

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

<b>7-ELEVEN, INC.,</b>	)	
	)	
<b>Opposer,</b>	)	
	)	<b>Opposition No. 91177807</b>
<b>v.</b>	)	
	)	<b>Serial No. 78/916,143</b>
<b>SUSAN B. BUCENELL,</b>	)	
	)	
<b>Applicant.</b>	)	
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**APPLICANT’S MEMORANDUM IN RESPONSE  
TO OPPOSER’S MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Applicant, Susan B. Bucenell (“Bucenell” or “Applicant”), files this memorandum of law in opposition to the motion for summary judgment of Opposer, 7-Eleven, Inc. (“7-Eleven” or “Opposer”). 7-Eleven opposes Bucenell’s application to register the mark HEALTHY GULP for “pet beverages, namely vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs,” under Section 2(d) of the Trademark Act, alleging that consumers would likely confuse the HEALTHY GULP mark with 7-Eleven’s BIG GULP and other “GULP Marks.” In support of this opposition, Applicant has filed herewith a Declaration of Susan B. Bucenell, Applicant, with supporting exhibits (hereinafter “Bucenell Decl.”); 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”). 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.<sup>1</sup>

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.

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<sup>1</sup> 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 ).<sup>2</sup>

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<sup>2</sup> 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](http://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.<sup>3</sup> 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

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<sup>3</sup> 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 entirety 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

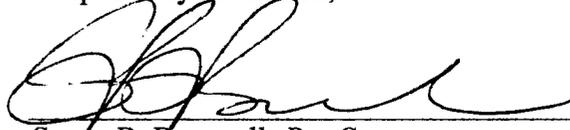
the mark challenged.” *Land O’Lakes, Inc. v. Land O’Frost, Inc.*, 224 USPQ 1022, 1026-1027 (TTAB 1984).

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 'SB Bucenell', written over a horizontal line.

Susan B. Bucenell, *Pro Se*

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Wesley Chapel, Florida 33543

Telephone: 813-333-4284

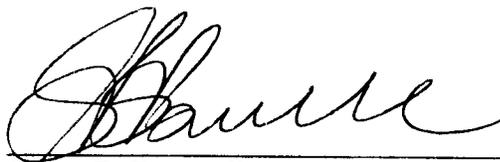
Facsimile: 813-333-4284

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



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Susan B. Bucenell

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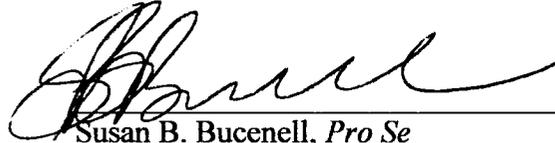
Applicant, Susan B. Bucenell ("Bucenell" or "Applicant"), files this opposition to the motion for summary judgment of Opposer, 7-Eleven, Inc. ("7-Eleven" or "Opposer") on its Sections 2(d) opposition claim against Serial Number 78/916,143 filed by Applicant for the reason that genuine issues of material 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. 9117739) 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 black ink, appearing to read 'Susan B. Bucenell', written over a horizontal line.

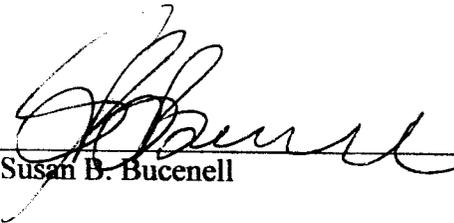
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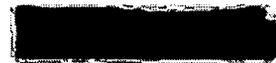
# Exhibit 1

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

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**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.").<sup>1</sup>
10. Notice of Reliance, Rebuttal Publications (May 17, 2006) (hereinafter "Opp. NOR Rebut. Pub.").

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<sup>1</sup> 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 (ll. 4-25), 8 (ll. 1-12), 12 (ll. 7-25), 13 (ll. 1-25), 14 (1-5), 15 (ll. 7-25), 16 (ll. 1-6), 19 (ll. 10-25), 20 (ll. 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 (ll. 15-18), 21 (ll. 12-25) & Ryckevic (Opp.) Exh. 2.

GULP Marks branded beverages originally were sold in disposable paper cups. *See, e.g.*, Ryckevic Dep. at 10 (ll. 14-19, 20-25), 11 (ll. 1-18), 12 (ll. 7-25), 13 (ll. 1-10), 15 (ll. 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 (ll. 11-17), 14 (ll. 9-24), 15 (ll. 7-25), 16 (ll. 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.<sup>2</sup> 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.

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<sup>2</sup> 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 <sup>3</sup>	1,644,785	5/14/91	Beverage containers, namely plastic bottles
MINI GULP <sup>4</sup>	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 <sup>5</sup>	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

<sup>3</sup> Cancelled (May 25, 2002).

<sup>4</sup> Cancelled (June 22, 2002).

<sup>5</sup> 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 woodsy 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,<sup>6</sup> *Pretty Woman* (1990, with Julia Roberts), Olsen Dep. at 22 (ll. 22-24), 23 (ll. 1-17) & Olsen (Opp.) Exhs. 27 & 28,<sup>7</sup> *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,<sup>8</sup> *Dumb & Dumber* (1994, with Jim Carey), Olsen Dep. at 24 (ll. 12-24), 25 (ll. 1-4) & Olsen (Opp.) Exhs. 31 & 32,<sup>9</sup> and *American Pie 2* (2001), Olsen Dep. at 23 (ll. 18-24), 24 (ll. 1-11) & Olsen (Opp.) Exhs. 29 & 30,<sup>10</sup> 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*

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

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

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

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

<sup>10</sup> 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.<sup>11</sup>

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:

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<sup>11</sup> 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, Ferier, 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.<sup>12</sup> 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:

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<sup>12</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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:

<b>MARK</b>	<b>REG. NO.</b>	<b>REG. DATE</b>	<b>GOODS</b>
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

<b>MARK</b>	<b>REG. NO.</b>	<b>REG. DATE</b>	<b>GOODS</b>
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 <sup>3</sup>	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 <sup>4</sup>	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.

<sup>3</sup> "Flavor shot" disclaimed.

<sup>4</sup> "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.<sup>5</sup>

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

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<sup>5</sup> 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 *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), 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,<sup>6</sup> coupled with enormous sales and

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<sup>6</sup> 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.<sup>7</sup> 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,

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<sup>7</sup> 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 Fresnoans 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.” Piercc, “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> <sup>8</sup>	1983	Burt Reynolds	BIG GULP
<i>Say Anything</i> <sup>9</sup>	1989	John Cusack	GULP, SUPER BIG GULP

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

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

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

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

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

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

<sup>13</sup> *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

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<sup>14</sup> *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:

<b>MARK</b>	<b>REG. NO</b>	<b>PERTINENT GOODS</b>
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.

<b>MARK</b>	<b>REG. NO</b>	<b>PERTINENT GOODS</b>
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

<b>MARK</b>	<b>REG. NO</b>	<b>PERTINENT GOODS</b>
		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.

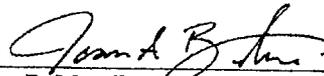
**IV. CONCLUSION**

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



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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.	)	

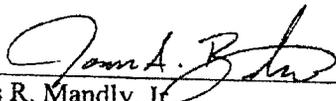
**OPPOSER'S NOTICE OF FILING OF  
CONFIDENTIAL DECLARATION OF EVAN BRODY**

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

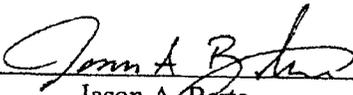
  
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Attorneys for Opposer  
7-Eleven, Inc.

**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**

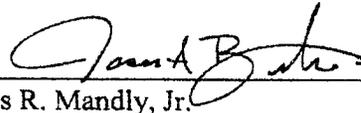
In accordance with Rule 2.127(A) of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Civil Procedure, opposer, 7-Eleven, Inc. ("7-Eleven"), moves for summary judgment on its Sections 2(d) opposition claim against application Serial Number 78/916,143 filed by applicant, Susan B. Bucenell ("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, 28<sup>th</sup> Floor  
Chicago, Illinois 60654

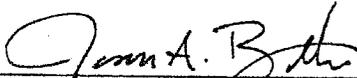
Telephone: 312-832-4500  
Facsimile: 312-832-4700

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,	)	
	)	<b>Opposition No. 91177807</b>
v.	)	
	)	<b>Serial No. 78/916,143</b>
SUSAN B. BUCENELL,	)	
	)	
Applicant.	)	

**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.

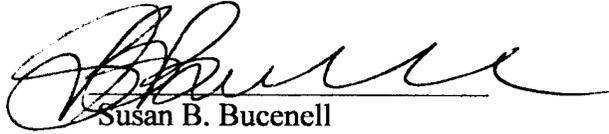
30. I have investigated and determined that there is considerable third party usage of unregistered marks that include the word "gulp". Attached hereto as Exhibit R are printouts from the web sites of various entities responsible for third party use, including but not limited to: Gulp Divers; Gulp-It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



---

Susan B. Bucenell

# Exhibit A



## UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
 United States Patent and Trademark Office  
 Address: COMMISSIONER FOR PATENTS  
 P.O. Box 1450  
 Alexandria, Virginia 22313-1450  
 www.uspto.gov

APPL NO.	FILING OR 371 (c) DATE	ART UNIT	FIL FEE REC'D	ATTY. DOCKET NO	DRAWINGS	TOT CLMS	IND CLMS
60/879,339	01/09/2007		100				

CONFIRMATION NO. 9607

FILING RECEIPT

\*OC00000022177422\*

Date Mailed: 01/26/2007

Receipt is acknowledged of this provisional Patent Application. It will not be examined for patentability and will become abandoned not later than twelve months after its filing date. Be sure to provide the U.S. APPLICATION NUMBER, FILING DATE, NAME OF APPLICANT, and TITLE OF INVENTION when inquiring about this application. Fees transmitted by check or draft are subject to collection. Please verify the accuracy of the data presented on this receipt. **If an error is noted on this Filing Receipt, please mail to the Commissioner for Patents P.O. Box 1450 Alexandria Va 22313-1450. Please provide a copy of this Filing Receipt with the changes noted thereon. If you received a "Notice to File Missing Parts" for this application, please submit any corrections to this Filing Receipt with your reply to the Notice. When the USPTO processes the reply to the Notice, the USPTO will generate another Filing Receipt incorporating the requested corrections (if appropriate).**

**Applicant(s)**

Susan B. Bucenell, Wesley Chapel, FL;

**Power of Attorney:** None**If Required, Foreign Filing License Granted:** 01/25/2007

The country code and number of your priority application, to be used for filing abroad under the Paris Convention, is **US60/879,339**

**Projected Publication Date:** None, application is not eligible for pre-grant publication**Non-Publication Request:** Not applicable**Early-Publication Request:** Not applicable**\*\* SMALL ENTITY \*\*****Title**

Healthy Gulp™- a vitamin and mineral flavor enhanced bottled water for dogs and cats with unique ingredients in formula to freshen pet's breath

## PROTECTING YOUR INVENTION OUTSIDE THE UNITED STATES

Since the rights granted by a U.S. patent extend only throughout the territory of the United States and have no effect in a foreign country, an inventor who wishes patent protection in another country must apply for a patent in a specific country or in regional patent offices. Applicants may wish to consider the filing of an international application under the Patent Cooperation Treaty (PCT). An international (PCT) application generally has the same effect as a regular national patent application in each PCT-member country. The PCT process **simplifies** the filing of patent applications on the same invention in member countries, but **does not result** in a grant of "an international patent" and does not eliminate the need of applicants to file additional documents and fees in countries where patent protection is desired.

Almost every country has its own patent law, and a person desiring a patent in a particular country must make an application for patent in that country in accordance with its particular laws. Since the laws of many countries differ in various respects from the patent law of the United States, applicants are advised to seek guidance from specific foreign countries to ensure that patent rights are not lost prematurely.

Applicants also are advised that in the case of inventions made in the United States, the Director of the USPTO must issue a license before applicants can apply for a patent in a foreign country. The filing of a U.S. patent application serves as a request for a foreign filing license. The application's filing receipt contains further information and guidance as to the status of applicant's license for foreign filing.

