

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

Pearson’s Inc. d/b/a Pearson	§	
Livestock Equipment Co.	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. 7:18-cv-00013-M
	§	
Robert Dean Ackerman, et al	§	
	§	
	§	
Defendants	§	
Counterclaim Plaintiffs	§	

**DEFENDANT-COUNTER PLAINTIFF’S
POST-TRIAL BRIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants-Counterclaim Plaintiffs Ackerman et al., through undersigned counsel, and pursuant to the Court’s request of the Parties, hereby submit this post-trial brief. This brief is a supplement to the trial brief Ackerman submitted on April 8, 2019 (ECF No. 117).

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BACKGROUND¹

A squeeze chute is a stall or cage designed to safely hold livestock during examination, branding, or treatment. Within the ranching community a squeeze chute for holding cattle is often referred to as a “cattle chute”.

In 1973 Plaintiff Pearsons, Inc. designed a parallel squeeze cattle chute for which it obtained patent protection in 1977. Throughout the next 20 years Plaintiff continued to make alterations to the overall appearance and design of its cattle chute, settling on its most recent design in approximately 1993 because it was a simpler, safer design for which consumers appeared to have a preference.

After Pearson’s patents expired in the 1990s, multiple third-party competitors began selling similarly or identically configured cattle chutes without objection or intervention by Pearson. After nearly 2 decades of third-party use of the parallel squeeze chute configuration, Defendants Ackerman et. al., a distributor of Pearson, envisioned that a cheaper, lighter chute could be designed so as to appeal to the more budget conscious consumer.

In 2014 Ackerman began coordinating with WW, a prominent manufacturer in the industry, to decrease the weight and cost of its cattle chutes while maintaining functionality and safety. When WW struggled to incorporate Ackerman’s desired features into the chute, Ackerman then delivered a Pearson chute, hoping to convey the utility of the chute’s removable side panels and multi-positioning lever handle.

Pearson representative David Rater, upon learning that Ackerman had delivered a Pearson chute to WW, called Ackerman and asked if he had sent the chute to be copied—to which Ackerman replied, “I did”. The Parties did not substantively discuss the significance of

¹ See generally Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 1-101.

Mr. Ackerman's response, but severed ties without relevant correspondence until the initiation of this dispute by Pearson four years later. David Rater also informed his son Ricky Rater of the conversation.

Throughout those four years, Ackerman has developed a valuable business retailing the economically priced cattle chutes of third-party manufacturers, such as Pro Farm Distributing, Inc. and Titan West, Inc. Ackerman's business model involves receiving the manufactured chutes, performing quality control and suggesting feedback for future production, labeling the chutes with his source identifiers, and then selling them either online, by catalogue, or at trade shows. Ackerman warrants any cattle chute it sells.

Concurrently during those four years, Pearson applied for and ultimately received federal trademark registration number 5/184,202 for the configuration of its parallel squeeze cattle chute. Prior to registering the '202 mark, Pearson received multiple USPTO office actions rejecting the mark on grounds of functionality and non-distinctiveness. Pearson ultimately overcame these office actions by asserting that the mark had been in continuous use since 1973, that the use had been entirely exclusive until approximately 2016, and that Ricky Rater has personal knowledge that Ackerman had copied the mark with the intent to profit from Pearson's goodwill.

After registering the '202 mark, Pearson filed this suit against Ackerman over his sale of cattle chutes branded as the "Renegade" and the "Equalizer". Pearson performed no investigation to identify or include additional retailers of these chutes, and actively resisted the inclusion of interested third party manufacturers such as Pro Farm—which manufactures the Renegade chute—among others.

Upon receiving notice of this dispute, Ackerman defensively began affixing an additional source identifier to his chutes, a star located where the pull lever meets the raised front cross-

arm. The USPTO recognized the validity of this use and found no likelihood of confusion, even when compared to other cattle chute marks such as Pearson's '202 registration.

SUMMARY OF ISSUES²

Pearson has asserted trademark and trade dress infringement under the Lanham Act, trade dress infringement under Texas common law, and trade dress dilution under the Texas Business and Commerce Code.

Ackerman has counterclaimed for trademark cancellation under the Lanham Act pursuant to theories of functionality, distinctiveness, abandonment, and fraudulent procurement, and further asserts affirmative defenses of laches, unclean hands, equitable estoppel, and fair use.

The Parties largely agree on the sequence of events occurring before Pearson initiated this dispute and regarding the cattle chute industry generally but dispute the intent and reasonable interpretation of their respective actions and how to properly apply the law.

SUMMARY OF ARGUMENT

All of Pearson's claims and Ackerman's counterclaims comprise the same tests, issues, and operative facts, and thus do not require separate analyses.

Clearline distinguishes between *Eppendorf* and *Two Pesos* to assist this Court in ruling that Pearson's registered product configuration is nothing more than an assemblage of functional parts and that the combination itself provides functional benefits of increased safety, versatility, and simplicity.

