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

Proceeding	91170341
Party	Plaintiff ConAgra Brands, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

IN THE MATTER OF OPPOSITION NO. 91170341
Serial No. 78/337,608
CANDWICH

CONAGRA FOODS RDM, INC., f/k/a CONAGRA BRANDS, INC.	)
Opposer,	)
v.	)
CANDWICH FOOD CORPORATION	)
Applicant.	)

OPPOSER'S TRIAL BRIEF

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Dated: 2/6/2008

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I. INTRODUCTION.

Opposer, ConAgra Foods, RDM, Inc. ("Opposer" or "ConAgra"), submits this trial brief in support of its opposition to the registration of Applicant Candwich Food Corporation's ("Applicant" or "Candwich") pending application for the mark CANDWICH (Ser. No. 78/337,608) ("CANDWICH"). Applicant's CANDWICH mark so resembles ConAgra's MANWICH mark as to be likely, when applied to Applicant's goods, to cause confusion, or to cause mistake, or to deceive. Thus, Applicant is not entitled to registration of CANDWICH and registration of this mark should be refused pursuant to 15 U.S.C §1052(d).

II. DESCRIPTION OF THE RECORD.

ConAgra's record consists of the following:

1. Testimony Deposition of Joe Bybel taken on August 6, 2007 (with Exhibit Nos. 1-4) ("Bybel Dep.").

2. Opposer's First Notice of Reliance filed on August 27, 2007 on ConAgra's pleaded Registration No. 0,888,780.

3. Opposer's Second Notice of Reliance filed on August 27, 2007 on ConAgra's pleaded Registration No. 1,349,839.

4. Opposer's Third Notice of Reliance filed on August 27, 2007 on the discovery deposition of Mark R. Kirkland taken on February 27, 2007 ("Kirkland Dep.").

5. Opposer's Fourth Notice of Reliance filed on August 27, 2007 on printed publications.

6. Opposer's Fifth Notice of Reliance filed on August 27, 2007 on third party Registration Nos. 2,899,796; 2,928,755; 2,156,879; 1,222,755; and 3,229,262.

Evidence introduced by Applicant includes the following:

1. Applicant's First Notice of Reliance filed on October 24, 2007 on printed publications and material.

2. Applicant's Second Notice of Reliance filed on October 24, 2007 on the discovery deposition of Mark R. Kirkland (with Exhibit Nos. 1-6).

3. Applicant's Third Notice of Reliance filed on October 24, 2007 on certain portions of the discovery deposition of Mark R. Kirkland.

III. STATEMENT OF THE ISSUE.

Whether Applicant's CANDWICH mark for "food items packaged in cans, namely vegetable based snack foods" in International Class 29 and "food items packaged in cans, namely meat based sandwiches, candy, popcorn, candy popcorn and dessert puddings" in International Class 30 are registerable under Section 2(d) of the Lanham Act, 15 U.S.C §1052(d), where ConAgra is the senior user of the famous MANWICH mark used in connection with similar goods.

IV. STATEMENT OF FACTS.

A. *The Famous MANWICH Trademark.*

ConAgra, through its predecessor in interest, Beatrice/Hunt-Wesson, Inc., began sales of MANWICH product for sloppy joe sandwich sauce in 1969. (Opposer's First Notice of Reliance). ConAgra owns two incontestable registrations for the MANWICH trademark:

- MANWICH (Registration 888,780) (Registered March 31, 1970) for "sandwich sauce" in International Class 30. (Opposer's First Notice of Reliance).
- MANWICH (Registration 1,349,839) (Registered July 16, 1985) for "spice and seasoning mixes for meats" in International Class 30. (Opposer's Second Notice of Reliance).

The MANWICH brand is one of the largest selling sloppy joe sandwich sauces in the country. Annual sales in fiscal year 2007 reached approximately $75 million. (Bybel Dep. at 17-18). Annual sales for fiscal year 2006 were approximately $69 million. (Bybel Dep. at 17-18). Sales during the past several years have increased by approximately 5% year after year. (Bybel Dep. at 17-18).

