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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

In the Matter of Registration No. 2,479,287
Issued on August 21, 2001

FOUR SEASONS DAIRY, INC., Petitioner, -against- INTERNATIONAL GOLD STAR TRADING CORP., Registrant	Cancellation No.: 92042082 Mark: BABUSHKA'S RECIPE Reg. No. 2,479,287 Filed: December 7, 1999 Issued: August 21, 2001

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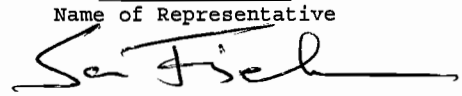

Signature
October 15, 2010
Date of Signature

TRIAL REPLY BRIEF OF PETITIONER FOUR SEASONS DAIRY, INC.

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Preliminary Statement

Petitioner Four Seasons Dairy Inc. ("Petitioner" or "Four Seasons") respectfully submits the instant Reply Brief in rebuttal to the main brief of Respondent International Gold Star Trading Corp. ("Respondent" or "Gold Star").

Summary of Argument

Having sworn to a date of first use in commerce of September 30, 1999 in its application to register BABUSHKA'S RECIPE as a trademark (Petitioner's Exhibit 215) ("P-215")[1], Respondent concedes that it now has the burden of proving an earlier date of first use in commerce by clear and convincing evidence. Brooks v. Creative Arts by Calloway LLC, 93 USPQ2d 1823, 1833 (T.T.A.B. 2009) (Respondent's Brief at p. 15). Respondent has failed to meet its burden.

Respondent's principal, Galina Pincow, admitted that Respondent does not have one shred of documentary evidence to show sales of dairy products under BABUSHKA'S RECIPE prior to September 30, 1999 (Galina Pincow, pp. 225, 227). Rather, Ms. Pincow acknowledged that all of the invoices upon which Respondent relies to establish an earlier date of first use reflect sales of dairy products under the mark GRANNY'S RECIPE. (Galina Pincow, p. 227). However, GRANNY'S RECIPE is not the legal equivalent of the mark at issue: BABUSHKA'S RECIPE.

Galina Pincow testified as follows:

> Q. And as we sit here today, there is no document, no invoice produced by International Gold Star that says "Babushka's Recipe" -- I'm talking literally Babushka's Recipe -- was sold at any time prior to May 2001?
>
> A. You're correct.

---

[1] The designation "(P-__)" refers to Petitioner's Trial Exhibits and "(R-__)" refers to Respondent's Trial Exhibits.

(Galina Pincow, p. 227, lines 13-19).

Respondent's disingenuous efforts to prove an earlier date of first use with sales under a mark that is not the legal equivalent of the mark at issue -- BABUSHKA'S RECIPE -- should not be countenanced by the Board. Respondent may not "tack on" sales of products under the mark GRANNY'S RECIPE to establish priority of use of BABUSHKA'S RECIPE. The two marks are not indistinguishable. Rather, they are materially different in sight, sound, language and overall commercial impression.

Similarly, Respondent has failed to provide clear and convincing proof that it sold yogurt cheese manufactured by Bunker Hill under the BABUSHKA'S RECIPE label prior to September 30, 1999. Indeed, all of the evidence demonstrates that Respondent could not have commenced affixing the BABUSHKA RECIPE label to Bunker Hill manufactured cheeses prior to 2001. Bunker Hill refused to permit Respondent to affix its private label while its competitor Beluga Caviar remained in business, because Bunker Hill had a pre-existing exclusive sales understanding with Beluga Caviar. (Troyer pp. 69, 75). (Galina Pincow, pp. 47-48, 244). On rebuttal, Beluga Caviar's warehouse manager produced clear and convincing proof of his employment by Beluga Caviar in the form of IRS Form W-2 statements from Beluga Caviar for 1996-2002. (Golub 10/15/09 pp. 8-11) (P-303). Mr. Golub confirmed that Beluga Caviar continued purchasing yogurt cheese from Bunker Hill until 2001. (Golub 10/15/09, pp. 11-13). Moreover, Respondent has no proof of selling or even advertising BABUSHKA'S RECIPE dairy products prior to its 2001-2002 Price List (R-122). All of the evidence suggests that Respondent's undated catalog (R-4; R-121) was created subsequent to its 2001-2002 Price List.

I. Respondent May Not "Tack On" Sales of Dairy Products Labeled GRANNY'S RECIPE for Purposes of Establishing Priority for BABUSHKA'S RECIPE.

Galina Pincow

Respondent's principal Galina Pincow is the person with greatest knowledge of Respondent's sales of products under BABUSHKA'S RECIPE. She admits that Respondent does not have any invoices to prove that Respondent sold any products under BABUSHKA'S RECIPE prior to May 2001. (Galina Pincow, p. 227). Rather, the documentary evidence produced by Respondent reflects that Respondent sold farmer's cheese under the label GRANNY'S RECIPE prior to September 1999. (R-115; R-116).

Ms. Pincow's testimony that its farmers cheese and butter were labeled BABUSHKA'S RECIPE, but referred to in all Respondent's business records, invoices, ledgers and receipts as GRANNY'S RECIPE strains credibility. Ms. Pincow attempted to explain the discrepancy by stating that Respondent substituted "GRANNY" in place of "BABUSHKA" for ease of reference (Galina Pincow, pp. 34-39). However, the same invoices that reflect sales of farmer's cheese labeled GRANNY'S RECIPE also reflect sales of such product names as TARAMOSALATA KRINOS, BRINZA MOLDOVSKAYA, SALAMI MOSCOWSKA and CHESNCHNAYA, to name only a few. (R-115, R-116). The foregoing Russian and/or Eastern European nomenclature for Respondent's products are far lengthier, more complex, difficult to spell and difficult to pronounce then "BABUSHKA" It is both contradictory and inconsistent for Respondent to claim that it used "GRANNY'S" as a shorthand for "BABUSHKA'S", but that it employed no shorthand whatsoever for product names as complex as TARAMOSALATA KRINOS and BRINZA MOLDOVSKAYA.

Additionally, Lewis "Butch" Miller of Queensboro Farms (Respondent's

Supplier) produced copies of GOLD STAR's COUNTRY FRESH FARMERS CHEESE label as well as other labels for GOLD STAR brand sour cream and pot cheese (P-213), which establish that Respondent also sold dairy products under its own GOLD STAR house label prior to September 30, 1999.

Respondent's purported proof of use of BABUSHKA'S RECIPE prior to September 30, 1999 falls far short of meeting the clear and convincing burden of proof necessary to prove a date of use prior to the date that it swore was truthful in its application to register BABUSHKA'S RECIPE. See e.g. Brooks v. Creative Arts by Calloway LLC, 93 USPQ2d 1823, 1833 (T.T.A.B. 2009). Because Respondent is seeking to prove a date of first use earlier than the date alleged in its application for registration (September 30, 1999), its proof of that earlier date must be "clear and convincing." Hydro-Dynamics Inc. v. George Putnam & Co., 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987) (dates of first use earlier than that alleged in the application is a change of position from one "considered to have been made against interest at the time of filing the application," and therefore requires enhanced proof); Ilco Corp. v. Ideal Security Hardware Corp., 527 F.2d 1221, 188 USPQ 485, 488 CCPA 1976); Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse, 89 USPQ2D 1844.

The invoices and testimony supplied by Respondent that reflect sales of "GRANNY'S RECIPE" prior to September 30, 1999 do not support Respondents' arguments of priority. GRANNY'S RECIPE is not the legal equivalent of BABUSHKA'S RECIPE. Respondent may not "tack on" sales of GRANNY'S RECIPE for purposes of establishing priority for BABUSHKA'S RECIPE. These respective marks do not convey the same commercial impression.

For purposes of tacking on, the two marks must be either indistinguishable or

contain no material differences. Pro-Cuts v. Schilz-Price Enterprises Inc., 27 USPQ2d 1224, 1226 (T.T.A.B. 1993). See also Van Dyne-Crotty Inc. v. Wear-Guard Corp., 926 F.2d 1156, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991). Here, BABUSHKA'S RECIPE and GRANNY'S RECIPE are vastly different in both sight and sound. Similarity under the doctrine of foreign equivalents is not sufficient to consider the marks as indistinguishable for purposes of "tacking on".

