

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNLEASHED MAGAZINE, INC. d/b/a
ORLANDO UNLEASHED,
a Florida corporation,

Plaintiff,

vs.

Case No. 6:06-CV-1690-ORL-28JGG

ORANGE COUNTY, FLORIDA d/b/a
ORANGE TV,

Defendant.

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DEFENDANT’S DISPOSITIVE MOTION FOR SUMMARY JUDGMENT

In this trademark dispute Orange County seeks summary judgment on all claims of Plaintiff, Unleashed Magazine, Inc. (“UMI”). UMI is a publisher of a local pet-related magazine. The County’s Orange TV broadcasts a government access television program about pets. UMI asserts three related claims against the County: Count I seeks relief under §43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); Count II seeks identical relief for common law trademark infringement; and Count III is a claim for unfair competition. (Dkt.1). UMI contends that it owns two as-yet-unregistered trademarks: **ORLANDO UNLEASHED**, for a magazine featuring topics related to animals, and **UNLEASHED**, for an alleged television show featuring topics related to animals. The County has denied liability, has filed its own declaratory counterclaim, (Dkt.12), and now seeks summary judgment on three grounds: (1) UMI has never once used the claimed mark **UNLEASHED**

in connection with television programming and has no legitimate claim to own that mark, (2) UMI cannot prove that the County's past use of **PET PALS UNLEASHED** as a service mark for a non-profit television program is (or was) likely to cause confusion as the result of UMI's prior adoption and use of **ORLANDO UNLEASHED**, and (3) UMI has no basis for obtaining either damages or injunctive relief against the County. A competent survey proves that none of the County's television viewers even recognize UMI's magazine or perceive any connection or association between the County's show **PET PALS UNLEASHED** and UMI's magazine, **ORLANDO UNLEASHED**.

Statement of Undisputed Facts

UMI filed its first trademark application in September 2003, seeking to register **ORLANDO UNLEASHED** (words only), for use on "printed publications, namely magazines, newsletters and books featuring information on pets, pet friendly places and pet friendly establishments," (Att.1, Application).¹ UMI's application disclaimed any exclusive rights to the term **ORLANDO** and was based on the alleged use of **ORLANDO UNLEASHED** in interstate commerce since at least as early as June 30, 2003 (*Id.*) -- although UMI's owner and director, Kim Cousins, has admitted that such use actually commenced in October 2003. (Att.2, Cousins Depo., 35:21-23).

The County timely filed a Notice of Opposition to UMI's application, chiefly on the grounds that the mark **ORLANDO UNLEASHED** is merely descriptive and geographically descriptive of the goods and services in the application. This filing triggered a proceeding

¹References to the attachments shall be as follows: "Att. [Attachment No.], [Brief Description], p. [page number]:[line numbers]." See attached index to attachments.

in the Trademark Trial and Appeal Board (“TTAB”). (Att.3, Notice of Opp.). The TTAB thereafter suspended the opposition proceeding, pending the outcome of the present proceedings. (Att.4, TTAB Order).

On June 7, 2006, UMI filed its second federal trademark application, this time for **UNLEASHED** (words only), for use on “entertainment services in the nature of *television programs* featuring a wide array of topics about pets, animals and events and issues of interest relating thereto.” (Dkt. 1, ¶7; Att.5, File Wrapper). This application was filed *after* the present dispute with Orange County over use of **PET PALS UNLEASHED** had commenced (Dkt. 1, ¶19), and with full knowledge that (a) the County was already using the word UNLEASHED in connection with its television show and (b) UMI had *never* used the claimed mark in television programming of any kind. (Att.2, Cousins, 287:18 to 297:4). Nevertheless, UMI declared under penalty of perjury that it had been using the mark **UNLEASHED** in connection with the television-related services since at least as early as June 30, 2003. (*Id.*, 289:18 to 292:11). This statement was false. (*Id.*)

UMI’s registration of **UNLEASHED** was thereafter rejected by the PTO because of a likelihood of confusion with other marks, including prior third party uses of the word mark **UNLEASHED**. (*Id.*; Att.5). UMI then abandoned its application. (*Id.*)

The County began using the trademark **PET PALS UNLEASHED** in connection with its pet-related television show (previously called PET CHAT) in or around May 2005. (Att.6, Suchy Aff’t, ¶3). The County never filed a trademark application for **PET PALS UNLEASHED**; it did, however, establish common law rights in the mark by its continuous

and exclusive use of this mark on its television show from 2005 through May 2007. (*Id.*, ¶4). In May 2007, the County abandoned **PET PALS UNLEASHED**, and adopted what it believed was a stronger mark and logo for its program. (*Id.*, ¶5). The television show has been renamed “Orange TV’s PET PALS,” and a few past episodes of the show have been re-edited to specifically delete the term UNLEASHED. (*Id.*, ¶6) This is the name under which the show is broadcast currently. (*Id.*, ¶6).

Orange TV is an information channel which made its debut in 1995 (*Id.*, ¶7) and televises programming related to government services and activities, including County commission meetings, on the cable networks serving Orange County. (*Id.*, ¶8). Orange TV does not televise its content outside of the County (*Id.*, ¶9), though it does provide live Internet streaming of its content on its website.

Orange TV is not a commercial television producer. It does not offer commercial programs; it does not advertise the products of others; it does not sell advertising; nor does it make any revenue from advertising for third parties. (Att.6, Suchy, ¶10). Though it does provide “credits” at the end of its television content where appropriate and it has sought (with no success for its pet show) “sponsors” of its non-profit television content, it does not compete with other television broadcast providers or other media, including UMI, for commercial advertising dollars; it is not an advertiser in that sense. (*Id.*, ¶10; Att.27, Triggs, ¶¶ 3-8).

