

“2”). As set forth below, genuine issues of material fact exist which preclude summary judgment in favor of 7-Eleven.

II. FACTS

A. Bucenell and her Healthy Gulp Product

On June 24, 2006, Applicant filed an Application for Trademark, Serial Number 78916143, for the mark HEALTHY GULP for vitamin, mineral and supplement enriched water for cats and dogs. (Bucenell Decl. ¶ 3 and Exh. B). The HEALTHY GULP mark was published in the Official Gazette on February 13, 2007 and was first used in commerce as early as August 2007. (Bucenell Decl. ¶ 5 and Exh. D). Based upon a search by the Examining Attorney at the U.S. Patent and Trademark Office, a first office action indicated that no similar marks were found on the Principal Registers that would bar registration of the HEALTHY GULP mark. (Bucenell Decl. ¶ 4 and Exh. C).

The HEALTHY GULP mark was formulated by Applicant as a suggestive mark with the intention of describing a beverage specifically for pets. The mark was selected because Applicant’s pet water is enriched with vitamins, minerals and supplements and pets tend to “gulp” water – hence HEALTHY GULP. (Bucenell Decl. ¶ 7). Applicant is the inventor of the product and has a patent pending under U.S. Patent Application No. 60/879,339. (Bucenell Decl. ¶ 2 and Exh. A).

Applicant’s pet water is bottled. (Bucenell Decl. ¶ 2). The label states “Pet Water”; includes a whimsical picture of a dog (peanut butter flavor), a cat (tuna flavor) or a dog and cat (unflavored); and includes Applicant’s slogan “Because We Deserve Bottled Water Too.” (Bucenell Decl. ¶ 10 and Exh. G). The label makes no reference to 7-Eleven or 7-Eleven’s slogan “Thank Heaven for 7-Eleven.” (Bucenell Decl. ¶10 and Exh. G).

Applicant's pet water is currently sold on her website in packages of 8 bottles for \$10.49. (Bucenell Decl. ¶ 12). With shipping and handling, the total cost of a package of 8 bottles is \$19.44. (Bucenell Decl. ¶ 12). Single bottles cannot be purchased on line. (Bucenell Decl. ¶ 12). Although she offered her product for sale on Ebay at one time, she has not done so for nearly one year. (Bucenell Decl. ¶ 12).

B. 7-Eleven and its GULP Products

7-Eleven is engaged in the business of offering convenience store services and products to the general public throughout the United States. (Memorandum in Support of Opposer's Motion for Summary Judgment at p. 2). 7-Eleven offers for sale groceries, household supplies, pet food and treats, and prepared food and beverages. *Id.* 7-Eleven sells soft drinks under the mark BIG GULP. BIG GULPs are fountain sodas of other manufacturers, such as Coke or Pepsi, which a customer manually places into a 7-Eleven cup or vessel while inside a 7-Eleven store. Bucenell Decl. ¶ 17. 7-Eleven does not sell BIG GULPs online, in pet stores, or anywhere other than its convenience stores for that matter.¹

7-Eleven has additional GULP marks including GULP, SUPER GULP, DOUBLE GULP, CAR GULP, X-TREME GULP, AND MINI GULP. *All* of these marks are used for fountain soft drinks sold inside 7-Eleven stores as described above. (Memorandum in Support of Opposer's Motion for Summary Judgment at p. 2). None of 7-Eleven's GULP fountain sodas are sold online, in pet stores, or anywhere other than in 7-Eleven convenience stores.

¹ Although 7-Eleven represents in its Memorandum of Law that its GULP marks branded beverages are "typically" sold at 7-Eleven stores, it offers no evidence that these products are sold anywhere else. Applicant could find no evidence on 7-Eleven's website that the GULP marks branded beverages are sold anywhere other than at 7-Eleven stores.

At one time, as set forth in 7-Eleven's Memorandum of Law, 7-Eleven sold bottled beverages under the GULP mark, including BIG GULP branded soft drinks and WATER GULP branded water. *Id.* 7-Eleven, however, has long abandoned the bottled GULP beverages and no longer offers bottled BIG GULP or WATER GULP in its convenience stores. (Bucenell Decl. ¶ 21). Indeed, on December 12, 2001, 7-Eleven abandoned its application for a WATER GULP trademark and in late November 2008 launched a different mark for a new line of private label products, including bottled water, called "7 Select." (Bucenell Decl. ¶ 24 and Exh. J). Currently, 7-Eleven does not sell bottled beverages under the GULP mark. (Bucenell Decl. ¶ 24).

7-Eleven also raises in its Memorandum of Law that, at one time, it sold products under the marks FRUIT GULP, GUMMI GULP AND SNACK GULP. Like WATER GULP, however, 7-Eleven abandoned or cancelled its trademark applications for FRUIT GULP (abandoned) on May 15, 2005, GUMMI GULP (cancelled) on May 16, 2009 and SNACK GULP (abandoned) on January 22, 2002. (Bucenell Decl. ¶ 27 and Exh. O). 7-Eleven is now selling pre-packaged fruit and salad under the brand name "Fresh to Go." (Bucenell Decl. ¶ 28). Notably, there are 18 live trademarks that use "Fresh To Go" registered with the USPTO. *Id.*

7-Eleven also claims that it has used its GULP marks on a variety of promotional products including throwing discs, shirts, caps and reusable beverage containers. (Memorandum in Support of Opposer's Motion for Summary Judgment at p. 3). The promotional products, however, are available to 7-Eleven employees as an internal incentive and are not marketed or available to the general public. (Bucenell Decl. ¶ 31 and Exh. S).²

² Applicant notes that in support of this factual claim, 7-Eleven has produced a 2001 catalog of merchandise, which suggests that 7-Eleven either has not raised its prices for promotional merchandise in 8 years or no longer offers the merchandise even to its employees.

7-Eleven sells pet products including kitty litter, pet food and pet treats. 7-Eleven does not manufacture any of the pet products it sells. (Bucenell Decl. ¶22). Applicant is willing to stipulate that she will never sell her HEALTHY GULP pet water in 7-Eleven convenience stores.

III. ARGUMENT

A. Summary Judgment is Precluded Where Genuine Issues of Material Fact Exist.

The Federal Rules of Civil Procedure govern inter party proceedings before the United States Patent and Trademark Office Trademark Trial and Appeals Board. 37 C.F.R. §2.116(a). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c). A material fact is one which may affect the outcome of the suit, and precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The evidence must be viewed in a light most favorable to the non-movant, and all reasonable inferences must be drawn in favor of the non-movant. *Id.* at 255. Therefore, there need not be a conflict in the evidence of the underlying facts to preclude summary judgment. *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

B. There is No Likelihood of Confusion between Marks

The United States Patent and Trademark Office may refuse to register a trademark that so resembles a registered mark “as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). The Board’s determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont du Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). Here, although

both marks consist of the word “Gulp” preceded by a modifying adjective, Applicant’s mark would not be viewed as a member of Opposer’s Gulp Marks for several reasons discussed below.

1. The Fame or Relative Strength of Opposer’s Marks

In its Memorandum, Opposer argues that “each of 7-Eleven’s GULP marks are inherently distinct” and, therefore, strong. The Board, however, has already addressed this precise issue and ruled against 7-Eleven in *7-Eleven, Inc. v. Lawrence I. Wechsler*, (Opposition No. 91117739)(“*Wechsler*”), a case remarkably similar to the case at bar.

In *Wechsler*, the Board dismissed 7-Eleven’s Opposition to registration of the mark “Gulpy” for goods identified as “portable animal water dishes and animal water containers sold empty.” On this issue, the Board held that only “Opposer’s BIG GULP mark *when used in connection with fountain soft drinks* has a very high degree of public recognition and renown.” (Emphasis added). On the other hand, the Board held that Opposer’s other “Gulp” trademarks did not show any significant public recognition and renown. *Id.* at 22.

Although the Board’s decision in *Wechsler* was issued on May 15, 2007, a comparison of 7-Eleven’s Memoranda in both cases demonstrates that principles of *res judicata* apply herein which prevent 7-Eleven from relitigating this issue. In its Memorandum filed in this case, 7-Eleven included three additional citations to support its claim that each of 7-Eleven’s GULP marks are famous, however, every additional citation refers to the BIG GULP or SUPER BIG GULP mark. (*Compare* Memorandum in Support of Opposer’s Trial Brief filed in *Wechsler* attached hereto as Exhibit “1”, with Memorandum in Support of Opposer’s Motion for Summary Judgment herein at pp. 11-15, new facts highlighted, attached hereto as Exhibit “2”). Therefore, Opposer has not offered any additional evidence which would support this Board reaching a different conclusion than it already reached in *Wechsler*.

Res judicata encompasses two preclusion concepts – issue preclusion, which forecloses litigation of a litigated and decided matter (often referred to as collateral estoppel) and claim preclusion which disallows litigation of a matter that has never been litigated but which should have been presented in an earlier suit. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 (1984); *see also Nevada v. United States*, 463 U.S. 110, 130 (1983) (“res judicata provides that when a final judgment has been entered on the merits of a case, ‘[i]t is a finality as to the claim or demand in controversy ..., not only as to every matter which offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose’”) (quotation omitted).

Here, 7-Eleven has already been given the opportunity to and has litigated the issue of the fame or relative strength of its marks which the Board ruled on as discussed above. 7-Eleven has not presented sufficient new evidence to support its attempt to get “a second bite at the apple” on this issue. For this reason, as previously ruled on by the Board, Applicant submits that BIG GULP is the only 7-Eleven trademark which has a high degree of public recognition and renown. This factor alone, however, is not sufficient to establish a likelihood of confusion.

2. The Similarity or Dissimilarity of the Goods

Opposer has registered the BIG GULP and GULP trademarks for “soft drinks for consumption on or off the premises.” Soft drinks refer to fountain sodas provided by Opposer at its premises. HEALTHY GULP is vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs. Likelihood of confusion may be found if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. *In*

re Pollio Dairy Products Corp., 8 USPQ2d 2012, 2015 (TTAB 1988); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984).

HEALTHY GULP is sold in 20 ounces bottles with a picture of a dog, cat or dog and cat on the label. HEALTHY GULP is offered in plain, peanut butter or tuna flavors. Bottles can be “purr-chased” in eight packs only off of Applicant’s website www.healthygulp.com. HEALTHY GULP is not sold in 7-Eleven convenience stores.

Opposer argues that the relatedness of consumable products and consumable pet products has “long been recognized.” In support of this argument, however, Opposer cites to cases involving identical or nearly identical names between the human and animal products (i.e. , FIDO-LAY for pets and FRITO LAY for humans, DOMINO for pets and humans, DOGIVA and CATIVA for pets and GODIVA for humans, V.I.P for pets and humans). This argument would be more persuasive if Applicant were trying to register the name “BIG GULP” or a nearly identical name for dogs and cats. Such is not the case.

Moreover, 7-Eleven’s BIG GULP products have never been synonymous with healthy food or beverage. Quite the contrary, all of the registered names would suggest large quantities of fountain soda, not a product generally associated with vitamin, mineral and supplement enriched water. Indeed, 7-Eleven abandoned its applications for trademarks for the only two GULP products it offered which could be considered healthy, FRUIT GULP and WATER GULP.

Opposer goes to great lengths to introduce evidence that other companies have the same mark for both consumable products and consumable pet products. Yet none of the companies identified by Opposer actually sell the same food for humans and pets. More importantly, Opposer has not offered any evidence that any of the companies produce and sell both fountain drinks and pet foods or beverages (let alone that any of the companies sell such products under

the same or similar marks). In *Wechsler*, the Board rejected the identical argument made by Opposer. Thus, this evidence does not support the conclusion that consumers would confuse soda dispensed from a fountain machine in a convenience store with bottled pet water sold on line and in pet stores.

Opposer claims that “many retailers commonly sell human food and beverage products in proximity to edible pet products, including pet water.” Opposer fails to mention that 7-Eleven is not one of those retailers. The only retailers that sell pet water are pet stores and none of them offer fountain soda, let alone 7-Eleven BIG GULPS.

Opposer claims that it sells significant quantities of pet products, including consumable pet products. None of the pet products sold by 7-Eleven are sold under the GULP brand and none are manufactured by 7-Eleven.

Opposer argues that Applicant’s bottler uses the same type of bottle for Applicant’s HEALTHY GULP that are used for human beverages sold by another party under the SQWINCHER mark.³ The fact that another manufacturer uses 20 ounces bottles for a flavored energy drink has no bearing on this motion. This fact is not evidence that a consumer will confuse 7-Eleven’s fountain soda with bottled water for dogs and cats. Although 7-Eleven cites to the fact that it sold bottled water under the WATER GULP mark, it fails to mention the more important evidence, namely that 7-Eleven abandoned its application for a WATER GULP mark in 2001 and no longer sells bottled water under this mark. Rather, 7-Eleven sells bottled water under a new mark “7-Select.” Thus, 7-Eleven was apparently unsuccessful trying to parlay the

³ The bottles are not the same. Sqwincher’s bottle has an indentation in the middle, whereas HEALTHY GULP’s bottle does not. (Bucenell Decl. ¶ 32).

GULP product line into bottled water which supports the conclusion that consumers do not identify the 7-Eleven GULP brand with bottled water, let alone pet water.

Finally, 7-Eleven tries to claim that it has expanded its GULP marks into a “wide array of goods ranging from fountain sodas to clothing, sporting goods, beverage containers, and other food products such as confections and salads...” As stated above, 7-Eleven abandoned its applications for marks under FRUIT GULP, GUMMI GULP AND SNACK GULP and now sells fruit and salad under the FreshtoGo mark and bottled water under the 7-Select mark. As for clothing and sporting goods, 7-Eleven at one time apparently provided these items as promotional materials to employees. They were not offered to the general public as marketing material. They were never trademarked. Providing free promotional materials to employees does not make the public more aware of 7-Eleven’s products. Opposer has not offered a single piece of evidence that it ever made a single sale of clothing and sporting goods and, thus, this is not evidence of public perception of 7-Eleven’s GULP products.

The dissimilarity of the goods in question can be highlighted as follows:

- BIG GULP is a 32 ounce cup used for soda dispensed from a fountain machine only at 7-Eleven convenience stores; HEALTHY GULP is a 20 ounce bottle containing pet water which is not sold at 7-Eleven convenience stores.
- BIG GULP is a product sold for human consumption; HEALTHY GULP is a product sold for dog and cat consumption.
- BIG GULP is a soda; HEALTHY GULP is a vitamin, mineral and supplement enriched water; 7-Eleven sells bottled water under the brand name “7-Select, not GULP.

- BIG GULP is a reusable plastic cup used for soda manufactured by soda manufacturers such as Coke, Pepsi, Mountain Dew, Sprite and Dr. Pepper; HEALTHY GULP is a disposable bottle containing pet water manufactured by HEALTHY GULP.
- Every BIG GULP product sold by 7-Eleven contains the 7-Eleven logo; HEALTHY GULP does not contain the 7-Eleven logo.
- Every BIG GULP cup prominently displays the words "BIG GULP"; every HEALTHY GULP bottle prominently displays the words "HEALTHY GULP" and a picture of a dog, cat or both.
- Every HEALTHY GULP bottle contains the slogan "Because we deserve bottled water too"; 7-Eleven's slogan is "Oh thank heaven for 7-Eleven."
- Every HEALTHY GULP bottle also contains information about the product formulation and includes the following note to purchasers: "As a Pet Parent you should feel good about giving your pet Healthy Gulp."
- 7-Eleven does not sell pet products manufactured by 7-Eleven or containing a GULP mark.

For all of these reasons, it is respectfully submitted that there is a strong dissimilarity of the goods in question.

2. Similarity of Dissimilarity of Marketing and Trade Channels

Opposer contends that because Applicant's application is without limitation as to trade channels, "overlapping trade channels must be presumed here." However, Applicant has stipulated that she will never sell her products in 7-Eleven convenience stores. At present, Applicant's products are sold over the Internet via her website and she would like to sell her products through pet stores. Opposer does not sell products over the Internet. A consumer

wanting to purchase a BIG GULP must go into a 7-Eleven store and fill a cup at a fountain soda machine. Pet stores, on the other hand, do not sell fountain sodas. Even if HEALTHY GULP was someday sold in a convenience store, it will never be sold in a 7-Eleven. In addition, BIG GULP is only in 7-Eleven stores. Therefore, the trade channels are dissimilar.

Opposer also contends that the parties employ overlapping marketing methods because both advertise and promote their respective products via the Internet. Under this argument, given that nearly all products are marketed over the Internet, 7-Eleven would have a similarity of marketing channels with every other product seller in the world. To be specific, there is nothing similar about the 7-Eleven and HEALTHY GULP websites.

4. Consumer Care

Opposer claims that the parties' respective products are inexpensive and consumers generally exercise less care in purchasing "such inexpensive goods." This is an incorrect. HEALTHY GULP is sold in eight packs only which cost \$10.49 per eight pack plus shipping and handling of \$8.95 for a total of \$19.44 per eight pack. This cannot be considered an "inexpensive good" considering that it is pet water. On the other hand, a BIG GULP costs \$1.19. It cannot be said as a matter of law that consumers would confuse purchasing a fountain soda for \$ 1.19 with an eight-pack of bottled pet water for \$19.44.

5. Similarity or Dissimilarity of the Marks

This *DuPont* factor focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San*

Fernando Electric Mfg. Co. v. JFD Electronics Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Here, both marks consist of the word “Gulp” preceded by a modifying adjective, i.e., BIG GULP and HEALTHY GULP. That, however, is where the similarities end. BIG GULP and Opposer’s other GULP marks refer to a *size* of cup (BIG GULP, SUPER BIG GULP, DOUBLE GULP). Opposer’s descriptive adjective does not refer to the type of beverage going into the plastic cup, i.e. a soda gulp.

Applicant’s mark, on the other hand, refers to the type of beverage contained in the bottle, i.e. a healthy beverage. Opposer offers no evidence that consumers identify 7-Eleven’s GULP products with healthy beverages. Indeed, 7-Eleven’s own survey demonstrates that consumers identify BIG GULP with a soft drink product and that “size, meaning big, is the strongest voluntary association with Big Gulp.” (*See Brody Confidential Declaration* filed with Opposer’s Motion for Summary Judgment and Exh. 10, p. 13 thereto).

