ESTTA Tracking number: **ESTTA123657**
Filing date: **02/06/2007**

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

Proceeding	91171426
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Date	02/06/2007
Attachments	ttabvue-91171425-OPP-17.pdf (24 pages)(822322 bytes)

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

PPC MARKETING, LTD.,	§	
Opposer,	§	
v.	§	Consolidated Opposition Nos.: 91171425 and 91171426
MICHAEL FOODS, INC.	§	
Applicant.	§	

OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Opposer, PPC Marketing, Ltd. ("Opposer" or "Pilgrim's Pride"), hereby responds in opposition to the Motion for Summary Judgment filed by Applicant, Michael Foods, Inc. Applicant's Motion focused entirely on the first *DuPont* factor to present its conclusory opinion that no likelihood of confusion exists between the marks EGGS PLUS and BETTER 'N EGGS PLUS and ALL WHITES PLUS. Applicant's Motion completely ignores highly relevant *DuPont* factors that evidence the likelihood of confusion, including the parties' legally identical goods, the parties' legally identical trade channels, and the low level of care exercised by consumers. Further, the obvious similarities and the connotations of the marks in use on identical goods, when considered in terms of a complete *DuPont* analysis, leads to the undeniable conclusion that confusion is likely. Suffice it to say, however, for the purposes of this Motion, Applicant's truncated *DuPont* analysis could not have carried its burden of proof for summary judgment and Applicant's Motion must fail.

II. BACKGROUND

Pilgrim's Pride is the largest provider of poultry products in the United States. Ylitalo Decl. ¶ 2. Pilgrim's Pride was one of the first companies to offer branded eggs when it launched its EGGS PLUS products in January 1997. Pilgrim's Pride typically invests more than $100,000 per year in the promotion of its EGGS PLUS products, and Pilgrim's Pride has invested over $1.2 million in the advertising and marketing of its EGGS PLUS products since 2001. *Id.* ¶ 4.

Since Pilgrim's Pride introduced its EGGS PLUS products, more than 240 media outlets, including 98 television stations, have reported on Pilgrim's Pride's EGGS PLUS products. *Id.*

Among them, for example, were *USA Today*, *The New York Times*, and *Good Housekeeping*, and *NBC Nightly News* and *CBS This Morning*. *Id.*

Pilgrim's Pride sells its EGGS PLUS products at a premium compared to other egg products. For example, Pilgrim's Pride's EGGS PLUS shell eggs typically cost about twice as much as ordinary shell eggs. Since 2001, Pilgrim's Pride has enjoyed annual revenues from its EGGS PLUS products of more than $800,000 per year, with sales revenues totaling more than $5.5 million. *Id.* ¶¶ 6-7.

Notwithstanding the prominence of Pilgrim's Pride's EGGS PLUS brand in the market place, Applicant filed intent-to-use applications for ALL WHITES PLUS and BETTER 'N EGGS PLUS on January 10, 2005. And more than nine years after Pilgrim's Pride introduced EGGS PLUS to the market, Applicant's Marks were published for opposition on May 23, 2006 and May 30, 2006. Opposer promptly filed its Notices of Opposition on June 17, 2006. These proceedings have just begun and neither party conducted discovery before the proceedings were stayed by Applicant's Motion for Summary Judgment.

III. ARGUMENT

A. Applicant Has a High Burden of Proof on Summary Judgment.

The Federal Rules of Civil Procedure govern summary judgment proceedings before the Trademark Trial and Appeal Board. 37 C.F.R. § 2.116(a). Federal Rule of Civil Procedure 56 only permits summary judgment when a review of all of the evidence of record leaves no "genuine issue of material fact," and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2553-54 (1986). The moving party has a heavy burden on summary judgment—the moving

party must affirmatively demonstrate that no reasonable fact finder could return a verdict against the moving party on any material issue. *See id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1996).

