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

Proceeding	92042082
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
FOUR SEASONS DAIRY, INC.,
Petitioner,

v.

INTERNATIONAL GOLD STAR
TRADING CORP.,
Registrant.

Cancellation No. 92/042,082

I hereby certify that the redacted version of this
correspondence is being filed with the TTAB electronically on
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Roger S. Thompson
Name of Registrant, assignee or Representative
Signature
April 30, 2010
Date of Signature



REGISTRANT'S TRIAL BRIEF

[REDACTED]

[TRADE SECRET/COMMERCIALY SENSITIVE]

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I PRELIMINARY STATEMENT

This cancellation proceeding is an attempt by a competitor with a demonstrated history of copying the products and packaging of the registrant, Gold Star International Trading Corp. ("Gold Star"), as well as the products of others, to appropriate Gold Star's widely recognized trademark BABUSHKA'S RECIPE. The evidence will establish that Gold Star, though its vice-president, Galina Pincow, conceived of the mark-at-issue, BABUSHKA'S RECIPE, in late 1997 and brought products to the marketplace under that mark in early 1998, well before petitioner, Four Seasons Dairy, Inc. ("Four Seasons"), brought products under its alleged mark, BABUSHKINO, to market. Four Seasons came into existence in January of 1999, and so could not have used the mark any earlier than that. Four Seasons claims, however, without proof or testimony to support it, that it is entitled to tack on a period of priority of use back to 1996 from a predecessor company, A&O Corp. Even if Four Seasons is entitled to tack on some use, however, the earliest documented use of the BABUSHKINO mark was well after Gold Star began use of the BABUSHKA'S RECIPE mark in interstate commerce.

II SUMMARY OF REGISTRANT'S CASE

Gold Star called the following witnesses during its trial period.

Galina Pincow is vice-president of Gold Star (G. Pincow v 1, page 4, line 20-page 5, line 4.¹). She testified that she conceived of the mark BABUSHKA'S RECIPE for use on dairy products in late 1997, that she shepherded products bearing that mark to the marketplace in early 1998, and that the mark has been and continues to be, used by Gold Star on and in connection with dairy products.

Robert Pincow is the President of Gold Star (R. Pincow page 4, lines 8-18). He testified about the operations of Gold Star and its use of the BABUSHKA'S RECIPE mark.

Irina Lubenskaya is a graphic designer (Lubenskaya page 5, lines 4-15). She testified that she personally created the graphical components of the label for the BABUSHKA'S RECIPE products on her computer beginning in late 1997 and continuing until early 1998, when the label was finalized. She further testified that Galina Pincow was the individual who brought the BABUSHKA'S RECIPE concept to her.

Daniel Bartolomeo is the owner of Gem Printing (Bartolomeo page 4, lines 20-24). He testified that Gem, and its predecessor, printed labels bearing the mark BABUSHKA'S RECIPE for Gold Star beginning in April of 1998.

Lewis "Butch" Miller is an Executive Vice-President of Queensboro Farm Products, Inc. (Miller page 6, lines 15-22). He testified that Queensboro supplies dairy products, including farmer's cheese, to Gold Star, and that Queensboro supplied farmer's

¹ References to Trial Depositions are made by reference to the deponents' surname, followed by the page and line numbers to which the Board's attention is directed. For Galina and Robert Pincow, both give initial and surname is provided, and for Galina Pincow's testimony the volume is identified as "V ___".

cheese to Gold Star that was sold under the BABUSHKA'S RECIPE brand beginning in 1998.

Lisa Troyer is the Vice-President of sales for Bunker Hill Cheese Company (Troyer page 5, lines 15-24), and has held that position since 1987 (Troyer page 6, lines 8-13). Ms. Troyer testified that Bunker Hill has been supplying yogurt cheese sold by Gold Star under the BABUSHKA'S RECIPE mark since 1998.

Jacob Krumgalz is the warehouse manager at Gold Star (Krumgalz page 4, line 24 – page 5, line 9). He testified that he has personally observed Gold Star's sales of BABUSHKA'S RECIPE dairy products since he started with the company in June of 1998.

Vladimir Krasnov is the owner of V.M. Food Service Corp. d/b/a New York International, a customer of Gold Star who has ordered dairy products each week from Gold Star since the business was started in 1995 (Krasnov page 4, line 22 – page 7, line 2). He testified that he has been buying BABUSHKA'S RECIPE dairy products from Gold Star on a weekly basis since Gold Star first started selling such products in 1998.

Oleg Kesler is the president of Four Seasons (Kesler page 5, lines 2-4). He has been the president since Four Seasons was incorporated in January of 1999 (Page 5, lines 5-9). He is also a majority shareholder (Kesler page 5, lines 13-19). Mr. Bekker is the only other shareholder (Kesler page 5, lines 13-22). Mr. Kesler testified that he came up with the name BABUSHKINO after seeing a product illegally offered for sale at a Russian store in Brooklyn named Yuzhni.

Alexander Bekker is a vice-president and minority shareholder of Four Seasons (Bekker page 4, line 20 – page 5, line 12).