The significance of a mark is not determined in the abstract but in connection with the goods to which the mark is applied and the context in which it is used because that is how purchasers encounter the mark. *Presto Products v. Nick-Pak Products*, 9 USPQ2d 1895, 1897 (TTAB 1988). Here, the packaging of the two products reinforces the difference in the commercial impressions. The front of the HEALTHY GULP bottle features a drawing of a dog, cat or dog and cat together. The back of the bottle features information about product formulation and contains verbiage such as “Pet Parent”. The same drawings and a more detailed story about why and how she created HEALTHY GULP are featured on Applicant’s website. This story on

Applicant's website is signed "Pet Wishes, Sue Bucenell." The writing and overall impression of the packaging is not similar to that of BIG GULP in any way whatsoever.

Although it is submitted that Opposer does not own the rights to the word "gulp," and that consumers will not confuse the two products, it is worth mentioning that similarity in any one of the appearance, sound, meaning and commercial impression factors may be sufficient to indicate that the marks are similar, but it does not require that conclusion where there are significant differences in one or more of the other factors. *Kabushiki Kaisha Hattori Seiko v Satellite Int'l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff'd without decision*, 979 F.2d 216 (Fed. Cir. 1992).

C. Balancing of the Factors

While the mark BIG GULP has a high degree of public recognition and renown insofar as it relates to soft drinks, that alone is insufficient in and of itself to establish a likelihood of confusion under Section 2(d) of the Lanham Act. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983). There must be a reasonable basis for the public to attribute Applicant's vitamin, mineral and supplement enriched bottled pet water to Opposer and its BIG GULP trademark. *Univ. of du Lac v. J.C. Gourmet Food*, 217 USPQ at 507; *American Optical Corp. v. Autotrol Corp.*, 175 USPQ 725, 729 (TTAB 1972). "The 'famous mark' argument carries less weight where, as here, (i) there are significant differences between the mark whose fame is asserted and the mark which is alleged to [be] confusingly similar and (ii) there is no persuasive rationale asserted nor evidence offered to support a finding that the famous mark would likely be associated in the minds of purchasers with

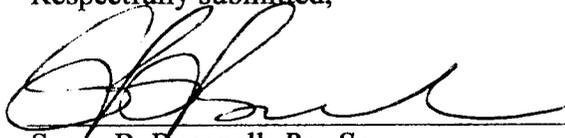
the mark challenged.” *Land O’Lakes, Inc. v. Land O’Frost, Inc.*, 224 USPQ 1022, 1026-1027 (TTAB 1984).

Opposer has not presented sufficient evidence that its customers, under normal conditions and circumstances surrounding the sale and consumption of fountain drinks, would associate Opposer with bottled pet water, which they would encounter in a different marketing milieu and purchase with different motivations and considerations. Applicant uses her mark in a different field and there is no interplay or relationship between the two fields from which confusion could arise. The differences between the parties’ products and the marks under which they are sold strongly suggest that there will not be any likelihood of confusion among the public. The simple fact that both marks contain an adjective preceding the word “gulp” is not sufficient in and of itself to merit summary judgment.

IV. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Opposer has not met its burden for the grant of summary judgment and that material issues of fact exist on the record before this tribunal. Therefore, Applicant respectfully requests that this Board deny Opposer’s Motion for Summary Judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Susan B. Bucenell', written over a horizontal line.

Susan B. Bucenell, *Pro Se*

30623 Bittsbury Court

Wesley Chapel, Florida 33543

Telephone: 813-333-4284

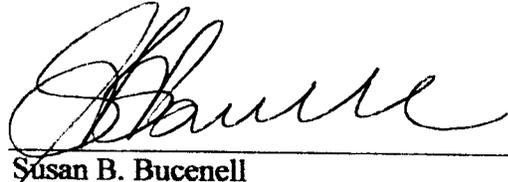
Facsimile: 813-333-4284

email: sbucenell@tampabay.rr.com

CERTIFICATE OF SERVICE

I, Susan B. Bucenell, hereby certify that APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT with Exhibits 1 and 2; supporting Memorandum of Law; and Declaration of Susan B. Bucenell with Exhibits was served on the following counsel of record this 28th day of August, 2009, by mailing a true and accurate copy of same via regular U.S. Mail postage prepaid:

Charles R. Mandly, Jr.
David A. Copland
Jason A. Berta
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654



Susan B. Bucenell

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

7-ELEVEN, INC.,)	
)	
Opposer,)	
	)	Opposition No. 91177807
v.)	
	)	Serial No. 78/916,143
SUSAN B. BUCENELL,)	
)	
Applicant.)	

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

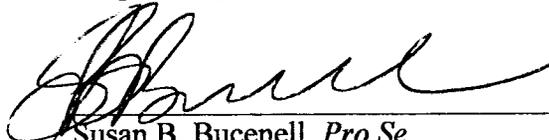
Applicant, Susan B. Bucenell ("Bucenell" or "Applicant"), files this opposition to the motion for summary judgment of Opposer, 7-Eleven, Inc. ("7-Eleven" or "Opposer") on its Sections 2(d) opposition claim against Serial Number 78/916,143 filed by Applicant for the reason that genuine issues of material fact exist which preclude the grant of summary judgment as a matter of law.

In support of this opposition, Applicant has filed contemporaneously herewith a Declaration of Susan B. Bucenell with Exhibits; Memorandum in Support of Opposer's Trial Brief filed in *7-Eleven, Inc. v. Lawrence I. Wechsler*, (Opposition No. 91117739) attached hereto as Exhibit "1"; and Memorandum in Support of Opposer's Motion for Summary Judgment filed herein at pp. 11-15 attached hereto as Exhibit "2".

For the reasons set forth in the accompanying Memorandum, Applicant

respectfully requests that the Motion for Summary Judgment of Opposer be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Susan B. Bucenell", written over a horizontal line.

Susan B. Bucenell, *Pro Se*
30623 Bittsbury Court
Wesley Chapel, Florida 33543

Telephone: 813-333-4284
Facsimile: 813-333-4284
email: sbucenell@tampabay.rr.com

CERTIFICATE OF SERVICE

I, Susan B. Bucenell, hereby certify that APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT with Exhibits 1 and 2; supporting Memorandum of Law; and Declaration of Susan B. Bucenell with Exhibits was served on the following counsel of record this 28th day of August, 2009, by mailing a true and accurate copy of same via regular U.S. Mail postage prepaid:

Charles R. Mandly, Jr.
David A. Copland
Jason A. Berta
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654

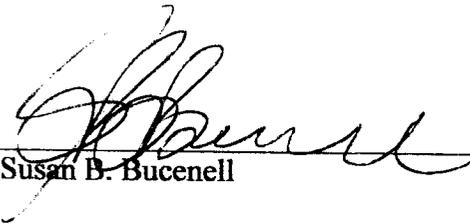

Susan B. Bucenell

Exhibit 1

TTAB

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

7-ELEVEN, INC.,)
)
 Opposer,) Opposition No. 91117739
)
 vs.)
)
 LAWRENCE I. WECHSLER,)
)
 Applicant.)
 _____)

OPPOSER'S TRIAL BRIEF



07-24-2006

U.S. Patent & TMO/c/TM Mail Rcpt Dt #22

CERTIFICATE OF MAILING

I hereby certify that this paper is being deposited with the United States Postal Service as first class mail in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on July 17, 2006

W. R. [Signature]

CHIC_1348089.4

7HG004565

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT	1
II. DESCRIPTION OF THE RECORD	1
III. ISSUES PRESENTED.....	3
IV. RECITATION OF FACTS.....	3
A. 7-Eleven and Its GULP Marks Products.....	3
B. Applicant and His GULPY Product.....	8
V. 7-ELEVEN'S SECTION 2(D) CLAIM.....	10
A. 7-Eleven's Ownership of the GULP Marks.....	10
B. Likelihood of Confusion.....	10
1. 7-Eleven's GULP Marks are Strong.....	11
2. Similarity of the Marks.....	19
3. The Respective Goods are Related or are Within 7-Eleven's Natural Zone of Expansion.....	22
4. Consumer Care.....	26
5. Marketing Channels and Methods.....	26
6. Actual Confusion.....	26
VI. 7-ELEVEN'S SECTION 2(F) CLAIM	27
A. Applicant's Use In Commerce.....	27
B. Applicant's Adopted his GULPY mark.....	28
C. 7-Eleven's GULP Marks are Distinctive and Famous.....	28
1. The inherent and acquired distinctiveness.....	28
2. Duration and extent of use.....	28
3. The duration and extent of advertising and publicity.....	29
4. The geographical extent of the trading area.....	29
5. The channels of trade for the goods.....	29
6. The degree of recognition of the mark.....	29

7.	Whether the mark is federally registered:.....	29
D.	Applicant's GULPY Mark is Likely to Dilute the Distinctive Qualities of 7-Eleven's GULP Marks	30
1.	Similarity of the marks.....	31
2.	Distinctiveness of the senior user's mark.	31
3.	Whether target customers are likely to associate two different products with the mark.....	31
VII.	CONCLUSION.....	32

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>American Sugar Refining Co. v. Andreassen</i> , 296 F.2d 783, 132 U.S.P.Q. 10 (C.C.P.A. 1961)	25
<i>In re Appetito Provisions Co., Inc.</i> , 3 U.S.P.Q. 2d 1553 (T.T.A.B. 1987)	20
<i>Automatic Timing & Controls, Inc. v. McDowell-Wellman Engineering Company</i> , 162 U.S.P.Q. 462 (T.T.A.B. 1969)	20
<i>In re Azteca Restaurant Enterprises, Inc.</i> , 50 U.S.P.Q. 2d 1209 (T.T.A.B. 1999)	26
<i>In re BASF Aktiengesellschaft</i> , 189 U.S.P.Q. 424 (TTAB 1976)	21
<i>Ex parte Bianchini, Ferier, Inc.</i> , 85 U.S.P.Q. 316 (T.T.A.B. 1950)	21
<i>Calvin Klein Industries, Inc. v. Calvins Pharma., Inc.</i> , 8 U.S.P.Q. 2d 1269 (T.T.A.B. 1988)	10
<i>Clinton Detergent Co. v. Procter & Gamble Co.</i> , 302 F.2d 745, 133 U.S.P.Q. 520 (C.C.P.A. 1962)	12
<i>In re DuPont DeNemours & Co.</i> , 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973)	11, 19
<i>Giant Foods, Inc. v. Nation's Foodservice, Inc.</i> , 710 F.2d 1565, 218 U.S.P.Q. 390 (Fed. Cir. 1983)	11
<i>Grey v. Campbell Soup Co.</i> , 650 F. Supp. 1166, 231 U.S.P.Q. 562 (C.D. Cal. 1986)	25
<i>Hanover Milling Co. v. Metcalf</i> , 240 U.S. 403 (1916)	10
<i>Hess's of Allentown, Inc. v. National Bellas Hess, Inc.</i> , 169 U.S.P.Q. 673 (T.T.A.B. 1971)	20

<i>J & J Snack Foods Corp. v. McDonald's Corp.</i> , 932 F.2d 1460, 18 U.S.P.Q. 2d 1889 (Fed. Cir. 1991)	18
<i>Kenner Parker Toys, Inc. v. Rose Art Industrial, Inc.</i> , 963 F.2d 350, 22 U.S.P.Q. 2d 1453 (Fed. Cir.), cert. denied, 506 U.S. 862 (1992)	17
<i>Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.</i> , 774 F.2d 1144, 227 U.S.P.Q. 541 (Fed. Cir. 1985)	11
<i>Knorr-Nahrungsmittel Aktiengesellschaft v. Havland International Inc.</i> , 206 U.S.P.Q. 827 (T.T.A.B. 1980)	22
<i>In re Martin's Famous Pastry Shoppe, Inc.</i> , 748 F.2d 1565, 223 U.S.P.Q. 1289 (Fed. Cir. 1984)	26
<i>McDonough Power Equip., Inc. v. Weed Eater, Inc.</i> , 208 U.S.P.Q. 676 (T.T.A.B. 1981)	20
<i>In re Midwest Oil Co.</i> , 289 F. 1018 (D.C. Cir. 1923)	21
<i>Minneapolis Brewing Co. v. Ekhardt & Becker Brewing Co.</i> , 38 U.S.P.Q. 344 (Com. Pat 1938)	25
<i>Money Station, Inc. v. Cash Station, Inc.</i> , 70 F.3d 1290, 38 U.S.P.Q. 2d 1150 (Fed Cir. 1995)	11
<i>In re Northland Aluminum Products</i> , 777 F.2d 1556, 227 U.S.P.Q. 961 (Fed. Cir. 1985)	12
<i>In re Pellerin Milnor Corp.</i> , 221 U.S.P.Q. 558 (TTAB 1983)	21
<i>Polaroid Corp. v. Polaraid, Inc.</i> , 319 F.2d 830, 138 U.S.P.Q. 2d 265 (7th Cir. 1963)	30
<i>Recot, Inc. v. M.C. Becton</i> , 214 F.3d 1322, 54 U.S.P.Q. 2d 1894 (Fed. Cir. 2000)	17, 23, 25
<i>Ringling Brothers-Barnum & Bailey Combined Shows, Inc., v. Utah Division Of Travel Development</i> , 170 F.3d 449, 50 U.S.P.Q. 2d 1065 (4th Cir. 1999)	30

<i>SMS, Inc. v. Byn-Maritime, Inc.</i> , 228 U.S.P.Q. 219 (T.T.A.B. 1985)	20
<i>In re Schnuck Markets, Inc.</i> , 202 U.S.P.Q. 154 (T.T.A.B. 1979)	20
<i>In re Sonar Radio Corp.</i> , 183 U.S.P.Q. 118 (T.T.A.B. 1974)	21
<i>Sun Electric Corp. v. Sun Oil Co. of Pennsylvania</i> , 196 U.S.P.Q. 450 (TTAB 1977)	21
<i>Toro Co. v. ToroHead Inc.</i> , 61 U.S.P.Q. 2d 1164 (T.T.A.B. 2001)	11, 27, 28, 30
<i>Trade-mark Cases</i> , 100 U.S. 82 (1879)	10
<i>Treo Co. v. Novack</i> , 105 F. Supp. 248, 94 U.S.P.Q. 324 (S.D.N.Y. 1952)	21
<i>Two Pesos Inc. v. Taco Cabana, Inc.</i> , 505 U.S. 763, 23 U.S.P.Q. 2d 1081 (1992)	11
<i>United States Olympic Committee v. Olymp-Herrenwaschefabriken Bezner GmbH & Co.</i> , 224 U.S.P.Q. 497 (T.T.A.B. 1985)	21
<i>V.I.P. Foods, Inc. v. Vulcan Pet, Inc.</i> , 210 U.S.P.Q. 662 (N.D. Okla. 1980), <i>rev'd on other grounds</i> , 675 F.2d 1106 (10 th Cir. 1982)	25
<i>Wawa, Inc. v. Haaf</i> , 40 U.S.P.Q. 2d 1629 (E.D.Pa. 1996), <i>aff'd mem</i> , 116 F.3d 471 (3d Cir. 1997)	26
<i>Weiss Associate Inc. v. HRL Associate Inc.</i> , 902 F.2d 1546, 14 U.S.P.Q. 2d 1840 (Fed. Cir. 1990)	26
<i>In re White Swan, Ltd.</i> , 6 U.S.P.Q. 2d 1534 (T.T.A.B. 1988)	19

STATUTES

15 U.S.C. § 1052(d)1
15 U.S.C. § 1052(f).....1
15 U.S.C. § 1057(b).....10
15 U.S.C. § 1063(a)27
15 U.S.C. § 1065.....8
15 U.S.C. § 1115(a)10
15 U.S.C. § 1115(b).....8
15 U.S.C. § 1125(c)(1).....27, 28, 29
15 U.S.C. § 1127.....30

OTHER AUTHORITIES

Merriam-Webster's Collegiate Dictionary (10th ed. 2001)22
TMEP § 1207.01(a)(i).....23
TMEP §§ 1212.06(a) & (b).....11

I. STATEMENT

Opposer, 7-Eleven, Inc. ("7-Eleven"), files this trial brief in support of its claims in this opposition proceeding against the applicant, Lawrence I. Wechsler ("Applicant"). For the reasons set forth below, the preponderance of the evidence establishes that Applicant's trademark GULPY for "portable animal water dishes and animal water containers sold empty" is confusingly similar to, and is likely to dilute the distinctive qualities of, 7-Eleven's various registered and common law GULP trademarks for, *inter alia*, beverage containers and soft drinks consumed on or off the premises, in violation of Sections 2(d) and (f) of the United States Trademark Act of 1946, 15 U.S.C. §§ 1052(d) & (f). Consequently, this honorable Board should sustain this opposition and deny Applicant's subject trademark application.

II. DESCRIPTION OF THE RECORD

7-Eleven states that it understands the record to consist of the following:

1. Notice of Reliance on Opposer's Registrations (Feb. 15, 2002) (hereinafter "Opp. NOR Reg.").
2. Notice of Reliance on Applicant's Responses to Opposer's Interrogatory Requests [*sic*] (Feb. 19, 2002) (hereinafter "Opp. NOR Inter.").
3. Notice of Reliance on Printed Publications (Films) (Feb. 22, 2002) (hereinafter "1 Opp. NOR Films").
4. Notice of Reliance on Printed Publications (Films II) (Feb. 27, 2002) (hereinafter "2 Opp. NOR Films").

5. Notice of Reliance on Printed Publications, Vols. 1 and 2 (Feb. 22, 2002) (hereinafter "Opp. NOR Pub.").
6. Notice of Reliance on Statements Made Against Interest Contained in Applicant's Response to Opposer's Motion for Summary Judgment (Apr. 1, 2002) (hereinafter "Opp. NOR Admiss.").
7. Opposer's Testimony Deposition of John Ryckevic (hereinafter "Ryckevic Dep."), with Ryckevic Exhibits 1-14 (hereinafter "Ryckevic (Opp.) Ex."). At the time of his testimony, Mr. Ryckevic was 7-Eleven's Director of Proprietary Beverages with extensive personal knowledge of, *inter alia*, 7-Eleven and its GULP Marks products. *See, e.g.*, Ryckevic Dep. at 4 (ll. 7-25), 5 (ll. 1-25), 6 (ll. 1-25), 7 (ll. 1-3).
8. Opposer's Testimony Deposition of Jean Olsen (hereinafter "Olsen Dep."), with Olsen Exhibits 1-27 (hereinafter "Olsen (Opp.) Ex."). At the time of her testimony, Ms. Olsen was a legal assistant with Wildman, Harrold, Allen & Dixon LLP, formerly counsel of record for 7-Eleven. *See, e.g.*, Olsen Dep. at 8 (ll. 14-17), 10 (ll. 2-8).
9. Applicant's Testimony Deposition of Lawrence I. Wechsler (hereinafter "App. Dep."), with Wechsler Exhibits 1-15 (hereinafter "App. Ex.").¹
10. Notice of Reliance, Rebuttal Publications (May 17, 2006) (hereinafter "Opp. NOR Rebut. Pub.").