Even if nonfunctional, the general product configuration of Pearson's cattle chute is both non-distinctive and abandoned because it has been widely adopted by third parties, and without policing efforts by Pearson, since the 1990's.

² See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 88, 105-143, 169.

Even if nonfunctional, distinctive, and not abandoned, Pearson fraudulently procured its registration from the USPTO by inducing reliance on false assertions of material fact for which Pearson had no reasonable basis and upon which Pearson hoped the USPTO would rely.

Notwithstanding the validity of Pearson's mark, there is no likelihood of confusion between the Parties' marks because of the particularly high sophistication of the Parties' consumers within their niche industry, and the complete absence of actual point of sale consumer confusion throughout the entirety of Ackerman's four years of coexisting sales with Pearson.

Notwithstanding issues of enforceability and confusion, equitable considerations including: delayed and targeted enforcement; objectively false statements to the USPTO; and industry need to incorporate the functional elements claimed in Pearson's mark, the affirmative defenses of laches, unclean hands, equitable estoppel, and fair use apply. These same considerations clearly demonstrate that this is an exceptional case because the claims are frivolous, motivated by personal animosity, objective unreasonable, and not advanced in consideration of compensation and deterrence.

ARGUMENT

I. PEARSON'S CLAIMS AND ACKERMAN'S COUNTERCLAIMS DO NOT REQUIRE SEPARATE ANALYSES

“[B]ecause the Lanham Act ‘provides no basis for distinguishing between trademark and trade dress,’ the test for trade dress protection is identical to that for trademark protection . . . and there is no persuasive reason to apply different analysis to the two.”³ “The issues in a common law trademark infringement action under Texas law are no different than those under federal

³ *Sunbeam Products, Inc. v. West Bend Co.*, 123 F.3d 246, 251 n.4 (5th Cir. 1997) (quoting *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1119 (5th Cir. 1991) *aff'd sub nom. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 812 (1992)).

trademark law.”⁴ “Trade[dress] dilution is absorbed in a finding that trade[dress] infringement exists.”⁵

“To prevail on a trade dress infringement claim, a plaintiff must prove three elements: (1) the trade dress is inherently distinctive or has acquired a secondary meaning; (2) its trade dress is primarily nonfunctional and therefore protectable; and (3) there is a likelihood that the defendant's trade dress will lead to customer confusion.”⁶

“In any action involving a registered mark the court may . . . order the cancelation of registrations, in whole or in part.”⁷ To prevail on a trade dress cancellation counterclaim, a defendant must prove the dress: (1) is functional; (2) is generic, non-distinctive or abandoned; or (3) was obtained fraudulently.⁸

Thus, to prevail on *any* of its claims, Pearson must prove its trade dress is nonfunctional and distinctive. Further, if Ackerman can establish *any one* argument that the Pearson mark is either nonfunctional, distinctive, abandoned, or fraudulently procured this Court may cancel the registration.

II. PEARSON CANNOT PREVAIL ON ITS CLAIMS AND ITS REGISTRATION SHOULD BE CANCELLED

A. The Pearson Trade Dress is Functional

Despite enjoying an initial, rebuttable presumption of validity in its registration, Pearson ultimately bears the burden to prove that its trade dress is nonfunctional.⁹

⁴ *All American Builders, Inc. v. All American Siding of Dallas, Inc.*, 991 S.W.2d 484, 488 (Tex. App.–Fort Worth 1999, no pet.); *see also Waples-Platter Cos. v. General Foods Corp.*, 439 F. Supp. 551, 583-84 (N.D. Tex. 1977).

⁵ *Waples* 439 F. Supp. at 584.

⁶ *Sparrow Barns & Events, LLC v. Ruth Farm Inc.*, No. 4:19-CV-00067, at *9 (E.D. Tex. April 10, 2019) (Mazzant, J.) (*citing, inter alia, Grand Time Corp. v. Watch Factory Corp.*, 3:08-CV-1770-K, 2011 WL 2412960, at *7 (N.D. Tex. Jun. 10, 2011) (Kinkeade, J.)).

⁷ 15. U.S.C. § 1119.

⁸ *See* 15 U.S.C. § 1064(3).

⁹ *See Poly-Am. L.P. v. Stego Indus. LLC*, 3:08-cv-2224-G, 2011 WL 3206687, at *15 (N.D. Tex. Jul. 27, 2011) (Fish, J.), *aff'd sub nom. Poly-Am. LP. V. Stego Indus., LLC*, 482 F. App'x 958 (5th Cir. 2012).