The non-moving party has no affirmative burden when opposing a motion for summary judgment, but the non-moving party can defeat the motion by demonstrating the existence of even a single material question of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511-12 (1986). Further, in deciding a motion for summary judgment, the Board must view the evidence in the light most favorable to the nonmovant, and the Board must draw all reasonable inferences from underlying facts in favor of the nonmovant. *See id.*

B. Applicant's Motion Must Fail Because Applicant Did Not Address Numerous Highly Relevant Fact Issues.

Instead of weighing all relevant *DuPont* factors, Applicant's Motion for Summary Judgment dismisses the full *DuPont* analysis and purports to focus exclusively on the first *DuPont* factor—the similarity of the Marks. Mot. at 6. Even Applicant's analysis of the first factor is flawed—Applicant recognizes that the Marks are strikingly similar and Applicant cannot avoid the certainty that the similarity of the marks is one factor favoring a likelihood of confusion. And while it is of course true that certain *DuPont* factors have more or less relevance than others in certain cases, Applicant's effort to ignore relevant *DuPont* factors and still carry its burden of proof was doomed from the outset.

In this case, the level of similarity needed to establish a likelihood of confusion is low because the parties use their marks on identical goods, with identical trade channels, and with relatively-low cost sales to consumers employing a low degree of care. *Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Hard Rock Cafe Int'l*

(USA), Inc. v. Elsea, 56 USPQ2d 1504, 1521 (TTAB 2000). And, again, the marks at issue are undeniably similar. At this summary judgment stage, Applicant's failure to address relevant *DuPont* factors[1] and Applicant's presentation of flawed and wholly conclusory opinions relating to the strength of Pilgrim's Pride's Mark cannot substitute for a complete analysis. As explained below, all relevant *DuPont* factors weigh in favor of a likelihood of confusion, or, at minimum, raise questions of fact that cannot be resolved on summary judgment.

C. Proper Consideration of the *DuPont* Factors Demonstrates That Confusion Is Likely.

1. The first *DuPont* factor weighs in favor of a likelihood of confusion.

A proper analysis of the first *DuPont* factor centers on the similarity or dissimilarity of the marks in their entireties as to the appearance, sound, connotation, and commercial impression. *In re Majestic Distilling*, 65 USPQ2d 1201 (Fed. Cir. 2003). When marks would appear on virtually identical goods or services, the degree of similarity necessary to find a likelihood of confusion declines. *Century 21 Real Estate*, 23 USPQ2d at 1700; *Hard Rock Cafe*, 56 USPQ2d at 1521.

In this case, the EGGS PLUS and BETTER 'N EGGS PLUS and ALL WHITES Plus Marks appear on legally identical "egg" products. The subject applications recite "processed egg" and Pilgrim's Pride's Registrations recite "eggs" broadly.[2] Contrary to Applicant's assertion, Pilgrim's Pride's Registrations are not restricted to "shell eggs" and the recited goods therefore cover all forms of eggs. As such, the goods recited in Pilgrim's Pride's Registrations

[1] Applicant's failure to address relevant *DuPont* factors in its Motion cannot be cured with a discussion of those factors in its Reply brief. Applicant was required to affirmatively carry its burden of proof in its Motion and Applicant cannot sand bag Pilgrim's Pride and the Board by saving for its Reply a proper *DuPont* analysis.

[2] The subject application recites "processed egg products for human consumption, mainly refrigerated, frozen and pre-cooked eggs." Pilgrim's Pride's Registrations recite "eggs" broadly—"eggs containing essential fatty acids and natural antioxidants and which are a good source of vitamin E."

overlap and envelop the goods recited in the subject applications. The parties' goods are therefore legally identical. Because the goods are legally identical, the level of similarity necessary to find a likelihood of conclusion is low. *Century 21 Real Estate,* 23 USPQ2d at 1700.

a. The BETTER 'N EGGS Plus Mark.

