 18, 2013, Cancellation No. 92058241 and Opposition Nos. 91213541, 91213540, 91213538; January 9, 2014, Opposition No. 91214392; January 16, 2014, Opposition No. 91214510; February 10, 2014, Opposition No. 91214846; April 1, 2014, Opposition No. 91215676; November 3, 2014, Cancellation No. 9206029). Each of these proceedings was ultimately consolidated with Opposition No. 91206345.

incontestable BERRY BOUQUET and BERRY TREE BOUQUET, claiming fraud. *1-800-Flowers.com, Inc. v. Edible Arrangements, LLC*, Cancellation Nos. 92058668 & 92058669, Doc. # 8, at 4-7 (TTAB) (Attached hereto as Exhibit D). 1-800-Flowers.com, Inc. alleged that the fraudulent statements were in the Combined Section 8 & 15 Declaration of Use and Incontestability. *Id.* That claim was dismissed with prejudice by the TTAB, which found that “18F’s allegations do not sufficiently allege fraud” and “[w]hile the Board is liberal in allowing amendments to pleadings, in this posture, any such amendment of the fraud claims would be futile.” *Id.* at 6-7. That decision was not appealed. No claim was ever pursued by 1-800-Flowers.com, Inc. at the TTAB asserting that Edible Arrangements, LLC procured any of its BOUQUET marks through fraud in the application process.

On February 21, 2014, Edible Arrangements filed a petition to cancel 1-800-Flowers.com, Inc.’s registration for the mark YOUR BEST SMILE BOUQUET. *See Edible Arrangements, LLC v. 1-800-Flowers.com, Inc.*, Cancellation No. 92058714 (TTAB). In that proceeding, which is conspicuously absent from the allegations of the Amended Counterclaim and which was filed nine months before this action was instituted, Edible Arrangements expressly alleged rights in a BOUQUET family of marks. (*Id.*, doc. # 1 (Exhibit E)) In response, 1-800-Flowers.com, Inc. counterclaimed seeking to cancel twelve of Edible Arrangements’ BOUQUET Marks.¹³ (*Id.*, doc. # 5 (Exhibit F)) Despite its claims here that the term BOUQUET standing alone is not protectable and that, consequently, the assertion of a

¹³ Those are: A BIRTHDAY BOUQUET; BLACK CAT BOUQUET; BREAST CANCER AWARENESS BOUQUET; CHOCOLATE BANANA BOUQUET; DIPPED FRUIT BOUQUET; FRUIT TRUFFLES BOUQUET; MERRY GINGERBREAD MEN BOUQUET; PATRIOTIC APPRECIATION BOUQUET; PEANUT BUTTER BOUQUET; PEANUT BUTTER CHOCOLATE BOUQUET; PEARADISE BOUQUET; and SWEET ANNIVERSARY BOUQUET. *See* Cancellation No. 92058714, at doc. # 5.

family of BOUQUET Marks is so fundamentally baseless that it gives rise to antitrust liability, 1-800-Flowers.com, Inc.’s cancellation counterclaim before the TTAB relied on the same grounds discussed above -- priority and likelihood of confusion. There was no claim of fraud or violation of the antitrust laws arising out the assertion of a family of BOUQUET marks.

Not content with its attempts to interfere with Edible Arrangements’ efforts to protect its BOUQUET Marks, on February 4, 2014, 1-800-Flowers.com, Inc. filed a petition to cancel the EDIBLE Mark, claiming that the mark is “highly descriptive” and Edible Arrangements failed to use the term as a mark prior to the registration. *See 1-800-Flowers.com, Inc. v. Edible Arrangements, LLC*, Cancellation No. 92058614 (TTAB), doc. # 1. It was not until four months later that 1-800-Flowers.com, Inc. moved to amend its petition to add genericness as grounds for cancellation. *Id.*, doc. # 7. That motion was opposed (*id.*, doc. # 8) and was denied without prejudice as the proceeding is currently suspended pending resolution of this action. *Id.*, doc. # 16. The 18F Defendants did not challenge the validity of any other EDIBLE Mark before the TTAB and, notwithstanding the numerous TTAB proceedings pending between the parties, have never sought to challenge the DO FRUIT Marks.

The 18F Defendants’ allegations remain insufficient to overcome application of the *Noerr-Pennington* doctrine, which immunizes plaintiffs’ efforts to police and protect their valuable trademark rights.

III. LEGAL STANDARD

“A motion to dismiss a counterclaim is evaluated under the same standard as a motion to dismiss a complaint.” *Radiancy, Inc. v. Viatek Consumer Prods. Group, Inc.*, No. 13-cv-3767, 2014 U.S. Dist. LEXIS 46024, at *6 (S.D.N.Y. April 1, 2014) (citation omitted).

Under Rule 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. To survive dismissal, a plaintiff must provide the grounds upon which its claim rests through factual allegations sufficient “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although a court must accept as true all factual allegations in the complaint, this tenet does not apply to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “While Rule 8 does not require detailed factual allegations, [a] pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678.

“In deciding a motion to dismiss under Rule 12(b)(6), the Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiffs favor.” *Musab Abuhamdan v. Blyth, Inc.*, 9 F. Supp. 3d 175, 187 (D. Conn. 2014). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, however, are not entitled to the assumption of truth.” *Id.* (citing *Iqbal*, 556 U.S. at 678). A court should dismiss a complaint when it has not crossed “the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680. “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Abuhamdan*, 9 F. Supp. 3d 175 at 187 (same). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.

