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

Proceeding	92053237
Party	Defendant Wildwood Gin, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BARNHARDT MANUFACTURING)
COMPANY,)
)
Petitioner,)
)
v.)
)
WILDWOOD GIN, INC.,)
)
Registrant)
_____)

Cancellation No. 92053237

REGISTRANT'S TRIAL BRIEF

On the Brief

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I. Introduction

Wildwood Gin, Inc. (“Wildwood”) is the owner of United States Trademark Registration No. 3,670,482 for the mark ULTRACLEAN for raw cotton.

Barnhardt Manufacturing Company (“Barnhardt”) has filed a Petition for Cancellation of Wildwood’s ULTRACLEAN trademark registration pleading that Barnhardt has been and continues to be damaged because of a likelihood of dilution by blurring or dilution by tarnishment of its use of “UltraClean” for the sale of bleached cotton under Lanham Act §43(c)(1); 15 U.S.C. §1125(c)(1), because of Wildwood’s registration of the mark ULTRACLEAN.

Barnhardt’s Petition for Cancellation alleges that Barnhardt uses a series of marks incorporating the prefix “ULTRA”, for some of its cotton products. Since Lanham Act §43(c)(1); 15 U.S.C. §1125(c)(1) is the statute relating to trademark dilution, Barnhardt bases its claim on the fact that the alleged use of the other Barnhardt “Ultra-containing” marks makes Barnhardt’s use of “UltraClean” famous within the meaning of the statute. The evidence or lack thereof shows that Barnhardt’s use of the term UltraClean on bleached cotton is not famous.

Although not specifically pleaded in the Petition for Cancellation, Barnhardt also alleges that it is a prior user of the mark making this is a clear case of likelihood of customer confusion. Any use by Barnhardt of the term “UltraClean” for identifying its cotton product, as revealed by the undisputed facts and the lack of evidence, is simply a “token use” and does not rise to the level of a “bona fide use of a mark in the ordinary course of trade.”

II. Summary of Arguments

Wildwood is the uncontested owner of United States Trademark Registration No. 3,670,482 for the mark ULTRACLEAN for *raw cotton*. The Wildwood mark was registered on the Principal Register on August 18, 2009, based on an intent-to-use application filed May 9, 2008, and later claiming a date of first use of June 2, 2008.

Petitioner, Barnhardt, seeks to cancel Wildwood's ULTRACLEAN mark. A cancellation petitioner must show that it possesses standing to challenge the continued presence on the register of the subject registrations and that there is a valid ground that nullifies the registrant's right to registration. Barnhardt bears the burden of proving by a preponderance of the evidence both "dilution" and "prior use", its asserted grounds for cancelling Wildwood's registration. Barnhardt has not met that burden.

Contrary to the allegation in Barnhardt's Trial Brief,¹ Barnhardt's Petition for Cancellation pleaded that Wildwood's mark should be cancelled because Barnhardt *has been and continues to be damaged*, because of a likelihood of dilution by blurring or dilution by tarnishment under the Lanham Act §43(c)(1); 15 U.S.C. §1125(c)(1). Trademark anti-dilution laws are intended to enable trademark owners to prevent the gradual weakening or whittling away of the strength of their mark, through blurring or tarnishing, even if the public is not likely to be confused. To prove dilution, a trademark challenger must establish that its mark is *famous* with the meaning of the statute. *After the mark became famous*, actual dilution is required to establish a violation. Barnhardt has the burden to show that its mark for UltraClean is famous as used on bleached cotton. Barnhardt abandoned or cancelled six of the seven trademark applications that it relies on

¹ Barnhardt alleges that it has priority rights in the name UltraClean. First, as will be shown, Barnhardt does not have prior user rights. Secondly, prior rights were not the subject of pleadings under 15 U.S.C. §1125(c)(1), although they were alluded to throughout the proceeding in this matter.

to show that its “Ultra-containing” mark is famous. Further, fame for dilution purposes is difficult to prove, *e.g.*, that the mark is truly famous. Even if Barnhardt can establish that its mark is famous, dilution must occur *after* the mark becomes famous. Barnhardt has failed to meet this heavy burden or to demonstrate actual dilution.