“The Supreme Court has held that the traditional test of functionality is whether the product feature ‘is essential to the use or purpose of the article or if it affects the cost or quality of an article.’”¹⁰ “More simply, if the feature is ‘the reason the device works,’ it is considered functional.”¹¹ “A feature is essential to the use or purpose of a product if it serves any significant function other than to distinguish a firm's goods or identify their source.”¹² “Alternatively, aesthetic features are functional if their exclusive use would place ‘competitors at a significant non-reputation-related disadvantage.’”¹³

While agreeing that every claimed feature of the Pearson trade dress is functional,¹⁴ the Parties dispute the proper application of the 5th Circuit’s rulings in *Eppendorf* and *Two Pesos* with regards to the *overall combination* of these functional features. Specifically, in *Two Pesos*, the 5th Circuit ruled that the combination of individual elements “*only some of which serve a functional purpose*” may be registerable “so long as the combination of these individual elements which define the trade dress . . . are configured in an arbitrary, fanciful, or distinctive fashion.”¹⁵ The 5th Circuit later ruled in *Eppendorf*, without overruling *Two Pesos*, that the Plaintiff had failed to establish that its trade dress, comprising *only functional elements*, was nonfunctional despite the availability of alternative designs—because the functional elements themselves could not be arbitrary or ornamental.¹⁶

¹⁰ *Provident Precious Metals, LLC v. Nw. Territorial Mint, LLC*, 117 F. Supp. 3d 879, 894 (N.D. Tex., 2015) (quoting *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 165 (1995)).

¹¹ *Id.* (quoting *Eppendorf–Netheler–Hinz GMBH v. Ritter GMBH*, 289 F.3d 351, 355 (5th Cir. 2002) and *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001)).

¹² *Id.* (quoting *Poly-Am. 3:08-CV-2224-G*, at *10).

¹³ *Id.* (quoting *Qualitex*, 514 U.S. at 165 via *Clearline Technologies Ltd. v. Cooper B–Line, Inc.*, 948 F. Supp. 2d 691, 700 (S.D. Tex. 2013)).

¹⁴ See Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 53-64.

¹⁵ *Two Pesos, Inc.* 505 U.S. 812 (1992)) (emphasis added).

¹⁶ See *Eppendorf* 289 F.3d at 357-358.

Although case law in this district has not yet attempted to distinguish the *Two Pesos* and *Eppendorf* rulings, the Federal Southern District of Texas has done so in *Clearline Technologies v. Cooper B-Line*.¹⁷ In *Clearline*, a split jury had found that the use of the color yellow on a rooftop support product was functional but that the combination of yellow against the natural black rubber of the product was a nonfunctional color scheme as arranged.¹⁸ In a subsequent motion for judgment as a matter of law, the sister-court declined to overrule the jury but observed that if the dispute had been over the combination of functional product *components* that the combination would be functional regardless as to their arrangement.¹⁹

Acknowledging both *Eppendorf* and *Two Pesos*, *Clearline* further clarified that “the combination of functional features results in a whole that is nothing more than the sum of its parts.”²⁰ Likewise, “the overall appearance of a product is functional where the product is designed such that the individual features all also work together to provide functionality.”²¹

Clearline’s approach and analysis should help this Court distinguish *Eppendorf* and *Two Pesos* in this case. In essence, if Pearson’s trade dress entirely comprises an assemblage of functional elements that combine together to enable the functionality of the cattle chute itself, it would be “semantic trickery to say that there is still some sort of separate overall appearance which is nonfunctional.”²²

¹⁷ See generally *Clearline* 948 F. Supp. 2d at 701-703.

¹⁸ See *Id.* at 697.

¹⁹ See *Id.* at 703 (“However, when the combination for which protection is sought is a color scheme, the whole is not merely the sum of its parts; colors, unlike two entirely distinct functional features such as a handle and a rounded edge, must be combined in some particular manner.”).

²⁰ *Id.* (*Tie Tech, Inc., v. Kinedyne Corp.*, 296 F.3d 778, 785–86 (9th Cir. 2002)).

²¹ *Id.* at 703 (citing *Antioch Co. v. W. Trimming Corp.*, 347 F.3d 150, 159 (6th Cir. 2003)).

²² *Id.* at 701-702 (quoting *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1013 (9th Cir.1999)).

That the elements of Pearson's trade dress must necessarily combine to provide functionality to the chute is disclosed in its expired patents and should be given great weight by this Court as evidence of functionality:

[A] patent claiming the design features at issue is strong evidence that those features are functional . . . [and] need not claim the exact configuration for which trademark protection is sought [S]tatements in a patent's specification illuminating the purpose served by a design may constitute equally strong evidence of functionality.²³

Even were it not so, elements of Pearson's mark are nevertheless arranged such that the arrangement itself additionally convey benefits²⁴ in safety and versatility that are "essential to the use or purpose" or "affect the cost or quality" of the cattle chute.²⁵ The Pearson mark is therefore functional by all standards and should be cancelled.