Orange TV began offering a pet-related news magazine television show as early as 1998. (*Id.*, ¶11). Then known as Pet Chat, the program was developed in conjunction with

Animal Services, to fulfill its mission to protect Orange County's citizens and animals. (*Id.*, ¶12) The television series originally was hosted by Tracy McCommon and featured segments on County laws regarding pets, how to choose a pet, how to keep your pet healthy, and the like. (*Id.*, ¶13). When Ms. McCommon left this position in 2004, Orange TV's station manager, Bill Suchy, decided to change the format of Orange TV's Pet Chat program, including the use of two new hosts: Vanessa Bouffard and Corene Fry. (*Id.*, ¶¶13-22). Ms. Bouffard remains one of the hosts of the program today, now airing as "Orange TV's PET PALS." (*Id.*, ¶15; Att.7, Bouffard, ¶6).

Ms. Bouffard, who is vilified in UMI's complaint, is the marketing and public relations coordinator for the County's Animal Services Division. (Att.7, Bouffard, ¶3). She has never been an employee of Orange TV and has never had the authority to produce an Orange TV program or to decide upon a name for an Orange TV show, or to bind Orange TV to a particular format or content. (Att.6, Suchy, ¶17; Att.7, Bouffard, ¶4).

It was not until October 2003 that UMI published its first issue of **ORLANDO UNLEASHED** (Att.2, Cousins, 35:21-23), which included contributions, such as articles and editing, from students in a college class she was conducting. (*Id.*). UMI "distributed a lot of free copies of the Holiday 2003 edition." (*Id.*, 60:5-7). Initially, UMI distributed the magazine to nearly 5000 people for free, with no more than 10 subscribers (*Id.* 157:22-25; 158:1-7). Today, more than four years later, UMI has no more than 7,000 subscribers (*Id.*, 267, L:4-5), of which only a very few are paid. (*Id.* 269, L:10-17; Att.19, NeSmith, Initial Rpt. 4). UMI has little in the way of earnings and has never once made a profit. (Att.19,

Nesmith, Initial Rpt. 4-5).

In February 2004, Ms. McCommon invited UMI's Kim Cousins to be a guest on Orange TV's Pet Chat so that she could discuss her magazine on the air. (Att.2, Cousins 51:17-25 & 52:1-16). In exchange for this free promotional opportunity, Cousins donated an add for Pet Chat in the Summer 2004 edition of **ORLANDO UNLEASHED**. (*Id.*, 55:8-25). This sort of "cross promotion" or "trading" was perceived as beneficial by both the County and UMI. (*Id.*, 55:25 & 56:1-5; Att.6, Suchy, ¶¶25-28; Att.12-13, emails).

In November 2004, Cousins appeared once again on the air for a "man-in-the-street" interview by Orange TV at a pet-related fund raiser. (Att.7, Bouffard, ¶9). She later sponsored a snow cone machine for Animal Services' Pet "Adopt-A-Thon" Spring event, in return for UMI's recognition in an Animal Services flyer. (Att.2, Cousins 155, L:3-16 & 132, L:14-19; Att.7, Bouffard, ¶11). In August 2005, Orange TV taped Ms. Bouffard's interview of Cousins at the Yellow Dog Café for an intended episode of **PET PALS UNLEASHED** (Att.2, Cousins 153:2-13; Att.7, Bouffard, ¶12). Bouffard had suggested that Cousins be interviewed for this episode, for she then believed that Cousins was supportive of the mission of the County Animal Shelter. (*Id.*, ¶12). By that time, the County had renamed its show from Pet Chat to **PET PALS UNLEASHED**. (Att.2, Cousins 139:19 to 154:24; Att.7, Bouffard, ¶¶12-18; Att.15, Trent, 18:18 to 25:2).

The name change was part of a larger effort to revitalize Pet Chat. In November 2004, Bill Suchy, Orange TV's manager, made the decision to improve and expand the program with new content, new hosts, and a new name. (Att.6, Suchy, ¶¶14-22). Suchy elected to use

a more vigorous hands-on style of presentation, using hand-held cameras and filming on location at various events, while also expanding the content to cover more pets and pet-related topics. (*Id.*) It was then that Bouffard and Ms. Corene Fry, an animal behaviorist, became the new hosts. (*Id.*; Att.7, Bouffard, ¶5).

Thereafter several Orange County staff personnel brain-stormed about a new name for the new format of Orange TV's show. (Bouffard, ¶¶13-16). Orange TV originally decided to rename the show PET PALS. (*Id.*, ¶14). Some staff felt that the name needed something extra; a cameraman suggested adding "unleashed" to the name. (*Id.*, ¶14). The producer of the show at the time, Phil Rafey, later independently decided to add "unleashed" to "Pet Pals" (Att.7, Bouffard, ¶14; Att.6, Suchy, ¶23; Att.15, Rafey, 10:14 to 16: 23), as he worked with the graphics and film for the first edition of the show.