The next argument raised by Barnhardt is that it claims ownership of the UltraClean mark because it is the prior user of the mark. The ownership of a trademark is governed by priority of a *bona fide* use in the ordinary course of commerce. In the arguments in Petitioner’s Trial Brief, Barnhardt claims priority through prior use. However, the facts and the evidence show that Barnhardt’s prior use is but a *token use*. The term “use in commerce” means the *bona fide* use of a mark in the ordinary course of trade and not just *token* use.

In *Lucent Information Management, Inc., v. Lucent Technologies, Inc.*, 186 F.3d 311, 316-317, 51 U.S.P.Q. 2d 1545 (3rd Cir. 1999) the court set forth the threshold test for “use” required to establish priority as a four-factor test looking to the volume of sales, growth trends, number of purchases, and the amount of advertising. The Court found that the first user of a mark for document imaging and management services was not, in fact, the senior user because prior to the defendants’ constructive use date, the plaintiff had made only one sale, which was not followed up by further sales until four months later. In *Lucent*, before the defendant filed its ITU, the plaintiff had made but one sale, had not invested any monies in public advertising, had not expanded beyond its initial set up, and had made a relatively small number of sales presentations. Based on these factors, the court therefore found for the defendant.

To establish priority, use of the mark must be in a *bona fide* sale sufficient to create an impact on the buying public. Barnhardt provided evidence only of a single sale in December 2006 of three shipments of cotton to an Israeli company, Spun Tech, located outside the United States. Wildwood's uncontested date of filing was May 9, 2008 and date of first use was June 2, 2008. Barnhardt provided no evidence of further sales of cotton under the Ultraclean mark between the time of the sale to the Israeli company in December 2006 and the filing of the Wildwood trademark application in May 2008 to indicate a continuous use of the mark. Thus, at best Barnhardt's use is "de minimis." In addition Barnhardt provided no evidence whatsoever of advertising or labeling between December 2006 and May 2008, the period in question. Barnhardt has, at best, shown only a *token* sale and thus has not met its burden to show that it made *bona fide* sales entitling it to prior user rights.

Since Wildwood, for the purposes of this action, is the senior user of the registered trademark for ULTRACLEAN, there can be no likelihood of confusion.

III. Description of the Record

Wildwood filed and served a Notice of Reliance, dated December 7, 2011,² in which the following item, among others, was made of record, and on which Wildwood relies:

- Barnhardt's Response to Wildwood's First Request for Admissions.

Barnhardt also filed and served a Notice of Reliance, dated December 7, 2011, in which it made of record the following items:

² Registrant would be remiss if it did not respond to Barnhardt's chiding that Wildwood produced very little discovery or depositions. The Board, of course, does not have to be reminded, as does Barnhardt's counsel, that the burden of proof is on Barnhardt.

- The Rule 30(b)(6) deposition of Lewis Barnhardt taken October 27, 2011 with all corresponding exhibits.
- The Rule 30(b)(6) deposition Lawson Gary for Wildwood taken July 15, 2011 and all corresponding exhibits;
- Wildwood's Response to Barnhardt's First Set of Interrogatories;
- Barnhardt's Petition to Cancel in this matter;
- USPTO record and file history of Barnhardt's federal application for the mark ULTRA-CLEAN, Serial No. 85/072,021; and
- USPTO records for Barnhardt's active and non-active applications and registration for the marks ULTRAWHITE, ULTRASORB, ULTRASCENT, ULTRAWHITE SOFT, ULTRAWHITE PURE, UNTRASORBENT, AND ULTRABLOCK.

Evidence automatically of record:

- USPTO record and file history of Wildwood's federal registration for the mark ULTRACLEAN, Registration No. 3,670,482.

Wildwood also relies on items in the record filed in Barnhardt's Notice of Reliance.

IV. Statement of the Facts

Wildwood is the uncontested owner of United States Trademark Registration No. 3,670,482 for the mark ULTRACLEAN for *raw cotton*. The Wildwood mark was registered on the Principal Register on August 18, 2009, based on an application filed

May 9, 2008, having a date of first use of June 2, 2008.³ *USPTO record of Wildwood's federal registration for the mark ULTRACLEAN, Registration No. 3,670,482. A copy may be found in Barnhardt's Petition for Cancellation in this matter, Exhibit 2, and Gary Dep., Exhibit 1.*

