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

Proceeding	91187908
Party	Plaintiff Oklahoma State University
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OKLAHOMA STATE UNIVERSITY,)	
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Opposer,)	
v.)	In the matter of Application
)	Serial No. 77/383,001
)	for the mark COWBOYADE
)	Opposition No. 91187908
SUPER BAKERY, INC.,)	
)	
)	
Applicant.)	

**REPLY IN SUPPORT OF
OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

REDACTED

Opposer Oklahoma State University (“Opposer” or the “University”) respectfully submits this reply memorandum in support of its motion for summary judgment against Applicant Super Bakery, Inc. (“Applicant”).

I. INTRODUCTION

The University owns substantial trademark rights in its strong COWBOYS trademarks (the University’s “COWBOYS Marks”), based on decades of use, advertising, promotion, and sales of a wide variety of goods and services under the marks. Applicant adopted the COWBOYADE mark with knowledge of the University’s rights and with an intent to sell sports drinks bearing the COWBOYADE mark to (among others) fans, alumni, and students of the University. These facts are undisputed.

Applicant fails to rebut any of the University’s evidence and fails to cite legal authority supporting its bald assertions. Indeed, Applicant’s only “evidence” is a trademark search report showing third-party registrations of marks incorporating the word “Cowboy”; but Applicant submits no evidence showing third-party use of the marks or any evidence suggesting that the listed marks have been the subject of more than *de minimis* advertising or sales. Applicant’s Brief Opposing Summary Judgment (“Response Brief”) thus fails to raise any genuine issues of disputed fact.

The undisputed record evidence shows that Applicant intends to use a mark (i) that fully incorporates the University’s strong COWBOYS Marks, (ii) on nearly identical and closely related goods, (iii) sold in identical and closely related channels of trade, (iv) to the same target consumers. Under these circumstances, the University is entitled to summary judgment.

II. Applicant’s COWBOYADE Mark Should Be Refused Registration As a Matter of Law

[T]he purpose of summary judgment is one of judicial economy, namely, to save the time and expense of a useless trial where no genuine issue of material fact remains and more evidence than is already available in connection with the motion for summary judgment could not be reasonably expected to change the result.

Aries Sys. Corp. v. World Book Inc., 23 U.S.P.Q.2d 1742, 1744 (T.T.A.B. 1992). Because Applicant fails to raise any genuine issues of material fact, this case is ripe for judgment as a matter of law. *See Nat’l Football League v. Jasper Alliance Corp. (“Jasper Alliance”)*, 16 U.S.P.Q.2d 1212, 1215 (T.T.A.B. 1990) (granting summary judgment for the opposer where the applicant failed to present any evidence sufficient to raise a genuine issue of material fact).

A. Applicant Failed to Rebut the Strength of the University’s COWBOYS Marks

The University’s COWBOYS Marks are incredibly strong nationwide and particularly in the mid-western United

States.¹ The University owns two federal registrations of its COWBOYS Marks for use in connection with a wide variety of goods and services. *See* Dkt. 8 (Declaration of Kurtis Mason (“Mason Dec.”) ¶ 3, Ex. A). In fact, the University’s federal registration of the mark OSU & Design (Registration No. 1,602,422), a Pistol Pete caricature drawing of the University’s Cowboy mascot (the University’s “Cowboy Mascot”), is incontestable, providing “conclusive evidence” of the mark’s validity and of the University’s ownership and exclusive right to use the mark in commerce. *See, e.g., Park ‘N Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) (finding an incontestable registration is conclusive evidence of the mark’s validity and the registrant’s ownership and exclusive right to use the mark). It is undisputed that the University has strong common law rights in its COWBOYS Marks that predate the filing date of Applicant’s application. Applicant completely ignores these common law rights in its Response Brief, despite the fact that it is well settled that a trademark registration is not required to establish a strong mark or to assert a claim for likelihood of confusion. *See Bd. of Supervisors v. Smack Apparel Co.* (“Smack”), 438 F. Supp. 2d 653, 659 (E.D. La. 2006) (finding universities’ colors to be strong marks based on common law rights only), *aff’d*, 550 F.3d 465, 476-77 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2759 (2009); *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1512-13 (11th Cir. 1984) (finding a trademark registration unnecessary to establish rights in a mark).