B. The Pearson Trade Dress is Non-Distinctiveness

"Because [Pearson's] trade dress is functional, it is not protectable, regardless of whether it is [distinctive]."²⁶ Further, because each of the claimed elements of the Pearson trade dress is independently functional, the combination of which "identif[ies] the exact *nature* of the product" as a parallel squeeze cattle chute, "none of the claimed elements of the [Pearson trade dress] are suggestive, arbitrary, or fanciful, either individually, or taken as a whole".²⁷

But "even if [Pearson's] trade dress were nonfunctional, it is not protectable, because Pearson has not produced sufficient evidence to support a finding of [distinctiveness]."²⁸ "[A] product design cannot be inherently distinctive" and therefore "can be protected only if [it has]

²³ *In re Becton, Dickinson & Co.*, 675 F.3d 1638, 1375 (Fed. Cir. 2012) (citing *TrafFix*, 532 U.S. at 33-35) .

²⁴ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 53-64.

²⁵ See *Qualitex*, 514 U.S. at 165 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982)).

²⁶ *Provident F. Supp.* 3d at 898.

²⁷ *Id.* at 894 (internal citations omitted) (emphasis added).

²⁸ See *Id.*; see also *Berg v. Symons*, 393 F. Supp. 2d 525, 555 (S.D. Tex. 2005) ("Although '[a] unique combination of elements may make a dress distinctive, [] the fact that a trade dress is composed entirely of commonly used or functional elements might suggest that the dress should be regarded as unprotectible [sic] or 'generic,' to avoid tying up a product or marketing idea." (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 118 (2d Cir. 2001))).

secondary meaning.”²⁹ “Secondary meaning occurs when, in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.”³⁰

“The inquiry is one of the public’s mental association between the dress and the alleged dress holder.”³¹ Seven factors determine whether secondary meaning has been established:

(1) length and manner of use of the mark or trade dress, (2) volume of sales, (3) amount and manner of advertising, (4) nature of use of the mark or trade dress in newspapers and magazines, (5) consumer-survey evidence, (6) direct consumer testimony, and (7) the defendant's intent in copying the trade dress.³²

“The burden to establish secondary meaning is substantial and requires a high degree of proof”³³ and “is primarily an empirical inquiry.”³⁴

The empirical facts before this Court weigh against Pearson in the seven factors for establishing secondary meaning, specifically: (1) the shape of Pearson’s cattle chute could not have enjoyed more than a few years of exclusivity; (2) Pearson has not presented any evidence of its volume of sales; (3) Pearson has not presented any evidence of the amount of its advertising; (4) the mark has never been used in print unless in conjunction with the color grey and the Pearson word mark; (5) Pearson has not presented any consumer-survey evidence; (6) direct consumer testimony is minimal and, without exception, associates the Pearson cattle chute in conjunction with shape, color, and/or the Pearson word mark; and (7) Ackerman did not intend to copy the trade dress.³⁵

²⁹ *Amid, Inc. v. Med. Alert Found. United States, Inc.*, 241 F. Supp. 3d 788, 803 (S.D. Tex., 2017) (citing *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212 (2000)).

³⁰ *Provident F. Supp. 3d* at 898 (citing *Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 476 (5th Cir. 2008)).

³¹ *Id.* (quoting *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 253 (5th Cir. 2010)) (brackets omitted).

³² *Id.* (citing *Amazing Spaces* 608 F.3d at 248).

³³ *Id.* (citing *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 567 (5th Cir. 2005)).

³⁴ *Id.* (citing *Sunbeam* 123 F.3d at 253) .

³⁵ See Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 65-69.

Specifically, from the 1970s to the 1990s Pearson made repeated changes to the functionality and design of its cattle chutes until settling on the subject of the '202 trade dress in approximately 1993. Pearson continued to enjoy exclusivity in this design, not because of its brand, but because of its patent, until at least 1997, after which third-party use of the product design began sometime later in the 1990s. Such third-party use continued and expanded without any policing action whatsoever by Pearson until the filing of its suit against Ackerman in 2018. Absent any evidence of sales or advertising volume, or consumer surveys, and furnished with sample advertisements and consumer testimony that wholly fails to distinguish the Pearson shape from its color and/or word mark, the only remaining factor worth analysis is Ackerman's intent.³⁶

Although the parties dispute Ackerman's intent, it is abundantly clear from the testimony that Ackerman merely sells at retail the product designs of other entities. He has minimal, if any involvement actually designing the cattle chutes he sells, and to the extent he has ever induced copying of a Pearson, it has been with respect to specific, functional product features that aren't necessarily even incorporated within the Pearson trade dress. Ackerman has further revealed that up until he was served the lawsuit he was unaware that one could even trademark a cattle chute and that, despite never before receiving notice of infringement, he immediately set about rebranding in an overabundance of caution.³⁷

Thus, on the balance, Pearson has not met its burden to establish that its trade dress is distinctive, and the registration should be cancelled.