In deciding a motion to dismiss pursuant to Rule 12(b)(6), this Court “is limited to the facts as asserted within the four corners of the complaint, the documents attached to the

complaint as exhibits, and any documents incorporated by reference.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The Court may also consider “matters of which judicial notice may be taken and documents either in plaintiffs’ possession or of which plaintiffs had knowledge and relied on in bringing suit.” *Roth v. CitiMortgage Inc.*, 756 F.3d 178, 180 (2d Cir. 2014). In the context of a motion to dismiss a claim of “sham litigation,” the court may consider the records of the underlying allegedly “sham” litigation. *Twin City Bakery Workers and Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 224 (S.D.N.Y. 2002) (“As both sides agree, this Court, even on a motion to dismiss, may take cognizance not only of those orders of Judge Jones expressly referenced in the Amended Complaint but also of her other orders and related public records in the case before her.”); *Bio-Technology Gen. Corp. v. Genentech, Inc.*, 886 F. Supp. 377, 381 (S.D.N.Y. 1995) (“Even on a Rule 12(b)(6) motion this court may properly take notice of documents outside of the four corners of the complaint.”).

IV. COUNTS ONE, TWO AND THREE OF THE COUNTERCLAIM SHOULD BE DISMISSED.

Plaintiffs had more than the probable cause required by the Supreme Court to invoke *Noerr-Pennington* to immunize their efforts to police and protect their trademarks and defendants’ allegation of a “pattern” of bringing baseless litigation is simply insufficient to strip the plaintiffs of that immunity. Accordingly, Counts One, Two and Three of the Counterclaim must be dismissed.

A. The *Noerr-Pennington* Doctrine Bars the 18F Defendants’ Antitrust Claims

Plaintiffs’ efforts to police and protect their federally registered trademarks fall squarely within the ambit of *Noerr-Pennington* immunity.

“[L]awsuits have only rarely been treated as part of an antitrust conspiracy.” *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1286 (E.D.N.Y. 1987) (quotation marks omitted). Moreover, “[a]ntitrust claims and counterclaims based on allegedly over-aggressive conduct of the trademark owner and bad-faith infringement litigation have consistently failed on the merits.” *Baltimore Luggage Co. v. Samsonite Corp.*, No. 86-503, 1991 U.S. Dist. LEXIS 12359, at *21 (D. Md. June 24, 1991). Efforts to protect a registered trademark cannot be the basis for an antitrust claim absent “evidence that the suit was brought in bad faith, to harass, or in any way such that it would not be immune from antitrust strictures under the *Noerr-Pennington* doctrine.” *Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68, 74 (2d Cir. 1987) (citation omitted); *Baltimore Luggage*, 1991 U.S. Dist. LEXIS 12359, at *22 (“A good faith effort to enforce a trademark is not the kind of exclusionary conduct condemned by § 2 of the Sherman Act.”).

“[T]he *Noerr-Pennington* doctrine holds that, by virtue of the right to petition guaranteed by the *First Amendment*, attempts to influence legislative, executive, administrative or judicial action are immune from antitrust liability.”¹⁴ *Twin City Bakery Workers and Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 223 (S.D.N.Y. 2002); *Marchon Eyewear, Inc. v. Rothanberg, Inc.*, No. 98 Civ. 1932, 2002 U.S. Dist. LEXIS 19628, at *21 (E.D.N.Y. Oct. 7, 2002) (“The *Noerr-Pennington* Doctrine allows a party to petition the government for redress of a grievance, such as a patent infringement claim, without the

¹⁴ *Noerr-Pennington* also immunizes petitioning activity from a claim that such activity violates CUTPA. *Uniroyal Chem. Co. v. Syngenta Crop Protection, Inc.*, No. 3:01cv2253(AHN), 2006 U.S. Dist. LEXIS 18853, at *21 (D. Conn. Feb. 28, 2006) (“Uniroyal’s claims are therefore immunized under the *Noerr-Pennington* doctrine from Syngenta’s counterclaims for violation of CUTPA and interference with business expectancies.”); see also *Milso Indus. Corp. v. Nazzaro*, No. 3:08cv1026(AWT), 2012 U.S. Dist. LEXIS 123999, at *66 (D. Conn. Aug. 30, 2012).

petitioning party being subject to antitrust claims as a result of its efforts.”) (citations omitted); *Mover’s & Warehousemen’s Assoc. of Greater N.Y., Inc. v. Long Island Moving & Storage Assoc., Inc.*, No. 98 CV 5373, 1999 U.S. Dist. LEXIS 20667, at *17-*18 (E.D.N.Y. Dec. 27, 1999) (The *Noerr-Pennington* doctrine “is derived from First Amendment principles guaranteeing the right to petition the government. To protect this fundamental right, *Noerr-Pennington* immunizes legislative, executive and judicial activity from antitrust liability even if the activity is designed to eliminate competition.”) (internal citations omitted).

“Courts have extended *Noerr-Pennington* to encompass concerted efforts incident to litigation, such as prelitigation ‘threat letters.’” *Primetime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92, 100 (2d Cir. 2000) (citation omitted); *DirectTV, Inc. v. Lewis*, No. 03-CV-6241-CJS-JWF, 2005 U.S. Dist. LEXIS 8187, at *14 (W.D.N.Y. April 29, 2005) (“[P]relitigation activities ... are protected by the *Noerr-Pennington* doctrine, a judicially created doctrine that protects a party’s entitlement to act in furtherance of the *First Amendment* right to petition governmental authorities for redress.”).

