

**THIS OPINION IS NOT A
PRECEDENT OF
THE TTAB**

Hearing:
July 22, 2010

Mailed:
March 31, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Societe Des Produits Nestle S.A.

v.

Midwestern Pet Foods, Inc.

Opposition No. 91163853 to application Serial No. 76563252
filed on November 21, 2003

Thomas A. Polcyn of Thompson Coburn LLP for Societe Des
Produits Nestle S.A.

Timothy D. Pecsénye of Blank Rome LLP for Midwestern Pet
Foods, Inc.

Before Zervas, Taylor and Wellington, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Midwestern Pet Foods, Inc. has filed an application to
register on the Principal Register the mark WAGGIN' STRIPS,
in standard character format, for "pet food and edible pet
treats" in International Class 31.¹

Registration has been opposed by Societe Des Produits
Nestle S.A. ("opposer") on the grounds of (1) priority and

¹ Serial No. 76563252, filed on November 21, 2003, with an
allegation of a bona fide intention to use the recited goods in
commerce. The term "strips" has been disclaimed.

Opposition No. 91163853

likelihood of confusion,² (2) dilution and (3) that applicant lacks a bona fide intent to use the mark in commerce. Opposer, in its first amended notice of opposition, specifically alleges that since as early as 1988, it has continuously used in interstate commerce BEGGIN' STRIPS as a trademark for dog snacks; that it is the owner of Registration No. 1529939 for the mark BEGGIN' STRIPS for "dog snacks";³ and that it has promoted and sold its dog snacks under the BEGGIN' STRIPS mark prior to any alleged use by applicant of its applied-for mark. Opposer further alleges that as a result of its use, promotion and advertizing of its BEGGIN' STRIPS mark, the mark has become well known to the trade and to the public, and has accordingly acquired significant good will; and that prior to applicant's adoption of its mark, Opposer's BEGGIN' STRIPS mark was distinctive and became "famous" within the meaning of 15 U.S.C. § 1125(c). Opposer then alleges that applicant's WAGGIN' STRIPS mark so resembles its previously used, and not abandoned, BEGGIN' STRIPS mark as to be likely, when applied to applicant's listed goods, to cause

² As confirmed by opposer's counsel at the oral hearing held in connection with this matter, opposer's assertion in the first amended notice of opposition that applicant's mark "falsely suggests a connection with Opposer" was in intended to be a part of opposer's claim of likelihood of confusion, and we have considered it as such.

³ Registration No. 1529939 issued March 14, 1989, renewed. The registration includes a disclaimer of the word "Strips."

confusion or to cause mistake or to deceive the public, or to cause dilution of the distinctive quality of opposer's mark.

Opposer also alleges that "upon information and belief," applicant never had or no longer has a *bona fide* intention to use the applied-for mark in commerce in connection with any of the goods listed in the application.

Applicant, in its answer, admitted that it had yet to use its applied-for mark in commerce (Answer, ¶¶ 6 and 11), but otherwise denied the essential allegations of the notice of opposition.⁴

PRELIMINARY MATTERS

Motion to Strike

On August 5, 2009, the Board deferred consideration of opposer's motion to strike one exhibit in applicant's notice of reliance. We now consider that motion which opposer renewed in its evidentiary brief. Opposer objects to Exhibit G, consisting of copies of packaging from applicant's competitors, arguing that these copies cannot be submitted by a notice of reliance.

⁴ Applicant also asserted the affirmative defense of unclean hands. However, since this defense was not pursued at trial, it is considered withdrawn and will not be further considered. In addition, the remaining enumerated "affirmative defenses" merely amplify applicant's denials of the claims asserted in the first amended notice of opposition.

In response, applicant contends that this material merely supplements the answer to a question in the May 5, 2009 testimony deposition of applicant's chief financial officer, Philip S. Montooth.⁵ Applicant further argues that "[i]nformation regarding the existence of these STRIP-denominated pet products was not provided by either party during discovery"; and that "[c]onsistent with Federal Rule of Civil Procedure 26(e), and as soon as Applicant became aware that discovery was incomplete, Applicant supplemented its discovery responses by submitting the aforementioned packaging in express support of the testimony..." Appl. resp to mot. to strike p. 2.

In reply, opposer argues that the contents of Exhibit G were not discussed and were not introduced as an exhibit during Mr. Montooth's deposition.

Documents and other evidence, not ordinarily admissible by notice of reliance, may be made of record with appropriate identifications and introduction by the witness during the course of a testimony deposition. See generally

⁵ The question and response (emphasis supplied) from the Montooth testimony is as follows:

Q. Can you identify those competitors that you recall that make strips treats?

A. There are a number of strip treats out there. Milk-bone makes a bacon - a bacon strip treat. Loving Pet makes a number of treats. Beef Eaters makes a number of strip treats. Bravo makes a number. Ol'Roy makes some strip treats. Dollar General has a brand. I believe PETCO and PetSmart also have a brand of strip treats. ...
(Montooth test. p. 32).

Opposition No. 91163853

TBMP § 703.01(a) (2d ed. 2004). A review of the Montooth testimony reveals that although Mr. Montooth identified several third parties that he believed made such treats, he made no reference to, nor authenticated any product packaging for such or other third-party treats. The objected-to materials were not introduced by applicant during the deposition. Consequently, applicant is seeking in the first instance to make the third-party product packaging of record via the notice of reliance. Product packaging is neither an official record nor a printed publication as described in Trademark Rule 2.122(e) and is therefore not admissible by notice of reliance. See generally TBMP § 704.02.

Additionally, applicant's argument that the material was submitted to "supplement discovery" pursuant to Fed. R. Civ. P. 26 is unavailing. Nothing in this record supports applicant's assertion that the material, if indeed responsive to propounded discovery, falls within any circumstance that would allow submission during applicant's testimony period by notice of reliance. See Trademark Rule 2.120(j).

