

**THE UNITED STATES PATENT AND TRADEMARK O  
BEFORE THE TRADEMARK TRIAL AND APPEAL B.**

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

75/865,702

Cancellation No.: 92042082

Mark: BABUSHKA'S RECIPE

Reg. No. 2,479,287

Filed: December 7, 1999

Issued: August 21, 2001

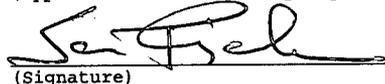
App. Ser. No. 76-174,746

Trademark Trial and Appeal Board  
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Samuel Friedman

(Typed Name of Person Signing Certificate)



(Signature)

May 10, 2007

(Date)

**PETITIONER'S OPPOSITION TO CROSS MOTION FOR LEAVE TO ASSERT  
UNTIMELY OBJECTIONS TO REQUESTS FOR PRODUCTION, INTERROGATORIES  
AND REQUESTS FOR ADMISSION, AND RELATED RELIEF**

COMES NOW, Petitioner, FOUR SEASONS DAIRY INC. (hereinafter "Petitioner"), by and through counsel, opposing the cross motion of Registrant, INTERNATIONAL GOLD STAR TRADING CORP. (hereinafter "Registrant"), requesting leave to assert objections, more than three years after service, to Petitioner's



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for Production and Interrogatories, and for leave to respond to Petitioner's Requests for Admissions.

STATEMENT OF FACTS

Petitioner's First Request for Production of Documents directed to Registrant and Petitioner's First Set of Interrogatories directed to Registrant, were duly and timely served upon counsel for Registrant on December 29, 2003. True copies thereof are annexed as **Exhibits A and B** to Petitioner's Pending Motion to Compel Discovery.

Similarly, on December 30, 2003, Petitioner duly and timely served Petitioner's First Requests for Admissions directed to Registrant pursuant to Section 2.120 of the Rules of Practice in Trademark cases and Rule 36 of the Federal Rules of Civil Procedure. (True copies of the Requests for Admissions are annexed as **Exhibit C** to Petitioner's Pending Motion to Compel Discovery). Registrant's Responses were to be served upon Petitioner by January 30, 2004. Registrant did not and to date has not served any responses or objections to Petitioner's Requests for Admissions.

Undersigned counsel for Petitioner, in a good faith effort to obtain full and complete discovery responses, discussed the matter with counsel for Registrant on or about February 2, 2004. During that telephone conversation, the

undersigned and counsel for Registrant mutually agreed to extend each other's time to respond to outstanding discovery demands by three weeks. This agreement is reflected in my letter to counsel for Registrant dated March 24, 2004 sent by first class mail to counsel for Registrant addressing the Registrant's failure to respond to Petitioner's discovery requests. A true copy of this letter is annexed as **Exhibit D** to Petitioner's Pending Motion to Compel Discovery.

Counsel for Registrant argues that there was an implied agreement to extend Registrant's time to assert objections to Requests for Production and Interrogatories. However, this is not true and is contradicted by the correspondence between counsel. For example in my letter to counsel for Registrant dated March 24, 2004, I clearly state: "To date, I have not received any responses or objections to Petitioner's discovery demands. Respondent has thus waived any right to assert objections." A true copy of said letter is annexed as **Exhibit D** to Petitioner's Pending Motion to Compel Discovery.

On July 31, 2006 the undersigned transmitted a further good faith demand that Registrant provide full and fair responses, without objections, to Petitioner's Requests for Production and Interrogatories. A true copy of said letter,

transmitted by fax and first class mail, is annexed as **Exhibit G** to Petitioner's Pending Motion to Compel Discovery.

#### ARGUMENT

Petitioner served proper and customary discovery requests on Registrant in compliance with the Rules. (See **Exhibits A, B and C** to Petitioner's Pending Motion to Compel). Petitioner's requests properly sought discoverable information and things. Id. Despite repeated demand, Registrant has failed to provide any answers or responses to Petitioner's requests as required by the Rules. By reason of Registrant's failure to even assert objections to Petitioner's discovery demands, it has waived any right to assert objections.

Petitioner will be severely prejudiced unless the Board compels Registrant to respond fully to Petitioner's Requests for Production and Interrogatories, and to respond without objection since the Registrant has waived its right to object to any of said discovery requests.

Further, Petitioner has fully satisfied its obligation under 37 C.F.R. § 2.120 by making repeated follow-up good faith efforts to obtain discovery responses in this matter.