Applicants may wish to consult the USPTO booklet, "General Information Concerning Patents" (specifically, the section entitled "Treaties and Foreign Patents") for more information on timeframes and deadlines for filing foreign patent applications. The guide is available either by contacting the USPTO Contact Center at 800-786-9199, or it can be viewed on the USPTO website at <http://www.uspto.gov/web/offices/pac/doc/general/index.html>.

For information on preventing theft of your intellectual property (patents, trademarks and copyrights), you may wish to consult the U.S. Government website, <http://www.stopfakes.gov>. Part of a Department of Commerce initiative, this website includes self-help "toolkits" giving innovators guidance on how to protect intellectual property in specific countries such as China, Korea and Mexico. For questions regarding patent enforcement issues, applicants may call the U.S. Government hotline at 1-866-999-HALT (1-866-999-4158).

---

### LICENSE FOR FOREIGN FILING UNDER Title 35, United States Code, Section 184 Title 37, Code of Federal Regulations, 5.11 & 5.15

#### **GRANTED**

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This license is to be retained by the licensee and may be used at any time on or after the effective date thereof unless it is revoked. This license is automatically transferred to any related applications(s) filed under 37 CFR 1.53(d). This license is not retroactive.

The grant of a license does not in any way lessen the responsibility of a licensee for the security of the subject *matter as imposed by any Government contract* or the provisions of existing laws relating to espionage and the national security or the export of technical data. Licensees should apprise themselves of current regulations especially with respect to certain countries, of other agencies, particularly the Office of Defense Trade Controls, Department of State (with respect to Arms, Munitions and Implements of War (22 CFR 121-128)); the Bureau of

Industry and Security, Department of Commerce (15 CFR parts 730-774); the Office of Foreign Assets Control, Department of Treasury (31 CFR Parts 500+) and the Department of Energy.

**NOT GRANTED**

No license under 35 U.S.C. 184 has been granted at this time, if the phrase "IF REQUIRED, FOREIGN FILING LICENSE GRANTED" DOES NOT appear on this form. Applicant may still petition for a license under 37 CFR 5.12, if a license is desired before the expiration of 6 months from the filing date of the application. If 6 months has lapsed from the filing date of this application and the licensee has not received any indication of a secrecy order under 35 U.S.C. 181, the licensee may foreign file the application pursuant to 37 CFR 5.15(b).

## Exhibit B

Document Description: **Application**  
 Mail / Create Date: **24-Jun-2006**

[Next Page](#)

You are currently on page 1 of 2



## Trademark/Service Mark Application, Principal Register

**Serial Number: 78916143**

**Filing Date: 06/24/2006**

**The table below presents the data as entered.**

Input Field	Entered
<b>MARK SECTION</b>	
MARK	Healthy Gulp
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	Healthy Gulp
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
<b>OWNER SECTION</b>	
NAME	Bucenell, Susan B
STREET	30623 Bittsbury Court
CITY	Wesley Chapel
STATE	Florida
ZIP/POSTAL CODE	33543
COUNTRY	United States
PHONE	813-333-4284
EMAIL	sbucenell@tampabay.rr.com
AUTHORIZED EMAIL COMMUNICATION	Yes
<b>LEGAL ENTITY SECTION</b>	

TYPE	INDIVIDUAL
COUNTRY OF CITIZENSHIP	United States
<b>GOODS AND/OR SERVICES SECTION</b>	
INTERNATIONAL CLASS	031
DESCRIPTION	Pet Beverages, namely vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs.
FILING BASIS	Section 1(b)
<b>SIGNATURE SECTION</b>	
SIGNATURE	/sbb/
SIGNATORY NAME	Susan B. Bucenell
SIGNATORY DATE	06/24/2006
SIGNATORY POSITION	President
<b>PAYMENT SECTION</b>	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	325
TOTAL AMOUNT	325.00
PAYMENT METHOD	CC
<b>CORRESPONDENCE SECTION</b>	
NAME	Bucenell, Susan B
STREET	30623 Bittsbury Court
CITY	Wesley Chapel
STATE	Florida
ZIP/POSTAL CODE	33543
COUNTRY	United States
EMAIL	sbucenell@tampabay.rr.com
AUTHORIZED EMAIL COMMUNICATION	Yes
<b>FILING INFORMATION</b>	
SUBMIT DATE	Sat Jun 24 09:27:22 EDT 2006
	USPTO/BAS-70124129166-200

TEAS STAMP

60624092722136763-7891614  
3-2006a88f28520546d76c7e3  
63225cc3a5e6-CC-869-20060  
624092317543029

**Trademark/Service Mark Application, Principal Register****Serial Number: 78916143****Filing Date: 06/24/2006****To the Commissioner for Trademarks:****MARK:** (Standard Characters, see mark)

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The literal element of the mark consists of Healthy Gulp.

The applicant, Susan B Bucenell, a citizen of United States, residing at 30623 Bittsbury Court, Wesley Chapel, Florida, United States, 33543, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

International Class 031: Pet Beverages, namely vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs.

The USPTO is authorized to communicate with the applicant or its representative at the following email address: sbucenell@tampabay.rr.com.

A fee payment in the amount of \$325.00 will be submitted with the application, representing payment for 1 class(es).

**Declaration**

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /sbb/ Date: 06/24/2006  
Signatory's Name: Susan B. Bucenell  
Signatory's Position: President

Mailing Address:  
Bucenell, Susan B  
30623 Bittsbury Court  
Wesley Chapel, Florida 33543

RAM Sale Number: 869  
RAM Accounting Date: 06/26/2006

Serial Number: 78916143  
Internet Transmission Date: Sat Jun 24 09:27:22 EDT 2006  
TEAS Stamp: USPTO/BAS-70124129166-200606240927221367  
63-78916143-2006a88f28520546d76c7e363225  
cc3a5e6-CC-869-20060624092317543029

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- **Questions about USPTO programs:** Please e-mail [USPTO Contact Center \(UCC\)](mailto:USPTOContactCenter@uspto.gov).

**NOTE:** Within any e-mail, please include your telephone number so we can talk to you directly, if necessary. Also, include the relevant serial number or registration number, if existing.

Document Description: **Application**  
Mail / Create Date: **24-Jun-2006**

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# Healthy Gulp

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- **Technical help:** For instructions on how to use TDR, or help in resolving **technical** glitches, please e-mail [TDR@uspto.gov](mailto:TDR@uspto.gov). If outside of the normal business hours of the USPTO, please e-mail Electronic Business Support, or call 1-800-786-9199.
- **Questions about USPTO programs:** Please e-mail USPTO Contact Center (UCC).

**NOTE:** Within any e-mail, please include your telephone number so we can talk to you directly, if necessary. Also, include the relevant serial number or registration number, if existing.

## Exhibit C

**Main Identity**

**From:** "ECom104" <Ecom1043@USPTO.GOV>  
**To:** <sbucenell@tampabay.rr.com>  
**Sent:** Thursday, November 30, 2006 11:49 AM  
**Subject:** TRADEMARK APPLICATION NO. 78916143 - HEALTHY GULP - N/A

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 78/916143

**APPLICANT:** Bucenell, Susan B

**\*78916143\***

**CORRESPONDENT ADDRESS:**

BUCENELL, SUSAN B  
 30623 BITTSBURY CT  
 WESLEY CHAPEL, FL 33543-3925

**RETURN ADDRESS:**

Commissioner for Trademarks  
 P.O. Box 1451  
 Alexandria, VA 22313-1451

If no fees are enclosed, the address should include the words "Box Responses - No Fee."

**MARK:** HEALTHY GULP

**CORRESPONDENT'S REFERENCE/DOCKET NO:** N/A

**CORRESPONDENT EMAIL ADDRESS:**

sbucenell@tampabay.rr.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and email address.

Serial Number 78/916143

**EXAMINER'S AMENDMENT**

**OFFICE RECORDS SEARCH:** The Office records have been searched and no similar registered or pending mark has been found that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

**ADVISORY – AMENDMENTS TO GOODS/SERVICES:** If the identification of goods and/or services has been amended below, any future amendments must be in accordance with 37 C.F.R. §2.71(a) and TMEP §1402.07(e).

**AMENDMENT(S) AUTHORIZED:** The application is amended as noted below. *If applicant disagrees with or objects to any of the amendments below, please notify the undersigned trademark examining attorney immediately.* Otherwise, no response is necessary. TMEP §707.

The application is amended to classify the goods in International Class 5. 37 C.F.R. §2.85; TMEP §1401.03(b).

12/13/2006

/Barney L. Charlon/  
Trademark Examining Attorney  
Law Office 104  
(571) 272-9141  
(571) 273-9104 (fax)

## Exhibit D



Jan 24, 2007

## NOTICE OF PUBLICATION UNDER 12(a)

1. Serial No.:  
78/916,143
2. Mark:  
HEALTHY GULP  
Standard Character Mark
3. International Class(es):  
5
4. Publication Date:  
Feb 13, 2007
5. Applicant:  
Bucenell, Susan B

The mark of the application identified appears to be entitled to registration. The mark will, in accordance with Section 12(a) of the Trademark Act of 1946, as amended, be published in the Official Gazette on the date indicated above for the purpose of opposition by any person who believes he will be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13(a) of the Statute or by rules 2.101 or 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a notice of allowance pursuant to section 13(b) of the Statute.

Copies of the trademark portion of the Official Gazette containing the publication of the mark may be obtained from:

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By direction of the Commissioner.

## Exhibit E

rogen bomb.  
 at is neither the speaker  
 any person whose sex  
 is lost. —n. A male  
 Usage notes at be, etc.

the Hebrew alphabet. See

helium.  
 ermost or forwardmost  
 ntaining the brain or prin  
 nose, mouth, and jaws;  
 brate organism. 2. The  
 ence, intellect, or mind  
 ntal ability or aptitude  
 sedom of choice or of  
 A habitual drug user;  
 sertation of a person  
 sing. verb). The side of  
 and the date. 8. Informal;  
 al; person: *count heads*  
 of something; leader, chief  
 The foremost or leading  
 the parade. 12. A head  
 pth of a liquid at two  
 ressure at the lower point  
 rence. c. The pressure of  
 steam. 14. The frothing  
 ng an effervescent liquid  
 scss, boil, or pimple;  
 int; crisis: *bring matters  
 ight, or fixture at the  
 a pin. b. The working  
 of a hammer. c. The part  
 he explosive; warhead;  
 achine that holds or  
 ording head of a tape.  
 lense, compact cluster of  
 or clover. 21. The upper  
 e the appropriate name  
 end considered the most  
 at the head of the table.  
 two ends are interchan  
 orward part of a vessel  
 part or upper edge of a  
 coal mine. 26. a. The top  
 l. A headline or heading  
 y. 27. Headway: pro  
 uction that has the same  
 ruction as a whole, as  
 head covering; the head  
 heads. —tr. 1. To be in  
 the committee. 2. To be  
 Collins heads the list  
 or turn in a certain dir  
 he hill. 4. To remove; th  
 all) in the air with one's  
 d each column with a  
 a certain direction;  
 titude or cabbage. 3. To  
 —phrasal verb. head  
 tion of; intercept: *Try  
 —Idioms. go to (one's)  
 or drunk: Wine goes  
 Success went to his head.  
 prior to: head and  
 al capability. head over  
 lt; tripped and fell head  
 sly: head over heels  
 n calm; remain in con  
 To lose one's poise or  
 a) head. Insane; crazy;  
 ability to understand  
 etely over her head. 2.  
 ver his boss's head and  
 her. To consult and**

up is sometimes used  
 up the committee. The  
 large majority of the

ain in the head. 2. In  
 n, that causes annoyanc  
 adj.  
 band worn around the  
 top of a page or beginn  
 loth band attached to

