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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91160978
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re App. Serial No. **78/247,326**
Mark: COOL CAT PRODUCTS and Design
Filed: May 8, 2003
Class: 18
Applicant: John D. Gullahorn
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PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

OPPOSER'S TRIAL BRIEF

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STATEMENT OF THE ISSUES

1. Whether Opposer acquired ownership of its marks in the United States prior to Applicant's constructive use date; and

2. Whether Applicant's "COOL CAT PRODUCTS and design (cat face)" mark so closely resembles Opposer's "COOL CAT Wheatgrass Pet Treat and design (cat face)" and "COOL CAT Wheatgrass Pet Treat" marks as to be likely, when applied to Applicant's goods, to cause confusion, or to cause mistake, or to deceive because the relevant trade and purchasing public are likely to believe that Applicant's goods have their origin with Opposer and/or that such goods are approved, endorsed, or sponsored by Opposer or associated in some way with Opposer.

I. INTRODUCTION

Since 1983, Opposer Perfect Foods, Inc. ("Perfect Foods") has been engaged in the business of cultivating, harvesting, selling and distributing for sale a fresh vegetable food product, namely natural wheatgrass. In 1988 Perfect Foods adopted the mark "Cool Cat Wheat Grass" and began selling its "Cool Cat" brand wheatgrass product as a snack or treat for pet cats. Perfect Foods' "Cool Cat" brand products are sold to individual pet owners, kennels, supermarkets and health food stores, in the State of New York and other states of the northeastern United States.

Perfect Foods adopted the image of a cat face as a part of its mark in 1988. Perfect Foods' wheatgrass products were then and are now marketed and sold under the

marks "Cool Cat Wheatgrass Pet Treat"; "Cool Cat Wheatgrass Pet Treat and design (cat face)"; "Cool Cat Pet Grass and design (cat)"; "Cool Cat and design (cat)"; and "Cool Cat"; hereinafter collectively referred to herein for sake of convenience as "Opposer's Cool Cat marks."

On May 8, 2003, Applicant, John D. Gullahorn ("Applicant") filed Application No. 78/247,326 (hereinafter the "Gullahorn Application") for "Cool Cat Products and design (cat face)," with "Products" disclaimed, in connection with "Cat Collars and Cat Clothes." The Gullahorn application was filed under Section 1(b) of the Lanham Act.

On May 24, 2003, Perfect Foods filed a trademark application seeking to register "Cool Cat Wheatgrass Pet Treat," U.S. App. Serial No. 78/254,092, in connection with "fresh vegetables, particularly for use as a pet treat" pursuant to Section 1(b) of the Lanham Act in Class 31. This application was amended on February 11, 2004 to allege use of Opposer's mark in interstate commerce at least as early as January 2002, and is now in use in such commerce by Perfect Foods.

On November 13, 2003, the United States Patent and Trademark Office notified Perfect Foods that its application for "Cool Cat Wheatgrass Pet Treat" was in conflict with the mark shown in Applicant's prior-filed intent-to-use Application Serial No. 78/247,326 and would be subject to refusal under Section 2(d) upon registration of Applicant's mark. Examination of Opposer's application was subsequently suspended on March 4, 2004, pending disposition of the Gullahorn application.

Perfect Foods has acquired priority of use by virtue of its sale of pet treat products under its Cool Cat marks, namely fresh wheatgrass as a treat for cats, in interstate commerce at least as early as 1988. Opposer's date of first use in commerce precedes the filing date of Applicant's intent-to-use application, May 8, 2003. Applicant's filing date (constructive use date) is the earliest date on which the Applicant can rely.

The Applicant is requesting an unrestricted registration of "Cool Cat Products and design (cat face)" in connection with cat collars and cat clothes. Under the duPont factors, the registration if granted would lead to a likelihood of confusion with Perfect Foods' previously used Cool Cat marks, which have not been abandoned. For these reasons, the Application Serial No. 78/247,326 should be refused and denied registration.

II. DESCRIPTION OF THE RECORD

On May 8, 2003, Applicant, John D. Gullahorn ("Applicant") filed Application No. 78/247,326 for "Cool Cat Products and design (cat face)," (hereinafter "Applicant's COOL CAT mark") with "Products" disclaimed, in connection with "Cat Collars and Cat Clothes." The application was filed on an intent-to-use basis and was published in the Official Gazette on May 11, 2004 at TM 433.

