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

Proceeding	91171426
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PPC Marketing, Ltd.,)	Opposition No. 91171426
)	Serial No. 78/544,615
Opposer,)	Mark: BETTER 'N EGGS PLUS
v.)	
)	
Michael Foods, Inc.,)	
)	
Applicant.)	

United States Patent And Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**APPLICANT'S MOTION FOR SUMMARY JUDGMENT
DISMISSING NOTICE OF OPPOSITION AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

MOTION

Applicant, Michael Foods, Inc., hereby moves the Trademark Trial and Appeal Board, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the Opposition of Opposer, PPC Marketing, Ltd., to the registration of Michael Foods' BETTER 'N EGGS PLUS trademark.

The ground for dismissing the Opposition is that based on the first *DuPont* factor alone, PPC's trademarks cited in its Notice of Opposition,

EGGS PLUS



are so highly suggestive that they are weak marks, and the addition of other matter to Michael Foods' mark,

BETTER 'N EGGS PLUS

makes it and PPC's marks dissimilar in their entireties as to appearance, sound, connotation and commercial impression such that, pursuant to the Lanham Act, 15 U.S.C. §1052(d), there is no likelihood that the BETTER 'N EGGS PLUS mark, when used on or in connection with the goods of Michael Foods, will cause confusion, or will cause mistake, or will deceive. Therefore, Michael Foods is entitled to summary judgment on PPC's Section 2(d) claim.

Michael Foods also requests that, pursuant to Trademark Rule 2.127(d), 37 C.F.R. § 2.127(d), the Board suspend this proceeding, pending determination of this motion, as of the date of the submission of this motion. In the event that the Board denies Michael Foods' motion for summary judgment, it hereby requests that the discovery, testimony and briefing periods in this proceeding be reset.

Michael Foods' motion is based upon the following facts and legal analysis; the accompanying Affidavit of Dean R. Karau in Support of Applicant's Motion for Summary Judgment Dismissing the Notice of Opposition ("Karau Aff.") and exhibits submitted therewith; the Application for the mark BETTER 'N EGGS PLUS, Serial No. 78/544,615; and the pleadings in this proceeding.

Dated: November 3, 2006



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MEMORANDUM OF LAW

I. INTRODUCTION

Now that it apparently is going into the processed egg product business, PPC, formerly only a shell egg producer, is attempting to use trademark law to create a monopoly in the term PLUS.

That is the only conclusion to draw from PPC's current opposition to not only Michael Foods' application to register BETTER 'N EGGS PLUS, but also PPC's opposition to Michael Foods' application to register ALL WHITES PLUS, filed simultaneously with this action.¹

The Board should not permit PPC such a monopoly.

Years ago PPC did not oppose others incorporating the term PLUS into their marks used for both shell eggs and processed egg products – for the marks OMEGA PLUS, YOLKS PLUS and EGG BEATERS PLUS. And for good reason. PPC's highly suggestive and very weak marks are entitled to only a very narrow scope of protection, and thus none of those other marks are confusingly similar to PPC's marks.

The same reasoning applies in the instant matter.

EGGS PLUS and BETTER 'N EGGS PLUS are dissimilar marks in their entirety.



and BETTER 'N EGGS PLUS are dissimilar marks in their entirety.



and BETTER 'N EGGS PLUS are also dissimilar marks in their entirety.

Simply put, based on the first *DuPont* factor alone, Michael Foods is entitled to summary judgment as a matter of law on PPC's 2(d) claim.

¹ PPC's opposition to Michael Foods' application to register ALL WHITES PLUS is Opposition No. 91,171,425.

II. STATEMENT OF FACTS

Michael Foods owns the intent-to-use application at issue in this proceeding, Application Serial No. 78/544,615, for the mark BETTER 'N EGGS PLUS, used in connection with “processed egg products for human consumption, mainly refrigerated, frozen and pre-cooked eggs.” Michael Foods filed the application on January 10, 2005, and it was published for opposition on May 30, 2006.²

PPC relies on three registrations in this matter.

PPC claims ownership³ of Reg. No. 2,164,616 for the word mark EGGS PLUS, used in connection with “eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E.” The registration issued on June 9, 1998, based on an application filed on September 12, 1996.

PPC claims ownership³ of Reg. No. 2,401,500 for the design mark  (the word portion of the mark is PILGRIM'S PRIDE EGGSPLUS PILGRIM'S PRIDE ESSENTIAL NUTRIENTS THE SIMPLE WAY), also used in connection with “eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E.” The registration issued on November 7, 2000, based on an application filed on April 7, 1999.