The University submitted hundreds of pages of evidence demonstrating the strength of its COWBOYS Marks, including, *inter alia*, substantial sales of licensed products bearing the COWBOYS Marks, unsolicited media references, and marketing and promotional materials. *See* Dkts. 5, 6, 8-9, 17 (Declaration of Michael Drucker (“Drucker Dec.”) ¶¶ 2-3, 6, Ex. A; Mason Dec. ¶¶ 11-15, Exs. B-M; Declaration of Lauren Sullins Ralls (“Ralls Dec.”) ¶ 8, Ex. H). This evidence demonstrates the strength of the COWBOYS Marks as a matter of law. *See Tex. Tech Univ. v. Spiegelberg*, 461 F. Supp. 2d 510, 521 (N.D. Tex. 2006) (finding Texas Tech University’s trademarks extremely strong based on the university’s longstanding use of its trademarks and substantial public recognition of its marks).

In response, Applicant raises three arguments: (1) that the COWBOYS Marks are not “famous”; (2) that the COWBOYS Marks often are used along with other trademarks of the University; and (3) that the promotional materials

¹ Applicant’s application has no geographic or channel-of-trade limitations and thus is presumed to be sold in every geographic region and in every channel of trade. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983) (in the absence of specific limitations in the application and registration, the “normal and usual channels of trade and methods of distribution” are presumed).

and unsolicited media are not relevant to strength of the mark. These arguments are entirely misguided.

First, the University seeks summary judgment of *infringement* (not dilution) and thus need not prove its COWBOYS Marks are famous. *See, e.g., Gilmar S.P.A. v. Mizuno Kabushiki Kaisha*, Opp. No. 91156043, 2008 WL 4572607, at *3 (T.T.A.B. Oct. 10, 2008) (sustaining opposition based on likelihood of confusion and finding opposer's mark to be a strong mark, although not a famous mark). That a mark is not "famous" does not mean it is not strong. *Id.*

Second, the fact that the University's COWBOYS Marks are often used with other University marks *increases* the strength of the marks as a source-identifier of the University's products. *See, e.g., Smack*, 438 F. Supp. 2d at 659 (finding the universities' use of their distinctive color marks in combination with other trademarks of the university only increased the strength of the marks as identifying the universities as the source of the products). In addition, the University has presented evidence of significant sales of University-related products totaling over **\$118 million** dollars *in the past five years alone*. *See* Dkts. 6, 8-9 (Drucker Dec. ¶¶ 2-3, 6, Ex. A; Mason Dec. ¶ 14, Ex. L). And almost all of these products bear the University's COWBOYS Marks. *See* Dkt. 6 (*See* Drucker Dec. ¶ 6). These substantial sales are overwhelming evidence of the strength of the University's COWBOYS Marks. *See, e.g., Smack*, 438 F. Supp. 2d at 658 (finding substantial sales of the universities' goods bearing their color schemes, logos, and designs, and sales evidenced the strength of the universities' marks).

Next, Applicant contends that the promotional materials are not relevant, asserting that they are "intended for a limited audience." Applicant misunderstands the scope of the audience for materials promoting the University's COWBOYS Marks, many of which are distributed publicly on the World Wide Web. *See, e.g.,* Dkts. 8-9 (Mason Dec. ¶ 11, Exs. B, G-I). Moreover, the University's COWBOYS Marks have been widely featured on national television broadcasts, online media available worldwide, and nationally-distributed publications. *See* Dkts. 8-9 (Mason Dec. ¶¶ 9, 12, Ex. J). Applicant also asserts that the University's substantial evidence of unsolicited media references should be discounted because the COWBOYS Marks are "used in connection with 'Oklahoma State.'" On the contrary, use of the COWBOYS Marks in conjunction with the name of the University increases the public's association of the marks with the University. The University's evidence of unsolicited media references thus only serves to highlight the strength of the University's BRONCOS Marks. *See generally Starbucks U.S. Brands LLC v. Ruben*, 78 U.S.P.Q.2d 1741, 1751 (T.T.A.B. 2006) (finding widespread unsolicited media coverage of the opposer's STARBUCKS mark indicative of the strength of the mark).