The MANWICH mark has been in use on sandwich sauces for well over 38 years[1]. (Opposer's First Notice of Reliance; Bybel Dep. at 9; Bybel Dep. Exhibit 1). The MANWICH name is well-known within American households as MANWICH products are sold through a wide range of retail grocery and convenience stores throughout the United States. (Bybel Dep. at 12). In fact, Applicant's own president acknowledges that MANWICH is a well-known brand. (Opposer's Third Notice of Reliance, Kirkland Dep. at 39). Recently, a Louisiana newspaper quoted a well-known comedian as describing the MANWICH brand as a name that everyone in his generation knows about. "No matter where you grew up, you knew about the Sears wish list, Easy Bake Ovens, the MANWICH, and little green Army men." (Opposer's Fourth Notice of Reliance, Lisa Tramontana, *Comedian Hazell Hits Bull's Eyes with Baby Boomers*, Baton Rouge Advocate, May 12, 2006 at 3, 2006 WLNR 8194019 (May 12, 2006)).

A typical can of MANWICH costs approximately $1.50 and the primary customer of the MANWICH brand is the individual responsible for purchasing household groceries. (Bybel Dep. at 21.)

In order to maintain the strength and notoriety of the MANWICH brand, ConAgra spends approximately $10 million annually on marketing and advertising. (Bybel Dep. at 16). ConAgra engages in a broad, organized national advertising effort for MANWICH that is comprised of television advertising to all 50 states; free standing inserts that accompany local newspapers; extensive retailer programs that result in the MANWICH brand being marketed in retailer circulars; Internet advertising and movie tie-ins that include joint promotions with movie videos such as SHREK. (Bybel Dep. at 12-16, 23).

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[1] ConAgra previously offered for sale a finished sandwich product (loose meat with sauce) without bread, under the MANWICH brand. (Bybel Dep. at 22).

B. *Applicant's CANDWICH Mark.*

In December 2003, nearly 35 years after ConAgra began its use of the MANWICH mark, Applicant filed an intent-to-use application for the following mark:

- CANDWICH (Ser. No. 78337608) (Filed December 8, 2003) for "food items packaged in cans, namely meat-based sandwiches, candy, popcorn, candy popcorn and dessert puddings" in International Class 30 and "food items packaged in cans, namely, vegetable-based snack foods" in International Class 29.

Applicant's goods are packaged in cans and Applicant intends to offer the CANDWICH product through a wide range of retail grocery and convenience stores. (Opposer's Third Notice of Reliance, Kirkland Dep. at 22-23). The price of a can of CANDWICH purchased from a vending machine will be between $1.50 and $2.00. (Opposer's Third Notice of Reliance, Kirkland Dep. at 28). At the retail level, the price of the CANDWICH product will be between $1.30 and $1.60 per can. (Opposer's Third Notice of Reliance, Kirkland Dep. at 28). The intended purchaser of the CANDWICH product is "anyone that intends to purchase a food item", or more specifically, the individual responsible for purchasing household groceries. (Opposer's Third Notice of Reliance, Kirkland Dep. at 22-23, 41; Applicant's Second Notice of Reliance, Kirkland Dep. at 41-42).

V. ARGUMENT.

A. *Standing*

ConAgra has standing to bring the present opposition. ConAgra presented evidence of its ownership of prior issued registrations for the MANWICH mark. (Opposer's First Notice of Reliance; Opposer's Second Notice of Reliance). Moreover, in its Notice of Opposition, ConAgra properly alleged that it will be damaged by the registration of Applicant's CANDWICH mark, and thus has standing to oppose registration of the mark. *See Starbucks U.S. Brands, LLC v. Ruben*, 78 U.S.P.Q.2d 1741, 1750 (TTAB 2006) (an opposer establishes standing where

it presents evidence of its ownership of prior issued registrations and alleges that it will be damaged by registration of Applicant's mark).

B. *Likelihood of Confusion*

Applicant's CANDWICH mark should be refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052, because the CANDWICH mark, as applied to the goods described in the application, so resembles ConAgra's MANWICH marks previously registered in the United States as to be likely to cause confusion, or to cause mistake, or to deceive. Section 2(d) of the Lanham Act precludes registration of a mark that so resembles "a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned as to be likely, when used on or in connection with the goods of the Applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. §1052(d).