) n. A board or pane  
 jellied loaf or sausage  
 s of the feet, head, and  
 of an animal, usually

counter (héd'koun'tər) n. A pollster.  
 (héd'drēs') n. 1. A covering or ornament for the  
 hairdo; coiffure.  
 (héd'id) adj. 1. Growing or grown into a head.  
 2. A head or heading. 3. Having a specified kind or  
 of heads: a two-headed eagle.  
 (héd'ər) n. 1. One that fits a head on an object.  
 that removes a head from an object, esp. a machine  
 the heads of grain and passes them into a wagon  
 ic. 3. A pipe that serves as a central connection  
 or more smaller pipes. 4. A floor or roof beam  
 between two long beams that supports the ends of  
 ees. 5. A brick laid across rather than parallel  
 all. 6. Informal. A headlong dive or fall.  
 (héd'furst') also head-fore-most (héd'fór'móst',  
 (héd'fór') adv. 1. With the head leading; headlong: *went  
 down the stairs*. 2. Impetuously; rashly.  
 (héd'g) n. 1. A control gate upstream of a lock or canal.  
 gate that controls the flow of water in a ditch,  
 race, or channel.  
 (héd'gr) n. 1. A covering, such as a hat or hel  
 of the head. 2. The part of a harness that fits about a  
 head. 3. The rigging for hauling or lifting located at  
 of a mine shaft.  
 (héd'hün'ting) n. 1. The custom of cutting  
 preserving the heads of enemies as trophies.  
 The process of attempting to remove influence and  
 from enemies, esp. political enemies. 3. Slang. The  
 to recruit personnel, esp. executive personnel, as for  
 tion. —head-hunter n.  
 (héd'ing) n. 1. The title, subtitle, or topic that  
 the top or beginning, as of a text. 2. The course or  
 in which a ship or aircraft is moving. 3. A gallery  
 of a mine.  
 (héd'lámp) n. A headlight.  
 (héd'lond, -lánd') n. 1. A point of land, usually  
 with a sheer drop, extending out into a body of  
 promontory. 2. The unplowed land at the end of a  
 furrow.  
 (héd'ls) adj. 1. a. Without a head. b. Decapi-  
 tating a leader or director. 3. Brainless; foolish.  
 ness n.  
 (héd'lít'r) n. A lamp mounted on the front of a  
 (héd'lin) n. 1. The title or caption of a newspaper  
 usually set in large type. 2. A line at the head of a  
 message giving information such as the title, author,  
 number. —tr. v. -lined, -lin-ing, -lines. 1. To supply  
 the passage) with a headline. 2. a. To present as a  
 The Palace Theater headlines a magician. b. To  
 the headline of: *He headlines the bill*.  
 (héd'lít'nr) n. A performer who receives promi-  
 ng; star.  
 (héd'lók') n. A wrestling hold in which the head  
 wrestler is locked under the arm of the other.  
 (héd'lóng, -lóng) adv. 1. With the head leading;  
 2. Impetuously; rashly. —adj. (héd'lóng, -lóng').  
 with the head leading; headfirst: *a headlong dive*.  
 ous; rash. 3. Archaic. Steep; sheer. [ME *hedling* <  
 ]  
 (héd'más'tər) n. A man  
 principal of a school, usually a private school.  
 (héd'míst'ris) n. A  
 who is principal of a school, usually a private girls'  
 (héd'móst', -móst) adj. Leading; foremost.  
 (héd'on, -ón') adj. 1. Facing forward; frontal.  
 the front end foremost: *a head-on collision*. —head-  
 (héd'fón) n. A receiver, as for a radio, held to  
 a headband.  
 (héd'pēs') n. 1. A protective covering for the  
 set of headphones; headset. 3. A headstall. 4. An  
 design, esp. at the top of a page.  
 (héd'kwo'rtər) tr. & intr. v. -tered, -ter-ing,  
 normal. To provide with or establish headquarters.  
 The verb *headquarter* is used informally in both  
 and intransitive senses: *The European correspon-*  
*headquarter in Paris. The magazine has headquar-*  
*in a building that houses many foreign journalists.*  
 examples are unacceptable in formal writing to a  
 nity of the Usage Panel.  
 (héd'kwór'təz) pl.n. (used with a sing. or pl.  
 the offices of a commander, as of a military unit,  
 official orders are issued. 2. A center of opera-  
 administration: *The company has its headquarters in*  
 The noun *headquarters* is used with either a  
 plural verb. The plural is more common: *The*  
*are in Boston*. But the singular is sometimes  
 when reference is to authority rather than to phys-  
*Battalion headquarters has approved the retreat.*  
 (héd'rís) n. A watercourse that feeds water into  
 a wheel, or turbine.  
 (héd'ríst') n. 1. A support for the head, as at the

back of a chair. 2. A cushion attached to the top of the back  
 of an automobile seat, esp. to prevent whiplash injury.  
**head restraint** n. A headrest (sense 2).  
**head-sail** (héd'səl, -sál') n. A sail, such as a jib, set forward  
 of a foremast.  
**heads-set** (héd'sét') n. A pair of headphones.  
**head-ship** (héd'ship') n. The position or office of a head or  
 leader.  
**head shop** n. Slang. A specialty shop that sells parapherna-  
 lia for drug users.  
**head shrinker** n. Slang. A psychiatrist, esp. a psychoana-  
 lyst.  
**heads-man** (hédz'mən) n. A public executioner who be-  
 heads condemned prisoners.  
**head-spring** (héd'spring') n. A fountainhead; source.  
**head-stall** (héd'stòl') n. The section of a bridle that fits over  
 a horse's head.  
**head start** n. 1. A start before other contestants in a race.  
 2. An early start that confers an advantage.  
**head-stock** (héd'stòk') n. A nonmoving part of a machine or  
 powered tool that supports a revolving part, such as the  
 spindle of a lathe.  
**head-stone** (héd'stòn') n. 1. A memorial stone set at the  
 head of a grave. 2. Also **head stone**. A keystone.  
**head-strong** (héd'stróng, -stróng') adj. 1. Inclined to insist  
 on having one's own way; willful and obstinate. 2. Result-  
 ing from willfulness and obstinacy.  
**heads up** interj. Used as a warning to watch out for a poten-  
 tial source of danger, as at a construction site.  
**head-trip** (héd'trip') n. Slang. 1. An experience that stimu-  
 lates the mind. 2. An exploration of one's own perceptions  
 or emotions.  
**head-wait-er** (héd'wá'tər) n. A waiter who is in charge of the  
 other waiters in a restaurant and is often responsible for  
 taking reservations and seating guests.  
**head-wa-ter** (héd'wò'tər, -wò'tər) n. Often **headwaters**. The  
 water from which a river rises.  
**head-way** (héd'wá') n. 1. Movement forward; advance.  
 2. Progress toward a goal. 3. The clear vertical space be-  
 neath a ceiling or archway; clearance. 4. The amount of  
 distance or time that separates two vehicles traveling the  
 same route.  
**head wind** n. A wind blowing directly opposite to the course  
 of a plane or ship.  
**head-work** (héd'wúrk') n. Mental activity or work. —head-  
 work'er n.  
**head-y** (héd'ē) adj. -er, -est. 1. Tending to make dizzy;  
 intoxicating: *a heady success; heady perfume*. 2. Headstrong;  
 obstinate. —head'y adv. —head'y-ness n.  
**heal** (hél) v. **healed, heal-ing, heals**. —tr. 1. To restore to  
 health or soundness; cure. 2. To set right; repair: *healed the*  
*rift between us*. 3. To restore (a person) to spiritual whole-  
 ness. —intr. To become whole and sound; return to health.  
 [ME *healen* < OE *hēlan*.] —**heal'a-ble** adj. —**heal'er** n.  
**heal-all** (hél'òl') n. The self-heal.  
**health** (hèlth) n. 1. The overall condition of an organism at a  
 given time: *was in poor health*. 2. Soundness, esp. of body or  
 mind; freedom from disease or abnormality. 3. A condition  
 of optimal well-being: *concerned about the ecological health*  
*of the area*. 4. A wish for someone's good health, often  
 expressed as a toast. [ME *helthe* < OE *hæilt*.]  
**health food** n. A food believed to be highly beneficial to  
 health.  
**health-ful** (hèlth'fəl) adj. 1. Conducive to good health; salu-  
 tary. 2. Healthy. —See Usage note at **healthy**. —**health'ful-**  
**ly** adv. —**health'ful-ness** n.  
**health insurance** n. Insurance against expenses incurred  
 through illness of the insured.  
**health spa** n. A business establishment with equipment and  
 facilities to help customers lose weight.  
**health-y** (hél'thē) adj. -er, -est. 1. Possessing good health.  
 2. Conducive to good health; healthful: *healthy air*. 3. In-  
 dicative of good health; sound: *a healthy attitude*. 4. Siz-  
 able; considerable: *a healthy portion*. —**health'y** adv.  
 —**health'y-ness** n.  
**Synonyms:** *healthy, sound, wholesome, hale, robust,*  
*well, hardy, vigorous, well-preserved*. These adjectives are  
 compared in the sense of being in good physical or mental  
 condition. *Healthy* stresses the absence of disease and often  
 implies energetic activity. *Sound* emphasizes freedom from  
 imperfection or impairment of function. *Wholesome* sug-  
 gests appealing healthiness and moral fitness. *Hale* stresses  
 absence of infirmity, especially in elderly persons. *Robust*  
 specifies physical strength and ruggedness. *Well* merely  
 specifies absence of sickness. *Hardy* is applicable to one  
 capable of withstanding physical hardship, and *vigorous* to  
 one whose energy and activity are indicative of a sound  
 mind and body. *Well-preserved* refers to lack of outward  
 evidence of bodily deterioration.  
**Usage:** One can expect to be *healthy* ("full of health")  
 if the regimen one follows is *healthful* ("conducive to  
 health"). However, the distinction is breaking down.  
*Healthful* is largely restricted to the meaning "conducive to  
 health," but *healthy* is commonly used in both senses: *a*  
*healthy person; a healthy climate*.  
**heap** (hèp) n. 1. A group of things piled haphazardly or in

which / I pt / I ple /  
 / ou out / òò took / òò

ssauce / sh ship, dish / t tight / th thin, path / th this, bathe / ù cut / ùr urge / v valve / w with / y yes / z zebra, size /  
 about, item, edible, gallop, circus / œ Fr. feu, Ger. schön / ù Fr. tu, Ger. über / KH Ger. ich, Scot. loch / N Fr. bon.

## Exhibit F



## Exhibit G



**Murray Label & Printing, Inc.**  
 700 Business Pkwy • Richardson, TX 75081  
 Phone (972) 234-2220 • Fax (972) 234-2239

THIS PROOF WAS PRODUCED VIA INK JET PROCESS ON HIGH QUALITY PAPER. IT IS A REPRESENTATION ONLY!  
 FLEXTO PRINTED FINISHED PRODUCT WILL VARY IN APPEARANCE; DUE TO DIFFERENCES IN INK TYPE,  
 SUBSTRATE TEXTURE AND AMBIENT LIGHTING.



Healthy Gulp™ has been specially formulated to give your pet the best possible nutrition and hydration. Its patent pending formula is the only pet water with Stabilized Chlorine Dioxide (SCD), and Fiber SCD kills the bacteria that causes tooth decay and bad breath. Fiber is now recognized for its many health benefits in pets.

As a pet parent, you should feel great about giving your pet Healthy Gulp™. Because they Deserve Bedded Water, too!

To learn more about Healthy Gulp™ and all its health benefits for your pet go to: [www.healthygulp.com](http://www.healthygulp.com)



- VITAMINS / MINERALS
- FRESHENS BREATH
- TAURINE / GLUCOSAMINE
- FIBER FOR HEALTH BENEFITS

Nutrition Facts	
Serving Size 8 FL OZ (240ml)	
Servings Per Container 25	
Amount Per Serving	% Daily Value*
Calories 10	
Total Fat 0 g	0%
Total Fiber 0 g	0%
Sodium 105 mg	4%
Cholesterol 0 mg	
Potassium 110 mg	1%
Total Carbs 2 g	1%
Dietary Fiber 1 g	
Sugars 0 g	0%
Protein 0 g	0%
Vitamin A 10%	Vitamin D 12%
Vitamin E 5%	Vitamin B1 25%
Vitamin B3 25%	Vitamin B5 1%
Vitamin B6 2%	Vitamin B12 2%
Biotin 4%	Calcium 5%
Magnesium 30%	Iodine 18mg
Glucosamine 150mg	Iron 30mg

**Directions for Use:** Pets 0-25 lbs. up to 2 bottles per day; 25-50 lbs. up to 3 bottles per day; 50+ lbs. up to 4 bottles per day.  
**Ingredients:** Filtered Water, Soluble Fiber, Glycerin, Sodium Acid Sulfate, Potassium Citrate, Monopotassium Phosphate, Sodium Benzoate (preservative), Calcium Gluconate, Vitamin E Ascorbyl, Glucosamine Hydrochloride, 2% Stabilized Chlorine Dioxide, Potassium Sorbate (preservative), Taurine, Allicinamide, Magnesium Gluconate, Vitamin A Palmitate, Thiamine Mononitrate, Cholecalciferol, Calcium Pantothenate, Inositol, Pyridoxine Hydrochloride, Biotin, Cyanocobalamin.