³⁶ *See Id.*

³⁷ *See* Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 89-94.

C. Pearson Abandoned its Trade Dress Prior to this Dispute

Because Pearson’s trade dress is functional and not distinctive, this Court need not reach the issue of abandonment. But even if this Court finds that Pearson’s trade dress were nonfunctional and distinctive, Pearson has abandoned the dress through its failure to pursue potential infringers.

“The Lanham Act provides grounds for cancelling a mark for abandonment.”³⁸ “Among other methods to prove ‘abandonment’ the alleged infringer must show that, ‘due to acts or omissions of the trademark owner, the . . . mark has lost its significance as a mark.’”³⁹ “Typically, this method of abandonment applies where a mark becomes a generic term; however, abandonment also applies more broadly where a mark ‘cease[s] to function as an indicator of origin’ or ‘loses trade significance.’”⁴⁰ “[A]n intent to abandon the mark is expressly not required to prove abandonment” and even a licensed trademark “may result in abandonment” through “[a] trademark owner’s failure to exercise appropriate control over its licensees.”⁴¹

For literal decades, Pearson took no action to control the use of its trade dress despite widespread industry use of the subject design. Neither has Pearson put any infringing entities on notice of its claimed trade dress except and until Ackerman was served with this suit—and third-party industry use of the subject design continues today without intervention from Pearson.⁴²

A significant part of Ackerman’s initial understanding was that if others in the market were selling similar cattle chutes unimpeded, that he might too. Rather, Ackerman doesn’t even manufacture his own cattle chutes, buying them wholesale from third parties.⁴³

³⁸ *Global Dev. Strategies, Inc.*, 44 F. Supp. 3d 666, 672 (W.D. Tex., 2014) (citing 15 U.S.C. §§ 1064(3) , 1065, 1127).

³⁹ *Id.* (quoting *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1079 (5th Cir.1997)); 15 U.S.C. § 1127.

⁴⁰ *Id.* (citing *Exxon* 109 F.3d at 1075).

⁴¹ *Exxon* 109 F.3d at 1075, 1080.

⁴² See Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 96-100.

⁴³ See Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 66-69.

These facts suggest that the mere shape of a parallel squeeze cattle chute has lost any capability to indicate source or origin. But even if this Court holds otherwise, considering that Pearson's allegation that Ackerman's unopposed four-year coexistence in the marketplace has somehow damaged them, this Court could not likely agree unless it were to also conclude that those damages include a loss in trade significance of the Pearson mark. Therefore, the Pearson trade dress is abandoned and should be cancelled.

D. Pearson Fraudulently Procured the Federal Registration of its Trade Dress

Because Pearson's trade dress is functional, not distinctive, and abandoned, this Court need not reach the issue of fraudulent procurement. But even if this Court finds that Pearson's trade dress is nonfunctional, distinctive, and not abandoned, Pearson nevertheless procured the dress by its fraudulent statements to the USPTO.

To establish fraudulent procurement of a trade dress, a counter-plaintiff "must prove (1) a false representation, (2) regarding a material fact, (3) the registrant's knowledge or belief that the representation is false, (4) the intent to induce reliance on the misrepresentation, (5) reasonable reliance, and (6) damages proximately resulting from the reliance."⁴⁴

"Fraud in procuring a trademark occurs when an applicant knowingly makes false, material representations of fact in connection with his application."⁴⁵ A false material representation can be made knowingly when an applicant has no reasonable basis in the assertion.⁴⁶

⁴⁴ *Burnscraft Mfg. Corp. v. Nat'l Constr. Rentals, Inc.* No. H-13-2769, 2014 WL 1386300, at *7 (S.D. Tex. Apr. 9, 2014) (Rosenthal, J.).

⁴⁵ *Id.* (quoting *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009)).

⁴⁶ *See Id.* at 8 ("the defendant had no reasonable basis for its averred belief that no other person had the right to use the same or a confusingly similar mark on or in connection with the goods or services identified in the application"); *see also Intellimedia Sports Inc., v. Intellimedia Corp.*, 43 U.S.P.Q.2d 1203, 1997 WL 398344, *4 (T.T.A.B. 1997).

The Parties do not dispute that the USPTO had rejected Pearson's trademark application multiple times on grounds of functionality and non-distinctiveness. Nor do the Parties dispute that Pearson ultimately overcame these rejections by alleging that the mark had been in continuous use since 1973, that the use had been entirely exclusive until approximately 2016, and that Ackerman had copied the mark with the intent to profit from Pearson's goodwill. The USPTO must therefore have relied on these statements, which Pearson admits were material and made with the intent to induce reliance.⁴⁷

However, none of these factual assertions were true. Specifically, Pearson repeatedly experimented on and modified the configuration of its cattle chute from 1973 until at least 1993, and the trademark specimen provided to the USPTO most resembles Pearson's post-1993 designs.⁴⁸ Pearson clearly must have known that its statement of continuous use of the 1993 design since 1973 was a false assertion or at the very least it had no reasonable basis to make the assertion.

