

ESTTA Tracking number: **ESTTA275653**

Filing date: **04/01/2009**

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

Proceeding	91186494
Party	Defendant Anthony Brown
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Submission	Reply in Support of Motion
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Date	04/01/2009
Attachments	KoolvsKraftresponse.pdf ( 5 pages )(223791 bytes )

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

In the Matter of Application Serial No. 77/355857: KOOL  
Published in the *Official Gazette* of July 22<sup>nd</sup> 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC,

Opposition No. 91186494

Opposer,

v.

ANTHONY BROWN,

Applicant.

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**APPLICANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

On 3/16/09 Applicant filed a Motion for Default Judgment against Opposer based on an untimely response from Opposer to Applicant's Motion for Summary Judgment. Opposer responded and filed a Cross Motion for Summary Judgment. Opposer's Cross Motion for Summary Judgment of over one-hundred (100) pages exceeds the Trademark Rules (Section 2.127) of allowing no more than twenty-five (25) Pages. Therefore, Opposer's Cross Motion for Summary Judgment should be struck accordingly.

In the event the Board disagrees with the Applicant's Motion for Default and does not strike Opposer's Cross Motion for Summary Judgment, Applicant hereby submits his reply in support of its Motion for Summary Judgment and states:

**1. The Key facts Which Permit the Entry of Summary Judgment are Undisputed**

While Kraft points to a number of factual disputes, the key facts supporting summary judgment (that the marks are dissimilar and therefore there is no likelihood of confusion, infringement or dilution) are not disputed. It is well settled that, where the key facts regarding the issue of likelihood of confusion are clear, it is appropriate to decide the issue in the context of a motion

for summary judgment. *See Rush Industries, Inc. v. Garnier LLC*, 496 F. Supp.2d 220 (E.D. N.Y. 2007)

Here, the key facts which require the entry of summary judgment are undisputed: 1) Applicant is the owner of the mark “Kool” which has no particular form of font styling and has not used the mark in commerce yet; 2) Kraft’s “Kool-Aid” mark consists of the words “Kool” and “Aid” joined by a hyphen along with a logo of a dancing and smiling glass pitcher filled with a red liquid and ice cubes who is marketed as “Kool-Aid” Man; 3) Applicant use of the word “Kool” is in the context of being hip and in style; 4) Kraft’s use of the word “Kool” is in the context of temperature and goes toward the refreshing aspect of the beverage; 5) Applicant’s beverages are “carbonated”; 6) Kraft’s beverages are non-carbonated and come in a powder form and are sometimes pre-mixed; 7) Applicant’s beverages are expensive at \$.99 per 8 oz can and cater to a specialized and discriminating consumer; 8) Kraft’s beverages are inexpensive at less than .25 cents per packet with one packet that can make over a gallon of beverage and cater to the non-discriminating general public; 9) Applicant’s beverages come packaged in slender energy style cans; 10) Kraft’s beverages do not come packaged in any type of can.

The foregoing facts establish that the marks are so dissimilar that Kraft’s likelihood of confusion claim fails as a matter of law and therefore summary judgment is appropriate.

## **II. Kraft Cannot Escape the Holding of the “Kool Kat” Case, which is Indistinguishable from this Case.**

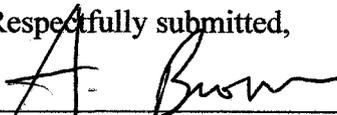
Kraft has not, and cannot, meaningfully distinguish the “Kool Kat” case (*Kraft Foods, Inc. V. Desnoes & Geddes Ltd, Opp’n No. 101,879* (T.T.A.B. 1999) in which the Trademark Trial and Appeal Board held that as a matter of law “Kool Kat” is not confusingly similar to “Kool-Aid”. Here, “Kool” is no more similar to “Kool-Aid” than “Kool Kat” is to “Kool-Aid”.