¹ Any citation herein to these materials is expressly without waiver as to any proffered evidentiary objections previously offered.

III. ISSUES PRESENTED

1. Does 7-Eleven own valid trademark rights in its GULP Marks?
2. Does Applicant's GULPY mark consist of or comprise a mark which so resembles one or more of 7-Eleven's GULP Marks as to be likely, when used on or in connection with the goods of the Applicant, to cause confusion, or to cause mistake, or to deceive?
3. Are 7-Eleven's GULP Marks famous within the meaning of Section 43(c)(1)?
4. Does Applicant's GULPY mark consist of or comprise a mark which does, or is likely to, dilute the distinctive quality of one or more of 7-Eleven's GULP Marks?

IV. RECITATION OF FACTS

A. 7-Eleven and Its GULP Marks Products

7-Eleven is engaged in the business, *inter alia*, of offering convenience store services and products to the general public throughout the United States through approximately 5,300 store locations. Among the wide array of convenience goods and services sold by 7-Eleven are groceries, personal care products, pet products, and prepared foods and beverages. *See, e.g.*, 1 Opp. NOR Pubs. at 1, 3, 27, 28, 36, 41, 44, 45, 52, 66, 69, 72, 76, 83, 87, 88, 90, 92, 95, 109, 116, 121, 122, 131, 145, 199, 229, 248; 2 Opp. NOR Pubs. at 271, 328; Ryckevic Dep. at 24 (Il. 15-25), 25 (Il. 1-16), 48 (Il. 13-25), 49 (Il. 1-25), 50 (1-3) & Ryckevic (Opp.) Exh. 1 at 29, 32.

Beginning at least as early as February 1978, 7-Eleven has sold soft drinks under the mark BIG GULP. *See* Ryckevic Dep. at , 7 (4-21), 10 (Il. 20-24); *see also* Ryckevic (Opp.) Exh. 1, at 1-18, 26-39. 7-Eleven's BIG GULP beverages immediately were a great success and quickly became a 7-Eleven signature product. *See, e.g.*, 2 Opp. NOR Pubs. at 412.

To capitalize upon the immediate and great success of its BIG GULP beverage and other product, over the years, 7-Eleven has adopted and used multiple marks with the common "gulp" element, including, *inter alia*, GULP, SUPER BIG GULP, DOUBLE GULP, CAR GULP, X-TREME GULP and MINI GULP (collectively hereinafter "GULP Marks") for soft drinks. *See, e.g.*, Ryckevic Dep. at 7 (Il. 4-25), 8 (Il. 1-12), 12 (Il. 7-25), 13 (Il. 1-25), 14 (1-5), 15 (Il. 7-25), 16 (Il. 1-6), 19 (Il. 10-25), 20 (Il. 1-14) & Exh. 1 at 1-14, 20-25; 1 OPP. NOR Pub. at 255; *see also* Opp. NOR Regs.; Opp. NOR Admiss. (Applicant's Memo. at 5 & 9) (Applicant admits that record establishes 7-Eleven's use of its various GULP Marks for a variety of goods including beverages, beverage containers, promotional goods and various food products).

Since 1978, 7-Eleven has sold billions of dollars of products under its GULP Marks, and over the period 1985 through 1998, 7-Eleven's average annual sales for such products are in excess of \$180,000,000 per year. *See* Ryckevic Dep. at 20 (Il. 15-18), 21 (Il. 12-25) & Ryckevic (Opp.) Exh. 2.

GULP Marks branded beverages originally were sold in disposable paper cups. *See, e.g.*, Ryckevic Dep. at 10 (Il. 14-19, 20-25), 11 (Il. 1-18), 12 (Il. 7-25), 13 (Il. 1-10), 15 (Il. 1-6) & Ryckevic (Opp.) Exh. 1, at 1-9. In recent years, 7-Eleven has sold most of its GULP Marks branded beverages in plastic cups which, while designed to be disposable, are also reusable by consumers. *See, e.g.*, Ryckevic Dep. at 13 (Il. 11-17), 14 (Il. 9-24), 15 (Il. 7-25), 16 (Il. 1-6) & Ryckevic (Opp) Exhs. 1, at 10-14..

Since at least as early as 1985, 7-Eleven has sold beverages in special promotional heavy-plastic cups designed to be reusable (sometimes referred to as "collectors cups") and other

containers bearing one of its GULP Marks. *See, e.g.*, Ryckevic Dep. at 16 (ll. 7-25), 17 (ll. 1-25), 18 (ll. 1-25), 19 (1-5) & Ryckevic (Opp.) Exh. 1, at 15A-19.

Since at least as early as 1997, 7-Eleven also has sold GULP Marks branded cups, bottles and other beverage containers, many of which are insulated, that are designed for "permanent" continuing use by consumers. *See, e.g.*, Ryckevic Dep. at 19 (ll. 6-25), 20 (ll. 1-14) & Ryckevic (Opp.) Exh. 1, at 20-25. In the first year of selling these permanent, reusable portable beverage containers, 7-Eleven sold more than a quarter of a million (250,000) units, with sales reaching approximately 1.3 million units by 2002. Sold at approximately \$4.00 a unit, these sales represent many millions of dollars of sale of such products. *See, e.g.*, Ryckevic Dep. at 22 (ll. 11-25), 23 (ll. 1-13).

For years, 7-Eleven has sold and distributed a variety of promotional products bearing one of its GULP Marks, including, *inter alia*, throwing discs, shirts, caps and beverage containers. *See* Ryckevic Dep. at 37 (ll. 16-25), 38 (ll. 1-10) & Exh. 1 at 48-53; *see also* Ryckevic Dep. at 57 (ll. 2-16); *see also* Opp. NOR Admiss. (Applicant's Memo. at 9) (Applicant admits that record establishes 7-Eleven's use of GULP Marks for promotional products).

In recent years, to further capitalize on the great fame and success of its other GULP Marks branded products, 7-Eleven has extended its use of the GULP Marks beyond beverages, beverage containers and related promotional goods. For example, 7-Eleven sells fresh fruit salads under the mark FRUIT GULP, salty snack mix under the mark SNACK GULP, salads under the mark GARDEN GULP, and candy under the marks CANDY GULP and GUMMI GULP. Ryckevic Dep. at 46-48 & Exh. 1 at 54-58; *see also* Opp. NOR Admiss. (Applicant's

Memo. at 9) (Applicant admits that record establishes 7-Eleven's use of GULP Marks for fruit, candy, and other food products).

Since 1978, 7-Eleven has incurred many millions of dollars in costs to advertise and promote its various GULP Marks branded goods. Ryckevic Dep. 35 (ll. 23-25), 36 (ll. 1-22) & Ryckevic (Opp.) Exh. 8.² Often, such advertising featured collectable and permanent reusable cups and containers, as well as one or more GULP Marks branded products are promoted together. *See, e.g.*, Ryckevic Dep. at 38 (ll. 12-25), 39 (ll. 1-19) & Ryckevic (Opp.) Exh. 1, at 34-36.

Since at least as early as the mid-1980's, 7-Eleven has used national television commercials to promote one or more of its GULP Marks branded products. *See, e.g.*, Ryckevic Dep. at 9 (ll. 20-25), 10 (ll. 1-13); *see also* Ryckevic Dep. at 31 (ll. 3-25), 32 (ll. 1-25), 33 (l. 1), 34 (ll. 10-25), 35 (ll. 9) & Ryckevic (Opp.) Exhs. 5, 6 and 7. 7-Eleven also has extensively advertised and promoted one or more of its GULP Marks branded products via radio. *See, e.g.*, Ryckevic Dep. at 28 (ll. 7-25), 29 (ll. 1-25), 30 (ll. 1-11) & Ryckevic (Opp.) Exh. 3 and 4. Since the 1990's 7-Eleven also has promoted its GULP Marks branded products on-line. *See, e.g.*, Ryckevic Dep. at 26 (ll. 19-25), 27 (ll. 1-22) & Ryckevic (Opp.) Exh. 1, at 38-46. Since at least as early as 1981, 7-Eleven also has had one or more of its GULP Marks products through product placement in movies and television programs. *See, e.g.*, Ryckevic Dep. at 40 (ll. 9-25), 41 (ll. 1-22), 42 (ll. 7-20), 52 (l. 12) & Ryckevic (Opp.) Exhs. 9, 10 and 14; 2 Opp. NOR Pubs. at 402, 434; *infra* at 15.

² Please note, Mr. Ryckevic testified that the stated expenditure for 2001 set forth in Ryckevic (Opp.) Ex. 8 was understated by a factor of 10. *See* Ryckevic Dep. at 36 (ll. 7-19).

In addition to broadcast, film and electronic media, for many years, 7-Eleven also has extensively advertised and promoted its GULP Marks branded through point of purchase and other store displays. *See, e.g.*, Ryckevic Dep. at 24 (ll. 15-25), 25 (ll. 1-25), 26 (ll. 1-18) & Ryckevic (Opp.) Exh. 1, at 26-37.

7-Eleven has registered multiple GULP Marks with the United States Patent and Trademark Office, including the following:

<u>MARKS</u>	<u>REG. NO.</u>	<u>DATE</u>	<u>GOODS and SERVICES</u>
GULP	1,586,016	03/06/90	Soft drinks for consumption on or off the premises
BIG GULP	1,110,172	12/26/78	Soft drinks for consumption on or off the premises
SUPER BIG GULP	1,470,871	12/29/87	Soft drinks for consumption on or off the premises
SPORT GULP ³	1,644,785	5/14/91	Beverage containers, namely plastic bottles
MINI GULP ⁴	1,647,587	08/11/91	Soft drinks for consumption on or off the premises
DOUBLE GULP	1,566,263	11/14/89	Soft drinks for consumption on or off the premises
DOUBLE GULP (Stylized)	1,615,968	11/02/90	Soft drinks for consumption on or off the premises
GULPSTER ⁵	2,130,647	01/20/98	Soft drinks for consumption on or off the premises
CAR GULP	2,494,955	10/2/2001	Reusable plastic cups, and for soft drinks for consumption on or off the premises

Except as otherwise noted, these registrations are valid and subsisting, and six of the registrations, Registration Numbers 1,615,968, 1,586, 016, 1,647,587, 1,566,263, 1,470,871 and

³ Cancelled (May 25, 2002).

⁴ Cancelled (June 22, 2002).

⁵ Cancelled (Oct. 23, 2004).

1,110,172, are incontestable in accordance with the provisions of Section 8 and 15 of the United States Trademark Act of 1946, 15 U.S.C. §§ 1065 & 1115(b). *See, e.g.*, Opp. NOR Reg.

7-Eleven has enjoyed very favorable public reaction to its various GULP Marks branded products, in particular reusable beverage containers. Such reaction is not evidenced merely by the substantial sales of these products, but also in favorable unsolicited customer communications to 7-Eleven. Ryckevic Dep. at 44 (Il. 10-25), 45 (Il. 1-6) & Ryckevic (Opp.) Exh. 11. For example:

- she “likes [the] new plastic DOUBLE BIG GULP cups,” (98/12/14);
- “the size of the DOUBLE BIG GULP is perfect . . . [and she] like[s] the 32 oz BIG GULP cup holder,” (99/07/29);
- “the SUPER BIG GULP cups are great and she loves hers,” (99/12/03); and,
- “our X-TREME GULP is the best invention ever,” (00/07/25).

B. Applicant and His GULPY Product

On August 27, 1998, Applicant filed an intent to use application (Serial Number 75/543, 909) for the mark GULPY for “portable animal water dishes and animal water containers sold empty.” 1230 Off. Gaz. Pat. Office TM 494 (January 4, 2000); *see also* Opp. NOR Interrogatories (No. 3). Applicant made no use of the mark GULPY prior to August 27, 1998, and did not commence use of the mark until approximately March 29, 2001. *See* Opp. NOR Admiss. (App. Memo. at 8). Applicant has no rights in his mark which pre-date the August 27, 1998, filing date of his application. *Compare* Amended Notice of Opposition, ¶ 7 with Answer, ¶ 7.

“Applicant intends to sell the products in all channels of trade normally used for pet food, pet related products and supplies.” Opp. NOR Inter. (No. 3). Applicant admits that such trade channels include convenience stores. Opp. NOR Admiss. (Applicant’s Memo. at 6).

Applicant uses his GUPLY mark on a reusable, portable beverage container designed for pet use. *See, e.g.*, App. Dep. at 8 (ll. 7-17). As illustrated below, Applicant’s product essentially consist of a plastic bottle with a screw-off top with an attached, flip-out cup allowing a pet to lap liquids:



See, e.g., App. Dep. at 12 (ll. 5-9, 20-25), 13 (ll. 1-13) & App. Ex. 2. The suggested retail price of Applicant’s GULPY product is \$10.99. Opp. NOR Admiss. (Applicant’s Memo. at 6).

V. **7-ELEVEN'S SECTION 2(D) CLAIM**

In order to prevail upon its Section 2(d) claim, 7-Eleven must establish that it is the owner of valid trade identity rights in its GULP Marks and that Applicant's use of its GULPY mark would likely to cause confusion with one or more of 7-Eleven's GULP Marks. *See, e.g., Calvin Klein Industries, Inc. v. Calvins Pharma., Inc.*, 8 U.S.P.Q.2d 1269, 1270 (T.T.A.B. 1988). For the reasons set forth below, 7-Eleven has proven each element of its Section 2(d) claim by a preponderance of the evidence, and is entitled to judgment.

A. **7-Eleven's Ownership of the GULP Marks**

Trademark rights are created by use of, *inter alia*, a word to identify the origin of goods. *See, e.g., Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916) (citing *Trade-mark Cases*, 100 U.S. 82, 94 (1879)). 7-Eleven has introduced substantial evidence that it has continuously used individual GULP Marks since long prior to Applicant's August 27, 1998, priority date for, *inter alia*, beverages, beverage containers and food products. *See supra* at 3-7.

Moreover, 7-Eleven owns multiple federal trademark registrations for a number of its GULP Marks (including several incontestable federal registrations). *See supra* at 7-8. Such registrations constitute at least *prima facie* evidence of the validity of the mark and of the registrant's exclusive right to use the mark on the goods specified in the registration. *See* 15 U.S.C. §§ 1057(b) & 1115(a).

7-Eleven's ownership of each of its GULP Marks is beyond reasonable dispute.

B. **Likelihood of Confusion**

In determining the issue of likelihood of confusion, the Board should consider a number of factors including, *inter alia*, similarity of the respective marks, relatedness of the respective

goods, the marketing channels for the respective goods, the degree of care exercised by purchasers, and the distinctiveness of the senior user's mark. *See, e.g., In re DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). A determination of likelihood of confusion is the ultimate legal conclusion based upon the weighing of the pertinent *DuPont* factors. *See, e.g., Giant Foods, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569, 218 U.S.P.Q. 390, 394 (Fed. Cir. 1983).

Further, according to the Federal Circuit:

... a newcomer has both the opportunity and the obligation to avoid confusion. And if he fails to do so by adopting a mark similar to one used by another for ... closely related goods or services does so at its own peril; all doubt on the issue of likelihood of confusion must be resolved against the newcomer.

Money Station, Inc. v. Cash Station, Inc. 70 F.3d 1290, 38 U.S.P.Q.2d 1150 (Fed Cir. 1995); *see, e.g., Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1147, 227 U.S.P.Q. 541, 543 (Fed. Cir. 1985).

1. 7-Eleven's GULP Marks are Strong

Each of 7-Eleven's GULP Marks are inherently distinctive. Such inherent distinctiveness is evidence, *inter alia*, by issuance of numerous federal registrations, *see supra* at 7; Opp. NOR Reg., for individual GULP Marks without either disclaimer or proof of secondary meaning. *See Toro Co. v. ToroHead Inc.*, 61 U.S.P.Q.2d 1164, 1177 (T.T.A.B. 2001). Moreover, Applicant has admitted that the BIG GULP and other "GULP Marks" are at least suggestive, Opp. NOR Admiss. (Applicant's Memo. at 7), thus conceding as a matter of law that such marks are inherently distinctive. *See, e.g., Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 23 U.S.P.Q.2d 1081, 1083 (1992).

In addition to inherent distinctiveness, 7-Eleven's GULP Marks have strong acquired distinctiveness, and have done so since long before Applicant's August 1998 priority date. Such strength is clearly shown by, *inter alia*, 7-Eleven's use of its marks over a period spanning four (4) decades, *see supra* at 3-8 coupled with the evidence, *see supra* at 6-7, of enormous sales and extensive advertising and marketing of 7-Eleven's GULP Marks branded goods. *See, e.g., Clinton Detergent Co. v. Procter & Gamble Co.*, 302 F.2d 745, 748, 133 U.S.P.Q. 520, 523 (C.C.P.A. 1962) (substantial sales evidence); TMEP §§ 1212.06(a) & (b) (4th ed. Apr. 2005). "Applicant does not dispute that the BIG GULP mark and other 'GULP Marks' may be well known to 7-Eleven convenience store customers who purchase fountain soft drinks . . ." Opp. NOR Admiss. (Applicant's Memo. at 7); *see id.* (admitting that "some" GULP Marks have acquired secondary meaning for fountain soft drinks).

Indeed, it is clear from the record that 7-Eleven's GULP Marks have not merely become highly distinctive, but in fact are truly famous, and have been so since long prior to August 1998. Such fame is clearly seen in the media references made of record. *See, e.g., In re Northland Aluminum Products*, 777 F.2d 1556, 1559, 227 U.S.P.Q. 961, 963 (Fed. Cir. 1985) ("Evidence of the public's understanding of [a] . . . term may be obtained from any competent source, such as . . . dictionaries, newspapers and other publications.").