**SIGN AND RETURN TODAY! DELIVERY DATE WILL BE EXTENDED ONE (1) DAY FOR EVERY DAY THIS PROOF IS NOT RETURNED.**  
**COLORS USED:** (Please indicate correct PMS Colors on return proof.)

BLACK  CYAN  MAGENTA  YELLOW

SIZE **3.25" x 8.625"**

WIND DIRECTION (CIRCLE ONE)

#1 THIS WAY  #2 THIS WAY  #3 THIS WAY  #4 THIS WAY  #5 THIS WAY  #6 THIS WAY  #7 THIS WAY  #8 THIS WAY

OK to print as is

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CLIENT: U.S. BEVERAGE DATE: 11-10-06 SIGNED: *[Signature]*

JOB DESCRIPTION: HEALTHY GULP PET WATER 20 OZ. VERSION NO: 1 DATE: 11/10/2006



**Murray Label & Printing, Inc.**  
 700 Business Pkwy • Richardson, TX 75081  
 Phone (972) 234-2220 • Fax (972) 234-2239

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 SUBSTRATE TEXTURE AND AMBIENT LIGHTING.



**HEALTHY GULP**

Because we deserve bottled water, too!

As a pet parent, you should feel good about giving your pet Healthy Gulp™. Because they deserve bottled water, too!

To learn more about Healthy Gulp™ and all its health benefits for your pet go to: [www.healthygulp.com](http://www.healthygulp.com)

6 89076 173604 6

- FIBER FOR HEALTH BENEFITS
- TAURINE / GLUCOSAMINE
- FRESHENS BREATH
- VITAMINS / MINERALS

**Nutrition Facts**

Serving Size 8 fl. Oz. (240ml)  
 Servings Per Container 2.5

Amount Per Serving	% Daily Value*
Calories 10	
Total Fat 0g	0%
Trans Fat 0g	0%
Sodium 105 mg	4%
Cholesterol 0 mg	
Potassium 110 mg	
Total Carbs 2 g	1%
Dietary Fiber 1 g	
Sugars 0g	
Protein 0g	0%
Vitamin A 10%	Vitamin D 12%
Vitamin E 5%	Vitamin B1 25%
Vitamin B3 25%	Vitamin B5 1%
Vitamin B6 2%	Vitamin B12 2%
Biotin 4%	Calcium 5%
Magnesium 3%	Taurine 18mg
Glucosamine 150mg	Isosorb 30mg

\*Percent Daily Values are based on a diet of dog food. ©2006 Murray Label & Printing, Inc. All rights reserved. Printed in the USA.

**Directions for Use:** Pets 0-25 lbs. up to 2 bottles per day, 25-50 lbs. up to 3 bottles per day, 50+ lbs. up to 4 bottles per day.

**Ingredients:** Filtered Water, Soluble Fiber, Glycerin, Natural Flavor, Sodium Acid Sulfate, Potassium Citrate, Monopotassium Phosphate, Sodium Benzoate (preservative), Calcium Guconate, Vitamin E Acetate, Glucosamine Hydrochloride, 2% Stabilized Chlorine Dioxide, Potassium Sorbate (preservative), Taurine, Nicotinamide, Magnesium Guconate, Vitamin A Palmitate, Thiamine Mononitrate, Cholecalciferol, Calcium Pantothenate, Inositol, Pyridoxine Hydrochloride, Biotin, Cyanocobalamin.

**FOR INFORMATION CALL 1-877-ART-1120 or visit [www.healthygulp.com](http://www.healthygulp.com)**

**HEALTHY GULP**

**PEANUT BUTTER FLAVORED WATER**

NET WT. 20 FL. OZ. (591ml)

**SIGN AND RETURN TODAY! DELIVERY DATE WILL BE EXTENDED ONE (1) DAY FOR EVERY DAY THIS PROOF IS NOT RETURNED.**

**COLORS USED:** (Please indicate correct PMS Colors on return proof.)

BLACK	CYAN	MAGENTA	YELLOW	PMS 485					
WIND DIRECTION (CIRCLE ONE)									
SIZE	3.25" X 8.625"								
#1	THIS MIN		THIS SHL		THIS PMS		THIS WAT		THIS WAT
OK to print as is									
OK to print with corrections									
Make corrections and re-proof									

Colors on this proof are not guaranteed PMS or Process Color matches. Consult Color Guide for final approval of colors. UPC's printed at under 80% size are not guaranteed to be scannable; please test codes before signing final approval. IT IS YOUR RESPONSIBILITY to verify SIZE, TYPESTYLE, POSITION, COLOR - BREAK, LAYOUT and BARCODE to prevent errors in production. WE ARE NOT RESPONSIBLE for punctuation errors, misspelled words, or placement errors if they pass your approval on this copy. You must sign the approval before we can proceed with your order.

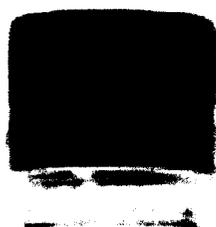
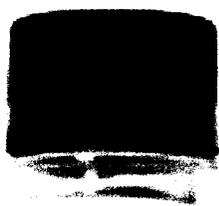
CLIENT:	U.S. BEVERAGE	DATE:	11-10-06	SIGNED:	<i>[Signature]</i>
JOB DESCRIPTION:	HEALTHY GULP DOG WATER 20 OZ.	VERSION NO:	1	DATE:	<i>[Signature]</i>



# Healthy Gulp!



“Because we deserve bottled water too!”



French Butter Flavored Water

NET WT. 12 FL. OZ. (354ml)



Pet Water



Yum Flavored Water

NET WT. 20 FL. OZ. (591ml)

# Healthy Gulp!



“Because we deserve bottled water too!”



Peanut Butter Flavored Water

NET WT. 20 FL. OZ. 1501ml



Pet Water



Yam Flavored Water

NET WT. 20 FL. OZ. 1501ml



BECAUSE WE DESERVE BOTTLED WATER TOO!

Now Available Here!



🐾 Peanut Butter for Dogs

🐾 Tuna for Cats

🐾 Plain for Cats or Dogs



*\*Ask your server for details.*

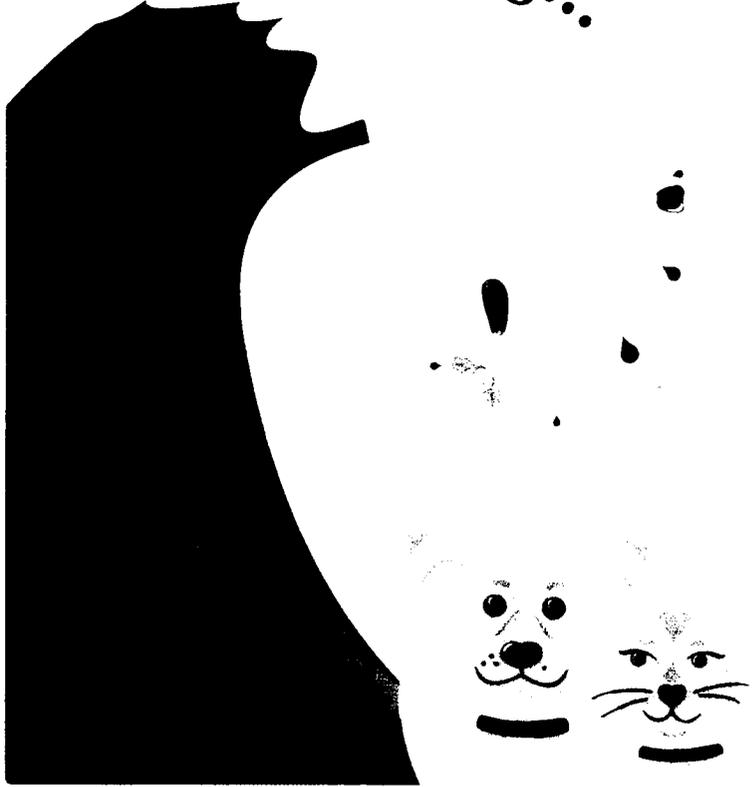
Healthy Gulp is a vitamin and mineral flavor enhanced bottled water for cats and dogs.

It's patent pending formula is the only bottled water for cats and dogs that freshens breath by killing odor causing bacteria. Healthy Gulp also contains fiber, glucosamine, taurine and many other nutrients specially formulated for your pet. So treat your furry friend to a healthy and tastier alternative to tap water, because they deserve bottled water too!

Healthy Gulp is proud to support St. Francis Animal Rescue of Tampa Bay and other Pet Charities.

For more information call 1-877-PET-#1H20 (1-877-738-1420) or visit [www.healthygulp.com](http://www.healthygulp.com)

Introducing...



# Exhibit H



The Gulp® drink is 7-Eleven® stores' proprietary fountain beverage. The Big Gulp®, Super Big Gulp®, Double Gulp®, refillable car cups and mugs offer even bigger sizes for you to fill. Refills in the refillable cups and mugs also cost less than a regular drink of the same size. The majority of 7-Eleven stores dispense 10 beverage choices or more from brands like Coca-Cola, Pepsi, Diet Coke, Diet Pepsi, Mountain Dew, Sprite and Dr Pepper.

# Exhibit I



United States Patent and Trademark Office

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Start List At: OR Jump to record: **Record 5 out of 8**

TARR Status ASSIGN Status TDR TTAB Status ( Use the "Back" button of the Internet Browser to return to TESS)

**Typed Drawing**

**Word Mark** WATER GULP  
**Goods and Services** (ABANDONED) IC 032. US 045 046 048. G & S: spring water for consumption on and off the premises  
**Mark Drawing Code** (1) TYPED DRAWING  
**Serial Number** 76212273  
**Filing Date** February 20, 2001  
**Current Filing Basis** 1B  
**Original Filing Basis** 1B  
**Owner** (APPLICANT) 7-Eleven, Inc. CORPORATION TEXAS 2711 North Haskell Avenue Dallas TEXAS 75204  
**Attorney of Record** Charles R. Mandly, Jr.  
**Prior Registrations** 1110172;1566263;1586016;1615968;2130647;AND OTHERS  
**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Live/Dead Indicator** DEAD  
**Abandonment Date** December 5, 2001

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**Serial Number:** 76212273 Assignment Information      Trademark Document Retrieval

**Registration Number:** (NOT AVAILABLE)

**Mark (words only):** WATER GULP

**Standard Character claim:** No

**Current Status:** Abandoned-Failure To Respond Or Late Response

**Date of Status:** 2002-04-04

**Filing Date:** 2001-02-20

**Transformed into a National Application:** No

**Registration Date:** (DATE NOT AVAILABLE)

**Register:** Principal

**Law Office Assigned:** LAW OFFICE 111

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

1. 7-Eleven, Inc.

**Address:**

7-Eleven, Inc.  
2711 North Haskell Avenue  
Dallas, TX 75204  
United States

**Legal Entity Type:** Corporation

**State or Country of Incorporation:** Texas

#### **GOODS AND/OR SERVICES**

**International Class:** 032

**Class Status:** Active

spring water for consumption on and off the premises

**Basis:** 1(b)

**First Use Date:** (DATE NOT AVAILABLE)

**First Use in Commerce Date:** (DATE NOT AVAILABLE)

### ADDITIONAL INFORMATION

**Prior Registration Number(s):**

1110172

1566263

1586016

1615968

2130647

### MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

### PROSECUTION HISTORY

**NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.**

2002-04-04 - Abandonment - Failure To Respond Or Late Response

2001-06-04 - Non-final action mailed

2001-05-24 - Assigned To Examiner

2001-05-23 - Assigned To Examiner

### ATTORNEY/CORRESPONDENT INFORMATION

**Attorney of Record**

Charles R. Mandly, Jr.