PPC also claims ownership of Reg. No. 2,975,706 for the design mark  (the word portion of the mark is EGGSPLUS), also used in connection with “eggs containing

² Michael Foods also owns Reg. No. 2,070,096 for the word mark BETTER 'N EGGS, used in connection with “egg substitute for human consumption.” The registration issued on June 10, 1997, based on an application filed on April 29, 1991, and claims a date of first use in 1995.

³ Although in the Notice of Opposition PPC claims ownership of this registration, U.S.P.T.O. records shows that Pilgrim's Pride Corporation, not PPC, is the owner of the registration, and that there is no assignment recorded. If this matter proceeds, Michael Foods will use discovery to ferret out more detailed information on the ownership issue and, if warranted, seek leave to amend its pleadings accordingly.

essential fatty acids and natural antioxidants and which are a good source for vitamin E.” The registration issued on July 26, 2005, based on an application filed on August 11, 2003.

There have been other applications and/or registrations for marks incorporating the term PLUS for both eggs and for processed egg products, none of which PPC opposed or petitioned to cancel.⁴

ConAgra Brands, Inc. filed an application to register EGG BEATERS PLUS for “cholesterol-free egg substitutes,” Application Serial No. 75/585,004, on November 9, 1998. Karau Aff., Exh. A. The U.S.P.T.O. published the application for opposition on July 13, 1999, *id.*, over a year after PPC’s Reg. No. 2,164,616 issued on June 9, 1998. PPC did not file any opposition to the registration of ConAgra’s mark. *Id.* The U.S.P.T.O. issued a notice of allowance on October 5, 1999. *Id.*

REW Marketing, Inc. filed an application to register YOLKS PLUS (disclaiming the term YOLKS) for “liquid egg products, namely liquid whole eggs, liquid yolks,” Application Serial No. 76/357,902, filed on January 11, 2002. Karau Aff., Exh. B. The U.S.P.T.O. published the application for opposition on December 31, 2002, *id.*, four and one-half years after PPC’s Reg. No. 2,164,616 issued on June 9, 1998, and over two years after PPC’s Reg. No. 2,401,500 issued on November 7, 2000. *Id.* PPC did not file any opposition to the registration of REW’s mark. *Id.* The U.S.P.T.O. issued a notice of allowance on March 25, 2003. *Id.*

Sparboe Agricultural Corporation filed an application to register OMEGA PLUS (disclaiming the term OMEGA) for “eggs,” Application Serial No. 76/615,145, filed on October 8, 2004. Karau Aff., Exh. C. The U.S.P.T.O. published the application for opposition on September 20, 2005, *id.*, over seven years after PPC’s Reg. No. 2,164,616 issued on June 9,

⁴ There are many other relevant PLUS marks, but for purposes of this motion only, Michael Foods will not rely on them.

1998, nearly five years after PPC's Reg. No. 2,401,500 issued on November 7, 2000, and two months after PPC's Reg. No. 2,975,706 issued on July 26, 2005. *Id.* PPC did not file any opposition to the registration of Sparboe's mark. *Id.* The application matured into a Registration No. 3,025,937 on December 13, 2005. *Id.*

III. ARGUMENT

PPC's marks are so highly suggestive that they are weak marks, and the addition of other matter to Michael Foods' BETTER 'N EGGS PLUS mark makes it and PPC's marks dissimilar in their entireties as to appearance, sound, connotation and commercial impression. Therefore, based on the first *DuPont* factor alone,⁵ as a matter of law Michael Foods is entitled to summary judgment dismissing the Opposition.

A. The Summary Judgment Legal Standard.

Summary judgment is a pretrial device to dispose of cases in which "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* F.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 U.S.P.Q.2d 1793 (Fed. Cir. 1987). The purpose of the motion is judicial economy – to avoid an unnecessary trial where there is no genuine issue of material fact and additional evidence could not reasonably be expected to change the result. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 U.S.P.Q. 741 (Fed. Cir. 1984). Summary judgment is "a salutary method of disposition," and the Board should not hesitate to

⁵ If the Board denies its motion for summary judgment, Michael Foods reserves the right to submit evidence at a later date to show that the other *DuPont* factors also weigh in its favor.

dispose of cases on summary judgment when appropriate. *See Sweats Fashions, Inc.*, 833 F.2d at 1562, 4 U.S.P.Q.2d at 1795.