II. The Testimony and Evidence Demonstrate that Respondent did Not Sell Bunker Hill's Yogurt Cheese Under the BABUSHKA'S RECIPE label prior to 2001

Lisa Troyer

The testimony of Lisa Troyer, Vice President of Bunker Hill Cheese Company ("Bunker Hill"), is unworthy of belief insofar as it is partisan, unsupported, self contradictory, and contradicted by convincing extrinsic evidence. Troyer at first claimed to be unaware that her company, Bunker Hill, is represented by counsel for Respondent in this proceeding (Troyer p. 49). She claims that Four Seasons in marketing NEW SALZBERG cheese, is copying Respondents' brand OLD SALZBERG CHEESE, manufactured by Bunker Hill, while ignoring the fact that Bunker Hill and Respondent are deceptively acting in concert in manufacturing and distributing a product labeled OLD SALZBERG cheese which is confusingly similar to SALZBERG cheese, imported from Austria (Troyer, pp. 112-116) (Respondent's Notice of Reliance [D.E. 67]).[2]

Ms. Troyer further claims to be the exclusive owner, together with her sister, of the trademark YOGURT CULTURED (Troyer, p. 64) while omitting the fact that the United States Patent and Trademark Office issued a section 2(e)(1) Descriptive Refusal of YOGURT CULTURED on the grounds that "the proposed mark merely describes and[sic] ingredient or

[2] "D.E." refers to docket entry as reflected on the TTABVUE Prosecution History.

characteristic of the applicant's goods and/or services", and relegated it to the Supplemental Register. See Petitioner's Notice of Reliance, Exhibit H.

Most importantly, Lisa Troyer testified under oath that Bunker Hill was selling yogurt cheeses exclusively to a Russian specialty foods distributor known as Beluga Caviar, until such time as Beluga Caviar went out of business and allegedly defaulted on debt owed to Bunker Hill. Ms. Troyer was clear in her testimony that she considered Gold Star and Beluga Caviar to be direct competitors; and that Bunker Hill's strict policy was to not sell the same products to competitors, such as Respondent Gold Star and Beluga Caviar. (Troyer p. 69). Ms. Troyer testified: "I was not willing to sell to Galina [Gold Star] things that I was selling to other people." (Troyer, p. 75).

Ms. Troyer testified that Havarti Yogurt Cheese was "the first product introduced to market with the BABUSHKA'S RECIPE labeling (Troyer, p. 74). Indeed, Ms. Troyer confirmed that it was only after Bunker Hill ceased selling cheese to Beluga Caviar, after Beluga Caviar went out of business, that Bunker Hill commenced selling cheese to Gold Star while affixing a Babushka's Recipe label.

Ms. Troyer testified without the benefit of any of Bunker Hills' business records to refresh her recollection. Nor did she produce any records. Her estimate of 1999 as being the year that Bunker Hill started selling cheeses to Gold Star was based solely upon her recollection that her daughter was a "toddler" at that time. (Troyer, pp. 19, 54). However, Troyer was uncertain as to whether "toddler" refers to a 2 year-old, 3 year-old or merely a young child (Troyer, p. 55).

The only certainty expressed by Troyer during her testimony was that Bunker Hill did not commence affixing labels to Gold Star's cheeses until after Bunker Hill ceased selling

yogurt cheeses to Beluga Caviar because it defaulted on debt and went out of business.

III. The Testimony of Lisa Troyer is Directly Contradicted by the Testimony of Arkadiy Golub, who, on Rebuttal, Produced Irrefutable Documentary Evidence of his Employment by Beluga Caviar from 1996 to Early 2002.

On its rebuttal case, Four Seasons presented the testimony of Arkadiy Golub, who had been employed as manager for Beluga Caviar from approximately 1996 to early 2002.[3] During his testimony, Mr. Golub produced true copies of the IRS Form W-2 Wage and Tax Statements that he had received for wages from his employment with Beluga Caviar at 32 Second Avenue, Brooklyn, New York. The W-2 Wage and Tax Statements for calendar years 1996 through 2002 were introduced collectively as Petitioner's Exhibit 303. They verify the fact that Golub was employed by Beluga Caviar during the relevant period. Mr. Golub testified that Beluga Caviar continued purchasing Bunker Hill's Heini's brand yogurt cheeses, including tomato yogurt cheese and jalapeno yogurt cheese, in the years 2000 and 2001. (Golub testimony, October 15, 2009, pp. 12-14).

Mr. Golub's testimony demonstrates that Bunker Hill could not have commenced selling yogurt cheeses to Gold Star any earlier than 2001 -- thus, pushing back the date of Gold Star's first sales of BABUSHKA'S RECIPE for yogurt cheese to 2001.

IV. Respondent's Undated Catalog (R-4; R-121) Was Created After Respondent's 2001-2002 Price List (R-122). Therefore, Respondent's Undated Catalog Does Not Establish Priority of Use

The earliest price list produced by Respondent (R-122) is for calendar years 2001-2002. The earliest catalog produced by Respondent (R-4; R-121) is undated. Respondent argues that the catalog was created in 2000-2001. (Galina Pincow, p. 93, line 23). Petitioner contends that the undated catalog (R-4) was created after the 2001-2002 price list (R-122). Ms. Pincow

[3] Mr. Golub was called to rebut the testimony of Respondent's witnesses Lisa Troyer and Igor Zagranichny.

testified that Respondent assigns a number to each of the products that it sells. (Galina Pincow, pp. 30, 156-158). The product numbers remain constant from catalog to catalog. (Robert Pincow, p. 44). A product known as Havarti Yogurt Cheese, manufactured by Bunker Hill, is assigned Product # 42025 by Respondent. (Galina Pincow, p. 30, line 16). In Respondent's undated catalog (R-4; R-121) at page 20 thereof, product 42025 is represented and displayed by a photograph of Bunker Hill manufactured Havarti Yogurt Cheese, packaged under the BABUSHKA'S RECIPE label.[4]

Galina Pincow and Lisa Troyer each testified that Havarti Yogurt Cheese was the first Bunker Hill yogurt cheese product to which Respondent was permitted to affix it's private BABUSHKA'S RECIPE label. This is confirmed by the product displays on page 20 of Respondent's undated catalog (R-4; R-121) inasmuch as the product nos. 42011, 42013, 42014, 42021, 42023 and 42024 each display Bunker Hill manufactured yogurt cheese products bearing Bunker Hill's own label known as HEINI'S. Indeed, in the undated catalog, product 42025 is the only Bunker Hill manufactured yogurt cheese product that displays the BABUSHKA'S RECIPE mark. Comparing the Respondent's 2001-2002 Price List (R-122) with its undated catalog (R-4), product 42011, 42013, 42014, 42021, 42023 and 42024 are each displayed with the same packaging and trade dress as Respondent's undated catalog, with the exception of Respondent's Product No. 42025, Havarti Yogurt Cheese.

Respondent's 2001-2002 Price List (R-122) does not display the BABUSHKA'S RECIPE mark for product 42025 (R-122, p. 15, Bates Stamp GOLD 0049). Rather, a Bunker Hill mark is displayed on product 42025, referred to as Yogurt Havarti Cheese, in Respondent's 2001-2002 Price List. (Robert Pincow, p. 47, lines 23-25, p. 48, lines 1-5). The inescapable

[4] Product No. 42025 for Havarti Yogurt Cheese with the BABUSHKA'S RECIPE label remains constant in Respondent's 2006 Catalog (R-120) (GOLD 0096-0145) at page 27 (GOLD 0124) as well as in Respondent's 2007 Catalog (R-118) (GOLD 0146-0203) at page 27 (GOLD 0174).

conclusion to be drawn is that Respondent's undated catalog (R-4; R-121) was created after Respondent's 2001-2002 price list (R-122). Since Respondent's witnesses agree that Bunker Hill's Havarti Yogurt Cheese was the first Bunker Hill product to which Respondent affixed its private label, and Respondent's 2001-2002 price list (R-122) displays the Yogurt Havarti Cheese under a Bunker Hill label, it logically follows that the undated catalog which displays Yogurt Havarti Cheese under the BABUSHKA'S RECIPE label must have been created after the 2001-2002 price list (R-122). Apart from its undated catalog, Respondent has offered no other documentary proof of sales of Bunker Hill yogurt cheese products under the BABUSHKA'S RECIPE label.