Applicant concedes, as it must, that the BETTER 'N EGGS Plus Mark includes the EGGS Plus Mark in its entirety. The only difference in the word marks is the junior mark's addition of the comparative term "better 'n," the connotation of which is "better than." Accordingly, the connotation and commercial impression of Applicant's Mark is "better than EGGS PLUS"—a connotation that consumers could interpret to be comparative (or disparaging) to Pilgrim's Pride's EGGS PLUS products. The sound of Applicant's Mark "better 'n EGGS PLUS" further suggests that use of Applicant's Mark on identical goods would invoke Pilgrim's Pride's EGGS Plus Mark in the minds of consumers. Indeed, the Marks considered in their entireties support Opposer's position that consumers would understand a connection between and be confused by Applicant's BETTER 'N EGGS Plus Mark and Pilgrim's Pride's EGGS Plus Mark. Applicant produced no evidence to suggest that a reasonable fact finder could not reach this conclusion, and Applicant's Motion for Summary Judgment must fail.

b. The ALL WHITES Plus Mark.

Similarly, Applicant's ALL WHITES PLUS also invokes a connection with Pilgrim's Pride's EGGS PLUS in the minds of consumers. The ALL WHITES Plus Mark simply substitutes "all whites" for "eggs" such that the ALL WHITES Plus Mark has a meaning and connotation substantially similar to the EGGS Plus Marks. *See, e.g., Bose Corp. v. QSC Audio*

Products Inc., 63 USPQ2d 1303 (Fed. Cir. 2002) (confusion likely between ACOUSTIC WAVE and POWER WAVE); *Watercare Corp. v. Midwesco-Enter., Inc.*, 171 USPQ 696 (TTAB 1971) (confusion likely between AQUA-CARE and WATER-CARE); *Simmons Co. v. Royal Bedding Co.*, 5 F. Supp. 946 (D. Pa. 1933) (confusion likely between BEAUTY-REST and BEAUTY SLEEP); *Gastown, Inc. of Deleware v. Gas City, Ltd.*, 187 USPQ 760 (TTAB 1975) (confusion likely between GASTOWN and GAS CITY); *Synergistic Int'l Inc. v. Windshield Doctor Inc.*, 66 USPQ2d 1936 (C.D. Cal. 2003) (granting preliminary injunction, confusion likely between GLASS DOCTOR and WINDSHIELD DOCTOR); *Synergistic Int'l Inc. v. Korman*, 77 USPQ2d 1599 (E.D. Va. 2005) (finding infringement between GLASS DOCTOR and WINDSHIELD DOCTOR on summary judgment). Consumers would logically conclude that ALL WHITES PLUS is simply an egg white version of EGGS PLUS. Likewise, consumers would reasonably believe that the ALL WHITES PLUS egg products and the EGGS PLUS egg products emanate from the same source. Applicant's conclusory arguments to the contrary simply cannot meet the summary judgment standard—at minimum, drawing reasonable inferences in favor of Pilgrim's Pride makes clear that a reasonable finder of fact could find that consumers would understand ALL WHITES PLUS and EGGS PLUS to be related.

c. Applicant's argument regarding the strength of Pilgrim's Pride's EGGS Plus Mark.

At the core of Applicant's suggestion that the first *DuPont* factor is determinative is Applicant's belief that Pilgrim's Pride's EGGS Plus Mark is very weak and does not deserve trademark protection. To fashion this argument, Applicant dissects the EGGS Plus Mark, arguing that, separately, EGGS is generic and PLUS is highly suggestive, and, Applicant argues,

it should necessarily follow that the composite Mark is highly suggestive. Mot. at 10. That is not the law and that is not a conclusion that can be reached on summary judgment.

Moreover, substantial evidence demonstrates the strength of Pilgrim's Pride's EGGS Plus Marks. Among other things, Pilgrim's Pride's EGGS PLUS products were among the first branded egg products. Ylitalo Decl. ¶ 7. Further, Pilgrim's Pride has used the EGGS Plus Mark in commerce for more than 10 years. Pilgrim's Pride's EGGS PLUS products often sell for more than twice the cost of regular eggs, and Pilgrim's Pride has enjoyed sales of more than $800,000 per year since 2001. *Id.* ¶ 4. Pilgrim's Pride's sales since 2001 have totaled more than $5.5 million. *Id.* ¶ 5.

