

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

Hearing: March 9, 2011

Mailed: September 14, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Four Seasons Dairy, Inc.

v.

International Gold Star Trading Corp.

Cancellation No. 92042082
to Registration No. 2479287
issued August 21, 2001

Samuel Friedman for Four Seasons Dairy, Inc.

Roger S. Thompson of Cohen, Pontani, Lieberman & Pavane LLP
for International Gold Star Trading Corp.

Before Zervas, Wellington, and Wolfson, Administrative
Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Four Seasons Dairy, Inc. ("petitioner") filed a
petition to cancel Registration No. 2479287 for the mark
BABUSHKA'S RECIPE for "dairy products, excluding ice cream,
ice milk and frozen yogurt processed and marinated

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vegetables,"¹ alleging prior use of the mark БАБУШКИНО for "vegetable oil spread, vegetable extracts for food, margarine, dairy products excluding ice cream, ice milk and frozen yogurt, butter, cottage cheese, and yogurt."² The proposed mark is in Cyrillic lettering and transliterates into English as "Babushkino."As grounds for cancellation, petitioner alleges a likelihood of confusion between the marks and that the registration was obtained fraudulently. In its answer, respondent, International Gold Star Trading Corp., admitted that the goods are closely related³ but otherwise denied the salient allegations of the complaint, claiming that it has priority of use of its mark and that petitioner lacks standing to bring this proceeding.

¹ Section 8 declaration accepted; Section 15 declaration acknowledged. We note that this proceeding commenced on May 29, 2003, less than two years after the registration issued. The registration was not eligible for incontestable status when the Section 15 declaration was filed, and the USPTO should not have acknowledged the affidavit. See TMEP § 1605.04 (7th ed. 2011) (USPTO will not acknowledge the affidavit if it finds there is a pending proceeding involving the owner's right to register the mark). However, even if in error, "[a]cknowledging receipt of the affidavit provides notice to the public that an affidavit of incontestability has been filed; it is not a determination by the USPTO that the registration is in fact incontestable. The question of whether the registration is incontestable arises and is determined by a court if there is a proceeding involving the mark." TMEP § 1605 (7th ed. 2011).

² Petition to Cancel, p. 2.

³ Answer, p. 2.

The Record

By rule, the record includes respondent's registration file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b).

Petitioner's Evidence

Petitioner introduced the following testimony and evidence during its testimony and rebuttal testimony periods:

1. The testimony deposition of Alexandr Bekker, vice president of Four Seasons Dairy, Inc., with attached exhibits.
2. The testimony deposition of Oleg Kesler, president of Four Seasons Dairy, Inc., with an attached exhibit.
3. The testimony depositions of seven third-party witnesses testifying regarding opposer's first use. Those witnesses are set forth below:
 - a. The April 15, 2008 testimony deposition of a confidential witness, the vice president of sales for the food manufacturer that supplies petitioner its dairy products, with attached exhibits.
 - b. The June 11, 2008 testimony deposition of the same confidential witness, with attached exhibits.
 - c. The testimony deposition of Leon Sheikhet, former owner of Miller's Market (out of business in 2004), a seller of, *inter alia*, dairy products, with attached exhibits.

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- d. The testimony deposition of Arkadiy Golub, former manager of Beluga Caviar (out of business in 2002), a wholesale seller of, *inter alia*, dairy products, with attached exhibits.
 - e. The testimony deposition of Sofya Sheydvasser, owner of Matreshka, a grocery store, with attached exhibits.
 - f. The testimony deposition of Arie Zurinam, owner of Quick Graphics, Inc., a printing shop, with attached exhibits.
 - g. The testimony deposition of Natalie Walewitsch, principal and buyer for Natar Foods, a wholesale distributor for, *inter alia*, dairy products, with attached exhibits.
 - h. The rebuttal testimony deposition of Arkadiy Golub, with attached exhibits
4. The rebuttal testimony deposition of Alexandr Bekker, with attached exhibits.

Petitioner also filed a notice of reliance on:

- 1. Copies of portions of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR").
- 2. Copies of portions of the 1999 Revision of Grade "A" Pasteurized Milk Ordinance (the "PMO of 1999").
- 3. Copies of portions of the 2007 Revision of Grade "A" Pasteurized Milk Ordinance (the "PMO of 2007").
- 4. Copies of fourteen U.S. trademark registrations owned by unrelated third parties purportedly to show that horse and carriage designs are common elements in trademarks for dairy products, to refute

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respondent's allegation of a pattern of copying by petitioner.