PET PALS UNLEASHED was first used on the air in May 2005 (Suchy, ¶24). Thus the new name for the show had been publicly broadcast for about three months prior to the taping session involving UMI's Cousins, as an invited guest on the show, in August 2005. (*Id.*, ¶¶24-26). Cousins admitted to watching at least parts of Pet Chat or **PET PALS UNLEASHED** during 2005. (Att.2, Cousins 140:20-23 & 141:1-3). Cousins was certainly aware that the new name of the County's show was **PET PALS UNLEASHED** when Greg Trent, the producer of the show, contacted her about being an invited guest, but she appeared on the show anyway. (*Id.*, 141:6 to 162:25). The facts are in dispute about Cousins' reactions to the new name for the County's show, but what is undisputed is that she appeared on the show, discussed the new name with the County staff, and then continued to discuss a cross-

promotion or barter arrangement whereby Ms. Cousins would promote **PET PALS UNLEASHED** in her magazine and, in return, the County would credit **ORLANDO UNLEASHED** as one of the show's sponsors. (Att.6, Suchy, ¶27; Att.2, Cousins, 141:6 to 162:25; Att.15, Trent, 18:18 to 25:2). Arrangements were then made for a meeting between Orange TV management and Cousins to discuss the details of this cross-promotion or barter arrangement (Att.6, Suchy, ¶¶26-28; Att.2, Cousins, 156:22 to 162:25; & 188:8 to 194:22; Att.15, Trent 18:18 to 25:2), as confirmed in emails between the parties. (Att.12-13). This meeting took place in October 2005. (Att.6, Suchy, ¶28; Att.15, Trent, 18:18 to 25:2).

When Orange TV staff showed up for the meeting they were expecting an amicable discussion about the details of a barter arrangement (Att.6, Suchy, ¶28; Att.2, Cousins, at 187:6-16). But Ms. Cousins came to the meeting with her attorney, and accused the County of infringement. (*Id.*). The County rejected the notion that **PET PALS UNLEASHED** for its television show could possibly confuse relevant consumers regarding **ORLANDO UNLEASHED**, a magazine. (Att.6, Suchy, ¶¶5, 31; Att.15, Trent, 22:2 to 25:2).

It was after this meeting that UMI filed a federal trademark application to register **UNLEASHED** for use on a television program. (Att.2, Cousins 189:4-7; 289:14-17 & Att.5, File wrapper). UMI also registered the domain name www.PetPalsUnleashed.com, even though it had neither the permission to do so from the County nor the intent to use that site for supplying content. (Att.2, Cousins 215:24 to 220:9).

Orange TV personnel deny that the adoption and use of the mark had anything to do with UMI's **ORLANDO UNLEASHED**. (Att.6, Suchy ¶29; Att.7, Bouffard ¶15; Att.14,

Rafey 16:17 to 21:10). They also deny any intent to create confusion. (*Id.*).

UMI has not identified any viewers of Orange TV's programming who have claimed confusion over the marks. (Att.2, Cousins, 195:22 to 204:3). UMI's Cousins could only identify some friends and some employees at a Starbucks she frequents, who had anything to say about these marks, and they were not identified as viewers of the County's show or suppliers to UMI. (*Id.*).

An expert in consumer surveys, Robert Klein, conducted a survey for the purpose of identifying any evidence of consumer confusion over the marks at issue by surveying relevant cable television viewers in Orange County, Florida. (Att.18, Klein, ¶¶ 5-10, and attached reports). Mr. Klein's expert reports and testimony show that there was no consumer confusion between the **PET PALS UNLEASHED** television program and the magazine **ORLANDO UNLEASHED**. (*Id.*, Initial Rpt., 8-11). Klein's analysis proves that **ORLANDO UNLEASHED** has no detectable recognition as a source identifier whatsoever among the viewers of Orange TV and that not a single instance of confusion between **ORLANDO UNLEASHED** and **PET PALS UNLEASHED** could be documented. (*Id.*).

Argument

"The tests for infringement of a trademark and for unfair competition are the same: whether there is a likelihood of confusion as to source or sponsorship of the two products at issue." *Caterpillar, Inc. v. Nationwide Equip.*, 877 F. Supp. 611, 614 (M.D. Fla. 1994). All three of UMI's claims require proof that UMI owns an enforceable mark and that the County's use of a junior mark was likely to cause consumers to "confuse the two." *Custom*

Mfg. & Eng'g, Inc. v. Midway Servs., 508 F.3d 641, 647 (11th Cir. 2007).

I. UNLEASHED Is Not A Service Mark of Plaintiff

By UMI's own admission, it has never used the mark **UNLEASHED** on a television program. (Att.2, Cousins, 291:6-21 & 292:4-11). There is no evidence that UMI has ever used the term **UNLEASHED** alone, without the term **ORLANDO**, on a magazine or any other products or services, either. (*Id.*, 292:4-11). Yet UMI attempted to improperly bolster its claims against the County by filing a trademark application for **UNLEASHED** for use in a television program - an application which was filed in June 2006, *after* the dispute between the parties arose in November 2005. (Att.2, Cousins 287:18 to 297:4). This application was filed with no factual basis, for UMI claimed that its date of actual use of the mark for television programming was June 30, 2003, but it concedes that it has *never* used the mark at all. (*Id.*, 291:7-15). How, then, could it have been confused in making this representation to the Trademark office, when it *never* used the mark for television? (*Id.*, 289:23-25; 290:1-4; 292:4-11). On May 9, 2007, UMI allowed this bogus application to go abandoned. (*Id.*, 291:7 to 297:4; Att.5, abandonment). The filing of such a false application, however, is a sufficient basis for inferring fraud on the PTO. *E.g.*, *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986). Ms. Cousins likely filed this application, just like she falsely registered the domain name www.PetPalsUnleashed.com, to vex the County. (Att.2, Cousins 215:24 to 220:9; 288:3 to 297:4).