Dmitry Lerner was formerly a partner in the Russian store known as “Yuzhni”, (Lerner page 4, line 24 – page 5, line 6). He contradicted certain aspects of Mr. Kesler’s testimony. More specifically, he testified that Yuzhni never sold any illegally imported products, but did buy products from Gold Star.

Igor Nagranichny, is the former owner of a business called Roman & Sons (Zagranichny, page 11, lines 2-4), which did business with Beluga Caviar, an alleged customer of Four Seasons (Zagranichny page 4, line 23 – page 6, line 17). He contradicted certain testimony of one of Four Seasons’ witnesses, Arkadiy Goleb, that Mr. Golub was a “manager” of Beluga Caviar.

Gold Star also filed a Notice of reliance identifying the following four trademark registrations:

1. United States Trademark Registration No. 1,631,762, registered January 15, 1991 for the mark LAPPI;
2. United States Trademark Registration No. 2,107,774, registered October 21, 1997 for the design mark shown therein;
3. United States Trademark Registration No. 2,760,438, registered September 2, 2003 for the mark SALZBERG;
4. United States Trademark Registration No. 3,080,997, registered April 11, 2006 for the mark YOGURT CULTURED;

The four registrations are third-party trademark registrations that, Gold Star contends, are infringed by Four Seasons as part of its pattern of copying products sold by Gold Star, including products sold under the mark at issue herein, BABUSHKA’S RECIPE.

III ISSUES PRESENTED

A. Responses to Petitioner's Statement of the Issues

1. There is no issue as to the likelihood of confusion between Gold Star's registered mark BABUSKHKA'S RECIPE and Four Seasons' later-adopted mark BABUSHKINO. Gold Star agrees that Four Season's mark is likely to be confused with Gold Star's registered mark.

2. Gold Star has established usage of BABUSHKA'S RECIPE prior to Four Season's first use of BABUSHKINO (*see*, Registrant's Counter-Statement No. 1, *infra*).

3. There is no issue as to the supposed fraud because there is no proof that a) Four Seasons had prior use and b), if it did, that Gold Star was aware of such use.

B. Registrant's Counter-Statement of the Issues

1. Whether Gold Star was the first to use a mark in commerce that included the term BABUSHKA or any similar term in connection with dairy products sold to the expatriate Russian community in the United States.

2. Whether Four Seasons has established any right to "tack on" priority of use as to any mark including the term BABUSHKINO from any date prior to Four Seasons' incorporation.

IV FACTS

A. The Parties

Registrant, Gold Star International Trading Corp. ("Gold Star") is a purveyor of foods, especially imported foods for the ethnic market, most especially the Eastern

European expatriate market. (Robert Pincow, page 5, lines 13-23). Petitioner, Four Seasons Dairy Products, Inc. (“Four Seasons”) sells to the same market (Robert Pincow, p. 12 lines 15-25; Bekker page 5, lines 22-25). Four Seasons was incorporated on or about January 4, 1999. (Four Seasons Trial Brief p. 9).

B. Development of the BABUSHKA’S RECIPE Mark by Gold Star

Galina Pincow, is currently the vice-president of Gold Star, and has been since 2002 or 2003 (G. Pincow v 1, page 4, line 20 - page 5, line 4.). Prior to becoming vice-president, Ms. Pincow was employed by Gold Star as the General Manager. (G. Pincow v 1, page 5, line 25 – page 6, line 22) and is the person at Gold Star responsible for sales of dairy products (R. Pincow, p. 12, lines 8-11; G. Pincow v 1, page 5 line 15 - 24). She is also responsible for Gold Star’s catalogs (R. Pincow, page 20, lines 3-7), and for securing the labels used on dairy products (R. Pincow, page 37, lines 9 – 15). She is also in charge of financing, marketing operations, sales, hiring and bookkeeping (G. Pincow, v 1, page 6, lines 13-19).

In 1996, Ms. Pincow was looking for a product name for a new line of products for her target market, and wanted a name that would appeal to both Americans and Russians nostalgic for their home country. She recognized that BABUSHKA, meaning grandmother or “granny” (R. Pincow, page 23, line 25 – page 24, line 9), was a term that made Russians nostalgic and yet was known and accepted by Americans. (G. Pincow, v 1, page 7, line 3 – page 8, line 4). She decided that dairy products, specifically farmer cheese or butter, were the products on which Gold Star should start with this new product

line. (G. Pincow v 1, page 8, lines 9-18.). She then began to work on developing the product and packaging.

In early 1997, Galina Pincow and Irina Lubenskaya, a graphic designer hired by Gold Star, were engaged in a brainstorming session on the BABUSHKA'S RECIPE packaging (Lubenskaya, page 5, lines 16 – page 6, line 14; Exhibit 207; G. Pincow v. 1, page 10, line 20-23). As with other marks developed by Ms. Pincow, Ms. Pincow conceived of the name and brought Ms. Lubenskaya in to discuss how to place the concept into the form in which it would appear on packaging (G. Pincow v. 1, page 10, lines 12 – 19). This is a process which takes some time (Lubenskaya page 6, lines 5-14), and culminated in a series of computer files dated between July 27, 1997 and December 30, 1997 (Lubenskaya page 6, lines 5-14; exhibit 207; G. Pincow v 1, page 11, line 12 – page 12, line 2). The files eventually included a series of colored layers (Lubenskaya page 8, lines 2-12; Exhibit 206; G. Pincow v. 1, page 12, line 20 – page 13, line 21).

