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

Proceeding	91160978
Party	Plaintiff PERFECT FOODS, INC ,
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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 REPLY BRIEF

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Opposer submits this brief pursuant to Trademark Rule 2.128 in response to Applicant's brief on the case. As shown in the evidentiary record presented herein and as argued in Opposer's main brief on the case, Opposer is entitled to judgment in view of the fact that the relevant du Pont factors clearly favor Opposer. This brief rebuts a number of points raised in Applicant's trial brief.

I. OPPOSER IS THE PRIOR USER OF ITS "COOL CAT" MARKS

Opposer has shown that it acquired priority based on its common law use and ownership of its various COOL CAT marks.

The Board has determined, and Applicant admits, that Applicant's filing date of May 8, 2003 is the earliest date on which 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. Applicant's main brief, page 6, lines 25-26.

Opposer's sworn testimony and documented evidence of record show Opposer's acquisition of common law ownership of its COOL CAT marks as follows:

- from 1988 through 2000 when hand-drawn cards were used in connection with sales to individuals and point of sale posters were used in connection with product trays placed in retail stores, Harley B. Matsil Tr. 18:2-8 and Alyse M. Matsil TR. 6:12-14;
- from 2001 through the present when computer-generated point of sale posters and printed tear-off slips were used, Harley B. Matsil Tr. 18:9-22 (Exhibits 6, 7); and

- from 2002 through the present 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).

II. OPPOSER HAS SHOWN ITS ENTITLEMENT TO JUDGMENT BASED ON THE RELEVANT DU PONT FACTORS

With respect to the marks of the parties, Applicant argues that its mark is distinguishable from the Opposer's previously used marks. Applicant contends that his mark is distinguishable by the partial outline of a cat's face, arguing the Opposer's mark is different since it includes the image of a cat that is wearing a T-shirt. The record shows that Opposer uses COOL CAT alone as well in combination with the image of a cat, and with other words, such as "WHEAT GRASS" and "PET TREAT." Consumers familiar with Opposer's mark "COOL CAT" as used in connection with wheat grass pet treats for cats, upon encountering cat collars sold under the mark COOL CAT and design, will believe that the respective goods originate from the same source. Consumers are most likely to reference and recall the word portion of a mark that includes a design.

Applicant has essentially appropriated the entirety of Opposer's COOL CAT mark and has added the descriptive word "PRODUCTS" along with the image of a cat face. The term "PRODUCTS" is a generic descriptor and so cannot serve as an indicator of origin. The Applicant's incorporation of a similar cat face graphic reinforces the likelihood of confusion. It is well settled and beyond dispute that where two marks share a common component, the addition of another word or words, or an image to the

junior user's otherwise confusingly similar mark will not avoid the likelihood of confusion, except where the common component is merely descriptive and would not be regarded by purchasers as an indicator of origin. Here, the respective marks share the identical words "COOL CAT" and both include the image of a cat face as well as descriptive words.

The similarity and appearance, sound and meaning between the respective marks, as noted in Opposer's main brief, are such that this factor clearly favors Opposer.

With respect to the channels of trade, Applicant takes the position that the channels of trade are distinctly different, contending that his alleged sales of cat collars are conducted almost entirely through an internet website. However, there are no restrictions in Applicant's application as to channels of trade. There are no restrictions in Applicant's application as to the price points of its cats collars or types of customers and, therefore, Applicant's cat collars sold under his mark must be presumed to be sold to all types of customers and through all the usual channels of trade for pet-related products of all price ranges.

Applicant contends that there are many third party marks in existence that include the words "COOL CAT" being used on similar goods. Much of the alleged evidence offered by Applicant on this point is not evidence of use of any third party marks or the extent of any such use.

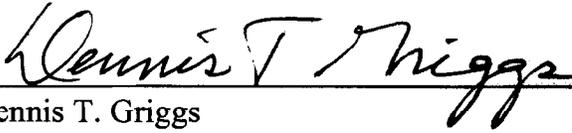
Opposer renews its objections to the documents the on which the Applicant seeks to rely. Opposer has previously filed a motion to strike Applicant's testimony on procedural grounds. Opposer, aside from the procedural objections set forth in the motion to strike, objects to the documents for the reason that those documents do not in any way evidence either current use or past use by third parties. For that reason, these documents are not entitled to any probative value on the issue of third party use.

III. CONCLUSION

Applicant's arguments to the contrary, the record clearly shows in this case that Opposer is entitled to judgment given the fact that virtually all of the relevant du Pont factors favor Opposer. The similarity of marks, the relatedness of the goods, the identity of the trade channels and the classes of customers all favor Opposer in this case.

For all of the foregoing reasons, and those set forth in Opposer's main brief, it is clear that use and registration of Applicant's mark on or in connection with cat collars and cat clothes, is likely to cause confusion with Opposer's common law COOL CAT marks. Opposer, therefore, respectfully requests that the Board find that the Applicant's mark is confusingly similar to Opposer's previously used COOL CAT marks, sustain this opposition and refuse registration to Applicant of the mark shown in the opposed application, SN 78/247,326.

PERFECT FOODS, INC.

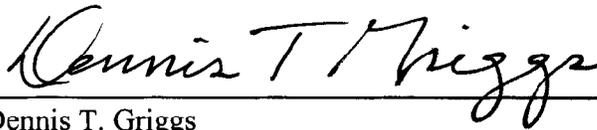
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPPOSER'S REPLY BRIEF was deposited this 8th day of November 2005 with the United States Postal Service, with sufficient postage as first class mail in an envelope addressed to:

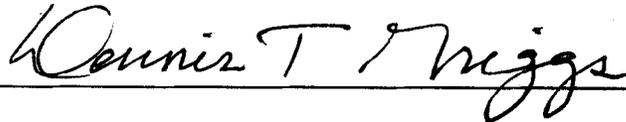
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that the foregoing OPPOSER'S REPLY 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.



November 8, 2005
(date of transmission)

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