5. Status and title copy of petitioner's registration No. 3339109 for the mark AMISH STYLE HIGH FAT SOUR CREAM and design for "sour cream" in class 29.
6. Status and title copy of petitioner's trademark application serial No. 77719928 for the mark TVOROG AMISH FARMERS CHEESE and design for "soft cheese, cream cheese and cottage cheese" in class 29.
7. Copy of respondent's Combined Declaration of Use and Incontestability under Section 8 and 15 for the subject registration No. 2479287.
8. Copy of an Office Action issued by the USPTO in connection with registration No. 3080997, issued on the Supplemental register, for the mark YOGURT CULTURED owned by an unrelated third party.
9. Copies of petitioner's first set of interrogatories, respondent's responses to petitioner's interrogatories, respondent's supplemental response to petitioner's interrogatories, and respondent's documents productions as part of its answers to petitioner's interrogatories.

Respondent's Evidence

Respondent introduced the following testimony and evidence during its testimony period:

1. The testimony deposition of Lisa Anne Troyer, vice president of sales at Bunker Hill Cheese Company, with attached exhibits.
2. The testimony deposition of Dmitry Lerner, former silent partner of Yuzhni grocery store, with an attached exhibit.

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3. The testimony deposition of Jacob Krumgalz, warehouse manager of International Gold Star Trading Corp., with attached exhibits.
4. The testimony deposition of Galina Pincow, vice president of International Gold Star Trading Corp., with attached exhibits.
5. The testimony deposition of Robert Pincow, president of International Gold Star Trading Corp., with attached exhibits.
6. The testimony deposition of Daniel Bartolomeo, owner of Northport Printing and Gem Printing, with attached exhibits.
7. The testimony deposition of Irina Lubenskaya, art director for IBM.com, with attached exhibits.
8. The testimony deposition of Lewis "Butch" P. Miller, executive vice president of Queensborough Farm Products, with attached exhibits.
9. The testimony deposition of Vladimir Krasnov of V.M. Food Service Corp., with an attached exhibit.
10. The testimony deposition of Igor Zagranichny, formerly of Roman & Sons, Inc., with an attached exhibit.
11. The testimony deposition of Oleg Kesler, president of Four Seasons Dairy, Inc., with an attached exhibit.
12. The testimony deposition of Alexander Bekker, vice president of Four Seasons Dairy, Inc., with attached exhibits.

Respondent also filed a notice of reliance on four trademark registrations owned by unrelated third parties,

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which respondent alleges were copied by petitioner, purportedly to show a pattern of copying by petitioner.

Evidentiary Objections

In its main trial brief, petitioner objected to the introduction of "Respondent's trial exhibits and any and all testimony of Respondent's witnesses related thereto, where the documents were not produced during discovery or supplemented under Rule 26 of the Fed.R.Civ.P." In response, as part of its main trial brief, respondent responded to petitioner's objections and made its own evidentiary objections on the basis of the best evidence rule, Fed. R. Evid 1002, against the introduction of evidence and testimony proffered by petitioner. As part of its reply brief on the case, petitioner filed a response to respondent's objections, and included an appendix listing testimony and documents allegedly not produced by respondent during discovery. Respondent filed a motion to deny petitioner's reply brief as untimely.⁴ Because we consider petitioner's evidentiary objections to be part of its case-in-chief and not proper rebuttal subject matter, the

⁴ To the extent respondent's motion includes arguments in support of its evidentiary objections, such arguments have not been considered, because they would be considered part of an otherwise improper reply brief. See Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1); and TBMP § 801.02(d) ("There is no provision for

appendix and arguments related to petitioner's objections that form part of petitioner's reply brief have not been considered. *See further discussion, infra.* Accordingly, the timing issue presented by respondent's motion is moot.

Petitioner's Objection Under Fed. R. Civ. Pro. 37 to Documents Allegedly Not Produced During Discovery

During the testimony deposition of several of respondent's witnesses, petitioner made numerous objections to the admission of evidence as not having been produced during discovery. Petitioner maintained the objections in its brief, but did not specify the particular exhibits to which it objected, or the specific discovery requests to which respondent allegedly had failed to respond. Respondent objected to exclusion of the evidence on this basis. In its reply brief, petitioner included the previously missing information.

"[T]o preserve an objection that was seasonably raised at trial, a party should maintain the objection *in its brief on the case*, as an appendix to its brief on the case or in a separate statement of objections *filed with its brief on the case.*" TBMP § 707.03(c) (3rd ed. 2011) (emphasis supplied);

filing a reply brief, rebuttal brief, rejoinder brief, etc. by a party in the position of defendant.").

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see also TBMP § 707.04 and authorities cited in that section.

In order to preserve an objection that was seasonably raised at trial, a party must maintain the objection in its opening brief on the case. See *Hard Rock Café International (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1507 n.5 (TTAB 2000) (objection to exhibit raised during deposition but not maintained in brief is deemed waived); and *Reflange Inc. v. R-Con International*, 17 USPQ2d 1125, 1126 n.4 (TTAB 1990) (objections to testimony and exhibits made during depositions deemed waived where neither party raised any objection to specific evidence in its brief). See also TBMP §707.03(c) (2d. ed. rev. 2004).