Over this same time period, Pilgrim's Pride has invested more than $1.2 million in advertising and marketing of its EGGS PLUS products. *Id.* ¶ 4. More than 240 media outlets have reported on Pilgrim's Pride's EGGS PLUS products. *Id.* Among those were nationwide publications such as *The New York Times, USA TODAY,* and *Good Housekeeping.* Also, more than 98 television programs have aired stories relating to EGGS PLUS, including *NBC Nightly News* and *CBS This Morning.* Nevertheless, Applicant's Motion for Summary Judgment improperly asks the Board to grant summary judgment based solely on Applicant's subjective conclusion that EGGS PLUS warrants a limited scope of protection. Applicant's entire argument is not one that can be recognized on summary judgment.

2. The second *DuPont* factors weighs in favor of a likelihood of confusion.

The second *DuPont* factor is the similarity of the goods associated with the parties' marks. As explained above, the parties' goods are legally identical because Pilgrim's Pride's

broad recitation of "eggs" wholly encompasses Applicant's "processed eggs." Accordingly, this *DuPont* factor weighs heavily in favor of a likelihood of confusion.

3. The third *DuPont* factor weighs in favor of a likelihood of confusion.

The third *DuPont* factor is the similarity of the trade channels through which the parties' goods travel. Goods are presumed to travel through all ordinary channels, and legally identical goods are presumed to travel through legally identical trade channels. *See, e.g., In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Further, as a practical matter, the parties' goods will likely be sold in the same grocery stores and could likely be displayed in close proximity within grocery stores. Accordingly, this factor weighs heavily in favor of a likelihood of confusion.

4. The fourth *DuPont* factor weighs in favor of a likelihood of confusion.

The fourth *DuPont* factor is the conditions under which and consumers to whom sales are made. This factor focuses on the lowest level of care that any relevant consumer would apply. *Checkpoint Sys., Inc. v. Check Point Software Tech.*, 60 USPQ2d 1609, 1618 (3rd Cir. 2001) ("If there is evidence that both average consumers and specialized commercial purchasers buy goods, there is a lower standard of care because of the lack of sophistication of some of the relevant purchasers."). While Pilgrim's Pride's EGGS PLUS products sell at a premium to other egg products, egg products of all types are relatively inexpensive food products that consumers purchase on a regular basis in grocery stores with a low degree of care. Accordingly, this factor weighs heavily in favor of a likelihood of confusion.

5. The fifth *DuPont* factor weighs in favor of a likelihood of confusion.

The fifth *DuPont* factor is the fame of the senior party's mark. Fame in the context of a likelihood of confusion analysis is a relative measure of a mark's strength, and a mark's strength "varies along a spectrum from very strong to very weak." *In re Coors Brewing Co.*, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003); *see also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d 1689, 1694-95 (Fed. Cir. 2005). The fame or strength of a mark may be measured by, among other things, length of use in commerce, sales revenues, advertising efforts, and success within the specific product market. *Palm Bay Imports*, 73 USPQ2d at 1694-95; *Bose Corp.*, 63 USPQ2d at 1305-06 (evidence of revenues and advertising may suffice to establish fame).