A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *See, e.g., Copelands' Enterprises, Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 U.S.P.Q.2d 1295 (Fed. Cir. 1991); *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 U.S.P.Q.2d 1545 (T.T.A.B. 1990), *aff'd*, 951 F.2d 330, 21 U.S.P.Q.2d 1142 (Fed. Cir. 1991); *Flatley v. Trump*, 11 U.S.P.Q.2d 1284 (T.T.A.B. 1989). The burden of the moving party may be met by showing, that is, pointing out, "that there is an absence of evidence to support the nonmoving party's case." *See Celotex*, 477 U.S. 317; *Liberty Lobby, Inc.*, 477 U.S. 242; *see also Pack'Em Enterprises Inc.*, 951 F.2d 330, 21 U.S.P.Q.2d 1142.

When the moving party's motion is supported by evidence sufficient, if unopposed, to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure, showing that there is a genuine factual dispute for trial. *See Fed. R. Civ. P. 56(e); Copelands' Enterprises*, 945 F.2d 1563, 20 U.S.P.Q.2d 1295; *Blansett Pharmacal Co. v. Carmrick Laboratories, Inc.*, 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992). A factual dispute is genuine only if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 U.S.P.Q.2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 U.S.P.Q.2d 1471 (Fed. Cir. 1992).

B. Michael Foods Is Entitled To Summary Judgment On PPC's Likelihood of Confusion Claim.

PPC has the burden of pleading and proving two basic elements: (1) that it has standing to oppose in that it is likely to be damaged by the registration, and (2) that there are valid grounds why the applicant is not entitled under law to register the mark. See J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §20:3 (4th ed. 2006). PPC, however, cannot meet its burden.

1. The first *DuPont* factor alone is dispositive of this matter.

In *Application of E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), the court set out thirteen factors that may be considered when determining whether a challenged trademark is likely to cause confusion with another prior mark. The *DuPont* factors, however, will vary from case to case, and not all of the factors need be present to determine the issue. *Id.* at 1361-62. Each factor may play a more or less weighty role in any particular determination. *In Re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993). A single factor can substantially outweigh any other relevant factor and be dispositive of the issue. See, e.g., *Kellogg Co. v. Pack'Em Enterprises, Inc.*, 14 U.S.P.Q.2d 1545 (T.T.A.B. 1990), *aff'd*, 951 F.2d 330 (Fed. Cir. 1991).

For the purpose of this motion only, Michael Foods is relying only upon the first *DuPont* factor. Also, while design elements often outweigh similarities in words, even in cases where the words in the mark are very similar, see, e.g., *Jordache Enter. Inc. v. Hogg Wyld Ltd.*, 828 F.2d 1482 (10th Cir. 1987), for purposes of this motion only, Michael Foods will assume that the words in the design marks are the dominant portions of those marks, and will confine its analysis to a comparison of the words alone.

The first *DuPont* factor alone, however, the dissimilarity of the marks themselves, is dispositive of the issue. PPC's marks are so highly suggestive that they are weak marks, and the addition of other matter to Michael Foods' BETTER 'N EGGS PLUS mark makes it and PPC's marks dissimilar in their entireties as to appearance, sound, connotation and commercial impression. Therefore, the Board should grant Michael Foods summary judgment on PPC's Section 2(d) claim.

2. PPC's failure to oppose other marks incorporating the term PLUS is an implicit admission that PLUS marks are registrable over its marks.

There were a number of other marks which incorporated the term PLUS for both eggs and processed egg products which the U.S.P.T.O. also published for opposition and for which it issued notices of allowance. However, PPC did not file oppositions to the registration of those marks or petition to cancel any resulting registrations. PPC's failure to oppose other marks incorporating the term PLUS is an implicit admission that marks incorporating PLUS are registrable over its marks.

In 1998, ConAgra Brands, Inc. filed an application for EGG BEATERS PLUS for a cholesterol-free egg substitute, the U.S.P.T.O. published the application for opposition in 1999, over one year after PPC's Reg. No. 2,164,616 issued in 1998, but PPC did not file any opposition, and the U.S.P.T.O. issued a notice of allowance.

In 2002, REW Marketing, Inc. filed an application for YOLKS PLUS (disclaiming the term YOLKS) for liquid egg products, namely, liquid whole eggs, liquid yolks. The U.S.P.T.O. published the application for opposition in 2002, four and one-half years after PPC's Reg. No. 2,164,616 issued in 1998, and over two years after PPC's Reg. No. 2,401,500 issued in 2000, but PPC did not file any opposition and the U.S.P.T.O. issued a notice of allowance.