V. The Testimony of Respondent's Witnesses was Vacuous at Best -- Staged, Coached, Cued and Solicited by Galina Pincow at Worst.

Robert Pincow

Robert Pincow, Respondent's President and owner (Robert Pincow, pp. 4, 58, 59) testified that Respondent considered GRANNY'S RECIPE to be interchangeable with BABUSHKA'S RECIPE (Robert Pincow, p. 23). However, Robert Pincow's testimony concerning foreign language equivalents merely corroborates that Respondent is relying upon sales under the mark GRANNY'S RECIPE to tack onto sales under BABUSHKA'S RECIPE. Robert Pincow testified that his wife, Galina Pincow, has overall responsibility for sales of dairy products as well as the files related thereto. (Robert Pincow, pp. 12, 36).

Robert Pincow testified that the product numbers that Gold Star assigns to its products are rarely, if ever, changed. (Robert Pincow, p. 44). He identified Product No. 42025 as Yogurt Havarti Cheese in Gold Star's 2006 catalog (R-120) (Robert Pincow, p. 27, lines 18-19) and in its undated catalog (R-121, R-4) (Robert Pincow, p. 31, lines 4-5), as well as on Gold Star's 2001-2002 price list (R-122) (Robert Pincow, p. 34, lines 16-20).

Robert Pincow identified the label on the reproduction of the Havarti Yogurt Cheese product in Respondent's 2001-2002 price list (R-122) as the manufacturer's label, Bunker Hill Cheese (Robert Pincow, p. 47, lines 23-25, p. 48, lines 1-5). Robert Pincow does not recollect when Respondent started using the BABUSHKA'S RECIPE for sales of cheese manufactured by Bunker Hill. (Robert Pincow, pp. 48-49).

Additionally, Robert Pincow identified Respondent's witness Dmitry Lerner as his employee at Spa 88, a club and lounge at 88 Fulton Street in lower Manhattan. (Robert Pincow, p. 55). Robert Pincow heard that Dmitry Lerner had some legal troubles, but did not know whether he had yet been indicted. (Robert Pincow, p. 55).

Igor Zagranichny

Mr. Zagranichny's vacuous testimony was that he formerly owned a business called Roman & Sons that did business with Beluga Caviar. Zagranichny testified that because he did not recollect the name Arkadiy Golub, Mr. Golub could not have worked for Beluga Caviar. (Zagranichny, pp. 14-16). Mr. Zagranichny's testimony, like Ms. Troyer's testimony, is rendered unbelievable by the irrefutable documentary evidence produced by Mr. Golub on rebuttal.

Lewis "Butch" Miller

The testimony of Lewis "Butch" Miller was void of any probative value as to Gold Star's product branding, except that contained within his file were the true labels that Gold Star used for its dairy products in 1998 and 1999. (P-214). These labels are GOLD STAR FARMERS CHEESE, GOLD STAR POT CHEESE and GOLD STAR SOUR CREAM. Mr. Miller produced some records which, if admissible, would tend to show that Queensboro has sold farmers cheese and pot cheese to Gold Star since 1996. However, Miller acknowledged that

he had no personal knowledge of any labels applied to the products sold by Queensboro to Gold Star other than GOLD STAR FARMERS CHEESE, GOLD STAR POT CHEESE and GOLD STAR SOUR CREAM. (Miller, pp. 14, 22) (P-213). He had never seen any BABUSHKA'S RECIPE labels. (Miller, p. 42). However, he had possession of the above-referenced generic Gold Star house labels, first used by Gold Star on farmer's cheese.

Mr. Miller, who has been executive vice president of Queensboro Farms for 25 years (Miller, p. 7), further confirmed that milk regulations require the identification of the dairy farm manufacturer on food product labels. (Miller, pp. 24-25). The evidence demonstrates that the labels that Galina Pincow claimed were created internally by Gold Star and affixed to its farmers cheese products in 1998 and 1999 (R-117) could not have been in use because they fail to comply with the applicable regulations. (Petitioner's Notice of Reliance, Exs. A, B and C).

As in the Krumgalz and Lubenskaya depositions, Galina Pincow felt free to participate while the witness was testifying, in an effort to subvert the truth-seeking function of the judicial process. (Miller, pp. 50-51).

Victor Krasnov

Respondent presented testimony from Victor Krasnov in a futile effort to substantiate sales of BABUSHKA'S RECIPE in December 2008. However, Mr. Krasnov testified that he considers GRANNY'S RECIPE to be the same as BABUSHKA'S RECIPE

> Q. Now, you said that the Babushka's Recipe is the same thing as Granny's Recipe?
>
> A. Yeah. Same as Babushka is. It's abbreviation in Russian is Babushka. Grandmother is the same. Babushka's Recipe, Grandmother's Recipe.

(Krasnov, p. 9).

Counsel next showed Mr. Krasnov a document, marked as Registrant's Ex. 115,

not previously exchanged during discovery, purporting to be an invoice dated December 18, 1998. Lead by counsel, and with the help of the unexchanged exhibit to cue him, Mr. Krasnov identified December 18, 1998 as the date of his first purchase of GRANNY'S RECIPE (Krasnov p. 13). Respondent's Exhibit 115 (bearing bates stamp nos. GOLD 0226- 0229) nowhere reflects sales of BABUSHKA'S RECIPE, but only FARMER CHEESE GRANNY'S RECIPE. (GOLD 0227).

Mr. Krasnov testified that BABUSHKA'S RECIPE dairy products were in Gold Star's catalog in 1998 (Krasnov p. 22). However, Galina Pincow admitted that Gold Star did not create any catalogs prior to 2001. (Galina Pincow, p. 93).

Jacob Krumgalz

Jacob Krumgalz, Respondent's warehouse manager, confirmed that in 1998 and 1999 Respondent applied labels that displayed the mark GRANNY CHEESE or GRANNY RECIPE on Gold Star's cheeses. Mr. Krumgalz testified: "Basically most of the product come without labels, so we -- our people actually put labels of granny cheese on those products. Havarti cheese and farmer cheese on those products. Havarti cheese and farmer cheese we put ourselves." (Krumgalz, p. 9). Mr. Krumgalz further confirmed that the farmer's cheese and butter sold to New York International store in Southfield, Michigan, represented by the invoice marked as R-115, was labeled GRANNY'S RECIPE. Mr. Krumgalz testified: "It's page 2, farmer cheese, granny's recipe, and also MA18 on the same page, butter Amish, 5 pound roll. That's the butter that we, I remember, used to put granny recipe label on." (Krumgalz, p. 16). Mr. Krumgalz identified a label without wordmark, R-117, the label in use in 1998. (Krumgalz, p. 20). Accordingly, the Krumgalz testimony does nothing more than corroborate that Gold Star was not using BABUSHKA'S RECIPE in 1998. This is entirely consistent with Galina

Pincow's sworn declaration in Respondent's application to register BABUSHKA'S RECIPE that the mark was not use in commerce prior to September 30, 1999.[5]

As in the case of witness Irina Lubenskaya, Galina Pincow was present during the testimony of her employee, Jacob Krumgalz, gesturing and signaling to him during his testimony. (Krumgalz, p. 21-24). (See also Lubenskaya, pp. 59-62).

Mr. Krumgalz confirmed that Gold Star had a catalog in 1998 (Krumgalz, p. 58-59). Galina Pincow, however, swore that no catalog was created prior to 2001. (Galina Pincow, p. 93). Either Ms. Pincow or Mr. Krumgalz is offering false testimony. Perhaps Ms. Pincow willfully failed to produce the 1998 Catalog because it reflects the label GRANNY'S RECIPE, rather than BABUSHKA'S RECIPE.