Here, Pilgrim's Pride's EGGS PLUS shell eggs were one of the first branded shell eggs on the market. Ylitalo Decl. ¶ 3. Pilgrim's Pride has advertised, marketed, and sold egg products under the EGGS Plus Mark since at least as early as 1997. *Id.* Since 2001, Pilgrim's Pride has invested more than $1.2 million in advertising and promoting its EGGS PLUS products. *Id.* ¶ 4. More than 240 media outlets have reported on Pilgrim's Pride's EGGS PLUS products. *Id.* ¶ 5. Included among those are nationwide publications such as *The New York Times*, *USA Today*, and *Good Housekeeping*. At least 98 television programs have aired reports that discussed EGGS PLUS, including *NBC Nightly News* and *CBS This Morning*. *Id.* Since 2001, Pilgrim's Pride's sales of EGGS PLUS products have exceeded $800,000 per year on the wholesale level, with total wholesale revenues in excess of $5.8 million. *Id.* ¶ 7. Further, consumers pay a significant premium for Pilgrim's Pride's EGGS PLUS products compared with other egg products. *Id.* ¶ 6. In stark contrast to the wholly conclusory and unsupported opinions in Applicant's Motion, these facts demonstrate that Pilgrim's Pride's EGGS Plus Marks are relatively *strong*. At minimum, the summary judgment standards require a finding that Pilgrim's

Pride's EGGS Plus Marks enjoy a strong reputation for quality, considerable goodwill, and relative fame such that this factor weighs in favor of a likelihood of confusion.

6. The sixth *DuPont* factor weighs in favor of a likelihood of confusion.

The sixth *DuPont* factor relates to the number and nature of similar marks in use on similar goods. Applicant states explicitly in its Motion for Summary Judgment that it relies only on the first *DuPont* factor (Motion at 6), therefore conceding the remaining factors for the purposes of this Motion. To the extent that Applicant unwittingly addressed this *DuPont* factor by arguing that three third-party marks have some relevance, that argument is wholly unpersuasive.

Applicant cites an *abandoned application* for EGG BEATERS PLUS, an *abandoned application* for YOLKS PLUS, and a third party registration for OMEGA PLUS, suggesting that these registrations somehow constitute an implicit admission that weighs against a likelihood of confusion in this case. To the contrary, this evidence is of minimal relevance and could at most show use of only one mark, OMEGA PLUS. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973) (third party registrations are not evidence of what happens in the market place or consumer familiarity); *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1798 (TTAB 2001) (third party registrations are not evidence of use or that consumers have been exposed to the registered marks); *Red Carpet Corp. v. Johnstown American Enterprises, Inc.*, 7 USPQ2d 1404, 1406 (TTAB 1988) (third party registrations are not evidence of use to show public awareness of the marks). And in stark contrast to Applicant's BETTER 'N EGGS Plus Mark, OMEGA PLUS does not incorporate Pilgrim's Pride's EGGS Plus Mark. Likewise, unlike the egg whites evoked by the ALL WHITES Plus Mark, "omega"

is not understood by consumers to be a substitute for eggs—substituting ALL WHITES for EGGS is not the same as substituting OMEGA for EGGS.

Moreover, Applicant's argument that Pilgrim's Pride should be punished for an alleged failure to oppose two now-abandoned trademark applications and the OMEGA PLUS Registration is unpersuasive and illogical. Mot. at 7-8. The *Interstate Brands Corp. v. Celestial Seasonings, Inc.* decision does not stand for any affirmative duty to institute opposition proceedings against trademark applications, and, appropriately, the sixth *DuPont* factor focuses on third-party use, not abandoned third-party trademark applications or third-party registrations.

In sum, the evidence of record demonstrates that no third parties use similar marks on similar goods. Accordingly, the sixth *DuPont* factor weighs in favor of a likelihood of confusion.

7. The seventh *DuPont* factor is not relevant to this Motion.

The seventh *DuPont* factor considers the nature and extent of actual confusion. An opposer has no duty to present evidence of actual confusion, although such evidence would be highly relevant. *Hydrotechnic Corp. v. Hydrotech Int'l, Inc.*, 196 USPQ 387, 392-93 (TTAB 1978). Here, this proceeding has just begun and the parties have not yet engaged in discovery. Pilgrim's Pride will investigate instances of actual confusion during discovery and may present any such evidence at a later time. For the purposes of this Motion, however, this *DuPont* factor has no relevance based on the evidence currently of record.