In 2004, Sparboe Agricultural Corporation filed an application to register OMEGA PLUS (disclaiming the term OMEGA) for eggs, the U.S.P.T.O. published the application for opposition in 2005, over seven years after PPC's Reg. No. 2,164,616 issued in 1998, nearly five years after PPC's Reg. No. 2,401,500 issued in 2000, and two months after PPC's Reg. No. 2,975,706 issued in 2005, but PPC did not file any opposition, the registration issued, and PPC has not petitioned to cancel the registration.

PPC's implicit admission of its opinion that the marks owned by REW, ConAgra and Sparboe were registrable over its PLUS marks, evidenced by its failure to oppose any of the marks and its failure to seek to cancel the third mark, is persuasive evidence to be weighed by the Board. *Interstate Brands Corporation v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151, 154 (CCPA 1978).

Although PPC now asks the Board to find confusion in this instance, consumers will experience no confusion by the use of BETTER 'N EGGS PLUS in the marketplace, just as PPC believed years ago that there would be no consumer confusion caused by the use of EGG BEATERS PLUS, YOLKS PLUS and OMEGA PLUS in the marketplace.

3. The parties' respective marks are different in their entireties.

Just as PPC did not believe there was any likelihood of confusion when it chose not to oppose the registration of the above-described marks, the U.S.P.T.O. also did not believe there was any likelihood of confusion as the result of any of PPC's registrations when examining Michael Foods' application to register BETTER 'N EGGS PLUS. There are excellent reasons why – PPC's marks are so highly suggestive that they are weak marks, and the addition of other matter to the BETTER 'N EGGS PLUS mark, just as with the other marks incorporating the term PLUS, makes it dissimilar to PPC's marks.

a. Marks must be viewed in their entirety.

Marks must be considered in their entirety, and not simply to determine what points they have in common. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 U.S.P.Q. 390, 395 (Fed. Cir. 1983). Moreover, the fact that two marks share a similar term is not itself an indication that the marks are similar, let alone create a likelihood of confusion. "The use of identical, even dominant, words in common does not automatically mean that the two marks are similar." *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987). A likelihood of confusion cannot be presumed simply because an applicant's mark contains an opposer's mark. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (RITZ and THE RITZ KIDS in their entirety create different commercial impressions); *In re Farm Fresh Catfish Co.*, 231 U.S.P.Q. 495 (T.T.A.B. 1986) (CATFISH BOBBERS (with "CATFISH" disclaimed) for fish held not likely to be confused with BOBBER for restaurant services); *In re Shawnee Milling Co.*, 225 U.S.P.Q. 747 (T.T.A.B. 1985) (GOLDEN CRUST for flour held not likely to be confused with ADOLPH'S GOLD'N CRUST and design (with "GOLD'N CRUST" disclaimed) for coating and seasoning for food items). Thus, under the overall impression analysis, there is no rule that confusion is automatically likely if a junior user has a mark that contains in part the whole of another's mark. *See* MCCARTHY, § 23:41, and cases cited therein.

The fact that the words EGGS and PLUS are incorporated into Michael Foods' mark does not lead to a likelihood of confusion, for a number of reasons.

b. EGGS PLUS is so highly suggestive that it is a weak mark entitled to only a very narrow scope of protection, and the addition of other matter precludes the likelihood of consumer confusion.

If the common element of two marks is "weak" in that it is generic, descriptive or highly suggestive of the named goods, consumers typically will be able to avoid confusion unless the

overall combinations have other commonality. *See, e.g., In re Bed & Breakfast Registry*, 791 F.2d 157, 229 U.S.P.Q. 818 (Fed. Cir. 1986) (BED & BREAKFAST REGISTRY for making lodging reservations for others in private homes held not likely to be confused with BED & BREAKFAST INTERNATIONAL for room booking agency services); *The U.S. Shoe Corp. v. Chapman*, 229 U.S.P.Q. 74 (T.T.A.B. 1985) (COBBLER'S OUTLET for shoes held not likely to be confused with CALIFORNIA COBBLERS (stylized) for shoes); *In re Istituto Sieroterapico E Vaccinogeno, Toscano "SCLAVO" S.p.A.*, 226 U.S.P.Q. 1035 (T.T.A.B. 1985) (ASO QUANTUM (with "ASO" disclaimed) for diagnostic laboratory reagents held not likely to be confused with QUANTUM I for laboratory instrument for analyzing body fluids).

Moreover, the Board and the courts have recognized that merely descriptive and weak designations may be entitled to a narrower scope of protection than an entirely arbitrary or coined word. *See, e.g., In re Central Soya Company, Inc.*, 220 U.S.P.Q. 914 (T.T.A.B. 1984).

In the instant matter, EGGS, as a generic portion of a composite mark, should be given little weight, because the public will look to other portions of the respective marks and will not be confused unless the other portions are similar. *See, e.g., In re National Data Corp.*, 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985).