Mr. Krumgalz could not explain why all product names set forth on the invoices are English transliterations of Russian or Polish words, with the exception of GRANNY'S, which is acknowledged to be the translation, rather than transliteration of the label. (Krumgalz, pp. 41, 42, 46).

Daniel Bartolomeo

The bulk of the testimony of Daniel Bartolomeo should be excluded because it is based on unreliable assumption, rather than personal knowledge; and because it is based on documents which were in the hands of Respondent since May 2007, but not produced by Respondent to Petitioner until October 2008 during Respondent's testimony period.

Mr. Bartolomeo admitted that he had been working with Gold Star since July of 2000 and had no personal knowledge of any dealings with Gold Star prior to July of 2000. (Bartolomeo, pp. 5, 23, 33). He purchased the assets of a company which had been known either

[5] Any testimony by Mr. Krumgalz to the contrary was solely in response to leading questions by counsel to which objection was duly made. (Krumgalz, p. 26).

as Gem Printing or Jes Printing, he was not sure which (Bartolomeo, pp. 15-17), and the principal of the predecessor company had passed away prior to his purchase of assets. (Bartolomeo, p. 35). Accordingly, his testimony consisted of nothing more than surmise, based on a loose interpretation of alleged hand-written notes that he had located, but he could not identify the handwriting (Bartolomeo, p. 47). Mr. Bartolomeo admitted that under his watch, the company does not keep handwritten notes in the ordinary course of business (Bartolomeo, p. 22). As such, the alleged hand-written notes located by Bartolomeo do not qualify as a business record and are no more than rank hearsay.

Yet another basis to exclude the testimony of Mr. Bartolomeo and to demonstrate its utter unreliability is the timeline of production of documents. Bartolomeo testified that he responded to Galina Pincow's request for documents in May 2007; and sent her two letters, one of which is unsigned and dated May 2, 2007 (P-206)[6], the other is dated May 24, 2007. Bartolomeo testified that he sent these letters and documents to Galina Pincow both by fax and UPS in May 2007 (Bartolomeo, p. 18). However, when Gold Star responded to the Order of the TTAB in this proceeding dated May 21, 2007 directing the production of documents, Gold Star produced only the May 24, 2007 letter and attachments, marked with bates-stamp nos. GOLD 0009-0011 (P-211, Petitioner's Notice of Reliance, Ex. I, GOLD 0009-0011). Clearly, Galina Pincow intentionally withheld the remaining documents that she had received from Mr. Bartolomeo in May 2007 until they were produced by Respondent on or about October 14, 2008; only after the commencement of Gold Star's testimony period. As such, P-206 and all testimony relating thereto should be excluded. Please see Appendix, infra Petitioner's Opposition to Respondent's Evidentiary Objections; and Rebuttal to Respondent's Opposition to Petitioner's

[6] The exhibit marked as P-206 was introduced during the cross-examination of Robert Pincow on October 16, 2008, with explicit reservation of objection to the late production of the documents by Respondent on October 14, 2008 -- in contravention of Order of the Board dated May 21, 2007. (Robert Pincow, p. 92).

Evidentiary Objections.

Bartolomeo's testimony concerning P-211 (bearing bates stamp nos. GOLD 0009-0011 which were timely produced) demonstrates the utter unreliability of his business records. On May 24, 2007, Mr. Bartolomeo wrote a letter to Galina Pincow: "Galina [p]er our conversation I have enclosed copies of our records regarding the "Babushka's Recipe" Farmer Cheese Tropol label . . . . Our records indicate that these labels were first produced on September 29, 2000." Attached to the letter is a label for Farmer's Cheese and an invoice dated September 29, 2000 for Homestyle Butter. (P-211, Notice of Reliance, Exh. I GOLD 0009-0011). Mr. Bartolomeo testified:

Q. And what is GOLD 0010?

A. GOLD 0010 is an invoice for the farmer cheese recipe that is on GOLD 0011.

Q. If it's for farmer's cheese, why does it say homestyle butter?

A. Good question.

Q. Do you know?

A. I don't know. The person who typed my invoice that day made a mistake. I don't know.

Q. How do you remember sitting here today that this invoice that says it was for homestyle butter labels was actually for farmer's cheese labels?

A. I don't.

(Bartolomeo, p. 29-30).

In sum, the testimony of Daniel Bartolomeo should be disregarded in its entirety.

Irina Lubenskaya

As with all of Respondent's witnesses, Galina Pincow was present in the conference room during the deposition of Irina Lubenskaya. Due to signaling and furtive

communications from Ms. Pincow to the witness while she was testifying, it was necessary for Petitioner's counsel to object to the seating arrangement in the conference room. (Lubenskaya, pp. 59-62).

Ms. Lubenskaya testified that she designed a label at the request of Ms. Pincow in 1997. Tellingly, the name that Ms. Lubenskaya gave to the computer file containing the label was "grannycollect.eps" (Lubenskaya, p. 9) (P-207). This file name was chosen to match the GRANNY'S RECIPE label that Gold Star was applying to its dairy products at that time. Ms. Lubenskaya confirmed that she never had contact with a printer for BABUSHKA'S RECIPE labels. (Lubenskaya, p. 20). The remainder of Ms. Lubenskaya's testimony concerned documents that she claimed to have sent to Galina Pincow's son, James Pincow, in May 2007 as evidenced by Exhibit P-207 (Lubenskaya, p. 28-29), but which were not provided to counsel for Four Seasons until Respondent's testimony period in October 2008, namely Exhibits P-206 and R-133. The late production of documents by Respondent was in direct contravention of the Order of the Board dated May 21, 2007. Therefore, the documents and all related testimony should be excluded.

Dmitry Lerner

Dmitry Lerner is the full-time manager in a club lounge known as Spa 88 in lower Manhattan that is owned by Robert Pincow. (Lerner, p. 8; Robert Pincow, p. 55). Counsel improperly lead Dmitry Lerner through his direct examination. Dmitry Lerner testified that he was a "silent partner" in a store known as Yuzhni in Brooklyn from 1993-1999. He "never worked" in the store. (Lerner, p. 10). He was never involved in ordering products for the store or stocking it's shelves. (Lerner, pp. 11-12). Yet, he testified under oath that Yuzhni never sold dairy products "that did not have proper U.S. labeling on them." (Lerner, p. 5). In view of

Galina Pincow's admission that she only recently learned of U.S. dairy labeling requirements (Galina Pincow, pp. 151-152), Mr. Lerner's testimony is wholly unpersuasive.

VI. The Labels Manufactured by Respondent "in-House" do Not Comply with the Applicable Federal and New York State Labeling Requirements for Dairy Products and Therefore Could Not Have Been in Use in Commerce.

Respondent's argument that it created BABUSHKA'S RECIPE labels on its own in-house label makers and affixed them to farmers cheese manufactured by Queensboro Farms is both convenient -- and highly susceptible of fraud. Exhibits R-117 and R-119 are examples of such labels (Robert Pincow, pp. 23-26) (Krumgalz, p. 20). However, in advancing its fanciful argument, Respondent ignores the applicable regulations such as the labeling requirements set forth in the 1999 Revision of the Pasteurized Milk Ordinance ("PMO") promulgated by the U.S. Department of Health and Human Services, Food and Drug Administration. The PMO requires that certain dairy products such as farmer's cheese bear the designation "Grade A Pasteurized" and identify the milk plant at which the pasteurization takes place. Clearly, Respondent's alleged "in-house" labels for farmer's cheese are non-compliant and could not have been in use by Respondent in 1999. See e.g. Petitioner's Notice of Reliance, Exhibit B. The same regulations are contained in the 2007 revision of the PMO. See e.g. Petitioner's Notice of Reliance, Exhibit C. New York State has adopted labeling requirements that are parallel to the federal requirements. See Petitioner's Notice of Reliance, Exhibit A.

The applicability of these labeling requirements were affirmed by Respondent's witness, Lewis "Butch" Miller, vice president of Queensboro Farms. (Miller, pp. 24-25). Galina Pincow admitted at deposition that she only recently learned of these requirements (Galina Pincow, pp. 151-152). The only conclusion to be drawn is that Respondent's in-house labels (R-117) and (R-119) are a sham and all testimony related thereto should be stricken.

