TTAB

IN THE UNITED STAES PATENT AND TRADEMARK OFFICE

Applicant:	JOANNE SLOKEVAGE	BEFORE THE
Trademark:	FLASH DARE!/DESIGN	TRADEMARK TRIAL
Serial No.:	75/602,873	AND
Address:	348 EAST 81 STREET 1C NEW YORK, NY 10028	APPEAL BOARD 2900 Crystal Drive Arlington, VA 22202-3514
January 10, 2005		TM Atty: Douglas Lee

COVER LETTER

Respectfully, please immediately forward these papers to the Trademark Trial and Appeal Board.
The items enclosed are as follows:

1. REQUEST FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL TO THE FEDERAL CIRCUIT COURT OF APPEALS – Two (2) Pages (not including this cover)
2. AMENDMENT REQUEST FOR RECONSIDERATION 01/10/05 – six (6)) Pages
3. Signed and dated 01-10-05 Express mail Post Office to Addressee ER 008898964 US
4. A return receipt stamped post card stating above #1, 2, & 3.

Very Respectfully,
Joanne Slokevage Jan 10, 2005
Joanne Slokevage – Applicant Pro-se 212-772-3435

Express Mail Label # ER 008898964 US **Date of Deposit: 01/10/05**

I hereby certify that these papers **[REQUEST FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL TO THE FEDERAL CIRCUIT COURT OF APPEALS, and AMENDMENT REQUEST FOR RECONSIDERATION 01/10/05]** are being deposited with the United States Postal Service using "Express Mail Post Office To Addressee " service under 37 CFR 1.10 on the date indicated above and is addressed to "US Patent and Trademark Office, TTAB, 2900 Crystal Drive, Arlington, Virginia, 22202-3513."

Joanne Slokevage (Pro se applicant) Signed: Joanne Slokevage Jan 10, 2005

Serial Number: 75/602,873

1 of 1

01-11-2005

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #66

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January , 10, 2005		TM Atty: Douglas Lee

REQUEST FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL TO THE FEDERAL CIRCUIT COURT OF APPEALS

The applicant respectfully requests a thirty (30) day extension of time in accordance with Trademark Rule 2.145(e) to file a Notice of Appeal from the decision of the Trademark Trial and Appeal Board of November 10, 2004 for the following reasons

1. Judge Bucher returned phone call to applicant on 12/14/04 and said the 12/10/04 Disclaimer wording was not acceptable, and that he would speak to the lead judge call the applicant back. Probably due to Hanukah, Christmas, and New Year's, the Judge did not call. The applicant was reluctant to call again and appear to press the judge, and so just waited. On 01/06/05 the applicant categorically withdrew the 12/10/04 Disclaimer.
2. Applicant has been trying to submit an acceptable disclaimer. A 01/06/05 Disclaimer has been submitted. Enclosed under the same cover here is a REQUEST FOR RECONSIDERATION 01/10/05. Applicant very respectfully requests that the Board use its discretion to construe the Extension Request paper filed on 12/10/04 as a Request For Extension for Reconsideration, which would permit examination of both the 01/06/05 Disclaimer and REQUEST FOR RECONSIDERATION

01/10/05 based on the new disclaimer. This is requested because the two questions discussed with Judge Bucher are not only the wording of the disclaimer, but substance as well. Therefore an idea that has not been previously recognized by the Examining Attorney, the Board, or the applicant, is proposed in the 01/06/05 Disclaimer Amendment which may result in an acceptable disclaimer to the Board.

3. The other and related reason the applicant requests the Board review the REQUEST FOR RECONSIDERATION 01/10/05 is that in the decision of 11/10/04, on page 7, in footnote 2, there is a factually incorrect description of another mark, Supplemental Registration No. 2168684. There is a Definition of Mark on the Drawing Page of that application, which the footnote strays from, and the Amendment Request For Reconsideration 01/10/05 discusses the differences. On point, the applicant amendment 01/10/00 particularly notes on page 8, "Importantly, the drawing of this trademark application is the mark, not all the various drawings of the design patent."

The applicant appreciates the Board's attention in this very important matter.