In short, Applicant presents no evidence rebutting the University's longstanding and substantial use of its

COWBOYS Marks. As such, the marks are strong as a matter of law. *See Kmart of Mich., Inc. v. Millyon Mktg. Concepts*, Opp. No. 91124776, 2005 WL 2451672, at *5 (T.T.A.B. Sept. 16, 2005) (granting summary judgment for the opposer where the applicant “failed to disclose any evidence that points to the existence of a genuine issue of material fact on the issue of likelihood of confusion” and the opposer established there was no genuine issue of material fact for trial).

B. Applicant’s COWBOYADE Mark is Nearly Identical to the University’s COWBOYS Marks

The similarity of the marks is one of the most important elements in the likelihood of confusion analysis. *See, e.g., Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001). On this critical factor, Applicant fails to refute the following undisputed facts:

- The dominant element of Applicant’s mark is the University’s identical COWBOY mark.
- The letter string “ADE” fails to distinguish Applicant’s COWBOYADE mark from the University’s COWBOYS Marks, since “ADE” is merely a generic suffix.
- Applicant’s COWBOYADE mark is unquestionably similar to the University’s COWBOYS Marks in appearance.
- Applicant’s COWBOYADE mark and the University’s COWBOYS Marks are phonetically similar.
- Applicant’s Mark conveys the same meaning as the University’s Marks in that it refers to the University, the University’s athletic teams, and the University’s Cowboy Mascot.

Applicant’s only response is that *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 271 (4th Cir. 2006) suggests the Board should focus on the “actual use” of competing marks in the marketplace. This argument is entirely misplaced, however, because the application here is an *intent-to-use* application and Applicant has never used its mark. *See* Dkts. 14, 17 (Ralls Dec. ¶ 3, Ex. B, Ex. E at pp. 13-14 (Applicant’s Interrogatory Responses Nos. 10 and 12)). A comparison of the actual use of the marks is thus impossible.

Similarly odd is Applicant’s argument that confusion is unlikely because the University uses its COWBOYS Marks, at times, with other trademarks or indicia of the University, including its color scheme and COWBOY designs. The fact that the COWBOYS Marks are associated strongly with the University and its other trademarks only *adds* to the substantial likelihood of confusion. *See, e.g., Smack*, 438 F. Supp. 2d at 659 (E.D. La. 2006), *aff’d*, 550 F.3d 465, 476-77 (5th Cir. 2008); *Tex. Tech*, 461 F. Supp. 2d at 520-21. It is worth noting that Applicant has introduced no evidence regarding how it intends to use the COWBOYADE mark; and because the pending application contains no limitations on

color, the Board must presume that it would appear in any color—including the colors of the University. *See, e.g., Youngstown Sheet and Tube Co. v. Missouri Rolling Mill Corp.*, 133 U.S.P.Q. 661 (T.T.A.B. 1962) (finding the applicant’s application contained no limitations on color and, therefore, the mark was presumed to appear in any possible combination of colors).

C. Applicant’s Goods are Nearly Identical to the University’s Goods

Applicant intends to use the COWBOYADE mark on goods—namely sports drinks—that are nearly identical or closely related to goods sold under the University’s COWBOYS Marks. Applicant’s plea that the goods are distinguishable is unsupported by the evidence and ignores controlling law.