The court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973) enumerated thirteen factors that can be considered when determining whether a likelihood of confusion exists. The relevant *du Pont* factors clearly establish a likelihood of confusion which precludes registration of the CANDWICH mark. Put simply, likelihood of confusion is evident in view of the following: (i) ConAgra's MANWICH mark is famous and distinctive; (ii) the goods are closely related; (iii) the marks are strikingly similar; (iv) the purchasers, channels of trade and promotional channels are identical; (v) the products at issue are inexpensive and the subject of frequent and repeat purchase, and not the type of products that are purchased with great care or significant deliberation. The CANDWICH application was filed on an intent to use basis and any use of the mark is extremely limited, so the opportunity for actual confusion is limited - accordingly the absence of actual confusion is immaterial and thus neutral with regard to the likelihood of confusion analysis.

In the present case, the registration of Applicant's CANDWICH mark must be refused in view of the fact that the overwhelming number of likelihood of confusion factors weigh in favor of Opposer. Further, as senior user, all doubts must be resolved in favor of ConAgra. *See Nina Ricci*

S.A.R.L. v E.F.T. Enterprises, Inc., 889 F.2d 1070, 1074, 12 U.S.P.Q.2d 1901, 1903 (Fed. Cir. 1989) ("all doubt as to whether confusion, mistake, or deception is likely to be resolved against the newcomer, especially where the established mark is one which is famous").

1. The MANWICH Mark is Strong and Famous.

Consideration of the fame of a mark is important in view of the fact that famous marks are afforded broad trademark protection. "When present, fame plays a dominant role on the process of balancing the *du Pont* factors." *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys v. Rose Art Industries, Inc.*, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992) ("As a mark's fame increases, the [Lanham Act's] tolerance for similarities in competing marks falls"). Generally stated, when considering the fame of a mark, courts look to the following factors: (1) volume of sales, (2) advertising, and (3) length of use. In this case, all three factors weigh heavily in favor of a finding that the MANWICH trademark is famous.

(a) *Volume of Sales.*

Over the past several years, the volume of sales of the MANWICH brand has been growing at an approximate rate of five percent per year. (Bybel Dep. at 18). In fiscal year 2007, sales of the MANWICH brand were approximately $75 million. (Bybel Dep. at 17-8). In fiscal year 2006, sales of the MANWICH brand were approximately $69 million. (Bybel Dep. at 17-8). These sales figures are consistent with prior years, and the 5% growth trend is attributable to increased marketing efforts.

(b) *Advertising.*

ConAgra currently advertises the MANWICH brand through a wide array of media outlets. MANWICH is advertised on television, the Internet, and through free standing inserts that accompany local newspaper circulars. (Bybel Dep. at 12-6). The mark is extensively advertised in circulars that are published by retail stores. (Bybel Dep. at 15). In addition, the MANWICH brand has been advertised through movie promotions and tie-ins such as the SHREK movie video.

(Bybel Dep. at 23). On average, ConAgra spends approximately $10 million a year solely on MANWICH advertisements. (Bybel Dep. at 16).

(c) *Length of Use*.

ConAgra's predecessor in interest began selling MANWICH products in 1969. MANWICH products have been sold nationwide continuously under the MANWICH brand for the past 38 years, and thus this mark enjoys almost universal recognition. (Opposer's First Notice of Reliance; Bybel Dep. at 9; Bybel Dep. Exhibit 1). There is little doubt that almost any purchaser of shelf stable grocery products is familiar with the MANWICH brand. This wide-spread recognition of the MANWICH brand was recently described this way: "No matter where you grew up, you knew about the Sears wish list, Easy Bake Ovens, the MANWICH, and little green Army men." (Opposer's Fourth Notice of Reliance, Lisa Tramontana, *Comedian Hazell Hits Bull's Eyes with Baby Boomers*, Baton Rouge Advocate, May 12, 2006 at 3, 2006 WLNR 8194019 (May 12, 2006)).