Accordingly, opposer's motion to strike is granted and Exhibit G to applicant's notice of reliance will not be further considered.

Evidentiary Objections

Opposer, in its brief, raised three objections to Mr. Montooth's testimony and certain exhibits introduced at his deposition. We address each of the three objections below in turn.

First, opposer objects to Exhibits 1-6⁶, and related testimony, as irrelevant because they do not show or relate to the mark at issue in this opposition.

In response, applicant argues that the evidence is relevant because it shows that applicant is capable of making, and does make, "strips" products similar to the type of goods to be sold under its applied-for mark. Thus, applicant contends, the packaging supports applicant's bona fide intent to the use the WAGGIN' STRIPS mark. Applicant also argues that the proffered packaging shows that the mock-up packaging submitted as Exhibit 7 to the Montooth testimony is consistent in appearance to its current product packaging, including applicant's consistent use of its PRO PAC house mark and logo.

Opposer's objection to exhibits 1-6 is overruled. The evidence is relevant to applicant's defense to both opposer's claims of likelihood of confusion and no bona fide intention to use the mark in commerce; in particular, the

⁶ Exhibits 1-6 consists of packaging of various pet treat products sold by applicant under marks other than the applied-for mark WAGGIN' STRIPS.

evidence relates to applicant's intent. To the extent that applicant is arguing that the packaging demonstrates applicant's "consistent" use of its house mark in connection with its other marks, it is irrelevant in this regard, because this proceeding only involves applicant's WAGGIN' STRIPS mark.

Second, opposer objects to Mr. Montooth's testimony regarding applicant's mock-up packaging for its WAGGIN' STRIPS mark. Opposer argues that the Board order issued October 17, 2008 states that "all information sought from Ms. Montgomery [an employee in applicant's graphic arts department and the creator of the mock-up packaging] during discovery but not produced by Applicant" would be stricken;⁷ that applicant now seeks to use Mr. Montooth as a proxy for Ms. Montgomery to introduce testimony about the mock-up packaging; and that introducing Mr. Montooth's testimony regarding the mock-up packaging is in contravention of the Board's order. Opposer also argues that the testimony about the circumstances surrounding applicant's selection of the

⁷ The ruling was made in a decision on a motion to strike the declaration of Cynthia Montgomery filed in support of applicant's motion for summary judgment and in defense of opposer's cross-motion for summary judgment. The Board ruled that "having refused to produce Ms. Montgomery for a deposition, arguing that any information she had is cumulative or irrelevant, applicant cannot now fairly rely on Montgomery's testimony ..." (October 17, 2008 order p. 10). The Board further stated that "at trial, applicant may not seek to introduce into evidence Ms. Montgomery's testimony, and/or information sought from Ms. Montgomery during discovery but not produced by applicant." *Id* at fn. 4.

Opposition No. 91163853

WAGGIN' STRIPS mark was specifically solicited from Ms. Montgomery and should not now be allowed into evidence.

In response, applicant maintains that opposer is placing too much reliance on the October 2008 order, which simply states that applicant cannot refuse to produce Ms. Montgomery for deposition purposes and, at the same time, rely on her testimony. Applicant explains that in the Board's April 5, 2008 order denying opposer's motion to compel the discovery deposition of Ms. Montgomery, the Board ruled that the deposition of Ms. Montgomery was not justified because there is no information she could provide that had not already been provided by Mr. Montooth. Applicant contends that the testimony provided by Mr. Montooth at his testimony deposition was already produced during discovery, either in answer to Opposer's interrogatories or in Mr. Montooth's 30(b)(6) deposition which opposer has made of record.

We overrule the objection. Although pursuant to the Board's order, applicant may not rely on any testimony from Ms. Montgomery, or any information sought from her but not produced, applicant is not foreclosed from relying on the testimony of Mr. Montooth regarding the mock-up packaging and applicant's selection of the WAGGIN' STRIPS mark because, as pointed out by applicant, this information was produced by applicant either in its responses to opposer's

Opposition No. 91163853

interrogatories or in Mr. Montooth's discovery deposition. See Opposer's Not. of Rel. Exh P-3, and Applicant's Not. of Rel. Exh. I.

Last, opposer objects to the Montooth Dep. Exhibits 8 and 9 (i.e., photographs of third-party pet treat product packaging), and related testimony. Opposer objects to the admissibility of these materials arguing that the exhibits are irrelevant as they do not relate to the marks at issue in this proceeding, and that the exhibits have not been properly identified and authenticated by Mr. Montooth because he has no personal knowledge related to the packaging.

In response, applicant contends that the evidence is relevant to show similar marks are in use in the industry; that opposer is objecting to evidence that opposer itself submitted into evidence; and that applicant authenticated its third party evidence in the same manner as opposer.

Evidence of third-party use of similar marks is relevant to applicant's defense of opposer's claim of likelihood of confusion and, in particular, the number and nature of similar marks in use on similar goods. In addition, Mr. Montooth testified that he is familiar with applicant's competitors' products and that he had seen the packaging in retail outlets. This testimony lays a sufficient foundation to introduce the packaging into the

record. The objection is accordingly overruled and we will accord the third-party packaging the appropriate probative value.⁸

Applicant likewise raised numerous objections to opposer's notice of reliance as well as to the testimony and exhibits of opposer's witness, Juli Plassmeyer, brand director for Beggin' Strips. Indeed, applicant objected to nearly every question and/or answer with regard to Ms. Plassmeyer's testimony on direct examination. Most of the objections served no useful purpose and unnecessarily interrupted the flow of the deposition. We address below only those objections that were repeated with particularity in applicant's combined response to opposer's evidentiary objections and applicant's evidentiary objections.

First, applicant objects to, and seeks to strike, Plassmeyer Deposition Exhibits 3-43 and Exhibits P6-P132 to opposer's notice of reliance because this evidence was requested by applicant during discovery, but was not produced. Applicant specifically contends that "[g]iven that no documents were produced in response to Applicant's requests, Applicant was entitled to reasonably rely on Opposer's certification that no documents existed."