VII. Respondent's Allegations of Copying by Four Seasons are Void of Merit

Respondent's allegations of infringement and copying by Four Seasons of marks that are not at issue in this proceeding are groundless and are a desperate attempt to shift focus from the fact that Four Seasons has priority with respect to the mark at issue in this proceeding. Respondent alleges that Four Seasons has copied Bunker Hill's label with a horse and buggy for cheese (Respondent's Brief at p. 12). However, Four Seasons has attached as Exhibit D to its Notice of Reliance 14 third party U.S. trademark registrations for cheese, each containing or consisting of a horse and carriage in similar style. Similarly, Exhibits E and F to Petitioner's Notice of Reliance contain, respectively, status and title copies of U.S. trademark Reg. No. 3,339,109 AMISH STYLE HIGH FAT SOUR CREAM with design of horse and carriage, owned by Four Seasons; as well as status and title copy of U.S. trademark application Ser. No. 77/719,928 for TVOROG AMISH FARMERS CHEESE with design of horse and buggy, owned by Four Seasons. Respondent's argument that Four Seasons has copied Bunker Hill's horse and buggy is nothing short of ludicrous.

Respondent falsely claims that Four Seasons never produced a sample of the wrapper for the Russian-made БАБУШКИНО product that he saw being sold in Yuzhini - a store in Brooklyn. (Respondent's Brief at p. 11). However, a sample of the wrapper was exchanged during discovery and marked with Petitioner's Bates-Stamp sequence P 0078. Furthermore, Alexander Bekker gave rebuttal testimony concerning the wrapper, which was marked as Petitioner's Exhibit 305 during the testimony of Alexander Bekker on October 15, 2009.

Respondent's claim that Four Seasons merely copies the products of others is further contradicted by the nine valid and subsisting trademark registrations referenced in Mr.

Bekker's testimony of October 15, 2009 and marked as Exhibits P-306, P-307, P-308, P-309, P-310, P-311, P-312, P-313 and P-314 (Bekker, Oct. 15, 2009, pp. 9-20). As of October 15, 2010, the database of the U.S. Patent and Trademark Office reflects a total of 22 U.S. trademark registrations owned by Four Seasons Dairy Inc.

VIII. Contrary to Respondent's Arguments, the Testimony and Evidence Establishes That Ownership of the Trademark БАБУШКИНО Passed From A&O Corp. to Four Seasons Dairy Inc. Under the Automatic Transfer Doctrine.

Respondent's challenge to the sufficiency of Petitioner's chain of title to the mark БАБУШКИНО is unpersuasive. It is clear from the record that Alexander Bekker and Oleg Kesler were the "leading lights" as owners of a business engaged in the distribution of dairy products. Over the years, Mr. Bekker and Mr. Kesler incorporated A&O Corp. in 1996 and then Four Seasons Dairy Inc. in January of 1999 and transferred the operation of their dairy product distribution business, including the rights to the trademark БАБУШКИНО and the goodwill of the business relating thereto, without interrupting their continuous distribution of БАБУШКИНО branded dairy products. Accordingly, the use of the mark БАБУШКИНО was for the benefit of, and inured to the benefit of, Mr. Bekker and Mr. Kesler. Transfer from A&O Corp. to Four Seasons Dairy Inc. does not create a break in the chain of title. Messrs. Bekker and Kesler, A&O Corp., Four Seasons Dairy and Four Seasons Dairy Inc. are, for all practical purposes, the same entity, selling the same goods, with substantially the same personnel, and therefore there has been a continuity of business operations by the entities. See Airport Canteen Services, Inc. v. Farmers Daughter, Inc., 184 USPQ 622, 627 (T.T.A.B. 1974). Moreover, the same goods continued to be sold under the identical mark: БАБУШКИНО.

As successor in interest to A&O Corp., the business originally operated by Mr. Bekker and Mr. Kessler, Four Seasons Dairy Inc. acquired all trademark rights of the

predecessor entity. TransAmerica Fin. Corp. v. Trans-American Collections, Inc., 197 USPQ 43 (T.T.A.B. 1977). Accordingly, based on the record in this case, the trademark rights that A&O Corp. had in БАБУШКИНО beginning in 1996, were transferred to its successor in interest, Four Seasons Dairy Inc., when it was organized by the same principals in January of 1999 and began selling the same dairy products under the same БАБУШКИНО trademark. Clearly, both the trademark and the goodwill passed from A&O Corp. to Four Seasons when it continued selling the same dairy products under the same brand to the same customers.

A transfer of ownership of a trademark can occur without an assignment of rights. The transfer of a trademark from one person or entity to another does not require, or even presuppose, that the transfer be memorialized in writing or otherwise be marked by formalities. No formal assignment is necessary for title in a trademark to pass from one owner to another. See Woodward v. White Satin Mills Corp., 42 F.2d 987 (8th Cir. 1930). See also Gaylord Bros. v. Strobel Products Co., 140 USPQ 72, 74 (T.T.A.B. 1963). See also Hi-Lo Manufacturing Corp. v. Winegard Co., 167 USPQ 295, 296 (T.T.A.B. 1970). Instead, the common law rights in a mark as well as the good will of the business may be presumed to have passed with the transfer of the business with which the mark has been identified. Sun Valley Co. v. Sun Valley Manufacturing Co., 167 USPQ 304, 309 (T.T.A.B. 1970). Dovenmuehle v. Gilldorn Mortg. Midwest Corp., 871 F.2d 697, 10 USPQ2d 1550 (7th Cir. 1989). This is also known as the "automatic transfer" doctrine.

Petitioner is entitled to "tack" the prior use of БАБУШКИНО by A&O Corp. onto Petitioner's use of БАБУШКИНО after changing the corporate name from A&O Corp. to Four Seasons Dairy, Inc. Petitioner is entitled to tack on the earlier use because the marks are indistinguishable from one another and therefore meet the legal equivalence test. That is, the

marks create the same commercial impression and are indistinguishable from one another. Therefore, they are legal equivalents. Pro-Cuts v. Schilz-Price Enterprises Inc., 27 USPQ2d 1224, 1226 (T.T.A.B. 1993). See also Van Dyne-Crotty Inc. v. Wear-Guard Corp., 926 F.2d 1156, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991).

IX. Four Seasons Has Demonstrated Priority of Use

Four Seasons has established priority of use, both in a strict trademark sense insofar as it has established actual sales in commerce of БАБУШКИНО labeled dairy products in 1997, but also in establishing that Bekker and Kesler were involved in designing and test marketing БАБУШКИНО labels with graphics designer Arie Zurinam and retailer Leon Sheikhet as early as 1996. See e.g. Shalom Children's Wear Inc. v. In-Wear Als, 26 USPQ2d 1516 (T.T.A.B. 1993). Unlike Respondent, which does not have actual proof of sales of "Babushka's Recipe" branded products until 2001, Four Seasons followed up with actual sales in commerce of БАБУШКИНО branded products in 1997. Dyneer Corp. v. Automotive Products Plc, 37 USPQ2d 1251, 1995 WL 785742 (T.T.A.B. 1995) (use analogous to trademark use can create priority but "actual, technical trademark use must follow the use analogous to trademark use within a commercially reasonable period of time"). See also McCarthy on Trademark and Unfair Competition §16:14 (4th Ed. 2010).

The testimony proffered by Respondent concerning alleged conception of the BABUSHKA'S RECIPE mark, and development of drawings with artist Irina Lubenskaya, does not overcome the priority established by Petitioner. At best, Respondent's activities constituted merely the conception of a mark with a vague intention to do business in the future and does not even establish trademark use of that mark. Heinemann v. General Motors Corp., 342 F.Supp. 203, 207, 174 USPQ 296 (N.D. I11.1972), aff'd, 478 F.2d 1405 (7th Cir. 1973).

