

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	86287391
LAW OFFICE ASSIGNED	LAW OFFICE 105
MARK SECTION	
MARK	http://tmng-al.uspto.gov/resting2/api/img/86287391/large
LITERAL ELEMENT	COZY COMFORT
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
<p>Applicant herewith requests reconsideration of the Final Refusal to Register the subject mark dated February 18, 2015. Since the Refusal has been made final and today is the final day in the 6th month statutory period for response, to preserve Applicant's rights, Applicant has also concurrently filed a Notice of Appeal of the Final Refusal to the Trademark Trial and Appeal Board (TTAB or the Board). The mark for which Applicant seeks registration is "COZY COMFORT." The goods for which registration is sought are bed blankets, blanket throws, blankets for outdoor use, children's blankets, children's bed sheets, pillow cases and blankets, fleece blankets, lap blankets, and receiving blankets. The Examining Attorney has refused registration, citing two earlier registrations, namely, the mark "COZY COMFORT" in Registration No. 3,513,048 for beds for household pets and nesting pads for use as beds by household pets, and the mark "COZY COMFORTER" in Registration No. 4,398,932 for fabric pet bed. As such, there is no overlap between the respective goods. The position the Examining Attorney has taken is that the respective goods are sufficiently related that confusion is likely. In support of this position, the Examining Attorney has cited a number of prior registrations allegedly demonstrating the relatedness of pet-related bedding products and human-related bedding products. In addition, the Examining Attorney has cited four examples of third party businesses selling, among other products, pet-related bedding products and human-related bedding products. Taking this evidence seriatim, Applicant notes the following: (1) Registration No. 3,816,573 for a logo mark with no literal element is registered for eight different types of goods in Class 3, three different types of goods in Class 20, and thirteen different types of goods in Class 24. As the Board stated in <i>In re Princeton Tectonics, Inc.</i>, 95 USPQ2d 1509 (TTAB 2010) [precedential] "The diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the</p>	

registration are related.", citing *In re Davey Products Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Moreover, "The third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them. However, the registrations 'may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type that may emanate from a single source.'" *CNL Tampa Int'l Hotel Partnership, LP v. Gomulka Palazzolo*, TTAB Decision dated March 7, 2007, Slip Op at 6, citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (emphasis added), also citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n. 6 (TTAB 1988). The same citations are equally applicable to the Examining Attorney's citation of Registration No. 4,124,230 for the mark "PRIMALOFT" claiming use for three goods in Class 17, six goods in Class 20, seven goods in Class 22, four goods in Class 24, and seven goods in Class 25; Registration No. 4,240,084 for the mark "NATURE'S SLEEP" for twelve goods in Class 20, six goods in Class 10, and four goods in Class 24; Registration No. 4,436,045 for the mark "D SUPERIEUR" for eleven goods in Class 20, and seventeen goods in Class 24; and Registration No. 4,575,694 for the mark "CARNIVAL and Design" for seven goods in Class 20, eight goods in Class 24, and services in connection with sales of eighteen goods in Class 35. Again, Applicant refers the Examining Attorney to the citation above of *In re Princeton Tectonics, Inc.* The other third party evidence proffered by the Examining Attorney is even less compelling. It consists of Internet print-outs from Wal-mart, Kohls, Sears, and Bed Bath and Beyond. This evidence purports to show that these four department store chains all sell pet bedding products and human bedding products. However, this so-called evidence does absolutely nothing whatsoever to inform us as to whether a consumer visiting these stores or their online websites would encounter the respective goods side-by-side such that a likelihood of confusion would be created as to the respective sources of the respective goods. As the United States Court of Customs and Patent Appeals stated in the oft cited case *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976): "A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed. See *Canada Dry Corp. v. American Home Products Corp.*, 468 F.2d 207, 175 USPQ 557 (Cust. & Pat.App. 1972). The means of distribution and sale, although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by ? 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Significantly more probative of the question of likelihood of confusion is Applicant's Attorney's physical visits today to Costco, Wal-mart and Target stores to view their displays of human bedding products and pet bedding products. These visits are recounted in the accompanying Declaration of H. Jay Spiegel to which is attached nine Exhibits showing the store facades as well as images of the respective human bedding and pet bedding departments. As declared by Mr. Spiegel, at the Costco store, the respective departments are spaced from one another by a distance of at least 150 feet. Concerning the Wal-mart and Target stores, the respective departments are spaced apart by at least 100 feet in each instance. As such, Applicant submits that the average consumer visiting any of these stores would be quite unlikely to encounter one of the departments when shopping in the other. This is significantly more probative of the issue of likelihood of confusion than mere speculation from computer print-outs from store chains and third party registrations in which numerous items are claimed to be used besides the two items the Examining Attorney alleges are somehow related. Again, these third party registrations are not evidence that the marks shown therein are in commercial use or that the public is familiar with them. *CNL Tampa Int'l Hotel Partnership, LP*, cited *supra*. For all of these reasons, it is submitted that the Examining Attorney has failed to establish sufficient relatedness between pet bedding products and human bedding products to support a finding of likelihood of confusion. As such, it is requested that the refusal to register be withdrawn and the application be passed to publication for opposition.

EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_68100242240-20150818151001843399_ CozyComfortEvidence.pdf
CONVERTED PDF FILE(S) (21 pages)	\\TICRS\EXPORT16\IMAGEOUT16\862\873\86287391\xml7\RFR0002.JPG
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	\\TICRS\EXPORT16\IMAGEOUT16\862\873\86287391\xml7\RFR0022.JPG
DESCRIPTION OF EVIDENCE FILE	Declaration of H. Jay Spiegel and Exhibits 1-9 consisting of photographs
SIGNATURE SECTION	
RESPONSE SIGNATURE	/H. Jay Spiegel/
SIGNATORY'S NAME	H. Jay Spiegel
SIGNATORY'S	

POSITION	Attorney of Record
SIGNATORY'S PHONE NUMBER	703-619-0101
DATE SIGNED	08/18/2015
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Aug 18 15:20:39 EDT 2015
TEAS STAMP	USPTO/RFR-68.100.242.240-20150818152039605934-86287391-540729262dceeb9380cd b970bbe65e87fa3e0b0b4c24b21cc2b670a334dbef-N/A-N/A-20150818151001843399

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **86287391** COZY COMFORT(Standard Characters, see <http://tmng-al.uspto.gov/resting2/api/img/86287391/large>) has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

Applicant herewith requests reconsideration of the Final Refusal to Register the subject mark dated February 18, 2015. Since the Refusal has been made final and today is the final day in the 6th month statutory period for response, to preserve Applicant's rights, Applicant has also concurrently filed a Notice of Appeal of the Final Refusal to the Trademark Trial and Appeal Board (TTAB or the Board). The mark for which Applicant seeks registration is "COZY COMFORT." The goods for which registration is sought are bed blankets, blanket throws, blankets for outdoor use, children's blankets, children's bed sheets, pillow cases and blankets, fleece blankets, lap blankets, and receiving blankets. The Examining Attorney has refused registration, citing two earlier registrations, namely, the mark "COZY COMFORT" in Registration No. 3,513,048 for beds for household pets and nesting pads for use as beds by household pets, and the mark "COZY COMFORTER" in Registration No. 4,398,932 for fabric pet bed. As such, there is no overlap between the respective goods. The position the Examining Attorney has taken is that the respective goods are sufficiently related that confusion is likely. In support of this position, the Examining Attorney has cited a number of prior registrations allegedly demonstrating the relatedness of

pet-related bedding products and human-related bedding products. In addition, the Examining Attorney has cited four examples of third party businesses selling, among other products, pet-related bedding products and human-related bedding products. Taking this evidence seriatim, Applicant notes the following: (1) Registration No. 3,816,573 for a logo mark with no literal element is registered for eight different types of goods in Class 3, three different types of goods in Class 20, and thirteen different types of goods in Class 24. As the Board stated in *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509 (TTAB 2010) [precedential] "The diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the registration are related.", citing *In re Davey Products Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Moreover, "The third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them. However, the registrations 'may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type that may emanate from a single source.'" *CNL Tampa Int'l Hotel Partnership, LP v. Gomulka Palazzolo*, TTAB Decision dated March 7, 2007, Slip Op at 6, citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (emphasis added), also citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n. 6 (TTAB 1988). 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It consists of Internet print-outs from Wal-mart, Kohls, Sears, and Bed Bath and Beyond. This evidence purports to show that these four department store chains all sell pet bedding products and human bedding products. However, this so-called evidence does absolutely nothing whatsoever to inform us as to whether a consumer visiting these stores or their online websites would encounter the respective goods side-by-side such that a likelihood of confusion would be created as to the respective sources of the respective goods. As the United States Court of Customs and Patent Appeals stated in the oft cited case *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976): "A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed. See *Canada Dry Corp. v. American Home Products Corp.*, 468 F.2d 207, 175 USPQ 557 (Cust. & Pat.App. 1972). The means of distribution and sale, although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by ? 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Significantly more probative of the question of likelihood of confusion is Applicant's Attorney's physical visits today to Costco, Wal-mart and Target stores to view their displays of human bedding products and pet bedding products. These visits are recounted in the accompanying Declaration of H. Jay Spiegel to which is attached nine Exhibits showing the store facades as well as images of the respective human bedding and pet bedding departments. As declared by Mr. Spiegel, at the Costco store, the respective departments are spaced from one another by a distance of at least 150 feet. Concerning the Wal-mart and Target stores, the respective departments are spaced apart by at least 100 feet in each instance. As such, Applicant submits that the average consumer visiting any of these stores would be quite unlikely to encounter one of the departments when shopping in the other. This is significantly more probative of the issue of likelihood of confusion than mere speculation from computer print-outs from store chains and third party registrations in which numerous items are claimed to be used besides the two items the Examining Attorney alleges are somehow related. Again, these third party registrations are not

