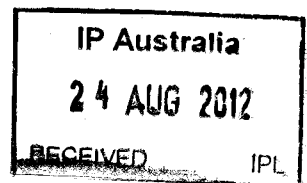


NOTE - EVIDENCE FORWARDED  
TO EXAM SERVICES

TAA  
TDC



The Registrar of Trade Marks  
PO Box 200  
WODEN ACT 2606

FB Rice  
Sydney NSW  
Telephone: 02 8231 1000  
Facsimile: 02 8231 1099  
Customer No: 9610000453

23 August 2012

Our Ref: 154567  
Contact: Joanne Martin  
jmartin@fbrice.com.au

**TRADE MARKS**

Dear Registrar

**Spartan Pty Ltd**  
Australian Trade Mark Application 1473122  
FRESH FEET Logo (colour) in Class 25

We refer to the Examiner's first official action. The Examiner has objected to acceptance of the trade mark FRESH FEET Logo, on the basis that the trade mark is not capable of distinguishing the applicant's goods from those of other traders. We submit the trade mark is entitled to registration because:

1. The trade mark, presented in a logo format is capable of distinguishing under the provisions of section 41(5), when used in respect of socks.
2. The trade mark is demonstrated to be capable of distinguishing as a result of extensive use since 2010 in respect of s socks.

**Inherent capacity to distinguish**

We note that the Examiner has raised objection under section 41(5), that is the Examiner has acknowledged that the trade mark FRESH FEET has *some* inherent capacity to distinguish. It is the Examiner's determination that the level of capacity is not sufficient to allow acceptance without evidence of use. We submit however, that FRESH FEET is not a term that is *apt for normal description* for socks. We appreciate that it is difficult to specify with any precision what constitutes aptness for normal description, and to differentiate between those marks on the one hand which are merely suggestive or indirectly descriptive and those on the other which are apt for normal description, or still further the down the spectrum, those marks which are so apt for normal description as to be incapable of functioning as a trade mark.

It is our submission that if a consumer were to go to a store and ask for FRESH FEET, clearly the shop assistant would be bewildered as to the object of enquiry or recognise those words as having generic reference to any product. We submit that FRESH FEET would be recognised as a trade mark.

In addition, registration of FRESH FEET as a trade mark in a stylised format in which it is filed, would not prevent other traders using the term FRESH FEET where, without improper motive, its use was needed as a genuine descriptive. That is, the infringement provisions of the Trade Marks Act protect genuine descriptive use of a word or phrase.

FRESH FEET is analogous to marks such as TUB HAPPY (1956) 5 CLR 190, where knowledge of the goods for which the words TUB HAPPY was to be applied, allowed the Examiner to make some connection between the trade mark and the goods. The ability to make a connection or find some meaning between FRESH

FB RICE

The Registrar of Trade Marks  
Our Ref: 154567  
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FEET and socks is not detrimental to acceptance. Rather, the test is whether other traders would legitimately need use the trade mark FRESH FEET in the stylised get up for their goods and in our view, the answer to this question is no.

**Evidence of use**

In addition, the applicant has used the trade mark for a number of years and we *attach* the Statutory Declaration of Jim McCarthy CFO of the applicant company, detailing the type and extent of use. (Please note that confidentiality is claimed for the commercially sensitive information at paragraphs 8 and 9). We ask the Examiner to consider this information with a view to assessing the registrability of the trade mark which has acquired distinctiveness or is shown to be capable of distinguishing as a result of use.

**Citation objection**

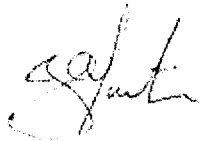
We request that the statement of goods be amended to read:

*School socks*

This amendment is in line with the consent given from the owner of cited trade mark 1008545. A copy of the Letter of Consent is attached as Annexure C to the declaration enclosed.

We look forward to receiving notice of acceptance.