**Correspondent**

CHARLES R. MANDLY, JR.

WILDMAN HARROLD ALLEN & DIXON

225 W WACKER DR

CHICAGO IL 60606-1224

Phone Number: 312-201-2941

Fax Number: 312-201-2555



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## Assignments on the Web > Trademark Query

**No assignment has been recorded at the USPTO**

**For Serial Number: 76212273**

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350.  
Web interface last modified: October 18, 2008 v.2.0.2

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## Exhibit J



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# 7-SELECT

<b>Word Mark</b>	7-SELECT
<b>Goods and Services</b>	IC 029. US 046. G & S: Processed nuts, namely, almonds and pistachios
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	77138045
<b>Filing Date</b>	March 22, 2007
<b>Current Filing Basis</b>	1B
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	February 12, 2008
<b>Owner</b>	(APPLICANT) 7-Eleven, Inc. CORPORATION ILLINOIS 2711 North Haskell Avenue, Suite 1000 Dallas TEXAS 75201
<b>Attorney of Record</b>	Cynthia B. Stevens
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

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## Exhibit K

7-ELEVEN  
3800 BRIGANTINE BLVD  
BRIGANTINE NJ 082031006  
6092660044  
STORE#: 26405

1	ClsscSlctSprtSprg24z	1.29F
1	Sea Isle Ice 7lb	1.79F
1	CASHBACK	10.00

SUBTOTAL	13.08
TOTAL DUE	13.08
DEBIT	<b>13.08</b>
CHANGE	10 00

ACCT#: \*\*\*\*\*7227  
ACCT TYPE: DDA  
APPROVAL#: 810919 AUTH CODE: 0  
APPROVAL TIME: 134008  
Maestro  
STORE#: 26405  
TERM#: :00072640510 08  
TERM SEQ#: 928792  
REF# : 95000 00 000 1  
APPROVED

CUSTOMER AGREES TO PAY THE ABOVE  
TOTAL AMOUNT ACCORDING TO THE CARD  
HOLDERS AGREEMENT

T#01 0P25 TRN0238 09/07/24 01:40 pm

## Exhibit L

7-ELEVEN

5102 POINT OF TAMPA W

TAMPA FL 33647

8138669524

STORE#: 33019

TRY A FRESH HOT GRILL CUBAN SANDWICH....

JUST \$ 3.79

1 7-SelectS&VKtt1.5z 0.79F  
1 ClsscSlctSprngWtr.5L 0.99F

SUBTOTAL 1.78

TOTAL DUE 1.78

DEBIT 1.78

ACCT#: \*\*\*\*\*7227

ACCT TYPE: DDA

APPROVAL#: 853047 AUTH CODE: 0

APPROVAL TIME: 145407

Maestro

STORE#: 33019

TERM# :00073301901 08

TERM SEQ#: 911969

REF# : 95000 00 000 1

APPROVED

CUSTOMER AGREES TO PAY THE ABOVE  
TOTAL AMOUNT ACCORDING TO THE CARD  
HOLDERS AGREEMENT

EVERYDAY

ALL THE TIME

T#02 OP01 TRN5716 09/08/20 02:54 pm

## Exhibit M

7-ELEVEN  
27219 SR 54  
WESLEY CHAPEL FL 33543  
8139941496

STORE#: 32782  
TRY OUR HOT PRESSED SANDWICHES

1	ClsscSlctSprngWtr.5L	0.99F
1	ClsscSlctSprngWtr1.5	1.69F
1	7-Select GummiWormPB	1.19B
1	7-SelectCrPpKtt1.5z	0.79F
1	Chicken Caesar Salad	4.69B

SUBTOTAL	9.35
SALES TAX ON 5.88	0.42
TOTAL DUE	9.77
<b>DEBIT</b>	<b>9.77</b>

ACCT#: \*\*\*\*\*7227

ACCT TYPE: DDA

APPROVAL#: 841139

AUTH CODE: 0

APPROVAL TIME: 134706

Maestro

STORE#: 32782

TERM#: 00073278201 08

TERM SEQ#: 993853

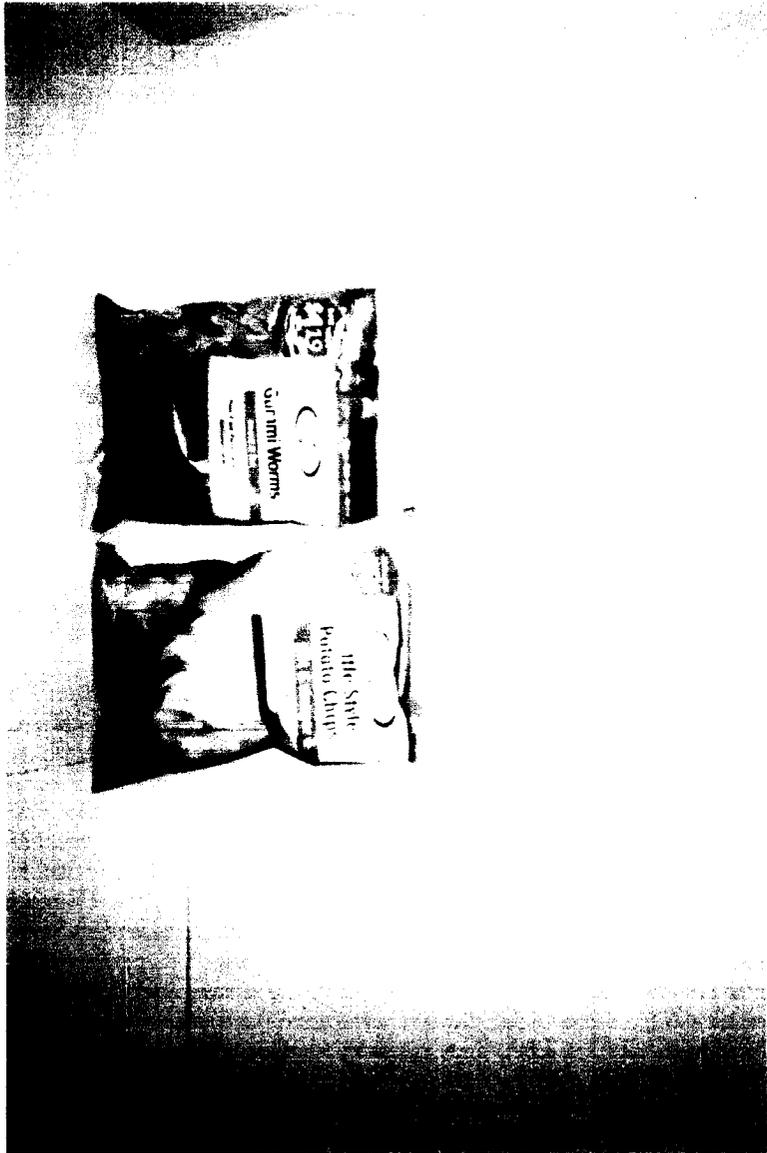
REF#: 95000 00 000 1

APPROVED

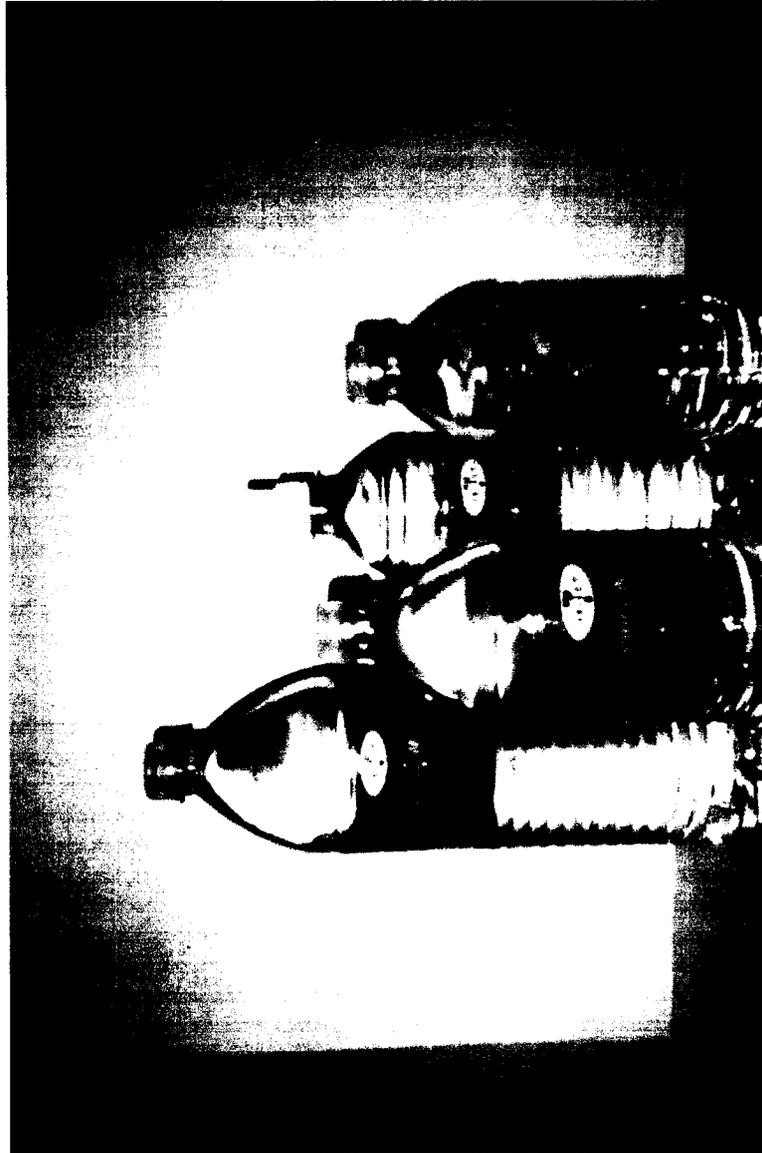
CUSTOMER AGREES TO PAY THE ABOVE  
TOTAL AMOUNT ACCORDING TO THE CARD  
HOLDERS AGREEMENT

TRY OUR GREAT APPLE FRITTERS  
T#01 0P26 TRN7257 09/08/20 01:47 pm





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# Exhibit O



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#### Typed Drawing

<b>Word Mark</b>	FRUIT GULP
<b>Goods and Services</b>	(ABANDONED) IC 029. US 046. G & S: salads except macaroni, rice, and pasta salad for consumption on and off the premises
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	76056274
<b>Filing Date</b>	May 24, 2000
<b>Current Filing Basis</b>	1B
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	February 19, 2002
<b>Owner</b>	(APPLICANT) 7-Eleven, Inc. CORPORATION TEXAS 2711 North Haskell Avenue Dallas TEXAS 75204
<b>Attorney of Record</b>	DIANE G ELDER
<b>Prior Registrations</b>	1110172;1470871;1586016
<b>Disclaimer</b>	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FRUIT" APART FROM THE MARK AS SHOWN
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	DEAD
<b>Abandonment Date</b>	May 15, 2005

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#### Typed Drawing

<b>Word Mark</b>	<b>GUMMI GULP</b>
<b>Goods and Services</b>	(CANCELLED) IC 030. US 046. G & S: confectionery products, namely candy for consumption on or off the premises. FIRST USE: 20010514. FIRST USE IN COMMERCE: 20010514
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	76260682
<b>Filing Date</b>	May 22, 2001
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	May 21, 2002
<b>Registration Number</b>	2607262
<b>Registration Date</b>	August 13, 2002
<b>Owner</b>	(REGISTRANT) 7-Eleven, Inc. CORPORATION TEXAS 2711 North Haskell Avenue Dallas TEXAS 75204
<b>Attorney of Record</b>	CRAIG S. FOCHLER
<b>Prior Registrations</b>	1110172;1470871;2130647;AND OTHERS
<b>Disclaimer</b>	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GUMMI" APART FROM THE MARK AS SHOWN
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	DEAD
<b>Cancellation Date</b>	May 16, 2009