On June 2, 2004, Opposer commenced this opposition on the ground that Applicant's COOL CAT mark so closely resembles Opposers' COOL CAT marks as to be likely, when applied to Applicant's goods, to cause confusion, to cause mistake, and to deceive the trade and public, which are likely to believe that Applicant's goods have their

origin with Opposer and/or that such goods are approved, endorsed, or sponsored by Opposer or associated in some way with Opposer. Applicant answered, denying the material allegations.

Opposer served discovery interrogatories, production requests and requests for admissions on Applicant on November 12, 2004. Applicant failed to timely respond to Opposer's requests, including the request for admissions. On December 30, 2004 Opposer notified Applicant's counsel that Opposer considered the requests as being "deemed admitted."

Harley B. Matsil, President of Perfect Foods, Inc., and Alyce M. Matsil, Vice President of Perfect Foods, Inc. testified on behalf of Opposer, Perfect Foods, Inc., during Opposer's assigned testimony period.

John D. Gullahorn and Dr. Jean R. Gullahorn, DVM testified on behalf of Applicant, during Applicant's assigned testimony period.

On June 3, 2005 Opposer filed a motion to strike the testimony of John D. Gullahorn. On June 17, 2005, the Applicant filed a brief in opposition to the motion. This motion remains pending before the Board for decision.

Opposer filed a notice of reliance on Applicant's deemed admissions No. 1-10 during its rebuttal testimony period.

On August 2, 2005, Applicant filed a motion to amend or withdraw the deemed admissions and a motion to strike the notice of reliance.

On August 26, 2005, the Board issued an order denying Applicant's motions.

Opposer's Testimony

Harley B. Matsil, President of Perfect Foods, Inc., and Alyce M. Matsil, Vice President of Perfect Foods, Inc. testified on behalf of Perfect Foods, Inc. on April 5, 2005. Pursuant to T.B.M.P. 703.01(h) and 703.01(1), when trial testimony is filed with the Board, it automatically constitutes part of the evidentiary record. The deposition transcript of Harley B. Matsil with Exhibits 1-15 and the deposition transcript of Alyce M. Matsil were filed with the Board on May 3, 2005.

Opposer's evidence also includes Applicant's deemed admissions 1-10, which Opposer offered by a notice of reliance in rebuttal filed with the Board during Opposer's rebuttal testimony on July 18, 2005. Deemed admissions may be made a part of the record by notice of reliance pursuant to Trademark Rule 2.120(j) and TBMP Section 704.09. The Board issued an order on August 26, 2005 denying Applicant's motion to strike the notice of reliance.

Applicant's Testimony

John D. Gullahorn and Dr. Jean R. Gullahorn, DVM testified on behalf of Applicant on May 26, 2005. Pursuant to T.B.M.P. 703.01(h) and 703.01(1), when trial testimony is filed with the Board, it automatically constitutes part of the evidentiary record. The Deposition Transcript of John D. Gullahorn with Exhibits 1-15 and the Deposition Transcript of Jean R. Gullahorn were served on Opposer on June 24, 2005.

As noted above, Opposer has filed a motion to strike the testimony of John D. Gullahorn, and this motion remains pending for decision. Opposer also objected to the admission of certain evidence offered by the testimony of Dr. Jean R. Gullahorn, DVM. Opposer now renews those objections.

The record also comprises the file of Applicant's U.S. Application No. 78/247,326 and the file of Opposer's U.S. Application. No. 78/254,092.

III. STATEMENT OF THE FACTS

Opposer, Perfect Foods, Inc. (Perfect Foods) of Goshen, New York, since its incorporation in 1983 has been engaged in the business of cultivating, harvesting, selling and distributing for sale a fresh vegetable food product, namely natural wheatgrass. Initially, the wheatgrass product was sold as frozen wheat grass juice to health food stores and juice bar establishments in New York City, New York. Harley B. Matsil Tr. 5:8-17 and 6:9-14.