Barnhardt alleges in its Petition for Cancellation that Wildwood's use of ULTRACLEAN *has resulted and will continue to result* in damages by "dilution by blurring or dilution by tarnishment" of Barnhardt's use of UltraClean. Barnhardt's basis for its position is that it has a long history of using the ULTRA prefix for marks used in association with cotton products. This, in Barnhardt's opinion, makes Barnhardt's use of the mark UltraClean for cotton "famous." When discussing the basis for why Barnhardt considered the term UltraClean to be famous, Mr. Barnhardt replied that Barnhardt has built a family of marks bearing the ULTRA prefix and all of the ULTRA prefix marks are widely known in the industry to belong to Barnhardt and refer to Barnhardt products. *Rule 30(b)(6) deposition of Lewis Barnhardt, 7:7-22; 8:1-25; 9:1-6 (hereinafter "Barnhardt Dep.")*.

A review of the current status of these marks tells quite a different story:

ULTRA SORB	Trademark cancelled 11/21/2009
ULTRASCENT	Trademark application abandoned 11/21/2003
ULTRA WHITESOFT	Trademark application abandoned 2/28/1994
ULTRA WHITE PURE	Trademark application abandoned 2/28/1994
ULTRA SORBENT	Trademark application abandoned 3/28/2001

³ Wildwood is the trademark owner and producer of ULTRACLEAN raw cotton. However, T.J. Beall is the exclusive marketer of Wildwood's ULTRACLEAN raw cotton product. *Rule 30(b)(6) deposition of Lawson Gary 7:6-9 ("hereinafter "Gary Dep.")*. For the purposes of this action, Wildwood and T.J. Beall are collectively referred to as Wildwood.

ULTRABLOCK Trademark application abandoned 4/1/2006

ULTRA WHITE Trademark registered on Supplemental Register

See USPTO records for ULTRAWHITE, Serial No. 74/385,643; ULTRASORB, Serial No. 78/048,637; ULTRA SCENT, Serial No. 78/048,637; ULTRAWHITE SOFT Serial No. 74.385,645; ULTRAWHITE PURE Serial No. 74/385,644; ULTRASORBENT Serial No. 78/048,641; and ULTRABLOCK, Serial No. 75/471,846.

Thus, of the seven marks that Barnhardt alleges provide it with famous status, six of the trademarks or applications have been abandoned or cancelled. To substantiate its claim that UltraClean is a famous mark, Mr. Barnhardt provided no further evidence. Barnhardt's lack of use of the term UltraClean to identify its product was so evident that Barnhardt's use of the term UltraClean did not even turn up in Wildwood's trademark clearance search. *Gary Dep. 14:11-16:3, Exhibit 5*. Furthermore, Barnhardt admits in its Trial Brief that "Barnhardt's family of ULTRA marks may not be considered 'famous' nationwide, . . ." *Barnhardt Trial Brief, page 14*. Barnhardt's admission should end this case with respect to the pleading pursuant to 35 U.S.C. §1125(c)(1) in Barnhardt's Petition for Cancellation and the Board should promptly find for the Registrant, Wildwood.

On March 28, 2006, Barnhardt prepared, as a document for *internal* use, a product specification (Product Code 2077310) for a *bleached* cotton product which Barnhardt called "BCC ULTRA CLEAN". *Barnhardt's Petition to Cancel in this matter, Exhibit 3*. Spun Tech, an Israeli Company, placed an order for a bleached cotton product for the company in December 2006 to be made according to product code 2077310. The order was broken into three shipments of 60 bales each and was shipped prepaid under the

name BCC Ultra-Clean to Spun Tech on December 11 and 12, 2006. *Barnhardt's Petition to Cancel in this matter, Exhibit 3.*

Mr. Barnhardt testified that Barnhardt has used the mark UltraClean *continuously* since at least as early as March of 2006. *Barnhardt Dep. 19:6-14.* Yet the evidence shows that Barnhardt's sale to Spun Tech was not until December 2006, some 8 months later. Barnhardt provided no other invoice or additional evidence showing continuous use by Barnhardt prior to Wildwood's trademark filing date of May 9, 2008.