7-Eleven has introduced more than 500 published articles evidencing the fame of the GULP Marks. *See* 1 & 2 Opp. NOR Pub. As early as 1982, *The Washington Post* could report, "The [7-Eleven] stores, *famous for soft drinks called Slurpees and Big Gulp*, are replacing traditional mom and pop operations and are becoming the neighborhood corner store." Latimer, "Colition Seeks to Stop Planned 7-Eleven in Woodridge," *Washington Post* (Sept. 15, 1982)

(emphasis added) (2 Opp. NOR Pub. at 462); *see also* 1 Opp. NOR Pubs. at 116, 209; 2 Opp. NOR Pubs. at 291, 323. According to another report, “[T]he *Big Gulp*. . . [the] *ubiquitous 32-ounce drink from 7-Eleven has become a common trademark alongside words like Xerox and Kleenex.*” McCarthy, “Americans Biting Off More Than They Should,” *Scripts Howard News Service* (Nov. 20, 1998) (emphasis added) (1 Opp. NOR Pubs. at 220); *see also* 1 Opp. NOR Pubs. at 208, 214. Other highlighted representative examples of print media references evidencing the fame of the GULP Marks include the following:

(i) “The *7-Eleven Big Gulp has become the gold standard for cup holders*; if your cup holder can hold the Big Gulp, it can hold anything. Jewett, “Car Cup Capers Continue With Icy/Hot Option,” *Automotive News* (May 13, 1996) (emphasis added) (2 Opp. NOR Pubs. at 435); *see also* 1 Opp. NOR Pubs. at 79, 98, 155, 200, 239, 252; 2 Opp. NOR Pubs. at 315, 375, 379, 392, 419, 431, 465.

(ii) “*Price Gulp: Was it just coincidence that on one of the hottest day of the year, the price of a Super Big Gulp jumped 30 cents? That’s what happened Saturday The cost of 7-Eleven’s bladder-challenging 48-ounce soda hopped from 69 cents to 99 cents.*” Curtis, *et al.*, “Valley Newswatch,” *Los Angeles Times* (June 4, 1996) (emphasis added) (2 Opp. NOR Pubs. at 428).

(iii) Metric measurement equivalents, “Meter: A yardstick plus 10 percent. Liter: A 7-Eleven Super Big Gulp. Millimeter: The thickness of a thumbnail.” Garchick, “Personals,” *San Francisco Chronicle* (June 5, 1996) (emphasis added) (2 Opp. NOR Pubs. at 427); *see also* 2 Opp. NOR Pubs. at 420, 424, 426; *cf.* 1 Opp. NOR Pubs. at 134, 203, 206, 223 (other examples of GULP Mark products used as comparative standard); 2

Opp. NOR Pubs. at 380, 387 (same).

(iv) “Eradicating unwanted pests is part of the [golf] greenkeeper’s job, just like a 7-Eleven clerk must make sure that’s there’s an ample supply of Big Gulp cups on hand.” Pierce, “It’s Not Easy Being Green,” *Colombian (Vancouver, Wash.)* (July 17, 1996) (emphasis added) (2 Opp. NOR Pubs. at 414).

(v) To explain how long ago it was that a Missouri University sports team had such a poor season start: “Want more perspective? Well, 7-Eleven hadn’t even invented the Big Gulp yet.” DeArmond, “Tigers socked by overdue CU: Colorado stops long slide at MU,” *Kansas City Star* (Jan. 8, 1997) (emphasis added) (2 Opp. NOR Pubs. at 385).

(vi) As indicative of an inhabited or civilized area: “. . . Military Reserve Park gives you that woody feeling, but you’re only a few minutes away from a Big Gulp at a 7-11 store.” Zimowsky, “Spend the holiday weekend hiking around Treasure Valley: Hundreds of miles of trails are within minutes of Boise,” *Idaho Statesman* (July 3, 1997) (emphasis added) (2 Opp. NOR Pub. at 362); see also 1 Opp. NOR Pubs. at 207, 230.

(vii) “The 7-Eleven has become a cultural institution.” “Home of the Super Big Gulp turns 70,” *Orange County Register* (July 11, 1997) (2 Opp. NOR Pubs. at 359).

(viii) “Times have changed, at least at 7-Eleven. Sure, the Big Gulp remains, like the Rock of Gibraltar.” Goodrich, “The Best of Times,” *Fort Worth Star-Telegram* (June 21, 1998) (2 Opp. NOR Pubs. at 276).

7-Eleven’s GULP Marks branded products frequently have been the subject of national radio and television news reporting. See, e.g., 1 Opp. NOR Pubs. at 175; 2 Opp. NOR Pubs. at 366, 416, 499. Indeed, 7-Eleven’s X-TREME GULP branded product was deemed sufficiently

newsworthy that it was a featured story on National Public Radio's well-known nationally broadcast All Things Considered program. See Olsen Dep. at 21 (ll. 22-24), 22 (ll. 1-21) & Olsen (Opp.) Exhs. 25 & 26; see also Ryckevic Dep. at 42 (ll. 21-25), 43 (ll. 1-25), 44 (ll. 1-9).

Further evidence that the GULP Marks long ago become fixtures of popular culture also strongly evidences the fame of such marks. As early as 1981, GULP Mark products were featured in popular films including, *inter alia*, *Cannonball Run* (1981, with Burt Reynolds and Dom DeLuise), 2 Opp. NOR Pubs. at 461, *Say Anything* (1989, with John Cusack), Olsen Dep. at 25 (ll. 5-24), 26 (ll. 1-2) & Olsen (Opp.) Exhs. 33 & 34,⁶ *Pretty Woman* (1990, with Julia Roberts), Olsen Dep. at 22 (ll. 22-24), 23 (ll. 1-17) & Olsen (Opp.) Exhs. 27 & 28,⁷ *Reality Bites* (1994, starring Winona Ryder), Ryckevic Dep. at 42 (ll. 7-19) & Ryckevic (Opp.) Exhs. 10 & 14; see also 2 Opp. NOR Pubs. at 282,⁸ *Dumb & Dumber* (1994, with Jim Carey), Olsen Dep. at 24 (ll. 12-24), 25 (ll. 1-4) & Olsen (Opp.) Exhs. 31 & 32,⁹ and *American Pie 2* (2001), Olsen Dep. at 23 (ll. 18-24), 24 (ll. 1-11) & Olsen (Opp.) Exhs. 29 & 30,¹⁰ As early as 1986, GULP Mark products featured in plays, see 2 Opp. NOR Pubs. at 441, 433, and have even been the subject of works of fine art. See 2 Opp. NOR Pubs. at 352.

The iconic nature of BIG GULP is perhaps even evident in references which treat BIG GULP branded products as purportedly representative of various aspects of American culture, see e.g., Piantados, "Looking to Find Yourself? Then You U.'s for You, for Sure," *Washington*

⁶ See 1 OPP. NOR Publications (Films) at arts. 13-16 (movie receipts, etc.).

⁷ See 1 OPP. NOR Publications (Films) at arts. 1-3 (movie receipts, etc.).

⁸ See 1 OPP. NOR Publications (Films) at arts. 4-12 (movie receipts, etc.).

⁹ See 1 OPP. NOR Publications (Films) at arts. 17-71 (movie receipts, etc.).

¹⁰ See 2 Opp. NOR Publications (Films) [all materials] (movie receipts, etc.).

Post (Sept. 9, 1983) (2 Opp. NOR Pub. at 458) (satirizing purchasing a BIG GULP at a 7-ELEVEN store as early as 1983), or other aspects of American society. In 1996, University of Michigan psychologist Brian L. Stogner wrote "The Big Gulp is a symbol of American haste and greed." McCarthy, "Americans Biting Off More Than They Should," *Scripts Howard News Service* (Nov. 20, 1998) (1 Opp. NOR Pub. at 220), *see* "Sacrifice now, benefit later," *USA Today* (Dec. 11, 1996) (2 Opp. NOR Pub. at 388); *see also* 1 Opp. NOR Pub. at 208, 214. Set forth below are other representative examples of such usages:

(i) "Ugh! You go to school to become educated, not to 'consume' education. *Education is not a Big Gulp from 7-Eleven.*" Dawson, "Television Ads Treat College Like Product," *Orlando Sentinel* (August 12, 1998) (emphasis added) (1 Opp. NOR Publ. at 253).

(ii) "... Scot says Kazunori is amazed with how big everything in America is -- especially after a trip to a nearby 7-Eleven. 'He really seemed to like the Super Big Gulp'" Collins, "Olathe Rotary Club welcomes Japanese teens," *Kansas City Star* (July 26 1997) (emphasis added) (2 Opp. NOR Pub. at 350); *see also* 2 Opp. NOR Publ. at 515.

(iii) "'Americans are greedy; their eyes are bigger than their stomachs. Look at 7-Eleven's Big Gulp,'" Clark, "One Tough Customer," *Washington Post* (Apr. 27 1997) (emphasis added) (2 Opp. NOR Pub. at 372); *see also* 2 Opp. NOR Pub. at 487.

(iv) Comparing older and more recent product sizes: "Drink sizes: Can of cola: 12 oz. 7-Eleven Double Gulp: 64 oz." Schulte, "Supersize it!: Americans becoming obsessed with making everything bigger," *Houston Chronicle* (Oct. 18, 1997)

(2 Opp. NOR Pub. at 314); *see also* 2 Opp. NOR Publs. at 284, 285, 296.

The extraordinary fame of the GULP Marks also is clearly evidenced in market research conducted by 7-Eleven. For example, according to research commissioned by 7-Eleven in 1990, the BIG GULP mark for beverages enjoyed unaided awareness of 76% and aided awareness of 100%. Ryckevic Dep. at 46 (ll. 8-23) & Ryckevic (Opp.) Exh. 12.¹¹

Based upon the record, it is beyond reasonable dispute that 7-Eleven's GULP Marks are extremely famous and, indeed, iconic. Accordingly:

The . . . fame of the prior mark plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection. . . . Thus, a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark. . . . [T]he Lanham Act's tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark's fame increases, the Act's tolerance for similarities in competing marks falls. . . . The driving designs and origins of the Lanham Act demand the standard consistently applied by this court – namely, more protection against confusion for famous marks.

Kenner Parker Toys, Inc. v. Rose Art Indus., Inc., 963 F.2d 350, 353, 22 U.S.P.Q.2d 1453, 1457 (Fed. Cir.), *cert. denied*, 506 U.S. 862 (1992). When present, the fame of the mark is “a dominant factor in the likelihood of confusion analysis for a famous mark, independent of the consideration of the relatedness of the goods.” *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1328, 54 U.S.P.Q.2d 1894, 1898 (Fed. Cir. 2000).

The strength of 7-Eleven's GULP Marks is such that 7-Eleven also clearly owns a family of GULP trademarks. The Federal Circuit has held:

¹¹ This study was conducted among 200 respondents in five geographically remote states with both 7-Eleven and non-7-Eleven customers. *Id.*

A family of marks is a group of marks having a recognized common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner.

J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 1462, 18 U.S.P.Q.2d 1889, 1891 (Fed. Cir. 1991). First, the record establishes that for years 7-Eleven has advertised two or more GULP Marks branded products together. *See supra* at 6. Such advertising strongly evidences the existence of a GULP family of marks. *See, e.g., J & J Snack Foods Corp.*, 932 F.2d at 1462-63, 18 U.S.P.Q.2d at 1891-92. The record further shows that, as reflected in media references, the public understands the relatedness of GULP Marks branded goods offered by 7-Eleven. *See, e.g.*, 1 Opp. NOR Pubs. at 96, 165, 170, 172, 240, 242, 244, 247, 250, 260; 2 Opp. NOR Pubs. at 399, 400, 401, 436, 475, 501.

Equally compelling are media references clearly establishing that even uncoupled from a particular product association, the public clearly recognize and associate "GULP," either alone or in association with other terms, as being synonymous with 7-Eleven and its convenience store products. Highlighted representative examples of such media references include the following:

- (i) In an article dealing with the purported excesses: "Until that day comes, expect to see the *Quadruple Gulp* and the Triple Big Bite at a 7-Eleven near you." McCarthy, "Americans Biting Off More Than They Should," *Scripts Howard News Service* (Nov. 20, 1998) (emphasis added) (1 Opp. NOR Pub. at 220).
- (ii) "Wines under \$15 a bottle will soon line shelves at – gulp! – 7-Eleven." "Now That's Convenience: Cheese Doodles and a Nice Merlot," *Palm Beach Post* (Jan. 7, 1999) (1 Opp. NOR Pub. at 198); *see also* 1 Opp. NOR Pubs. at 141, 161; 2

Opp. NOR Publs. at 449, 464.

(iii) Satire of corporate arena sponsorship: "The *7-Eleven Slurpee Park*. Basketball and hockey games now last a mere 15 minutes without timeouts, so you can get home faster. Concessions feature the new *192-ounce Gargantuan Gulp* for a mere \$1.50 (friendly employees will assist you in carting the drink back to your seat)." Philpot, "Name that Arena," *Fort-Worth Star-Telegram* (Mar. 27, 1999) (emphasis added) (1 Opp. NOR Pub. at 177).

(iv) "... a chopstick that came with his 7-Eleven sushi (Raw Gulp)." Ostler, "A Mini-Mart's Big, New Ideas," *San Francisco Chronicle* (Sept. 28, 2000) (1 Opp. NOR Pub. at 61).

Based upon the foregoing, it is clear that the public understands the common GULP element, either alone or with other elements, to identify 7-Eleven and its GULP Marks products. Accordingly, 7 - Eleven has established its ownership of a GULP family of marks.

2. Similarity of the Marks

In determining similarity, the respective marks are to be compared in their entireties in terms of sight, sound and connotation. *See, e.g., In re E.I. DuPont DeNemours & Co.*, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Similarity as to one element (*i.e.*, sight, sound or connotation) may be sufficient for the respective marks to be held similar. *See In re White Swan, Ltd.*, 6 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988). The respective marks need not be identical to support a finding of likelihood of confusion. Further, in determining the similarity of the respective marks, the test is not whether the marks can be distinguished when subject to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of overall commercial impression

that confusion as to the source of the goods is likely to result. The focus of the inquiry is on the (perhaps imperfect) recollection of the average purchaser, who normally retains a general rather than a specific impression of the marks. *See, e.g., In re Schnuck Markets, Inc.*, 202 U.S.P.Q. 154, 156 (T.T.A.B. 1979).

Although marks should be compared in their entireties when determining similarity, it is well established that greater weight may be afforded different elements of the mark depending upon the relative distinctiveness of such elements. *See e.g., In re Appetito Provisions Co., Inc.*, 3 U.S.P.Q.2d 1553, 1554 (T.T.A.B. 1987); *SMS, Inc. v. Byn-Mar, Inc.*, 228 U.S.P.Q. 219, 220 (T.T.A.B. 1985). Thus, in determining the similarity of marks comprised of multiple words, greater weight should be given to the dominant term in the mark. *See SMS, Inc.*, 228 U.S.P.Q. at 220. The clearly dominant term in each of 7-Eleven's GULP Marks, including the GULP trademark, is the term "gulp." Here, Applicant's GULPY mark is identical to 7-Eleven's GULP trademark, as well as the common "gulp" element for each of 7-Eleven's GULP Marks, except for a single letter "y" added to "gulp." It is well established that probable confusion is not avoided through such minor variants. *See, e.g., Hess's of Allentown, Inc. v. National Bellas Hess, Inc.*, 169 U.S.P.Q. 673, 677 (T.T.A.B. 1971) (HESS'S v. HESS); *Automatic Timing & Controls, Inc. v. McDowell-Wellman Engineering Company*, 162 U.S.P.Q. 462, 463 (T.T.A.B. 1969) (ABC v. ABCs); *see also McDonough Power Equip., Inc. v. Weed Eater, Inc.*, 208 U.S.P.Q. 676, 685 (T.T.A.B. 1981) (SNAPPER v. SNIPPY). Indeed, even greater differences than the addition of a single final letter frequently are insufficient to avoid a finding that the respective marks are confusingly similar. As the Board has noted:

... marks with "small suffix" add-on differences comparable to "OLYMP" and "OLYMPIC" have not infrequently been found to produce a likelihood of confusion or mistake when used on similar goods. See *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) ("MILLTRON" and "MILLTRONICS"); *Sun Electric Corp. v. Sun Oil Co. of Pennsylvania*, 196 USPQ 450 (TTAB 1977) ("SUNELECT" and "SUNELECTRIC"); *In re BASF Aktiengesellschaft*, 189 USPQ 424 (TTAB 1976) ("LUTEX" and "LUTEXAL").

United States Olympic Committee v. Olymp-Herrenwaschfabriken Bezner GmbH & Co., 224 U.S.P.Q. 497, 498 (T.T.A.B. 1985). Consequently, the commercial impression of the respective marks is virtually identical.

Moreover, where the purportedly distinguishing elements of the respective marks renders one mark to be the diminutive form of the other, confusion is even more likely. It long has been recognized that the mere addition of a diminutive to a distinctive mark is insufficient to distinguish the diminutive form from the original. See, e.g. *In re Midwest Oil Co.*, 289 F. 1018, 1018-19 (D.C. Cir. 1923) (AVIOLINA is a diminutive of, and confusingly similar to, AVIO; denial of trademark application aff'd); *United States Olympic Committee*, 224 U.S.P.Q. at 498 (OLYMP is a diminutive of, and confusingly similar to, OLYMPIC; application denied); *In re Sonar Radio Corp.*, 183 U.S.P.Q. 118, 119 (T.T.A.B. 1974) (SONAR is confusingly similar to SONARETTE, the diminutive form of "sonar"; application denied); *Ex parte Bianchini, Ferrier, Inc.*, 85 U.S.P.Q. 316, 317 (T.T.A.B. 1950) (CREPE ROMAIN is confusingly similar to ROMAINETTE CREPE, "romainette" being the diminutive form of "romain"; denial of trademark application aff'd); see also *Treo Co. v. Novack*, 105 F. Supp. 248, 251, 94 U.S.P.Q. 324, 326 (S.D.N.Y. 1952) (TRIOLETTE is a diminutive of, and confusingly similar to, TREO; infringement held).