The activity complained of here -- the petitioning of this Court, other courts and the TTAB and pre-litigation efforts -- are plainly immunized from antitrust and CUTPA liability under the *Noerr-Pennington* doctrine. Each of those efforts is a core petitioning activity long held to be immune. *E.g.*, *Twin City Bakery*, 207 F. Supp. 2d at 223; *Marchon Eyewear, Inc.*, 2002 U.S. Dist. LEXIS 19628, at *21; *Mover’s & Warehousemen’s Assoc.*, 1999 U.S. Dist. LEXIS 20667, at *17-*18.

B. The “Sham” Exception Does Not Apply to Vitate *Noerr-Pennington* Immunity

1. The “Sham” Exception to *Noerr-Pennington*

“Courts have ... recognized a limited exception to *Noerr-Pennington* immunity known as the ‘sham’ exception.” *Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *22; *Twin City Bakery*, 207 F. Supp. 2d at 223 (“*Noerr-Pennington* immunity is not, however, absolute. Among other things, it does not protect the bringing of ‘sham’ litigation”) (citation omitted); *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 592 (W.D.N.Y. 2000).

“The sham exception to the *Noerr-Pennington* doctrine provides that ‘activity ostensibly directed toward influencing governmental action does not qualify for *Noerr* immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.’” *Bath Petroleum Storage*, 129 F. Supp. 2d at 592-93 (citation omitted).

“Essentially, a defendant’s activities are a sham where they are frivolous and instituted solely for the purpose of injuring, harassing or delaying the opponent.” *Id.* at 593. The 18F Defendants cannot establish that this exception applies here.

“In *Professional Real Estate Investors, Inc.*, the Supreme Court explained how the [“sham”] exception applies to court proceedings. In doing so, the Court outlined a two-part definition of ‘sham’ litigation[.]” *Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *22; *Twin City Bakery*, 207 F. Supp. 2d at 223.

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s

subjective motivation.¹⁵

Prof. Real Estate Invs., 508 U.S. at 60-61.¹⁶ “Under the objective prong of the sham exception, ... sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief.” *Prof. Real Estate Invs.*, 508 U.S. at 62; *see also Twin City Bakery*, 207 F. Supp. 2d at 223.

“The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation.” *Prof. Real Estate Invs.*, 508 U.S. at 62; *Bath Petroleum Storage*, 129 F. Supp. 2d at 593 (“A finding that a defendant had probable cause to institute legal proceedings ends the inquiry, regardless of defendant’s subjective intent.”). “Probable cause to institute civil proceedings requires no more than a ‘reasonable belief that there is a chance that [a] claim may be held valid upon adjudication.’” *Prof. Real Estate Invs.*, 508 U.S. at 62-63 (citation omitted).

“When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant’s position could realistically expect success on the merits of the challenged lawsuit. Under [the two-prong standard], therefore, a proper probable-cause determination *irrefutably*

¹⁵ It is not enough to demonstrate that a plaintiff will not prevail or has not done so to establish that the suit was a sham. The suit must have been “objectively baseless” and “[t]he court must remember that ‘even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.’” *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 n.5 (1993).

¹⁶ The *Professional Real Estate* analysis may properly be conducted at the motion to dismiss stage and, indeed, should be conducted at this stage where possible “in order to avoid chilling a litigant’s exercise of the right to petition.” *Twin City Bakery Workers and Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 223 (S.D.N.Y. 2002) (citing cases); *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 593 (W.D.N.Y. 2000) (“Where there is no dispute over the predicate facts of the underlying legal proceeding, the court may decide probable cause as a matter of law.”) (dismissing antitrust claims).

demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.” *Prof. Real Estate Invs.*, 508 U.S. at 63 (emphasis added).

“The rationale of the *Noerr-Pennington* doctrine is to protect the right of plaintiffs to petition the government unless the plaintiffs have *no* reasonable claim.” *Uniroyal Chem. Co.*, 2006 U.S. Dist. LEXIS 18853, at *22. Accordingly, “litigation will not be considered a ‘sham’ so long as at least one claim in the lawsuit has objective merit.” *Dentsply Int’l, Inc. v. New Tech. Co.*, No. 96-272 MMS, 1996 U.S. Dist. LEXIS 19846, at *9 (D. Del. Dec. 19, 1996) (citing cases); *see also Uniroyal Chem. Co. v. Syngenta Crop Protection, Inc.*, No. 3:01cv2253(AHN), 2006 U.S. Dist. LEXIS 18853, at *21-*22 (D. Conn. Feb. 28, 2006) (“A lawsuit is not rendered a sham merely because one form of relief sought may be objectively unreasonable.”); *Bath Petroleum Storage*, 129 F. Supp. 2d at 595 (“Based upon the fact that many of defendant’s objections are not being challenged here by plaintiffs, and that there was a factual basis for many of defendants’ claims, the Court finds that defendants had probable cause for their objections.”); *Twin City Bakery*, 207 F. Supp. 2d at 224 (“These determinations, allowing claims of infringement of four of the six asserted patents to proceed beyond summary judgment, and two of the four to proceed through trial, preclude any contention that defendants’ litigation is so baseless as not to warrant *Noerr-Pennington* immunity.”). To conclude otherwise “would, in effect, measure the merit of a suit by its weakest aspect, not its strongest claim as the *Noerr-Pennington* doctrine clearly contemplates.” *Uniroyal Chem. Co.*, 2006 U.S. Dist. LEXIS 18853, at *21-*22.