Barnhardt misleads the Board by alleging that it was marking each bale of cotton with a label showing the mark Ultra-Clean on cotton products by implying that labeling was made prior to Wildwood's trademark filing on May 9, 2008. *Barnhardt Dep. Exhibit 6. See also, Barnhardt's Trial Brief, page 9, lines 1-3.* The *only* label marking that Barnhardt has placed into evidence is the undated label provided through Mr. Barnhardt's deposition. *Barnhardt Dep. Exhibit 6; Barnhardt's Petition for Cancellation, Exhibit 1.* No attempt at verification of the date of this document is in the record. In fact, when asked about the date that document was made Barnhardt admitted that it was not made before May 9, 2008, the date of Wildwood's trademark filing. *Barnhardt's Response to Wildwood's First Request for Admissions, #2.* Thus, Barnhardt has provided no evidence of labels using UltraClean or Ultra-Clean on cotton bales prior to Wildwood's trademark filing for the mark on May 9, 2008.

Mr. Barnhardt alleges that Barnhardt "promoted or advertised" the products it sells using the Ultra-Clean trademark through trade shows, through market-bale tags, through invoices, and through internal literature. *Barnhardt Dep. 20:3-7.* Barnhardt has presented no evidence of what may have been shown at trade shows or any advertising

using the mark UltraClean between December 2006 and May 2008. Likewise, Barnhardt has provided no evidence of sales using the UltraClean mark from December 2006 until March 30, 2009. Of course, internal literature is not advertising in the trademark sense. Wildwood understands that Spun Tech resumed purchasing bleached cotton under the Ultra-Clean name from Barnhardt in 2009.

Interestingly, Barnhardt argues that Wildwood's use of its ULTRACLEAN mark causes confusion in the marketplace, but Barnhardt did not file its own application to register Ultra-Clean until June 25, 2010 – almost one year after Wildwood's registration issued and almost two years after Wildwood's first use.

V. Legal Argument

A. Barnhardt's petition should be dismissed for failure to meet the elements for cancellation

The trademark laws are embodied in the Lanham Act. A trademark is infringed [or subject to cancellation] when the mark or a similar mark is used in a way that is likely to confuse the public into believing that the trademark owner is the source or sponsor of products that it does not actually make or endorse.

To successfully prosecute a petition for cancellation, the petitioner must plead and prove two basic elements; (1) that it has standing to petition to cancel in that it is likely to be damaged by the registration,⁴ and (2) that there are valid grounds why the registration should not continue to be registered. *Young v. AGB Corp.*, 152 F.3d 1377, 1379, 47 U.S.P.Q. 2d 1752 (Fed. Cir. 1998). Barnhardt has not met its burden of proof for establishing valid grounds why Wildwood may not maintain the registration.

⁴ Wildwood does not dispute that Barnhardt's Petition for Cancellation, if proved, would constitute standing to cancel Wildwood's registration.

B. Barnhardt's UltraClean mark is not a famous mark

In this case, Barnhardt has based its cancellation petition on the Lanham Act §43(c)(1) 15 U.S.C. §1125(c)(1), alleging that it is the owner of a famous mark and that it *has been and continues to be damaged*, including as a result a *likelihood* of dilution by *blurring* or dilution by *tarnishment*. A mark is famous if it is widely recognized by the general consuming public of the United States. *15 U.S.C. §1125(c)(2)(A)*. The burden of proof is on the challenger, in this case Barnhardt.

1. The legal criteria for “dilution”

Trademark anti-dilution laws are intended to enable trademark owners to prevent the gradual weakening or whittling away of the strength of their mark, through blurring or tarnishing, even if the public is not likely to be confused. Because of trademark dilution issues, Congress passed the Federal Trademark Dilution Act which amended the Lanham Act and became effective in 1996. To prove dilution a trademark challenger must prove that:

- its mark is *famous* with the meaning of the statute;
- *after* the mark became famous, another party began to make commercial use of the mark in commerce; and
- the unauthorized use causes *dilution* of the distinctive quality of the trademark owner's famous mark.

More specifically, in *Moseley v. Victoria's Secret Catalogue Inc.*, 537 U.S. 418, 432, 123 S.Ct. 1115 (2003) the Supreme Court held that *actual dilution*, not just a likelihood of dilution, is required to establish a violation of the FTDA. The Lanham Act

also requires – in determining whether a mark is distinctive and famous – that the plaintiff must prove a “degree of inherent or acquired distinctiveness of the mark.”