Likewise, Pearson admits that it was aware of a plurality of third-party uses of its trade dress at the time that it filed its USPTO application in 2014, that it considered these uses to be infringing, and that some of these uses dated back years.⁴⁹ Pearson clearly must have known that its statement of exclusive use was a false assertion or at the very least it had no reasonable basis to make the assertion.

Further, despite his affidavit assertion otherwise, Ricky Rater did not have personal knowledge of Ackerman's actions with respect to the Pearson mark, let alone his intent or the circumstances that might have informed such action or intent.⁵⁰ Pearson clearly must have

⁴⁷ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 13-31, 40-52.

⁴⁸ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 13-31.

⁴⁹ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 40-52.

⁵⁰ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 13-31.

known that its statements of personal knowledge as to Ackerman's actions or intent was a false assertion or at the very least it had no reasonable basis to make the assertion.

Therefore, Ackerman has met all the factors necessary to prove that Pearson fraudulently procured its trade dress from the USPTO. Pearson's representatives asserted false, material representations of fact—either knowingly or without reasonable basis in the assertions—and the USPTO reasonably relied on these assertions to justify registration of a trade dress that it otherwise held to be unregistrable. And but for the fraudulent registration of the Pearson mark and subsequent legal action by Pearson, Ackerman would not have needed to expend the significant legal resources necessary to defend himself in this dispute. Thus, this Court should find that Pearson's federal trade dress registration was fraudulently procured and should be cancelled.

III. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN THE PARTIES' RESPECTIVE TRADE DRESS

Because Pearson's trade dress is unenforceable and should be cancelled, this Court need not reach the issue of consumer confusion. But even if this Court finds that Pearson's trade dress were valid and enforceable, there is no likelihood of confusion between the parties' trade dress.

“Likelihood of confusion' means more than a mere possibility; the plaintiff must demonstrate a probability of confusion.”⁵¹ Courts “examine the following non-exhaustive ‘digits of confusion’ in evaluating likelihood of confusion: (1) the type of trademark; (2) mark similarity; (3) product similarity; (4) outlet and purchaser identity; (5) advertising media identity; (6) defendant's intent; (7) actual confusion; and (8) care exercised by potential purchasers.”⁵²

⁵¹ *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 226 (5th Cir. 2009) (citing *Smack Apparel*, 550 F.3d at 478).

⁵² *Id.* at 227.

“No digit is dispositive, and the digits may weigh differently from case to case, depending on the particular facts and circumstances involved.”⁵³

“[T]he sophistication of []potential purchasers alone is enough to find that there is no likelihood of confusion even when all of the other digits weigh in favor of such a finding.”⁵⁴

Further, “[a]n absence of . . . actual confusion . . . over an extended period of time of concurrent sales weighs against a likelihood of confusion.”⁵⁵

Here, the Parties agree that the average consumer of cattle chutes is highly discerning. It is a big purchase within a niche industry, often a family decision, and the buyer is likely to compare and contrast several choices over a period of time before making an ultimate purchase. The high degree of care exercised by the Parties’ respective purchasers is likely the reason that Plaintiff has wholly failed to provide even one piece of evidence that a consumer had purchased one Party’s product thinking it was the other, despite nearly five years of coexistence of their products in the market.⁵⁶

Therefore, this Court should find there is no likelihood of confusion between the parties’ respective trade dress.

IV. ALTERNATIVELY, PEARSON’S TRADE DRESS HAS NOT BEEN DILUTED

Because Pearson cannot prevail on its infringement claims, this Court need not reach the issue of dilution.⁵⁷ Alternatively, even if this Court reaches the issue of dilution Pearson nevertheless cannot recover because it has failed to meet the basic elements of a dilution claim.

⁵³ *Id.*

⁵⁴ *John Crane Prod. Solutions, Inc. v. R2R & D, LLC*, 861 F. Supp. 2d 792, 801 n.16 (N.D. Tex., 2012) (citations omitted).

⁵⁵ *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 204 (5th Cir. 1998); *see also Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 173 (5th Cir. 1986) (finding no likelihood of confusion based upon concurrent sales over seventeen months with no evidence of actual confusion).

⁵⁶ *See* Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 70-87.

⁵⁷ *See Waples* 439 F. Supp. at 584 (“Trade[dress] dilution is absorbed in a finding that trade[dress] infringement exists.”).

