

ESTTA Tracking number: **ESTTA156561**

Filing date: **08/13/2007**

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

Proceeding	92042082
Party	Defendant International Gold Star Trading Corp.
Correspondence Address	Roger S. Thompson Cohen, Pontain, Lieberman & Pavane 551 Fifth Avenue New York, NY 10176 UNITED STATES
Submission	Opposition/Response to Motion
Filer's Name	Roger S. Thompson
Filer's e-mail	rthompson@cplplaw.com, docket@cplplaw.com
Signature	/Roger S. Thompson/
Date	08/13/2007
Attachments	5060-2L Opposition to Motion for Sanctions.pdf (10 pages)(671850 bytes) 5060-2L Sanctions Exh. A.pdf (1 page)(48444 bytes) 5060-2L Sanctions Exh. B.pdf (2 pages)(70112 bytes) 5060-2L Sanctions Exh. C.pdf (1 page)(39020 bytes) 5060-2L Sanctions Exh. D.pdf (2 pages)(96416 bytes) 5060-2L Sanctions Exh. E.pdf (2 pages)(69776 bytes) 5060-2L Sanctions Exh. F.pdf (2 pages)(83728 bytes)

Briefly, Registrant opposes Petitioner's Motion on the grounds that Registrant has not failed to comply with the Board's Order dated May 21, 2007 (Exhibit A to the petitioner's Motion) directing Registrant to respond to Petitioner's discovery demands. While Registrant has attempted to schedule a mutually convenient time for the parties to exchange documents, Registrant has never conditioned its production of documents on Petitioner's compliance with its own discovery obligations. The only reason that Petitioner has not received the documents it has requested, and that Registrant stands ready to produce, is that counsel for Petitioner has refused to speak with counsel for Registrant to discuss the matter.

Registrant has copied the requested documents, "Bates" numbered them, made them ready for production, and awaits a simple telephone call from counsel for Petitioner to schedule his pickup of the copies. Counsel, however, has failed to take the undersigned's telephone calls, has declined to respond to the telephone messages left for him, and has failed to respond to the undersigned's repeated written invitations to call, as will be detailed below.

It is therefore submitted that sanctions against Registrant are inappropriate, as Registrant is not in violation of any order of the Board and, unlike the Petitioner, stands ready to comply fully with its discovery obligations, if counsel would simply pick up the telephone.

As to Registrant's cross-motion to compel Petitioner to produce the documents Petitioner promised to produce in 2004, it is uncontested that Petitioner has failed to produce the requested documents and Petitioner has offered no basis for refusing to do so. Thus, Petitioner should be ordered to comply with its promises and obligations, and to produce all relevant documents. In addition, since Petitioner is causing the needless multiplication of these proceedings, and has not offered any reason whatsoever to refuse to produce the documents, it is requested that Petitioner be compelled to produce its responsive documents in the same fashion Registrant is prepared to produce its documents, namely by providing copies of the documents.

BACKGROUND

The instant proceeding was commenced by the Petitioner by filing a Petition to Cancel the subject mark on May 29, 2003, which Petition was duly and timely answered. The Board set December 30, 2003 as the close of discovery. The parties exchanged written discovery prior to the close of discovery, and then entered into prolonged settlement negotiations.²

After a mutually agreed-upon extension of time to respond to written discovery, Petitioner served its written responses to Registrant's discovery (a copy of the Petitioner's Responses are attached as Exhibit H to Petitioner's Motion papers). As may be seen, Petitioner offered to produce responsive documents upon entry of a suitable protective order and at a mutually agreeable date and time. As stated, the parties were then involved in the settlement discussions that broke off earlier this year. When the talks broke off, counsel for Petitioner and the undersigned counsel for Registrant spoke about Registrant's responding to Petitioner's outstanding written discovery. Counsel agreed on a date by which Registrant's responses would be due, May 21, 2007, but disagreed as to whether Registrant would still be entitled to serve objections to the Petitioner's discovery and/or respond to Petitioner's Requests for Admissions.