An owner of an allegedly famous mark must prove that the mark became famous *prior to* the constructive use date of the challenged registration. *Enterprise Rent-A-Car v. Advantage Rent-A-Car, Inc.*, 330 F.3d, 1333, 1335, 66 U.S.P.Q. 2d 1811 (Fed. Cir. 2003). The Lanham Act states that the famous mark owner is entitled to injunctive relief “against another person who, at any time after the owner’s mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution.” Thus, Section 43©(1) requires that the accused dilution must have “commenced” *after* the date that the plaintiff’s mark became famous. *15 U.S.C. §1125(c)(1)*. Dilution is not based on likelihood of confusion. *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 628, 67 U.S.P.Q.2d 1481 (6th Cir. 2003).

2. The facts as applied to this case

Barnhardt’s only “proof” that the mark UltraClean is a famous mark is its prior use of the prefix “Ultra” on a series of abandoned or cancelled trademarks and/or trademark applications. This evidence does not provide a basis for establishing that the term UltraClean has famous status.

Even if Barnhardt could prove that today its use of the mark UltraClean was famous, Barnhardt would have to prove that the mark was famous *before* Wildwood began its use in June of 2008. The burden of proof is on Barnhardt to establish such proof *and* that its use of the mark has been diluted. Barnhardt has presented no evidence that Wildwood’s use of the ULTRACLEAN mark has caused customers not to recognize that UltraClean represents a Barnhardt product.

In addition, Barnhardt did not file its own trademark application to register Ultra-Clean until almost one year after Wildwood's registration issued. This, after the fact that Barnhardt, who is apparently versed in trademark law, knew or should have known the need to file a trademark application if there were indeed a viable product. In fact, Barnhardt did not even consider obtaining trademark registration until it became aware of Wildwood's use of the mark. *Barnhardt's Response to Wildwood's First Request for Admissions, #9*. It is indeed strange that if Barnhardt was allegedly actually and actively using the Ultra-Clean mark during the time period of concern and, as alleged by Barnhardt, was a competitor with Wildwood in the same target market, that Barnhardt would have waited so long to file its own application to obtain registration or to seek to enforce its common law rights.

Throughout the prosecution of this matter Barnhardt has maintained that its use of UltraClean for the sale of bleached cotton make it a famous mark. In fact, Barnhardt has now admitted that its mark is not be famous. Wildwood maintains that if, in fact, Barnhardt's use of UltraClean were *famous* it would have been picked up in Wildwood's Trademark clearance search. In case there is any doubt, this matter should not be decided for Barnhardt – the party alleging dilution. Barnhardt's allegation of dilution under 15 U.S.C. §1125(c)(1) are unfounded and the Petition for Cancellation should be dismissed.

C. Barnhardt fails to satisfy the tests that would entitle it to prior user rights

1. Legal considerations for obtaining rights in a trademark

The ownership of a trademark is governed by priority of use. The term “‘use’ in commerce” means the bona fide use of a mark in the ordinary course of trade and not just token trade. Furthermore, “the concept of priority in the law of trademarks is applied not

in its calendar sense but on the basis of the equities involved.” *Chandon Champagne Corp. v. San Marino Wine Corp.*, 335 F.2d 531, 534, 142 U.S.P.Q. 239 (2nd Cir. 1964).

In *Lucent Information Management, Inc.*, 186 F.3d at 316-317, the Third Circuit initially raised the threshold of “use” required to establish priority. The court transported to the priority arena the “market penetration” test traditionally used to determine the territorial scope of trademark rights by measuring the quantity of sales. The court used a four-factor test looking to the volume of sales, growth trends, number of purchases, and the amount of advertising. The court found that the first user of the mark LUCENT for document imaging and management services was not in fact the senior user because prior to the defendants’ constructive use date, the plaintiff had made only one sale, that was not followed up by further sales until four months later. The plaintiff existed for only about three months before the defendant filed its ITU, had made but one sale in that period, had not invested any monies in public advertising, had not expanded beyond its initial set up, and had made a relatively small number of sales presentations.

To establish priority, use of the mark must be in a *bona fide* sale sufficient to create an impact on the buying public. Thus, trademark rights are not created unless there is a shipment or sale exposed to the public in the United States. Further, to establish ownership of a mark, the prior user must establish not only that at some date in the past its use of the mark was a *bona fide* use in the ordinary course of trade, but that such use has *continued* to the present. *D. & M. Antique Import Corp., v. Royal Saxe Corp.*, 311 F. Supp. 1261, 1270-1271, 166 U.S.P.Q. 302 (S.D.N.Y. 1969) (initial sale followed six years later by a \$400 shipment held insufficient continuous use to qualify for federal registration). A deliberate and continuous use implies something more than mere

in its calendar sense but on the basis of the equities involved.” *Chandon Champagne Corp. v. San Marino Wine Corp.*, 335 F.2d 531, 534, 142 U.S.P.Q. 239 (2nd Cir. 1964).