2. This Is Not a “Sham” Suit

This suit asserts infringement and dilution of federally registered trademarks and asserts rights never previously challenged as violative of the antitrust laws, notwithstanding the history of proceedings before the TTAB dating back to February of 2012. Defendants cannot demonstrate a lack of probable cause and, therefore, this suit cannot be “objectively baseless.”

First, as noted above, the 18F Defendants’ Counterclaim is utterly silent on plaintiffs’ DO FRUIT Marks and six of plaintiffs’ EDIBLE Marks. Moreover, the 18F Defendants do not seek to cancel an additional thirteen of plaintiffs BOUQUET Marks, alleging only that plaintiffs have purportedly admitted that they have no exclusive right to use the term “BOUQUET” “alone, or at all except as used in the specific mark for which it was applying.” (Amended Counterclaim, ¶ 61) By not seeking to cancel these twenty-two marks here, the 18F Defendants have conceded their validity. Because there are undisputedly meritorious claims asserted in this action, this action cannot be “objectively baseless”; plaintiffs’ claims of infringement of those marks undisputedly have a basis. *Uniroyal*, 2006 U.S. Dist. LEXIS 18853, at *22; *Dentsply Int’l*, 1996 U.S. Dist. LEXIS 19846, at *8-*9 (citing cases); *Bath Petroleum Storage*, 129 F. Supp. 2d at 595; *Twin City Bakery*, 207 F. Supp. 2d at 224.

Moreover, the 18F Defendants’ characterization of plaintiffs’ Six Petal Daisy Design as “functional” and allegation that others have used that design are simply not sufficient to strip the plaintiffs of *Noerr-Pennington* immunity. The characterization of plaintiffs’ design as functional is a conclusion that need not be taken as true by this Court. *Iqbal*, 556 U.S. at 678 (“[A] pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do.”). As the Second Circuit instructs:

trade dress is functional, and thus not protectable, when it is "essential to the use or purpose of the article." A product design is functional when "certain features of the design are essential to effective competition in a particular market." In other words, "the absence of alternative constructions performing the same function . . . renders the feature functional."

Cartier, Inc. v. Sardell Jewelry, Inc., No. No. 07-1813-cv, 2008 U.S. App. LEXIS 19277, at *13 (2d Cir. Sept. 8, 2008). A determination of whether plaintiffs' Six Petal Daisy Design will thus require a number of factual determinations at trial and the 18F Defendants' conclusory allegations cannot suffice to establish functionality at the pleading stage.

The conclusory allegation that others (including the defunct Fresh Fruit Bouquet Company) have used this design -- even taken as true -- does not raise the 18F Defendants' claim that this action is wholly without basis from conceivable to plausible. *Iqbal*, 556 U.S. at 663 (A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680 (A court should dismiss a complaint when it has not crossed "the line from conceivable to plausible."). The Court may draw any number of inferences from the allegation that some others have allegedly used the design. Those others may have been licensing the design from plaintiffs, or plaintiffs may have purchased rights in the design from those "others" or plaintiffs may be appropriately waiting to assert rights against those others until such time as that use rises to a level that is not merely *de minimis*.¹⁷

¹⁷ The Second Circuit has long recognized that:

A plaintiff is not "obligated to sue until its right to protection has ripened such that plaintiff knew or should have known, not simply that defendant was using the potentially offending mark, but that plaintiff had a provable infringement claim against defendant." Under the doctrine of progressive encroachment, a plaintiff has "some latitude in the timing of its bringing suit" because the laches period begins to run, not at the first sign of a *de minimis* infringing use, but rather, when "the likelihood of confusion looms large." We have

“[W]hat *Twombly* and *Iqbal* teach is that where there are other plausible explanations, it is not sufficient to speculate in a complaint. *This is particularly true where the expensive process of discovery in an antitrust suit is at stake.*” *PODS Enterprises, Inc. v. ABF Freight Sys., Inc.*, No. 8:11-cv-84-T-33MAP, 2011 U.S. Dist. LEXIS 119657, at *13 (M.D. Fla. Oct. 17, 2011) (citations omitted) (emphasis added).

Additionally, the 18F Defendants’ dogged claim that Edible Arrangements cannot have any rights in a BOUQUET family of marks (and knows it) because the term BOUQUET is generic does not and cannot vitiate *Noerr-Pennington* immunity. First, that claim depends on the determination that the term BOUQUET is, in fact, generic -- a conclusion that should not be taken as true merely because the 18F Defendants have alleged it. *Iqbal*, 556 U.S. at 678 (court must accept as true all *factual* allegations not legal conclusions). In any event, however, even if the Court were to find that the term BOUQUET is generic with respect to cut fruit arrangements, such a finding would not render this suit “objectively baseless.” Even the 18F Defendants, who portray the genericness of BOUQUET as patently obvious, did not concoct such a claim until *after* the filing of this suit notwithstanding the fact that the family of BOUQUET marks had been asserted in previous TTAB proceedings. (See Ex. F & G) It is simply not the case that *no* reasonable litigant could expect success on the merits of that claim.

Lastly, plaintiffs have valid registrations for each of the trademarks that they have asserted and, at least with respect to the marks registered on the principal register, those registrations create a presumption of validity and a “strong presumption that the term is not

recognized that “any other rule would require each trademark owner to sue first and ask questions later, and would foster meritless litigation.”