⁸ In any event, the packaging identified as Exhibit G to Mr. Montooth's testimony had already been made of record by opposer and may be considered for whatever value it has. See Plassmeyer Exh. 44.

Applicant's Combined Resp. to Opposer's Evidentiary Objections and Applicant's Evidentiary Objections p. 7. Further, applicant seeks to strike Plassmeyer testimony Exhibits 16-18, 21-29 and 38-43, i.e., evidence of applicant's advertising, sales and marketing figures, on the additional ground that they are summary documents and opposer did not make the underlying documents available.⁹ Applicant also argues that opposer has not established that the summaries are accurate or that the underlying documents are themselves admissible.

Opposer, in response, maintains that its testimony and exhibits should be admitted because: (i) the Plassmeyer testimony, in its entirety, is based on Ms. Plassmeyer's personal knowledge; (ii) the exhibits were either previously provided to applicant, available for inspection, not sought by applicant and/or properly objected to; and (iii) applicant failed to meet and confer or move to compel and the automatic disclosure requirements do not apply to this proceeding. "Applicant had full and fair opportunity for discovery of additional information however, Applicant chose not to inspect documents or make alternative arrangements to

⁹ Applicant's additional argument that the summary documents are not the best evidence is not well taken since applicant had the opportunity to review the underlying documents. See e.g., *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 859 (TTAB 1981 (Summary exhibits were not excluded when a party "made no demand for the detailed records from which the summaries were prepared, although they were available.")).

Opposition No. 91163853

obtain copies." Opposer's response to Applicant's Evidentiary Brief p. 1.

Opposer particularly contends, with respect to Exhibit 43 of the Plassmeyer testimony, that it is a compilation showing BEGGIN' STRIPS brand awareness and is not a study conducted pursuant to this matter. Opposer explains that the chart was created from material that opposer uses in the ordinary course of business and does not provide information on the ultimate issue to be decided by the Board. Opposer further contends that even assuming that its discovery responses should have been supplemented, applicant's claim of prejudice is "suspect." Given applicant's disregard for the discovery process, opposer argues that it is unlikely that applicant would have come to inspect the data underlying Exhibit 43.

We first consider Exhibit 43 - a summary chart showing brand awareness among several pet treat brands compiled from data extrapolated from a 2004-2006 survey performed by the firm Millward Brown. This document is responsive to Applicant's Document Request No. 3, which sought "all documents that refer, relate to, or include surveys, marketing studies, focus group studies and polls regarding the BEGGIN' STRIPS Mark," and note that opposer responded "none at this time."

The duty to supplement a response is governed by Fed. R. Civ. P. 26(e). Under this rule, a party that has responded to a request for discovery has a duty to supplement or correct the response to include information thereafter acquired under the particular circumstances specified by the rule. TBMP § 408.03 (2d. rev. March 2004). A responding party which, due to a failure to supplement its response to include newly acquired information, may not thereafter rely at trial on such information that was properly sought but not seasonably updated as required by Fed. R. Civ. P. 26(e).

We find opposer's objection to Exhibit 43 well taken. Applicant timely requested the production of survey/marketing study materials and opposer responded that, at the time, none existed. In the absence of a supplemental response, applicant had no reason to believe that any such material existed. In addition, we will not speculate as to whether applicant would, or would not, have inspected the materials if it knew such materials existed.

Accordingly, Exhibit No. 43 to the Plassmeyer testimony deposition is here stricken.¹⁰

¹⁰ We add that even if we had considered this material, it would not have changed the outcome. Because Ms. Plassmeyer did not have firsthand knowledge to testify about the brand awareness survey undertaken by Milward Brown, the compilation document has little probative value.

In addition, applicant pointed to two other discovery requests to which opposer responded "none" or "none at this time." These

Opposition No. 91163853

With regard to the objection to the remaining exhibits, opposer consistently indicated in its discovery responses that: (1) responsive documents would be produced at a mutually agreeable time and place; (2) the request was overbroad and unduly burdensome; (3) the documents sought were irrelevant; (4) the documents sought were privileged, subject to the work product doctrine or proprietary in nature prior to entry of a suitable protective agreement; and/or (5) the documents sought were equally available to applicant. That is, unlike its response to applicant's Document Requests Nos. 3 and 4, opposer did not state that no documents were in its possession or control. Additionally, with regard to the document request seeking documents relating to opposer's responses to applicant's first set of interrogatories, opposer responded that the interrogatories exceeded seventy-five in number. By these responses, and contrary to applicant's contention, opposer in no way led applicant to believe that no documents satisfied applicant's discovery requests. Since applicant was unsatisfied with opposer's failure to produce any documents in response to its requests, it was incumbent upon

requests are Document Request No. 4, which sought documents and information which refer or relate to instances of actual confusion, or the absence of such confusion, between the BEGGIN' STRIPS Mark and the WAGGIN' STRIPS Mark, and Interrogatory Request No. 5. We note, however, that applicant's application is based on intent-to-use and, because applicant did not make its

Opposition No. 91163853

applicant to file a timely motion to compel or to modify its interrogatories to comply with the number limitation.

Applicant, having failed to do so, has waived its right to object to such testimony and evidence on the ground that it was not produced during discovery. See *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1719 (TTAB 2008) (party that receives response it believes inadequate but fails to file a motion to test sufficiency of response, may not thereafter complain about its insufficiency); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002) (having failed to file motion to compel, defendant will not later be heard to complain that interrogatory responses were inadequate); and *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1201 (TTAB 1993) (where applicant gave partial answers and otherwise objected to requests as cumulative or burdensome but opposer did not file motion to compel, modify discovery requests, or otherwise pursue the requested material, evidence introduced by applicant at trial was considered), *aff'd*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994). In short, it was applicant's own inaction that prevented applicant from obtaining opposer's evidence prior to trial. Under these circumstances, applicant cannot assert prejudice.