One of the first dairy products sold by Gold Star bearing the BABUSHKA'S RECIPE mark was farmer's cheese, which was manufactured for Gold Star by Queensboro Farm Products, Inc. Queensboro started selling dairy products to Gold Star in 1996 (Miller page 7, line 22 – page 8, line 21; Exhibit 136). Exhibit 136 is a printout of Queensboro's computer records, showing that the "Beginning Date" of the account was August 23, 1996. (Miller page 10, lines 11-14). One of the first products sold by Queensboro to Gold Star was farmer's cheese. (Miller page 11, lines 12-17). Prior to the sales of farmer's cheese to Gold Star, Queensboro had never sold farmer cheese to anyone else, because it had not had the necessary equipment to make that cheese. Gold Star supplied that equipment to Queensboro. (Miller page 11, line 21 – page 12, line

14). Queensboro supplied the farmer cheese to Gold Star at first was a simple Gold star" label, but then shipped the product unlabelled beginning sometime in 1998. (Miller page 14, lines 8-21). Gold Star applied self-printed labels to the unlabelled farmer's cheese. (Exhibit 119).

After Ms. Lubenskaya created the computer files of the artwork, the next step in the process was getting the actual color labels printed. Gold Star's printer at the time was Jes Printing (G. Pincow, v 1, page 16, lines 9-18). Jes was subsequently succeeded by Gem Printing which maintained the records of Jes (G. Pincow v 1, page 16, line 25 - page 17, line 4; Exhibit 206). Gem's principal is Dan Bartolomeo (G. Pincow, v. 1, page 17, lines 5-7). The first BABUSHKA'S RECIPE products for which Jes made labels was a yogurt cheese, and Jes printed a first run of 7000 labels for BABUSHKA'S RECIPE yogurt cheese on or about April 7, 1998 (exhibit 206). Gold Star contracted with Bunker Hill Cheese Company (d/b/a Heini's cheese; Troyer page 25, lines 15-22) to supply Havarti yogurt cheese that would be sold under the BABUSHKA'S RECIPE name (G. Pincow v 1, page 20, lines 5 - page 21, line 13). Galina Pincow brought the BABUSHKA'S RECIPE mark to Bunker Hill (Troyer page 17, lines 7-15). Bunker Hill sold to Gold Star the Havarti yogurt cheese that Gold Star sold under the mark BABUSHKA'S RECIPE (Troyer page 11, line 24 - page 12, line 9; page 13, lines 2-5) beginning in 1998 (Troyer page 50, line 24 - page 51, line 4).

Bunker Hill employees physically applied the BABUSHKA'S RECIPE labels to the products they manufactured for Gold Star, and Bunker Hill then shipped those products to Gold Star (Troyer page 13, lines 6-24). The BABUSHKA'S RECIPE labels applied by Bunker Hill to the products shipped to Gold Star looked like the labels shown

in Exhibit 102 – namely having a picture of a grandmother, and bearing the BABUSHKA’S RECIPE mark in two languages (Troyer page 13, line 25 – page 15, line 2).

BABUSHKA’S RECIPE products manufactured for Gold Star by Bunker Hill, bearing labels printed by Jes/Gem, were sold by Gold Star beginning in April 1998, and were, and remain, one of the most popular items Gold Star has in its product line (G. Pincow v. 1, page 24, lines 6-13). Every “meaningful” customer of Gold Star purchases BABUSHKA’S RECIPE dairy products from Gold Star (G. Pincow, v. 1, page 25, lines 16-21).

Gold Star has continuously sold farmer cheese under the BABUSHKA’S RECIPE mark since 1998 (G. Pincow v 1, page 51, lines 4-13), and is now ordering about one hundred cases of three pound product each week (G. Pincow v 1, page 27 line 19 – 28, line 15). The label used since 1999-2000 is shown as Exhibit 117 (G. Pincow v 1, page 28, line 24 – page 29, line 13). Gold Star has catalogs from the 1999-2000 time frame in which BABUSHKA’S RECIPE products are advertised. (G. Pincow v 1, page 29, line 24 – page 32, line 4; Registrant’s Exhibit 4; Exhibit 121).

Joseph Krumgalz joined Gold Star June 22, 1998 as a general manager responsible for receiving products (G. Pincow v 1, page 70, line 2 - page 72, line 20, page 73, line 23 – page 74, line 11; Exhibit 126). He testified that he has seen BABUSHKA’S RECIPE dairy products sold by Gold Star on a continuous basis since he joined Gold Star, and that he personally supervises the application of BABUSHKA’S RECIPE labels that Gold Star prints to products shipped by Gold Star. (Krumgalz, page 11, lines 10-19).