In 1988 Perfect Foods determined that its wheatgrass product could be sold in its fresh form to pet owners as a treat for cats and adopted the mark "Cool Cat Wheat Grass" as a brand name for its new pet treat product line. Harley B. Matsil Tr. 7:5-9. From 1988 on the pet treat product was sold in small trays or flats, and later in small pot containers as well. A cardboard sign bearing the words "Cool Cat Wheat Grass" with a hand-drawn image of a cat's face was displayed adjacent to the flats in retail stores. A plastic tray insert with the words "Cool Cat™ Pet Treat and design (cat face)" was also used in the trays and

in pot containers. Harley B. Matsil Tr. 7:16-21. (Exhibits 5, 9).

Perfect Foods began selling its "Cool Cat" brand pet treat product in 1988 to individual pet owners, health food stores, supermarkets and kennels located in the State of New York. Harley B. Matsil Tr. 8:5-8, 10:9-11, 28:6-13, 30:8-11 and 31:11-16. Elyse M. Matsil Tr. 6:2-8. Opposer's "Cool Cat" brand products are advertised to the public and to the trade as a "treat" for pet cats. Harley B. Matsil Tr. 7:5-9. Exhibits 5, 6 and 8.

In August 1988, Perfect Foods expanded its sales of Cool Cat pet treat products to retail dealers in the neighboring states of New Jersey and Connecticut. Harley B. Matsil Tr. 13:5-8. The retail dealers in turn sell the wheatgrass in flats and in pots to the individual pet owners. Harley B. Matsil Tr. 17-18:23-5. Exhibits 1, 3, 4, 10, 11 and 12 to deposition.

The price range of Opposer's Cool Cat pet treat products is \$1.12 per pot/\$20 per tray (wholesale) and \$1.99 per pot/\$35.82 per tray (retail). Harley B. Matsil Tr. 33:5-19. Exhibit 14 to deposition. Opposer advertises its pet treat products in retail stores by point of sale display posters, tear-off slips, tray inserts and fliers. Harley B. Matsil Tr. 16:9-13, 17:14-16, 18:11-19, 25-26:25-6, 24:16-21 and 33:5-10. Exhibits 5, 6, 7, 8, 9 and 14 to deposition.

The image of a cat face was hand-drawn on a cardboard point of sale display poster, with the words "Cool Cat" appearing above the cat's head and the words "Pet

Treat" appearing below the cat's head. Harley B. Matsil Tr. 11:10-11. Elyse M. Matsil Tr. 6:12-16. The hand-drawn display poster was discontinued in favor of computer-generated display posters that included the image of a cat, and were adopted in 2001. Harley B. Matsil Tr. 17:14-16. Exhibit 6 and Exhibit 8. Opposer's Cool Cat pet treat products were thereafter and are currently advertised and sold under Opposer's marks "Cool Cat Wheatgrass Pet Treat and cat face design" (Exhibit 5); "Cool Cat Pet Grass with cat logo" (Exhibit 6); "Cool Cat " (Exhibit 7); and "Cool Cat Pet Treat and cat design" (Exhibit 8); Harley B. Matsil Tr. 13:15-18, 14:18-19, 16:4-17, 17:6-8, 17:14-25.

Applicant, John D. Gullahorn ("Applicant"), filed Application No. 78/247,326 for "Cool Cat Products and design (cat face)," with "Products" disclaimed, in connection with "Cat Collars and Cat Clothes." The application was filed under Section 1(b) of the Lanham Act on May 8, 2003.

On November 13, 2003, the United States Patent and Trademark Office notified Opposer that its application for "Cool Cat Wheatgrass Pet Treat" was in conflict with the Applicant's prior-filed intent-to-use Application Serial No. 78/247,326 and would be subject to refusal under Section 2(d) upon registration of Applicant's mark. Opposer's application was subsequently suspended on March 4, 2004, pending the disposition of Applicant's request for registration.

Opposer's testimony shows that Opposer's priority use date is at least as early as 1988. Opposer's date of first use in commerce thus precedes the filing date of

Applicant's intent-to-use application, May 8, 2003. Applicant's filing date (constructive use date) is the earliest date on which the Applicant can rely. Board's Order dated 08/26/2005 and Opposer's Notice of Reliance in Rebuttal, Deemed Admissions No. 5 and No. 6.