Interrogatories of record, the information sought by Interrogatory Request No. 5 is unknown.

Opposition No. 91163853

In view of the foregoing, with the exception of Exhibit 43 to the Plassmeyer testimony deposition, applicant's objections are overruled.

Last, citing, *inter alia*, *Toro Co. v. Torohead*, 62 USPQ2d 1164, 1174 (TTAB 2001), applicant objects to opposer's evidence supporting the fame of its mark, and seeks to strike Plassmeyer test. Exhs. 16-20 and 30-43 and Exhibits P11-24, P30-74, P124-127 and P129-132, arguing that the documents are dated after the November 21, 2003 filing date of applicant's intent-to-use application.

We overrule this objection as it is essentially directed to the probative value to be accorded this evidence. Moreover, opposer's notice of opposition includes claims of likelihood of confusion and dilution. Although most of the evidence may not be particularly probative of the factor of fame with respect to opposer's dilution claim, because fame of a party's mark is not static, this evidence is relevant (and the probative value more fully discussed, *infra*) to the issue of likelihood of confusion. The Board generally accepts and considers evidence related to likelihood of confusion for the period up to the time of trial, and this includes evidence of the fame of a plaintiff's mark.

As to each party's remaining objections to the other's testimony based on relevancy, lack of foundation, improper

testimony and leading questions, they principally relate to the probative value to be accorded the testimony in question. While not addressed specifically, we overrule them are mindful of them and have accorded the relevant testimony the appropriate probative value.¹¹

THE RECORD

In light of the foregoing, the record consists of the pleadings and the file of application Serial No. 76563252. In addition, during its assigned testimony periods, opposer submitted the testimony deposition of Juli Plassmeyer, with exhibits 1-42 and 44-46; opposer's three notices of reliance (all filed on March 16, 2009) on: (a) a status and title copy of its pleaded Registration No. 1529939¹²; (b) applicant's responses to certain of opposer's discovery requests; (c) official records in the nature of a copy of a third-party complaint filed by applicant's predecessor-in-interest and copies of four third-party registrations; and (d) printed publications in the nature of newspaper and

¹¹ Opposer's motion to strike references in applicant's brief to the relative size of the parties and incomplete hypotheticals as immaterial and impertinent is denied.

¹² Although the title and status information regarding Registration No. 1529939 became outdated during the course of this proceeding, we have, in accordance with Board practice, reviewed the electronic records of the Office and note that ownership remains with opposer and that the registration is currently subsisting, having been renewed for a period of ten years on March 4, 2009.

magazine articles; and opposer's rebuttal notice of reliance submitting dictionary definitions of "beg" and "wag."

During its assigned testimony period, applicant submitted the testimony declaration, with exhibits 1-9, of Philip Montooth, applicant's chief financial officer; and applicant's notice of reliance on (a) copies of applications and registrations owned by applicant; (b) copies of third-party registrations; (c) dictionary definitions of the terms "wag" and "beg"; (d) opposer's responses to applicant's interrogatories and document requests; and (e) portions of the Rule 30(b)(6) discovery deposition of applicant "so as to make not misleading" what was offered by opposer in its notice of reliance on portions of that deposition.

Both parties filed briefs on the case, including a reply brief by opposer, and an oral hearing was held.

DISCUSSION

Opposer's Standing and Priority of Use

Because opposer has properly made pleaded Registration No. 1529939 of record, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's Registration No. 1529939 is of record, Section 2(d) priority is not an issue in this case

as to the mark therein and goods covered thereby. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Turning now to our discussion of the issue of likelihood confusion, our determination thereof is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Fame

We begin our likelihood of confusion analysis with the *du Pont* factor which requires us to consider evidence of the fame of opposer's mark and to give great weight to such fame if it exists. See *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Opposition No. 91163853

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the *DuPont* factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown." *Id.*

Bose Corp. v. QSC Audio Products Inc., 63 USPQ2d at 1305.

In determining whether a mark is famous, we may consider sales, advertising expenditures, and the length of time the mark has been used. *Id.* at 1309. This information, however, should be placed in context (e.g., a comparison of advertising figures with competitive products, market share, reputation of the products, etc.). *Id.* at 1305-1306 and 1309.

We now consider the evidence introduced by opposer to establish that its BEGGIN' STRIPS mark is famous, and note that much of it has been designated as confidential and, where necessary, will be referred to only in general terms. We also point out that while, at first blush, opposer's evidence appears to overwhelmingly support the fame of its BEGGIN STRIPS mark, much of it suffers from inconsistencies or insufficient context. In particular, although opposer's witness, Ms. Plassmeyer, testified that opposer has had tremendous sales of dog snacks under the mark, this

testimony is a marked departure from its response to Interrogatory No. 8 wherein opposer indicated that its sales were only in the "hundreds of thousands of dollars."¹³ Opposer's proffered advertising expenditure figures are similarly inconsistent¹⁴ and, additionally, are absent context. Although applicant pointed out these inconsistencies in the sales and advertising figures, both during the Plassmeyer testimony and in the evidentiary brief that accompanied its main brief, opposer never addressed the inconsistencies. Because of the unexplained discrepancies in the sales and advertising figures, this evidence has little probative value - we do not know which ones are accurate. In addition, since opposer's market share information is primarily based on sales information that we have found inconsistent, it, too, is not especially probative.

We further find the Plassmeyer testimony, and accompanying Exhibit 21, regarding opposer's annual "Beggin' FSI [free standing inserts] impressions"¹⁵ from 2000 to 2008 of limited probative value. Although Ms. Plassmeyer

¹³ Applicant's not. of rel. exh. H.