Gold Star has identified an invoice dated December 18, 1998 to a customer, New York International Store in Southfield, Michigan as an early sale of the BABUSHKA RECIPE products (G. Pincow v. 1, page 33, line 7 – page 34, line 17; exhibit 115). Other invoices show usage shortly after that date (G. Pincow v 1, page 37, line 16 – page 39, line 8; Exhibit 116). Those invoices refer to the BABUSHKA’S RECIPE dairy products as “Granny’s recipe” products.

New York International is one of Gold Star’s largest and longest-tenured clients and has been buying BABUSHKA’S RECIPE products, including farmer cheese and yogurt cheese since 1998 (Krasnov page 7, lines 7-24). The earliest invoice to New York International uncovered is found in Exhibit 115, which is an invoice from December 1998, showing the sale of “Granny’s recipe” cheese. Mr. Kraznov recognizes that reference as referring to BABUSHKA’S RECIPE cheese (Krasnov page 8, line 19 – page 9, line 14). The products New York International buys that are called “Granny’s recipe” on the invoice bear the BABUSHKA’S RECIPE label when received from Gold Star (Krasnov page 9, line 22 – page 10, line 11). Exhibit 102 is a label for Havarti yogurt cheese, and it is identical to the labels used on products New York International has bought from Gold Star since 1998, and had shipped to New York International in Michigan (Krasnov page 10, line 12 – page 12, line 23; page 17, lines 13-19). When ordering products from Gold Star, Mr. Krasnov would order products by name, *e.g.*, “BABUSHKA’S RECIPE” (Krasnov page 19, lines 15-25).

Gold Star’s ships products nearly every week to New York International, and has shipped BABUSHKA’S RECIPE dairy products to New York International, since at least as early as December 18, 1998 (Krumgalz page 14, line 18 - page 16, line 13; Exhibits

115 and 116). Exhibit 117 shows the label that was in use in 1998. (Krumgalz page 20, lines 10-25).

Gold Star has produced sales sheets from the 1999-2000 time frame showing the sales of BABUSHKA'S RECIPE dairy products (G. Pincow v 1, page 55, line 14 – page 57, line 20; Exhibits 208 and 209). Gold Star has produced other invoices in January 1999 for BABUSHKA'S RECIPE dairy products (G. Pincow v 1, page 58, line 2 – page 61, line 4). Gold Star has sold dairy products bearing the BABUSHKA'S RECIPE mark every month between 2001 and to at least the date of Ms. Pincow's deposition (G. Pincow v 1, page 62 – page 63, line 7, 64, line 3 – page 65, line 19; page 67 lines 7-20; Exhibit 125). Gold Star's sales of BABUSHKA'S RECIPE dairy products have exceeded [REDACTED] units between 2001 and May 2007 (Exhibits 125, 126).

C. Four Seasons' Pattern of Copying of the Products of Others

Mr. Bekker, Four Seasons' vice-president, testified that he had seen the name BABUSHKINO applied to a butter product before using it in the sale of Four Seasons' products. The product bearing that name was supposedly available in Yuzhini, a store in Brooklyn (Petitioner's Bekker page 144, line 22 – page 146, line 3). That product was supposed "illegal" as improperly labeled. (Petitioner's Bekker page 145, line 24 – page 145, line 3).

While Mr. Bekker stated that the BABUSKINO product he saw at Yuzhini was illegally sold in the United States without proper labeling, Mr. Lerner, a principal of Yuzhini (page 4, line 24 – page 5, line 6), testified that Yuzhini sold no illegally marked products (Lerner page 5, lines 7-22). Mr. Bekker said he had the wrapper for that

product, was asked to produce it, but never did. (Petitioner's Bekker 145, line 22 – page 146, line 5).

Mr. Kesler testified that he had seen BABUSHKA products developed by someone else in Ukraine after 1993 (Kesler page 10, lines 21-25). Mr. Bekker said the same (Bekker page 11, lines 8-22).

Thus, both principals of Four Seasons admit that they did not originate the name BABUSHKINO for dairy products, although they have offered differing stories on how they did, in fact, come up with it. Perhaps this is not surprising, since Mr. Sheikhet testified that it was *his* idea to use a picture of a grandmother (he suggested a picture of his wife) (Sheikhet page 9, lines 9-22).

All that is certain is that Four Seasons admits that it got the idea from somebody else.

This is consistent with other Four Seasons' conduct with respect to other marks, for example:

Bunker Hill sells an Amish Valley Colby cheese under a label with a horse and buggy on it (Troyer page 27, lines 2-16; Exhibit 106). Four Seasons sold a product with a similar label (Troyer page 29, line 18 – page 31, line 10; Exhibits 104, 105; Troyer page 44, lines 8-14, page 44, line 22 – page 45, line 6; Exhibit 112; Exhibit 110).

Bunker Hill also has a registration for YOGURT CULTURED, Reg. No. 3,080,997 (Exh. 201, Notice of Reliance). Four Seasons sells a product using the term YOGURT CULTURED (Exhibit 105).