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#### Typed Drawing

<b>Word Mark</b>	<b>SNACK GULP</b>
<b>Goods and Services</b>	(ABANDONED) IC 030. US 046. G & S: confectionery products and snack foods for consumption on or off the premises
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	76260693
<b>Filing Date</b>	May 22, 2001
<b>Current Filing Basis</b>	1B
<b>Original Filing Basis</b>	1B
<b>Owner</b>	(APPLICANT) 7-Eleven, Inc., CORPORATION TEXAS 2711 North Haskell Avenue Dallas TEXAS 75204
<b>Attorney of Record</b>	David A. Copland
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	DEAD
<b>Abandonment Date</b>	January 22, 2002

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Current Search: S5: (live)[LD] AND (Fresh To Go)[COMB] docs: 18 occ: 167

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1	78558756		FRESH TO GO	TARR	LIVE
2	78863635	3428574	FRESH HEALTHY GOOD TO GO	TARR	LIVE
3	78573178	3113255	FRESH ASIAN CUISINE TO-GO	TARR	LIVE
4	78447448	3118125	FRESH AIR TO GO	TARR	LIVE
5	78330930	2970096	MORRISON'S FRESH COOKING TO-GO	TARR	LIVE
6	78330754	2958611	FRESH "N" HOT CHICKEN TO GO	TARR	LIVE
7	78323642	2970062	MORRISON'S FRESH COOKING TO-GO	TARR	LIVE
8	77799132		TAP FRESH TO GO	TARR	LIVE
9	77272198	3577266	FRESH BREATH TO GO	TARR	LIVE
10	77395312		SPECIAL T'S FRESH TO GO...	TARR	LIVE
11	77171783	3506027	FRESH TO GO	TARR	LIVE
12	77278258	3405227	SLICED FRESH TO GO!	TARR	LIVE
13	76698750		FRESH 2 GO	TARR	LIVE
14	76586907	3431684	SHEETZ MADE TO GO FRESH FOOD FAST	TARR	LIVE
15	75810763	2399878	HOSS'S FRESH TO GO PARTY PACKS	TARR	LIVE
16	75934476	2514277	DELI JOE'S FRESH TO GO	TARR	LIVE
17	75761109	2347329	SIMPLY HOT FRESH AND TO GO	TARR	LIVE
18	74338543	2014652	PAPA'S PIZZA TO-GO FRESH BAKED	TARR	LIVE

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### Typed Drawing

<b>Word Mark</b>	GULPY
<b>Goods and Services</b>	IC 021. US 002 013 023 029 030 033 040 050. G & S: Portable animal water dishes and animal water containers sold empty. FIRST USE: 20010516. FIRST USE IN COMMERCE: 20010516
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	75543909
<b>Filing Date</b>	August 27, 1998
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	January 4, 2000
<b>Registration Number</b>	3436490
<b>Registration Date</b>	May 27, 2008
<b>Owner</b>	(REGISTRANT) Wechsler, Lawrence I. INDIVIDUAL UNITED STATES 1 Wooleys Lane Great Neck NEW YORK 11023
<b>Attorney of Record</b>	Robert E. Wechsler, Esq.
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

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### Typed Drawing

**Word Mark**                      SIP BY SIP RATHER THAN GULP BY GULP  
**Goods and Services**        IC 030. US 046. G & S: tea. FIRST USE: 19950204. FIRST USE IN COMMERCE: 19950204  
**Mark Drawing Code**        (1) TYPED DRAWING  
**Serial Number**                75032196  
**Filing Date**                    December 11, 1995  
**Current Filing Basis**        1A  
**Original Filing Basis**        1A  
**Published for Opposition**    November 5, 1996  
**Registration Number**         2033658  
**Registration Date**            January 28, 1997  
**Owner**                            (REGISTRANT) Republic of Tea, Inc., The CORPORATION CALIFORNIA #5 Hamilton Landing, Suite 100 Novato CALIFORNIA 94949  
**Attorney of Record**         JEFFREY L. MICHELMAN  
**Type of Mark**                    TRADEMARK  
**Register**                         PRINCIPAL  
**Affidavit Text**                 SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20070328.  
**Renewal**                         1ST RENEWAL 20070328  
**Live/Dead Indicator**         LIVE

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# GULP

**Word Mark**                      **GULP**  
**Goods and Services**                      IC 020. US 002 013 022 025 032 050. G & S: Plastic lids, closures, caps and covers for cut flower containers, for preventing water spillage, containers, tubs, buckets and vases for transporting, packaging or displaying flowers for commercial use

IC 021. US 002 013 023 029 030 033 040 050. G & S: Cut flower containers incorporating features for preventing water spillage; Containers, tubs, buckets and vases for flowers; Containers, tubs, buckets and vases for transporting, packaging or displaying flowers for domestic use; flower buckets; flower tubs; flower containers; flower vases; any of the aforesaid having anti-spillage or spillage prevention devices or features; anti-spillage and spillage prevention parts; fittings, and components and accessories, namely, holders for flowers

**Standard Characters Claimed**  
**Mark Drawing Code**                      (4) STANDARD CHARACTER MARK  
**Serial Number**                      78931834  
**Filing Date**                      July 18, 2006  
**Current Filing Basis**                      1B;44E  
**Original Filing Basis**                      1B;44D  
**Published for**

**Opposition** March 11, 2008  
**Owner** (APPLICANT) Woodhouse, Peter Joseph INDIVIDUAL UNITED KINGDOM Flower World Limited  
Chequers House, Chequers Lane Derby UNITED KINGDOM DE21 6AW  
**Attorney of Record** Richard A. Sharpe  
**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Live/Dead Indicator** LIVE

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# GULP

<b>Word Mark</b>	GULP
<b>Goods and Services</b>	IC 036. US 100 101 102. G & S: Financial services, namely, foreign exchange trading services via an online communications network; financial research services
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	77017948
<b>Filing Date</b>	October 10, 2006
<b>Current Filing Basis</b>	1B
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	February 13, 2007
<b>Owner</b>	(APPLICANT) Goldman, Sachs & Co. The Goldman Sachs Group, Inc., a Delaware corporation, and The Goldman, Sachs & Co., LLC, a Delaware limited liability company LIMITED PARTNERSHIP NEW YORK 85 Broad Street New York NEW YORK 10004
<b>Attorney of Record</b>	John Squires
<b>Type of Mark Register</b>	SERVICE MARK PRINCIPAL

Live/Dead  
Indicator      LIVE

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### Typed Drawing

**Word Mark** GULP

**Goods and Services** IC 035. US 100 101 102. G & S: Office functions for others, namely providing call-centers, secretarial services, creating and distribution of mailings and data processing services, namely maintenance of customer data, providing office jobs, namely running online databases for procurement of jobs, especially procurement of employees and freelancers for IT-projects; providing online directory information services also featuring hyperlinks to other websites; customer services in the fields of procurement of jobs; product marketing for others; job placement; business management; business consultation; foreign trade information and consultation, namely, fostering trade relations between the Federal Republic of Germany and the United States; employment staffing, placement, consulting and recruiting; employment outplacement services; temporary employment agencies; providing online information in the field of employment, namely, information on available jobs and available employees; advertising agencies; business management and consultation, namely, negotiation of business projects for others in the field of information technology; business management, namely, business administration for others

IC 038. US 100 101 104. G & S: Telecommunication services in the Internet sector, namely, web messaging, electronic file transfer services over a global computer network, and providing multiple user dial up and dedicated access to the Internet

IC 042. US 100 101. G & S: Hosting the websites of others on a computer server for a global computing network; registration of domain names for identification of users on a global computer network; online offers contacts, namely, data mining; interactive technical consultation in the field of design, implementation and maintenance of computer networks, namely, internet related networks, local area networks and wide area network; industrial research services in the field of network related hard and software; computer services, namely, designing and implementing network web pages, web sites for others; consulting services in the field of design, selection, implementation and use of computer hardware and software systems for others; product research and development; scientific research; computer programming for others

**Mark Drawing Code** (1) TYPED DRAWING

**Serial Number** 76148250  
**Filing Date** October 17, 2000  
**Current Filing Basis** 44E  
**Original Filing Basis** 44D;44E  
**Published for Opposition** October 8, 2002  
**Registration Number** 2667885  
**Registration Date** December 31, 2002  
**Owner** (REGISTRANT) Gulp Information Services GmbH CORPORATION FED REP GERMANY Ridlerstr. 37 a D-80339 Munchen FED REP GERMANY  
**Attorney of Record** Kenneth F Florek  
**Priority Date** April 17, 2000  
**Type of Mark** SERVICE MARK  
**Register** PRINCIPAL  
**Affidavit Text** SECT 15. SECT 8 (6-YR).  
**Live/Dead Indicator** LIVE

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### Typed Drawing

<b>Word Mark</b>	GULP!
<b>Goods and Services</b>	IC 028. US 022 023 038 050. G & S: ARTIFICIAL FISHING LURES AND ARTIFICIAL FISHING LURE BODIES. FIRST USE: 20030300. FIRST USE IN COMMERCE: 20030500
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	76529890
<b>Filing Date</b>	July 16, 2003
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	March 23, 2004
<b>Registration Number</b>	2902123
<b>International Registration Number</b>	0849491
<b>Registration Date</b>	November 9, 2004
<b>Owner</b>	(REGISTRANT) PURE FISHING, INC. CORPORATION IOWA 1900 18th Street Spirit Lake IOWA 51360
<b>Assignment Recorded</b>	ASSIGNMENT RECORDED
<b>Attorney of Record</b>	Lance G. Johnson
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

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### Typed Drawing

<b>Word Mark</b>	GULP!
<b>Goods and Services</b>	IC 042. US 100 101. G & S: mail order catalog services and retail store services featuring photographic equipment and photographic supplies. FIRST USE: 19910600. FIRST USE IN COMMERCE: 19910600
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	74724875
<b>Filing Date</b>	September 5, 1995
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	April 9, 1996
<b>Registration Number</b>	1984336
<b>Registration Date</b>	July 2, 1996
<b>Owner</b>	(REGISTRANT) UNIQUE PHOTO, INC. CORPORATION NEW JERSEY 11 VREELAND ROAD FLORHAM PARK NEW JERSEY 07932-151
<b>Attorney of Record</b>	Bruce H. Sales
<b>Type of Mark</b>	SERVICE MARK
<b>Register</b>	PRINCIPAL
<b>Affidavit Text</b>	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20051025.
<b>Renewal</b>	1ST RENEWAL 20051025
<b>Live/Dead Indicator</b>	LIVE

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# MaxiGulp

<b>Word Mark</b>	MAXIGULP
<b>Goods and Services</b>	IC 021. US 002 013 023 029 030 033 040 050. G & S: buckets, washing brushes, brooms and parts thereof, namely, metal and non-metal broom handles, sold as a unit, cloths for wiping or dusting, dust pans, mops and parts thereof, namely, metal and non-metal mop handles, sold as a unit, mop heads, squeegees, cleaning sponges, non-electrical carpet and hardwood floor sweepers, and scouring pads. FIRST USE: 20051227. FIRST USE IN COMMERCE: 20051227
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	78790541
<b>Filing Date</b>	January 12, 2006
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	June 6, 2006
<b>Registration Number</b>	3266342
<b>Registration Date</b>	July 17, 2007

**Owner** (REGISTRANT) NCP Enterprises, LLC LTD LIAB CO OHIO 625 Burt St Springfield OHIO 45505  
 (LAST LISTED OWNER) NEXSTEP COMMERCIAL PRODUCTS, LLC LTD LIAB CO OHIO 625  
 BURT STREET SPRINGFIELD OHIO 45505