As such, the MANWICH mark is appropriately classified as a "famous" mark. *See Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 U.S.P.Q.2d 1303 (Fed. Cir. 2002) (ACOUSTIC WAVE mark deemed famous based on 17 years of use, annual sales over $50 million, annual advertising in excess of $5 million and media coverage); *Nina Ricci S.A.R.L. v E.T.F. Enterprises*, 889 F.2d *at* 1074 (NINA RICCI famous for perfume, clothing and accessories based on $200 million in wholesale sales over a 5 year period, $37 million in advertising over a 5 year period and more than 27 years of use); *Specialty Brands v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 U.S.P.Q. 1281, 1284 (Fed. Cir. 1984) (SPICE ISLANDS for teas, spices and seasonings famous based on use for over 40 years, $25 million annual sales for spices, $12 million sales for tea between 1959-1981 and "several million" in advertising over the years). Because the MANWICH mark is almost universally known, it is more likely to be remembered and associated in the public's mind than is a weaker mark, and it is afforded broad protection. *Recot, Inc. v. Becton*, 214 F.3d *at* 1327. Accordingly, this factor weighs heavily in favor of Opposer.

2. The Goods Described in the CANDWICH Application and the Goods Described in the MANWICH Registrations are Closely Related and the CANDWICH Goods Fall Within ConAgra's Natural Zone of Expansion.

The goods identified by the parties' respective marks are very closely related. It is well settled that "the Board must base its determination whether there is a relationship between the goods and services of the parties on the basis of the goods identified in the respective application and registrations." *Starbucks*, 78 U.S.P.Q.2d (BNA) *at* 1751. The greater the similarity between the goods sold by the parties, the greater the likelihood that the use of similar marks will cause consumer confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 U.S.P.Q.2d (BNA) 1698, 1701 (Fed. Cir. 1992). Moreover, to support a holding of likelihood of confusion, "it is sufficient that the respective goods are related in some manner, and/or the conditions and activities surrounding the marketing of the goods are such that they could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer." *In re International Telephone & Telegraph Corp.*, 197 U.S.P.Q. 910, 911 (TTAB 1978); *see also In re Melville Corp.*, 18 U.S.P.Q.2d 1386 (TTAB 1991) (explaining that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion; instead, it is enough that the goods are related in some manner such that their marketing would be likely to be seen by the same persons which could give rise to a mistaken belief that they are associated).

In the present case, the goods listed in the CANDWICH application are very closely related to ConAgra's International Class 30 goods. ConAgra's goods are comprised of a sandwich sauce; the CANDWICH goods are comprised of "food items packaged in cans, namely meat based sandwiches....." Applicant's president acknowledged that the MANWICH meat sauce could certainly be combined with the CANDWICH meat sandwich.

A. "I said on the way down here I was thinking well, gosh, we can make a deal with ConAgra to co-brand and use their sauce in our sandwiches, but that's about as close as I've - - know. It would be a - - friendly agreement that was beneficial to

both. It was just this morning I thought, I guess we could use their sauce in our product. It's not - - it's not an ingredient in a finished product." (Opposer's Third Notice of Reliance, Kirkland Dep. at 38:16-24).

When assessing the relatedness of goods, any goods that are within registrant's normal fields of expansion must also be considered to determine whether Registrant's goods are related to Applicant's goods. *In re General Motors Corp.*, 196 U.S.P.Q. 574 (T.T.A.B. 1977). Stated simply, the test is whether purchasers would believe the product is within Registrant's logical zone of expansion. *CBP Products Corp. v. Perceptual Play*, Inc., 221 U.S.P.Q. 88 (T.T.A.B. 1983).

Third party registrations can be offered as probative evidence to the extent that they indicate that goods listed therein are of a kind that emanate from a single source. *See In re Infinity Broad Corp.*, 60 U.S.P.Q.2d 1214, 1217-1218 (T.T.A.B. 2001); *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783 (TTAB 1993) (third party registrations that cover a number of different goods are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, nevertheless such registrations have some probative value to the extent that they may serve to suggest that such goods are of a type that may emanate from a single source).