To recover for dilution under the Texas Business and Commercial Code, Pearson must prove: (1) that its mark is famous; (2) that its mark is widely recognized throughout Texas—or in a geographic region of Texas—as a source identifier for its cattle chutes; (3) that Ackerman began using the mark after it had become famous; (4) and that there is a likelihood of confusion of the famous mark.⁵⁸

“Alleging facts about the topics covered by each of the [dilution] factors is insufficient to state a . . . dilution claim. The point of the factors is to aid courts in determining whether a mark is ‘widely recognized by the general consuming public.’”⁵⁹ “A famous brand is a household name, such as Budweiser beer, Camel cigarettes, Barbie dolls, Nike, Starbucks, and McDonalds.”⁶⁰ Fame only in a niche market is insufficient to support a dilution claim.⁶¹

At trial Pearson presented virtually no evidence that could allow this Court to justify finding that the general consuming public recognizes the shape of its cattle chute to the extent that it is a famous household name. Therefore, Pearson cannot recover under its dilution claim.

V. EQUITABLE CONSIDERATIONS BAR PEARSON FROM RELIEF

A. Laches

“Laches is an inexcusable delay that results in prejudice to the defendant.”⁶²
“Additionally, laches has three elements: (1) delay in asserting one's trademark rights; (2) lack of excuse for the delay; and (3) undue prejudice to the alleged infringer caused by the delay.”⁶³

⁵⁸ See Tex. Bus. Com. Code § 16.103(a).

⁵⁹ *Springboards to Educ., Inc. v. Scholastic Book Fairs, Inc.*, No. 3:17-cv-0054-B, at *8 (N.D. Texas Apr. 17, 2018) (Boyle, J.) (citing 15 U.S.C. § 1125(c)(2)(A)).

⁶⁰ *Id.* at 7 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012)).

⁶¹ *Id.* (citing *Bd. of Regents, Univ. of Tex. Sys. ex rel. Univ. Tex. at Austin v. KST Elec., Ltd.*, 550 F. Supp. 2d 657, 673 n.13 (W.D. Tex. 2008)).

⁶² *Tesoros Trading Co. v. Tesoros Misticos, Inc.*, 10 F. Supp. 3d 701, 719 (N.D. Tex. 2014) (quoting *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 622 (5th Cir. 2013)).

⁶³ *Id.* (quotation marks and citation omitted).

“The period of delay begins when the trademark owner knew or should have known of the unlicensed user's use of the marks and ends when the trademark owner files suit against the unlicensed user.”⁶⁴ “[P]rejudice encompasses actions by the defendant that it would not have taken or consequences it would not have suffered had the plaintiff brought suit promptly Laches is a good defense if plaintiff's long failure to exercise its legal rights has caused defendant to rely to its detriment by building up a valuable business around its trademark.”⁶⁵

Because Pearson never indicated its alleged rights to Ackerman, the period for delay began in 2014 when it first learned of Ackerman's sales of allegedly infringing cattle chutes and ended with the filing of this lawsuit in 2018. During this delay Ackerman built a valuable business as a retailer of parallel squeeze cattle chutes and has already incurred expenses affixing additional source identifiers to his chutes in the face of this lawsuit.⁶⁶ Therefore, Ackerman has established its laches defense and Pearson should be barred from relief.

B. Unclean Hands

Unclean hands applies if Ackerman proves that Pearson's conduct is unconscionable with respect to the subject matter of its claims.⁶⁷ “Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause' for the court to invoke the doctrine.”⁶⁸ Because Pearson persuaded the USPTO to register its mark only after falsely asserting that Ackerman had intentionally copied the mark, it would be unconscionable to then assert herein that the registration is *prima facie* proof that its mark is valid against Ackerman.

⁶⁴ *Abraham* 708 F.3d at 624 (affirming that this district's jury instructions for undue prejudice were proper).

⁶⁵ *Id.* (quoting 6 McCarthy on Trademarks and Unfair Competition § 31:12 (4th ed. 2001)).

⁶⁶ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts 88-101.

⁶⁷ See *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 272 (5th Cir. 1999); see also *Healthpoint, Ltd. v. Ethex Corp.*, 273 F. Supp. 2d 817, 847 (W.D. Tex. 2001) (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945)).

⁶⁸ *Healthpoint* 273 F. Supp. 2d 817 at 847 (quoting *Precision Instrument* 324 U.S. at 815).

In a broader sense, Pearson has singularly targeted Ackerman in this civil action and not the manufacturer of its primary product, Pro Farm, nor any other retailer of Pro Farm products. Further, Pearson seeks damages from Ackerman without notice or warning and even after Ackerman has voluntarily added additional source identification to his product to help distinguish the Parties' marks. The additional facts that Ackerman is a former Pearson distributor who left on bad terms, internal Pearson correspondence mocking Ackerman, and Ricky Rater so grossly maligning Ackerman's intent to the USPTO, it should be clear to this court that this dispute is motivated at least in part for personal reasons beyond Pearson's actual damages.⁶⁹

Therefore, Ackerman has established his unclean hands defense and Pearson should be barred from relief.