**Assignment Recorded** ASSIGNMENT RECORDED

**Attorney of Record** Melanie Martin-Jones

**Type of Mark** TRADEMARK

**Register** PRINCIPAL

**Live/Dead Indicator** LIVE

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# GULP! ALIVE

<b>Word Mark</b>	GULP! ALIVE
<b>Goods and Services</b>	IC 028. US 022 023 038 050. G & S: Artificial fishing bait. FIRST USE: 20060621. FIRST USE IN COMMERCE: 20070615
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Trademark Search Facility Classification Code</b>	NOTATION-SYMBOLS Notation Symbols such as Non-Latin characters,punctuation and mathematical signs,zodiac signs,prescription marks
<b>Serial Number</b>	78927631
<b>Filing Date</b>	July 12, 2006
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	January 9, 2007
<b>Registration Number International</b>	3300117

**Registration Number** 0912955  
**Registration Date** September 25, 2007  
**Owner** (REGISTRANT) Pure Fishing, Inc. CORPORATION IOWA Legal Department 1900 18th Street Spirit Lake IOWA 51360  
**Attorney of Record** Lance Johnson  
**Prior Registrations** 2902123  
**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Live/Dead Indicator** LIVE

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<b>Word Mark</b>	GULP! GUARANTEED LOWEST PRICING! WE WILL BEAT ANY VERIFIABLE PRICE.
<b>Goods and Services</b>	IC 042. US 100 101. G & S: mail order catalog services and retail store services featuring photographic equipment and photographic supplies. FIRST USE: 19940100. FIRST USE IN COMMERCE: 19940100
<b>Mark Drawing Code</b>	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
<b>Design Search Code</b>	26.01.02 - Circles, plain single line; Plain single line circles 26.03.21 - Ovals that are completely or partially shaded
<b>Serial Number</b>	74725159
<b>Filing Date</b>	September 5, 1995
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	April 9, 1996
<b>Registration Number</b>	1984338
<b>Registration Date</b>	July 2, 1996
<b>Owner</b>	(REGISTRANT) UNIQUE PHOTO, INC. CORPORATION NEW JERSEY 11 VREELAND ROAD FLORHAM PARK NEW JERSEY 07932-151
<b>Attorney of Record</b>	BRUCE H SALES

**Disclaimer** NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GUARANTEED LOWEST PRICING!" APART FROM THE MARK AS SHOWN  
**Type of Mark** SERVICE MARK  
**Register** PRINCIPAL  
**Affidavit Text** SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20060328.  
**Renewal** 1ST RENEWAL 20060328  
**Live/Dead Indicator** LIVE

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Gulp Divers is a small but busy diving club based near Wisbech, north Cambridgeshire.

We like to think of ourselves as keen and friendly divers whose focus is on good skills and safe diving.

We can offer training at all levels and diving within the UK at both inland sites and off the coast; and we also venture abroad to warmer and bluer waters.

With a high ratio of active instructors we can offer training to new and qualified divers.

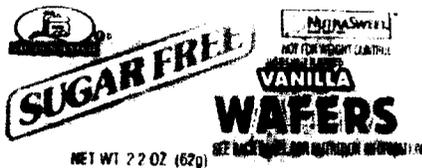
If you are interested in easy-going dives with a friendly group of divers give us a call or come and see us on a club night.

For more information about us [click here](#).

Gulp Divers meet every first and third Thursday from 8.00pm onwards at the Crown Lodge Hotel, Outwell.

Site last updated 22nd July, 2009





A Snack and Soda Vending Company

**Gulp-It! focuses on your snack and soda vending machines so you can focus on your business.**



We are first and foremost a service business. Our mission is to remove the hassle from vending snacks and drinks to your employees and visitors.

All of our vending machines are wirelessly monitored 24/7. We know when the vending machine needs to be serviced before you do, no matter where you are in Houston.

If you are in the Houston, Texas area and need snack or drink vending machine service, we invite you to explore our website to learn more about vending and more about Gulp-It!



**When you are ready to talk vending, just click on the "Contact Us" tab on any page.**

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- NEW Jarred- Fish Fry
- NEW 3 in. Bulky Hawgs
- NEW 3 in. Nuclear Nellys
- NEW 4 in. Crawfish
- NEW 4 in. Gobys
- NEW Shaky Worms
- NEW 6 in. Nightcrawlers
- NEW Crazy Leg Grubs
- NEW Jerk Shads
- NEW Lizards
- NEW Sand Eels
- NEW Bloodworms
- NEW 8 in. Eels
- NEW Spray Attractants
- NEW Leeches
- NEW Minnow Grubs
- NEW Minnows
- NEW Peeler Crabs
- NEW Pogys

NEW Berkley® Gulp!® Alive!™ 5" Crazy Leg Jerk Shad, Chart. Pepper Neon

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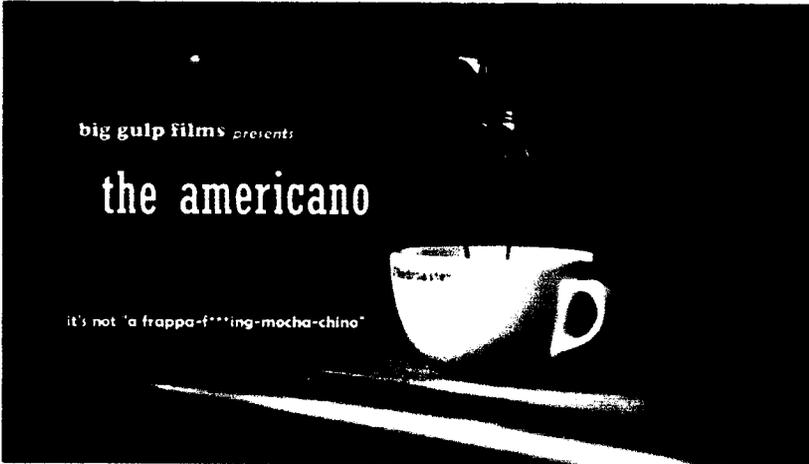
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it's not 'a frappa-f\*\*\*ing-mocha-chino'

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Not all of our clients companies have the same size or location. That's why we offer big gulp films in a variety of sizes.

Shooting in Indiana in January 2008. The client wanted a 30 second commercial for their new product. We shot it in a 30 second commercial.

The client wanted a 30 second commercial for their new product. We shot it in a 30 second commercial. We shot it in a 30 second commercial. We shot it in a 30 second commercial.

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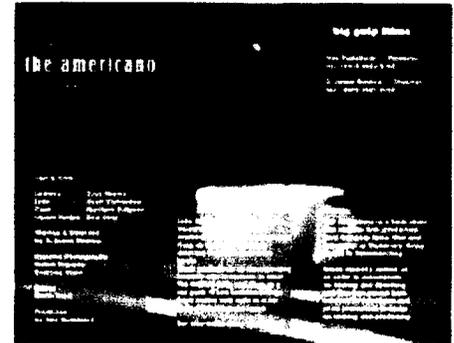
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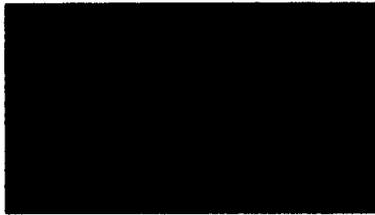
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- Successful Endings
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- Silencing the Internal Editor

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"Since completing the Gulp!Fiction course I have become a person who writes, instead of a person who wants to write. Joy's feedback gave me practical advice and clear methods, allowing me to improve my stories. The habits that I developed during the course also meant that I was better prepared, when the opportunity arose, to apply for a scholarship in the Arts (MS Society). Gulp!Fiction gave me the courage to write the submission; I believe that the skills I acquired and practiced contributed to the success of my application. The scholarship will give me the opportunity to have better writing tools and more coaching to keep developing my story telling abilities. I thoroughly recommend it to anyone who procrastinates about writing or wants to know how to begin."

- J. Love



Taking the Fear Out of Fiction

by Joy Aimée

# Google Gulp

## Quench your thirst for knowledge.

At Google our mission is to organize the world's information and make it useful and accessible to our users. But any piece of information's usefulness derives, to a depressing degree, from the cognitive ability of the user who's using it. That's why we're pleased to announce Google Gulp (BETA)<sup>™</sup> with Auto-Drink<sup>™</sup> (LIMITED RELEASE), a line of "smart drinks" designed to maximize your surfing efficiency by making you more intelligent, and less thirsty.

### Think fruity. Think refreshing.

Think a DNA scanner embedded in the lip of your bottle reading all 3 gigabytes of your base pair genetic data in a fraction of a second, fine-tuning your individual hormonal cocktail in real time using our patented Auto-Drink<sup>™</sup> technology, and slamming a truckload of electrolytic neurotransmitter smart-drug stimulants past the blood-brain barrier to achieve maximum optimization of your soon-to-be-grateful cerebral cortex. Plus, it's low in carbs! And with flavors ranging from Beta Carroty to Glutamate Grape, you'll never run out of ways to quench your thirst for knowledge.



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### How to get Gulped?

You can pick up your own supply of this "limited release" product simply by turning in a used Gulp Cap at your local grocery store. How to get a Gulp Cap? Well, if you know someone who's already been "gulped," they can give you one. And if you don't know anyone who can give you one, don't worry – that just means you aren't cool. But very, very (very!) soon, you will be.

### Google Gulp and Your Privacy

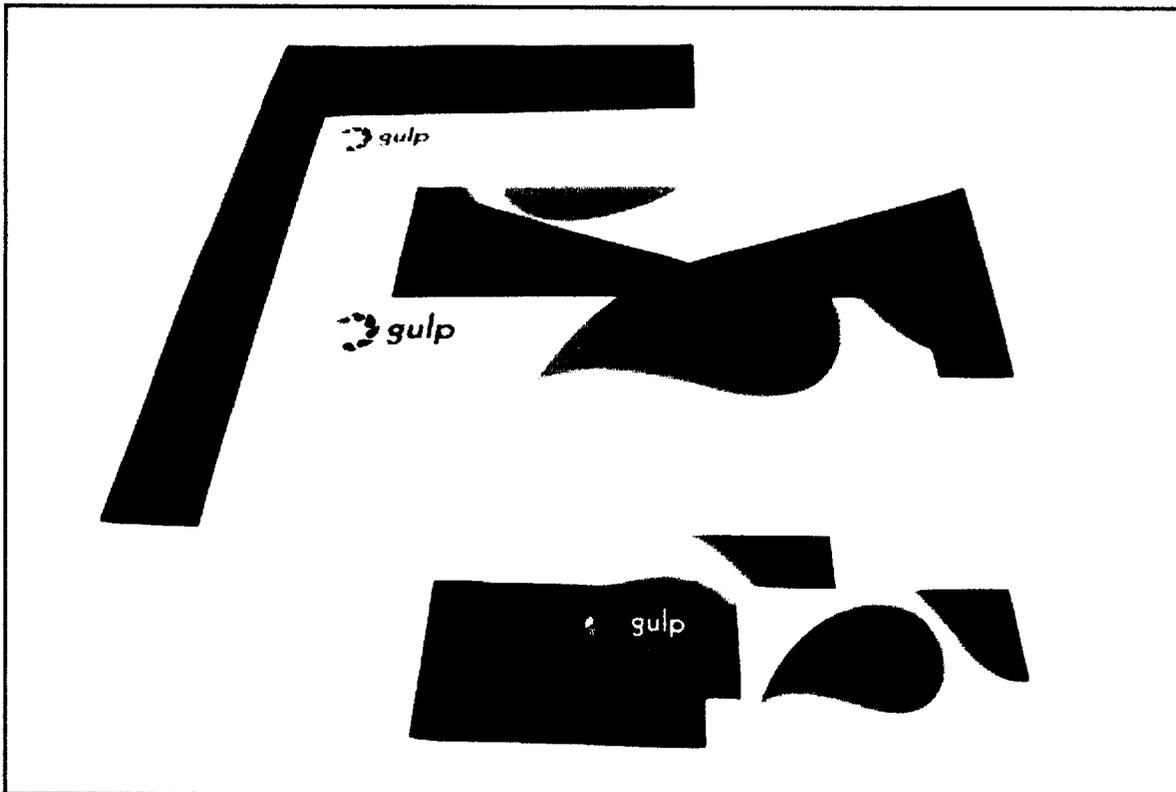
From time to time, in order to improve Google Gulp's usefulness for our users, Google Gulp will send packets of data related to your usage of this product from a wireless transmitter embedded in the base of your Google Gulp bottle to the GulpPlex<sup>™</sup>, a heavily guarded, massively parallel server farm whose location is known only to Eric Schmidt, who carries its GPS coordinates on a 64-bit-encrypted smart card locked in a stainless-steel briefcase handcuffed to his right wrist. No personally identifiable information of any kind related to your consumption of Google Gulp or any other current or future Google Foods product will ever be given, sold, bartered, auctioned off, tossed into a late-night poker pot, or otherwise transferred in any way to any untrustworthy third party, ever, we swear. See our Privacy Policy.