In this case, the following registrations help establish that sandwich sauces and sandwiches are offered under the same mark:

- Sandwiches and Sloppy Joe Sauce are offered under the trademark A TASTE OF INDONESIA, U.S. Registration No. 2,899,796. (Opposer's Fifth Notice of Reliance).
- Sandwiches and sauces are offered under the trademark PLANET COOK, U.S. Registration No. 2,928, 755. (Opposer's Fifth Notice of Reliance).

- Sandwiches and sauces are offered under the trademark TRADER JOE'S, U.S. Registration No. 2,156,879. (Opposer's Fifth Notice of Reliance).
- Sandwiches and sauces are offered under the trademark STOUFFER'S, U.S. Registration No. 1,222,755. (Opposer's Fifth Notice of Reliance).

In addition to the foregoing third party registrations, the evidence of record establishes that ConAgra previously offered for sale a finished sandwich product (loose meat with sauce) without bread, under the MANWICH brand. (Bybel Dep. at 22). This evidence buttresses the conclusion that Applicant's good and Opposer's goods are closely related.

3. Applicant's CANDWICH Mark is Extremely Similar to ConAgra's MANWICH Mark in Sight, Sound and Meaning.

The CANDWICH mark and the MANWICH mark are extremely similar in sight, sound and meaning. Under the *du Pont* factor analysis, 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 such that confusion as to the source of the goods offered under the respective marks is a likely result. *Sealed Air Corp. v. Scott Paper Co.*, 190 U.S.P.Q. 106 (TTAB 1975).

In the present case, both Applicant's and Opposer's marks are comprised of two syllables and the last syllable of the two marks are identical. The only noticeable difference between the marks is the fact that Applicant's mark starts with the letter "C", while the ConAgra mark begins with the letter "M." The marks look almost identical and any difference in sound occurs at the very beginning of the word. The pronunciation of the second half of both words is identical. "Slight differences in the sound of similar trademarks will not protect the infringer." *G.D. Searle & Co. v. Chas. Pfizer & Co.*, 265 F.2d 385, 387, 121 U.S.P.Q. 74 (7th Cir. 1959) (finding "Bonamine" and "Dramamine" confusingly similar despite differences in the prefixes of both words); *see also Interlego AG v. Abrams/Gentile Entertainment Inc.*, 63 U.S.P.Q.2d 1862 (TTAB 2002) (finding "Mego" confusingly similar to "Lego"); *American Cyanamid Co. v. U.S. Rubber Co.*, 356 F.2d

1008, 148 U.S.P.Q. 729 (U.S. C.C.P.A. 1966) (court concluded that given the similarity in sound and spelling, PHYGON was confusingly similar to CYGON).

In addition to the similarities in sight and sound, both CANDWICH and MANWICH evoke an image of a sandwich. While there may not be a true dictionary definition for either term, both marks are seemingly intended to convey a relationship with sandwiches. This conclusion is clear when one considers that both marks are directly related to sandwiches; CANDWICH is for a sandwich in a can, while MANWICH applies to sandwich sauce.

The President of CANDWICH acknowledges that MANWICH is a well-known brand, and he further admits that CANDWICH and MANWICH sound alike. (Opposer's Third Notice of Reliance, Kirkland Dep. at 39). As noted earlier, when the registered mark at issue is well known, a competitor is advised to avoid "even approaching such mark." *Nina Ricci S.A.R.L. v E.T.F. Enterprises*, 889 F.2d 1070, 1074, 12 U.S.P.Q. 1901,1904 (Fed. Cir. 1989) ("There is no excuse for even approaching the well-known trademark of a competitor"). Further, all doubt with respect to whether confusion, mistake or deception is likely is resolved against the Applicant. *Uncle Ben's, Inc. v. Stubenberg, Int'l, Inc.*, 47 U.S.P.Q. 1310 (T.T.A.B. 1998) (finding a likelihood of confusion between UNCLE BEN'S and BEN'S BREAD).