Petitioner then moved to compel Registrant to respond to discovery without objections and for a unilateral re-opening of the discovery period (Paper 30 – Petitioner's Motion to Compel, pp. 6-7). Registrant responded to that motion by confirming its prior agreement to respond, but seeking the Board's approval (by way of a cross-motion) for Registrant to include objections, as appropriate, in its responses and for leave to respond to the Requests for Admissions. Registrant also request that the Board, *if and only if it were to re-open discovery for Petitioner*, re-open the discovery period bilaterally (*see*, Paper No. 32 – Registrant's Cross-Motion to re-open discovery bilaterally, p. 4 of text). Registrant pointed out that it was unnecessary and untimely to re-open discovery but

² These discussions have been detailed at length in relation to Petitioner's initial Motion to Compel and will not be repeated here, except as necessary for an understanding of the pending Cross-Motions for Sanctions and to Compel

requested that, if the Board, in its discretion, did so, discovery be re-opened bilaterally.³ Registrant *never* moved on its own for re-opening discovery, and *expressly* pointed out that Registrant believed it was inappropriate to re-open discovery. Registrant only requested that, if the Board chose to re-open discovery, discovery should be re-opened bilaterally. Registrant sought then, and seeks now, to have both sides treated evenhandedly.

The Board characterized Registrant's request as a motion to re-open discovery, but "denied" that motion while not expressly addressing Petitioner's actual request for the unilateral re-opening of the discovery period. The Board thus determined that Registrant's position was the correct one, although it characterized its decision as a "denial" of relief sought by Registrant. Ordinarily, this discussion would be moot, but Petitioner has seized upon the mis-characterization of the relief sought to justify its position herein, and so the within clarification is believed in order. Furthermore, Petitioner actually seeks again to have the Board re-open discovery (*see*, p. 8 of the Petitioner's Motion).

Before receiving a decision on Petitioner's Motion to Compel, on May 21, 2007, Registrant served its responses to Petitioner's discovery, as Registrant had promised to do. The responses included objections and an offer to exchange documents. Registrant also declined to provide confidential information absent the entry of a protective order. Coincidentally, the same day, May 21, 2007, the Board issued its ruling on the pending cross-motions, including the imposition of a protective order, and requiring both sides to execute Acknowledgments agreeing to be bound by the Protective Order (Paper No. 34). The Board set June 20, 2007 as the date by which Registrant would be obliged to serve its

³ This is how Registrant presented the issue of re-opening discovery to the Board:

"Petitioner also seeks to have discovery re-opened unilaterally, *i.e.*, for Petitioner only. Registrant opposes this request and asks that the Board either open discovery fully for both sides to permit the parties to further explore the issues in the dispute, or . . . decline to re-open discovery for either side. Registrant simply seeks to have the two sides treated equally . . . It is especially noted that discovery had closed before answers to Petitioner's discovery would have been due, even if served with no extension. Thus, neither party would have been entitled to 'followup' discovery. Petitioner should not receive it unilaterally now."

written responses to Petitioner's discovery demands and by which each side would supply its Acknowledgement.

On June 20, 2007, Registrant, in compliance with the Board's Order, timely served its amended responses to Petitioner's discovery, in light of the imposition of the protective order, and again offered to exchange documents with counsel for Petitioner. (*see*, Exhibit B to Petitioner's Motion). At that same time, Registrant provided copies of Acknowledgments to be bound by the Protective Order signed by the President of Registrant and by counsel for Registrant. (*see*, Letter from the undersigned dated June 20, 2007, Exh. B to Petitioner's Motion). Apparently, counsel for Petitioner mailed a signed Acknowledgment on or about the same date, but Petitioner's Acknowledgement was not received by the undersigned for several days.

On June 21, 2007, at about 7:13 pm, counsel for Petitioner faxed the undersigned a letter (Exh. D to Petitioner's Motion) offering several dates for reviewing the documents selected by Registrant as responsive to Petitioner's discovery, starting on the following morning and extending for one week thereafter (*i.e.*, until June 29, 2007). That letter was silent on the issue whether Petitioner would produce its promised documents

The following day, June 22, 2007, when the fax was actually seen by the undersigned, the undersigned replied thereto (Exh. E to Petitioner's Motion), asking for clarification if Petitioner intended to exchange documents at the meeting, as "that would influence the time I need to set aside for the meeting." There was no refusal to produce the documents, and no demand for any *quid pro quo*. It was simply an enquiry as to how much time would be needed for the meeting proposed by counsel for Petitioner. In addition, since by that time no Acknowledgement by Petitioner to be bound by the Protective Order had yet been received, counsel for Registrant requested the provision thereof. The undersigned received no reply to that letter, and no response to a telephone call placed to counsel for Petitioner, and so sent a follow-up letter to counsel for Petitioner on June 27, 2007 (Exh. E to Petitioner's Motion), in which it was requested that an Acknowledgement be provided, since no Acknowledgement had by then been seen by the undersigned. The Acknowledgement was received on June 25, 2007 and

distributed within Registrant's counsel's firm on June 28, 2007 (*see* copy of the Notice of Filing the Acknowledgement from the files of Registrant's counsel – Exhibit A hereto, showing the dates of receipt and distribution).