Four Seasons sells other products that are copies of Gold Star products (G. Pincow v 1, page 77, line 16 – page 80, line 24; Exhibits 110, 111, 112, 127). Gold Star

sells OLD SALZBERG brand cheese (G. Pincow v 2, page 96, line 11 – page 97, line 20; exhibit 203; Troyer page 44, lines 15-21; Exhibit 111). Four Seasons sells a product called “New Salzburg”(Bekker page 21, line 18 – page 22, line 3; Exhibit 111). Mr. Bekker was one of the people who selected the label as Exhibit 111 (Bekker page 24, lines 2-4). Before choosing the label (Exhibit 111) it applied to cheese, Four Seasons undertook no search to see if anyone had rights to the name (Bekker page 24, lines 5-10).

Gold Star sells a product with the registered trademark of LAPPI (G. Pincow v 2, page 97, lines 21-22, page 98, line 14 – page 99, line 19; exhibit 131). Mr. Bekker admits that Four Seasons sells a product called “Amish Lappi” cheese (Bekker page 55, lines 9-22; Exhibit 127). Mr. Bekker admitted that he had previously sold cheese bearing the mark LAPPI since the 1990’s (Bekker page 57, line 19 – page 58, line 18; Exhibit 131).

These illustrations are not offered as a basis for an infringement claim against Four Seasons, or for a claim of unfair competition, either of which would be improper in this forum. Rather, these other instances of Four Seasons’ product copying are offered pursuant to Fed.R.Evid. 406 to establish the routine practice of Four Seasons to take ideas for its product line from products successfully sold by others, particularly Gold Star. With that background, it is submitted that Four Season’s claims of prior use of the mark BABUSHINO should be viewed with some care.

Before this proceeding was commenced, Gold Star contacted Four Seasons and asked the principals thereof to cease using the BABUSHKINO name (R. Pincow page 16, line 3 – 18, line 5). Four Seasons did not stop.

The principals of Four Seasons also admitted that they had had prior dealings with Gold Star while at a prior business, Friendly Foods, and had bought dairy products from Gold Star. (Bekker page 28, line 7 – page 29, line 20). Mr. Bekker was a manager at Friendly as far back as 1994 (Bekker page 16, lines 6-14).

The question then subsists of who copied the name from whom. The answer is clear, that Four Seasons has the history of copying and had knowledge of Gold Star and its products, including dairy products. Gold Star is the originator.

D. Four Seasons' Claim of Prior Use

Four Seasons was incorporated in January 1999 (Bekker page 5, lines 18-21) and BABUSHKINA butter, farmer cheese and feta were among the first products it sold after its incorporation (Kesler page 15, lines 4-17). The first issue is whether Four Seasons can establish use prior to January 1999 for BABUSHKINO products.

Four Seasons has no documentary proof of sales of BABUSHKINO dairy products by any entity prior to January of 1999. The evidence instead establishes that the products may have been ordered from ██████ in late 1998, and that labels were ordered in that same time frame, but there is no evidence (even though Mr. ██████ testified that it would exist) showing when Four Seasons received its first shipment of products, and Mr. Zurinam testified that he did not know when the labels were delivered.

The letters offered by Four Seasons to show prior sales should be excluded as hearsay (*see, infra.*), and are not supported by any documentary evidence. They are also inconsistent with the evidence that has been offered that use actually began much later.

Thus, Four Seasons has failed to introduce competent, admissible evidence of any use prior to its incorporation. Even if such evidence was found to exist, however, there is

no evidence that Four Seasons actually acquired the goodwill associated with that use. Four Seasons has offered no documents showing an assignment of rights, and, even more interestingly, did not even offer uncorroborated testimony that Four Seasons acquired rights from A&O. Given the uncontradicted testimony of Mr. [REDACTED] that Four Seasons was *not* the only successor to A&O, and that it was Food House that acceded to the purchase of the oldest products from [REDACTED], there is therefore no clear showing that Four Seasons is entitled to claim any tacking on to a date prior to its incorporation.

V ARGUMENT

A. Burden of Proof

A trademark registration is presumed valid. 15 U.S.C. § 1115(a). A petitioner for cancellation has the burden of establishing the facts entitling it to the relief sought by a preponderance of the evidence. *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 26 USPQ2d 1912, 1918 (Fed. Cir. 1993). Where, as here, a petitioner seeks cancellation due to fraud, however, it must prove fraud “to the hilt”. *Bonaventure Associates v. Westin Hotel Company*, 218 USPQ 537, 540 (T.T.A.B. 1983).

B. Gold Star’s proof of use prior to the date alleged in its application.

In the application which matured into the subject registration, Gold Star stated that its date of first use of the mark BABUSHKA’S RECIPE was September 1999. This is incorrect. Gold Star’s usage was actually over a year earlier, as demonstrated above. A registrant in a cancellation proceeding may prove a date of first use that is earlier than that alleged in its original application but must prove that earlier date by clear and

convincing evidence. *Brooks v. Creative Arts By Calloway LLC*, 93 USPQ2d 1823, 1833 (T.T.A.B. 2009).