In this case, numerous objections were made during the testimonial depositions. The general reference, in its brief, to the objections raised by petitioner during trial is insufficient to preserve the individual objections originally made during the testimonial depositions. Petitioner has the obligation to identify in its main trial brief those particular discovery requests that sought the evidence in dispute, and to detail the inadequacy of respondent's production. Allowing petitioner to wait until its reply brief to clarify the objections effectively

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forecloses respondent from responding to the objections. *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1104 (TTAB 2007) (objection raised at trial waived when petitioner waited until its reply brief to renew objections).

Accordingly, petitioner has failed to preserve its objections on the record. See *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741, 1747 (TTAB 2006) (sweeping allegations in brief insufficient to preserve individual objections originally made in testimonial deposition); *United Rum Merchants Ltd. v. Fregal, Inc.*, 216 USPQ 217, 218 n.4 (TTAB 1982) (party failed to pursue objection to certain insufficiently identified exhibits introduced at trial in its brief). Petitioner's objections to respondent's evidence are overruled.

Respondent's Objection Under the "Best Evidence Rule" to Petitioner's Exhibits 7-11

Respondent has objected to the Board's consideration of petitioner's Exhibits 7-11 on the basis of the "best evidence" rule, Fed. R. Evid. 1002. That rule, in order to provide a safeguard against unreliable evidence, requires production of the original of a document to prove its contents. This concern for accuracy is justified by the

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fact that the precise content of items such as writings is frequently the central issue in a case.

Here, Exhibits 7-11 may be characterized as "To whom it may concern" letters that were written at petitioner's request by third parties in support of petitioner's priority claim. The letters each internally identify a date, and each of the persons who signed the letters was deposed during trial (except for Mark Gorelik, who is now deceased) as to the accuracy of that date. Respondent would have us exclude the letters where the witness identified underlying documents to verify such date because petitioner did not introduce copies of the underlying documents, the purported dates thereon are allegedly contradictory to other evidence of record, and the witnesses allegedly do not have personal knowledge of the sales represented by the underlying documents.

Here, there is no dispute that the copies of the letters adduced are accurate copies of the originals, and the testimony of each witness stands independently to identify the date set forth in the letters. Where the testimony presents insufficient facts for the Board to draw a conclusion as to the accuracy of the date embedded in the letter, the probative value of the information is

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diminished. Nonetheless, the letters themselves will not be excluded under the rule, as there is no doubt as to their authenticity, and we will consider them for whatever probative value they may have. Respondent's objection is overruled.

Respondent's Objection to the Testimony of Natalie Walewitsch

Respondent objects to the introduction of Ms. Walewitsch's testimony because she walked out of the deposition before respondent had had a chance to fully cross-examine. Petitioner argues that the witness was being asked questions that went beyond the scope of direct and were directed to obtaining information from a competitor regarding confidential business matters that respondent had no right to know. Trademark Rule 2.123(e)(3), 37 C.F.R. 2.123(e)(3) provides that "Every adverse party shall have full opportunity to cross-examine each witness." The Board has reviewed the testimony and agrees that the deposition was effectively concluded before respondent had completed its cross-examination. Accordingly, respondent's motion to exclude Ms. Walewitsch's testimony is granted.

Standing

Petitioner pleads ownership of trademark application serial No. 76174746, and alleges that the application has

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been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) on the basis of respondent's registration.⁵ Petitioner's application and the Office Action refusal were made of record.⁶ Because respondent's registration was cited as a bar to registration of petitioner's application, petitioner has established its standing. See *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008) (standing found because the opposed application was cited as a potential bar to opposer's registration); see also *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

To establish priority on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned..." Trademark Act § 2, 15 U.S.C. § 1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, actual use, or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet web sites, which

⁵ Petition for Cancellation, para. 7.

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create a public awareness of the designation as a trademark identifying the party as a source. See Trademark Act §§ 2(d) and 45, 15 U.S.C. §§ 1052(d) and 1127; *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996), *vacating Pactel Teletrac v. T.A.B. Systems*, 32 USPQ2d 1668 (TTAB 1994); and *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). Priority is an issue in this case because petitioner does not own an existing registration upon which it can rely for purposes of a Section 2(d) likelihood of confusion analysis. *Cf. King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Respondent is at least entitled to the filing date of the underlying application of its registration, which is December 7, 1999. See *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) ("Of course, petitioner or respondent may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date.").

Petitioner's Allegation of First Use Through A&O Corp.

Petitioner alleges that it first used its mark in 1997 through a predecessor, A&O Corporation ("A&O"), a grocery

⁶ Kesler Dep., p. 9-13, petitioner's ("P's") Ex. 17.