It is self-evident that GULP (either itself a mark or as the common dominant element of other GULP Marks) is virtually identical to GULPY in terms of their respective visual impressions.

GULP (either itself a mark or as the common dominant element of other GULP Marks) also is strikingly similar to GULPY aurally being separated by a single syllable. *See Knorr-Nahrungsmittel Aktiengesellschaft v. Havland Int'l Inc.*, 206 U.S.P.Q. 827, 835-36 (T.T.A.B. 1980) (NOR-KING v. KNORR).

GULP (either itself a mark or as the common dominant element of other GULP Marks) also is strikingly similar to GULPY connotatively. The purportedly distinguishing "Y" element of Applicant's GULPY mark plainly renders it a mere diminutive form of 7-Eleven's GULP mark, as well as the common "Gulp" element of each of 7-Eleven's GULP Marks. Regardless of whether or not this diminutive form is understood as adding an endearing connotation to "gulp," *see* Opp. NOR Admiss. (Declaration of Vicki Crawford (July 27, 2001) at ¶ 5), or connoting the quality of "gulp-ness," necessarily the connotations of 7-Eleven's GULP Marks and Applicants GULPY mark must be deemed highly related. *See generally Merriam-Webster's Collegiate Dictionary* 575 & 1365 (10th ed. 2001) (definitions of "-ie" and "-y" respectively).

In sum, the respective marks are strikingly similar.

**3. The Respective Goods are Related
or are Within 7-Eleven's Natural Zone of Expansion**

In determining the relationship of the parties' respective goods, it is well established that:

The goods . . . do not need to be identical or even competitive in order to determine that there is a likelihood of confusion. It is sufficient that the goods . . . of the applicant and the registrant are so related that the circumstances surrounding their marketing are

such that they are likely to be encountered by the same persons under circumstances that would give rise, to the mistaken belief that they originate from the same source.

TMEP § 1207.01(a)(i). Moreover, where, as here, the senior user's mark is "famous," protection should be accorded "independent of the consideration of the relatedness of the goods." *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 U.S.P.Q.2d 1894, 1898 (Fed. Cir. 2000).

7-Eleven and Applicant sell permanent, reusable, portable beverage containers, 7-Eleven under one or more of its GULP Marks, Applicant under its GULPY mark. Although Applicant's GULPY portable container product appears to be intended for use with household pets such as dogs, *see, e.g.*, App. Exs. 2, and 7-Eleven's portable container products for human use, nothing of record establishes that, for example, a 7-Eleven portable container could not be used to dispense food or drink to such household pets, or, indeed, that a human could not drink from Applicant's product.¹² Consequently, Applicant's and 7-Eleven's permanent, reusable, portable beverage containers are not merely related, they are legally identical.

Moreover, the identity of Applicant's GULPY product with 7-Eleven's GULP Marks beverage containers is particularly underscored by the fact, as seen below, that at least one of 7-Eleven's GULP Mark products is a heavy-plastic water bottle designed for continual use and of the kind frequently carried on bicycles and Applicant's product is the same thing but for the "flip-out" cup feature:

¹² Of course, such potential dual human/pet usage is not limited to permanent, reusable, portable beverage containers, but would span the full range of beverage containers sold by 7-Eleven. Indeed, the Board may take judicial notice that it is perhaps even more likely that a disposable cup or container might be pressed it service to dispense food or water to a pet than one nominally intended for human use.



See App. Exs. 2 & 15.



See Ryckevic (Opp.) Ex. 1, at 19, 25.

Even if the parties' respective products are differentiated based upon intended pet or human use, the parties' respective permanent, reusable, portable beverage containers, even if not identical goods, must be deemed closely related goods. It is self evident that a permanent, reusable, portable beverage containers for pets may be used in immediate conjunction with such a container for humans (*e.g.*, in walking a dog on a warm day). In addition, at the risk of noting the obvious, it is self evident that beverages products and beverage containers are

complementary goods. *Cf. Minneapolis Brewing Co. v. Ekhardt & Becker Brewing Co.*, 38 U.S.P.Q. 344, 345 (Com. Pat 1938) (beer v. beer bottles).

Furthermore, the relatedness of pet products and human products long has been recognized. *See, e.g., Recot, Inc.*, 214 F.3d at 1329, 54 U.S.P.Q.2d at 1898 (FIDO-LAY dog treats v. FRITO LAY human snack foods); *American Sugar Refining Co. v. Andreassen*, 296 F.2d 783, 784, 132 U.S.P.Q. 10, 11 (C.C.P.A. 1961) (DOMINO for pet food v. DOMINO for sugar); *Grey v. Campbell Soup Co.*, 650 F. Supp 1166, 1175, 231 U.S.P.Q. 562 (C.D. Cal. 1986) (DOGIVA and CATIVA for dog biscuits v. GODIVA for gourmet chocolates); *V.I.P. Foods, Inc. v. Vulcan Pet, Inc.*, 210 U.S.P.Q. 662, 665 (N.D. Okla. 1980) (V.I.P. for animal foods v. VIP for frozen and non-frozen human foods), *rev'd on other grounds*, 675 F.2d 1106 (10th Cir. 1982) (*rev'd as to attorneys' fee award*). The relatedness of such products is particularly strong when the animals in question are household pets rather than farm livestock. *See V.I.P. Foods, Inc.*, 210 U.S.P.Q. at 665.

Moreover, 7-Eleven has established it uses its GULP Marks on a wide array of goods ranging from permanent, reusable, portable beverage containers, to beverages and food, to clothing, to toys. *See supra* at 3-7. 7-Eleven further has established that it sells significant quantities of pet products. *See Ryckevic Dep.* at 48 (ll. 13-25), 49 (ll. 1-2), 50 ll. (4-22) & Ryckevic (Opp.) Exh. 13. Consequently, permanent, reusable, portable beverage containers intended for use by pets clearly falls within 7-Eleven's natural zone of product expansion.

In sum, consumers could reasonably believe that Applicant's GULPY container and 7-Eleven's GULP Marks products, in particular beverage containers and beverages, originate from the same source or have some connection. This factor also weighs heavily in favor of a

finding of likelihood of confusion.

4. Consumer Care

The parties' respective products are inexpensive. *Compare supra* at 9 (Applicant's suggested retail price \$10.99), *with supra* at 5 (approximate actual prices for misc. GULP Marks branded permanent reusable beverage containers \$4.00). It is well established that consumers generally exercise less care in purchasing such inexpensive goods, thereby increasing likelihood of confusion. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 U.S.P.Q. 1289, 1290 (Fed. Cir. 1984), *see also Wawa, Inc. v. Haaf*, 40 U.S.P.Q.2d 1629, 1632 (E.D.Pa. 1996), *aff'd mem.* 116 F.3d 471 (3d Cir. 1997).

5. Marketing Channels and Methods

The record establishes overlapping marketing channels. Applicant admits that his trade channels include all outlets for pet products, including convenience stores. *See supra* 9. The record further clearly establishes that 7-Eleven convenience stores sell pet products. *See supra* at 3.

The record also establishes overlapping marketing methods. Both 7-Eleven, *see* 6-7, and Applicant, *see, e.g.*, App. Dep. at 12 (ll. 20-25), 13 (ll. 1-12), 16 (ll. 18-23) & App. Ex. 2, advertise and promote their respective products via the Internet.

6. Actual Confusion

There is no evidence of specific instances of actual confusion which have been made of record. However, it is well established that evidence of actual confusion is not required to establish likelihood of confusion. *See, e.g., Weiss Assoc. Inc. v. HRL Assoc. Inc.*, 902 F.2d 1546, 1549, 14 U.S.P.Q.2d 1840, 1842-43 (Fed. Cir. 1990); *In re Azteca Restaurant Enterprises, Inc.*,

50 U.S.P.Q.2d 1209, 1212 (T.T.A.B. 1999). Further, it also is well established that the absence of specific evidence actual confusion is immaterial in proceedings, such as these, where the respective goods are relatively inexpensive because consumers are unlikely to complain. *See, e.g., In re Azteca Restaurant Enterprises, Inc.*, 50 U.S.P.Q.2d at 1212.

VI. 7-ELEVEN'S SECTION 2(F) CLAIM

7-Eleven also has opposed Applicant's application alleging that the mark GULPY for portable animal water dishes and animal water containers sold empty is likely to dilute the distinctive qualities of 7-Eleven's various registered and common law GULP Marks for beverage containers, beverages, food and an array of other products. In order to prevail against Applicant's intent-to-use application, 7-Eleven will prove the following elements: (1) Applicant's use is in commerce; (2) Applicant adopted its GULPY mark after 7-Eleven's GULP Marks had become distinctive and famous; (3) 7-Eleven's GULP Marks are distinctive and famous; and (4) Applicant's proposed mark is likely to dilute the distinctive quality of 7-Eleven's GULP Marks. *See* 15 U.S.C. § 1125(c)(1); *Toro Co. v. ToroHead, Inc.*, 61 U.S.P.Q.2d 1164, 1173-74 & n. 7. 7-Eleven's opposition should be sustained and the subject application should be disallowed. *See* 15 U.S.C. § 1063(a).

A. Applicant's Use In Commerce

Applicant seeks to register his GULPY mark based upon a stated bona fide intent to use the mark GULPY in commerce in connection with specified goods, which satisfies the use in commerce element. *See Toro*, 61 U.S.P.Q.2d at 1174.

**B. Applicant's Adopted his GULPY mark
after 7-Eleven's GULP Marks became Famous**

Applicant made no use of his GULPY mark prior to filing the opposed application on August 27, 1998, long subsequent to 7-Eleven's aforesaid acquisition of fame and distinctiveness in its GULP Marks. *See supra* at 9; *Toro*, 61 U.S.P.Q.2d at 1174.

C. 7-Eleven's GULP Marks are Distinctive and Famous

Section 43(c) provides a non-exclusive list of eight factors which may be considered in determining whether a mark is distinctive and famous:

- (A) the inherent or acquired distinctiveness of a mark;
- (B) the duration and extent of use of the mark in connection with the goods and services with which the mark is used;
- (C) the duration and extent of advertising and publicity of a mark;
- (D) the geographical extent of the trading area in which the mark is used;
- (E) the channels of trade for the goods and services with which the mark is used;
- (F) the degree of recognition of the mark in trading areas and channels of trade; used by the mark's owner and the person against whom [relief] is sought;
- (G) the nature and extent of use of a similar mark by third parties; and
- (H) whether the mark is federally registered.

See 15 U.S.C. § 1125(c)(1); *see also Toro*, 61 U.S.P.Q.2d at 1176.

1. The inherent and acquired distinctiveness

As established *supra* at 3-8, 11-19, the GULP Marks are inherently distinctive and have acquired a very high degree of distinctiveness.

2. Duration and extent of use

Since first acquiring the rights to the GULP Marks, as early as 1978, opposer has

continuously used its GULP Marks in connection with the sale of beverage products and beverage container products. Over the years, 7-Eleven has extended its use of GULP Marks to other goods including food products, clothing and toys. *See supra* at 4-5.

3. The duration and extent of advertising and publicity

For decades, 7-Eleven has extensively advertised and promoted its GULP Marks products throughout the United States. *See supra* at 6-7. Further, for decades 7-Eleven and its GULP Marks products have been the subject of great public interest and publicity. *See supra* at 12-19.

4. The geographical extent of the trading area

For decades, 7-Eleven has advertised and sold its GULP Marks products nationally, including through its more than 5,300 convenience stores. *See supra* at 3.

5. The channels of trade for the goods

The parties' respective goods travel through a wide array of trade channels, including overlapping channels such as convenience stores. *See supra* at 3 & 6.

6. The degree of recognition of the mark

As has been established, 7-Eleven's GULP Marks products have acquired a very high degree of recognition, not merely within its own trade channels and territories, but nationally and throughout the American culture. *See supra* at 12-19.

7. Whether the mark is federally registered:

7-Eleven long has registered a number of its GULP Marks. *See supra* at 7.

All of the factors prescribed by the statute favor a finding that 7-Eleven's GULP Marks are distinctive and famous for purposes of Section 43(c)(1).

Exhibit 2

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

7-ELEVEN, INC.,)	
)	
Opposer,)	
)	
v.	)	Opposition No. 91177807
)	
SUSAN B. BUCENELL,	)	Serial No. 78/916,143
)	
Applicant.)	

**MEMORANDUM IN SUPPORT OF
OPPOSER'S SUMMARY JUDGMENT MOTION**

I. STATEMENT

Opposer, 7-Eleven, Inc. ("7-Eleven"), files this memorandum of law in support of its summary judgment motion filed against applicant, Susan B. Bucenell ("Applicant"). For the reasons set forth below, there is no genuine issue of material fact which would preclude a finding that Applicant's trademark HEALTHY GULP for "pet beverages, namely vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs" is confusingly similar to 7-Eleven's various registered and common law GULP Marks (as defined herein) for, *inter alia*, soft drinks, as well as for beverage containers and other goods, in violation of Section 2(d) of the United States Trademark Act of 1946, 15 U.S.C. § 1052(d). Consequently, 7-Eleven is entitled to judgment as a matter of law.

In support of this motion, concurrently herewith 7-Eleven has filed the following: (i) Declaration of Evan Brody with supporting exhibits (hereinafter "Brody Decl."); (ii) Confidential Declaration of Evan Brody with supporting exhibit (hereinafter "Confidential Brody Decl."); and (iii) Declaration of Jean M. Olsen with supporting exhibits (hereinafter "Olsen Decl.").

II. FACTS

A. 7-Eleven and Its GULP Products

Applicant admits that, for decades, and since long prior to Applicant's June 24, 2006 application date, 7-Eleven has been engaged in the business, *inter alia*, of offering convenience store services and products, to the general public throughout the United States. *Compare* Notice of Opposition ¶ 1, with Answer ¶ 1. Among the wide array of convenience goods and services sold by 7-Eleven are groceries, household supplies, pet food and treats, and prepared foods and beverages. Brody Decl. ¶ 2. Since at least as early as February 1978, 7-Eleven has sold soft drinks under the mark BIG GULP. Brody Decl. ¶ 3; *see also* Olsen Decl. ¶ 2 & Ex. 1.¹ 7-Eleven's BIG GULP beverages immediately were a success and quickly became a 7-Eleven signature product. Brody Decl. ¶ 3.

To capitalize upon the great success of its BIG GULP beverage product, over the years, 7-Eleven has adopted and used multiple marks with the common "gulp" element, including, *inter alia*, GULP, SUPER BIG GULP, DOUBLE GULP, CAR GULP, X-TREME GULP, and MINI GULP (collectively hereinafter "GULP Marks") for soft drinks. Brody Decl. ¶ 4.² Although most GULP Marks beverage products are sold in cups and similar beverage containers, *see id.* ¶ 5 and Exs. 1 & 2, 7-Eleven also has sold bottled beverages, including BIG GULP branded soft drinks and WATER GULP branded water. *See id.* ¶ 6 & Ex. 3.

Since 1978, 7-Eleven has sold many hundreds of millions of dollars of beverage products under its GULP Marks, and since at least as early as 1997, 7-Eleven's average annual sales for such products are approximately \$100,000,000. *Id.* ¶ 9. 7-Eleven's GULP Mark beverages have been so successful that they long have been synonymous with 7-Eleven. *Id.* ¶ 10; *see also infra* at 10-16.

¹ 7-Eleven's use of its BIG GULP mark for soft drinks, beverage containers and other goods prior to Applicant's June 24, 2006, filing date, is admitted. *Compare* Notice of Opposition ¶ 2, with Answer ¶ 2.

² 7-Eleven's use of its GULP Marks for soft drinks, beverage containers and other goods prior to Applicant's June 24, 2006, filing date, is admitted. *Compare* Notice of Opposition ¶ 2, with Answer ¶ 2.

For years, 7-Eleven has used its GULP Marks on a variety of promotional products including, *inter alia*, throwing discs, shirts, caps and reusable beverage containers. Brody Decl. ¶ 7 & Ex. 4.

In recent years, to further capitalize on the great fame and success of its other GULP Marks branded products, 7-Eleven has extended its use of the GULP Marks beyond beverages, beverage containers and related promotional goods. For example, prior to the Applicant's June 2006 filing date, 7-Eleven offered fresh fruit salads under the mark FRUIT GULP, candy under the mark GUMMI GULP, and salty snacks under the mark SNACK GULP. Brody Decl. ¶ 11 & Ex. 6.

Since 1978, 7-Eleven has incurred many millions of dollars in costs to advertise and promote its GULP Marks branded goods. Brody Decl. ¶ 8. Often, one or more GULP Marks branded products are promoted together. *Id.* ¶ 8 & Ex. 5.

Since as least as early as the 1980s, 7-Eleven has advertised its GULP Marks via radio and television. *See* Brody Decl. at ¶ 14. & Ex. 9. Since at least as early as the 1970's, 7-Eleven also has advertised and promoted its GULP Marks branded products through point of purchase and other store displays. *See id.* ¶ 12 & Exs. 5, 7. Since at least as early as the 1990's, 7-Eleven also has advertised and promoted its GULP Marks branded products via the Internet. *See id.* ¶ 15 & Ex. 9. For years 7-Eleven has also promoted its GULP Marks products through out of door media, such as billboards, and displays on public transportation such as buses and bus shelters. *Id.* ¶ 16.

It is admitted that 7-Eleven has registered a number of its GULP Marks with the United States Patent and Trademark Office, including the following:

MARK	REG. NO.	REG. DATE	GOODS
BIG GULP	1,110,172	12/26/1978	Soft drinks for consumption on or off the premises
SUPER BIG GULP	1,470,871	12/29/1987	Soft drinks for consumption on or off the premises
DOUBLE GULP	1,566,263	11/14/1989	Soft drinks for consumption on or off the premises

MARK	REG. NO.	REG. DATE	GOODS
DOUBLE GULP (stylized)	1,615,968	10/2/1990	Soft drinks for consumption on or off the premises
GULP	1,586,016	3/6/1990	Soft drinks for consumption on or off the premises
BIG GULP FLAVOR SHOT ³	2,749,708	8/12/2003	Soft drinks and syrups or concentrates added to soft drinks for consumption on or off the premises
BIG GULP SODA FLOAT ⁴	2,997,248	9/20/2005	Soft drinks containing ice cream for consumption on or off the premises
CAR GULP	2,494,955	10/2/2001	Reusable plastic cups; soft drinks for consumption on or off the premises
X-TREME GULP 7-ELEVEN & Design	2,528,578	1/8/2002	Beverage containers, namely, mugs; soft drinks for consumption on or off the premises
PRO CAR GULP	2,928,007	2/22/2005	Reusable plastic cups; soft drinks for consumption on or off the premises
BIG GULP	3,076,786	4/4/2006	Confectionery products, namely candy
TEAM GULP	3,082,886	4/18/2006	Beverage containers, namely, reusable plastic cups, plastic sports and squeeze bottles sold empty

Compare Notice of Opposition ¶ 6, with Answer ¶ 6; see also Olsen Decl. ¶¶ 2-13 & Exs. 1-12.