The uncontradicted evidence shows that Ms. Pincow developed the name and brought it to Gold Star's graphics designer, Irina Lubenskaya, in 1997. Ms. Lubenskaya, in consultation with Ms. Pincow, developed labels through the end of calendar year 1997. The labels were printed by Jes/Gem on or about April 7, 1998, and put on products manufactured by Bunker Hill shortly thereafter. Gold Star then sold that cheese at least as early as June 1998 as testified to by Mr. Krungalz and Ms. Troyer. Shortly thereafter, Queensboro began manufacturing farmer's cheese that Gold Star sold under the BABUSHKA'S RECIPE mark. Mr. Kraznov testified that he purchased farmer cheese bearing the BABUSHKA'S RECIPE mark no later than December 1998, as supported by invoices printed by Gold Star and introduced in evidence herein. (Exhibit 116). The evidence is therefore quite clear and convincing. The designer has testified (supported by documents) that the labels were designed. The printer has testified (as supported by documents) that the labels were printed. The manufacturer has testified (supported by documents) that the product was manufactured. The warehouse manager testified that he shipped the products. A customer has testified (supported by documents) that he purchased the products. The entire chain of events is clearly spelled out and proven, without inconsistency, and with documentary support. Gold Star has established clearly and convincingly that it had a first use of the mark BABUSHKA'S RECIPE beginning in about April 1998.

Four Seasons on the other hand was not brought into existence until 1999 and so must rely on tacking on of alleged prior use by A&O. The evidence of Four Seasons' entitlement is much less strong.

First, Four Seasons has offered no evidence that it acquired rights from A&O. Although, in its Trial Brief, Four Seasons states that it "is the direct successor of A&O Corp., a New York corporation formed on August 30, 1996 [P-Exhibit 16] . . ." Exhibit 16, however, is simply an abstract of the New York State on-line corporate records. It gives no support for Four Seasons' claim that it was the 'direct successor' of A & O. The evidence is actually quite a bit murkier than that, at least according to Four Seasons' own witnesses.

Four Seasons relies heavily for its proof of early use on the testimony of Leo [REDACTED], the vice-president of sales of [REDACTED] Foods which manufactures products for Four Seasons ([REDACTED] v 1, page 6, lines 16 – 25). Mr. [REDACTED] testified, though, that when he was introduced to A & O, it had at least three principals, Mr. Bekker, Mr. Kesler and another individual named Mark. ([REDACTED] v 1, page 7, line 24 – page 8, line 3). Mr. [REDACTED] also testified that meetings were held with those three individuals and a further individual named Michael ([REDACTED] v 1, page 9, lines 4-9). Mr. [REDACTED] then testified that he understood that A&O "became" a company called Food House Distributing, Inc. "sometime after [REDACTED] started doing business with [A&O]." ([REDACTED] v 1, page 13, lines 2-9; Exhibit 18). Mr. [REDACTED] also stated that, to his knowledge, A&O was made up of four people, not two: Mark and Michael in addition to Alex and Oleg and that Food House was also a successor to A&O ([REDACTED] v 1, page 13, lines 10-20; v 2, page 59, line 19 – page 61, line 17). Mark and Michael continued to do business with [REDACTED] and buy the products sold

since the earliest date by [REDACTED] (*cf.*, Exhibit 18, which shows an order history of Food House Distribution, Inc. going back to March 5, 1997 with Exhibit 19, an order history for Four Seasons which only goes back to November 13, 1998). Mr. [REDACTED] testified that Food House and Four Seasons were two different customers ([REDACTED] v 2 page 48, lines 10 – 25), and that sales to Four Seasons did not begin until *after* November 13, 1998 ([REDACTED] v 2 page 49, line 11 – page 50, line 2). He could not determine how much later, so the record is not clear as to when Four Seasons, or its putative predecessor, A&O, actually had products in hand to ship. Mr. [REDACTED] testified that those records would be available, and yet Four seasons never produced them. ([REDACTED] v 2, page 49, line 18 – page 15, line 12). Mr. Zurinam testified that the earliest order he had for the BABUSHKINO label was Exhibit 4, with a date of November 25, 1998, which contradicts the statements in Exhibit 6 that sales started earlier than that.

Thus, Mr. [REDACTED] contradicts Four Seasons' unsupported assertion of being a "direct successor" to A&O, and also that A&O was the entity that continued to sell the products that A&O bought from its commencement of dealings with [REDACTED].

Furthermore, as to the date on which Four Seasons first began to use the mark BABUSHKINO, [REDACTED] records indicate that their products were shipped with "no label" to Four Seasons starting in November 1998. (Exhibit 19). The earliest record of any labels being printed for Four Seasons was November 25, 1998 (Exhibit 4).

Mr. Zurinam testified that he signed the letter dated May 21, 2003 based on records he reviewed at the time, but those records were not produced or introduced by Four Seasons. Mr. Zurinam testified that he was only looking to check the date loosely ("I am not really good with dates . . . Then I just want to make sure that it is 1997 and not

like, you know, 2005.” – Zurinam page 35, lines 17 – page 36, line 7). By Mr. Zurinam’s own statement, he did not verify closely the date he stated in Exhibit 7 of 1997, but only that it was not 2005. This sort of evidence is far short of “clear and convincing”

Mr. Zurinam also clarified his statement in Exhibit 7 that he printed labels every two or three weeks for Four Seasons. That referred generally to different labels which Quick Graphics printed for Four Seasons, not specifically to BABUSHKINO labels. (Zurinam page 39, line 15 – page 40, line 15). He offered no testimony or evidence to support any claim that Quick Graphics printed BABUSHKINO labels for Four Seasons prior to November 1998.