In this case, it is clear that Applicant adopted its mark knowing full well of ConAgra's famous MANWICH mark. (Opposer's Third Notice of Reliance, Kirkland Dep. at 35). Moreover, Applicant acknowledges that the goods offered under its mark can be used in conjunction with the goods offered under the MANWICH mark. (Opposer's Third Notice of Reliance, Kirkland Dep. at 38:16-24). "It is a well established principle that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and any doubt as to likelihood of confusion must be resolved against the newcomer and in favor of the prior registrant." *Starbucks U.S. Brands, LLC v. Ruben*, 78 U.S.P.Q.2d 1741 (T.T.A.B. 2006). In this case, Applicant's mark is simply too similar to Opposer's mark and as such, any doubt which may exist, must be resolved against Applicant.

4. Opposer's MANWICH Mark and Applicant's CANDWICH Mark Travel Within Identical Channels of Trade.

Both Applicant's and Opposer's goods are shelf stable retail products. Applicant's goods are canned sandwich sauce products that will be sold on retail store shelves within grocery stores, "big box stores" or convenience stores. (Opposer's Third Notice of Reliance, Kirkland Dep. at 22-3). Opposer's products are also canned sandwich products which are sold on retail grocery, big box and convenience stores. (Bybel Dep. at 12).

Importantly, the goods covered by Applicant's mark are not restricted in terms of proposed channels of trade. It is well settled that "absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same classes of purchasers." *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 U.S.P.Q.2d 1001, 1005 (Fed. Cir. 2002).

The goods covered under Applicant's mark are intended to be sold in a can on a grocery store shelf, which is the exact same manner in which Opposer's goods are sold. Accordingly, the channels of trade factor weighs in favor of ConAgra.

5. Applicant's Goods and Opposer's Goods Fall in the Category of Impulse Items.

Generally stated, when goods are purchased on impulse and without a great deal of care, consumers extend limited attention to the purchase of such goods and are thus more susceptible to confusion. The evidence in this case reflects that Applicant's canned sandwich will retail between $1.30 and $1.60 per can. (Opposer's Third Notice of Reliance, Kirkland Dep. at 28). Opposer's sandwich sauce retails for approximately $1.50. (Bybel Dep. at 21). In short, as inexpensive products, both products qualify as "impulse items." "It has often been stated that purchasers of such products are held to a lesser standard of purchasing care and thus, are more likely to be confused as to the source of the goods." *The Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 U.S.P.Q.2d 1629 (TTAB 2007) (sustaining the opposition on the grounds of likelihood of confusion, in part, because the parties' goods were susceptible to impulse purchase and

frequent replacement) (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.* 748 F.2d 669, 223 U.S.P.Q.2d 1281 (Fed. Cir. 1984)).

6. The *du Pont* Factor of Actual Confusion Here is Neutral.

The text under Section 2(d) of the Trademark Act is likelihood of confusion. Actual confusion is not necessary for a finding of likelihood confusion. *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546, 1549, 14 U.S.P.Q.2d 1840 (Fed. Cir. 1990); *Lois Sports Wear U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 230 U.S.P.Q. 831 (2nd Cir. 1986). Where, as here, the application is filed on the basis of intent to use and any sales activity is recent and any promotional activity has been modest, the absence of evidence of actual confusion does not weigh against finding likelihood of confusion. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 949, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000). Accordingly, this factor is neutral as applied in the context of the likelihood of confusion analysis.

C. *Dilution*

Applicant's CANDWICH mark should be refused registration for the additional reason that allowing such registration would result in dilution of ConAgra's MANWICH mark in violation of the Lanham Act. Specifically, Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c) forbids dilution of famous marks and provides injunctive relief against, "commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark . . . ." 15 U.S.C.. § 1125(c) (1998). Dilution is defined as, "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception." 15 U.S.C. § 1127 (1998).

A dilution claim requires the existence of a famous or distinctive mark and a likelihood of dilution. *See Viacom Inc. v. Ingram Enters.*, 141 F.3d 886 (8th Cir. 1998). Dilution can be found upon a showing of either blurring or tarnishment. *See 3M v. Rauh Rubber*, 943 F. Supp. 1117 (D. Minn. 1996), aff'd 130 F.3d 1305 (8th Cir. 1997).