Black Diamond Sportswear, Inc. v. Black Diamond Equip., Ltd., No. 06-3508-cv, 2007 U.S. App. LEXIS 23515, *4-*5 (2d Cir. Oct. 5, 2007) (citations omitted).

generic, or, if merely descriptive, is accorded secondary meaning by the relevant public.”

Horizon Mills Corp. v. QVC, Inc., 161 F. Supp. 2d 208, 214 (S.D.N.Y. 2001) (citation omitted); 15 U.S.C. § 115(a) (registration “shall be *prima facie* evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce”).

Thus, the court in *PODS Enterprises, Inc.*, 2011 U.S. Dist. LEXIS 119657 dismissed the defendants’ Sherman Act claim, which was based on facts that are very similar to those alleged by the 18F Defendants in the Counterclaim. There, the defendants alleged that plaintiff’s infringement action asserting the PODS Mark was objectively baseless because:

PODS “has no reasonable basis to believe that it would be successful in a trademark infringement suit to enforce the PODS mark against ABF and against ABF’s fair and descriptive use of the ‘pods’ term. ABF further allege[d] that PODS filed suit against ABF for anticompetitive purposes. ABF asserts that PODS “is well aware that the term ‘pods’ is generic’ and that ‘ABF’s use of the term ‘pod’ and ‘pods’ is and has always been fair and descriptive.’ ABF argues that despite this knowledge, PODS brought suit against ABF in bad faith.

Id. at *11 (internal citation omitted). The defendant further alleged that “PODS has filed trademark infringement lawsuits against other competitors ... and PODS ‘has had no cases where its claimed right to exclude use of the generic or descriptive term ‘pods’ was adjudicated on the merits.” *Id.* at *13-*14. The defendant also alleged that “the registration of ‘pods’ as a trademark without disclaiming the generic use of the term constitutes anticompetitive conduct not immunized by the *Noerr-Pennington* doctrine.” *Id.* at *14. Lastly, the defendant alleged that the act of sending of numerous cease and desist letters was not protected by *Noerr-Pennington*. *Id.* at *14-*15.

The court disagreed on all fronts, finding that notwithstanding the fact that the

defendant “offers a number of facts to support its allegation that the ‘pods’ mark is or has become generic,”

The fact remains, however, that PODS holds four registered trademarks -- indeed, ABF seeks cancellation of the registrations. Registration of a mark provides the plaintiff with a presumption that the mark is not generic, which may be overcome by proof of genericness. Even if ABF’s allegations ultimately prove that the “pods” mark has become generic, they do not show at this juncture that PODS’s lawsuit is objectively baseless.

Id. at *12 (internal citation omitted).

The court further recognized, in response to defendants’ claim that nothing more was required at the pleadings stage other than an allegation that “Plaintiff engaged in various conduct, including bringing this baseless suit” that, as noted above, “where there are other plausible explanations, it is not sufficient to speculate in a complaint. *This is particularly true where the expensive process of discovery in an antitrust suit is at stake.*” *Id.* at *13 (citations omitted) (emphasis added); *see also Whirlpool Props. v. LG Elecs. U.S.A.*, No. 1:03-cv-414, 2005 U.S. Dist. LEXIS 30311, at *82 (W.D. Mich. Nov. 17, 2005) (“Many of defendants’ allegations of fraud do not involve matters of fact. Defendants allege fraud arising from plaintiffs’ failure to concede in their trademark application that the term Whisper Quiet was generic and its assertions that the mark was fanciful and not descriptive. These are matters of characterization and opinion, not fact.”); *id.* at *82-*83 (“To the extent that defendants are arguing that Whirlpool failed to disclose the fact of prior use by others, defendants’ allegations are legally insufficient, because they presuppose a duty that the law does not recognize. A registration applicant has no duty to investigate and report to the PTO all other possible users of the same or similar mark. Only in the rare circumstance that another user of the same mark has rights that are “clearly established,” must this use be disclosed. Rights are only considered

"clearly established" if they have been determined by court decree, a settlement agreement, or a trademark registration. In most cases, the registration applicant has no obligation to report other users. If an applicant has a good-faith belief that it is the senior user, then the oath cannot be fraudulent.") (internal citation omitted).

Here, plaintiffs have alleged that their registered marks have been infringed. At least as to the marks registered on the principal register, those registrations are presumptively valid.¹⁸ The 18F Defendants' claims of invalidity in this action (which, with one exception,¹⁹ were not advanced during the TTAB proceedings), are irrelevant to the issue of objective reasonableness. Until the presumption of validity is overcome, plaintiffs' marks are valid and, thus, were valid at the time this suit was brought. *DISH Network, LLC v. Fun Dish Inc.*, No. 1:08cv1540, 2010 U.S. Dist. LEXIS 137926, at *23-*24 (N.D. Ohio July 30, 2010) ("Registration of a trademark gives rise to a rebuttable presumption that the trademark is valid. Although several of the defendants' other counterclaims challenge the validity of the registered trademarks, the court has not ruled on those claims, and the registered trademarks are presumptively valid at this point.") (citation omitted). The bare assertion of genericness and

¹⁸ Moreover, contrary to the allegations in the Amended Counterclaim, registration on the supplemental register is not -- as a matter of law -- an admission by the plaintiffs that they lack any trademark rights in those marks. 15 U.S.C. § 1095 ("Registration of a mark on the supplemental register *shall not constitute an admission that the mark has not acquired distinctiveness.*" (emphasis added)).