I can be reached by phone at 212-772-3435.

Very Respectfully,
Joanne Slokevage 1/10/05
Joanne Slokevage - Applicant pro-se

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Joanne Slokevage (Pro se applicant) Signed: Joanne Slokevage
Jan. 10, 2005

Serial Number: 75/602,873

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AMENDMENT REQUEST FOR RECONSIDERATION 01/10/05

The Board and the Examiner have focused on the subject matter "portion" of the instant mark which is also on the Supp. Reg. alone. In the context of an inherently distinctive composite (which the Board has already acknowledged the instant mark is) there is no reason to view the clothing feature as *a* component, e.g., the "holes" are a distinctive component of the composite, whereas the flaps, however unusual due to there shape and slant within the composite, are variations on commonplace flaps *when viewed alone.* The "holes" modify the words "Flash Dare!"; the "holes" and words are not separable, and therefore the "holes" do not require a disclaimer.

The "Flash Dare!"/clothing feature composite mark is design construct which functions immediately to identify and separate the line from others in the field. It does this very effectively, otherwise the Board would not have permitted it to proceed to publication (with disclaimer). The elements are linked visually by the "vee" shaped angle the words are displayed on matching the "vee" shaped upper borders of the "holes", which flank the Flash Dare! label. The meaning between the words and the "holes" is such that the "holes" are intrinsic and essential to the single distinct commercial message. Board acknowledges

this commercial message, or otherwise would not permitted publication(with disclaimer). Although the Board simply states that the mark is not unitary on page 5, no evidence is offered to rebut all of the evidence in the record already entered and asserted by applicant in the briefs. TMEP1213.07 Removal Rather Than Disclaimer (within the Unitary Matter section) shows that the Board clearly acknowledges that *the clothing feature is part of the mark.* Further, that the mark is distinctive as-applied-for.

The only issue now is which elements of the distinctive composite are unregistrable. The decision by the Board does not address the fact that the "holes" modify and define the words "Flash Dare!" very precisely. Within the mark, it is the "holes" which relate to the other elements forming an inherently distinctive composite. Therefore they are *not* separable elements. Case law is clear on this. The flap components are disclaimed by the applicant, as they cannot be said to be intrinsic to the "peek-a-boo" "dare-to flash" message. There is no reason within the instant mark, to consider the hole and flaps as *a component*, and require a disclaimer of them as a unit. In fact, it is unreasonable to do so. Within the mark, each relates to the other matter within the mark differently. It is wholly straying from what is right to not acknowledge this.

On page 6 of the 11/10/04 decision, the Board states:

> [The sole issue before us is whether the product design features of this composite matter can be considered to be inherently distinctive.]

and:

> [We find that applicant's unusual "product design" qua trade dress will not be regarded as a source indicator at the time of its introduction:]

The Board seems unaware that it is *now only looking at part of the mark.* A mark must be judged as a whole. Since the instant mark was created almost concurrently with the Supp. Reg. mark, it is insignificant in terms of its introduction. The applicant began with the

Supplemental Registration subject matter, but shortly began creating the improved, or instant mark. The instant mark must be judged on its own merits.. The Board cannot take the position of choosing not to acknowledge the entrance into the marketplace of the inherently distinctive composite mark. It is a fact that the Examiner and the Board found *no conflicting marks in the instant application.* Therefore, the Board cannot reasonably hew to a course of regarding the instant mark as if there is a conflicting mark, or as if there is an opposition in play, e.g. that a competitor appropriated the Supp. Reg. mark before the introduction of the instant mark (inherently distinctive) into the marketplace. In due course, any bona fide opposer will have their opportunity to protect their own interests. It is not for the Board to adopt that stance.

Respectfully, the Board may examine a number of important points:

1. The Board has equated acquired distinctiveness with disclaimer. On page 7:

   ["this holes and flaps product design may not, as the Supreme Court held in *Walmart v. Samara, supra*, be registered absent a showing of acquired distinctiveness (or a disclaimer).]