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store and wholesale operation in the Russian food market.⁷ Since the record reflects that petitioner was not incorporated until January 4, 1999,⁸ we must first consider whether the evidence of record shows that any rights A&O established in the **БАБУШКИНО** mark transferred to Four Seasons Dairy, Inc. upon its incorporation.

In 1996, Messrs. Kesler and Bekker formed A&O Corp. as a New York corporation, taking the first letter of each of their first names to create the company name.⁹ On September 12, 1996, one hundred shares of company stock were issued, fifty to Mr. Kesler and fifty to Mr. Bekker.¹⁰ Mr. Kesler surrendered his shares to Mr. Bekker as of September 24, 1996,¹¹ but remained vice president of A&O and shared equally in the profits generated by sales of products sold by A&O.¹² A&O maintained a bank account and Messrs. Kesler and Bekker were the signatories on the account.¹³

Mr. Bekker testified as to the evolution of the company's name from A&O to Four Seasons as follows:

⁷ See discussion, *infra*.

⁸ Bekker Dep., p. 49.

⁹ Bekker Dep., p. 111; P's Ex. 16; Kesler Dep., p. 25. (as respondent's witness).

¹⁰ Bekker Dep., p. 105; P's Ex. 15.

¹¹ Kesler Dep., p. 25. (as respondent's witness).

¹² Bekker Dep., p. 112.

¹³ Bekker Dep., p. 113.

Somewhere in September of 1998 we started to try the name of Four Seasons because we wanted to create a new name and we were registered at the factory Oasis as Four Seasons. When our bookkeeper started to change to Four Seasons, New York State already had it and we couldn't repeat it. So he was looking for a similar name like Four Seasons Distributors and he found a name that was available. This name was Four Seasons Dairy. Beginning January 4th, 1999 we were registered as Four Seasons Dairy.¹⁴

There is some conflicting testimony from the confidential witness, the vice president of the food manufacturer that manufactures petitioner's **БАБУШКИНО** butter blend product, who testified (under seal) that he had had an initial meeting with four individuals who identified themselves as A&O,¹⁵ and that both A&O and a company called Food House Distribution were predecessors to Four Seasons Dairy.¹⁶ However, the witness later stated that "Alex and Oleg, they separated from Mark and Michael and became Four Seasons Dairy. Michael and Mark became Food House."¹⁷ It is also corroborated from other witnesses' testimony that Four Seasons Dairy Inc. was the successor to the interests of A&O. We will now examine the testimony of these other witnesses.

¹⁴ Bekker Dep., p. 49.

¹⁵ Confidential witness Dep., p. 13.

¹⁶ Confidential witness Dep., p. 7-8.

¹⁷ Confidential witness Dep., p. 13.

Arie Zurinam, president of Quick Graphics, Inc., testified that he printed labels bearing the **БАБУШКИНО** mark for A&O and then, Four Seasons.

Q: When you started doing work for Alex Bekker and Oleg Kessler, was there any company name that they used?

A: I think they were, before Four Seasons, they had like A & O. I think Alex and Oleg, something like this. It was like I think when they opened up or something.

Q: Was there any point in time when that name changed?

A: Yeah, they changed it to Four Seasons. I can't give you the date. I don't know, but later on they changed it to Four Seasons.¹⁸

Sofya Sheydvasser, owner of the grocery store Matreshka, testified that A&O were known as the predecessor to Four Seasons.

Q: Okay. Back when they had this store called Friendly Food store, do you know whether Alex and Oleg, did they have a company with a company name?

A: Yes. This was before Four Seasons. It was, just a second, A&O, A&O, I think O&A or A&O Dairy Product or...

Q: You said this was before they became Four Seasons?

A: Yes, sure.

Q: So -

A: It is not was a long time A&O, maybe two years, maybe, I think. And after they make a company, it was Four Seasons. It is now Four Seasons.¹⁹

¹⁸ Zurinam Dep., p. 13.

¹⁹ Sheydvasser Dep., p. 14.

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Arkadiy Golub, former manager at Beluga Caviar, a wholesale distributor of Russian foods, testified to the transition from A&O to Four Seasons as follows:

Q: Do you remember the name of the company that Alex Bekker and Oleg had when you started ordering Babushkino?

A: A & O, yes A - A & O.

...

Q: Do you know whether the company ever changed names?

...

A: Yes, '90 -- '98, maybe Four Seasons, Four Seasons Dairy, yes.

Leon Sheikhet, owner of Unsurpassed Meat Corporation, d/b/a Miller's Market from 1994 to 2004, testified that he did business with Messrs. Bekker and Kesler first as A&O and then as Four Seasons:

Q: Do you know if there were other people at A and O Corporation that you ever dealt with besides Alex and Oleg?

A: No.

Q: Do you know if Alexander or Oleg was affiliated with a company other than A & O and Four Seasons?