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To establish priority, use of the mark must be in a *bona fide* sale sufficient to create an impact on the buying public. Thus, trademark rights are not created unless there is a shipment or sale exposed to the public in the United States. Further, to establish ownership of a mark, the prior user must establish not only that at some date in the past its use of the mark was a bona fide use in the ordinary course of trade, but that such use has *continued* to the present. *D. & M. Antique Import Corp., v. Royal Saxe Corp.*, 311 F. Supp. 1261, 1270-1271, 166 U.S.P.Q. 302 (S.D.N.Y. 1969) (initial sale followed six years later by a \$400 shipment held insufficient continuous use to qualify for federal registration). A deliberate and continuous use implies something more than mere

sporadic or *de minimis* sales. *Drexel Enterprises, Inc. v. Hermitage Cabinet Shop, Inc.*, 266 F. Supp. 532, 536, 152 U.S.P.Q. 484 (N.D. Ga. 1967):

2. The facts as applied to this case

The evidence shows that Barnhardt's first and only use of the UltraClean mark was the single sale in December 2006 to Spun Tech. Wildwood Gin's constructive use of the ULTRACLEAN mark on raw cotton was May 9, 2008 and first actual use was June 2, 2008. Barnhardt has provided no evidence of a bona fide use of UltraClean in the ordinary course of business. In fact, Barnhardt provided no evidence of advertising prior to Wildwood's filing, no evidence of labeling the product with the mark UltraClean prior to Wildwood's filing, and no continued use between the time of Barnhardt's token filing and Wildwood's trademark application filing. Barnhardt has not shown by a preponderance of the evidence that Wildwood is not the proper owner of the mark ULTRACLEAN for raw cotton.

What Barnhardt sells or offers for sale after the filing of the Wildwood trademark application for ULTRACLEAN has no bearing on the issues in the present matter.

D. No likelihood of confusion exists because Wildwood is the proper owner of the registration

There can be no likelihood of confusion between the raw cotton sold by Wildwood under its registered trademark ULTRACLEAN with the bleached cotton alleged by Barnhardt because Wildwood is proper owner of the registration for ULTRACLEAN.

Based on the single sales event to Spun Tech, Barnhardt made but a *token* use of the Ultra-Clean mark prior to Wildwood's application filed on May 9, 2008. In fact, as noted earlier, the Ultra-Clean mark was not even picked up by Wildwood's trademark

clearance search. *Gary Dep. 14-16, Exhibit 5*. This being the case the Board should find that Wildwood is the proper owner of the ULTRACLEAN trademark registration. If this is the case then likelihood of confusion between raw cotton and bleached cotton is not an issue in this matter.

VI. Conclusion

Barnhardt has not shown by a preponderance of the evidence that their use of the mark UltraClean for bleached cotton is famous under 35 U.S.C. §1125(c)(1). Further, Barnhardt has not shown by a preponderance of the evidence that it has prior user rights. Rather, its one time sale in December 2006 of processed bleached cotton using the Ultra-Clean name to a *single* customer establishes only a *token* use of the mark and Barnhardt's failure to continue sales makes Barnhardt's use a *de minimis* use of the mark, especially when coupled with the fact that there is no notice to the general public of the use of the mark such as through advertising or labeling. Even more important are the approximate two year lack of use of the mark before Wildwood filed its trademark registration and the lapse of about three years before a further sale was made by Barnhardt.

Barnhardt should not prevail on the Petition for Cancellation.

WHEREFORE, Registrant respectfully prays to the Trademark Trial and Appeal Board that Cancellation No. 92053237 be dismissed with prejudice.

Respectfully submitted,

WILDWOOD GIN, INC.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REGISTRANT'S TRIAL BRIEF was duly served in the United State Patent and Trademark Office via electronic mail.

I further certify that a copy of the foregoing REGISTRANT'S TRIAL BRIEF was duly served upon the petitioner by delivering copies thereof, via email, addressed to the following attorney of record:

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This the 15th day of May, 2012.



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