The claimed mark **UNLEASHED** has in all events never been used by UMI in television programming; it does not exist. UMI therefore cannot satisfy the threshold

requirement for a trademark claim: that it made a use in commerce of the mark “sufficiently public to create ownership rights in the mark,” *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1196 (11th Cir. 2001). If UMI does not own this mark, it cannot sue for its alleged infringement on any theory. *Id.*, *HBP, Inc. v. Am. Marine Holdings, Inc.*, 290 F. Supp. 2d 1320,1327 (M.D. Fla. 2003), *aff’d.*, 2005 U.S. App. LEXIS 9169 (11th Cir. 2005).

II. ORLANDO UNLEASHED Is Not Distinctive

ORLANDO UNLEASHED is descriptive because it is made up of two terms that merely identify “a characteristic or quality of an article or service.” *Dieter v. B&H Indus.*, 880 F.2d 322, 327 (11th Cir. 1989). The two component terms that comprise **ORLANDO UNLEASHED** retain their descriptive significance in relation to UMI’s magazine; in combination they create only a composite mark descriptive of the magazine’s services. *See In re Oppedahl & Larson LLP*, 373 F.3d 1171 (Fed. Cir. 2004) (**PATENTS.COM** merely descriptive of computer software). UMI cannot claim exclusive rights to these descriptive terms. *In re Abcor Dev. Corp.*, 588 F.2d 811, 813 (C.C.P.A. 1978).

UMI has conceded that **ORLANDO** is descriptive, for it has disclaimed this component of its mark in the course of prosecuting its trademark application. (Att.1). But the term **UNLEASHED** used in combination with **ORLANDO** is also descriptive of UMI’s magazine services of “unleashing the city of Orlando on pets and their owners” through “printed publications . . . featuring information on pets, pet friendly places and pet friendly establishments.” (*Id.*, 208:5-8; Dkt.1, ¶6). Hence when combined together to create **ORLANDO UNLEASHED** these terms are descriptive of UMI’s magazine and its focus on

unleashing the City of Orlando's pet owners. This is evident from UMI's magazines (Att.8-9), which use the mark entirely descriptively, as well as Ms. Cousins' own testimony. (Att.2, Cousins 208:3 to 210:21). The descriptive nature of the term UNLEASHED is further evidenced by the existence of a plethora of third-party registrations containing this identical term. *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977) (commonly-used SCHOLASTIC merely descriptive of devising, scoring and validating tests); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer software for use in development and deployment of application programs). In the instant case, there are hundreds of trademark registrations that contain the term UNLEASHED. (Att.2, Cousins 220:17 to 241:22; Att.20-22, third party registrations). Many of these registrations are directed to goods and services in the pet industry; all of these registrations evoke the unleashed or unrestrained nature of the goods or services identified in the registrations.

If the mark **ORLANDO UNLEASHED** is descriptive, it has no inherent distinctiveness as a matter of law, and UMI must prove that the mark has acquired distinctiveness in order to claim any exclusive rights to it. UMI "has the burden of sustaining a high degree of proof in establishing a secondary meaning for a descriptive term." *Bavaro Palace, S.A. v. Vacation Tours, Inc.*, 203 Fed. Appx. 252, 255 (11th Cir. 2006). *See also Gift of Learning Found., Inc. v. TGC, Inc.*, 329 F.3d 792, 800 (11th Cir. 2003).

UMI cannot meet its burden of proving secondary meaning. UMI has only used **ORLANDO UNLEASHED** since October 2003. There were only printed four issues of

ORLANDO UNLEASHED prior to Orange TV's use of **PET PALS UNLEASHED** in January 2005. (Att.2, Cousins 35:21-23). UMI has no real evidence that its use of the name distinguishes its magazine. (*Id.*, 215:1-12; 240:10-13). The mark has not been in long use or in wide distribution; it is a limited distribution magazine with few subscribers or advertisers (*Id.*, 276:19 to 283:7; Att.19, Nesmith, Initial Rpt. 4-5). Neither is UMI the only entity to use **ORLANDO** and/or **UNLEASHED**. (Att.2, Cousins 220:17 to 240:13; Att.6, Suchy, ¶¶29-30). *In re Uncle Sam Chemical Co.*, 229 USPQ 233 (TTAB 1986) (§2(f) claim of acquired distinctiveness of **SPRAYZON** found persuasive where applicant had supporting sales figures and over eighteen years of substantially exclusive and continuous use). Neither has UMI provided evidence of substantial advertising expenditures or revenues to promote brand recognition. (*Id.*; Att.19, Nesmith, Initial Rpt., 5). *In re Redken Laboratories, Inc.*, 170 USPQ 526, 529 (TTAB 1971) (evidence by applicant held insufficient to establish acquired distinctiveness of **THE SCIENTIFIC APPROACH**, for lectures concerning hair and skin treatment, notwithstanding ten years of use, over \$500,000 in promotion and sponsorship expenses, and the staging of over 300 shows per year). UMI also has adduced no survey that shows that customers recognize UMI by the mark **ORLANDO UNLEASHED**. (Att.2, Cousins, 213:16-20). *In re Paint Products Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988).

Indeed the contrary inference is compelled by Orange County's survey evidence, which establishes that there was little awareness of **ORLANDO UNLEASHED** and there was no consumer confusion between the **PET PALS UNLEASHED** television program and the magazine **ORLANDO UNLEASHED**. (Att.18, Klein, Initial Report, 10-11). Thus it is

not surprising that expert analysis of UMI's financial information shows that it has none of the indicia of brand awareness: it has few paid subscribers and limited circulation, and little in the way of advertising revenue; it has never made a profit; it is by all appearances a failing company. (Att.19, Nesmith, Initial Rpt. 4-7). Nor has UMI provided survey evidence to establish that consumers do associate the claimed mark with a source for high quality magazine services. UMI simply cannot establish the existence of a material issue of fact over whether **ORLANDO UNLEASHED** has the acquired distinctiveness necessary to make the mark enforceable. *Gift of Learning Found., Inc. v. TGC, Inc.*, 329 F.3d 792, 801-802 (11th Cir. 2003).

