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December 13, 2007

BY FEDEX

John M. Lemmon, Esq.
Knox Lemmon & Anapolsky LLP
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Sacramento, California 95814-3229

Re: Allegation of infringement of GOT MILK trademark (Our Ref.: PETA USA TC 0708345)

Dear Mr. Lemmon:

We represent People for the Ethical Treatment of Animals, Inc. ("PETA"). PETA has asked us to respond to your November 26, 2007 letter to Ms. Ingrid E. Newkirk concerning our client's use of the slogan "got pus? Milk does" on t-shirts and other merchandise. As discussed in further detail below, your client's allegations of trademark infringement are entirely without merit.

As your client knows, PETA has long protested the dairy industry's treatment of cows and the industry's efforts to mislead consumers into believing that cows' milk marketed by industrialized producers is a healthy and humane product, maintaining that it is neither. As part of its mission to educate consumers about the industry's practices, PETA has, among other things, parodied the "Got Milk?" slogan that the milk industry uses to market milk. Such parodies include PETA's "Got Zits?," "Got Heart Disease?," "Got Breast Cancer?," "Got Sick Kids?," "Got Diabetes?," and "Got Veal?" campaigns, as well as its "got pus? Milk does" campaign at issue here. PETA launched each of these campaigns to draw attention to the fact that drinking milk is linked to these various health ailments and to the integral role of the dairy industry in the veal industry. Specifically, the "got pus? Milk does" campaign was launched in 2002 to educate consumers about the presence of pus in milk due to the painful inflammation of cows' mammary glands (mastitis) that is common among cows raised for their milk. To ensure that its educational message will reach the broadest audience possible, PETA has not only advertised in traditional media (e.g., television, radio, print, Internet and outdoor), it also has

sought to create "walking billboards" by selling t-shirts and other items of merchandise that contain the slogan.

In your letter, you claim that the California Milk Processors Board owns exclusive rights in the GOT MILK? trademark and that PETA's use of the slogan "got pus? Milk does" infringes such rights. At the outset, we note that PETA is using the slogan to educate consumers, not to indicate source. Such use is, therefore, not the type of "trademark use," i.e., to identify the source of a product, addressed by the Lanham Act.

Even if our client's use were considered "trademark use," your client's trademark infringement claim would fail. To prevail on a trademark infringement theory, your client would need to prove that PETA's slogan is a "colorable imitation" of GOT MILK? that is likely to cause confusion among an appreciable number of consumers as to the source, sponsorship or affiliation of the parties' respective products. *See* 15 U.S.C. §§ 1114(1) & 1125(a). But your client's rights in the GOT MILK? mark, if any, are exceedingly narrow and limited to that exact phrase. Indeed, there is widespread third-party use and federal registration of slogans that use the GOT _____? formulation, which suggests that consumers do not associate such slogans employing that formulation with any one particular source. (*See, e.g.,* U.S. Registration Nos. 3,325,943 (GOT POOP?); 3,234,753 (GOT BOOBIE?); 3,308,556 (GOT FOOD?); 3,271,797 (GOT OIL?); 3,208,021 (GOT BREAKFAST?); and 3,090,299 (GOT SOY?), among *dozens* of other federally registered GOT-formative marks). There is no reason why consumers, who are accustomed to distinguishing among various users of GOT-formative trademarks and slogans, should have any trouble differentiating products bearing PETA's slogan from products sold by your client.

Moreover, PETA's "got pus? Milk does" slogan is an obvious parody of GOT MILK?, and there is no question that consumers who encounter the slogan—whether on billboards or on t-shirts—would perceive it as such. Your client cannot seriously contend that an appreciable number of consumers who see a t-shirt bearing the "got pus? Milk does" slogan would be confused into thinking that your client is the source of the t-shirt, attempting to sell milk by letting the public know that when they drink milk they are also consuming pus. Because there is no likelihood of confusion, there is no trademark infringement. *See, e.g., Black Dog Tavern Co. v. Hall,* 823 F. Supp. 48 (D. Mass. 1993) (defendant's sale of BLACK HOG and DEAD DOG t-shirts not likely to cause confusion with plaintiff's BLACK DOG mark); *see also Mattel Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1152 (C.D. Cal. 1998) (no likelihood of confusion caused by defendant's parody of BARBIE character and trademark in song title and lyrics), *aff'd on other grounds*, 296 F.3d 894 (9th Cir. 2002).[1]