X. Respondent's Registration Should be Declared Void due to its Actual Knowledge of Petitioner's Prior Use at the Time it Applied to Register its Mark

An applicant commits fraud in procuring a trademark when its makes material representations of fact in its declaration which it knows or should know to be false or misleading. See Medinol Ltd. v. Neuro Vasx, Inc., 67 USPQ2d 1205 (T.T.A.B. 2003); see also Torres v. Cantine Torresella S.R.L., 808 F.2d 456, 1 USPQ2d 1483 (Fed Cir. 1996).

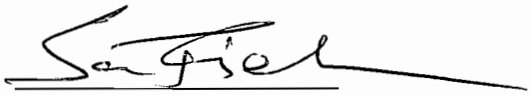
In this case, when Respondent filed its application it knew that Four Seasons Dairy was the prior user of the mark. The Russian specialty foods community in Brooklyn, New York was sufficiently small in 1999 that Respondent was well aware of the goods actually sold by Petitioner in the market place. Moreover, Petitioner had actually sold BABUSHKINO marked dairy goods to Respondent prior to September 1999 (Bekker 4/10/2008, pp. 117-118). Respondent knew or should have known that it could not rely on its sales of GRANNY'S RECIPE labeled dairy products prior to September 1999 to support its application. Therefore, Respondent committed fraud when Galina Pincow declared under oath, on November 11, 1999, to the best of her knowledge and belief, "no other person, firm or corporation or association has the right to use said mark in commerce . . . ." (P-215).

Conclusion

For the reasons stated herein, Four Seasons respectfully urges the Board to sustain this Cancellation proceeding and to cancel Registration No. 2,479,287.

Dated: New York, New York
October 15, 2010

Respectfully submitted,



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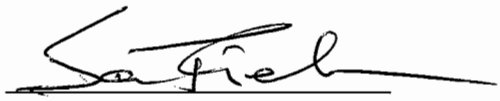
Attorney for Petitioner
FOUR SEASONS DAIRY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Petitioner's Trial Reply Brief and Appendix in Cancellation Proceeding No. 92042082 entitled Four Seasons Dairy, Inc. v. International Gold Star Trading Corp., was, pursuant to stipulation served by email on counsel for Registrant, addressed as follows:

Roger S. Thompson
Cohen, Pontani, Lieberman & Pavane
551 Fifth Avenue
New York, New York 10176
Email: rthompson@cplplaw.com.



Samuel Friedman

October 15, 2010
Date

APPENDIX

Appendix

Petitioner's Opposition to Respondent's Evidentiary Objections; and Rebuttal to Respondent's Opposition to Petitioner's Evidentiary Objections.

Opposition to Respondent's Evidentiary Objections

Testimony of Natalie Walewitsch

Respondent seeks to exclude the testimony of Natalie Walewitsch because she walked out of her deposition during cross examination. However, the cross examination of Ms. Walewitsch clearly exceeded the scope of the direct examination and was based on notes supplied to counsel by Galina Pincow, sitting at the side of counsel for Respondent. (Walewitsch, p. 26). Walewitsch's company, Natar Foods, directly competes with Respondent and Respondent was using this forum to question Ms. Walewitsch concerning confidential suppliers of Natar Foods; and other matters having nothing whatsoever to do with this proceeding. (Walewitsch, p. 26). At the conclusion of the deposition, Galina Pincow went on record as follow:

MISS PINCOW: Roger, we will impeach this witness, whatever it takes.

(Walewitsch, p. 29). Clearly, Respondent's objection lacks merit.

Petitioner's Exhibits 7-11

Respondent's objection to Petitioner's Exhibits 7, 8, 9, 10 and 11 are void of merit. Each of the persons whose signatures appear on Petitioner's Exhibits 7, 8, 9 and 11 gave testimony in this proceeding, based on personal knowledge, subject to cross examination by counsel for Respondent. See e.g. (Zurinam, P-7, pp. 20-24, 33, 35, 37, 40, 61, 64) (Golub, 4/17/08, P-8, pp. 15, 16, 21) (Sheikhet, P-9, pp. 15-19, 22, 46) (Shaydvasser, P-11, pp. 23-24). Unfortunately, Mark Gorelik who signed P-10, passed away in 2006 prior to Petitioner's

testimony herein. However, Alexander Bekker authenticated the document. (Bekker 4/10/08, P-10, pp. 85-87, 133). Based on the foregoing, Alexander Bekker's testimony concerning Petitioner's Exhibit 10 is admissible as past recollection recorded, F.R.E. 803(5). Moreover, the witnesses who testified concerning Petitioner's Exhibits 7, 8, 9 and 11 had independent recollections of the events and transactions at issue and there is no valid objection to the admissibility of their testimony. To the extent that Respondent may argue that the witnesses had forgotten the events at issue, then their testimony relating to the disputed exhibits is similarly admissible as past recollection recorded or present recollection refreshed.

Rebuttal on Petitioner's
Evidentiary Objections

Respondent's Opposition to Petitioner's Evidentiary Objections is Void of Merit. Respondent is Estopped From Introducing Documents that it Refused to Produce in Discovery or in Response to the TTAB Order of May 21, 2007

Four Seasons has objected to all of Respondent's trial exhibits that were not produced during the discovery period of this proceeding. These objections were placed on the record during Respondent's testimonial depositions, as follows:

List of Pages in Transcripts with Objections

Witness	Date	Pages
Lisa Troyer	10/14/2008	19-21, 26-29, 36, 42-43
Jacob Krumgalz	10/14/2008	13-14, 16-17
Robert Pincow	10/16/2008	23, 92
Galina Pincow	10/17/2008	97-98 (vol. II)
	10/23/2008	213 (vol. III)
Irina Lubenskaya	10/17/2008	13-14
Lewis Miller	10/20/2008	8-9

Respondent is in Violation of
<u>the Order of the Board Dated May 21, 2007</u>

Respondent failed and refused to respond to Four Seasons' discovery demands during discovery. Consequently, Four Seasons moved to compel discovery. The motion to compel discovery was served by Respondent on or about March 31, 2007 [D.E. 30][1]. In view of the fact that Respondent defaulted in responding to Petitioner's discovery demands, Four Seasons sought entry of an Order requiring production of documents and sworn answers to interrogatories without objection. Respondent cross moved for an order to reopen discovery bilaterally, and for leave to serve objections to Four Seasons' discovery demands [D.E. 31]. By Order dated May 21, 2007 [D.E. 34], the Board denied the Respondent's motion to reopen discovery. The Board additionally found that "respondent's failure to serve timely responses to petitioner's first set of interrogatories, first set of document requests and first set of requests for admissions was not the result of excusable neglect." <u>See</u> Order of Board, mailed May 21, 2007 [D.E. 34 at p. 2].

Nevertheless, the Board exercised its discretion to permit Respondent to serve discovery responses with objections. The Board allowed Respondent 30 days to select, designate and identify the items and documents to be produced in response to Petitioner's first set of document requests. <u>See</u> Order of Board, mailed May 21, 2007 [D.E. 34 at p. 3].

After further delay by Respondent resulting in Petitioner filing a motion for sanctions on July 23, 2007 [D.E. 39], on or about November 15, 2007, Respondent produced 203 pages of documents bearing bates-stamp nos. GOLD 0001 - GOLD 0203. The first 95 pages of Respondent's document production[2] is filed with the Board as part of Exhibit I to Four Seasons'

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[1] D.E. refers to docket entry as reflected on TTABVUE Prosecution History.

[2] Four Seasons filed only the first 95 pages of the Respondent's document production and did not include

Notice of Reliance filed November 4, 2009 [D.E. 80]. As set forth therein, GOLD 0001 - GOLD 0095 are filed for the purpose of demonstrating that the Respondent failed to disclose its Trial Exhibits during discovery to the prejudice of Four Seasons.

Thereafter, on October 14, 2008, at the commencement of the testimonial deposition of Respondent's First Witness, Lisa Troyer, counsel for Respondent produced additional documents which it sought to enter into evidence as Respondent's Trial Exhibits.[3]

Counsel for Petitioner duly noted its objection on the record of the testimonial deposition of Lisa Troyer:

> MR. FRIEDMAN: I am just going to place an objection on the record to the introduction of any documents by Registrant that were not exchanged during the discovery phase of this proceeding, such as R-102.
>
> MR. THOMPSON: I understand. I will state for the record, as I have told you previously off the record, these are documents which came from third parties and were only received moments before I emailed them to you on Friday.