III. There is No Evidence of a Likelihood of Confusion

UMI may argue that **ORLANDO UNLEASHED** is at least a suggestive mark, rather than a descriptive mark, and thus that secondary meaning is not required for it to succeed on its claims. If the Court accepts this contention, which the County disputes, the lynchpin of UMI's claims will be that of likelihood of confusion: can it prove the existence of a genuine issue of fact over the potential for confusion between UMI's use of **ORLANDO UNLEASHED** for an obscure limited circulation magazine and the County's former use of **PET PALS UNLEASHED** for a pet-related television show broadcast only on government sponsored cable channels in Orange County? Or on the Internet through a link embedded within Orange County Government's web page? To answer these questions, it is necessary to review the available evidence in light of the well-known confusion factors adopted in this circuit for determining whether a likelihood of confusion exists. *John H. Harland Co. v.*

Clarke Checks, Inc., 711 F.2d 966, 972 (11th Cir. 1983). UMI's overall proof must establish that "confusion, mistake, or deception [will] be *likely, not merely possible.*" *Custom Mfg.*, at 508 F.3d 651. Although the proper application of these factors to the evidence in a particular case will ordinarily create an issue of fact, summary judgment is the proper course where the evidence is "so one-sided that there can be no doubt about whether customer confusion is likely." *World Triathlon Corp., Inc. v. Dawn Syndicated Productions*, 2007 U.S. Dist. LEXIS at *24 (M.D. Fla. Sept. 28, 2007); *HBP, Inc.* at 290 F. Supp. 2d 1325. This is such a case.

The Strength of the Mark. Federal trademark law provides the greatest protection to strong trademarks. *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F. 2d 966, 973-975 (11th Cir. 1983). The strength of a mark depends both on its distinctiveness, and on the extent to which third parties have used it. (*Id.*, 973-975). Widespread third party use suggests that a mark is weak, and militates against a finding of likelihood of confusion. *John H. Harland Co.*, 711 F. 2d at 973-975; *Carnival Corp. v. SeaEscape Casino Cruises, Inc.*, 74 F. Supp. 2d 1261, 1265 (S.D. Fla. 1999).

UMI's mark falls on the weak end of the spectrum of trademark strength because it consists of the term ORLANDO – which is indisputably geographically descriptive – and the very common English word UNLEASHED. A mark that merely incorporates a "common English word is inherently weaker than a mark consisting of fanciful and fictitious terms." *World Triathlon Corp.*, at *12. What is more, the key word UNLEASHED is not only common but it is the subject of pervasive third party use throughout our culture – an important factor. *HBP, Inc.*, at 290 F. Supp. 2d 1329-1330 (Collecting cases). Numerous

trademark registrations contain the term UNLEASHED, and many such uses are directed to goods and services in the pet industry. (Att.2, Cousins 220:17 to 241:22; Att.20-22, third party uses). Likewise many word marks feature the word in combination with other words in a wide spectrum of contexts. (*Id.*). A recent Google search of the term “unleashed” in the advanced search mode returned 26 million hits. (Att.6, Suchy, ¶29). Orange TV’s staff rightly perceived UNLEASHED to be a common term, that posed no conflict between **ORLANDO UNLEASHED**, for a magazine, and **PET PALS UNLEASHED**, for a television program, precisely because of its wide-spread use in so many different contexts. (*Id.*, ¶¶ 29-30; Att.7, Bouffard, ¶¶15-18; Att.14, Rafey, 31:14-22). If UMI’s claimed mark is distinctive at all, it is doubtless of limited strength. *See Sun Banks of Florida, Inc. v. Sun Federal Sav. & Loan Assn.*, 651 F.2d 311, 316 (5th Cir. 1981) (extensive use of “sun” was “impressive evidence that there would be no likelihood of confusion between Sun Banks and Sun Federal”); *HBP, Inc.*, at 1329-1332 (widespread use of “Daytona” lessened range of protection for even incontestable marks); *Carnival Corp.*, at 74 F. Supp.2d 1265 (extensive third party use of “fun” “weakens the strength of the ‘Fun Ship’ mark”); *World Triathlon Corp.*, at *12-13 (extensive use of “ironman” made it unlikely that Ironman mark had strong trademark significance). *See also Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1240 (11th Cir. 2008) (absence of third party use of Health-Chem accorded mark “more strength and meriting further protection”).

The Similarity of the Marks. For this factor the Court must compare “the marks and considers the overall impressions that the marks create, including the sound, appearance,

and manner in which they are used.” *Frehling Enters., Inc. v. Int’l Select Group, Inc.*, 192 F.3d 1330, 1337 (11th Cir. 1999). What is the similarity between **ORLANDO UNLEASHED**, in the context of an obscure magazine with little circulation, and **PET PALS UNLEASHED**, for a government television program? Certainly it does not suffice to focus only on the fact that both marks use the term UNLEASHED. “The basic principle in determining confusion between marks is that marks must be compared in their entireties ... likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Hence when considering the appearance, sound, and meaning of **ORLANDO UNLEASHED** and **PET PALS UNLEASHED**, it is necessary that each mark be compared by looking at the marks as a whole, rather than breaking them into their component parts. *Little Caesar Enterprises, Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571 (6th Cir.1987). All relevant facts as to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar. *Packard Press, Inc. v. Hewlett-Packard Co.*, 56 USPQ2d 1351 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). For this reason the mere similarity of one portion of a mark will not suffice to bar registration; the addition of a single unique component to a mark can make a significant contribution, lessening any potential for confusion. *Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827 (8th Cir.1999); *Little Caesar Enterprises, Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571 (6th Cir. 1987) (no confusion between **LITTLE CAESAR** and **PIZZA CAESAR USA**); *General Mills, Inc. v. Kellogg*

Co., 824 F.2d 622, 627 (8th Cir. 1987) (the use of identical, even dominant, words in common does not automatically mean that two marks are similar); *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 1402 (CCPA 1970) (the mere presence of the word “peak” in **PEAK PERIOD** created no confusion or deception with the mark **PEAK**).