Yours respectfully  
FB Rice



Joanne Martin  
Registered Trade Mark Attorney

AUSTRALIA

Trade Marks Act 1995


IN THE MATTER OF Trade Mark Application  
1473122 FRESH FEET Logo (colour)  
the Name of **Spartan Pty Ltd**

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**DECLARATION**

I, Jim McCarthy, of Building 3, 621 Whitehorse Road, Mitcham, Victoria, 3132, do solemnly and sincerely declare as follows:-

1. I am Chief Financial Officer of Spartan Pty Ltd, ACN 005 346 001 of 3, 621 Whitehorse Road, Mitcham, Victoria, 3132 (the Applicant) and the facts declared herein are from the records of the Applicant or from my personal knowledge. I am authorised to make this declaration on behalf of the Applicant.
2. The Applicant is a manufacturer and supplier of school items including school bags, school uniforms and school accessories. The Applicant commenced business in 1982 as manufacturer and wholesaler of school bags. In 1990 it expanded its range to include school hats and in 1999 it expanded its range to include socks. The majority of socks of the applicant are sold to the educational sector for schools and sports institutions but not exclusively so.
3. The Applicant adopted the trade mark FRESH FEET in 2010 after conducting searches to ensure the availability of the trade mark for use in relation to socks. The applicant's trade marks are:

Number	Marks	Goods
1395200 Lapsed	FRESH FEET	School Socks
1473122 Filed 7 February 2012		Socks

(the Trade Mark).

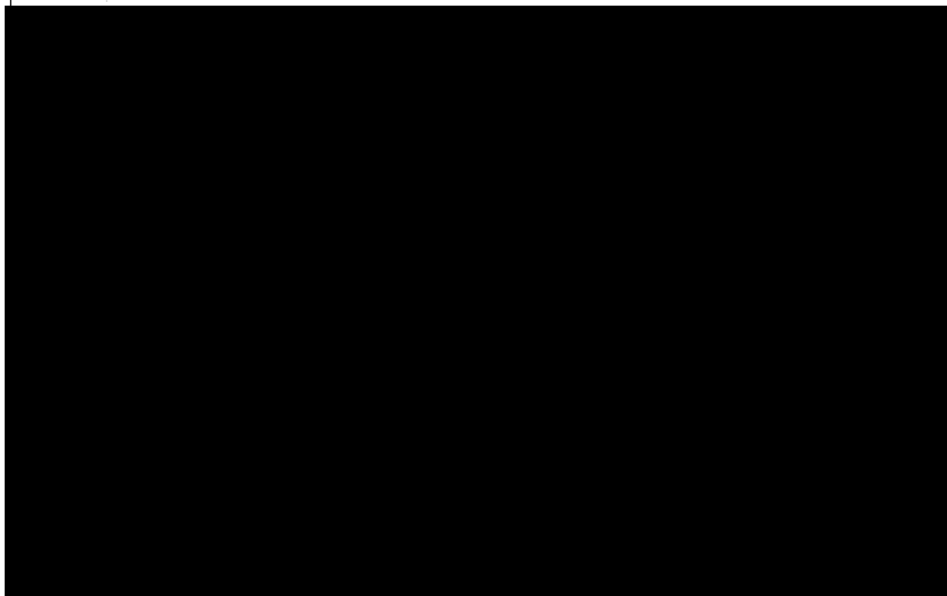
4. The Applicant chose the trade mark FRESH FEET on the basis that it is fanciful because it suggests that the user of the applicant's socks will enjoy having fresh feet.
  - The name FRESH FEET is a good name for branding purposes.

- After conducting appropriate searches, the Applicant was not aware of any other business in Australia using FRESH FEET for socks.
5. The Trade Mark is used in a stylised get up, as shown in application 1473122 and has continuously been used in this getup since adoption of the trade mark in 2010 and first commercial sales in 2011.
  6. Attached and marked **Annexure A** are samples and information showing use of the FRESH FEET trade mark including packaging, pricelists, brochures, flyers and information from the Applicant's website.
  7. Attached and marked **Annexure B** is a photograph of a display stand for the Applicant's FRESH FEET product. Such stands are used in school uniform shops to display the FRESH FEET socks.