In addition, PLUS is a highly suggestive term, an everyday word which merely implies that there is a quality or value added to the "eggs." *See, e.g., Plus Products v. Natural Organics, Inc.*, 204 U.S.P.Q. 773, 780 (T.T.A.B. 1979); *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 222 U.S.P.Q. 373 (C.A.N.Y. 1983); *Plus Products v. Redken Laboratories*, 199 U.S.P.Q. 111 (T.T.A.B. 1978); *Plus Products v. General Mills, Inc.*, 188 U.S.P.Q. 520 (T.T.A.B. 1975); *Plus Products v. Sterling Food Company, Inc.*, 188 U.S.P.Q. 586 (T.T.A.B. 1975). As

such, PLUS is a weak term, and its use also reduces the likelihood of confusion. See MCCARTHY, § 23:48 and other cases cited therein.

As a result, the entire word mark EGGS PLUS mark is so highly suggestive of eggs with an additive that it is a weak mark. As such, the addition of other matter, even of a suggestive or laudatory character, would distinguish EGGS PLUS for shell eggs from processed egg products in the mind of the consumer. See, e.g., *Industrial Adhesive Company v. Borden, Inc.*, 218 U.S.P.Q. 945 (T.T.A.B. 1983); see also MCCARTHY, § 23:48 and other cases cited therein.

Industrial Adhesive Company v. Borden, Inc., is instructive. Industrial owned the trademark and registration BOND-PLUS for industrial adhesives. Industrial opposed Borden's application for WONDER BOND PLUS for cyanoacrylate adhesive. The Board found that the parties' respective goods were related, "sufficient to set the stage for confusion to arise." *Industrial Adhesive*, 218 U.S.P.Q. at 951. Nevertheless, the Board found no likelihood of confusion,

despite certain obvious similarities in appearance, sound and connotation (i.e., the fact that opposer's mark "BOND-PLUS" is completely encompassed within applicant's "WONDER BOND PLUS" mark, the latter differing only by addition of the somewhat laudatory prefix term "WONDER")"

Id. The Board found that to be the case because

opposer's "BOND-PLUS" mark is so highly suggestive of adhesive products that it may be regarded as a "weak" mark such that addition of other matter, even of a suggestive or laudatory character, would in our judgment be capable of distinguishing "BOND-PLUS" from other adhesive marks in the minds of the consuming public.

Id. Continuing, the Board noted:

It is true that when a mark of one party completely encompasses that of another on related products (as in this case) likelihood of confusion will frequently ensue, particularly if the added matter of the encompassing mark is of a descriptive, highly suggestive or subordinate character. However, this is not necessarily the case where descriptive or highly suggestive characteristics of the common portions of the marks or frequent trade use of the common portions are involved.

Id. (Internal citations omitted.)

The instant matter is very similar to *Industrial Adhesive*. Even though the words EGGS and PLUS are completely encompassed in Michael Foods' BETTER 'N EGGS PLUS mark, the EGGS PLUS mark is so highly suggestive of eggs with an additive that, because there is no other commonality, there is no likelihood of confusion. Moreover, the addition of other matter, the word BETTER and the contraction 'N, is quite capable of distinguishing the marks in the minds of the consuming public.

In fact, although Michael Foods' mark incorporates the words EGGS and PLUS, it is not using the term BETTER 'N to modify the term EGGS PLUS; rather, it is using the term PLUS to modify the term BETTER 'N EGGS, making confusion even more unlikely.

The meaning or connotation of a mark must be determined in relation to the named goods or services, and even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the parties' respective goods so that there is no likelihood of confusion. *See In re Sears, Roebuck and Co.*, 2 U.S.P.Q.2d 1312 (T.T.A.B. 1987); *In re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q. 629 (T.T.A.B. 1977).

In the present matter, the goods used in connection with Michael Foods' BETTER 'N EGGS PLUS mark provide consumers adequate guidance which will avoid the likelihood of confusion. The BETTER 'N EGGS PLUS mark is used in connection with processed egg products, not shell eggs. Consumers will understand that, when buying "processed egg products" under the mark BETTER 'N EGGS PLUS, the term BETTER 'N EGGS references the "processed egg products" and that the term PLUS modifies the term BETTER 'N EGGS, indicating that a quality or value has been added. Therefore, the public will view the overall mark BETTER 'N EGGS PLUS as being broken into the two terms BETTER 'N EGGS and PLUS, suggesting "processed egg products with additives."