evidence that the marks shown therein are in commercial use or that the public is familiar with them. CNL Tampa Int'l Hotel Partnership, LP, cited supra. For all of these reasons, it is submitted that the Examining Attorney has failed to establish sufficient relatedness between pet bedding products and human bedding products to support a finding of likelihood of confusion. As such, it is requested that the refusal to register be withdrawn and the application be passed to publication for opposition.

EVIDENCE

Evidence in the nature of Declaration of H. Jay Spiegel and Exhibits 1-9 consisting of photographs has been attached.

Original PDF file:

[evi_68100242240-20150818151001843399_.CozyComfortEvidence.pdf](#)

Converted PDF file(s) (21 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

[Evidence-16](#)

[Evidence-17](#)

[Evidence-18](#)

[Evidence-19](#)

[Evidence-20](#)

[Evidence-21](#)

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /H. Jay Spiegel/ Date: 08/18/2015

Signatory's Name: H. Jay Spiegel

Signatory's Position: Attorney of Record

Signatory's Phone Number: 703-619-0101

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute

power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 86287391

Internet Transmission Date: Tue Aug 18 15:20:39 EDT 2015

TEAS Stamp: USPTO/RFR-68.100.242.240-201508181520396

05934-86287391-540729262dceeb9380cdb970b

be65e87fa3e0b0b4c24b21cc2b670a334dbef-N/

A-N/A-20150818151001843399

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

AMERICAN TEXTILE COMPANY

LAW OFFICE: 105

Serial Number: 86/287,391

Examining Attorney:
Shavell McPherson-Rayburn

Filed: May 21, 2014

Mark: COZY COMFORT

Date: August 18, 2015

DECLARATION OF H. JAY SPIEGEL

Commissioner for Trademarks
P.O. Box 1450
Alexandria, VA 22313

Sir:

The undersigned, H. Jay Spiegel, makes the following declaration:

(1) I am Counsel to American Textile Company (ATC) in the referenced application for registration of the mark "COZY COMFORT" (Applicant's mark) for bed blankets, blanket throws, blankets for outdoor use, children's blankets, children's bed sheets, pillow cases and blankets, fleece blankets, lap blankets, and receiving blankets.

(2) On February 18, 2015, the USPTO refused registration of Applicant's mark, alleging that a likelihood of confusion exists between Applicant's mark and the mark "COZY COMFORT" in Registration No. 3,513,048 for beds for household pets and nesting pads for use as beds by household pets, and the mark "COZY COMFORTER" in Registration No. 4,398,932 for fabric pet bed.

(3) In supporting this refusal, the Examining Attorney has alleged that the respective goods are similar and that evidence uncovered by the Examining Attorney demonstrates a relationship between the sales of pet bedding, on the one hand, and human bedding, on the other.

(4) On August 18, 2015 (today), I visited Costco, Wal-mart and Target department stores located on Richmond Highway in the Alexandria section of Fairfax County, VA. The purpose for my visits was to ascertain whether pet products are sold in these stores in close proximity to human bedding products.

(5) Exhibit 1 shows the facade of the Costco store I visited. Exhibit 2 shows an image of the human bedding department therein. Exhibit 3 shows an image of the pet supply department therein. The human bedding department is located toward the front of the store while the pet supply department is located on the rear wall. These departments are spaced from one another by a distance of at least 150 feet.

(6) Exhibit 4 shows the facade of the Wal-mart store I visited. Exhibit 5 shows an image of the human bedding department therein. Exhibit 6 shows an image of the pet supply department therein. The human bedding department is located toward the middle of the store while the pet supply department is located near the front of the store. These departments are spaced from one another by a distance of at least 100 feet.

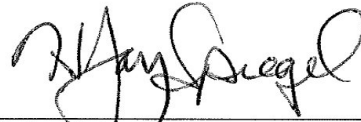
(7) Exhibit 7 shows the facade of the Target store I visited. Exhibit 8 shows an image of the human bedding department therein. Exhibit 9 shows an image of the pet supply department therein. The human bedding department is located toward the middle of the store while the pet supply department is located near the front of the store. These departments are spaced from one another by a distance of at least 100 feet.