Counsel for Petitioner responded to the undersigned's letters of June 22 and 27 on Friday evening, June 29, 2007 at 7:16 pm (Exh. F to Petitioner's Motion) demanding that the copies made by Registrant be sent to his office, a demand that exceeds the obligations placed on a responding party under Fed.R.Civ.Pro 34. Here, Petitioner's relation of the correspondence between counsel ends, even though there was still further relevant correspondence.

The following Monday morning, July 2, 2007, the undersigned responded to counsel for Petitioner, asking if Petitioner would be complying with its commitment to produce documents. (Exh. B hereto). Counsel for Petitioner sent a further letter on July 6, 2007 again demanding delivery of the documents to his office no later than July 10, 2007, and again ignoring completely the repeated demands for a response as to whether Petitioner would produce the promised documents. (Exh C hereto). That same day, the undersigned attempted once more to contact counsel for Petitioner by telephone, but reached his voice mail, and so sent a further fax asking if Petitioner would comply with its discovery obligations, and explaining that the undersigned would be out of the office on the dates demanded by counsel for Petitioner. (Exh. D hereto).

Not receiving any response from counsel for Petitioner, the undersigned sent a further fax on July 13, 2007 (Exh. E hereto) asking if Petitioner would produce the promised documents and reminding that Registrant's production was available in my office.

Still receiving no response, the undersigned sent a still further letter on July 19, 2007 seeking some contact by counsel for Petitioner to resolve the dispute (Exh. F hereto). Petitioner finally responded thereto on July 23, 2007 by mailing its Motion for Sanctions.

Discussion

Sanctions

Petitioner is not entitled to sanctions under 37 C.F.R. § 2.120(g)(1).

Sanctions are only appropriate where a party has refused to comply with an Order of the Board. T.B.M.P. § 527.01(a) *Nobelle.com LLC v. Qwest Communications International Inc.*, 66 U.S.P.Q.2d 1300, 1303 n6 (TTAB 2003). (Sanctions denied where the responding party advised the moving party that requested documents were available, and enquired how the moving party wished to proceed). Here, the only relevant Order of the Board is that dated May 21, 2007 (Exh. A to the Petitioner's Motion). In that Order, the Board directed Registrant to serve written responses to Petitioner's discovery by June 20, 2007. Registrant did so. The Board further directed Registrant, in its response, to "select, designate and identify" the documents responsive to Petitioner's demand for documents. Registrant did so. Registrant went even further, by making copies of the documents available for Petitioner. Registrant then repeatedly offered to produce the documents, and sought to discuss how much time might be needed to exchange documents if Petitioner wished to do so. Petitioner, however, never responded to these requests and instead demanded that the copies be sent to him, which is not the obligation of a party responding to a request for the production of documents.

The sole reason that the Petitioner did not pick up the copies, apparently, was its counsel's unwillingness to discuss (either face-to-face, by telephone or in writing) with Registrant's counsel Petitioner's own unwillingness to live up to its promise to produce documents. Counsel for Petitioner would not even state that it would not produce the documents. It simply ignored the issue.

Registrant went beyond its obligations, either under the Rules or the Board's Order, by making copies available for Petitioner. Registrant did not condition its production of the copies upon Petitioner's compliance with its own obligations, and merely sought to establish how an exchange could take place. If Petitioner believed it had a lawful right to walk away from its discovery obligations and promises, it had ample opportunity to contact the undersigned, by phone, letter, e-mail or fax, to make its case,

or even state its position, and yet Petitioner made no effort to do so. If counsel for Petitioner had made any attempt to resolve the matter directly, it could have been resolved, but, instead, counsel for Petitioner preferred to stall, delay, and stonewall, refusing even to pick up the phone to talk about the matter. Registrant tried (repeatedly), and failed (repeatedly), to make the first move. Counsel for Petitioner, therefore, should bear the responsibility for not receiving the documents, which to this day, remain available in the office of the undersigned. Sanctions in Petitioner's favor therefore are inappropriate.