A: No. I only know them A & O and Four Seasons.²⁰

Although there is no written assignment transferring any of A&O's assets, including whatever trademark rights it may have had, to Four Seasons Dairy, Inc., an assignment of an unregistered trademark is not void for lack of a writing embodying the transfer. See *Hi-Lo Manufacturing Corp. v.*

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Winegard Company, Inc., 167 USPQ 295, 296 (TTAB 1970);
McCarthy on Trademarks and Unfair Competition § 18:4 (4th
ed.) ("An assignment in writing is not necessary to pass
common law rights in a trademark"). Where there has been no
written assignment, the transfer of common law rights to
trademarks "may be established by clear and uncontradicted
testimony by a person or persons in a position to have
knowledge of the transactions affecting said designations;
and the common law rights in a mark will be presumed to have
passed, absent contrary evidence, with the sale and transfer
of the business with which the mark has been identified."
Sun Valley Co. v. Sun Valley Manufacturing Co., 167 USPQ
304, 309 (TTAB 1970).

The weight of the evidence supports the conclusion that
the common law rights A&O Corp. had in the mark

БАБУШКИНО were effectively transferred to Four Seasons
Dairy, Inc. as of January 4, 1999, its date of
incorporation. Accordingly, Four Season Dairy, Inc. is
entitled to rely upon A&O's date of first use of the
mark **БАБУШКИНО** .

Petitioner's Date of First Use

²⁰ Sheikhet Dep., p. 44.

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We now turn our attention to determining what was petitioner's date of first use.

In this regard, we start with the statements made by Four Seasons' principals. Mr. Bekker testified that in 1997, together with a designer, Mr. Kesler and Mr. Bekker designed the label for the **БАБУШКИНО** brand.²¹ He further testified that **БАБУШКИНО** butter blend, yogurt and feta cheese were first sold in 1997,²² and

БАБУШКИНО farmer cheese "somewhere from the end of 1997."²³ Mr. Kesler testified that A&O started using the mark in "1997. In the middle of the year, September, October."²⁴ Mr. Bekker also indicated that sales were made to companies in New York, to a company in Los Angeles, and to a company in Canada.²⁵

Petitioner also presented the testimony of several of its witnesses to establish its priority. Leon Sheikhet testified that Messrs. Bekker and Kesler came up with the name in 1996.²⁶ He further testified that he was one of petitioner's first customers in "1997, something like this,

²¹ Bekker Dep., p. 12; P's Ex. 1.

²² Bekker Dep., p. 9.

²³ Bekker Dep., p. 12.

²⁴ Kesler Dep., p. 13.

²⁵ Bekker Dep., p. 15.

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1996, even 1996" and that products first came on the market under the mark in 1997:

Q: The first Babushkin products you purchased were in 1997?

A: Babushkin when it's came on the market at that time 1997.

Ms. Sheydvasser also identifies 1997 as the date she started buying from Alex Bekker and Oleg Kesler.²⁷

Q: Do you remember around when it was that you started buying things from Alex Bekker and Oleg Kesler?

A: Yes. I think it was maybe, maybe ten years ago, '97. I think it is '97. You know, I remember because they sell the milk product and before they have Friendly Food store. And the location of the Friendly Food store was, I don't know exactly the mail address but this is one, two, three, four, like a five blocks from my store. It was Friendly Food.

Q: Friendly Food, is that the name of the store?

A: They make - they were before, yes. This Alex and Oleg.

Q: And at that time that they had the Friendly food store, were they selling things to you at Matreshka?

A: Yes.

Q: At that time, what kinds of things were they selling to you at Matreshka?

A: You know, they sell the butter, the butter, Grandma butter and other kind of butter. I don't know, what is the - Grandma butter, Basania.

THE COURT REPORTER: What was that?

A: It is name of the butter. Two Cows.

Q: Is that Two cows?

A: Yes, Two Cows and Grandma. And it was in the - in the foil, foil paper.

²⁶ Sheikhet Dep., p. 9.

²⁷ Sheydvasser Dep., p. 10.

MR. FRIEDMAN: I am going to show the witness a document previously marked as Petitioner's Exhibit 1 at a deposition of April 10, 2008.

Q: If you could please take a look at that? Do you recognize what you are looking at?

A: Yes.

Q: What is it?

A: This is Babushkino butter, Grandma butter.²⁸

Arie Zurinam also identified the label bearing the trademark **БАБУШКИНО** (marked as Petitioner's Exhibit 1) as being one of the first labels that his company printed for A&O.²⁹ He authenticated a copy of the internal order form that his company used to invoice petitioner for an order of 10,000 of these labels on November 25, 1998.³⁰ He further identified another label that he had printed earlier:

Q: I am going to show you another document previously marked as petitioner's Exhibit 13 at a deposition of April 10, 2008. I am directing the attention of the witness to the bottom right of the exhibit. These (sic) is a design there. Can you identify that design, please?