¹⁴ *Id.*

¹⁵ Ms. Plassmeyer indicated that "[i]mpressions are defined in this case by distribution. So they take the circulation of the newspapers and times that by, you know, or add that all up basically to get your impressions across the country." Plassmeyer test. p. 69.

testified that the inserts were distributed "nationwide," there is no testimony (or exhibits) concerning any specifics such as the particular newspapers, the areas of distribution and the length of time distributed, e.g., once or over the ten year period. That is to say, on this record, we cannot ascertain what Ms. Plassmeyer meant by "nationwide" distribution.

We likewise find the evidence of annual television "impressions"¹⁶ from 2000-2008, excluding 2007 lacks context. While Ms. Plassmeyer testified that the "impressions" were compiled from Nielsen data maintained by opposer and reviewed by her in the course of her employment, the summary information is hearsay because the Nielsen data is not maintained by her and the compilation was not prepared by her. Moreover, her testimony, and supporting exhibit No. 18, fail to indicate what percentage of the "gross impressions" refers to discrete impressions or the viewing markets of those impressions. As proffered, the impressions could refer to a limited number of households located in limited geographic locations. The evidence of the annual impressions of the BEGGIN' STRIPS[®] Barkus Pet Parade (discussed more fully below) for the years 2004-2008

¹⁶ Ms. Plassmeyer, in her deposition, stated that "[i]mpressions is [sic] basically the number of people that have seen the commercial times the number of times they have seen it. So that sets the impressions." Plassmeyer test. p. 55.

Opposition No. 91163853

also has limited probative value. Although opposer provided a breakdown by television media outlets and viewers, the information only covers the 2007 parade, and the air dates of February 13, 2007 and February 16, 2007. Plassmeyer test. pp. 81-96, Exhs. 27 through 29.

Other evidence in the record is probative of the length of use and renown of opposer's mark. Opposer has used its BEGGIN' STRIPS mark since at least as early as 1988.

Plassmeyer test. pp. 17-19. Goods bearing the BEGGIN' STRIPS mark have been sold and distributed throughout the United States. Plassmeyer test. pp. 125-126. Opposer uses a variety of media outlets to advertise and promote the BEGGIN' STRIPS mark, including newsprint, magazines, television, radio and direct mailing. Plassmeyer test. pp. 47, 54-55 and 60-61. Commercials featuring opposer's BEGGIN' STRIPS mark have been copied by fans and placed on the video sharing website www.YouTube.com. Plassmeyer test. pp. 46-47. In 2008, there were over 36,000 visits to opposer's website, www.beggingtime.com, by which opposer advertises its BEGGIN' STRIPS mark. Plassmeyer test. p. 61. For the sixteen years preceding the Plassmeyer deposition, opposer has sponsored the BEGGIN STRIPS® Barkus Pet Parade in St. Louis, Missouri, an event which receives nationwide media exposure. Plassmeyer test. pp. 80-105, exhs. 27-29, and e.g., not. of rel., exhs. P 11-24, 30, 33 and 51. In

addition, opposer has received unsolicited media coverage in, for example, the Chicago Sun Times, Albuquerque Journal, Greensboro News & Record, St. Louis Post-Dispatch and The Boston Herald, albeit primarily with regard to either the Barkus Pet Parade or a "stupid dog trick" contest, which appears to have at one time been an event sponsored by opposer. Opposer's not. of rel. Exhs. 30-132.

Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 1961). In this case, while opposer has demonstrated that its mark has achieved at least a high degree of recognition, because of inconsistencies and lack of context, the evidence is not sufficient to support a finding that the mark is famous and thus entitled to the extensive breadth of protection accorded a truly famous mark.

Nonetheless, based on the record, we find opposer's BEGGIN' STRIPS mark distinctive and strong and entitled to a broad scope of protection. In coming to this determination, we have considered all of the evidence relevant thereto, including applicant's evidence, more fully discussed *infra*,

of third-party uses of various "GIN," "GGIN," "GGIN'" and "N'" formative marks.

Similarity of the Goods and Services/Trade Channels/Purchasers

We next consider the *du Pont* factors which pertain to the similarity or dissimilarity of the goods, channels of trade and classes of purchasers. It is well settled that likelihood of confusion is determined on the basis of the goods as identified in the application and in the pleaded registration. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Where the goods in the application and pleaded registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. In *re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

As for the goods, applicant's goods are identified as "pet food and edible pet treats" and opposer's goods are identified as "dog snacks." We find applicant's pet food and edible pet treats are so broadly identified as to

encompass opposer's dog snacks. As such, we find them legally identical.

Further, in the absence of any limitations in applicant's application and opposer's pleaded registration as to channels of trade and classes of purchasers, we must presume that the identical goods will be sold in the same channels of trade and to the same classes of purchasers. See *In re Elbaum*, 211 USPQ at 640. Indeed, applicant does not contend otherwise and its brief is silent on these issues. Indeed, these identical goods could be sold side by side in the same supermarkets or pet supply stores.

The *du Pont* factors of relatedness of the goods, channels of trade and classes of purchasers thus favor opposer.

Conditions of Sale

With respect to the conditions under which the parties' goods are or will be purchased, we note that the goods are or will be relatively inexpensive items, either priced or to be priced at as little as \$2¹⁷, which would be purchased by ordinary consumers who will exercise no more than ordinary care in making their purchasing decisions.

Thus, this *du Pont* factor favors opposer.

¹⁷ Plassmeyer test. pp 122-123; and Applicant's Not. of rel. exh. I.

The Marks

We now turn to a consideration of the marks, keeping in mind that when marks would appear on identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). That is, the purchaser's fallibility of memory over a period of time must be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurant Inc. v. Morrison Inc.*, 23

Opposition No. 91163853

USPQ2d 1735 (TTAB 1991); aff'd unpub'd (Fed. Cir., June 5, 1992).

With these principles in mind, we compare applicant's mark WAGGIN' STRIPS with opposer's mark BEGGIN' STRIPS.