For all these reasons, therefore, at no time has Registrant failed to comply with the Board's Order, and so Petitioner's Motion for Sanctions should not be granted. *Nobelle, supra.*

Cross-Motion to Compel

Petitioner should be compelled to produce the documents it promised to produce.

It is undisputed that Registrant timely served its written discovery demands prior to the close of discovery. It is likewise undisputed that Petitioner's responses to Registrant's discovery included an offer to produce documents at a convenient date and time. During the lengthy settlement discussions, Registrant made no move to run up its counsel fees by seeking the production of documents that would only be necessary if the talks were fruitless. It is further undisputed that, promptly upon the breaking down of the settlement talks, Registrant rejoined the issue of the production of the promised documents, and it is finally undisputed that Petitioner has never directly responded to repeated requests for the production of the promised documents. Thus, Registrant, despite the good faith efforts made by counsel to resolve the dispute, has been forced to move to compel the production of the promised, yet not forthcoming, documents.

The only firm deadline for moving to compel is that any such motion must be made prior to the commencement of the first testimony period. 37 C.F.R. § 2.120(e)(1). In this case, the first testimony period has not begun, and so the motion is timely under 37 C.F.R. § 120(e)(1).

A motion to compel must also be made within a reasonable time after the failure to respond. T.B.M.P. § 523.03. Here, Petitioner did not make any express refusal to comply with its discovery obligations, and so Registrant, no longer believing that Petitioner would live up to its promises, has timely moved to secure the production of the withheld documents within a reasonable time after the last of its attempts to resolve the dispute were made.

Petitioner, by avoiding the issue, has offered no reason to justify its refusal to produce the documents, and so should not now be permitted to evade its obligations.

Conclusion

For the reasons stated, sanctions are not appropriate, as Registrant has not failed to meet any obligation imposed upon it either by the Rules or by an Order of the Board. Registrant stands ready to produce the requested documents either upon an Order of the Board directing it to produce documents unilaterally, or upon stipulation of counsel.

Furthermore, Registrant is entitled to have Petitioner be compelled to live up to its promise and its obligation to produce responsive documents.

Early and favorable action is therefore respectfully solicited.

Respectfully submitted,
COHEN, PONTANI, LIEBERMAN & PAVANE

By


Roger S. Thompson
551 Fifth Avenue
New York, New York 10176
(212) 687-2770

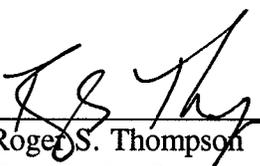
Attorneys for Registrant,
International Gold Star Trading Corp.

Dated: August 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Registrant's Opposition to Petitioner's Motion for Sanctions; and Registrant's Cross-Motion to Compel, was served by first class mail, postage prepaid, on counsel for Petitioner, addressed as follows:

Samuel Friedman, Esq.
225 Broadway, Suite 1804
New York, New York 10007



Roger S. Thompson
Counsel for Registrant

August 13, 2007
Date

5060-2C

WAA
RST

**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

**NOTICE OF FILING OF ACKNOWLEDGEMENT OF
AGREEMENT OR ORDER PROTECTING CONFIDENTIALITY
OF INFORMATION REVEALED DURING BOARD OF PROCEEDING**

Petitioner Four Seasons Dairy Inc. hereby files Acknowledgement of Agreement
or Order Protecting Confidentiality of Information Revealed During Board Proceeding in
accordance with Order of the Board.

Dated: June 20, 2007
New York, New York

Respectfully submitted,



Samuel Friedman
225 Broadway, Suite 1804
New York, New York 10007
Tel: (212) 267-2900
Attorney for Petitioner
FOUR SEASONS DAIRY, INC.

I hereby certify that this correspondence is
being deposited with the United States Postal
Service as first class mail in an envelope
addressed to: Trademark Trial and Appeal
Board, U.S. Patent and Trademark Office, P.O.
Box 1451, Alexandria, VA 22313-1451 on the
date shown below:

Samuel Friedman

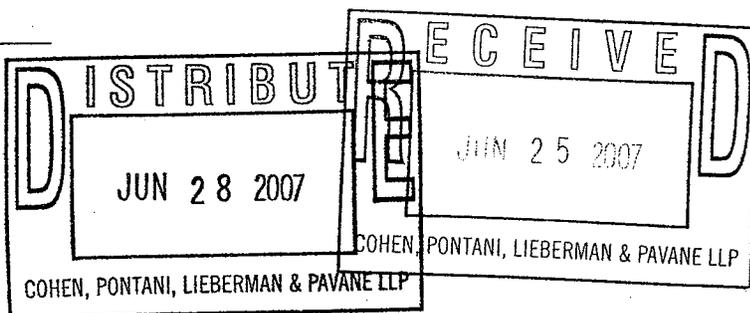
(Typed Name of Person Signing Certificate)