In contrast, when consumers see PPC’s EGGS PLUS mark on the named goods – “eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E” – they will understand that they are buying a shell egg albeit with an added quality or value.

Simply put, the consumers will suffer no confusion.

- c. **The dominant portion of Michael Foods’ mark is BETTER ‘N EGGS, while the dominant, albeit weak, term PLUS is the dominant portion of PPC’s mark.**

One feature of a mark may be more significant and it is proper to give greater force and effect to that dominant feature. *See* MCCARTHY, § 23:42, and cases cited therein. Therefore, it is not improper to discount the similarity of descriptive or generic parts of conflicting marks. *Id.*

Typically, the first word or words in a mark are considered the dominant portion of the mark. *See e.g., Presto Products v. Nice-Pak Products, Inc.*, 9 U.S.P.Q.2d 1895, 1898 (T.T.A.B. 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind ... and remembered when making purchasing decisions involving the services of the applicant and Opposer.”).

In this case, consumers understand that the term PLUS refers to something of added value or quality. As discussed above, consumers, when viewing the goods used in connection with Michael Food’s mark – processed egg products – will understand that the term BETTER ‘N EGGS is the product to which a quality or value has been added. Therefore, consumers will view BETTER ‘N EGGS as a unitary term and, because it is the first portion of the mark, they will view that term as the dominant portion of Michael Foods’ mark.

In contrast, because the term EGGS in the EGGS PLUS mark is a generic term, the term PLUS must necessarily be the dominant term. *See* MCCARTHY, § 23:45, and cases cited therein. Moreover, the descriptive and generic parts of the marks should be discounted.

Thus, when comparing the dominant portions of the respective marks, there simply is no likelihood of consumer confusion.

d. The traditional sight, sound, meaning and commercial impression tests make clear why there is no likelihood of consumer confusion.

Moreover, unlike *Industrial Adhesive*, in the present matter there are distinct differences in the sight, sound, meaning and commercial impression of the marks, making confusion even more unlikely.

In the instant matter, the marks are very different visually in their entireties:

BETTER ‘N EGGS PLUS

EGGS PLUS



Michael Foods’ BETTER ‘N EGGS PLUS mark consists of a complete word, a contraction, a third word and a fourth word. In contrast, EGGS PLUS consists of only two words.

Additionally, as discussed above, consumers are likely to view the term BETTER ‘N EGGS as a unitary term with the word PLUS modifying that term. In contrast, consumers will perceive the term PLUS as modifying the term EGGS in PPC’s marks.

Importantly, Michael Foods’ mark begins with the word BETTER, which does not appear anywhere in PPC’s marks. In addition, the contraction ‘N creates a very distinct visual impression – more of a symbol, not a distinct word – which also has no counterpart in PPC’s marks. Moreover, the contraction also creates a symmetry around it which, again, has no counterpart in PPC’s marks. Finally, BETTER ‘N EGGS PLUS has the appearance of a slogan, while EGGS PLUS does not. The marks thus are very different visually.

The marks are also aurally very different.

Michael Foods' mark includes significantly different, as well as additional, sounds that unmistakably set it apart from PPC's marks. The first word BETTER and the contraction 'N in the dominant term have no sound counterpart in the PPC marks. In addition, BETTER 'N EGGS PLUS consists of five syllables. The first word BETTER consists of two syllables and the contraction 'N consists of one syllable, none of which are found in PPC. Moreover, the fact that consumers will perceive BETTER 'N EGGS as a unitary term creates a rhythm and cadence in the pronunciation of the term which, again, does not exist in any of PPC's marks.

Thus, the marks are also very different as to sound.

In terms of meaning and commercial impression, as discussed more fully above, the goods used in connection with Michael Foods' BETTER 'N EGGS PLUS mark provide consumers with guidance about the meaning and impression of the mark. The BETTER 'N EGGS PLUS mark is used in connection with processed egg products, not shell eggs. Consumers will understand that, when buying "processed egg products" under the mark BETTER 'N EGGS PLUS, the term BETTER 'N EGGS references the "processed egg products" and that the term PLUS modifies the term BETTER 'N EGGS, indicating that a quality or value has been added. Therefore, the public will view the overall mark BETTER 'N EGGS PLUS as being broken into the two terms BETTER 'N EGGS and PLUS.

In contrast, when consumers see the EGGS PLUS mark on the named goods – "eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E" – they will understand that they are buying a shell egg albeit with an added quality or value.