¹⁹ The 18F Defendants attempted to amend the petition to cancel the EDIBLE Mark based on a claim of genericness. *1-800-Flowers.com, Inc. v. Edible Arrangements, LLC*, Cancellation No. 92058614 (TTAB), doc. # 7. The 18F Defendants did not assert genericness against any other mark at issue in the TTAB (or challenge the validity of any other EDIBLE Mark or DO FRUIT Mark). Moreover, the only claims of fraud asserted at the TTAB, in relation to the BERRY BOUQUET AND BERRY TREE BOUQUET marks, stemmed from alleged statements made in Edible Arrangements' Combined Statement of Use and Incontestability, not from the application process and those claims were dismissed. No claim of fraud in the procurement of any of the trademarks at issue here or in the TTAB was asserted prior to the filing of the 18F Defendants' Counterclaim.

fraud is not enough to establish that this suit is an “objectively baseless” sham. *PODS*, 2011 U.S. Dist. LEXIS 119657, at * 13; *Whirlpool Props.*, 2005 U.S. Dist. LEXIS 30311, at *82.

Accordingly, the plaintiffs’ efforts to police and protect their registered marks cannot be “objectively baseless.” Indeed, plaintiffs have an obligation to do so. *See Black Diamond Sportswear, Inc. v. Black Diamond Equip., Ltd.*, No. 06-3508-cv, 2007 U.S. App. LEXIS 23515, at *7 (2d Cir. Oct. 5, 2007) (*quoting* 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 31:38, at 31-97 (4th ed. 2007) (trademark owner has “duty to police its rights against infringers”)); *Barq’s Inc. v. Barq’s Beverages, Inc.*, 677 F. Supp. 449, 452 (E.D. La. 1987) (“The owner of a trademark has the duty to exercise supervision and control over the use of its mark by others and over the quality of the product to which the mark applies. The purpose of such a requirement is to protect the public from deception.”). Plaintiffs’ registrations provide plaintiffs with at least probable cause for bringing this suit, which establishes irrefutably that the *Noerr-Pennington* doctrine applies and the 18F Defendants’ Sherman Act and CUTPA counterclaims should be dismissed. *See DISH*, 2010 U.S. Dist. LEXIS 137926, at *24 (“Federal courts have found that ‘efforts to protect trademark rights, even those that go as far as bringing suit against a party who has allegedly infringed upon or diluted the trademark owner’s rights ... do not constitute violations of antitrust law.... [L]egal efforts to protect trademark rights simply do not constitute a restraint of trade in violation of antitrust laws.’”) (citing cases) (citation omitted); *Gardner v. Clark*, 101 F. Supp. 2d 468, 472-73 (N.D. Miss. 2000) (dismissing antitrust claim based on allegation that plaintiffs “falsely claim[ed] exclusive ownership of the trademark registration of The Coasters,” finding that plaintiff’s “position, which is supported by documentation verifying his

trademark registration, is that he has rights in The Coasters trademark. The court is of the opinion that his claim, that those rights were infringed upon by actions taken by the Defendants, is reasonably calculated to elicit a favorable outcome.”); *Barq’s Inc.*, 677 F. Supp. at 454 (“Utilization of the courts in a manner which is in accordance with the spirit of the law is exempt from the antitrust laws.”) (citation omitted).

C. Defendants Have Not Alleged a “Pattern” or “Series” of Sham Litigation

In the course of their forty-six page Counterclaim, the 18F Defendants cited to four lawsuits and six demand letters, all directed to different entities over the course of thirteen years, as the basis for the claim that plaintiffs “engaged in a pattern of baseless efforts to assert trademark rights” (Counterclaim, ¶¶ 42-50, 85) The 18F Defendants now additionally point to the claims advanced against the Delaneys in this suit, a settlement reached with Harry & David, LLC and the six opposition proceedings filed by Edible Arrangements, LLC against the Fruit Bouquet applications.²⁰ (Amended Counterclaim, ¶¶ 53-55; *see also* ¶ 149) The 18F Defendants’ allegations are not sufficient to vitiate *Noerr-Pennington* immunity.

1. The *Primetime 24* Test Does Not Apply Here

In *Primetime 24*, 219 F.3d at 101, the Second Circuit determined that the two-step inquiry set forth in *Professional Real Estate Investors* “applies to determining ‘whether a single action constitutes sham petitioning.’” *See also Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *23 (same); *Surface Supplied, Inc. v. Kirby Morgan Dive Sys., Inc.*, No. C-13-0575,

²⁰ The 18F Defendants also cite to the purported “misconduct” by Edible Arrangements, LLC before the USPTO, which, as is discussed below, is legally insufficient to vitiate *Noerr-Pennington* immunity. (Amended Counterclaim, ¶ 149 (“Edible Arrangements engaged in a campaign of improper conduct before the USPTO. The series of actual and threatened lawsuits, legal claims, and misconduct before the USPTO collectively amount to a pattern of sham petitioning activities”))

2013 U.S. Dist. LEXIS 143478, at *16 (N.D. Cal. Oct. 3, 2013) (The *Professional Real Estate Investors* test applies “[i]f the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits)”).

A different test applies “[i]n cases in which ‘the defendant is accused of bringing a whole series of legal proceedings’” *Primetime 24*, 219 F.3d at 101. Then,

the test is not “retrospective” but “prospective”; “Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?” ... [I]t is immaterial that some of the claims might, “as a matter of chances,” have merits. The relevant issue is whether the legal challenges “are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.”