To be clear, the University does not need to own a *registration* for drinks or juices in Class 32 or to be a *manufacturer* of food and drink products to acquire trademark rights in these goods. *See, e.g., McDonald’s Corp. v. McClain*, 37 U.S.P.Q.2d 1274, 1275 (T.T.A.B. 1995) (sustaining opposition brought by opposer who is not a producer of food products, but operates, licenses, and services a worldwide system of restaurants); *Varela Hermanos, S.A. v. EGD Bus. Solutions, Inc.*, Opp. No. 91152633, 2006 WL 2645214, at *7 (T.T.A.B. Sept. 6, 2006) (sustaining opposition based on opposer’s common law rights). The University has proffered ample evidence, including affidavits from its licensing agent and its Trademark and Licensing Administrator, that it uses its COWBOYS Marks in connection with food and beverage products. *See* Dkts. 6, 8-9 (Drucker Dec. ¶¶ 2-3, Ex. A; Mason Dec. ¶ 14, Ex. L). Specifically, the University has used its COWBOYS Marks on a variety of food and beverages, including: vitamin-enriched energy drinks, soft drinks, coffee, bottled water, lollipops, various sauces and seasonings, and tortilla chips. *See* Dkts. 6, 8-9 (Drucker Dec. ¶¶ 2-3, Ex. A at pp. 1-4; Mason Dec. ¶ 14, Ex. L at pp. 1-13). Moreover, the University’s Trademark and Licensing Administrator has attested that food products are sold daily on the University’s campus and at University events in close association with the University’s COWBOYS Marks, including through OSU COWBOY DINING, which provides food and beverage service to the Club and Suite levels of the University’s football stadium and to the University’s Athletic Department for special events. *See* Dkts. 8-9 (Mason ¶ 15, Ex. M). These facts are undisputed.

Applicant attempts to draw a bright line between sports drinks and other beverages, but fails (i) to present any evidence that the market recognizes such a distinction or (ii) to cite even a single case that suggests such products are not similar. In fact, the Board has found similar beverage products, like the products here, to be nearly identical and likely to cause confusion. *See, e.g., The Coca-Cola Co. v. Country Club Indus. Corp.*, Opp. No. 102,216, 1998 WL 887261, at *2 (T.T.A.B. Dec. 17, 1998) (finding sports drinks and bottled water to be similar such that confusion is likely).

Applicant's attempt to challenge the proportionality of food and beverage products compared to the total number of licensed designs also clearly misses the mark. First, the University's licensed retail sales figures (which exceeded \$118 million dollars in the past five years) include sales of food and beverage-related products bearing the University's Marks. *See* Dkts. 6, 8-9 (Drucker Dec. ¶¶ 2-3, Ex. A at pp. 1-4; Mason Dec. ¶ 14, Ex. L at pp. 1-13). Second, the licensed products submitted by the University are *representative samples* of its licensed products. Applicant's attempt to extrapolate figures from these representative examples cannot rebut the undisputed fact that the University has used its marks in connection with food and beverages and that the parties' products are nearly identical.

Finally, it is well-established that the relevant inquiry here is whether the relatedness of the goods – which need not be identical – is likely to lead purchasers into assuming a common source. *See Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 1013 (C.C.P.A. 1979). The undisputed fact that the University has, for decades, used its COWBOYS Marks on a wide variety of goods and services only increases the relatedness of the goods in the minds of purchasers. *See, e.g., L.C. Licensing Inc. v. Berman*, 86 U.S.P.Q.2d 1883, 1889-90 (T.T.A.B. 2008) (finding similarity of the goods where the opposer's licensing of its marks in connection with a broad range of urban lifestyle clothing and accessories increased the likelihood that the purchasing public would believe that the applicant's customized automotive accessories originated or were sponsored by the opposer).