Applicant further admits that these registrations are valid, subsisting and owned by 7-Eleven, and that Registration Numbers 1,110,172, 1,470,871, 1,566,263, 1,586,016 and 1,615,968 are now incontestable in accordance with Sections 15 and 33(b) of the Trademark Act, 15 U.S.C. §§ 1065 & 1115(b). Compare Notice of Opposition ¶ 6, with Answer ¶ 6; see also Olsen Decl. ¶¶ 2-6 & Exs. 1-5.

Applicant admits that since long prior to her June 24, 2006 application date, 7-Eleven has owned a family of "Gulp" marks for its aforesaid products. Compare Notice of Opposition ¶ 8, with Answer ¶ 8.

³ "Flavor shot" disclaimed.

⁴ "Soda float" disclaimed.

7-Eleven's GULP Marks branded beverages are typically sold at 7-ELEVEN stores for relatively inexpensive prices. Prices can vary by region, but representative retail prices for fountain beverages sold under the GULP Marks are \$0.89 for a 20 ounce fountain beverage or \$1.39 for a 64 ounce fountain beverage. Brody Decl. ¶ 17.

As previously noted, among the mix of products sold through 7-ELEVEN branded stores are pet products, including dog food, cat food, pet treats, and cat litter. See Brody Decl. ¶ 18; see also Olsen Decl. ¶¶ 22-28 & Exs. 21-24. During the period 2000 through 2008 alone, 7-Eleven's average annual sales of pet products was well in excess of \$10,000,000. See Brody Decl. ¶ 18.

B. Applicant and Her HEALTHY GULP Product

On June 24, 2006, Applicant filed an intent to use application (Serial Number 78/916,143) for the mark HEALTHY GULP for "pet beverages, namely vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs" (hereinafter "Pet Beverages"). Compare Notice of Opposition ¶ 10, with Answer ¶ 10. Applicant adopted her HEALTHY GULP mark with full knowledge of 7-Eleven and its GULP Marks. See Olsen Decl. ¶ 14, Ex. 13 at 3, Interrogatory Response 12 (Applicant's letter to Opposer's counsel of Jan. 9, 2008).

Applicant made no use of the mark HEALTHY GULP prior to June 24, 2006, and as of June 24, 2006 had not sold any products intended for use with the HEALTHY GULP mark. Olsen Decl. ¶ 14, Ex. 13 at 1, Document Request Responses 4 & 5 (Applicant's letter to Opposer's counsel of Jan. 9, 2008) ("product sales did not commence until the 4th quarter of 2007"). Applicant's first use of the HEALTHY GULP mark was not until late 2007. *Id.* As of May 2008, Applicant's sales activities included offering goods for sale on Applicant's own Internet website and through the website of a third party (*i.e.*, eBay). Olsen Decl. ¶ 15, Ex. 14 at 3, answer to Interrogatory No. 3 (Applicant's interrogatory answers); *id.* ¶ 17, Ex. 16 at 1, responses to Interrogatory No. 4 and Document Request No. 5 (Applicant's letter to

Opposer's counsel of May 19, 2008). Applicant's application does not limit the channels of trade through which the applied for goods would be offered for sale.

Pet Beverages such as those sold by Applicant, are inexpensive goods, costing less than \$2 per 20 ounce bottle. See Olsen Decl. ¶ 32, Ex. 28 (third party product). Applicant offers her HEALTHY GULP product at \$10.49 for a package of eight 20-ounce bottles, or about \$1.31 per 20-ounce bottle. See Olsen Decl. ¶ 21, Ex. 20 (Applicant's website).

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment should be granted where the moving party establishes an absence of a genuine issue of material fact and that he or she is entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Upon the moving party's *prima facie* showing of entitlement to summary relief, the non-moving party may not rest on mere denials or conclusory assertions, but rather must present specific facts showing a genuine issue for trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether there is a genuine issue of material fact which would preclude the grant of summary judgment, the Board must look to the controlling substantive law. See *Anderson*, 477 U.S. at 248.

B. 7-Eleven's Section 2(d) Claim

In order to prevail upon its Section 2(d) claim, 7-Eleven must establish that it is the owner of valid trade identity rights in its GULP Marks, that, *vis-à-vis* Applicant's HEALTHY GULP mark, 7-Eleven's GULP Marks have priority, and that Applicant's use of its HEALTHY GULP mark would be likely to cause confusion with one or more of 7-Eleven's GULP Marks. See, e.g., *Calvin Klein Industries, Inc. v. Calvins Pharms., Inc.*, 8 U.S.P.Q.2d 1269, 1270 (T.T.A.B. 1988). For the reasons set

forth below, there are no genuine issues of material facts as to either element of 7-Eleven's Section 2(d) claim, and judgment should be entered thereon as a matter of law.

1. 7-Eleven's Ownership and Priority of its GULP Marks

Trademark rights are created by use of, *inter alia*, a word to identify the source of goods. *See, e.g., Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916). Applicant admits 7-Eleven's use of its GULP Marks for soft drinks, beverage containers and other goods since long prior to her June 24, 2006 filing date. *Supra* at n.2. Applicant's admission is fully corroborated by 7-Eleven's submission of substantial evidence of its use of its GULP Marks for decades. *See supra* at 2-3.

Applicant further admits that 7-Eleven owns multiple federal trademark registrations for a number of its GULP Marks (including several incontestable federal registrations). *See supra* at 3-4. Such registrations constitute prima facie evidence of the validity of the mark and of the registrant's exclusive right to use the mark on the goods specified in the registration. *See* 15 U.S.C. §§ 1057(b), 1115(a).

In addition to establishing that it owns the individual GULP Marks, 7-Eleven also has established its ownership of a family of GULP trademarks. "A family of marks is a group of marks having a recognized common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner." *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1462, 18 U.S.P.Q.2d 1889, 1891 (Fed. Cir. 1991). The Board has previously found that 7-Eleven owns a family of GULP Marks. *7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715, 1720 (T.T.A.B. 2007) ("Opposer's 'Gulp' family of marks consists of the word 'Gulp' and the word 'Gulp' preceded by a modifying adjective (*e.g.*, Big, Super Big, Double, X-Treme, etc.)."). Moreover, Applicant admits that "[s]ince long prior to June 24, 2006, 7-Eleven has owned a family of 'Gulp' marks for[, *inter alia*, soft drinks, beverage containers, and candy]." *Compare* Notice of Opposition ¶ 8, *with* Answer ¶ 8.

7-Eleven's ownership of a family of GULP trademarks is fully corroborated by the record, including:

(i) 7-Eleven has advertised two or more GULP Marks branded products together. *Supra* at 3. Such advertising strongly evidences the existence of a GULP family of marks. *See, e.g., J & J Snack Foods Corp.*, 932 F.2d at 1462-63, 18 U.S.P.Q.2d at 1891-92.

(ii) The record further shows that, as reflected in media references, the public understands the relatedness of GULP Marks branded goods offered by 7-Eleven. *See infra* at 10-16; *see also 7-Eleven, Inc.*, 83 U.S.P.Q.2d at 1720. This is particularly true because in numerous instances, the media has referred to fictitious "Gulp" marks in connection with articles about 7-Eleven, which references would be unintelligible but for the strong public association of the "Gulp" element with 7-Eleven.⁵

Consequently, 7-Eleven's ownership of, and priority for, its individual GULP Marks, as well as a family of GULP trademarks, is conclusively established.

2. Likelihood of Confusion

In determining the issue of likelihood of confusion, the Board should consider a number of factors including, *inter alia*, similarity of the respective marks, relatedness of the respective goods, the

⁵ For example:

(i) In an article dealing with the purported excesses: "Until that day comes, expect to see the *Quadruple Gulp* and the Triple Big Bite at a 7-Eleven near you." McCarthy, "Americans Biting Off More Than They Should," *Scripts Howard News Service* (Nov. 20, 1998) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 219.

(ii) Satirizing corporate arena sponsorship: "The 7-Eleven *Sturpee Park*. Basketball and hockey games now last a mere 15 minutes without timeouts, so you can get home faster. Concessions feature the new 192-ounce *Gargantuan Gulp* for a mere \$1.50 (friendly employees will assist you in carting the drink back to your seat)." Philpot, "Name that Arena," *Fort-Worth Star-Telegram* (Mar. 27, 1999) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 177.

(iii) Commenting on changing food tastes: "... a chopstick that came with his 7-Eleven *sushi (Raw Gulp)*." Ostler, "A Mini-Mart's Big, New Ideas," *San Francisco Chronicle* (Sept. 28, 2000) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 61.

marketing channels for the respective goods, and the fame of the senior user's mark. *See, e.g., In re DuPont DeNemours & Co.*, 476 F.2d 1356, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). A determination of likelihood of confusion is the ultimate legal conclusion based upon the weighing of the pertinent *DuPont* factors. *See, e.g., Giant Foods, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569, 218 U.S.P.Q. 390, 394 (Fed. Cir. 1983).

In determining the issue of likelihood of confusion, the Board's determination is to be guided by the principle that:

. . . a newcomer . . . has both the opportunity and the obligation to avoid confusion, and if he fails to do so by adopting a mark similar to one used by another for the same or closely related goods . . ., he does so at his own peril, all doubt on the issue of likelihood of confusion is resolved against him.

Money Station, Inc. v. Cash Station, Inc., No. 95-1240, 70 F.3d 1290, 38 U.S.P.Q.2d 1150, 1153 (Fed Cir. 1995) (mem. opinion); *see also Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1147, 227 U.S.P.Q. 541, 543 (Fed. Cir. 1985).

a. 7-Eleven's GULP Marks are Strong

Each of 7-Eleven's GULP Marks are inherently distinctive. Such inherent distinctiveness is evidenced, *inter alia*, by issuance of numerous federal registrations, *see supra* at 3-4; for individual GULP Marks without either pertinent disclaimer or proof of secondary meaning. *See Toro Co. v. ToroHead Inc.*, 61 U.S.P.Q.2d 1164, 1177 (T.T.A.B. 2001).

7-Eleven's GULP Marks also have strong acquired distinctiveness, and have had such since long before Applicant's June 2006 priority date. Such strength is clearly shown by, *inter alia*, 7-Eleven's use of its marks over a period spanning four (4) decades, *supra* at 2-3,⁶ coupled with enormous sales and

⁶ 7-Eleven's use of its GULP Marks since "long prior to June 24, 2006," is admitted. *Compare* Notice of Opposition ¶ 2, *with* Answer ¶ 2.

extensive advertising and marketing of 7-Eleven's GULP Marks branded goods, *supra* at 2-3. See, e.g., *Clinton Detergent Co. v. Procter & Gamble Co.*, 302 F.2d 745, 748, 133 U.S.P.Q. 520, 523 (C.C.P.A. 1962) (substantial sales evidence); Trademark Manual of Examining Procedure §§ 1212.06(a) & (b) (5th ed. Sept. 2007) (hereinafter "T.M.E.P."). The results of this tremendous commercial success is clearly reflected in market research. As early as 1990, market research established that 7-Eleven's BIG GULP mark for beverages enjoyed unaided public awareness of 76% and aided awareness of 100%. Confidential Brody Decl. ¶ 2, Ex. 10 at 9-10.⁷ The strength of 7-Eleven's GULP Marks also is evidenced by the admitted fact that 7-Eleven owns a family of GULP trademarks. See *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338, 57 U.S.P.Q.2d 1557, 1560 (Fed. Cir. 2001) (admitted family of marks supports implicit finding as to strength).

Indeed, it is clear from the record that 7-Eleven's GULP Marks have not merely become highly distinctive, but in fact are truly famous, and have been so since long prior to June 2006. In addition to the previously described evidence, such fame is clearly seen in media references to 7-Eleven's GULP Marks branded products. See, e.g., *In re Northland Aluminum Products*, 777 F.2d 1556, 1559, 227 U.S.P.Q. 961, 963 (Fed. Cir. 1985) ("Evidence of the public's understanding of [a] . . . term may be obtained from any competent source, such as . . . dictionaries, newspapers and other publications.").

As early as 1982, *The Washington Post* could report, "The [7-Eleven] stores, famous for soft drinks called Slurpees and Big Gulp, are replacing traditional mom and pop operations and are becoming the neighborhood corner store." Latimer, "Coalition Seeks to Stop Planned 7-Eleven in Woodridge," *Washington Post* (Sept. 15, 1982) (emphasis added) Olsen Decl. ¶ 47, Ex. 43 at 462, see also *id.* Ex. 43 at 116, 209, 291, 323. According to another report, "[T]he Big Gulp . . . [the] ubiquitous 32-ounce drink from 7-Eleven has become a common trademark alongside words like Xerox and Kleenex." McCarthy,

⁷ This study was conducted among 200 respondents in five geographically remote states with both 7-Eleven and non-7-Eleven customers. Confidential Brody Decl. ¶ 2, Ex. 10 at 5-6.

“Americans Biting Off More Than They Should,” Scripts Howard News Service (Nov. 20, 1998) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 220; *see also id.* Ex. 43 at 208, 214. A more recent report stated, “[T]he company that pioneered the convenience store concept nearly 80 years ago by selling ice, milk, bread and other consumables . . . established sub-brands like Slurpee and *Big Gulp* that have grown into ‘icon’ status.” Quackenbush et al., “Colossal Success: Despite its Size, 7-Eleven, Inc. Employs the Grace, Speed to Market and Creative Thinking Often Seen in Aggressive Start-Ups,” *Convenience Store Decisions* (Nov. 2005) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 528; *see also* Donahue, “A Comfortable Friend,” *Convenience Store Decisions* (Nov. 1, 2005) (“7-Eleven has become the face of the convenience store industry; for many, the green, red and orange logo has become synonymous with convenience, not to mention ‘icon’ brands like Slurpee and *Big Gulp*.”), Olsen Decl. ¶ 47, Ex. 43 at 527.

Other highlighted representative examples of print media references evidencing the fame of the GULP Marks include the following:

(i) “The *7-Eleven Big Gulp* has become the gold standard for cup holders; if your cup holder can hold the *Big Gulp*, it can hold anything. Jewett, “Car Cup Capers Continue With Icy/Hot Option,” *Automotive News* (May 13, 1996) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 435; *see also id.* Ex. 43 at 98, 155, 200, 239, 252, 315, 375, 379, 419, 431, 465. “Mini-Cooper wants to make sure its drivers don’t go thirsty. So it offers multiple cup holders – including one that can hold *the horse-bucket-size 7-Eleven Big Gulp*.” Guerrero, “Luxury Takes Back Seat in \$319,000 Mayback,” *Chicago Sun-Times* (Feb. 18, 2005) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 548; *see also* DiMascio, “Driving; Forget Options, Where Do I Put My Coffee?,” *The New York Times* (July 19, 2002) (“The looming challenge [for cup holder manufacturers] was to somehow secure the *Big Gulp*.”), Olsen Decl. ¶ 47, Ex. 43 at 633.

(ii) “*Price Gulp*: Was it just coincidence that on one of the hottest days of the year, the *price of a Super Big Gulp* jumped 30 cents? That’s what happened Saturday The cost of *7-Eleven’s*

bladder-challenging 48-ounce soda hopped from 69 cents to 99 cents.” Curtis, *et al.*, “Valley Newswatch,” *Los Angeles Times* (June 4, 1996) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 428.

(iii) GULP products have been used as a unit of measure. “Meter: A yardstick plus 10 percent. *Liter: A 7-Eleven Super Big Gulp*. Millimeter: The thickness of a thumbnail.” Garchick, “Personals,” *San Francisco Chronicle* (June 5, 1996) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 427; *see also id.* Ex. 43 at 420, 424, 426. [GULP Mark products have also frequently been used as comparative standards. Keeler, “Attention Grabber Save Mart Center Gives Fresnans Something to Stop and Marvel at,” *The Fresno Bee* (Oct. 24, 2003) (comparing the paint on the interior of a sports arena to “3,200 -- the number of Super Big Gulp cups from 7-Eleven that it would take to hold the 1,100 gallons of paint used on the arena’s interior”), Olsen Decl. ¶ 47, Ex. 43 at 588; “\$3 Gas? Be Glad Car Doesn’t Run on Beer,” *The Arizona Republic* (May 20, 2006) (comparing the price of once gallon of gasoline to “one gallon of Coca Cola from the soda fountain at 7-Eleven *at the Big Gulp 99-cent rate: \$3.96*”) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 516; *see also id.* Ex. 43 at 134, 203, 206, 223, 380, 387 (other examples of GULP Mark products used as a comparative standard).

(iv) “Eradicating unwanted pests is part of the [golf] greenskeeper’s job, just like *a 7-Eleven clerk must make sure that’s there’s an ample supply of Big Gulp cups on hand*.” Pierce, “It’s Not Easy Being Green,” *Colombian (Vancouver, Wash.)* (July 17, 1996) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 414.

(v) To explain how long ago it was that a Missouri University sports team had such a poor season start: “Want more perspective? Well, *7-Eleven hadn’t even invented the Big Gulp yet*.” DeArmond, “Tigers socked by overdue CU: Colorado stops long slide at MU,” *Kansas City Star* (Jan. 8, 1997) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 385.

(vi) As indicative of an inhabited or civilized area: “. . . Military Reserve Park gives you that woody feeling, but you’re only a few minutes away from a Big Gulp at a 7-11 store.” Zimowsky, “Spend the holiday weekend hiking around Treasure Valley: Hundreds of miles of trails are within minutes of Boise,” *Idaho Statesman* (July 3, 1997) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 362; see also *id.* Ex. 43 at 207, 230.