8. The eighth *DuPont* factor is not relevant to this Motion.

The eighth *DuPont* factor is the length of time during which the marks at issue have been in use without actual confusion. Applicant filed the subject applications on a § 1(b) intent-to-use basis and there is no evidence of actual use in the record. Even if Applicant has chosen to commence use of the opposed marks, the length of such use would be very short in view of the Applicant's January 10, 2005 intent-to-use filing date. For the purposes of this Motion, this *DuPont* factor has no relevance based on the evidence of record.

9. The ninth *DuPont* factor is not relevant to this Motion.

The ninth *DuPont* factor is a consideration of the variety of goods on which a mark is or is not used. For the purposes of this Motion, this *DuPont* factor has no relevance based on the evidence of record.

10. The tenth *DuPont* factor weighs in favor of a likelihood of confusion.

The tenth *DuPont* factor is a consideration of the market interface between applicant and the owner of a prior mark. Here, the parties are competitors and the marks at issue are used on competing products. Accordingly, this factor favors a likelihood of confusion.

11. The eleventh *DuPont* factor is not relevant to this Motion.

The eleventh *DuPont* factor is the extent to which the applicant has a right to exclude others from use of its mark on its goods. Applicant did not argue that it has any right to exclude others from use of its mark on its goods. Accordingly, this factor is not relevant to this Motion.

12. The twelfth *DuPont* factor weighs in favor of a likelihood of confusion.

The twelfth *DuPont* factor is the extent of potential confusion. In this case, the potential for confusion is substantial in view of the factors discussed above—particularly the relatedness of the goods, the low level of care, the identical trade channels, and the striking similarity between the marks. Accordingly, this factor favors a likelihood of confusion.

13. The thirteenth *DuPont* factor weighs in favor of a likelihood of confusion.

The last *DuPont* factor is a catch-all provision in which the Board may consider any other probative fact or argument. The junior party's intent is often considered with the thirteenth *DuPont* factor, and there is currently no evidence in the record to suggest that Applicant intended to trade off of Pilgrim's Pride's goodwill when it adopted the mark. It is important to remember, however, the junior party has the opportunity and *obligation* to avoid confusion when selecting a trademark. *See In re Chatman Int'l Inc.*, 380 F.3d 1340, 1345 (Fed. Cir. 2004) ("Like the Board, this court 'resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.'"); *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73 (2d Cir. 1910) (admonishing junior trademark users who adopt "from the entire material universe" marks similar to marks used by competitors); *see also Specialty Brands, Inc. v. Coffee Bean Dist., Inc.*, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (even approaching well-known trademark of a competitor raises an inference of an intent to trade on senior user's reputation).

Here, Applicant had the opportunity and obligation to select a trademark that would avoid confusion. Instead, Applicant selected "from the entire material universe" a trademark that incorporated its competitor's mark in its entirety. As mentioned above, Pilgrim's Pride is the

largest provider of poultry products in the United States, EGGS PLUS is well known, and the parties' goods are directly competitive. Nevertheless, Applicant chose to call its new product "better than" EGGS PLUS and "egg whites" PLUS. To the extent that the thirteenth *DuPont* factor is relevant based on the facts currently of record, this factor weighs in favor of a likelihood of confusion.

IV. CONCLUSION

Applicant brought this Motion for Summary Judgment based on its flawed analysis of the first *DuPont* factor. Applicant's unpersuasive and conclusory arguments cannot carry its burden of proof to demonstrate that no reasonable fact finder could find in favor of Pilgrim's Pride. In fact, a proper analysis of all of the relevant *DuPont* factors, including the first factor, demonstrates that Applicant's use of EGGS PLUS in its BETTER 'N EGGS Plus Mark is very likely to cause confusion. Likewise, Applicant's substitution of "all whites" for "eggs" to change EGGS PLUS into ALL WHITES PLUS is also very likely to cause confusion. To the extent that summary judgment is appropriate in this case, the Board should enter judgment in favor of Pilgrim's Pride. *See* TBMP § 528.08.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of February, 2007, a true copy of the foregoing **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** was served on opposing counsel, via First Class mail, postage prepaid:

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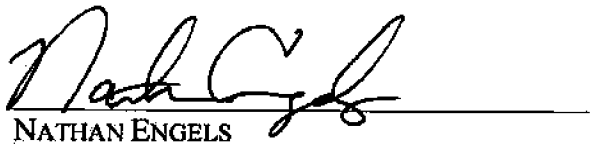

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MICHAEL FOODS, INC.	§	
Applicant.	§	

DECLARATION OF JOE A. YLITALO

I, Joe A. Ylitalo, hereby declare as follows:

1. I am Corporate Counsel for Pilgrim's Pride Corporation. Through my position with Pilgrim's Pride, I have personal knowledge of the matters set forth herein and I submit this Declaration in support of Opposer's Response to Applicant's Motion for Summary Judgment.

2. Pilgrim's Pride is the largest supplier of poultry products in the United States. Pilgrim's Pride sells chicken and egg products, with annual sales exceeding $5 billion.

3. Pilgrim's Pride was one of the first companies to introduce branded shell eggs when it launched its EGGS PLUS products in January 1997.

4. Pilgrim's Pride typically invests more than $100,000 per year in the promotion of its EGGS PLUS product, and Pilgrim's Pride has invested more than $1,200,000 in advertising and marketing of its EGGS PLUS product since 2001.

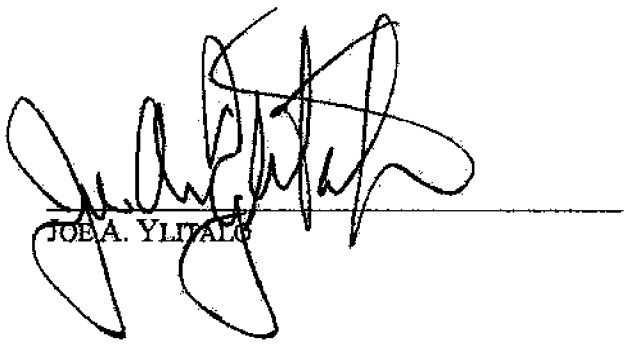
5. Among other promotions, Pilgrim's Pride hired The Richards Group to assist with its nationwide promotional campaign for the EGGS PLUS product. The Richards Group helped our company create press kits that included survey results relating to EGGS PLUS from the

American Dieticians Association. The press kits also included recipes that called for EGGS PLUS from celebrity chefs Stephen Pyles and Emeril Lagasse. By the end of the first year of our promotional campaign, more than 240 media outlets, including 98 television stations, had reported on our EGGS PLUS product. Among others, *USA Today*, *The New York Times*, *Good Housekeeping*, *NBC Nightly News*, and *CBS This Morning* have reported on EGGS PLUS.

6. Pilgrim's Pride sells its EGGS PLUS product at a premium to other egg products. Pilgrim's Pride's EGGS PLUS shell eggs typically cost about twice as much as ordinary shell eggs.

7. Since 2001, Pilgrim's Pride has enjoyed annual revenues from its EGGS PLUS product of more than $800,000 per year, with sales revenue totaling more than $5.5 million.

Date: February 6, 2007



JOE A. YLITALO

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of February, 2007, a true copy of the foregoing document was served on opposing counsel, via First Class mail, postage prepaid:

DEAN R. KARAU
FREDRIKSON & BYRON, P.A.
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200 SIXTH STREET SOUTH
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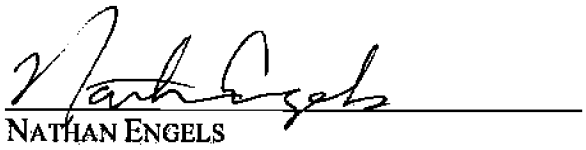

NATHAN ENGELS