ORLANDO UNLEASHED and **PET PALS UNLEASHED** neither look alike nor sound alike; they do not share the same commercial impression. The predominant portion of the County’s mark is the distinctive term PET PALS, which UMI does not use and does not claim to use. PET PALS is a spin off of Orange TV’s long-standing show PET CHAT. The first producer of the revamped PET PALS show, Phil Rafey, added UNLEASHED to PET PALS because it fit better with the graphics that Mr. Rafey conceived for the program and added spice; he was not even aware of UMI’s magazine or its name at the time. (Att.14, Rafey, 14:4 to 18:12). Other county personnel who did know of the magazine liked the concept of adding UNLEASHED to PET PALS, for reasons that had nothing to do with UMI’s magazine. (*Id.*; Att.6, Suchy, ¶¶29-31; Att.7, Bouffard, ¶¶12-18). The marks also differ orally. When spoken aloud, UMI’s mark contains 2 words and 5 syllables starting with ORLANDO, while Orange County’s former mark contains 3 words and 4 syllables starting with PET PALS. The only similarity between the marks is the term UNLEASHED – a descriptive, weak, and commonly used term. As in the above-cited cases, the shared use of the term UNLEASHED does not suggest that the marks are confusingly similar. *E.g.*, *World Triathlon Corp.* at *16. Indeed the overall impression conveyed by these marks is against the inference of similarity. **PET PALS UNLEASHED** is simply not confusingly similar to

ORLANDO UNLEASHED.

Similarity of Products and Services. This factor requires a “determination as to whether the products are the kind that the *public attributes to a single source*, not whether or not the purchasing public can readily distinguish between the products of the respective parties.” *Frehling Enters.*, 192 F.3d at 1338 (emphasis added). The key inquiry is whether the services of the two parties are “so related in the minds of consumers that they get the sense that a single producer is likely to put out both,” such that a “reasonable consumer could possibly attribute the products here to the same source.” *Id.* Thus it is appropriate to ask whether a reasonable consumer of Orange County’s programming – the viewers of the junior user – could possibly attribute Orange TV’s show about pets, in which two hosts present segments about pets and otherwise promote the mission of Animal Services on two local government access cable stations, under the mark **PET PALS UNLEASHED**, to the *same source or producer* as the commercial magazine **ORLANDO UNLEASHED**? Clearly not.

There is no similarity between the format, content or overall impression conveyed by UMI’s magazine and the County’s television program; they are neither competitive nor complementary in their goods and services. *Parenting Unlimited, Inc. v. Columbia Pictures TV, Inc.*, 743 F. Supp. 221 (S.D.N.Y. 1990) (**BABY TALK** magazine different from defendant’s **BABY TALK** television show). UMI’s own franchisee, who is attempting to produce the magazine **CHESAPEAKE UNLEASHED**, rightly thought it absurd to suggest that any pet shows on television would compete with pet magazines. (Att.16, Hopkins, 58:19 to 60:7). Mr. Klein’s survey of Orange TV viewers could detect no evidence that viewers

associated **PET PALS UNLEASHED** with any magazine, let alone UMI's, and did not perceive that the County's programming emanated from the same source or producer as UMI's or any other magazine. (Att.18, Klein, Initial Rpt. 8-11). The evidence is decidedly in favor of the County on this factor.

Trade Channels and Outlets. This factor "takes into consideration where, how, and to whom the parties' products are sold." *Frehling Enters.*, at 1339. Though the parties' outlets "need not be identical . . . some degree of overlap should be present." *Id.* Here there is none. Orange TV is a non-profit which sells no advertising (Att.6, Suchy ¶10; Att.27, Triggs ¶4); it has no "trade outlets" as such. UMI produces a print publication that has almost no paid subscribers; its revenue, which has always been meager and has never returned a profit, comes from the sale of ads in its magazine (Att.19, NeSmith, Initial Rpt 4-7; Att.2, Cousins, 265:20 to 283:10). UMI's magazine is available for free at various pet related stores (Att.2, Cousins, 251:19 to 252:12); the County's show can be seen only on government access channels unless one chooses, as few apparently do, to watch the show via Internet streaming over the County's website. For a brief time the County did have copies of **ORLANDO UNLEASHED** free for the taking at Animal Services (Att.2, Cousins, 60:12 to 61:14 & 97:4 to 98:10), but there is no evidence that the County, in do so doing, attempted to link the magazine to its show to imply an association. (*Id.*; Att.7, Bouffard ¶¶15-18). It is implausible that the show would be perceived as occupying the same market as the magazine. (Att.16, Hopkins, 58:19 to 60:7). Mr. Klein's survey suggests that viewers of Orange TV have no recognition of the magazine at all; the "customers" of the parties have no apparent

relationship. (Att.18, Klein, Initial Rpt. 8-11). Clearly the dissimilarity of the parties' services, the distribution of their content, and the predominant consumers of their respective services lessen any possibility of confusion. *John H. Harland Co.*, 711 F.2d at 975. *Compare World Triathlon*, at *19-20 and *Carnival Corp.* at 74 F. Supp. 2d 1267 (two cruise providers lacked similarity in customers, bookings, and trade channels).