A: Yes. It is the Babushkino - it is the Babushkino label, actually the same design, same style.

Q: Are there any differences between that label and the label that we see in Petitioner's Exhibit 1?

A: Yes. Most likely this label was created before this.

Q: Okay. You are saying most likely this label in Petitioner's Exhibit 13 was created before the label in Petitioner's Exhibit 1?

²⁸ Sheydvasser Dep., p. 10-12.

²⁹ Zurinam Dep., p. 10-12.

³⁰ Zurinam Dep., p. 13-14.

A: Right.

Q: And how do you know that?

A: Because the zero percent cholesterol, the one that says over here on the label in the middle, this was changed later on to 75 percent vegetable oil. This I remember because I actually did the change myself. Also, what I think, the whole label is written in Russian and -

Q: Referring to Petitioner's Exhibit 13?

A: Yes. The label is, like maslo is butter in Russian.

Additional witnesses corroborated the 1997 date.

Arkadiy Golub testified that in 1997 he became general manager of Beluga Caviar, a wholesaler of dairy products, responsible for ordering products for the store. He testified that starting from the time he became manager, he ordered "Babushkino zdorovye"³¹ on a weekly basis.³²

The vice president for the company that manufactures margarine and butter blend products for petitioner (confidential) testified that his company received their first order for butter blend from A&O on March 5, 1997.³³ He further testified that A&O Corp. placed an order with the manufacturer for "margarine unsalted" on October 10, 1997.³⁴

³¹ This word was not defined, but was used in the following exchange:

Q: Do you remember any of the brand names that were on the products that you ordered?

A: Yes. I ordered butter and caviar and Babushkino zdorovye.

Golub Dep., p. 9.

³² Golub Dep., p. 9-11.

³³ Confidential witness Dep., p. 14; P's Ex. 18.

³⁴ Confidential witness Dep., p. 15; P's Ex. 18.

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The testimony regarding the labeling of these initial products is unclear; on the one hand the witness indicates the goods were sold under the "A&O Brand"³⁵ but elsewhere in his testimony he identifies petitioner's Exhibit 1, the label bearing the mark **БАБУШКИНО** , as the "label that they originally started with." Counsel inquired as to that label:

Q: Directing your attention to the lettering in Cyrillic, in Russian, is that representative of the name that they were applying to their product back in 1997?

A: Yes. They called it Babushkino.³⁶

On October 6, 1998, petitioner placed its first order with the manufacturer for a product that would be manufactured without a label, "unsalted margarine plain no label."³⁷ While the witness conceded that he did not see the labels being placed on the product, as "the customer applied the labels themselves,"³⁸ he testified that he did see the label proofs "because we had to make sure the ingredient statement and everything was correct, us being the manufacturer"³⁹ and that "they were calling it

³⁵ Confidential witness Dep., p. 15.

³⁶ Confidential witness Dep., p. 11.

³⁷ Confidential witness Dep., p. 30.

³⁸ Confidential witness Dep., p. 9-10, p. 16.

³⁹ Ibid.

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Grandmother's Babushkino I believe, but Grandmother's is what they called the product."⁴⁰

As further proof of sales, Mr. Bekker identified entries taken from a copy of an invoice booklet, P's Exhibit 3, showing sales made to petitioner's customers of

БАБУШКИНО dairy products in January 1999.⁴¹ The invoice booklet accompanied Mr. Bekker on deliveries to petitioner's customers⁴² and contained carbon copies of original invoices that he personally handed to customers.⁴³ Mr. Sheikhet and Ms. Sheydvasser identified entries in the booklet that represented purchases they made of

БАБУШКИНО products.⁴⁴ Several of the individual invoices included an entry called "balance." Mr. Bekker explained, using the customer Golden Key as an example,⁴⁵ that these entries on the invoice indicated that the customer owed a previously due balance.⁴⁶

Q: Do you recall since when you had been selling dairy products to Golden Key?

A: Since 1997 we sold products to Golden key as A&O Corporation. When we became Four Seasons, the

⁴⁰ Confidential witness Dep., p. 10.

⁴¹ Bekker Dep., p. 18; P's Ex. 3.

⁴² Bekker Dep., p. 18.

⁴³ Bekker Dep., p. 22.

⁴⁴ Sheikhet Dep., p. 11-13 and 40-41; Sheydvasser Dep., p. 15-22.

⁴⁵ Page 4 of P's Ex. 3; identified by Mr. Bekker at Dep. p. 26 as including entries for BABUSHKINO goods.