Opposer's sales receipts show continuous sales of its pet treat products from 1988 to the present. Harley B. Matsil Tr. 8:16-22, 10:9-15, 13:5-12, 15:18-21, 27:2-16, 28:9-13, 29:23-25 and 31:11-16. Exhibits 1-4 and 10-13.

In connection with the sale and distribution of its pet treat products, Perfect Foods uses its Cool Cat marks on promotional fliers and price lists provided to each retailer Perfect Foods trades with. Harley B. Matsil Tr. 34:4-17. Exhibits 9, 14. Tear-off promotional slips are also made available to pet owner customers in retail stores. Harley B. Matsil Tr. 18:11-19. Exhibit 7.

Perfect Foods has established widespread knowledge of and goodwill for its Cool Cat marks, as evident from the repetitive and continuous use of its mark on point of sale posters, tray inserts and advertising materials that are provided to retailers and individual pet owners over the last 17 years.

Applicant is seeking an unrestricted registration of "Cool Cat Products and design (cat face)" in connection with cat collars and cat clothes. Under the duPont factors, the registration if granted would lead to a likelihood of confusion with Perfect Foods's Cool Cat marks as used in connection with pet treats for cats. For these reasons,

registration of Applicant's mark should be refused and denied.

ARGUMENT

IV. U.S. APPLICATION S/N 78/247,326 SHOULD BE REFUSED

Perfect Foods will be damaged by the registration of Applicant's Cool Cat mark in connection with cat collars and cat clothes. With regard to standing, Perfect Foods does not have to prove actual damage; rather it is only necessary to show the likelihood of damage due to the registration of Applicant's mark. Golden Gate Salami Co. v. Gulf States Paper Corp., 332 F.2d 184, 141 U.S.P.Q. 661, 664 (C.C.P.A. 1964); Hario v. Pro Football Inc., 30 U.S.P.Q.2d 1828, 1832 (T.T.A.B. 1994). Because Perfect Foods's application to register has been suspended and is subject to refusal if the application is registered, Perfect Foods has standing. Moreover, Perfect Foods's proof of likelihood of confusion is sufficient to create standing.

A. PERFECT FOODS HAS PRIOR RIGHTS IN ITS "COOL CAT" MARKS.

In order to sustain its burden under section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), Opposer must establish that it has priority over Applicant, and that Applicant's mark, when used in connection with the goods set forth in his application, creates a likelihood of confusion. See, e.g., Genesco Inc. v. Martz, 66 U.S.P.Q.2d 1260, 1267 (T.T.A.B. 2003). As set forth below, Opposer's evidence establishes both of these elements.

Applicant, by the filing of his application under the provisions of Section 1(b), is entitled to a constructive use date of May 8, 2003. By defaulting on his responses to Opposer's requests for admission, Applicant admitted to not having used his "Cool Cat Products and design" mark prior to May 8, 2003, the filing date of Applicant's intent-to-use application. Opposer's Notice of Reliance in Rebuttal, (Request Nos. 5-6).

Opposer's evidence clearly shows that Opposer has used its Cool Cat marks in interstate commerce continuously from at least as early as 1988, many years before any date that Applicant can claim. Opposer's continuous use of its marks in connection with pet treat products over the last 17 years is supported by the undisputed testimony of its President and Vice President, and by undisputed documentary evidence in the nature of advertising specimens, sales receipts, trademark specimens and promotional materials that are authenticated by the sworn testimony of Opposer's witnesses.

Opposer's evidence as a whole is clear and convincing, and has not been controverted by Applicant. The testimony of Opposer's principal witness, its President, is corroborated by the testimony of its Vice President, and taken together with the documentary evidence carries a conviction of accuracy and reliability as to the fact of previous use. Opposer's testimony and accompanying evidence is sufficiently probative to show sales of its Cool Cat pet treats by at least 1988 when hand-drawn point of sale posters were used, Harley B. Matsil Tr. 18:2-8 and Alyce M. Matsil TR. 6:12-14; or by at least as early as 2001 when computer-generated point of sale posters and tear-off slips

were used, Harley B. Matsil Tr. 18:9-22 (Exhibits 6, 7); or by at least as early as 2002 when plastic tray inserts, printed packing inserts and printed point of sale posters were used. Harley B. Matsil Tr. 19:15-25 (Exhibits 5, 7, 8).