Applicant argues that its mark differs from opposer's mark:

Given that WAGGIN' and BEGGIN', the beginning-dominant portions of Opposer's and Applicant's marks are so dissimilar, coupled with the fact that the shared portion "STRIPS" is generic, and given that the appearance, sound, connotation, and commercial impression of the mark WAGGIN' STRIPS is completely separate and distinct from Opposer's mark BEGGIN' STRIPS, consumers are not likely to believe Applicant's WAGGIN' STRIPS pet treats and Opposer's BEGGIN' STRIPS dog snacks emanate from the same source.

Applicant's br. p. 22.

We disagree. Comparing the marks first in terms of appearance, we find that they look similar to the extent that both have the same format, structure and syntax; both being comprised of two words, the first word in each ending in "GGIN'" and the second in each being the word STRIPS. Although the words BEGGIN' and WAGGIN' include different-first two letters, they nonetheless look similar to the extent that both are six letter words, include "GGIN" as the final four letters and use an apostrophe in place of the final letter "g" of present participle forming suffix "ing." Further, even though the word STRIPS is admittedly descriptive and has been disclaimed in each case, that does not remove the word from each mark or reduce its

contribution to the overall look of each mark. We also note that the fact that applicant seeks registration of its mark in standard character format, as is opposer's registered mark, means that neither party is limited to any particular manner of display. See *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) (When a word mark is registered in typed form, the Board must consider all reasonable modes of display that could be represented.). Thus, both parties could display their marks in similar lettering. The similarities in appearance overshadow the differences.

In terms of sound, we find the marks to be similar in rhythm and cadence, both having three syllables, the final two of which would be pronounced the same. While "wag" and "beg" sound different, they only comprise a single syllable of each mark. In their entirety, the marks sound similar.

As regards connotation, since both parties' goods include edible pet treats, the term "strips" would mean the same thing in relation to both marks. In addition, both "WAGGIN'" and "BEGGIN'" evoke images of, albeit somewhat different, dog behaviors.¹⁸ As such, both marks, as a

¹⁸ Both applicant and opposer have made definitions of the terms "wag" and "beg" of record. We have set forth the most pertinent below, both taken from Webster's Third New International Dictionary (3rd ed. 1981) and made of record by applicant in its Not. of rel. Exh. F:

whole, connote types of treat that elicit certain canine behavior.

Applicant has argued that the marks have "decidedly" separate and distinct meanings. Citing to the Plassmeyer testimony deposition, applicant particularly argues that opposer's mark conveys the message that BEGGIN' STRIPS means "bacon strips" while its mark, by contrast, contains no wordplay and communicates no direct or hidden meaning of "bacon." Applicant br. p. 18 citing Plassmeyer test. p. 141. The evidence, however, is not conclusive that consumers understand BEGGIN' STRIPS only to mean bacon strips. Indeed, even if BEGGIN' STRIPS is understood by some consumers to mean "bacon strips," as just noted, the plain meaning of BEGGIN' STRIPS is of strips treats intended to elicit certain canine behavior, and that same connotation can be attributed to applicant's WAGGIN' STRIPS mark. Moreover, applicant cited only to a portion of Ms. Plassmeyer's response. As revealed by her complete response

"wag" **5a:** to move with a wagging or wobbling motion: WADDLE <a dog *wagging* down the street> **b** of an animal: to wag the tail <a pack of dogs - they fawned, they *wagged*, they growled - Helen Howe>

(p. 2568);

"beg" **4:** to obtain release of esp. by entreaty ~ iv ... 3 of a dog or other pet animal : to make a formalized gesture of request, esp.: to sit erect on the haunches with the forepaws raised

(p. 198).

noted below, Ms. Plassmeyer stated that the word Beggin' is also intended to convey "excited dog behavior."

Q. (By Mr. Braunel) What do you intend to convey with the word "Beggin'" as shown on the Beggin' Strips Bag?

A. Well, the word "Beggin'" -- we have done a lot of consumer research, the word "Beggin'" has kind of a dual meaning, which is great. So it conveys bacon. So bacon strips, obviously it looks like a piece of bacon so it conveys that. As well as it conveys the dogs excitement. He is begging to get them. He is very excited to get them. He is enthusiastic to get them."¹⁹

Further, in considering the meanings of the marks, we must consider the meaning of opposer's mark not only when heard, but also when read. When read, the meaning conveyed by BEGGIN' STRIPS is not "bacon strips." As such, notwithstanding the dual connotations that may be attributed to opposer's mark, Ms. Plassmeyer's testimony is consistent with our finding that both opposer's mark and applicant's mark have very similar connotations.

In terms of commercial impression, we find the marks are very similar. They are two-word marks which are constructed in the same way. They both begin with similarly spelled words that describe attributes of dog behavior and end with the identical word STRIPS. This significant similarity in the basic format and structure of the two

¹⁹ Plassmeyer test. p. 141.

marks simply outweighs the differences in the first words of the two marks.

While admittedly there are differences in the parties' marks when viewed on a side-by-side basis, we nonetheless conclude that the marks, when considered in their entireties are substantially similar in appearance, sound, connotation and commercial impression. Simply put, the similarities between the marks outweigh the differences.

Before leaving this discussion, we address the following additional arguments made by applicant. First, we find unavailing applicant's contention that in determining whether the marks are similar we must consider that opposer's BEGGIN' STRIPS mark is generally used in connection with the Purina house mark and checkerboard design and, that if applicant ever uses the WAGGIN' STRIPS mark, it will likely do so in connection with Applicant's PRO PAC mark and dog face logo. "[I]t is settled that a product label can bear more than one trademark without diminishing the identifying portion of each portion." *Fort James Operating Co. v. Fort Royal Paper Converting, Inc.*, 83 USPQ2d 1624, 1629 (TTAB 2007), citing *The Proctor & Gamble Company v. Keystone Automotive Warehouse, Inc.*, 191 USPQ 468, 474 (TTAB 1976). The issue of likelihood of confusion in this case involves applicant's applied-for mark WAGGIN' STRIPS and opposer's pleaded mark BEGGIN' STRIPS. See *Hat*

Opposition No. 91163853

Corp. of America v. John B. Stetson Co., 223 F.2d 485, 106 USPQ 200 (CCPA 1955); and ITT Canteen Corp. v. Haven Homes Inc., 174 USPQ 539 (TTAB 1972).²⁰ We have therefore not considered the additional marks that have or may appear on the parties' products.