Because the PPC marks and the BETTER 'N EGGS PLUS mark in their entireties convey different commercial impressions, confusion is unlikely, regardless of identical or highly

related goods, identical trade channels, and the same consumers.⁶ See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 U.S.P.Q.2d 1459 (Fed. Cir. 1998) (CRYSTAL CREEK for wine did not create a likelihood of confusion with CRISTAL and CRISTAL CHAMPAGNE despite being in the same class of goods and trade channels and being purchased by the same consumers).

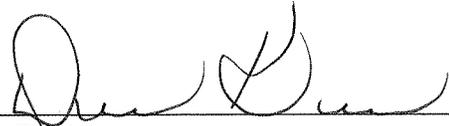
Consequently, the mere fact that the respective marks may share some words does not mean that the BETTER 'N EGGS PLUS mark and PPC marks, when considered in their entireties, are sufficiently similar in meaning, or project a similar commercial impression. Instead, when considered in their entireties, BETTER 'N EGGS PLUS is different from the PPC marks. Simply put, confusion is unlikely to result from contemporaneous use of BETTER 'N EGGS PLUS and the PPC marks, even if the marks are used on identical goods marketed in the same trade channels to the same class of purchasers. Thus, the dissimilarity of the marks simply outweighs the other relevant *DuPont* factors.

III. CONCLUSION

Based on the first *DuPont* factor alone, there is no likelihood of confusion. By choosing a generic and a descriptive term for its word mark and the word portions of its design marks, PPC must live with the resulting weakness of its marks and the very narrow scope of protection afforded to them. PPC's marks are so highly suggestive that they are weak marks, and the addition of other matter to Michael Foods' BETTER 'N EGGS PLUS mark makes it and PPC's marks dissimilar in their entireties. Therefore, Michael Foods respectfully requests that the Board grant its motion for summary judgment, dismissing the Notice of Opposition.

⁶ Michael Foods does not concede that the goods are highly related or that the channels of trade and consumers are identical. For purposes of this motion only, however, Michael Foods does not rely on the differences.

Dated: November 3, 2006

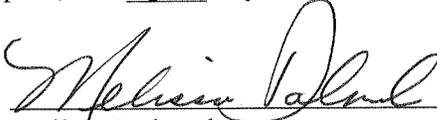


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4105266_1.DOC

CERTIFICATE OF SERVICE

I hereby certify that true copies of the APPLICANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING NOTICE OF OPPOSITION AND MEMORANDUM OF LAW IN SUPPORT THEREOF and the AFFIDAVIT OF DEAN R. KARAU IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING NOTICE OF OPPOSITION were served by United States mail on the attorney of record for PPC Marketing, Ltd. in this action, Nancy Navarro, Navarro Law Office, P.C., P.O. Box 166851, Irving, TX 75016, by mailing it to her address of record by first class mail, postage prepaid, this 3rd day of November, 2006.



Melissa Dahmeh

4105266_1.DOC

3. Attached as Exhibit B is a true and correct copy of the U.S.P.T.O.'s TARR database webpage for REW Marketing, Inc.'s application to register YOLKS PLUS for "liquid egg products, namely liquid whole eggs, liquid yolks," Application Serial No. 76/357,902, showing that it was filed on January 11, 2002, that it published for opposition on December 31, 2002, that neither PPC nor anyone else filed a notice of opposition, and that a notice of allowance was issued on March 25, 2003.

4. Attached as Exhibit C is a true and correct copy of the U.S.P.T.O.'s TARR database webpage for Sparboe Agricultural Corporation's application to register OMEGA PLUS for "eggs," Application Serial No. 76/615,145, showing that it was filed on October 8, 2004, that it was published the application for opposition on September 20, 2005, that neither PPC nor anyone else filed a notice of opposition, and that it matured into Registration No. 3,025,937 on December 13, 2005.

Dated this 1 day of November, 2006

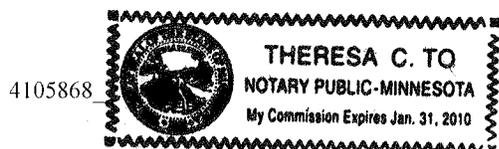


Dean R. Karau

Subscribed and sworn to before me
this 2nd day of November, 2006.

Theresa C. To

Notary Public



Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2006-11-02 14:20:27 ET

Serial Number: 75585004 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): EGG BEATERS PLUS

Standard Character claim: No

Current Status: Abandoned: No Statement of Use filed after Notice of Allowance was issued.

Date of Status: 2002-10-06

Filing Date: 1998-11-09

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2003-05-29

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. ConAgra Brands, Inc.