**PORTFOLIO | BLOG | ABOUT  
RYAN RIEGNER**

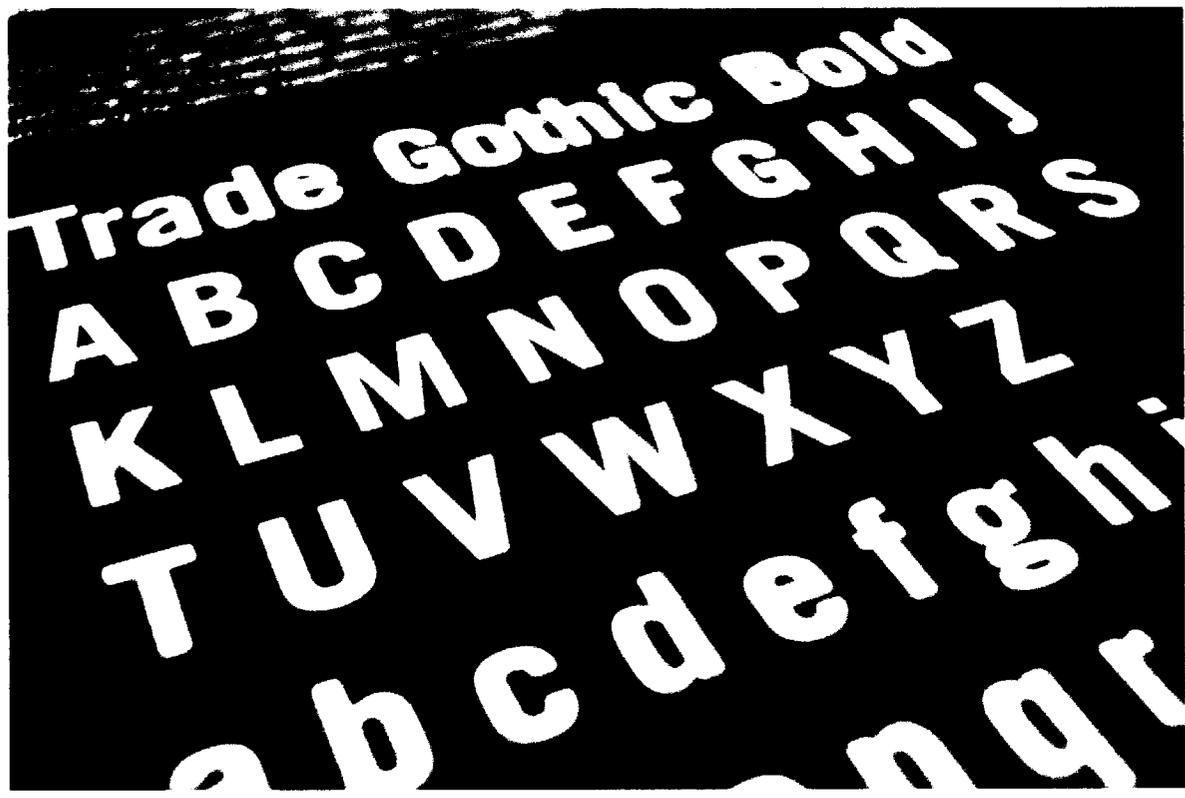
**FEEDBACK IS ENCOURAGED AND WELCOME!**

- **Gulp: Explore Your Thirst**
- February 18, 2009  
4 comments
- In Corporate, Design, Identity, Logo, Portfolio, Print, Web

One of my more in-depth works on identity design, Gulp is an company created around it's internet based search engine. Along with the Gulp search homepage and search results page, I also produced the standard corporate identity of logo, business cards, envelopes and letterheads, along with annual report covers, t-shirts, and brand book. All Type is set in Trade Gothic Bold and Medium.









## Comments

**David Airey**

Hello from across the water.

I like it, Ryan. Particularly how you show the flexibility of the mark across various media.

**frebro**

I love the business card design. It's interesting to see how you work with light and dark backgrounds to create different feelings in the designs, but still manage to keep them together as a whole.

**David Airey**

I second that, Fredrik. The business card's slick.

**Ryan Riegner**

Thanks for the great responses David and frebro. @frebro – Yes, it was an interesting challenge to deal with sharply contrasting background in relation to the varying values of the logo, and then to obtain a sense of unity above it all! It was a much different approach than my other identity projects and I'm pleased how gulp turned out. Cheers on the Karlshamn logo as well.

## What Do You Think?

Name

Required!

E-mail

Safe from Spam!

Website

Optional!

Comment

POST

## • Search

## • Most Popular

- Write it, Buy it, Eat it, Enjoy it!
- Jaw Dropping Gulp Logo Concept
- Armed Crime Task Force Logo Proposal
- Waterblock Type Book
- US Money, Put to Shame Down Under
- "Happy 4th of July" Says the Explosives!
- The Carpet Art Craftsmanship
- Toddlers Kidnap my Camera
- The Eleflate: Inflatable Bag Sculpture
- Type Spec Vision Testing
- Philippines Currency
- Typography Talks Back
- Hot off the Melody Press
- Gulp: Explore Your Thirst
- Albino Rhino Design is Born

## • Topics

- Albino Rhino (1)
- Animation (1)
- Blog (8)
- Book (3)
- Book Cover (2)
- Cooperate (4)
- Currency (2)
- D.I.Y (4)
- Design (13)
- Digital Art (1)
- Drawing (1)
- Identity (6)
- International (3)
- Logo (5)
- NYC (1)
- Painting (2)
- Photography (4)
- Portfolio (12)
- Portraits (1)
- Poster (1)
- Print (4)
- Printmaking (2)
- Re-Design (2)
- Sculpture (2)
- Typography (7)
- Uncategorized (1)
- Web (2)

[RSS](#) | [PORTFOLIO](#) | [BLOG](#) | [ABOUT](#)

## Exhibit S

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

7-Eleven, Inc.,

Opposer,

v.

Lawrence I. Wechsler,

Applicant.

)  
)  
)  
)  
)  
)  
)

Opposition No. 117,739

\*\*\*\*\*

ORAL DEPOSITION OF

JOHN RYCKEVIC

March 29, 2002

\*\*\*\*\*

ORIGINAL

ORAL DEPOSITION OF JOHN RYCKEVIC, taken at the instance of the Opposer on the 29th of March, A.D., 2002, in the above-styled and numbered cause at the offices of 7-Eleven Corporation, 2711 North Haskell, 29th Floor, in the City of Dallas, County of Dallas and State of Texas before Shauna P. Camp, CSR, a Certified Shorthand Reporter in and for the State of Texas, pursuant to the Federal Rules of Civil Procedure.

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Pursuant to information made a part of the record at the time said testimony was taken, the following includes all parties present.

A P P E A R A N C E S

FOR THE OPPOSER:

**Mr. Charles R. Mandly**  
WILDMAN, HARROLD, ALLEN & DIXON  
225 West Wacker Drive  
Chicago, Illinois 60606-1229

FOR THE APPLICANT:

**Mr. Thomas Furth** (Via Telephone)  
ATTORNEY AT LAW  
122 East 42nd Street, Suite 4000  
New York, New York 10168

\*\*\*\*\*

1 and ask you if you could identify that for us, please,  
2 sir.

3 A. Page 47 is reflective of a little -- a card  
4 holder. The actual -- it's a paper holder that you  
5 would put a phone card into around Christmas time, and  
6 again, it's -- on that particular item the main  
7 program is the phone card that we're offering people  
8 for gift giving, but it does reflect our BIG GULP cup  
9 on there. Again, it's something that customers would  
10 be familiar with.

11 So we offered this with the purchase of a  
12 phone card, and again, it did the have the BIG GULP  
13 cup on there. So it was a little extra value ad for  
14 the customer. And then they could turn around and  
15 give it as a gift, a stocking stuff.

16 Q. (By Mr. Mandly) I'd next like to direct your  
17 attention to the materials at pages 48 through 53 of  
18 Exhibit 1 and ask you if you could identify those  
19 materials for us, please, sir.

20 A. We have taken the -- these are examples of  
21 taking our BIG GULP and putting it onto other items.  
22 Page 48 is a Frisbee. Page 49 is a hat, and then page  
23 50 is we developed a whole merchandise catalog  
24 primarily for internal use where our employees could  
25 purchase items that have our different marks on them.

1           So the 2001 catalog, a lot of different  
2 shirts and different type things that carry many of  
3 our trademarks and, I think, examples of the ones that  
4 would carry the BIG GULP trademark. So there's a  
5 water bottle on page 53 that has BIG GULP on it.  
6 There could be some SLURPEE ones. There's golf balls,  
7 so this is a good example of the types of items  
8 outside of a fountain cup that would have our  
9 trademarks on it. And there's examples of the ones  
10 with the BIG GULP.

11           Q. Thank you.

12           Mr. Ryckevic, I'm going to hand you again  
13 Deposition Exhibit No. 1, and I'd like to direct your  
14 attention specifically to pages 34 and 35 and 36 of  
15 that exhibit. You've previously testified as to you  
16 know what those items are, that they're in-store  
17 displays. But I notice that there are multiple GULP  
18 products pictured in those advertisements. Is there  
19 any particular reason why multiple products are  
20 depicted in the advertising?

21           A. Yes. We -- I think page 34 -- the verbiage  
22 that's on there really kind of hits on the fact that  
23 the program is not only one cup. There's a family of  
24 vessels that the customers can enjoy, so what we try  
25 to do is -- this is an example of one. It was around

1 independents that actually had a name similar to ours,  
2 and I think they called it 7 In-and-Out. You know,  
3 they kind of made it look a little like 7-Eleven, but  
4 that's the only personal knowledge of one that I would  
5 have. Again, that was the southern California area.

6 MR. FURTH: That's really all that I  
7 have for the witness.

8 REDIRECT EXAMINATION

9 BY MR. MANDLY:

10 Q. The only question I have is, again, referring  
11 back to the merchandising catalog. I just want to  
12 make certain that I understand your testimony with  
13 respect to the nature of the consumer to whom that's  
14 directed. Is it your testimony that that catalog is  
15 directed exclusively to 7-Eleven employees for  
16 exclusively internal use?

17 A. The catalog is made available to 7-Eleven  
18 employees, but they can purchase these items -- and  
19 many people do; in fact, I have -- purchase these logo  
20 items for their friends. So you do not have to be a  
21 7-Eleven employee to be wearing a BIG GULP hat. As an  
22 employee, you have access to them at good rates, and  
23 you can buy them for your friends or your -- the ball  
24 team. So the catalog is directed at employees, but  
25 they're being worn by -- those types of things are

1 being used by other than 7-Eleven employees.

2 Q. And over the years are you aware of 7-Eleven  
3 using -- well, I'll call them merchandising products  
4 -- to promote its other store products? In other  
5 words, are there times when 7-Eleven has had, like,  
6 special offers for materials that might be otherwise  
7 branded 7-Eleven or with some of the other marks?

8 A. We've offered within the store -- I can  
9 remember one time we did -- we kind of did a special  
10 shirt that was only available at 7-Eleven. It was  
11 tied in with the *Simpsons*, and it had the BIG GULP on  
12 it. So we do use it. It was T-shirts that we  
13 offered. So from time to time, depending on the  
14 program, we may offer that logo'd one. But it  
15 typically would be tied to something else that was  
16 going on, a movie or a TV show.

17 MR. MANDLY: I don't have anything  
18 further.

19 MR. FURTH: Okay. I guess we're done  
20 then.

21 MR. MANDLY: Thank you very much.

22 MR. FURTH: Thank you.

23 (Deposition concluded at 10:43 a.m.)

24 \*\*\*\*\*  
25