(8) Based upon these findings, I submit that the average consumer visiting one of these stores to purchase pet-related products would not encounter the human bedding department. I submit that the reverse is also true, the average consumer visiting one of these stores to purchase human bedding products would not encounter the pet department.

(9) I make this declaration with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any registration accruing therefrom.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES



H. Jay Spiegel
Attorney for Applicant
Registration No. 30,722

DATE: August 18, 2015

H. JAY SPIEGEL & ASSOCIATES
P.O. Box 11
Mount Vernon, VA 22121
(703) 619-0101 - Phone
(703) 619-0110 - Facsimile
jayspiegel@aol.com - e-mail

EXHIBIT 1



EXHIBIT 2



EXHIBIT 3

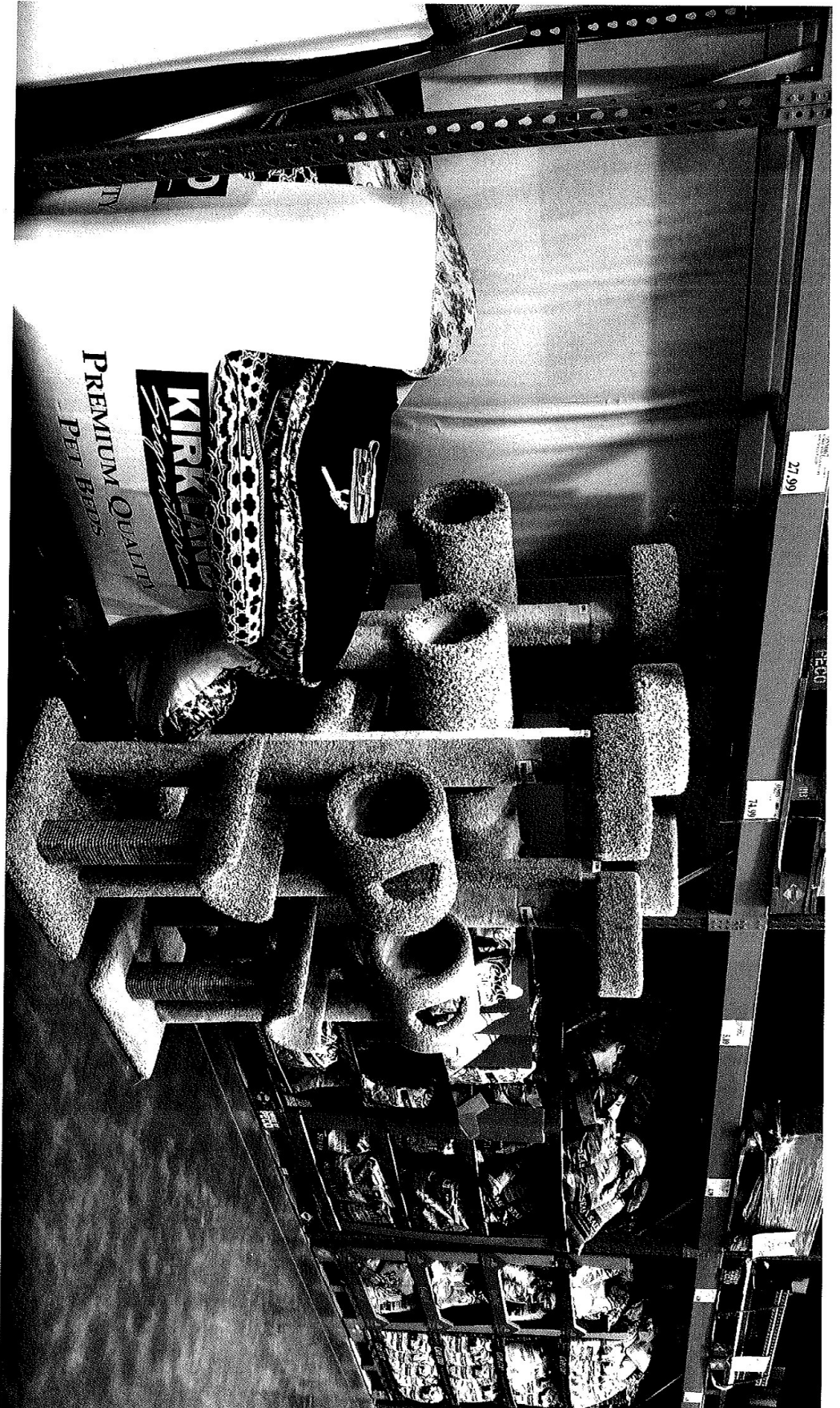


EXHIBIT 4



EXHIBIT 5



EXHIBIT 6



EXHIBIT 7



EXHIBIT 8



EXHIBIT 9