⁴⁶ Bekker Dep., p. 30.

balances got transferred in here, in this book because we were the same people.⁴⁷

Five of petitioner's witnesses signed letters that state that they did business "under the BABUSHKINO (Grandmothers) brand, since December 1997, under the A&O Corporation, and beginning in January 1999, under Four Seasons Dairy Inc."⁴⁸ The confidential witness testified that he prepared his letter himself, and that he "went into our customer history to get the dates."⁴⁹ Arie Zurinam, owner of Quick Graphics, Inc., testified that he essentially reproduced the letter that the confidential witness had prepared, but verified the accuracy of the dates in the letter by referring to an order form he located in his files.⁵⁰ Mr. Golub testified that he knew the information in the letter he signed was true before he signed it,⁵¹ but did not "look at any pieces of paper" to help him verify the dates.⁵² Mr. Sheikhet also testified that he "checked my invoices to sign the letter" and that he knew "for a fact" that he ordered Babushkin products on a weekly basis since

⁴⁷ Bekker Dep., p. 32. Mr. Sheikhet also testified that the balance he owed was included on the invoices, Dep. p. 42. Ms. Sheydvasser testified that there were balances on her invoices as well, Dep., p. 20.

⁴⁸ P's Exhibits 6-10.

⁴⁹ Confidential witness Dep., p. 25; P's Ex. 6.

⁵⁰ Zurinam Dep., p. 23; P's Ex. 4.

⁵¹ Golub Dep., p. 16; P's Ex. 8.

⁵² Golub Dep., p. 23.

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1997.⁵³ Ms. Sheydvasser testified that she did not write the letter she signed; but relied on her memory:

Q: When you put together, signed that letter for Alex, did you look at any documents, any pieces of paper?

A: I say leave it me, this letter, and I saw what I need to do with this letter. Because I stay in the store by myself. And he leave the letter and I opened all my, the - all my - all my memory and I say, yes, I work - I never buy from somebody I still work with these people a long, long time.

Q: When you signed the letter, did you look at any pieces of paper to help you look for dates and things like that?

A: I don't have a document for the ten years, sir. But I remember, I worked with these people.⁵⁴

Ms. Sheydvasser's testimony is not entirely consistent with that of Mr. Bekker, who testified that he saw Ms. Sheydvasser verify the information in the letter.

Q: Did you have an opportunity to see what Sonya did to verify the accuracy of this information?

A: Yes, I did.

Q: What did you see?

A: She had originals from our invoices. She found them and took a look.

Nonetheless, taken as a whole, Ms. Sheydvasser's testimony supports petitioner's claim of 1997 as its date of first use of the mark БАБУШКИНО . Moreover, the testimony and provided by Messrs. Bekker and Kesler and the witnesses, coupled with the invoices and letters, support

⁵³ Sheikhet Dep., p. 46.

⁵⁴ Sheydvasser Dep., p. 47-48.

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the conclusion that petitioner's first use of its mark was in 1997 for butter blend, yogurt, feta cheese and farmer cheese. We therefore find that petitioner's first use of its mark was in 1997 for butter blend, yogurt, feta cheese and farmer cheese.

Respondent's Date of First Use

In late 1996 or early 1997, respondent's vice president, Galina Pincow, conceived of the idea of labeling dairy products, specifically farmer cheese and butter, with the mark BABUSHKA'S RECIPE.⁵⁵ Ms. Pincow hired Irina Lubenskaya to work with her in developing a label design bearing the mark. Ms. Lubenskaya sent several different images for the proposed label to Ms. Pincow for review on or about July 27, 1997.⁵⁶ The artwork was then sent to the printer in December of 1997.⁵⁷ On or about April 7, 1998, respondent placed an order with Jes Printing for 7000 labels to be used on BABUSHKA'S RECIPE yogurt cheese.⁵⁸ Testimony from Ms. Pincow and respondent's warehouse manager corroborate this date. Ms. Pincow testified that the earliest sales of goods bearing the mark BABUSHKA'S RECIPE

⁵⁵ G. Pincow Dep., p. 8.

⁵⁶ G. Pincow Dep., p. 14.

⁵⁷ Lubenskaya Dep., p. 37, 47; respondent's ("R's") Ex. 212.

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occurred "in the beginning of 1998."⁵⁹ Joseph Krumgalz, respondent's warehouse manager, testified that since July or August of 1998, when he joined International Gold Star Trading Co.,⁶⁰ one of his duties was to oversee respondent's employees affix BABUSHKA'S RECIPE labels on dairy products sold to respondent's customers.⁶¹

Lisa Troyer, vice president of sales at Bunker Hill Cheese Company, testified that sometime in 1998, Bunker Hill Cheese Company started supplying Havarti yogurt cheese to respondent under the BABUSHKA'S RECIPE label.⁶² Lewis "Butch" Miller, executive vice president for Queensboro Farms, testified that Queensboro Farms began supplying dairy products, specifically farmer cheese and pot cheese, to respondent in 1996,⁶³ but from "August of 1996 through the beginning of 1998," the label used on the products did not include the mark BABUSHKA'S RECIPE.⁶⁴

Q: And do you remember exactly what labels, if any, were on those products as they were sold in 1996?