Advertising. The greater the similarity in the advertising campaigns of the parties, the greater the likelihood of confusion. *Ross Bicycles, Inc. v. Cycles USA, Inc.*, 765 F.2d 1502, 1508 (11th Cir. 1985). Here such similarity is impossible. Orange TV does not advertise in any meaningful sense of the term; it has no advertising budget, it does not promote even on other public channels; it has no way to advertise, other than an occasional collateral piece handed out to interested persons and an occasional sponsorship or trade (Att.27, Triggs, ¶¶ 4-8; Att.6, Suchy, ¶27), save a modicum of Internet coverage on the County's web site. As for UMI, it does not purchase advertising on television (Att.2, Cousins 241:17 to 243:22), though UMI's Cousins has appeared as a guest on Pet Chat – an opportunity Ms. McCommon accorded Ms. Cousins in order to give her magazine some exposure on Orange TV's show. (Att.2, Cousins, 54:3 to 56:22).

Intent. There is also no credible evidence that the County, in adopting **PET PALS UNLEASHED**, “intended to capitalize on plaintiff's good will.” *Int'l Stamp Art, Inc. v. United States Postal Serv.*, 456 F.3d 1270, 1275 (11th Cir. 2006). Orange TV's purpose in renaming its “Pet Chat” was to further the mission of the Animal Services Division, not to garner business by trading on UMI's alleged good will. (Att.6, Suchy, ¶¶23-32; Att.14, Rafey,

at 15:1 to 17:21; Att.7, Bouffard ¶¶8-18). Indeed the producer most responsible for adding the common word “unleashed” to “Pet Pals,” Phil Rafey, had never even heard of UMI’s magazine or mark; he added UNLEASHED because it appealed to him, not to trade on UMI’s little known trade name. (Att.14, Rafey, 16:18 to 17:21). Though other Orange County personnel were aware of the magazine, such as co-host Vanessa Bouffard, there is no evidence from which a jury could infer that such persons were motivated either to harm UMI or to trade on whatever good will the mark might enjoy. (Att.2, Cousins, 122:20 to 135:11 & 165:2 to 169:7; Att.7, Bouffard ¶¶1-18; Att.14, Rafey, 15:10 to 17:21). Nor is mere knowledge of the “senior user’s” mark sufficient to infer bad faith. *World Triathlon*, at *21-22. It is undisputed that Orange TV personnel who did know of the magazine saw no potential for confusion between **ORLANDO UNLEASHED** and **PET PALS UNLEASHED**, and even exerted efforts to help UMI increase its recognition in the community by inviting UMI’s Cousins as a guest on the show and by providing free copies of UMI’s magazine at the Animal Services’ office. (*Id.*; Att.2, Cousins, 97:4 to 100:18; Att.15, Trent, 18:18 to 25:2). Is this evidence of intent to profit unfairly? More importantly, the intent relevant to the confusion inquiry is intent to derive “a *benefit* from the plaintiff’s *business reputation*.” *Frehling Enters.* at 1340. UMI had no reputation that can be objectively verified. **ORLANDO UNLEASHED** was a start-up which had spent almost nothing on advertising or otherwise achieving a business reputation. Since its founding in 2003 UMI has garnered almost no paid subscribers, has earned only a paltry sum in advertising revenue, and has never made a profit; it has been financed only by Ms. Cousins’ borrowing. (Att.19, Nesmith, Initial Rpt. 4-7).

Moreover a competent survey of potential viewers of Orange TV's (the "junior user's") programming determined that **ORLANDO UNLEASHED** had *no recognition* and *none* of the respondents surveyed associated Orange TV's **PET PALS UNLEASHED** with any magazine, let alone UMI's obscure and effectively unknown mark. (Att.18, Klein, Initial Rpt, 8-11). How could any reasonable jury infer an intent on the part of the County to "benefit" from UMI's non-existent good will under these circumstances? (Att.7, Bouffard ¶¶7-18). If intent is usually a question for the jury, it is nevertheless true that it is not always so; in this case every objective factor that could be considered on intent is in the County's favor. *See, e.g., Int'l Stamp Art, Inc. v. United States Postal Serv.*, 456 F.3d 1270, 1274-75 (11th Cir. 2006) (summarizing cases addressing intent to trade on a mark's good will); *HBP, Inc.*, 290 F. Supp. 2d at 1337-38 (rejecting plaintiff's argument on subjective intent). The evidence actually supports the conclusion that it is UMI, not the County, that has acted with ill-intent. It was Ms. Cousins who registered, in an act of spite, the domain name www.petpalsunleashed.com. (Att.2, Cousins, 215:24 to 220:9); it was Ms. Cousins who prepared and filed a false application for **UNLEASHED** after this dispute had commenced. (*Id.*, 288:18 to 297:4); it is Ms. Cousins who is seeking damages when her own records show that she has suffered no injury. (Att.19, Nesmith, 4-7); and it was Ms. Cousins who used the trademarks of others without permission. (Att.2, 88:7 to 90:10). This conduct attests to UMI's unclean hands. *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450-51 (11th Cir. 1993).