All of Opposer's use dates are well prior to Applicant's constructive use date, the only date on which Applicant may rely.

While no poster specimen is now available for the period 1988 - 2000, the oral testimony relating to the those posters is sufficient to overcome the lack of documentary evidence for that period. That the early posters are not now available after several years is understandable and not surprising since they were hand-made, produced only as needed, and were replaced by computer generated and commercially printed materials in 2001.

Even though some early sales records and advertising documents are not now available, the evidence is nevertheless thoroughly convincing as to Opposer's continuous use of its Cool Cat marks in connection with its pet treat products. The documentary evidence of record as a whole fully supports the production and sale of pet treat products from 1988 to the present. As pointed out by the court in West Florida Seafood Inc. v. Jet Restaurants Inc., *supra*, 31 U.S.P.Q.2d at 1665, Section 2(d) does not speak of continuous use but rather whether the mark has been "previously used in the United States by another and not abandoned." Here there is no question of abandonment. Accordingly, the evidence of record is clear and convincing proof of Opposer's prior use of its Cool Cat marks.

**B. APPLICANT'S "COOL CAT" MARK CREATES
A LIKELIHOOD OF CONFUSION WITH
PERFECT FOODS'S "COOL CAT" MARKS.**

This Board determines the question of likelihood of confusion with reference to the duPont factors given in In re E. I. duPont De Nemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).

**i. THE MARKS ARE SO SIMILAR AS TO CREATE
A LIKELIHOOD OF CONFUSION.**

The first duPont factor is "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. Id.

Looking first to Applicant's mark COOL CAT PRODUCTS and design (cat face), and Opposer's mark COOL CAT Wheatgrass Pet Treat and design (cat face), as shown in Opposer's Exhibit 5, or Opposer's mark COOL CAT as shown in Opposer's Exhibit 7, the dominant portion of each mark is "COOL CAT." The word portions COOL CAT of the marks are identical, and each mark includes an image of a cat face. Therefore the marks bear a strong similarity in appearance and pronunciation. In the context of pet products generally, and cat products in particular, the connotations of the marks are virtually identical.

As for the "cat face" design elements of the marks, when a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. In re Appetito Provisions Co., 3 U.S.P.Q.2d 1553 (T.T.A.B. 1987). Here the respective designs each feature a cat's face,

which reinforces the "CAT" component of the word mark, and would be understood as a pictorial representation of the word mark.

While marks must be considered in their entireties in determining likelihood of confusion, it is well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See In re National Data Corp., 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985). Although disclaimed or descriptive matter cannot be ignored, the fact remains that customers are more likely to rely on the non-descriptive portion of a mark as an indication of origin. See Hilson Research Inc. v. Society for Human Resource Management, 27 U.S.P.Q. 2d 1423 (T.T.A.B. 1993).

Here, customers would be much more likely to look to the distinctive COOL CAT portion of Applicant's mark as an indication of source, rather than the descriptive word PRODUCTS. Although there are obvious differences in the appearance and sound of the marks as a whole, the overall commercial impressions are highly similar.

ii. THE GOODS OFFERED UNDER THE MARKS ARE SO RELATED AS TO CREATE A LIKELIHOOD OF CONFUSION.

The second factor to consider is "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567.

In this case the respective goods are not identical in kind, but do belong to the same product category: pet care accessories for pet cats.

When considering the relatedness of the goods, "even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis." Recot, Inc. v. Becton, 214 F.3d 1322, 54 U.S.P.Q.2d 1894, 1898 (Fed. Cir. 2000).

Here, the respective goods are related in the sense that both cat collars and pet treats are pet care items that promote pet safety and well being. Opposer's pet treat products "satisfy a cat's craving for grass, aid digestion and supply natural vitamins, minerals, enzymes and chlorophyl," and "helps them with fur balls." Exhibit 7 to Harley B. Matsil Tr. Applicant testified that wheatgrass "is an emetic," Dr. Jean R. Gullahorn DVM Tr. 24:3; that "grass-eating is a natural behavior" for cats, Dr. Jean R. Gullahorn, DVM Tr. 8:14; and that "grass-eating seems to serve as a method for a cat to purge itself of hair balls or some other foreign material." Dr. Jean R. Gullahorn, DVM Tr. 8:17-19.