A: At the inception of the sale there was a simple label that said Gold Star on the product. Sometime after that Gold Star directed Queensboro

⁵⁸ G. Pincow Dep., p. 23, 101; R's Ex. 206.

⁵⁹ G. Pincow Dep., p. 148.

⁶⁰ The exact date was verified by another witness as June 22, 1998. G. Pincow Dep., p. 70-74; R's Ex. 126.

⁶¹ Krumgalz Dep., p. 7-10.

⁶² Troyer Dep., p. 19, 51, 54, 57-58.

⁶³ Miller Dep., p. 8, 11; R's Ex. 136.

⁶⁴ Miller Dep., p. 22, R's Ex. 213.

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to not use that label, send the product in unlabeled, and they would apply their own labels.

Q: Do you remember when that was?

A: I think it was within two years after we started.

Q: So that would be sometime in 1998.

A: That's my recollection.⁶⁵

Vladimir Kraznov, owner of V.M. Food Service Corporation, d/b/a/ New York International Store, at first testified that he purchased BABUSHKA'S RECIPE products from respondent in 1997 or 1998.⁶⁶ After identifying Exhibit 115, an invoice from respondent to New York International dated December 18, 1998,⁶⁷ he was asked if it "would have been the first purchase of Babushka's Recipe products you made from Gold Star?" He responded that it would have been the "first or second."⁶⁸ On cross-examination, he clarified that he thought the earliest sale likely occurred in 1998, but was unsure:

Q: And were you ordering those products those Babushka's Recipe products also before 1998?

A: No.

Q: 1998 is when you started.

A: Yes.

Q: So from 1995 until 1998 you did not sell Babushka's Recipe dairy products; is that right?

A: No.

Q: You agree with me that you did not sell Babushka's Recipe dairy products from 1995 until 1998.

⁶⁵ Miller Dep., p. 14.

⁶⁶ Krasnov Dep., p. 7.

⁶⁷ Krasnov Dep., p. 8.

⁶⁸ Krasnov Dep., p. 13.

A: I don't think - I don't remember exactly because I don't want to - I want to tell you the truth. I don't remember it exactly.⁶⁹

Giving this testimony limited weight, and taking into account the testimony of Ms. Pincow and the other witnesses, and the evidence provided by respondent, we find that respondent's first use of the mark BABUSHKA'S RECIPE occurred sometime in 1998 for yogurt cheese, farmer cheese, butter and pot cheese. Accordingly, petitioner has priority of use.

Likelihood of Confusion

Although petitioner argued in its main trial brief that likelihood of confusion is an issue in this case, and provided a likelihood of confusion analysis in its brief, respondent concedes that there is no issue as to likelihood of confusion and "agrees that Four Season's mark is likely to be confused with Gold Star's registered mark."⁷⁰ Even if respondent had not conceded likelihood of confusion, petitioner would prevail on the issue. The record shows that BABUSHKA and applicant's mark БАБУШКИНО, which is transliterated as BABUSHKINO, both mean "grandmother" or "granny" in Russian.⁷¹ Petitioner's mark would be

⁶⁹ Krasnov Dep., p. 24; R's Exs. 115, 102.

⁷⁰ Respondent's Brief, p. 5.

⁷¹ Bekker Dep., p. 8; G. Pincow Dep., p. 33.

pronounced "Babushkino" by speakers who can read the Cyrillic alphabet. The marks sound alike and have similar connotations. The fanciful term BABUSHKA'S is clearly the dominant element in the mark BABUSHKA'S RECIPE; the use of the possessive is immaterial and the word "recipe" is less significant as it is suggestive of the goods. While the marks differ somewhat in appearance, overall, the marks have similar commercial impressions.

As for the goods, the parties each sell farmer cheese, yogurt, and butter under their respective BABUSHKA'S RECIPE and **БАБУШКИНО** marks; and they sell to the same class of consumers, namely, the Russian ethnic market.⁷² Given the similarities of the marks and the virtual identity of the goods, trade channels and classes of consumers, a likelihood of confusion exists.⁷³

Decision: Having found that petitioner has priority of use and that there is a likelihood of confusion, the

⁷² G. Pinco Dep., p. 7; Bekker Dep., p. 14.

⁷³ We note that the parties devote a considerable amount of resources to show that their adversary acted in bad faith. Respondent has alleged petitioner's bad faith in copying other parties' trademarks, including other marks of respondent. The evidence does not support this bad faith allegation. Likewise, the evidence does not support a conclusion that respondent acted in bad faith in selecting its mark or in otherwise labeling its goods.

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petition to cancel Registration No. 2479287 under Section 2(d) of the Act is granted.⁷⁴

⁷⁴ Having found grounds for cancellation under Section 2(d) of the Act, we need not reach petitioner's pleaded claim of fraud.