[1] To the extent your client believes that slogans on t-shirts are not entitled to protection under the First Amendment's guarantee of freedom of expression, it is wrong. *See Cohen v. California*, 403 U.S. 15 (1971); *see also Comedy III Prods. v. Gary Saderup Inc.*, 25 Cal. 4th 387 (2001) ("First Amendment doctrine does not disfavor nontraditional media of expression"; defendant's use of Three Stooges' likeness on t-shirt entitled to protection under First Amendment).

It is important to note that PETA has presented evidence to the public not only that milk contains pus, but also that your client knows this to be the case. For example, the "got pus?" link on PETA's website www.MilkSucks.com states as follows:

> The dairy industry knows that there is a problem with pus in milk…every state but Hawaii is producing milk with pus levels so high that it shouldn't enter the human food supply…Researchers estimate that an ordinary glass of milk contains between one and seven drops of pus. This isn't just disgusting – it can also be dangerous. Pus can contain paratuberculosis bacteria, which are believed to cause Crohn's disease in human beings.

Against this backdrop, and putting aside the fact that there is no likelihood of confusion, your client's claim also fails because PETA's use of the slogan would be considered "nominative fair use." For a parody to be effective, it must take *some* elements of the original so that consumers will know who and what is being parodied. *See Mattel Inc.*, 28 F. Supp. 2d at 1141. Our client's entire point is to tell people that when they drink the milk that your client sells they are also consuming pus (something they probably would prefer not to consume). Thus, to the extent certain elements of your client's mark are incorporated into PETA's slogan, such incorporation is permitted by law and not actionable. *See id.* at 1141-43; *see also New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (setting forth nominative fair use standard).

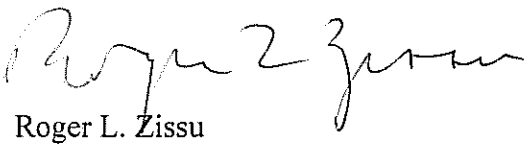
Finally, even if your client had a valid trademark infringement claim at one time (and as explained above, it never did), the claim would be barred in its entirety by laches given that PETA has used the "got pus? Milk does" slogan without objection by your client since 2002. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002) (laches defense available where defendant unreasonably fails to bring trademark infringement claim within three years of defendant's first allegedly infringing use).

In sum, your client's trademark infringement claim fails on several independent grounds. Accordingly, the demands set forth in your letter are completely unjustified and PETA will not comply with them.[2] Please be advised that PETA considers your client's allegations to be objectively unreasonable and will not hesitate to seek recovery of its attorneys' fees should your client carry through with its threat to commence litigation against PETA. *See Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 816 (9th Cir. 2003) (remanding to district court for determination whether attorneys' fees should be awarded to defendant who successfully defended against trademark infringement and trade dress infringement claims based on parody of

[2] We need not address your claims regarding the remedies available to your client in detail, but note that your citation to the statutory damages provisions in the Lanham Act, which apply only to "counterfeit marks," is misguided. *See* 15 U.S.C. § 1116(d) (definition of "counterfeit mark"); *cf. Johnson v. Connolly*, No. C 06-6414 VRW, 2007 WL 1151004, at *2 (N.D. Cal. April 18, 2007) (explaining difference between standard trademark infringement claims and claims involving counterfeit marks).

BARBIE character). PETA also would consider seeking relief under California's Anti-SLAPP statute if your client were to pursue any state law unfair competition claims.

Yours sincerely,



Roger L. Zissu

cc: Jeff Kerr, Esq. (General Counsel & Vice President of Corporate Affairs, Foundation to Support Animal Protection)
Philip J. Hirschkop, Esq.
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