Moreover, it is common knowledge that cat collars contain an insect repellent for repelling fleas; that cat collars usually carry identification tags, providing the pet's name, the owner's contact information; and that such tags may also include information confirming current rabies vaccination, all of which are important to the pet's safety and well being. Applicant testified that his cat collars are designed to accommodate ID tags:

"Our very own *Cool Cat Collars* are made with the safety of cats in mind. . . . Both feature an eyelet that allows placement of ID tags easily." Exhibit 6 (p.1) to John D. Gullahorn Tr.

"Cool Cat Collars are great safety collars for your cat. Their *Velcro* fastener break-away design insures your feline will not be injured because of it's collar. An eyelet is included on the 12" collar for your kitty's tags." Exhibit 6 (p.32) to John D. Gullahorn Tr.

Therefore, a pet owner would have an understandable concern about his pet's safety and well being in mind as he views a pet care product and makes his selection, and would reasonably assume that a selected item - the item with a *familiar* brand - comes from the same source as other similarly marked items that earned his satisfaction in the past.

For these reasons, Perfect Foods' pet treats for cats and Applicant's cat collars are sufficiently related in the mind of the consuming public as to warrant a finding of likelihood of confusion.

iii. THE CHANNELS OF TRADE ARE THE SAME

The third factor to consider when determining whether a likelihood of confusion exists is "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. In Jockey International Inc. v. Butler, the Board stated that "absent any limitations in the parties' identifications, the goods must be assumed to move through all normal channels of trade for goods of this type and to reach all normal purchasers and users." 3 U.S.P.Q.2d 1607, 1611 (T.T.A.B. 1987). See also In re Nobody's Perfect Inc., 44 U.S.P.Q.2d 1054, 1055 (T.T.A.B. 1997).

Opposer's evidence shows that its established trade channels are direct sales to individual pet owners, e.g., J.B. Brown, Harley B. Matsil Tr. 10:20-24, Exhibit 2; to kennels, e.g., Laurden Kennels, Harley B. Matsil Tr. 29:23-25, Exhibit 12; to supermarkets, e.g., Adams Fairacres Farms, Harley B. Matsil Tr. 31:11-16, Exhibit 13; and to health food stores, e.g., Nature's Pantry, Harley B. Matsil Tr. 28:9-13, Exhibit 11.

It is reasonable to assume that cat collars would be sold directly to pet owners, and could be expected to be sold to supermarkets that carry pet supplies. Likewise, cat collars could be expected to be sold to kennels, since kennels are known to board dogs and cats, and in doing so sometime find it necessary to provide courtesy collars for their guests.

Applicant cannot deny that his cat collars could be sold to kennels. Applicant testified that "I had clients who kenneled their dogs, and I had clients that had cats that used boarding facilities." Dr. Jean R. Gullahorn, DVM Tr. 23, lines 13-15. Moreover, Applicant testified that he has received a wholesale request to purchase his cat collars from Snow Drift Kennels of Blue Point, New York. John D. Gullahorn Tr.31:2-8; Exhibit 13, page 2. On direct examination in response to a question about wholesale customers, Dr. Jean R. Gullahorn, DVM testified that "I have one, Blue Pointe, New York, that wants to carry our products." Dr. Jean R. Gullahorn, DVM, Tr. 17:8,9.

There are no limitations on channels of trade or classes of customers stated in the Gullahorn Application S/N 78/247,326 and so it must be read to encompass direct sales to individual pet owners, to supermarkets and other retail stores that carry pet supply products, and to kennels where cats are boarded.

In this case the respective goods are both in the same product category: pet care products for pet cats. Since the respective goods, cat collars and cat treats, are related in that both are intended for the care of pet cats and are typically sold at retail to general consumers, the absence of restrictions in the Gullahorn application, in particular on channels of trade or classes of consumers, favors the conclusion that the Applicant's goods and the Opposer's goods move in the same channels of trade, i.e., through the same types of stores or resellers, to the same ultimate consumers.

iv. THE LOW PRICE OF APPLICANT'S PRODUCTS SUPPORTS A FINDING OF LIKELIHOOD OF CONFUSION.