Id.; *Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *23-*24.

The *Primetime 24* test does not apply “absent a large volume of repeated, consistently baseless litigation.” *In re Fresh Del Monte Pineapple Antitrust Litig.*, No. 04MD1628, 2007 U.S. Dist. LEXIS 1372, at *51 n.19 (S.D.N.Y. Jan. 9, 2007); *Applera Corp. v. MJ Research, Inc.*, 303 F. Supp. 2d 130, 133 (D. Conn. 2004) (“*Primetime*, however, does not apply to this case, as this case concerns not ‘simultaneous and voluminous’ legal proceedings, but rather a single lawsuit with ‘concerted efforts incident to litigation, such as prelitigation “threat letters.”’); *Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *23-*24 (two lawsuits are insufficient to allege a “pattern” or “series” of suits, finding that in *Primetime 24 Joint Venture*, such a “pattern” or “series” of suits was adequately alleged where the defendants allegedly “had submitted ‘simultaneous and voluminous challenges ... without regard to whether the challenges had merit,’ and where ‘appellees coordinated their efforts to submit huge volumes of challenges simultaneously.’”).

The invocation of six opposition proceedings filed against the Fruit Bouquet marks in

2012 cannot salvage this claim. Those proceedings, which were all consolidated shortly after they were filed and thereafter proceeded as one, simply do not give rise to the concerns sought to be addressed by the *Primetime 24* court -- the simultaneous filing of a huge volume of suits without regard for their merit undertaken for the purposes of harassment. *Marchon Eyewear*, 2002 U.S. Dist. LEXIS 19628, at *23-*24. Indeed, if any party to this suit is guilty of such conduct, it is the party who -- over the course of two years -- filed approximately forty proceedings before the TTAB seemingly in retaliation for the six opposition proceedings.

Moreover, for application of the *Primetime 24* test, the “repeated and consistently baseless litigation” must be directed at the same target -- the party asserting the antitrust claim. *Twin City Bakery*, 207 F. Supp. 2d at 224 n.2 (“Whereas *Primetime* involved ‘simultaneous and voluminous’ lawsuits brought against a single television provider, the lawsuits complained of in the Amended Complaint are simply individual actions against each of ten generic-drug applicants.”). As one court has explained it, the *Primetime 24* decision involved “thousands of statutory challenges *against a single competitor* to raise its expenses of defending litigation,” which “cast the shadow of ‘serial litigation’ used to injure a single competitor” *In re Terazonsin Hydrochloride Antitrust Litig.*, 335 F. Supp. 2d 1336, 1367 (S.D. Fla. 2004) (emphasis added) (whereas “seventeen separate lawsuits involving five different patents” against “seven different ... companies” did not raise the same concern and did not rise to the level that occurred in *Primetime 24*); *see also Disenos*, 676 F. Supp. at 1286 (counter-plaintiff “has no standing to challenge allegedly coercive lawsuits brought against other parties,” rejecting allegation that “counterdefendants used their copyrights and ‘overwhelming economic powers to force defendants [in infringement actions] to agree not to import any Llardro

porcelain figurines”).

Here the 18F Defendants have alleged: 4 lawsuits over the course of thirteen years (one of which was filed *against* the plaintiffs), six demand letters in 2013, the settlement of a dispute with Harry & David and the claims asserted in this case against the Delaneys. Each of these policing efforts was directed to different third parties, involved different conduct and in several cases involved different claims unrelated to plaintiffs’ trademarks. Accordingly, the 18F Defendants’ allegations simply do not rise to the level of “large volume, repeated” litigation with which the *Primetime 24* court was concerned and these allegations “do[] not cast the shadow of ‘serial litigation’ used to injure a single competitor that occurred in *Primetime 24*.” *In re Terazonsin Hyrdrochloride Antitrust Litig.*, 335 F. Supp. 2d at 1367. Accordingly, the *Primetime 24* test does not apply here so as to strip Edible Arrangements of *Noerr-Pennington* immunity.

2. **Regardless of Which Test Applies, Plaintiffs’ Policing of Their Marks Was Not Objectively Baseless**

The opposition proceedings, lawsuits and demand letters sent by the plaintiffs were not “objectively baseless.” Accordingly, whether the *Professional Real Estate Investors* test or the *Primetime 24* test is applied, *Noerr-Pennington* immunity applies and the Sherman Act and CUTPA counterclaims must be dismissed.

First, three of the third-party lawsuits and the dispute with Harry & David all ended in settlement. Settlement of claims “does not lend itself well to the label ‘objectively baseless.’” *Mover’s & Warehousemen’s Assoc.*, 1999 U.S. Dist. LEXIS 20667, at *22; *GEICO v. Hazel*, No. 11-CV-00410, 2014 U.S. Dist. LEXIS 133870, at *47-848 (E.D.N.Y. Aug. 11, 2014) (citing cases); *see also 24 Hour Fitness USA, Inc. v. Annis*, No. 04-257-SM, 2004 U.S. Dist.

LEXIS 23702, at *9-*10 (D.N.H. Nov. 18, 2004) (“[A]t least two of the cases referenced by defendants ended when 24 Hour Fitness successfully secured consent judgments and permanent injunctions against the parties it claimed were infringing its marks. Such outcomes do not support the conclusion that [plaintiff has] engaged in a pattern of baseless and abusive litigation; to the contrary, they suggest that [plaintiff’s] litigation had, at least in those cases, some merit.”).