The Board has noted: "It is common knowledge, and a fact which we can take judicial notice, that the licensing of commercial trademarks on 'collateral products' has become a part of everyday life." *Id.* Consumers encountering Applicant's sports drinks and the University's wide variety of licensed merchandise, which includes beverages, snack items, candies, athletic T-shirts, athletic jerseys, athletic commemorative drink cups, sports water bottles, and related sports-themed glassware, likely would be confused as to the source of Applicant's products bearing the COWBOYADE mark because, at a minimum, they are collateral products which appeal to the same customer for use together with the University's products. *See, e.g., In Re Endeavors, Inc.*, Serial No. 78418326, 2007 WL 2972206, at *6 (T.T.A.B. Sept. 11, 2007) (finding similarity of the goods where applicant's personal care products, candles, and hand wash are complementary to opposer's dispenser, holder, and container products because they can be used together and appeal to the same consumers).

D. Applicant's Channels of Trade and Customers are Identical

Despite Applicant's statements that it has established trade channels and targeted K-12 schools and pre-K markets in the past, Applicant's recitation of goods in its application does not limit the goods to these particular channels of trade.

“[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268 (Fed. Cir. 2002). Applicant admitted that it intends to sell the COWBOYADE sports drinks to fans and alumni of the University. *See* Dkt. 14 (Ralls Dec., Ex. G at pp. 15, 22 (Deposition of Franco Harris (“Harris Dep.”) 41:8-14, 61:10-14)). This fact alone is enough for the Board to find the channels of trade are identical.

Applicant cannot create a genuine issue of material fact simply by contradicting its own prior deposition testimony. *See Kabbalah Ctr. Int’l, Inc. v. Kabbalah Diet, L.L.C.*, Opp. No. 91171862, 2009 WL 1017286, at *4 (T.T.A.B. Mar. 25, 2009) (finding that a witness’s declaration which contradicted his prior deposition testimony failed to raise a genuine issue of material fact). Rather, Applicant’s deposition testimony confirms that the channels of trade are identical. [REDACTED]

[REDACTED] *See* Dkt. 14 (Ralls Dec., Ex. G at pp. 3, 10 (Harris Dep. 8:9-17; 33:4-11)). [REDACTED]

[REDACTED] *See* Dkt. 14 (Ralls Dec., Ex. G at pp. 8, 10, 15, 22 (Harris Dep. 8:9-17; 33:4-11, 41:8-14, 61:10-14)).

Applicant’s unsupported allegation that the University is precluded from selling sports drinks on the University’s campus, even if true, fails to raise a genuine dispute of material fact. Not only has Applicant failed to cite a single case in support of this proposition, even if it had, the Board has found that contractual or legal limitations of particular conditions of sale do not preclude confusion. *See, e.g., In re Rola Weinbrenneri Und Likorfabrik GmbH & Co.*, 223 U.S.P.Q. 57, 59 n.1 (T.T.A.B. 1984) (despite legal limitations on the sale of alcohol that forecloses certain markets such as minors, the parties’ channels of trade were identical given the absence of any such limitation in the applicant’s descriptions of goods and the fact that alcoholic and soft drinks, traveling in their respective channels of trade, would reach adults).

Accordingly, the existence of any sports drinks contract, if one exists, would not serve to preclude consumer confusion where the Applicant’s application, as here, contains no limitation on the channel of trade.

E. Absent Evidence of Use, Alleged Co-Existing Registrations Are Entitled to Limited Weight

Applicant’s mere trademark search of registrations incorporating the term “COWBOYS”—absent any evidence of third party use or that the listed marks have been the subject of more than *de minimis* advertising or sales—fails to raise any genuine issue of material fact.