The fourth factor is "[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Here, both parties' goods are relatively inexpensive and are purchased by the general public rather than by sophisticated purchasers. Both products can be considered to be impulse shopping items. Applicant's cat collars retail in the range of \$4.00-\$15.00 each and wholesale in the range of \$2.00 - \$9.00 each, John D. Gullahorn Tr. Exhibits 6, 10. Opposer's pet treats are sold retail at \$1.99 per pot. Harley B. Matsil Tr. 33:11-19. Exhibit 14. Such low prices displayed on cat collars bearing

Applicant's COOL CAT mark will not predispose a customer to be sufficiently careful as to preclude a likelihood of confusion. Therefore, the low price of Applicant's cat collars favors a finding of likelihood of confusion.

v. OPPOSER'S LONG TERM PRIOR AND EXCLUSIVE USE OF ITS MARKS SUPPORTS A FINDING OF LIKELIHOOD OF CONFUSION

Perfect Foods has established a strong trade reputation in the field of pet treats for cats by virtue of its long term exclusive use of "COOL CAT" in connection with its wheatgrass pet treat product; has distributed price lists and promotional brochures displaying the COOL CAT marks to Opposer's many retailers; has displayed Opposer's COOL CAT marks on point of sale posters in retail shops; and has handed out packing slips containing the mark COOL CAT and product information to individual customers, all since 1988. Harley B. Matsil Tr. and Exhibits.

Because of such long term use, COOL CAT and COOL CAT in combination with the image of a cat face are immediately recognized by the trade and by the purchasing public as being associated exclusively with Opposer, thus favoring a finding of likelihood of confusion.

vi. THERE IS NO EVIDENCE OF SIMILAR THIRD PARTY MARKS.

The sixth factor is "[t]he number and nature of similar marks in use on similar goods." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Regarding the sixth duPont factor, Applicant has the burden to show such widespread, significant and unrestrained third party use of the mark to the extent that it cannot serve as an indicator of origin. See Hilson

Research Inc. v. Society for Human Resource Management, 27 U.S.P.Q.2d 1423, 1431 (T.T.A.B. 1993).

Applicant did not provide admissible evidence of use by third parties. Its only alleged evidence of third party use is inadmissible hearsay. Further, Applicant offers no proof as to the numbers of products sold by any third party. Applicant has offered nothing more than a print-out of an internet web search that includes a few mentions of "Cool Cat." Note that seven (7) of the "hits" were to Applicant's own web sites at www.fantasycollars.com, www.coolcatcollars.com and www.dangullahorn.com. The other few mentions of "cool cat" are not evidence of actual business use in trade. Even if it were admissible, Applicant's proposed proof of these alleged third party use of COOL CAT is too limited to meet its burden.

Therefore, the lack of third party users of COOL CAT supports a finding of likelihood of confusion.

vii. THERE IS NO EVIDENCE OF ACTUAL CONFUSION

The seventh factor to be considered is "[t]he nature and extent of any actual confusion." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. If such evidence is of record, then it must be considered. Id. It should be noted, however, that the absence of evidence of actual confusion does not necessarily support a finding of no likelihood of confusion. Beer Nuts, Inc. v. Clover Club Foods Company, 805 F.2d 920, 231 U.S.P.Q. 913, 918 (10th Cir. 1986). It is not necessary to provide evidence of actual confusion to establish a

likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 U.S.P.Q. 390, 396 (Fed.Cir. 1983).

The absence of actual confusion is a factor which favors neither Applicant nor Perfect Foods.

viii. THE LENGTH OF CONCURRENT USE, IF ANY, IS TOO SHORT

The eighth factor is "[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. There is no evidence of actual confusion in the record. Applicant filed his application on the basis of intent-to-use on May 8, 2003. Applicant has admitted that he has not used his mark prior to his filing date. Board's Order 08/26/2005 and Opposer's Notice of Reliance in Rebuttal, Deemed Admissions No. 5 and No. 6. Accordingly, the period of any possible concurrent use is only about two years, which is not long enough to overcome a finding of likelihood of confusion.

ix. THE VARIETY OF GOODS ON WHICH THE MARK IS DISPLAYED.