**CONFIDENTIAL INFORMATION**

8. The table below lists the volume and dollar value of sales for the FRESH FEET branded socks in Australia for financial year 2011-2012 during which time over [REDACTED] pairs of socks have been sold at a retail value in excessive of [REDACTED]

2011/12 - ACTUAL FIGURES



**CONFIDENTIAL INFORMATION**

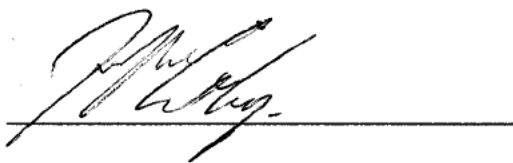
9. The majority of promotion of the FRESH FEET branded socks product is by way of distribution of catalogues, promotion on the applicant's website at [www.spartanss.com.au](http://www.spartanss.com.au) as well display stands

in school uniform stores. Also flyers are distributed to customers and potential customers. The approximate expenditure for advertising, promotion and marketing is [REDACTED] per year.

10. Registration 1008545 BURLON FRESH FEET has been cited as an objection to acceptance of the Applicant's mark. I am aware that there is no confusion in the marketplace between products of the cited owner and the FRESH FEET socks sold by the Applicant. Attached as Annexure C is a copy of the Letter of Consent to registration of the Trade Mark provided by the owner of the cited trade mark.

AND I MAKE this declaration conscientiously believing the statements contained herein to be true in every particular.

DECLARED at Mitcham, Victoria this 10<sup>th</sup> day of August 2012

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be 'P. M. King'.

## EVIDENCE SUMMARY SHEET

ss41(5)

**TRADE MARK NUMBER: 1473122      TRADE MARK: FRESH FEET**

**TYPE: (SFAS, Geog, Desc, Subj matt, etc) descriptive**

**EVIDENCE SUMMARY:**

**Have you considered:**

How the trade mark is being used (See Part 19A of the Manual): AS APPLIED FOR

How the trade mark is being promoted: CATALOGUES, PROMOTION OF WEBSITE; DISPLAY STANDS

The geographical extent of the use: NOT ADDRESSED (BUT GIVEN THE CIRCUMSTANCES OUTLINED FURTHER BELOW, I BELIEVE THIS DOES NOT NECESSARILY HAVE TO BE OBSTRUCTIVE)

Duration of use (including date of first use, continuous use): TM ADOPTED IN 2010 AND FIRST COMMERCIAL SALES HAPPENED IN 2011; USE HAS BEEN CONTINUOUS

How substantial is the sales volume/turnover: 2011 - 2012: [REDACTED]

Unit cost: [REDACTED]

How much has been expended on advertising: [REDACTED]

Goods/services the trade mark has been used on: SCHOOL SOCKS

Overseas use:

Intended use:

Other Circumstances:

**EXAMINER'S RECOMMENDATION/S:** ss41(5)    Applied     Not Applied:

**REASON/S:** THE TM IS NOT THE WORST TM GOING ROUND. IN RELATION TO THE RELEVANT GOODS, THE WORDS 'SCHOOL SOCKS' WOULD BE THE WORST TM YOU COULD HAVE, FOLLOWED BY SOMETHING LIKE 'ODOUR FREE' AND THEN 'FRESH FEET'. THEREFORE IF THERE WAS A SCALE - 10 BEING THE LEAST LIKELY TO DISTINGUISH AND 1 BEING THE MOST LIKELY TO DISTINGUISH - I THINK THE TM IN QUESTION WOULD HAVE TO BE ABOUT A 5. THE PURPOSE OF THIS IS TO ESTABLISH THAT NO GREAT AMOUNT OF EVIDENCE OF USE IS NECESSARY TO HAVE THIS MARK ACCEPTED. THIS IS EVEN MORE THE CASE WHEN WE ACKNOWLEDGE THAT THE TRADE MARK COMES WITH SOME DEGREE OF STYLISATION. THESE CONSIDERATIONS, WHEN COMBINED WITH THE FACT THAT - 1. THE USE TO DATE IS ACTUALLY QUITE IMPRESSIVE. 2 THE MARKET IN WHICH THE APPLICANT OPERATES IS NARROW, AND THE SPECIFICATION OF GOODS REFLECTS THAT MARGIN - WE CAN CONCLUDE THAT THE TRADE MARK IS CAPABLE OF DISTINGUISHING

**ss41(5) could be applied under the following conditions :**

**Examiner : S. MARINCESKI**

**Date: 31 AUGUST 2012**

**SUPERVISOR/TEAM LEADER COMMENTS:**

**Supervisor:**

**Date:**

---

**Team Leader:**

**Date:**

**REMINDERS:**

- **Add Endorsement**