The weakness of Registrant's argument is underscored by the stipulation and request to extend trial dates that it has annexed as **Exhibit B** to its cross-motion. The said stipulated

request was served on February 23, 2004, within the mutually agreed three-week extension period to bilaterally respond to outstanding discovery demands. My unrebutted memorializing letter to counsel for Registrant dated March 24, 2004, provides, in relevant part:

On or about February 2, 2004 during a telephone conversation, you and I mutually agreed to extend each other's time to respond to outstanding discovery demands by three weeks. Respondent's responses to discovery demands then became due on or about February 24, 2004.

To date, I have not received any responses or objections to Petitioner's discovery demands. Respondent has thus waived any right to assert objections.

Request is hereby made that you immediately provide all discovery responses, without objections, as any right to assert objections has been waived.

(Please see **Exhibit D** to Petitioner's Pending Motion to Compel Discovery).

Counsel for Registrant acknowledges that Petitioner timely served Responses and Objections to Registrant's discovery demands. Petitioner's Responses and Objections are annexed as **Exhibit C** to Registrant's cross-motion for leave to assert late objections; and they reflect an unrebutted date of service of February 24, 2004.

Counsel for Registrant never explains the stark contrast between the Petitioner having duly served Responses to Discovery, while Registrant willfully neglected and refused to respond, even after repeated good faith efforts by Petitioner to obtain the duly demanded discovery.

The stipulated requests for extensions of trial dates filed with the Board thereafter all reflect the Registrant's failure to respond to timely served discovery demands.

After having repeatedly and willfully failed and refused to respond to Interrogatories and Requests for Production, the Registrant has waived any and all right to object and should be compelled to provide full and fair responses without objections.

**Petitioner Should Not be Permitted to Withdraw Admissions by Default, More than Three Years After Default**

Registrant should not now, more than three years after service, be permitted to respond to Petitioner's Requests for Admission. (See Exhibit C to Petitioner's Pending Motion to Compel). It is well established that if a party upon which requests for admission have been served fails to file a timely response thereto, the requests will stand admitted automatically and may be relied upon by the propounding party pursuant to 37 CFR § 2.120(j)(3)(i). See TBMP § 527.01(d). Registrant has not

made the showing of excusable neglect necessary to be permitted to serve responses three years late.

Petitioner would be unduly prejudiced if Registrant is permitted to answer or object more than three years after service. Memories have faded, documents may have been destroyed by third parties or Registrant; and witnesses with knowledge may have disappeared. Registrant will not be prejudiced in being denied leave to withdraw admissions by default. To the extent that Registrants' admissions may be contradicted by competent admissible evidence to be submitted by Registrant, this Honorable Board may exercise discretion by not relying on the admissions, as the Board deems appropriate. See e.g. BankAmerica Corp. v. International Travelers Cheque Co., 205 USPQ 1233, 1235 (TTAB 1979).

#### CONCLUSION

**FOR ALL THE FOREGOING REASONS,** Registrant's cross motion should be denied and it should be ordered to fully answer Petitioner's First Set of Interrogatories and Requests for Production, without objection; and to promptly produce to Petitioner all documents and things demanded in Petitioner's Requests For Production. Moreover, Registrant should not be permitted to withdraw its admissions by default. Petitioner

further respectfully requests such other, further and different relief as the Board deems just, proper and equitable.

Respectfully submitted,

FOUR SEASONS DAIRY, INC.

Dated: May 10, 2007

By: 

Samuel Friedman, Attorney at Law  
225 Broadway, Suite 1804  
New York, New York 10007  
Tel. (212) 267-2900

*Attorney for Petitioner*

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing PETITIONER'S OPPOSITION TO CROSS MOTION FOR LEAVE TO ASSERT UNTIMELY OBJECTIONS TO REQUESTS FOR PRODUCTION, INTERROGATORIES AND REQUESTS FOR ADMISSION; AND RELATED RELIEF in Cancellation Proceeding No. 92042082 entitled Fours Seasons Dairy, Inc. v. International Gold Star Trading Corp., was served by First Class Mail, on counsel for Registrant, addressed as follows:

Roger S. Thompson  
Cohen, Pontani, Lieberman & Pavane  
551 Fifth Avenue  
New York, New York 10176



Samuel Friedman

May 10, 2007

Date