The ninth factor is "[t]he variety of goods on which a mark is or is not used (house mark, "family" mark, product mark)." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Perfect Foods uses its marks only on pet treats. The description of goods in the subject application is limited to cat collars and cat clothes. There is no variety of goods to consider. No analysis of house marks is required.

x. THERE IS NO MARKET INTERFACE TO PRECLUDE A FINDING OF LIKELIHOOD OF CONFUSION.

The tenth factor to consider is "[t]he market interface between applicant and the owner of a prior mark." duPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Applicant demonstrates no interface that can overcome a likelihood of confusion. There is no consent or other agreement between the parties and Applicant offers no credible proof of laches or estoppel indicative of a lack of confusion. Therefore, this factor does not preclude a finding of likelihood of confusion.

xi. THE MISCELLANEOUS FACTORS DO NOT PRECLUDE A FINDING OF LIKELIHOOD OF CONFUSION.

The eleventh factor is "[t]he extent to which applicant has a right to exclude others from use of its mark on its goods." duPont, 476 F. 2d at 1361, 177 U.S.P.Q. at 567. The final two factors are "[t]he extent of potential confusion, i.e., whether "de minimis or substantial" and "[a]ny other established fact probative of the effect of use." Id.

These final three factors are neutral or have no application in the present matter.

xii. ANY DOUBT SHOULD BE RESOLVED IN FAVOR OF PERFECT FOODS, WHO IS NOT THE NEWCOMER.

If the Board has any doubt regarding the likelihood of confusion, then such doubt should be resolved against the newcomer. Crown Radio Corp. v. Soundsciber, 506 F.2d 1392, 184 U.S.P.Q. 221,223 (C.C.P.A. 1974). Stated another way, when a case is "difficult to resolve," any doubt should be resolved in favor of the prior user. Century 21 Real Estate, 23 U.S.P.Q. 2d at 1701. Opposer has proven prior ownership of its COOL

CAT marks by clear and convincing evidence. Perfect Foods is not the newcomer and thus deserves the benefit of any doubt.

V. CONCLUSION

Perfect Foods has demonstrated previous use and ownership of its COOL CAT marks and a likelihood of confusion. Perfect Foods therefore requests an order from the Board sustaining this opposition, refusing U.S. App. Serial No. 78/254,092 and denying registration.

PERFECT FOODS, INC.

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VI. EVIDENTIARY OBJECTIONS

Opposer objects to admission of the following evidence offered by Applicant:

1. Opposer renews its pending motion to strike the trial testimony and exhibits of John D. Gullahorn offered on May 26, 2005.
2. Opposer objects on the grounds of lack of foundation as to authenticity under Rule 901 of the Federal Rules of Evidence and hearsay under Rule 802 of the Federal Rules of Evidence to the admission of Exhibit Nos. 1, 2, 8 and 9 of the deposition of John D. Gullahorn offered on May 26, 2005.
3. Opposer objects to the admission of the testimony on page 12, lines 14-23; page 13, line 3-10, 14-15, 20-25; page 17, lines 14-22; and page 18, lines 7-24 of the deposition transcript of Dr. Jean R. Gullahorn, DVM, offered on May 26, 2005, on the grounds of improper direct examination under Rule 611 of the Federal Rules of Evidence.
4. Opposer objects to the admission of the testimony on page 21, lines 1-25; page 22, lines 1-25, 14-15, 20-25; page 25, lines 17-25; page 28, lines 4-24; and page 30, lines 15-23; of the deposition transcript of Dr. Jean R. Gullahorn, DVM, offered on May 26, 2005, on the grounds that the questions were beyond the scope of direct examination under Rule 611 of the Federal Rules of Evidence.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPPOSER'S TRIAL BRIEF was deposited this day September 23, 2005 with the United States Postal Service, with sufficient postage as first class mail in an envelope addressed to:

John D. Gullahorn
4111 Calico Drive
Cantonment, Florida 32533

Dennis T. Griggs
Dennis T. Griggs

* * * * *

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that the foregoing OPPOSER'S TRIAL BRIEF is being filed electronically via ESTTA on the date shown below to the Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, Alexandria, Virginia.

Dennis T. Griggs

September 23, 2005
(date of transmission)

Dennis T. Griggs
(typed name of person transmitting paper)