Kraft would have the Board ignore that the underpinnings of the “Kool Kat” case which are the same as the case at hand. For example, both the “Kool Kat” and “Kool” have a meaning referring to hipness or coolness of the product. The word Kool is a well know slang word for being hip and in style therefore telling the consumer that if one drinks this beverage they are a kool person. On the other hand, as was determined by the TTAB in the “Kool Kat” case, “Kool-Aid” refers to the cooling effect of the “Kool-Aid” beverages. Also the TTAB decision cited by Kraft, *Chicago Dietetic Supply House, Inc. v. Perking Prods Co.* 280 F. 2d 155 (C.C.P.A. 1960), found that “Aid” was a common place word (*i.e* like lemonade) furthering the long standing finding that “Kool-Aid” does not refer to something hip or cool. Moreover, as in the “Kool Kat” case, the parties marks and logos present a dissimilarity, both visually and phonetically (“Kool” is one word while “Kool-Aid” is two words). Applicant’s mark ‘Kool’ has no particular form of font styling while Kraft’s “Kool-Aid” is a distinct logo with a wave-like line. Both words, “Kool” and “Aid” are the same font size and Kraft’s use of the word “Kool” is not a dominant portion of its mark. Moreover, Kraft’s own arguments demonstrate that there is no possibility of confusion. Kraft touts the long history of its strong logo. In particular, Kraft points to its extensive marketing and resulting fame of the “Kool-Aid mark which always includes the “Kool-Aid” man. Upon information and belief there has never been a commercial or any type of print ad in any type of media that has not utilized the “Kool-Aid” man in conjunction with the mark, “Kool-Aid”. In fact, Kraft has intentionally not submitted to the Board any samples of their products actual mark in commerce because every submission would have the “Kool-Aid” man in the advertisement. This fact cements the conclusion that the public is not and will not be confused between the Kraft’s Kool-Aid mark with Kool-Aid Man (a dancing and smiling glass pitcher filled with a red liquid and ice cubes) and Applicants “Kool” mark with no particular form of font styling.

Additionally, extensive third party use of the word "Kool" including "Kool Freeze" Registration # 3237259 for Ice Cream and the "Kool Kat" mark, which Kraft ignores, substantially weakens Kraft's arguments. *See Sun Banks of Florida Inc. v. Sun Federal Savings and Loan Association* 651 F.2d 311 (5<sup>th</sup> Cir. 1981) (finding that due to extensive third party use of the word "Sun" there would be no likelihood of confusion between Sun Banks and Sun Federal). Also, weakening by third party use is not limited to those instances where the third-party is within the same industry or product line. *See Sports Authority, Inc. v. Abercrombie & Fitch, Inc.* 965 F. Supp. 925,941 (E.D. Mich 1997) (whether or not the third party use of a mark is in a relevant market, such use diminishes any "distinctive" or "famous" aspects of the mark). Lastly, Kraft touts the fact that they have successfully prevented any company or person from registering a product with the mark "Kool" that they feel may infringe into their market venue. Upon our information and belief the reason there aren't many registrations with the word "Kool" in the food and beverage industry is because, Kraft a wealthy conglomerate has threatened or forced all applicant's to either abandon or settle. Kraft knows that a small company cannot continue to pay expensive legal fees to fight for its rights. In the few instances like the "Kool Kat" case and "Kool Freeze" for Ice Cream, the applicant's did not allow themselves to be scared off and fought back and subsequently won their right to use their mark.

**WHEREFORE**, Applicant respectfully requests this Board grant summary judgment in its favor.

Respectfully submitted,

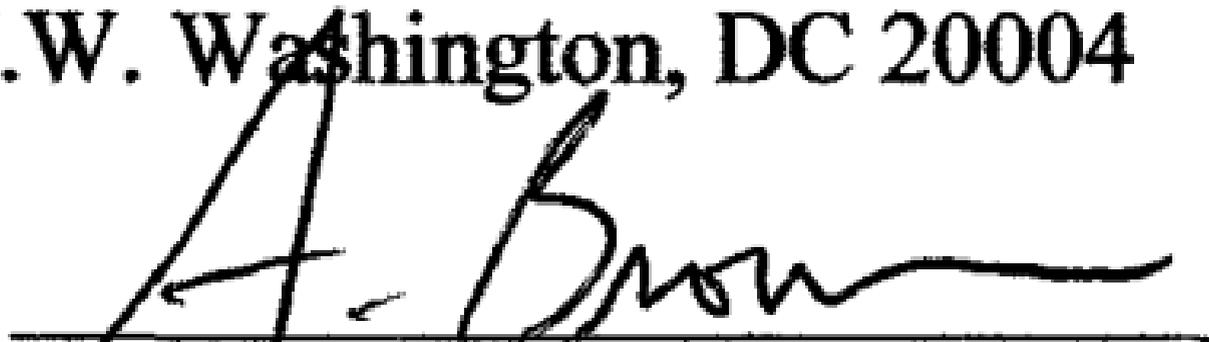


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Anthony Brown, Pro se  
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Dated: 4/1/09

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished via U.S. Mail 1<sup>st</sup> Class on this 1st Day of April 2009 to: Morgan, Lewis & Bockius LLP Att: Kevin Fee and Natalie Ward- 1111 Pennsylvania Avenue, N.W. Washington, DC 20004

  
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Anthony Brown 4/1/09