It is well-established that a mere trademark search report (such as the one proffered by Applicant) has no probative value standing alone. *See, e.g., Centraz Indus. Inc. v. Spartan Chem. Co., Inc.*, 77 U.S.P.Q.2d 1698, 1701 (T.T.A.B. 2006) (“trademark search report is not credible evidence of the third-party uses or registrations listed in the report”); *Jasper Alliance*, 16 U.S.P.Q.2d at 215 n.3 (“it is well settled that a search report does not constitute evidence of the existence of a registration or use of a mark”). The burden to present any evidence of third-party use is on the Applicant. *See, e.g., Charles Schwab & Co. v. The Hibernia Bank*, 665 F. Supp. 800, 806 (N.D. Cal. 1987) (“The defendant has the burden of showing how extensive the [third party] uses are and how long they have continued.”). Despite Applicant’s burden to present such evidence, Applicant has not offered any evidence of the *extent* of third-party use and customer awareness of the listed marks.² *See, e.g., Sunenblick v. Harrell*, 895 F. Supp. 616, 627 (S.D.N.Y. 1995), *aff’d*, 101 F.3d 684 (2d Cir. 1996) (“third-party trademarks [are] significant not by virtue of their mere existence but upon proof of their usage and customer awareness of such marks.”). Accordingly, Applicant’s only evidence of record – a mere trademark search – has no probative value and fails to raise a genuine issue of material fact. *See, e.g., Miss Universe*, 212 U.S.P.Q. at 429 (finding a list of third-party uses had no evidentiary value other than showing that a certain mark is popular among potential infringers).

F. Applicant Concedes the Goods are Inexpensive and Consumers will be Confused Regardless of Whether They See an Officially Licensed Tag at the Time of Sale

Applicant does not contest that sports drinks are inexpensive goods. Applicant argues instead—without any evidence—that purchasers are sophisticated because they prefer officially licensed product and may look for an “officially licensed” tag when purchasing University products. This argument fails for three reasons. First, the absence of any record evidence supporting this argument renders it incapable of raising a genuine issue of disputed fact. *See Impact*

² Applicant’s assertion that other schools use “Cowboy” as a mascot is likewise of “little probative value,” as Applicant has not demonstrated the extent of such uses, their geographic scope, or, most importantly, whether and the extent to which relevant consumers are even aware of these other entities. *See Miss Universe, Inc. v. Little Miss U.S.A., Inc.*, 212 U.S.P.Q. 425, 429-30 (N.D. Ga. 1981). Moreover, the mere fact that there are other schools that use the term “cowboy” does not preclude a finding that the University’s COWBOYS Marks are strong marks. *See Chicago Bears Football Club, Inc. v. 12th Man/Tenn. LLC*, 83 U.S.P.Q.2d 1073, 1081-82 (T.T.A.B. 2007) (“Obviously, the word ‘Bear’ is not a unique term in the United States and it is not surprising that the term has been associated with other sports teams. This, however, does not result in opposers’ marks being entitled to only a limited scope of protection.”).

Sports, Inc. v. Impact Sports Techs., Inc., Opp. No. 91178693, 2008 WL 3917510, at *5 (T.T.A.B. Aug. 13, 2008) (granting summary judgment for the opposer where it presented uncontradicted evidence of a likelihood of confusion and the applicant failed to introduce “any evidence whatsoever” which would raise a genuine issue of material fact). Second, the Board has held that drinks, such as soft drinks, protein drinks, and alcoholic drinks, are the “subjects of impulse purchases.” *In re All Am. Beverage Inc.*, Serial No. 75/235,920, 1999 WL 1062810, at *1 (T.T.A.B. Nov. 17, 1999). Third, even assuming the officially licensed product tag is visible at the point-of-sale, confusion occurring prior to the sale or in the post-sale environment is sufficient to sustain the opposition.

Section 2(d) of the Trademark Act does not make a distinction between confusion arising at an early stage in the purchasing process and confusion arising at a later stage. Registration should be denied under the Trademark Act when there exists likelihood of confusion, no matter where it occurs in the marketing or sale of similar goods under similar marks.

Hrl Assocs. Inc. v. Weiss Assocs. Inc., 12 U.S.P.Q.2d 1819, 1822 (T.T.A.B. 1989) (finding initial interest confusion even though purchasers at the point of sale may not be confused). Likelihood of confusion can occur before and after the point-of-sale among unsophisticated purchasers where tags and other packaging has been removed.

G. Applicant’s Bad Faith Intent to Trade on the University’s Goodwill Remains Unrebutted

Applicant has failed to rebut the University’s evidence that Applicant intended to trade upon the goodwill associated with collegiate mascots and marks, including the University’s Cowboy Mascot and COWBOYS Marks.