Moreover, three of the suits involved conduct unrelated to the assertion of plaintiffs’ trademark rights, including claims for breach of contract, unfair competition, copyright infringement and misappropriation of trade secrets. None of these claims have been challenged by the 18F Defendants as “objectively baseless.” Indeed, the Amended Counterclaim is silent as to those claims, asserting cursorily only that each of those suits are “objectively baseless” because they assert rights in purportedly invalid marks. Given the existence of claims that undisputedly have a reasonable basis, none of those suits could be “objectively baseless.”

In any event, plaintiffs’ policing efforts were all based on probable cause. Plaintiffs have registrations for the asserted trademarks--several of which are incontestable--and, accordingly, have a strong presumption of validity. Indeed, plaintiffs have not only the right but the obligation to police and protect those marks. Applying a “prospective” analysis, at the time the opposition proceedings and lawsuits were brought and the cease and desist letters were sent, there were no challenges to plaintiffs’ marks based on genericness or purported fraud. Plaintiffs had and have valid and subsisting registrations for their marks, which plaintiffs had the right and the obligation to police. Such a course is far from “objectively baseless” and is, indeed, objectively reasonable. *See DISH*, 2010 U.S. Dist. LEXIS 137926, at *24; *Gardner*,

101 F. Supp. 2d at 472-73; *Barq's Inc.*, 677 F. Supp. at 452.

For the foregoing reasons, this litigation is not objectively baseless and plaintiffs have not engaged in a pattern of objectively baseless litigation. Plaintiffs' conduct is immunized from liability pursuant to the *Noerr-Pennington* doctrine and this Court should dismiss Counts One, Two and Three of the Amended Counterclaim.

D. The 18F Defendants' Claims Regarding Purported Misconduct Before the USPTO Are Legally Insufficient.

Evidently recognizing the privileged nature of the litigation and pre-litigation efforts discussed above, the 18F Defendants' allege that "Edible Arrangements has also engaged in a pattern of misconduct before the USPTO" and further allege that "Edible Arrangements engaged in a campaign of improper conduct before the USPTO. The series of actual and threatened lawsuits, legal claims, and misconduct before the USPTO collectively amount to a pattern of sham petitioning activities" (Amended Counterclaim, ¶¶ 99 & 149) They thus now appear to intend to argue that there is no protection for Edible Arrangements, LLC's efforts to register its marks because it allegedly engaged in "misconduct" in the form of purported fraud in procuring eight of its forty-seven asserted marks. This claim, whether standing alone or alleged as part of a "pattern," cannot, as a matter of law, vitiate *Noerr-Pennington* immunity.

Noerr-Pennington immunity does not protect "the procurement of *patents* by fraud." *Twin City Bakery*, 207 F. Supp. 2d at 223 (emphasis added). In *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 (1965), the Supreme Court found proof that a patent infringement plaintiff "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office" is "sufficient to strip [the plaintiff] of its exemption

from the antitrust laws.” This alternative basis for vitiating *Noerr-Pennington* immunity, however, has never been extended to a claim that a trademark has been fraudulently obtained. *WMH Tool Group, Inc. v. Woodstock Int’l, Inc.*, No. 07-cv-3885, 2009 U.S. Dist. LEXIS 125325, at *42 (N.D. Ill. Dec. 9, 2009) (“The Court is unaware of any case that has applied *Walker Process* to a claim of immunity related to enforcing a trademark, and Defendants have identified none.”). There is no justification for taking such an extraordinary step here.

“[T]rademarks are non-exclusionary” *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F. 3d 50, 57 (2d Cir. 1997). “Unlike a patent or copyright, a trademark does not in any way represent a monopoly conferred upon a particular product.” *Car-Freshener Corp. v. Auto Aid Manufacturing Corp.*, 438 F. Supp. 82, 86 (N.D.N.Y. 1977). “While patent laws were enacted to encourage invention and development of new products, trademark laws were intended solely to protect the consuming public from deception and confusion, oftentimes resulting from imitation of the distinguishing trademarks of established products.” *Id.* at 86 (finding that “plaintiffs’ efforts to register and protect the trademark in issue did not constitute an unlawful attempt to monopolize” and that such acts “merely represent fair and aggressive competition which does not constitute a violation of the antitrust laws.”); *see also WMH Tool Group, Inc. v. Woodstock Int’l, Inc.*, No. 07-cv-3885, 2009 U.S. Dist. LEXIS 125325, at *42 n.7 (N.D. Ill. Dec. 9, 2009) (“The only case Defendants identify applying *Walker Process* outside of the patent context is *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 647 (S.D.N.Y. 1992), which applied *Walker Process* in a case alleging fraudulent procurement of a copyright. That court declined to limit *Walker Process* to patent cases, because the Supreme Court had stated that the rights of copyright holders are no less

than those of patent holders. *Id.* Defendants have not shown the same to be true for the rights of trademark holders.”).

There is no basis for applying *Walker Process* here and the 18F Defendants’ tenuous allegations that any such fraud was committed (raised for the first time here despite the pending TTAB proceedings) cannot vitiate *Noerr-Pennington* immunity.

V. CONCLUSION

For the foregoing reasons, plaintiffs’ actions in policing and protecting their trademarks were not “objectively baseless,” and the *Noerr-Pennington* doctrine immunizes this conduct. Accordingly, Counts One, Two and Three should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by U.S. mail, postage prepaid, to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

_____/s/Patrick M. Fahey