(vii) [“The Loudon Road [7-Eleven] store is open all through the weekend, ‘cause nothing says ‘Merry Christmas’ like Doritos and a Big Gulp.” Heckman, “Last Minute Food,” *Concord Monitor* (Dec. 23, 2005) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 523.]

(viii) “The 7-Eleven has become a cultural institution.” “Home of the Super Big Gulp turns 70,” *Orange County Register* (July 11, 1997), Olsen Decl. ¶ 47, Ex. 43 at 359; [see also Williams, “More . . . Bridal Couples Opt These Days to Put Their Own, Unique Stamp on the Wedding,” *Arkansas Democrat-Gazette* (June 8, 2005) (describing 7-Eleven-themed wedding where “the bride, an employee of the convenience store chain, carried a bouquet in a Super Big Gulp container”), Olsen Decl. ¶ 47, Ex. 43 at 542; Mayhew, “Gas-Station Gourmand: Who Needs Restaurants When Quiktrip, RaceTrac and 7-Eleven Offer So Many Dining Options?,” *Fort Worth Star Telegram* (July 24, 2004) (calling the soft drink price competition between 7-Eleven and its competitors the “Gulp War”), Olsen Decl. ¶ 47, Ex. 43 at 567; “John Thompson Turned 7-Eleven Into Global Giant,” *Chicago Tribune* (Jan. 30, 2003) (the Big Gulp “became part of American consumer culture”), Olsen Decl. ¶ 47, Ex. 43 at 610.]

(ix) “Times have changed, at least at 7-Eleven. Sure, the Big Gulp remains, like the Rock of Gibraltar.” Goodrich, “The Best of Times,” *Fort Worth Star-Telegram* (June 21, 1998) Olsen Decl. ¶ 47, Ex. 43 at 276.

(x) [“7-Eleven should draw up the sponsorship papers now. This kid is the next *big gulp* of boxing.” Houlihan, “The Dream Team: The Next Green Hope and Pickle Joyce,” *Chicago Sun-Times* (Feb. 6, 2005) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 549.]

(xi) [“Everything is bigger in America, starting with the Big Gulp at 7-Eleven and going down from there.” Weinraub, “The Grace of a Smaller Bird: Why a 12 to 14 Pound Turkey is Worth Trying to Find,” *The Washington Post* (Nov. 17, 2004), Olsen Decl. ¶ 47, Ex. 43 at 554; Kiger, “Living Ever Larger: How Wretched Excess Became a Way of Life in Southern California,” *Los Angeles Times* (June 9, 2002) (“Call it the Big Gulp Culture, because it manifests itself not just in opulence but also in sheer outlandish size.”), Olsen Decl. ¶ 47, Ex. 43 at 641.]

7-Eleven’s GULP Marks branded products frequently have been the subject of national radio and television news reporting. See Olsen Decl. ¶ 47, Ex. 43 at 366, 416, 499. Indeed, 7-Eleven’s X-TREME GULP branded product was deemed sufficiently newsworthy that it was a featured story on National Public Radio’s well-known nationally broadcast All Things Considered program. *Id.* ¶ 39, Ex. 35.

Further evidence that the GULP Marks long ago become fixtures of popular culture also strongly evidences the fame of such marks. As early as 1981, GULP Mark products were featured in popular films including, *inter alia*, *Cannonball Run* (1981, with Burt Reynolds and Dom DeLuise), Friendly, “Selling It at the Movies,” *Newsweek* (July 4, 1983), Olsen Decl. ¶ 47, Ex. 43 at 461. 7-Eleven’s GULP Marks have continued through the years to be featured in widely seen films. Below is a list of representative examples:

<u>Film</u>	<u>Year of Release</u>	<u>Star</u>	<u>Product(s) Depicted</u>
<i>Cannonball Run</i> ⁸	1983	Burt Reynolds	BIG GULP
<i>Say Anything</i> ⁹	1989	John Cusack	GULP, SUPER BIG GULP

⁸ Olsen Decl. ¶ 46, Ex. 42 at 94-101 (movie receipts, etc.).

<i>Pretty Woman</i> ¹⁰	1990	Julia Roberts	BIG GULP
<i>Reality Bites</i> ¹¹	1994	Winona Ryder	BIG GULP
<i>Dumb & Dumber</i> ¹²	1994	Jim Carey	GULP
<i>American Pie 2</i> ¹³	2001	Jason Biggs	GULP
<i>Baby Mama</i> ¹⁴	2008	Tina Fey	SUPER BIG GULP

As early as 1986, GULP Mark products featured in plays, *see* Olsen Decl. ¶ 47, Ex. 43 at 441, 433, and have even been the subject of works of fine art. *See Id.* ¶ 47, Ex. 43 at 352.

The iconic nature of BIG GULP is perhaps even evident in references which treat BIG GULP branded products as purportedly representative of various aspects of American culture, *see e.g.*, Piantados, “Looking to Find Yourself? Then You U.’s for You, for Sure,” *Washington Post* (Sept. 9, 1983) (satirizing purchasing a BIG GULP at a 7-ELEVEN store as early as 1983) Olsen Decl. ¶ 47, Ex. 43 at 458, or other aspects of American society. In 1996, University of Michigan psychologist Brian L. Stogner wrote “The Big Gulp is a symbol of American haste and greed.” McCarthy, “Americans Biting Off More Than They Should,” *Scripts Howard News Service* (Nov. 20, 1998) *Id.* ¶ 47, Ex. 43 at 220; *see also* “Sacrifice Now, Benefit Later,” *USA Today* (Dec. 11, 1996) *Id.* ¶ 47, Ex. 43 at 388, *see also* 208, 214. Set forth below are other representative examples of such usages:

(i) “Ugh! You go to school to become educated, not to ‘consume’ education. *Education is not a Big Gulp from 7-Eleven.*” Dawson, “Television Ads Treat College Like Product,” *Orlando Sentinel* (August 12, 1998) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 253.

⁹ *Id.* ¶ 40, Ex. 36 (screenshots) & ¶ 46, Ex. 42 at 13-16 (movie receipts, etc.).

¹⁰ *Id.* ¶ 41, Ex. 37 (screenshots) & ¶ 46, Ex. 42 at 1-3 (movie receipts, etc.).

¹¹ *Id.* ¶ 42, Ex. 38 (screenshots) & ¶ 46, Ex. 42 at 4-12 (movie receipts, etc.).

¹² *Id.* ¶ 43, Ex. 39 (screenshots) & ¶ 46, Ex. 42 at 17-71 (movie receipts, etc.).

¹³ *Id.* ¶ 44, Ex. 40 (screenshots) & ¶ 46, Ex. 42 at 72-93 (movie receipts, etc.).

(ii) “. . . Scot says Kazunori is amazed with how big everything in America is – especially after a trip to a nearby 7-Eleven. ‘He really seemed to like the Super Big Gulp’ . . .” Collins, “Olathe Rotary Club welcomes Japanese teens,” *Kansas City Star* (July 26 1997) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 515.

(iii) “‘Americans are greedy; their eyes are bigger than their stomachs. Look at 7-Eleven’s Big Gulp,’ . . .” Clark, “One Tough Customer,” *Washington Post* (Apr. 27 1997) (emphasis added), Olsen Decl. ¶ 47, Ex. 43 at 487.

(iv) Comparing older and more recent product sizes: “Drink sizes: Can of cola: 12 oz. 7-Eleven Double Gulp: 64 oz.” Schulte, “Supersize it!: Americans becoming obsessed with making everything bigger,” *Houston Chronicle* (Oct. 18, 1997), Olsen Decl. ¶ 47, Ex. 43 at 314; *see also id.* Ex. 43 at 284, 285, 296.

Based upon the record, it is beyond reasonable dispute that 7-Eleven’s GULP Marks are extremely famous and, indeed, iconic. Accordingly:

The . . . fame of the prior mark plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection. . . . Thus, a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark. . . . [T]he Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark’s fame increases, the Act’s tolerance for similarities in competing marks falls. . . . The driving designs and origins of the Lanham Act demand the standard consistently applied by this court – namely, more protection against confusion for famous marks.

Kenner Parker Toys, Inc. v. Rose Art Indus., Inc., 963 F.2d 350, 353, 22 U.S.P.Q.2d 1453, 1457 (Fed. Cir.), *cert. denied*, 506 U.S. 862 (1992). When present, the fame of the mark is “a dominant factor in the likelihood of confusion analysis for a famous mark, independent of the consideration of the relatedness of

¹⁴ *Id.* ¶ 45, Ex. 41 (screenshots) & ¶ 46, Ex. 42 at 102-110 (movie receipts, etc.).

the goods.” See *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1328, 54 U.S.P.Q.2d 1894, 1898 (Fed. Cir. 2000).

b. Similarity of the Marks

In the present case, it is admitted that 7-Eleven owns a family of GULP trademarks. *Supra* at 4. “In comparing opposer’s family of marks with applicant’s mark, the question is not whether applicant’s mark is similar to opposer’s individual marks, but whether applicant’s mark would be likely to be viewed as a member of Opposer’s ‘Gulp’ family of marks.” *7-Eleven, Inc.*, 83 U.S.P.Q.2d at 1720. “Opposer’s ‘Gulp’ family of marks consists of the word ‘Gulp’ and the word ‘Gulp’ preceded by a modifying adjective (e.g., Big, Super Big, Double, X-Treme, etc.)” *Id.*; see also *supra* at 7. Applicant’s mark – HEALTHY GULP – consists of the word “Gulp” preceded by the modifying adjective “Healthy.” In sum, Applicant’s HEALTHY GULP mark precisely fits the pattern of 7-Eleven GULP Marks and will be perceived by consumers as a member of 7-Eleven’s family of marks.

Additionally, Applicant’s HEALTHY GULP mark is similar to one or more of 7-Eleven’s individual GULP Marks. In determining the similarity of marks, the respective marks are to be compared in their entireties in terms of sight, sound and connotation. See, e.g., *In re DuPont DeNemours & Co.*, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Similarity as to one element (*i.e.*, sight, sound or connotation) may be sufficient for the respective marks to be held similar. See *In re White Swan, Ltd.*, 6 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988). The respective marks need not be identical to support a finding of likelihood of confusion. In determining the similarity of marks comprised of multiple elements, greater weight should be given to the dominant element. See *SMS, Inc. v. Byn-Mar, Inc.*, 228 U.S.P.Q. 219, 220 (T.T.A.B. 1985). Further, in determining the similarity of the respective marks, the test is not whether the marks can be distinguished when subject to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of overall commercial impression that confusion as to the source of the goods

is likely to result. *Spoons Restaurants Inc. v. Morrison Inc.*, 23 U.S.P.Q.2d 1735, 1741 (T.T.A.B. 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The focus of the inquiry is on the (perhaps imperfect) recollection of the average purchaser, who normally retains a general rather than a specific impression of the marks. *See, e.g., In re Schnuck Markets, Inc.*, 202 U.S.P.Q. 154, 156 (T.T.A.B. 1979).

The clearly dominant term in each of 7-Eleven's GULP Marks, including the GULP trademark, is the term "gulp." Here, Applicant's HEALTHY GULP mark incorporates the identical dominant element. The addition of the descriptive or laudatory-suggestive term "healthy" does not distinguish the respective marks. "It is a general rule that likelihood of confusion is not avoided between otherwise confusingly similar . . . marks merely by adding or deleting . . . matter that is descriptive or suggestive of the named goods . . ." T.M.E.P. § 1207.01(b)(iii). Accordingly, there can be no genuine issue respecting the fact that applicant's HEALTHY GULP mark is at least highly similar, if not essentially identical, to 7-Eleven's individual GULP Marks.

c. The Relatedness of the Respective Goods

In determining the relationship of the parties' respective goods, it is well established that:

In order to find that there is a likelihood of confusion, it is not necessary that the goods . . . with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources.

McDonald's Corp. v. McKinley, 13 U.S.P.Q.2d 1895, 1898 (T.T.A.B. 1989); *see also In re Opus One Inc.*, 60 U.S.P.Q.2d 1812, 1814-15 (T.T.A.B. 2001); T.M.E.P. § 1207.01(a)(i). The greater the similarity of the respective marks, the less related need be the respective goods to support a finding of likelihood of confusion. *See Opus One*, 60 U.S.P.Q.2d at 1815. Moreover, where, as here, the senior user's mark is

“famous,” protection should be accorded “independent of the consideration of the relatedness of the goods.” See *Recot, Inc.*, 214 F.3d at 1329, 54 U.S.P.Q.2d at 1898.

The relatedness of consumable products and consumable pet products long has been recognized. See, e.g., *Recot, Inc.*, 214 F.3d at 1329, 54 U.S.P.Q.2d at 1898 (FIDO-LAY dog treats v. FRITO LAY human snack foods); *American Sugar Refining Co. v. Andreassen*, 296 F.2d 783, 784, 132 U.S.P.Q. 10, 11 (C.C.P.A. 1961) (DOMINO for pet food v. DOMINO for sugar); *Grey v. Campbell Soup Co.*, 650 F. Supp 1166, 1175, 231 U.S.P.Q. 562 (C.D. Cal. 1986) (DOGIVA and CATIVA for dog biscuits v. GODIVA for gourmet chocolates); *V.I.P. Foods, Inc. v. Vulcan Pet, Inc.*, 210 U.S.P.Q. 662, 665 (N.D. Okla. 1980) (V.I.P. for animal foods v. VIP for frozen and non-frozen human foods), *rev'd on other grounds*, 675 F.2d 1106 (10th Cir. 1982) (*rev'd as to attorneys' fee award*). The relatedness of such products is particularly strong when the animals in question are household pets rather than farm livestock. See *V.I.P. Foods*, 210 U.S.P.Q. at 665. Accordingly, here, the products are at least related, with 7-Eleven selling, *inter alia*, beverages and Applicant also selling beverages, albeit intended for pets.

The soundness of this prior authority is fully corroborated by the record, including:

(i) 7-Eleven has introduced substantial evidence that companies have registered the same mark for both consumable products and consumable pet products including:

MARK	REG. NO	PERTINENT GOODS
HIMALANIA	3,397,061	Beverages for animals, bird seed, dog biscuits, dog treats in International Class 31; drinks based on yoghurt, milk based beverages containing fruit juice; milk beverages containing fruits, and milk drinks containing fruits in International Class 29; and aerated fruit juices, colas, de-alcoholized wines, energy drinks, flavoured waters, frozen fruit-based beverages,

MARK	REG. NO	PERTINENT GOODS
		fruit beverages, fruit drinks, fruit flavored soft drinks, fruit juice bases, fruit juices, fruit juices, namely, fruit punch, fruit-flavored drinks, fruit-flavoured beverages, lemonade, non-alcoholic beverages containing fruit juices, non-alcoholic beverages, namely, carbonated beverages, non-alcoholic fruit juice beverages, non-carbonated, non-alcoholic frozen flavored beverages, pop, smoothies, soft drinks, and sports drinks in International Class 32.
TERRAMAZON	3,397,062	Beverages for animals, bird seed, dog biscuits, dog treats in International Class 31; drinks based on yoghurt, milk based beverages containing fruit juice; milk beverages containing fruits, and milk drinks containing fruits in International Class 29; and aerated fruit juices, colas, de-alcoholized wines, energy drinks, flavoured waters, frozen fruit-based beverages, fruit beverages, fruit drinks, fruit flavored soft drinks, fruit juice bases, fruit juices, fruit juices, namely, fruit punch, fruit-flavored drinks, fruit-flavoured beverages, lemonade, non-alcoholic beverages containing fruit juices, non-alcoholic beverages, namely, carbonated beverages, non-alcoholic fruit juice beverages, non-carbonated, non-alcoholic frozen flavored beverages, pop, smoothies, soft drinks, and sports drinks in International Class 32.

MARK	REG. NO	PERTINENT GOODS
LA CENSE BEEF	3,306,160	Dog food in International Class 31; and beef and related products, namely, beef steaks, roasts, burgers, hot dogs, brisket, ribs, beef for kabobs, liver, London broil, prime rib, chateaubriand in International Class 29.
KINGKRILL	2,840,517	Animal feed and fish food, and animal and fish feed additives for nonnutritional purposes, namely krill, krill meal and krill oil in International Class 31; seafood products for human consumption, namely krill, krill meat, krill protein concentrate, edible oils, namely krill oil in International Class 29; and nutritional supplements, namely krill, krill meat, krill protein concentrate and krill oil; fish food and animal feed nutritional supplements, namely krill, krill meal and krill oil in International Class 5.
YUKIGUNI MAITAKE	2,759,308	Animal foodstuffs and pet foods containing processed mushrooms in International Class 31; and processed mushroom products, namely, cooked, preserved or salted mushrooms; dried mushrooms and powdery dried mushrooms; prepared foods containing mushrooms, namely, stew; soups containing mushrooms; hamburgers steak and sausages containing mushrooms, and foods boiled in soy sauce, namely, seasoned mushrooms to be used as materials for seasoned rice; and ready made dishes containing mushrooms, namely, tempura, croquette

MARK	REG. NO	PERTINENT GOODS
		and fried mushroom chips in International Class 29.
THE CULINARY INSTITUTE	3,345,086	Food stuffs for animals in International Class 31; meat, fish, poultry, game, fruit preserves, cooked fruits and vegetables, jellies, jams, fruit, eggs, milk products excluding ice cream, ice milk and frozen yogurt in International Class 29; coffee, tea, cocoa, sugar, rice, tapioca, bread, and pastries in International Class 30; and beers, mineral and aerated waters, soft drinks, fruit juices, syrups and other preparations for making beverages in International Class 32.
BEST OF HEALTH!	3,493,799	Alfalfa for animal consumption, animal feed, and straw for animal consumption in International Class 31; butter, cheese, cottage cheese, eggs, milk, preserved vegetables, yogurt based beverages, yogurt, and sour cream in International Class 29; and fruit juices and vegetable juices in International Class 32.
PS: PRIVATE SELECTION & Design	1,966,330	Animal litter and pet food in International Class 31; precooked or ready to eat foods, namely canned vegetables, frozen vegetables, chicken, ham, sliced meats, luncheon meats, soups, instant soups, shelled salted roasted nuts, raisins and prunes, snack mix consisting primarily of processed fruits, processed nuts, and/or raisins; canned, dried and preserved fruits in International Class 29; pancake mix, flour, candy, processed cereals, iced tea,

MARK	REG. NO	PERTINENT GOODS
		cookies, honey, salsa, salad dressing and rice in International Class 30; and beverages, namely soft drinks, carbonated and non-carbonated flavored seltzer water, orange juice, sports drinks and beer in International Class 32.