First, Applicant’s assertion that it filed its trademark applications for the disputed marks, including the COWBOYADE mark, because they were “commonplace names, places, and nationalities” is disingenuous at best. *See* Dkt. 11 (Response Brief at pp. 1, 5).³ Without a doubt, Applicant had numerous non-infringing options to choose from if it truly wished to have marks incorporating “commonplace names, places, and nationalities.” A simple glance at Applicant’s applications clearly shows an intentional, bad-faith effort to usurp college mascots and nicknames. *See* Dkts. 14, 17 (Ralls Dec. ¶ 3, Ex. A).

Despite contending that the University’s well-known Cowboy Mascot is “commonplace,” Applicant has failed to introduce any evidence that Applicant was aware of any alleged cowboy mascots other than the University’s iconic Cowboy Mascot prior to its adoption of the COWBOYADE mark. In fact, the undisputed evidence shows that Applicant was well-aware of the University’s COWBOYS Marks prior to its adoption of the COWBOYADE mark and that

³ [REDACTED] *See* Dkt. 14 (Ralls Dec., Ex. G at pp. 8-9 (Harris Dep. at 31:13-32:11)).

Applicant adopted its infringing mark, in part, because of the University's COWBOYS Marks. See Dkt. 14 (Ralls Dec. Ex. G at pp. 21, 22 (Harris Dep. 60:9-14, 61:10-14)). Wrongful intent can be inferred where, as here, "the junior user knew of the senior user's closely similar mark used on similar goods or services, had freedom to choose any mark, and 'just happened' to choose a mark confusingly similar to plaintiff's mark." 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 23:115 (4th ed. 2009); see also *Paddington Corp. v. Attiki Importers & Distribs., Inc.*, 996 F.2d 577, 586 (2d Cir. 1993) ("Where a second-comer acts in bad faith and intentionally copies a trademark or trade dress, a presumption arises that the copier has succeeded in causing confusion. . . .").

In addition, Applicant concedes that it desires to expand on the success of its LIONADE product, which was named after Pennsylvania State University's Nittany Lions Mascot. See Dkts. 11, 14 (Response Brief at p. 4; Ralls Dec. Ex. G at pp. 2, 4 (Harris Dep. 6:7-13; 24:12-14)). Applicant also admits that its LIONADE product was developed with the permission of Pennsylvania State University and even developed color labels featuring Pennsylvania State University's Blue-and-White Color Scheme for the product. See Dkts. 11, 14 (Response Brief at p. 4; Ralls Dec. Ex. G at pp. 11-12 (Harris Dep. 35:11-36:1)). Applicant has introduced no evidence regarding how it intends to use the COWBOYADE mark and whether it would differ at all from the manner in which the LIONADE mark was adopted, marketed, and sold. And, as noted above, the application for COWBOYADE contains no limitations on color, appearance, channels of trade, or the like.

It remains undisputed that Applicant intends to use the COWBOYADE mark to trade upon the goodwill associated with iconic collegiate mascots and nicknames, including the University's Cowboy Mascot. Applicant should not be allowed to reap the benefits of what it has not sown. See *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.*, 123 F.2d 582 (5th Cir. 1941), *cert. denied*, 315 U.S. 824 (1942).

III. CONCLUSION

For the foregoing reasons, the University respectfully requests the Board grant its motion for summary judgment.

Dated: May 20, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY IN SUPPORT OF OPPOSER’S MOTION FOR SUMMARY JUDGMENT was served on counsel for Applicant on May 20, 2010 via first class mail to:

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/s/Allison M. Scott

Allison M. Scott
Attorney for Opposer

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing REPLY IN SUPPORT OF OPPOSER’S MOTION FOR SUMMARY JUDGMENT is being filed electronically with the TTAB via ESTTA on this day, May 20, 2010.

/s/Allison M. Scott

Allison M. Scott
Attorney for Opposer