Address:

ConAgra Brands, Inc.
One ConAgra Drive
Omaha, NE 68102
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Nebraska

GOODS AND/OR SERVICES

International Class: 029

Class Status: Active

Exhibit A

Cholesterol-free egg substitute

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2003-05-24 - Abandonment - No use statement filed

2002-04-11 - Extension 5 granted

2002-03-29 - Extension 5 filed

2002-03-29 - PAPER RECEIVED

2001-09-29 - Extension 4 granted

2001-09-19 - Extension 4 filed

2001-05-01 - Extension 3 granted

2001-04-05 - Extension 3 filed

2000-12-19 - Extension 2 granted

2000-10-03 - Extension 2 filed

2000-05-17 - Extension 1 granted

2000-03-24 - Extension 1 filed

1999-10-05 - Notice of allowance - mailed

1999-07-13 - Published for opposition

1999-06-11 - Notice of publication

1999-04-09 - Approved for Pub - Principal Register (Initial exam)

1999-03-26 - Communication received from applicant

1999-03-15 - Non-final action mailed

1999-03-09 - Assigned To Examiner

CORRESPONDENCE INFORMATION

Correspondent

Patrick C. Stephenson (Attorney of record)

PATRICK C. STEPHENSON
MCGRATH, NORTH, MULLIN & KRATZ, P.C
1400 ONE CENTRAL PARK PLAZA
OMAHA, NEBRASKA 68102

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2006-11-02 14:22:32 ET

Serial Number: 76357902 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): YOLKS PLUS

Standard Character claim: No

Current Status: Abandoned: No Statement of Use filed after Notice of Allowance was issued.

Date of Status: 2003-09-26

Filing Date: 2002-01-11

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 111

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Current Location: 900 -File Repository (Franconia)

Date In Location: 2003-11-10

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. REW Marketing, Inc.

Address:

REW Marketing, Inc.
6525 W. Campus Oval, Suite 185
New Albany, OH 43054
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Ohio

GOODS AND/OR SERVICES

International Class: 029

Class Status: Active

Exhibit B

Liquid egg products, namely, liquid whole eggs, liquid yolks

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

Disclaimer: "YOLKS"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2003-11-06 - Abandonment - No use statement filed

2003-03-25 - Notice of allowance - mailed

2002-12-31 - Published for opposition

2002-12-11 - Notice of publication

2002-11-04 - Approved for Pub - Principal Register (Initial exam)

2002-11-01 - Assigned To Examiner

2002-10-17 - Communication received from applicant

2002-10-17 - PAPER RECEIVED

2002-04-22 - Non-final action mailed

2002-04-05 - Assigned To Examiner

CORRESPONDENCE INFORMATION

Correspondent

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CLAYTON L. KUHNELL
DINSMORE & SHOHL LLP
1900 CHEMED CENTER
255 EAST FIFTH STREET
CINCINNATI, OHIO 45202

Phone Number: (513) 977-8377

Fax Number: (513) 977-8141

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2006-11-02 14:23:06 ET

Serial Number: 76615145 Assignment Information

Registration Number: 3025937

Mark

OMEGA PLUS

(words only): OMEGA PLUS

Standard Character claim: Yes

Current Status: Registered.

Date of Status: 2005-12-13

Filing Date: 2004-10-08

Transformed into a National Application: No

Registration Date: 2005-12-13

Register: Principal

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 650 -Publication And Issue Section

Date In Location: 2005-12-13

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. SPARBOE AGRICULTURAL CORP.

Address:
SPARBOE AGRICULTURAL CORP.
35 E. 4th St. P.O. Box 961

Exhibit C

Litchfield, MN 55355

United States

Legal Entity Type: Corporation

State or Country of Incorporation: Minnesota

GOODS AND/OR SERVICES

International Class: 029

Class Status: Active

EGGS

Basis: 1(a)

First Use Date: 2004-01-15

First Use in Commerce Date: 2004-01-15

ADDITIONAL INFORMATION

Disclaimer: "OMEGA"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2005-12-13 - Registered - Principal Register

2005-09-20 - Published for opposition

2005-08-31 - Notice of publication

2005-05-31 - Law Office Publication Review Completed

2005-05-27 - Assigned To LIE

2005-05-23 - Examiner's amendment mailed

2005-05-20 - Approved for Pub - Principal Register (Initial exam)

2005-05-20 - Examiners Amendment -Written

2005-05-16 - Non-final action mailed

2005-05-13 - Non-Final Action Written

2005-05-12 - Assigned To Examiner

2004-10-21 - New Application Entered In Tram

CORRESPONDENCE INFORMATION

Correspondent

SPARBOE AGRICULTURAL CORP.

PO BOX 961

LITCHFIELD, MN 55355-0961