We also are not persuaded by applicant's arguments that "logic dictates that consumers familiar with Opposer's BEGGIN' line of products [under the line extension marks BEGGIN' TIME, BEGGIN' CHEW, BETTIN' LITTLES, BEGGIN' WRAPS, BEGGIN' CANADIAN CUTS, ITS BEGGIN' TIME and THERE'S NO TIME LIKE BEGGIN' TIME] are likely to believe that a mark that does NOT include the term "BEGGIN'," e.g., WAGGIN' STRIPS, JUMPIN' STRIPS or JOGGIN' STRIPS, must emanate from a source other than Opposer." (Appl. br. p. 22 (emphasis supplied)). As just stated, we must compare the marks as they appear in applicant's application and the pleaded registration.

Furthermore, to the extent that applicant and, for that matter, opposer have relied on a variety of cases to bolster their respective contentions that the marks are or are not similar, as is often noted by the Board and the Courts, each case must be decided on its own merits. See In re Nett Designs Inc., 236 F.3d 1339, 51 USPQ2d 1564, 1566 (Fed.Cir.

²⁰ We also point out that the issue of likelihood of confusion before the Board concerns registrability rather than use. For this reason, the infringement cases cited by applicant in support of its position that the Board should consider product packaging are readily distinguishable.

2001). See also, *In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); and *In re Wilson*, 57 USPQ2d 1863 (TTQAB 2001). Here, for the reasons discussed above, the marks are substantially similar in appearance, sound, connotation and commercial impression.

In view thereof, the *du Pont* factor of similarity/dissimilarity of the mark favors opposer.

The Number and Nature of Similar Marks in Use on Similar Goods

In further support of its contention that there is no likelihood of confusion between the marks, applicant has made of record various used-based third-party registrations which include the suffixes "GIN," "GGIN," "GIN'," "GGIN'," or "N'" in combination with other matter, or incorporate pet characteristics such as wag, beg, wiggle or bark, primarily for pet food and pet treats, to show that the "-GGIN'" portion of opposer's is weak and entitled to a narrow scope of protection or that it is common to incorporate animal characteristics in pet food/pet treat marks. While third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they are not evidence that the marks shown therein are in use or that the public is aware of them. See *AMF Incorporated v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973) ("little weight is to be given such registrations in evaluating whether there is likelihood of confusion.").

Opposition No. 91163853

Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of similar marks in the marketplace and, as a result, are able to distinguish between the "-GGIN'" marks based on slight differences between them. Nor are they proof that consumers are able to distinguish between various animal characteristic marks.

Moreover, of the forty registrations submitted, four are expired (Registration Nos. 2836520, 2631655, 2832081 and 2178965). Another nine are for marks which are more dissimilar to opposer's BEGGIN' STRIPS than is applicant's and cover dissimilar goods and/or services (Registration No. 2350531 for the mark WAGGIN' WEAR and design for leashes and collars, Registration No. 2313808 for the mark WAGGIN' CORRAL for kennels for animals, Registration No. 1073731 for the mark KITTY DIGGIN'S for absorbent material used for small animal litter, Registration No. 2874758 for the mark WALK THE DOG TAIL WAGGIN' PET CARE for dog walking and pet sitting, Registration No. 3120549 for the mark GROOM WAGGIN MOBILE PET GROOMING for animal grooming, Registration No. 1978406 for the mark WAGGIN' WHEELS for home pet sitting, Registration No. 3224598 for the mark TAILS R WAGGIN MOBILE PET GROOMING and design for mobile non-med pet grooming, Registration No. 2995927 for the mark RESCUE WAGGIN for charitable fundraising and Registration No. 3309646 for the

Opposition No. 91163853

mark EMERGENCY RELIEF WAGGIN for charitable services, namely providing transportation via commercial vehicle, of pet food and supplies to pet animal rescue. The remaining twenty-seven registrations are for marks more dissimilar to opposer's BEGGIN' STRIPS mark than is applicant's mark, although they pertain to similar goods (for example, Registration Nos. 3296383, 3228640, 3428776, 3456757 and 3296382 - owned by the same entity - for marks including the term WAGGIN' TRAIN BRAND, Registration No. 2815161 for the mark BARK N BAC'N, Registration No. 3378068 for the mark CHICK 'N' CHEDDAR, Registration No. 2861354 for the mark BAC'N BAC'N, Registration No. 3227464 for the mark UNCLE JIMMY'S HANGIN' BALLS, Registration No. 3083560 for the mark BAK'N TREATS, Registration No. 2945321 for the mark BAK'N DELIGHTS, Registration No. 2875964 for the mark BAC'N'CHEESE and Registration No. 3082854 for the mark BEGGAR'S CHOICE).²¹

²¹ Applicant also submitted six use-based third-party registrations (i.e., Registration No. 2515898 for MEATY STRIPS, Registration No. 2867508 for LICKETY STRIPS, Registration No. 3250022 for SCHMACKOS BAKON STRIPS, Registration No. 3277971 for CHICKEN STRIPS, Registration No. 3133006 for BREATH-EZE BREATH STRIPS and Registration No. 2935635 for TASTY STRIPS) that include the term "STRIPS" for pet food or dental care products to show that it, too, merits very little weight in the overall likelihood of confusion analysis. We note that these registrations either include a disclaimer of the terms "strips," are registered on the supplemental register, or the term is incorporated in a unitary design. As discussed earlier, even though matter may be descriptive, that does not reduce its contribution to the overall look of a mark. More importantly, none of these registrations include both the terms "strips" and "beggin'" or any variation thereof.