Mr. Bekker understood what an assignment of a trademark was when queried by his counsel, and yet was never asked if A&O had assigned its trademark rights to Four Seasons (Bekker Trial Test. page 8, lines 6-9; page 10, lines 2-3); pager 11, lines 7-8; page 11, line 25 – page 12, line 3; page 13, lines 23-24; page 14, lines 24-25; page 16, lines 17-19).

Here, the evidence unequivocally shows that, even under the earliest date alleged by Four Seasons, Gold Star has established priority of use.

VI Four Seasons’ Motion to exclude

Four Seasons has moved to exclude certain unspecified evidence and all testimony relating to that evidence without specifying just what the evidence to be excluded is, or what document was requested in what request. As such, the motion is facially deficient and must be denied on that basis alone. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, (T.T.A.B. 2008) (“[B]ecause applicant failed to provide copies of the specific discovery requests to which opposer failed to respond, we cannot judge

whether those discovery requests sought the documents that were later introduced as opposer's evidence.”)

Additionally, the motion is vague as to the basis for the motion, stating only that it is directed to documents not produced during discovery or in a later supplement, but the documents to which it is believed reference was made were all turned over to Four seasons, or else they would not be moving to exclude them. Four Seasons has failed to identify what Request for Production sought the documents, and how it would be prejudiced by receiving the documents it eventually received. If Four Seasons had chosen to do so, it could have requested an adjournment or extension of time, a re-opening of any discovery or testimony period or other relief. Exclusion of relevant (if unspecified) evidence is disfavored

In any event, Gold Star found documents after the initial production concluded and produced them when found in satisfaction of its discovery obligations under the Federal Rules.

VII Gold Star’s Motion to Exclude

Gold Star hereby moves to exclude certain evidence offered by Four Seasons. Specifically, Gold Star moves to exclude the letters listed as Exhibits 7-11², on the basis of the “best evidence” rule (Fed.R.Evid. 1002), and Exhibit 6, and all testimony related thereto, as being inconsistent with the documents and other testimony provided.

Additionally, Gold Star moves to exclude the testimony of Natalie Walewitsch since she walked out of her deposition (she was not subpoenaed) during cross-

² It is unclear if Four Seasons seeks to introduce Exhibit 10a letter from Mark with an unintelligible signature. It appears that the signer of that letter passed away, and so its contents were never verified.

examination, thereby preventing Gold Star from having a full and fair opportunity to conduct her cross-examination.

C. Exhibits 8-11

Exhibits 8-11 are all substantially identical documents (including the same typographical error "GRANDMATHERS")-- letters which purport to support Four SEASONS' contentions that it has sold BABUSHKINO brand butter blend since December 1997. These letters were written by Four seasons and presented to the signatories for execution. One of the letters (Exhibit 10) was never proved up by its signatory, Mark Goulum (sp?) (he had apparently passed away).

As to Exhibit 9, a letter signed by Leon Sheikhet, of Unsurpassed Meat, Inc. (d/b/a Miller's Finest), Mr. Sheikhet testified that he verified the accuracy of the statement he had bought BABUSHKINO branded products from Four Seasons' predecessor since December 1997, by reference to certain records page 15, line 5 – page 18, line 6).

He testified that he did not then remember the actual dates he started buying their products, but thinks he went to his basement to look at old (unspecified) records to make sure the date 1997 in the letter was accurate. At the time of his deposition, he was not sure of the date, but he believed that, five years earlier, he had checked documents that he thinks substantiated the date alleged, but he is not sure. (Sheikhet page 17, line 24 – page 18, line 6: "Exactly the date I cannot say. Actually just what it says in the letter here I assume because I checked at that time.")

Exhibit 11 is a substantially identical letter signed by Sonya Sheydvasser, of Matreshka, Inc., who testified that she signed the letter without verifying that the dates

recited were accurate, but only remembering that she had worked with the owners of Four Season for some time. (Sheydvasser page 47, line 13 – page 48, line 16)..

Exhibit 8 is a letter signed by Arkadiy Golub who claims to have been a manager at Beluga Caviar, Inc., and that he recollected buying BABUSHKINO brand butter blend since 1997. However, Mr. Golub did not review any documents to support the statement that, in 2003, he independently recollected buying BABUSHKINO branded products since 1997.

There is also a serious question of whether Mr. Golub was actually a manager at Beluga Caviar, according to the testimony of Mr. Zagranichny who worked regularly with Beluga Caviar, and yet never met Mr. Golub (Zagranichny page 7, line 24 – page 8, line 2).