(Troyer, pp. 19-20).

Four Seasons duly objected to introduction of the following exhibits on grounds that they were not exchanged during discovery:

Registrant's Exhibit	Objection Noted	Description	Date
R-103	Lisa Troyer pp. 19-21	Gold Star's "Babushka's Recipe" label for Havarti Yogurt Cheese (GOLD 0209).	10/14/08
R-104	Lisa Troyer pp. 26-29	See-through wrap for "Heini's Semi Soft Part-Skim Cheese" with logo of a horse and carriage manufactured for Bunker Hill Cheese Co., Inc. (GOLD 0286).	10/14/08

documents with bates-stamp nos. GOLD 0096 - GOLD 0203 because identification of GOLD 0096 - GOLD 0203 is not reasonably in dispute. GOLD 0096 - GOLD 0145 is Respondent's 2006 Catalog (R-120); GOLD 0146 - GOLD 0203 is Respondent's 2007 Catalog (R-118).

[3] Counsel for Respondent emailed some of these documents to counsel for Petitioner the prior Friday evening, on or about October 10, 2008, as well as on Monday October 13, 2008, the day prior to taking the testimony of Lisa Troyer.

R-105	Lisa Troyer (continued objection)	Four Seasons' label for "Amish Gourmet Semisoft Part-Skim Cheese" with logo of a horse and carriage manufactured exclusively for Four Seasons Dairy Inc. (GOLD 0289).	10/14/08
R-106	Lisa Troyer (continued objection)	Label of "Amish Valley Farms Colby Cheese" with logo of a horse and carriage distributed by Bunker Hill Cheese CO., Inc. (GOLD 0288).	10/14/08
R-107	Lisa Troyer p. 36	Curwood invoice #80433270 dated 5/30/03.	10/14/08
R-108	Lisa Troyer p. 36	USA Label Express, Inc. invoice 7176 dated 6/10/03.	10/14/08
R-109	Lisa Troyer p. 36	Curwood invoice #80433312 dated 6/02/03.	10/14/08
R-110	Lisa Troyer pp. 42-43	Photocopy of Four Seasons' label for "Amish Gourmet Semisoft Part-Skim Cheese" with logo of a horse and carriage manufactured exclusively for Four Seasons Dairy Inc.	10/14/08
R-111	Lisa Troyer pp. 42-43	Photocopy of label for "New Salzberg Cheese" made exclusively for Four Seasons Dairy Inc.	10/14/08
R-112	Lisa Troyer pp. 42-43	Photocopy of label for "Amish Country Roll Butter" with logo of a horse and carriage manufactured exclusively for Four Seasons Dairy Inc.	10/14/08
R-115	Jacob Krumgalz pp. 13-14 and Galina Pincow p. 213	Gold Star's invoice #108538 dated 12/18/98 (GOLD 0226 - GOLD 0229).	10/14/08 10/23/08
R-116	Jacob Krumgalz pp. 16-17 and Galina Pincow p. 213	Gold Star's invoice #109845 dated 12/29/98 (GOLD 0230 - GOLD 0285).	10/14/08 10/23/08
R-119	Robert Pincow p. 23	Gold Star's "Babushka's Recipe" label for Farmer Cheese (GOLD 0300).	10/16/08
R-127	Galina Pincow (continued objection)	Four Seasons' label for "Amish Gourmet Semisoft Part-Skim Cheese" with logo of a horse and carriage manufactured exclusively for Four Seasons Dairy Inc. (GOLD 0311).	10/16/08

R-130	Galina Pincow p. 97 (vol. II)	Color Photocopy of, P-203, label for "Old Salzberg semi soft cheese" made exclusively for International Gold Star Trading Corp. (GOLD 0313).	10/17/08
R-131	Galina Pincow p. 98 (vol. II)	Color Photocopy of label for "Finlandia Lappi Park Skim Milk Semisoft Cheese" distributed by Finlandia Cheese Inc. (GOLD 0312).	10/17/08
R-133	Irina Lubenskaya pp. 13-14	Gold Star's "Babushka's Recipe" labels (GOLD 0290 - GOLD 0299).	10/17/08
R-135	Lewis Miller pp. 8-9	Printout of payments from Gold Star (GOLD 0314)	10/20/08
R-136	Lewis Miller (continued objection)	Queensboro Printout with balance information of Gold Star (GOLD 0313)	10/20/08
R-137	Lewis Miller (continued objection)	Queensboro invoice #111616 dated 11/15/97 (GOLD 0316)	10/20/08

Petitioner's Exhibit	Objection Noted	Description	Date
P-206	Robert Pincow p. 92	Letters (not signed) from Dan Bartolomeo of Gem Printing to Galina of Gold Star dated 5/2/07 and 5/24/07; and copies of "Babushka's Recipe" labels (GOLD0204-GOLD0225). The within "Babushka's Recipe" label (GOLD0209) is also marked as R-103 on 10/14/08.	10/16/08
P-210	Robert Pincow (continued objection)	Photocopy of label currently in use by Gold Star (GOLD0300).	10/16/08
P-212	Irina Lubenskaya (continued objection)	Email from Roger Thompson, Esq. to Samuel Friedman, Esq. dated 10/10/08 re Files rec'd today from Irina Lubenskaya.	10/17/08
P-214	Lewis Miller (continued objection)	Printout of items that they are currently marketing	10/20/08

As admitted by Mr. Thompson these documents were not produced during discovery. Rather, to the prejudice of Four Seasons they were produced only after commencement of Respondent's testimony period.

Notably, all of Respondent's witnesses appeared voluntarily for deposition at the offices of Respondent's counsel. None of Respondent's witnesses testified pursuant to subpoena. All of Respondent's witnesses appeared to have been prepared to testify by Respondent's principal, Galina Pincow, who sat through all of Respondent's testimony. Clearly, Respondent could have obtained and produced these documents in response to Order of the Board dated May 21, 2007. Respondent's failure to comply with discovery obligations and Board Orders precludes introduction at trial of materials that it refused to produce in discovery.

Ms. Pincow was present for the testimony of Respondent's witnesses. On more than one occasion, it was necessary for undersigned counsel for Four Seasons to object to the seating arrangement in the deposition room because of apparent signaling and communication by Ms. Pincow to the witness during the examination. (Lubenskaya, pp. 59-62), constituting a perversion of the truth-seeking function of this honorable tribunal.

Counsel for Petitioner duly objected on the record to introduction of trial exhibits that were not produced during discovery on grounds of untimeliness. In accordance with the rules of practice set forth in the TBMP, the objections were preserved on the record, but the examinations proceeded and counsel examined the witnesses, subject to a determination by the Board as to admissibility. Documents bearing bates stamp nos. GOLD 0204 - 0299 were first produced by Respondent during its testimony period on October 14, 2008, notwithstanding that many of these documents originated with Respondent. See e.g.

> MR. FRIEDMAN: Again, these documents are being handed to me for the first time today and I object to the introduction of any documents not previously

exchanged during discovery.

MR. THOMPSON: For the record, these documents aren't being introduced right now.

MR. FRIEDMAN: These documents are from your client?

MR. THOMPSON: Some of them are. Towards the end of the pile there are documents that were not from my client. Up to 285, I think, were invoices from the client, and then starting at 286 to 299 these are -- some of them may have been in their files, but not all of them.

(Troyer, pp. 21-22).

Counsel for Respondent then made the baseless and unsupported argument that the Respondent's documents had not been previously produced because they were not requested during the discovery period. (Troyer, p. 22).

The fallacy of Respondent's argument that Respondent's exhibits were not requested during discovery is made evident by a review of Petitioner's discovery demands, which are attached as exhibits to Petitioner's Motion to Compel discovery [D.E. 30]. For example, Exhibit A to Petitioner's Motion to Compel Discovery is Petitioner's Request for Production of Documents, served on December 29, 2003. Selected excerpts from Petitioner's Request for Production are reprinted below for the convenience of the Board:

Request No. 3:
Produce all documents which record, refer to, or relate to Registrant's use of the BABUSHKA'S RECIPE designation, including Registrant's investigation of Registrant's Mark for its availability for adoption and registration, its licensing, use, intended use, exploitation, and/or intended exploitation.