See Olsen Decl. ¶¶ 48-55 & Exs. 44-51. These third party registrations evidence that consumers understand that consumable products, including beverages, and consumable pet products, including pet beverages, are types of goods emanating from a single source. *Ventura Out Properties LLC v. Wynn Resorts Holdings, LLC*, 81 U.S.P.Q.2d 1887, 1892-93 (T.T.A.B. 2007)

(ii) Many retailers commonly sell human food and beverage products in proximity to edible pet products, including pet water. See Olsen Decl. ¶¶ 29, 30, 32 & Exs. 25, 26, 28.

(iii) 7-Eleven itself sells significant quantities of pet products, including consumable pet products, in its 7-ELEVEN convenience stores, and has sold over \$10,000,000 of such goods annually since at least as early as 2000. Brody Decl. ¶ 18.

(iv) Applicant offers her HEALTHY GULP beverage in twenty ounce (20 oz.) bottles that look very similar to bottles commonly used for human beverages. Olsen Decl. ¶¶ 37, 38 & Exs. 33, 34. In fact, applicant's bottler used the same type of bottle for Applicant's HEALTHY GULP product as is used for human beverages sold by another party under the SQWINCHER mark. See Olsen Decl. ¶ 16, Ex. 15 (correspondence with bottler produced by Applicant during discovery); *id.* ¶ 20, Ex. 19 (third party's SQWINCHER ads).

The parties' respective products also are more likely to be perceived as related because 7-Eleven has established it uses its GULP Marks on a wide array of goods ranging from fountain

beverages to clothing, sporting goods, beverage containers, and other food products such as confections and salads – *and bottled water offered under the mark WATER GULP*. Brody Decl. ¶¶ 5-12 & Exs. 1-7.

In sum, consumers could reasonably believe that Applicant's HEALTHY GULP pet beverages and 7-Eleven's GULP Marks products, in particular beverages, originate from the same source or have some connection. This factor also weighs heavily in favor of a finding of likelihood of confusion.

d. Consumer Care

The parties' respective products are inexpensive. *Compare supra* at 5, *with supra* at 6. It is well established that consumers generally exercise less care in purchasing such inexpensive goods, thereby increasing likelihood of confusion. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 U.S.P.Q. 1289, 1290 (Fed. Cir. 1984).

e. Marketing Channels and Methods

Applicant's application is without limitation as to trade channels and, consequently, her goods are presumed to pass through all normal trade channels for such goods. *See* T.M.E.P. § 1207.01(a)(iii). 7-Eleven has established that pet consumables, such as Applicant's product, are sold through, *inter alia*, convenience stores such as 7-Eleven. *See supra* at 5, 23. Consequently, overlapping trade channels must be presumed here.

Additionally, 7-Eleven has established that the parties employ overlapping marketing methods. Both 7-Eleven, *see supra* at 3, and Applicant, *see supra* at 5-6, advertise and promote their respective products via the Internet.

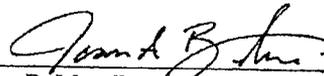
IV. CONCLUSION

In light of the foregoing facts, 7-Eleven contends that there are no genuine issues respecting: (i) its ownership of its GULP Marks, including a family of GULP trademarks; (ii) the priority of 7-Eleven's GULP Marks *vis-à-vis* Applicant's HEALTHY GULP mark; and (iii) that Applicant's HEALTHY GULP mark is likely to be understood by consumers as a member of 7-Eleven's GULP family of trademarks, or is otherwise likely to be confused with one or more of 7-Eleven's GULP Marks. Accordingly 7-Eleven respectfully requests that summary judgment be entered against Applicant, and that the subject application be denied.

Dated: June 23, 2009

Respectfully submitted,

FOLEY & LARDNER LLP



Charles R. Mandly, Jr.

David A. Copland

Jason A. Berta

321 North Clark Street, Suite 2800

Chicago, Illinois 60654

Telephone No. (312) 832-4500

Facsimile No. (312) 832-4700

Attorneys for Opposer

7-Eleven, Inc.

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

7-ELEVEN, INC.,)	
)	
Opposer,)	
)	
v.	)	Opposition No. 91177807
)	
SUSAN B. BUCENELL,	)	Serial No. 78/916,143
)	
Applicant.)	

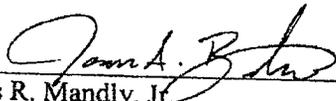
**OPPOSER'S NOTICE OF FILING OF
CONFIDENTIAL DECLARATION OF EVAN BRODY**

PLEASE TAKE NOTICE that opposer, 7-Eleven, Inc., filed by post in support of its Motion for Summary Judgment, the Confidential Declaration of Evan Brody, and accompanying exhibit, with the Trademark Trial and Appeal Board under seal on today's date, June 23, 2009.

Dated: June 23, 2009

Respectfully submitted,

FOLEY & LARDNER LLP



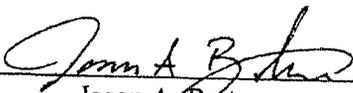
Charles R. Mandly, Jr.
David A. Copland
Jason A. Berta
321 North Clark Street, Suite 2800
Chicago, Illinois 60654
Telephone No. (312) 832-4500
Facsimile No. (312) 832-4700

Attorneys for Opposer
7-Eleven, Inc.

CERTIFICATE OF SERVICE

I, Jason A. Berta, counsel for Opposer, hereby certify that a copy of Notice of Filing of Confidential Declaration of Evan Brody, was served on this 23rd day of June, 2009 via first class mail, postage prepaid, upon Applicant at:

Susan B. Bucenell
30623 Bittsbury Ct.
Wesley Chapel, FL 33543-3921



Jason A. Berta

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

7-ELEVEN, INC.,)	
)	
Opposer,)	
)	
v.	)	Opposition No. 91177807
)	
SUSAN B. BUCENELL,	)	Serial No. 78/916,143
)	
Applicant.)	

OPPOSER'S SUMMARY JUDGMENT MOTION

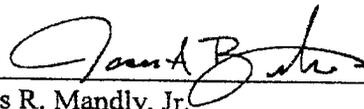
In accordance with Rule 2.127(A) of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Civil Procedure, opposer, 7-Eleven, Inc. ("7-Eleven"), moves for summary judgment on its Sections 2(d) opposition claim against application Serial Number 78/916,143 filed by applicant, Susan B. Bucenell ("Applicant"). As good cause for the requested relief, 7-Eleven believes that there are no genuine issues of material fact which preclude judgment as a matter of law on 7-Eleven's Section 2(d) opposition claim.

A Memorandum of Law and Fact, Declaration of Jean M. Olsen, Declaration of Evan Brody, and Confidential Declaration of Evan Brody (filed under seal) are filed concurrently herewith in support of this motion.

For the reasons set forth in the accompanying Memorandum, 7-Eleven respectfully requests that judgment be entered as a matter of law against Applicant, and that the subject application be denied.

FOLEY & LARDNER LLP

Date: June 23, 2009



Charles R. Mandly, Jr.
David A. Copland
Jason A. Berta
321 North Clark Street, 28th Floor
Chicago, Illinois 60654

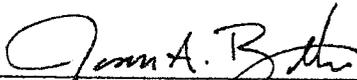
Telephone: 312-832-4500
Facsimile: 312-832-4700

Attorneys for Opposer,
7-Eleven, Inc.

CERTIFICATE OF SERVICE

I, Jason A. Berta, counsel for Opposer, hereby certify that a copy of OPPOSER'S SUMMARY JUDGMENT MOTION and supporting Memorandum of Law and Facts, together with Declaration of Jean M. Olsen and exhibits, Declaration of Evan Brody and exhibits, Confidential Declaration of Evan Brody with exhibit, and the Notice of Filing of Confidential Declaration of Evan Brody, was served on this 23rd day of June, 2009 via first class mail, postage prepaid, upon Applicant at:

Susan B. Bucenell
30623 Bittsbury Ct.
Wesley Chapel, FL 33543-3921



Jason A. Berta

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

7-ELEVEN, INC.,)	
)	
Opposer,)	
	)	Opposition No. 91177807
v.)	
	)	Serial No. 78/916,143
SUSAN B. BUCENELL,)	
)	
Applicant.)	
<hr style="width: 40%; margin-left: 0;"/>		

DECLARATION OF SUSAN B. BUCENELL

I, Susan B. Bucenell, declare as follows:

1. I am the Applicant in the above entitled proceeding, and make this declaration based upon facts of which I have personal knowledge; I am competent to testify as to all matters stated herein.

2. I am the inventor of vitamin, mineral and supplement enriched flavored and plain purified bottled water for cats and dogs and currently have a Patent Pending before the U.S. Patent Office, Application No. 60/879,339, filed on 01/09/2007. Attached hereto as Exhibit A is a copy of the US Patent Filing Receipt.

3. On June 24, 2006, I filed a Trademark Application for the HEALTHY GULP mark, under Section 1(b) based upon my *bona fide* intent to use said mark in commerce. Attached hereto as Exhibit B is a copy of my US Trademark Application.

4. Based upon a search by the Examining Attorney at the U.S. Patent and Trademark Office, a first office action indicated that no similar marks were found on the Principal Register that would bar registration of the HEALTHY GULP mark. Attached hereto as Exhibit C is a

cat for tuna flavored water, and a whimsical picture of a cat and dog for unflavored water. Attached hereto as Exhibit G are copies of the labels and various HEALTHY GULP print collateral used in connection with my pet bottled water.

11. The label on my pet water to which the HEALTHY GULP mark is applied includes my slogan, "Because We Deserve Bottled Water Too." See Exhibit G.

12. The pet water to which the HEALTHY GULP mark is applied is currently sold on my website in packages of eight 20 ounce bottles for \$10.49 plus shipping and handling of \$8.95 for a total cost of a package of eight bottles with shipping and handling of \$19.44. Single bottles cannot be purchased online. At one time, I offered the pet water for sale on Ebay, however, I have not done so for nearly one year.

13. I have visited countless pet stores and stores that sell pet products and have not seen any 7-Eleven products offered for sale at these pet stores. Indeed, I have not seen any of 7-Eleven's GULP products for sale in any store other than 7-Eleven.

14. During my visits to countless pet stores and stores that sell pet products, I have never seen a fountain drink dispenser.

15. On 7-Eleven's web site, it maintains that "The Gulp drink is 7-Eleve (sic) stores' proprietary fountain beverage." Attached hereto as Exhibit H is a printout from 7-Eleven's web site.

16. I have recently visited several 7-Eleven stores personally and conducted a careful and thorough examination of the merchandise available for purchase at each of the stores visited.

17. During my recent visits to several 7-Eleven stores, I observed that a beverage sold under the mark BIG GULP is a 32 ounce fountain soda of other manufacturers, such as Coke or Pepsi, which a customer manually places into a 7-Eleven cup or vessel while inside a 7-Eleven

copy of the first office action.

5. The HEALTHY GULP mark was published in the Official Gazette on February 13, 2007. Attached hereto as Exhibit D is a copy of the Notice of Publication.

6. The HEALTHY GULP mark was first used in commerce as early as August 2007 on my vitamin, mineral and supplements enriched water for cats and dogs and since that date I have not received a single report of actual confusion as to the origin of the product.

7. The HEALTHY GULP mark was formulated by me with the intention of describing a beverage specifically for pets. The "HEALTHY" word in the mark was meant to portray a commercial impression of a beverage containing vitamins, minerals and supplements which offers health benefits. The "GULP" word in the mark was meant to provide a description of how pets, and in particular, dogs and cats, drink water. I put the two words together to create the HEALTHY GULP mark. Attached hereto as Exhibits E and F are excerpts from the American Heritage Dictionary, Second College Edition, 1982 for the words "healthy" and "gulp"; meaning "Conducive to good health" and "to swallow greedily or rapidly in large amounts", respectively.

8. At no time prior to or during the development of the HEALTHY GULP mark did I consider the Opposer's GULP marks relevant to the HEALTHY GULP mark, nor did I make any mental connection between the Opposer's GULP marks and my own.

9. The addition of the word "HEALTHY" in front of the word "GULP" suggests a dramatically different product than any "BIG GULP" products sold by 7-Eleven, namely large soda beverage vessels.

10. The label on my pet water to which the HEALTHY GULP mark is applied includes a whimsical picture of a dog for peanut butter flavored water, a whimsical picture of a

store.

18. During my recent visits to several 7-Eleven stores, I observed that a beverage sold under the mark BIG GULP costs \$1.19.

19. During my recent visits to several 7-Eleven stores, I did not observe any bottled water manufactured for pets for sale.

20. During my recent visits to several 7-Eleven stores, I did not observe any bottled water for humans under any "gulp" marks for sale.

21. During my recent visits to several 7-Eleven stores, I did not observe any bottled beverages, including soda, under any "gulp" marks for sale.

22. During my recent visits to several 7-Eleven stores, I did not observe any pet products containing the 7-Eleven logo or any "gulp" marks for sale.

23. On December 12, 2001, 7-Eleven abandoned its application for a WATER GULP trademark. Attached hereto as Exhibit I is a copy of the abandonment document.

24. In late November 2008, 7-Eleven launched a different mark for a new line of private label products, included bottled water, called "7-Select." Attached hereto as Exhibit J is a copy of 7-Eleven's Trademark Application for 7-Select.

25. During my recent visits to several 7-Eleven stores, I made the following purchases and observations with regard to 7-Eleven's bottled water sold under the name "7-Select":

- On July 24, 2009, at 7-Eleven store # 26405, located at 3800 Brigantine Blvd., Brigantine, NJ, 08203, I purchased a 24 fl. oz. bottle of "7-Select" Spring Water. Attached hereto as Exhibit K is a receipt detailing the purchase.
- On August 20, 2009, at 7-Eleven store # 33019, located at 5102 Point of Tampa

Way, Tampa, FL, 33647, I purchased a 16.9 fl. oz. of "7-Select" Spring Water. Attached hereto as Exhibit L is a receipt detailing the purchase.

- On August 20, 2009, at 7-Eleven store # 32782, located at 27219 State Road 54, Wesley Chapel, FL, 33543, I purchased a .5 and a 1.5 liter of "7-Select" Spring Water, a package "7-Select" Gummi Worms, a package of "7-Select" Kettle Potato chips, and a "Fresh to Go" Chicken Caesar Salad Attached hereto as Exhibit M is a receipt detailing the purchase.
- "7-Select" bottled water is sold in the following sized for the following prices:
 - 16.9 ounces for .99 cents
 - 24 ounces for \$1.29 (sport cap bottle)
 - 33.8 ounces for \$1.19
 - 1.5 liter for \$1.69
- Attached hereto as Exhibit N are photos of 7-Eleven's 7-Select bottled water.

26. During my recent visits to several 7-Eleven stores, I did not observe fruit or garden salads under any "gulp" marks for sale.

27. 7-Eleven has either cancelled or abandoned its trademark applications for FRUIT GULP (Abandonment, May 15, 2005); GUMMI GULP (Cancellation, May 16, 2009); and SNACK GULP (Abandonment, January 22, 2002). Copies of the cancellation/abandonment documents for these trademarks are attached hereto as Exhibit O.

28. During my recent visits to several 7-Eleven stores, I observed pre-packaged fruit and salad for sale under 7-Eleven's logo and the brand name "Fresh to Go". However, I was unable to find a trademark application submitted by 7-Eleven for "Fresh to Go" There are eighteen live trademarks that use "Fresh to Go" registered with the USPTO. Attached hereto as

Exhibit P is a printout from the USPTO detailing these applications.

29. I have investigated and determined that there are numerous registered trademarks which include the word "gulp". These include: GULPY; SIP BY SIP RATHER THAN GULP BY GULP; GULP (under three different applications by three different companies); Maxi-Gulp; GULP!ALIVE; GULP!; GULP! Guaranteed Lowest Pricing! Attached hereto as Exhibit Q is a printout of records printed from the USPTO web site.

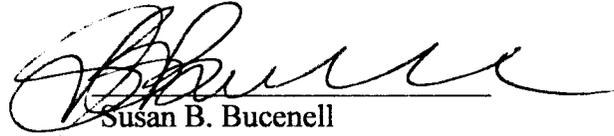
30. I have investigated and determined that there is considerable third party usage of unregistered marks that include the word "gulp". Attached hereto as Exhibit R are printouts from the web sites of various entities responsible for third party use, including but not limited to: Gulp Divers; Gulp-It Vending; Gulp!; Big Gulp Films; Big Gulp Games; Gulp!Fiction; Google Gulp; and Gulp: Explore Your Thirst.

31. 7-Eleven does not sell or otherwise make available to the general public its promotional materials including throwing discs, shirts, and caps; this promotional material is only available to 7-Eleven employees as an incentive. Attached hereto as Exhibit S is a copy of the transcript of the deposition testimony of John Reckevic, Director of Proprietary Beverages of 7-Eleven, Inc., dated March 29, 2002 in the case of *7-Eleven, Inc. v. Lawrence I. Wechsler*, (Opposition No. 91117739).

32. I have compared the bottles currently used for SQWINCHER flavored energy drink with the bottles used for my pet water and they are not the same shape (contrary to 7-Eleven's assertion in its brief).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27th, 2009.

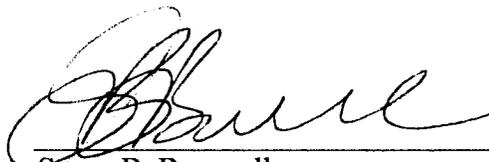


Susan B. Bucenell

CERTIFICATE OF SERVICE

I, Susan B. Bucenell, hereby certify that APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT with Exhibits 1 and 2; supporting Memorandum of Law; and Declaration of Susan B. Bucenell with Exhibits was served on the following counsel of record this 28th day of August, 2009, by mailing a true and accurate copy of same via regular U.S. Mail postage prepaid:

Charles R. Mandly, Jr.
David A. Copland
Jason A. Berta
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654

A handwritten signature in cursive script, appearing to read 'Susan B. Bucenell', is written over a horizontal line.

Susan B. Bucenell

Exhibit A