Unsupported testimony by a witness lacking personal knowledge concerning sales is hearsay and inadmissible. *Rolex Watch U.S.A., Inc. v. Madison Watch Co., Inc.*, 211 USPQ 352, 355 (T.T.A.B. 1981). each of the letters relies on sales information that was the subject of a purported review by the signer, and yet the documents themselves were never obtained and made available for inspection. They are also contradictory to the documentary evidence of record, and unsupported by any documents whatsoever.

Thus, the requested Exhibits should not excluded, and all testimony relating thereto stricken.

D. Testimony of Natalie Walewitsch

Gold Star moves to exclude the entire testimony of Natalie Walewitsch, as she walked out of her deposition during cross-examination and did not return (Walewitsch, page 27, line 5, page 28, line 6). Four Seasons did not subpoena Ms. Walewitsch, and

she just walked out when she felt like it. The rules, 37 C.F.R. § 2.123(e)(3), T.B.M.P. § 533.02 require that adverse parties be given a “full and fair opportunity to cross-examine each witness”. Ms. Walewitsch chose to leave in the middle of her cross-examination, and Gold star had no recourse, as she was not under subpoena. Four Seasons made no effort to re-call Ms. Walewitsch, and therefore her testimony should be excluded.

VIII Four Seasons has not proven that Gold Star Committed Fraud

The Board has discussed the standards for proving fraud quite clearly:

Fraud in a trademark cancellation is something that must be “proved to the hilt” with little or no room for speculation or surmise; considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission; and reasonable doubts resolved against the charging party. *See Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033 (TTAB 1981); *J.G. Hook, Inc. v. David H. Smith, Inc.*, 214 USPQ 662 (TTAB 1982) and cases cited therein. Indeed, the standard of disclosure as to prior knowledge of facts and of possible other and earlier uses is regarded as somewhat lower in a trademark than a patent proceeding, *Morehouse Manufacturing Corp. v. J. Strickland & Co.*, 160 USPQ 715, 719-20 (CCPA 1969); and the statement of an applicant that no other person “to the best of his knowledge” has the right to use the mark does not require the applicant to disclose those persons whom he may have heard or noticed are using the mark if he believes that the rights of such others are not superior to his. *SCOA Industries Inc. v. Kennedy & Cohen, Inc.*, 188 USPQ 411, 414 (TTAB 1975); *UMC Electronics Co. v. UMC Industries, Inc.*, 184 USPQ 319 (TTAB 1974); *Griffin Wellpoint Corp. v. AMSTED Industries, Inc.*, 172 USPQ 503 (TTAB 1971); J.T. McCarthy, Trademarks and Unfair Competition §31.21 B&C.

Bonaventure Associates v. Westin Hotel Company, 218 USPQ 537, 540 (T.T.A.B. 1983)

Here, Four Seasons alleges that Gold Star is guilty of fraud simply because it stated that it had superior rights to use the mark, which it believes and believed that it did. That is shown by the above proofs. The claim made by Four Seasons is thus deficient, inadequately plead and should be dismissed. As to the claim that the inadvertent filing of a Sec. 15 Declaration makes out a case for fraud was not litigated and was not part of the

proceedings, and so Gold Star had no notice of its inclusion herein. If appropriate, Gold Star should be given the opportunity to rebut the late-presented claim.

Fraud must be proven by separate clear and convincing evidence of intent to deceive, and Four Seasons has not provided any showing that the inadvertent submission of the Sec. 15 Declaration was done with intent to deceive. *DaimlerChrysler Corp. v. American Motors Corp.*, 94 USPQ2d 1086, (T.T.A.B. 2010). The issue was not raised at any time during the prosecution of this proceeding, and no evidence was taken on the issue.. Thus, this claim must fail.

IX Request for Oral Argument

Gold Star hereby requests oral argument.

X Conclusion

Four Seasons has not carried its burden of proof to establish clearly that it has priority of use to use the mark BABUSHKINO when compared to Gold star's clearly demonstrated rights in and to BABUSHKA'S RECIPE. Four Seasons has offered no reliable testimony and no documents supporting a use date going back to 1996 as claimed, or even prior to its inception in 1999. Even if it had, Four Seasons has completely failed to introduce evidence of any clear and unambiguous right to claim succession to whatever rights may have existed prior to is inception

Thus, The Petition for cancellation of Gold star's BABUSHKA'S RECIPE mark should be dismissed.

Respectfully submitted,

COHEN, PONTANI, LIEBERMAN & PAVANE

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Dated: April 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Registrant's Trial Brief [Redacted] in Cancellation Proceeding No. 92042082 entitled *Four Seasons Dairy, Inc. v. International Gold Star Trading Corp.*, was served by e-mail on counsel for Petitioner:

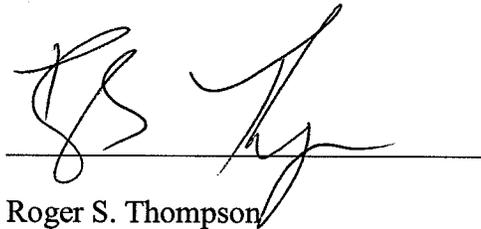
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April 30, 2010

Date