Request No. 4:
Produce all documents which record, refer to, or relate to Registrant's use of the terms BABUSHKA or BABUSHKINO in connection with any goods and/or services.

Request No. 5:
Produce all documents which record, refer to, or relate in any manner to the subject matter of this cancellation proceeding.

Request No. 8:
Produce all documents which record, refer to, or relate to Registrant's sales or intended sales of any goods and/or services under Registrant's Mark.

Request No. 9:
Produce all documents which record, refer to, or relate to the selection, design, adoption, proposed use of, decision to use, and first use of Registrant's Mark and/or any mark including the terms BABUSHKA or BABUSHKINO, including samples of any names, designations and/or other marks considered and rejected.

Request No. 11:
Produce all documents which refer to, relate to, or are in any way concerned with the preparation, filing and/or prosecution of any applications for registration, state or federal, of marks incorporating the terms BABUSHKA or BABUSHKINO by Registrant including, without limitation, U.S. Trademark Registration No. 2,479,287.

Request No. 12:
Produce all documents which record, refer to, or relate to Registrant's consideration or decision to select, adopt and/or use Registrant's Mark and/or any designation including the terms BABUSHKA or BABUSHKINO in each different logotype, design, hang tag, packaging, font of type or style in which said designation is being used, or is intended to be used, by or on behalf of Registrant.

Request No. 13:
Produce a sample of each different logotype, design, hang tag, packaging, font of type or style in which Registrant's Mark and/or any designation including the terms BABUSHKA or BABUSHKINO is being used, or is intended to be used, by or on behalf of Registrant.

Request No. 18:
Produce all documents which record, refer to, or relate to the amount of sales (actual and/or projected) by calendar quarter of goods sold by or for Registrant under Registrant's Mark including, without limitation, the identification of the goods or services, the number of units and/or services sold, the dates of the sales, and the dollar value of the sales.

Request No. 21:
Produce all documents which record, refer to, or relate to Registrant's knowledge and/or awareness of the use and/or application for registration of Petitioner's Mark by Petitioner.

Request No. 22:
Produce all documents which record, refer to, or relate to any inquiry, investigation, evaluation, analysis, or survey conducted by Registrant or any person acting for or on behalf of Registrant regarding any issues involved in this

proceeding.

Request No. 28:
Produce a copy of all documents, other than those produced to any of the foregoing requests, upon which Registrant intends to rely in connection with this cancellation proceeding.

Request No. 29
Produce all documents identified in response to Petitioner's First Set of Interrogatories to Registrant, not produced in response to the above requests.

Additionally a brief review of Petitioner's duly served Interrogatories, which were also the subject of the previous motion to compel, demonstrates that all of the Respondent's trial exhibits were duly demanded during discovery. Selected interrogatories are reproduced below for the convenience of the Board:

Interrogatory No. 2:
Describe in detail all past and existing relations, including contracts, agreements, licenses, assignments, or other relations, between Registrant and any third party, including predecessor companies, related, or affiliated companies, relating in any manner to Registrant's Mark.

Interrogatory No. 4:
Identify all state and federal registrations, applications for registration, and uses by Registrant of any mark which incorporates the terms BABUSHKA or BABUSHKINO, and for each such registration, application, and use, identify all documents relating thereto.

Interrogatory No. 7:
Identify and describe each of the goods and/or services on which Registrant intends to use or has used Registrant's Mark, or any variation thereof.

Interrogatory No. 8:
Identify all documents and set forth with specificity all facts regarding the selection by Registrant of Registrant's Mark including, without limitation, the circumstances and method by which Registrant adopted the terms BABUSHKA as a part of its mark.

Interrogatory No. 13:
For each of the goods identified in Registrant's application, to register Registration's Mark, identify all documents supporting the date on which the mark was first used.

Interrogatory No. 20:
For each of the goods or services sold under Registrant's Mark, set forth the number of units and dollar amount of the annual sales of such goods or services, the dollar amount of annual advertising expenditure on such goods or services, and the individual media through which such advertising took place, and the dollar amount of advertising through each such media; and identify documents sufficient to support your response to this interrogatory.

Interrogatory No. 27:
For purposes of establishing priority of use, identify the earliest date upon which Registrant intends to rely in this proceeding with respect to its use of Registrant's Mark and/or any mark that includes the terms BABUSHKA or BABUSHKINO, and produce all documents relating to such use(s).

Notwithstanding the clear and unequivocal language of the Board's Order of May 21, 2007 that "the documents must be selected, designated and produced within thirty days . . . . . ." , Respondent failed and refused to produce the documents until the opening of its testimony period in October 2008, approximately seventeen (17) months after the Order of the Board.

Here, unlike in H.D. Lee Co. v. Maidenform Inc., 87 USPQ2d 1715 (T.T.A.B. 2008), relied upon by Respondent, a motion to compel discovery was previously served in order to test the sufficiency of Respondent's discovery responses.

Here, unlike in H.D. Lee v. Maidenform, supra, Respondent served a cross motion to reopen discovery [D.E. 32] for the very purpose of providing the long overdue answers and objections to the outstanding discovery demands. Moreover, here, unlike in H.D. Lee v. Maidenform, supra, the Board entered an Order [D.E. 34] directing Respondent, within thirty (30) days, to "select, designate and identify the items and documents . . . . . to be produced." Respondent's ensuing failure to produce trial exhibits for seventeen (17) months thereafter, choosing instead to produce its trial exhibits only after its testimony period commenced, to the prejudice of Petitioner, is nothing more than a contemptuous and contumacious violation of this Board's Order as well as Respondent's discovery obligations.

Here, unlike in H.D. Lee v. Maidenform, the estoppel sanction should apply.

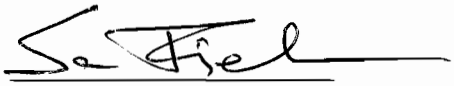
Respondent answered Petitioner's discovery demands and purported to comply with the Board's May 21, 2007 Order by producing GOLD 0001 - 0202 (described previously) as well as Answers and Objections to Interrogatories (Petitioner's Notice of Reliance, Exhibit I). Respondent is thus barred by its own actions from introducing at trial the information sought in Petitioner's discovery demands -- which Respondent failed and refused to produce in discovery or in compliance with the Board's May 21, 2007 Order. As set forth in the Troyer transcript of testimonial deposition, Petitioner preserved its objections to the evidence on grounds of untimely production, and preserved the objection in Petitioner's Brief, as well as supporting the grounds for it in Petitioner's Notice of Reliance, Exhibit I, as well as in prior motions to the Board. Accordingly, Respondent should be precluded and estopped from introducing the exhibits. Moreover, all testimony relating to or relying thereon should also be excluded. Weiner King, Inc. v. Weiner King Corp., 615 F.2d 512, 204 USPQ 820, 828 (CCPA 1980) (where North Carolina corporation refused to answer interrogatories on grounds that requested information was irrelevant and immaterial, TTAB erred in considering evidence which New Jersey corporation has unsuccessfully sought to discover, as North Carolina corporation was equitably estopped from introducing such evidence. Additionally, where a party seeks to discover facts that it expects the other party to introduce into evidence and the other party represents that all of those facts are already of record, the first party has the right to expect reliance by the other party on those facts of record alone, and any attempt, in such circumstances, to introduce other testimony about those or other facts bearing on the same issues amounts to the type of surprise that the Federal Rules of Civil Procedure were designed to avoid). See also Super Valu Stores Inc. v. Exxon Corp., 11 USPQ2d 1539 (T.T.A.B. 1989); TMBP 527.01(e).

Conclusion

For the reasons stated herein, Four Seasons respectfully urges the Board to sustain this Cancellation proceeding and to cancel Registration No. 2,479,287.

Dated: New York, New York
October 15, 2010

Respectfully submitted,



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