(Signature)

June 20, 2007

(Date)



6/20/07



COHEN PONTANI LIEBERMAN & PAVANE LLP

551 Fifth Avenue, New York, NY 10176 phone 212.687.2770 fax 212.972.5487 www.cplplaw.com

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Lisa A. Ferrari
Alan J. Morrison

Sidney R. Bresnick
Of Counsel

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Douglas D. Zhang
Edward V. DiLello
Edward M. Reisner
Bradley M. Marazas
F. Brice Faller
Marilyn Neiman

Enshan Hong
Technical Advisor

July 2, 2007

BY FACSIMILE: (212) 587-0570

Samuel Friedman, Esq.
225 Broadway, Suite 1804
New York, New York 10007

Re: *Four Seasons Dairy, Inc. v. International Gold Star Trading Corp.*
T.T.A.B. Cancellation No. 92/042,082
Our ref.: 5060-2L

Dear Sam:

Thank you for your letter dated June 29, 2007 (apparently sent at 7:16 pm that evening).

Please advise immediately if you are refusing to produce the documents that you promised to produce for inspection and copying "at a mutually convenient date and time" on February 24, 2004.

Very truly yours,
COHEN PONTANI LIEBERMAN & PAVANE LLP



Roger S. Thompson

RST/mam
cc: International Gold Star Trading Corp.
encl. - Letter of June 22, 2007

 *** TX REPORT ***

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Very truly yours,
 COHEN PONTANI LIEBERMAN & PAVANE LLP


 Roger S. Thompson

RST/mam

cc: International Gold Star Trading Corp.
 encl. - Letter of June 22, 2007

Sidney R. Bresnick
 Of Counsel

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 Vincent M. Fazzari
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 Marilyn Neiman

3060-22

WAA
EST

SAMUEL FRIEDMAN

ATTORNEY AT LAW

225 BROADWAY - SUITE 1804
NEW YORK, N.Y. 10007
TELEPHONE (212) 267-2900
FAX (212) 587-0570

July 6, 2007

Via Fax and Mail: (212) 972-5487 (1 page total)

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

Re: Four Seasons Dairy, Inc. v.
International Gold Star Trading Corp.
Trademark Trial and Appeal Board
Cancellation Proceeding No. 92042082

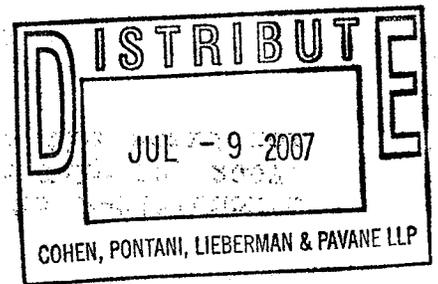
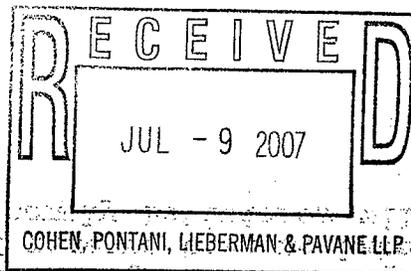
Dear Mr. Thompson:

Please provide Respondent's responses to Petitioner's discovery demands so I receive them no later than July 10, 2007. Upon your failure to comply Petitioner will move the Board for all appropriate relief.

Very truly yours,

Samuel Friedman (aj)
Samuel Friedman

SF: aj
cc: Four Seasons Dairy, Inc.





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July 6, 2007

BY FACSIMILE: (212) 587-0570

Samuel Friedman, Esq.
225 Broadway, Suite 1804
New York, New York 10007

Re: *Four Seasons Dairy, Inc. v. International Gold Star Trading Corp.*
T.T.A.B. Cancellation No. 92/042,082
Our ref.: 5060-2L

Sidney R. Bresnick
Of Counsel

Dear Sam:

Thank you for your letter of earlier today.

Unfortunately, I will be out of the office on Monday and Tuesday, at a deposition in Lansing, Michigan, and so will be unable to send the documents out before Wednesday.