The absence of confusion. Actual confusion is "the best evidence of likelihood of

confusion.” *Frehling Enters.*, at 1340. UMI has no credible evidence of actual confusion, and has provided no surveys showing a likelihood of confusion. *See HBP, Inc.*, 290 F. Supp. 2d at 1336. UMI’s “proof” of confusion consists of hearsay declarations of sales people at the Starbucks which Ms. Cousins has frequented since 2004 (Att.2, 195-200), and possibly the statements of professional friends invested in her success. But such self-serving claims of confusion are worthless. *Frehling Enterprises*, 192 F.3d at 1341 (distinguishing between self-serving claims of confusion and authentic incidents of confusion).

Orange TV, on the other hand, has gone to the trouble and the expense of a professionally conducted survey on the issue. As Mr. Klein’s report shows, there is no credible evidence of past or future confusion from the County’s now-abandoned use of **PET PALS UNLEASHED**. (Att.18, Klein, Initial Rpt., 3-11). Such surveys are entitled to weight, *E.g., Jellibean, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 843 (11th Cir. 1983), as is the plaintiff’s failure to obtain one. *HBP, Inc.*, at 290 F. Supp. 2d 1336.

The Composite Picture. It is not essential that a party “win” on *all* of the likelihood of confusion factors, but Orange County has shown that each and every one of the factors detailed above supports the conclusion that there is no likelihood of confusion between the parties’ marks. There are no triable issues of fact over the potential for confusion. *Custom Mfg.*, at 508 F.3d 652 -653 (11th Cir. 2007).

IV. UMI Has No Plausible Evidence of Injury

UMI also has no evidence that it has been injured by the County’s former use of **PET PALS UNLEASHED**. Its earnings, such as they are, did not appear to diminish while the

County's show was so named (Att.19, Nesmith, Initial Rpt. 4-7; Rebuttal Rpt.), and there is no evidence of any losses that can be causally linked to the County. (*Id.*). Its only damage theory is for the recovery of past royalties, a form of profit, for which there is no evidence (*Id.* Att.19, Nesmith Rebuttal Rpt.), and which is supported only by the "opinions" of a business broker with no qualifications to testify, who did not even look at UMI's financials (*Id.*; Att.17, Brenner, 8:1 to 64:1). Such speculative past royalties would not be recoverable even if UMI could prove liability. *See, e.g., St. Charles Manufacturing Co v. Mercer*, 719 F.2d 380, 382 (11th Cir. 1983) (plaintiff must prove causation of lost profits in dollars and cents); *Aronowitz*, 513 F.3d 1241 (jury must be supplied with evidence of injury proximately resulting from infringer's acts). The County has adopted a new mark, so UMI could not even lay claim to an injunction, or costs. *See, e.g., Tommy Hilfiger Licensing, Inc v. Goody's Family Clothing, Inc.*, 2003 U.S. Dist. LEXIS 8788 at *113-115 (N.D. Ga. 2003). Indeed, if one looks at the financial picture of this plaintiff, it is clear that UMI has no plausible case for claiming any injury linked to the alleged infringement. UMI's entire suit is opportunistic and lacking in merit. Summary judgment should therefore be entered in favor of the County.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2008, I presented the foregoing to the Clerk of the Court for uploading to the Case Management/Electronic Case Files (“CM/ECF”) System, which will send a Notice of Electronic Filing to:

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s/ Stephen D. Milbrath

Attachments to Defendant's Dispositive Motion for Summary Judgment

- Att. 1 **Orlando Unleashed** Trademark Application and File History, Cousins Depo. Ex. 3.
- Att.2: Deposition of Kim Cousins, Condensed Format
- Att. 3: Orange County Notice of Opposition and TTAB Acknowledgment
- Att. 4: TTAB Order Suspending Opposition Proceeding
- Att. 5: Trademark Office File Wrapper for the Mark **Unleashed**, Cousins Depo. Ex. 38
- Att. 6: Affidavit of Bill Suchy
- Att. 7: Affidavit of Vanessa Bouffard
- Att 8: **Orlando Unleashed** magazine, Cousins Depo. Ex. 4
- Att. 9: **Orlando Unleashed** magazine, Cousins Depo. Ex. 7
- Att 10: Cousins Depo Ex. 11, Bouffard email of July 23, 2004
- Att. 11: Cousins Depo. Ex. 14, Orange tv emails
- Att. 12: Cousins Depo. Ex. 24 regarding "trade" with UMI
- Att: 13: Cousins Depo. Ex. 25, regarding meeting over "trade" with UMI
- Att. 14: Deposition of Phil Rafey, condensed transcript
- Att. 15: Deposition of Greg Trent, condensed transcript
- Att. 16 Deposition of Jerri Anne Hopkins, condensed transcript
- Att. 17: Deposition of Rand Brenner, condensed transcript
- Att. 18: Declaration of Bob Klein and attached expert report

Att. 19: Declaration of Ted Nesmith and non-confidential excerpts of expert report and Rebuttal Report

Att. 20: Cousins Depo. Ex. 30: Third party registrations of **unleashed**

Att. 21: Cousins Depo. Ex. 31: Third party random goods and services using **unleashed**

Att.22: Cousins Depo. Ex. 32: Showing third party use of **unleashed**

Att. 23: Sample of Television Content for Orange Tv's **PET PALS UNLEASHED**, motion to file in CD format pending

Att. 24: Rafey Depo. Ex. 47 regarding Phil Rafey's Pitch for Pet Pals Unleashed

Att: 25: Hopkins Depo. Ex. 42, Chesapeake Unleashed Website, Home Page and first article

Att: 26: Hopkins Depo. Ex. 44, Chesapeake Unleashed Website, Home Page and All other Linked Pages.

Att: 27: Affidavit of Steve Triggs