1. The MANWICH Mark is Famous and Distinctive.

As discussed above with respect to the likelihood of confusion issue, given the volume of sales, advertising, and length of use, the MANWICH mark is considered famous and distinctive. ConAgra hereby incorporates by reference the law and argument set forth above with respect to this issue.

2. Likelihood of Dilution by Blurring.

Dilution by blurring "occurs when consumers see the plaintiff's mark used on a plethora of different goods and services . . . raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's product." *Autozone, Inc. v. Tandy Corp.,* 373 F.3d 786, 71 U.S.P.Q.2d 1385 (6th Cir. 2004) *citing Eli Lilly & Co. v. Natural Answers, Inc.,* 233 F.3d 456, 466 (7th Cir. 2000).

Five factors have been identified as relevant for assessing dilution by blurring under Section 43(c) of the Lanham Act:

(1) similarity of the trademarks;

(2) similarity of the products;

(3) sophistication of consumers;

(4) renown of the senior mark; and

(5) renown of the junior mark.

Federal Express Corp. v. Federal Espresso, Inc., 201 F.3d 168, 172, 53 U.S.P.Q.2d 1345 (2nd Cir. 2000) *citing Clinique Labs, Inc. v. Dep Corp.*, 945 F. Supp. 547, 562 & n. 22 (S.D.N.Y. 1996).

As discussed earlier, the CANDWICH mark and the MANWICH mark are extremely similar in sight, sound and meaning. In addition, the goods listed in the CANDWICH application are very closely related to ConAgra's International Class 30 goods for the MANWICH mark. Since both MANWICH and CANDWICH are inexpensive products, the products qualify as "impulse items" purchased by ordinary consumers who extend limited attention to the purchase of such goods,

and thus, the consumers of these products are not so sophisticated as to avoid potential confusion. Without doubt, the MANWICH mark is distinct and renown, given that MANWICH products have been sold nationwide continuously for the past 38 years. (Opposer's First Notice of Reliance; Bybel Dep. at 9; Bybel Dep. Exhibit 1). The CANDWICH application, on the other hand, was filed on the basis of intent to use. Any sales activity under the CANDWICH mark is recent, and any promotional activity has been modest, so the CANDWICH mark is not famous. Considering all these factors, it is evident that there is a likelihood of dilution by blurring of the MANWICH mark if the Applicant's request for registration of the CANDWICH mark is granted. Accordingly, Opposer respectfully requests that registration of the CANDWICH mark be denied.

CONCLUSION

For the foregoing reasons, Opposer, ConAgra Foods, RDM, Inc. respectfully requests that registration for the mark CANDWICH be denied.

Respectfully submitted,

CONAGRA FOODS RDM, INC.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document entitled Opposer's Trial Brief has been duly served on Applicant by mailing the same to Applicant's attorney, via U.S. Postal Service, first class, postage prepaid on this 6th day of February, 2008 at the following address:

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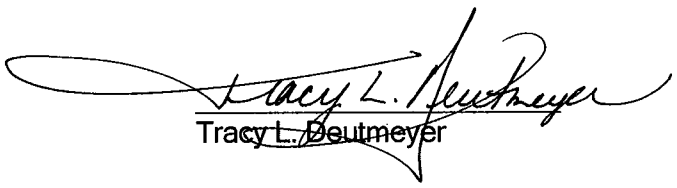

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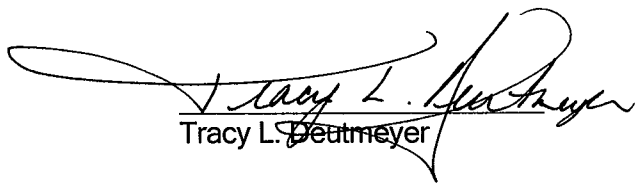
I hereby certify that this Opposer's Trial Brief is being filed with the United States Patent and Trademark Office, via U.S. Postal Service, first class, postage prepaid on this 6th day of February, 2008.



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