Applicant has also made of record copies of third-party product packaging showing third-party marks for strips-type dog treats. The packaging is for marks that are more dissimilar to opposer's mark than is applicant's and applicant has provided no evidence as to the extent of such third-party use. Accordingly, the packaging, being evidence of third party use, has little probative value. See e.g., *Fort James Operating v. Fort Royal Paper Converting, supra*.

We thus find that applicant's evidence does not establish that there is widespread use of similar marks for pet treats such that opposer's mark is weak, or otherwise justify the registration of another confusingly similar mark.

Applicant's Intent

Last, opposer maintains that "Applicant knew of Nestle's BEGGIN' STRIPS mark before applicant adopted its WAGGIN' STRIPS mark and yet adopted it anyway."²² Appl. br. p. 21. Opposer also contends that applicant copied Nestle's mark when creating preliminary mock-up packaging, and that that copying strongly suggests an intent to trade on Nestle's reputation. Although there is some similarity between opposer's product packaging and applicant's mock up packaging with respect to the depiction of the product

²² Nestle is one of opposer's predecessor companies, and the name Nestle was used by opposer at times during the course of this proceeding to refer to itself.

itself, applicant has yet to finalize any packaging design and, further, its mock-up design closely resembles packaging that applicant already uses in commerce for other pet treat products. Moontooth test. pp. 19-29, Exhs, 1-7. We therefore are not persuaded that applicant copied opposer's packaging. In addition, applicant's prior knowledge of the opposer's mark, in and of itself, does not constitute bad faith. See *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ 1307 (Fed. Cir 1989). *Ava Enterprises, Inc. V. Audio Boss USA, Inc.*, 77 USPQ2d 1783 (TTAB 2006). On this record, opposer did not establish that applicant intentionally sought to trade on opposers' good will or otherwise has acted in bad faith in seeking to register the applied-for mark.

Even so, it is settled that one who adopts a mark similar to the mark of another for the same or closely related goods does so at his own peril. *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.* 190 USPQ 308 (TTAB 1976).

Conclusion

We have carefully considered all of the evidence pertaining to the relevant *du Pont* factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion. After balancing the relevant factors, we conclude that confusion is likely between opposer's BEGGIN'

STRIPS mark and applicant's WAGGIN' STRIPS mark. We do so principally because the goods are identical, the channels of trade and classes of purchasers are the same, and the marks are similar in appearance, sound, connotation and commercial impression.

DILUTION

We now consider opposer's dilution claim. The Lanham Act provides for a cause of action for the dilution of famous marks. The fame that must attach to a mark for it to be eligible under the dilution provisions of the Trademark Act is greater than that which qualifies a mark as famous for the *du Pont* analysis of likelihood of confusion. *Toro Co. v. ToroHead Inc.*, 61 at 1170, citing *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 47 USPQ2d 1225, 1239 (1st Cir. 1998) ("[T]he standard for fame and distinctiveness required to obtain anti-dilution protection is more rigorous than that required to seek infringement protection."). Since we have already found that, on this record, opposer's BEGGIN' STRIP mark does not have the *du Pont* analysis fame, then it would follow that it does not have the fame necessary for a dilution claim.²³ Having found so, we need not reach the other factors in a dilution analysis.

²³ We are compelled to comment that even if we had found that the evidence of record demonstrated fame for likelihood of confusion purposes, it would not have been considered particularly probative to show fame for dilution purposes. This is so because opposer would have had to show that its mark was famous prior to

BONA FIDE INTENTION TO USE THE MARK

We finally consider opposer's claim that applicant does not have a bona fide intention to use its mark in commerce. Opposer contends that "[t]he admitted absence of the slightest documentation of intent to use WAGGIN' STRIPS as a trademark demonstrates Applicant's lack of bona fide intent to use the mark." Opposer further explains that applicant has conducted no market research, no manufacturing activities and no promotional activities in connection with its WAGGIN' STRIPS mark. For these reasons, opposer maintains that the Board should rule applicant's application void.

Trademark Act Section 1(b), 15 U.S.C. § 1051(b), states that "a person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" may apply for registration of the mark. A determination of whether an applicant has a bona fide intention to use the mark in commerce is an objective determination based on all the circumstances. *Lane Ltd. v. Jackson International Trading Co.*, 33 USPQ2d at 1355. Opposer has the burden of demonstrating by a preponderance

the filing date of applicant's intent-to use application. *Toro Co. v. Torohead, supra*. Here, the overwhelming majority of evidence relating to opposer's fame is dated thereafter.

of the evidence that applicant lacked a bona fide intent to use the mark on the identified goods.

In this case, we find that opposer has not met its burden of demonstrating applicant's lack of a bona fide intent to use the mark. Although the documentary evidence consists solely of mock-up product packaging, applicant's witness, Mr. Montooth, has testified to applicant's general practice when selecting a trademark for a new product, and there is no indication that the practice was not followed. Montooth test. pp. 16-19, and 40. Mr. Montooth testified that due to the large costs related to manufacturing and launching new pet food and treat products, applicant does not fully develop the product or packaging until the application has been allowed to register by the United States Patent and Trademark Office. Appl. br. p. 6, citing Montooth test. pp. 16-19. Furthermore, because applicant's mark had yet to clear the application process, statements made by applicant during discovery do not negate applicant's bona intent to use the WAGGIN' STRIPS mark in commerce.²⁴

Unlike the applicant in *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993), here applicant is not only a competitor in the pet treat industry

²⁴ During discovery, Applicant stated "Applicant has not decided to use the name on pet food and edible treats. The name has not been and may never be used." Opposer's not. of rel. exh. P-2, Applicant's answer to Interrogatory No. 27.

Opposition No. 91163853

with the capability to manufacture strips, but applicant currently manufactures other strips-type products and does not have numerous intent-to-use applications pending for the same goods.

Decision: The opposition is sustained as to opposer's priority and likelihood of confusion claim and dismissed as to its dilution and no bona fide intention claims.