C. Equitable Estoppel

Equitable estoppel applies when a defendant "prove[s] intentional deception through concealment or inaction or gross negligence amounting to constructive fraud."⁷⁰

Pearson's false assurances to the USPTO—that it had continuously used the same mark since 1973, that it had enjoyed pure exclusivity until approximately 2016, and that Ackerman had intentionally copied the mark for purposes profiting from Pearson's goodwill—were intentionally deceptive or at least grossly negligent, and resulted in constructive fraud when the USPTO relied on these statements to register the Pearson mark.⁷¹ Therefore, Ackerman has established his equitable estoppel defense and Pearson should be barred from relief.

⁶⁹ See Defendant-Counter Plaintiff's Proposed Findings of Fact and Conclusions of Law, Facts 88-100.

⁷⁰ *Source, Inc. v. SourceOne, Inc.*, 2006 WL 2381594, at *8 (N.D. Tex. Aug. 16, 2006) (Fish, Chief J.) (citing *Matter of Henderson*, 577 F.2d 997, 1001 (5th Cir. 1978)).

⁷¹ See *supra* II.D and accompanying notes.

D. Fair Use

Fair use applies if a defendant proves that it used the mark “(a) descriptively, (b) fairly, and (c) in good faith.”⁷²

A product trade dress is used descriptively, fairly, and in good faith if it “denotes a characteristic or quality of the product”, informs the consumer what the product does, and “employs the defendant’s own source designations elsewhere on the product.”⁷³

Because every element of the Pearson trade dress is functional, the combination of which informs the consuming public of the characteristics and qualities of what a parallel squeeze cattle chute does, and because Ackerman labels his cattle chutes with his own source designations, Ackerman has established its fair use defense and Pearson should be barred from relief.⁷⁴

VI. THIS CASE IS EXCEPTIONAL

“In ‘exceptional’ cases under the Lanham Act, the court may award reasonable attorneys’ fees to the prevailing party.⁷⁵ “[A]n exceptional case is one where: (1) in considering both governing law and the facts of the case, the case stands out from others with respect to the substantive strength of a party’s litigating position; or (2) the unsuccessful party has litigated the case in an unreasonable manner.”⁷⁶ “District courts may determine whether a case is exceptional in the case-by-case exercise of their discretion, considering the totality of the circumstances.”⁷⁷

“The Supreme Court has suggested that the factors a court may consider include, ‘frivolousness, motivation, objective unreasonableness (both in the factual and legal components

⁷² *Rin Tin Tin, Inc. v. First Look Studios, Inc.*, 671 F. Supp. 2d 893, 898-99 (S.D. Tex. 2009), (citing, *inter alia*, 15 U.S.C. § 1115(b)).

⁷³ *See Id.* 671 F. Supp. 2d 899-901 (citing *Sugar Busters* 177 F.3d at 270-271 (5th Cir. 1999) and *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1186-7 (5th Cir. 1980)).

⁷⁴ *See* Defendant-Counter Plaintiff’s Proposed Findings of Fact and Conclusions of Law, Facts ¶¶ 70-87.

⁷⁵ *Tinker, Inc. v. Poteet*, No. 3:14-CV-2878-L, at *2 (N.D. Tex. Aug. 9, 2018) (Toliver, J.) (quoting 15 U.S.C. § 1117).

⁷⁶ *Id.* at *3 (quoting *Baker v. DeShong*, 821 F.3d 620 (5th Cir. 2016)).

⁷⁷ *Id.* (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014)).

of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.”⁷⁸ The moving party must establish their entitlement to fees by a preponderance of the evidence.⁷⁹

The facts governing Ackerman’s counterclaim and equitable defenses establish that the Pearson mark is functional, nondistinctive, abandoned, fraudulently procured, and not likely to be confused with Ackerman’s chutes. Further, equitable considerations of delayed and targeted enforcement and objectively false statements to the USPTO clearly establish that Pearson brought frivolous claims comprising objectively unreasonable facts and claims, motivated by personal animosity toward Ackerman, which were advanced without consideration of compensation and deterrence. Thus, this case is exceptional, and Ackerman merits a reasonable award of its costs and attorney’s fees.

CONCLUSION

For the forgoing reasons, Pearson mark is not valid, there is no likelihood of confusion between the Parties, and enforcement of Pearson mark against Ackerman would be inequitable. Therefore, this Court should deny all of Pearson’s claims, cancel its mark, and award fees.

Respectfully submitted,

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⁷⁸ *Id.* (quoting *Octane* 134 S. Ct. at 1756 n.6).

⁷⁹ *Id.* (quoting *Octane* 134 S. Ct. at 1758).

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the above and foregoing document was served Monday, July 1, 2019 on attorneys of record via E-Service.