I note, however, that you have not as yet responded to my direct requests for production of Four Seasons' documents in this matter. I called you earlier today, and reached your voice mail and left a message for you asking (once more) about those documents.

Please advise, directly, if you will or will not produce the documents you promised to produce in 2004. I will remind you that Gold Star's discovery demands were served timely, and you promised to produce the documents at a convenient time and date. If you do not intend to honor that commitment, please let me know so that I may weigh the appropriate steps to take.

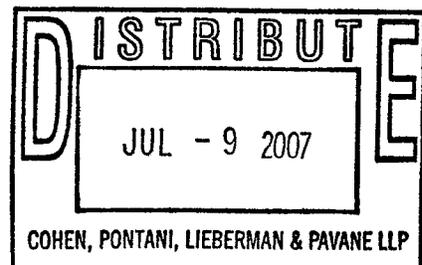
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Marilyn Neiman

Very truly yours,
COHEN PONTANI LIEBERMAN & PAVANE LLP


Roger S. Thompson

RST/mam
cc: International Gold Star Trading Corp.

Enshan Hong
Technical Advisor



 *** TX REPORT ***

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July 6, 2007

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 Samuel Friedman, Esq.
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 Our ref.: 5060-2L

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Sidney R. Bresnick
Of Counsel

Dear Sam:

I have not as yet received a response from you concerning your production of documents. Please let me know if you will respond. I have the documents Gold Star is prepared to produce, awaiting your response.

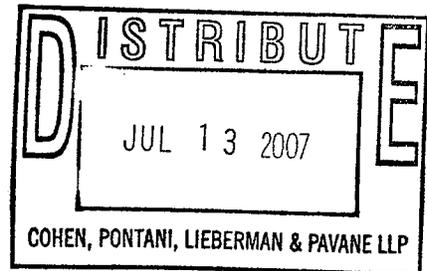
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Mher Hartoonian
Alphonso A. Collins
Douglas D. Zhang
Edward V. DiLello
Edward M. Reisner
Bradley M. Marazas
F. Brice Faller
Marilyn Neiman

Very truly yours,
COHEN PONTANI LIEBERMAN & PAVANE LLP


Roger S. Thompson

RST/mam
cc: International Gold Star Trading Corp.

Enshan Hong
Technical Advisor



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551 Fifth Avenue, New York, NY 10176 phone 212.687.2770 fax 212.972.5487 www.cplplaw.com

Myron Cohen (1927-2005)
Thomas C. Pontani, Ph.D.
Lance J. Lieberman
Martin B. Pavane
Thomas Langer
Michael C. Stuart
William A. Alper
Edward M. Weisz
Kent H. Cheng, Ph.D.
Julia S. Kim
Alfred W. Froebrich
Lisa A. Ferrari
Alan J. Morrison

July 13, 2007

BY FACSIMILE: (212) 587-0570

Samuel Friedman, Esq.
225 Broadway, Suite 1804
New York, New York 10007

Re: *Four Seasons Dairy, Inc. v. International Gold Star Trading Corp.*
T.T.A.B. Cancellation No. 92/042,082
Our ref.: 5060-2L

Dear Sam:

I have not as yet received a response from you concerning your production of documents. Please let me know if you will respond. I have the documents Gold Star is prepared to produce, awaiting your response.

Very truly yours,
COHEN PONTANI LIEBERMAN & PAVANE LLP


Roger S. Thompson

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Sidney R. Bresnick
Of Counsel

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Vincent M. Fazzari
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July 19, 2007

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I will be in the office all day tomorrow, Friday, July 20, and am prepared to discuss the matter with you at your convenience. However, I will be out of the office on depositions beginning on Monday, July 23, returning to the office on Friday, July 27.

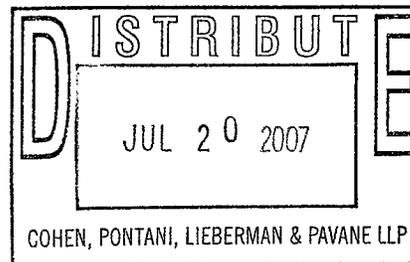
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COHEN PONTANI LIEBERMAN & PAVANE LLP


Roger S. Thompson

Enshan Hong
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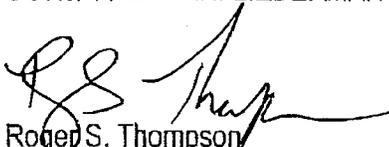
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