First, *Walmart v. Samara, supra*, is not a trademark case, and the decision never deals with word/design feature composite marks. Secondly, within the composite, in view of the single distinct message, the "holes" are registrable matter. A word such as "inc." may be unregistrable matter under section 6 of the Act, but the "holes" are clearly registrable without disclaimer under the existing conditions.

2. *In re J.R. Carlson Laboratories, Inc.* 183 U.S.P.Q. 509, 511 (TTAB 1974) states:

   [...and it would be improper to disclaim a portion of its mark which aids in distinguishing applicant's mark and goods from the marks and goods of others.]

and,

[...it is believed that it serves an additional function as *a salient feature* of applicant's trademark.] and,

[Moreover, registration of a compound mark is merely recognition of rights in the mark as a whole and does not create or recognize any proprietary rights in the components apart from each other.]

Based on the above Board ruling, it is inconsistent to require the "hole" components of the instant mark to be disclaimed.

The unique nature of the "holes" per se is evidenced by the design patent and prior art entered into the design patent, definitively and strikingly "teaching away" from exposure of anything, underclothing or skin, through inadvertent lapses in covering up one's rear. There was nothing anything like the instant Flash Dare! Sportswear mark when it entered the marketplace; it was a true departure from the commonplace. It is rare.

Also, with respect, the Board has misstated on page 7 of 11/10/04 decision in footnote 2:

{...applicant has registered on the Supplemental Register [see Reg. No. 2168684] a drawing of one side of this clothing feature (e.g., where the flap, when affixed to the right, seat pocket button, creates a hole) ...}

Respectfully, the applicant has registered a mark, not a drawing, and there is no "seat pocket button", as there is no pocket in the drawing (not all Flash Dare! garments have back pockets, and, when present, they do not affect the look of the mark to the public.) The actual wording of the Description of Mark on the Drawing page of the Supp. Reg. is:

{The mark consists of a clothing feature on the rear hips comprised of a cut-out area, or "hole", and a flap affixed to the seat area with a closure device.}

Of note, it states, "a flap affixed to the seat area"; not "when affixed...it creates a hole".

The mark does not change from garment to garment within this line, regardless of whether the garment has back pockets or not.

Also, regarding the instant mark and the Board's footnote 2, the Applicant Amendment 01/10/00 particularly states on page 8:

> [The applicant is aware that the existence of a design patent has no bearing as regards the issue of distinctiveness of a trademark. I submit the design patent as a *contributing factor* to finding the subject matter of this mark highly distinctive and unusual in my field. Importantly, the drawing of this trademark application is the mark, not all the various drawings of the design patent.]

The mark has no variations.. The design patent has variations; the mark is a set composite as presented on the Drawing page, the specimens, and all the evidence. The mark has a fixed appearance when marketed and there is no hint of selling a "Flash Dare! open-n-close" flap, it is called a "Flash Dare! cut-away flap". All advertising copy in the record evidences that fact. Not withstanding, a purchaser may iron the unbuttoned flap flat before buttoning it after laundering, depending on the fabric (otherwise it might remain wrinkled around the button, the same as a breast flap on a shirt). Apart from this maintenance, the applicant has no reason to think that this changes the way the mark impacts the public, or change the way the buyer wears the garment. The Board has presented no reason to believe this. In fact the record supports the view that the mark is stressed as a mark, a static "Flash Dare! cut-away flap. For the applicant to do otherwise would be counter productive to the mark's consistent immediate recognition by the public, and the record shows it is not the case. The practice of sewing extra buttons for "keeping the shape" during laundering was dropped (the file already records this) early on as being impractical, due to unnecessary expense of buying all the extra buttons and cost of sewing them on.

Also, the Board on page 4, after using the words 'directed to girls and young women", the Board continues in the same paragraph,

"she [applicant] seems to argue...suggesting the wearer might "dare-to-flash" some skin on her posterior."

The single distinct "peek-a-boo" message exists even if what is "peeked at" or "flashed" is a shirt tucked in; there is no requirement for "bare skin on her posterior". The wording in evidence from *Teen* Magazine demonstrates this. It is an eye-catching mark simply because it employs elements *never seen before in the field*, (the "hole" portion is particularly unique) combining in a single distinct commercial message. It doesn't matter what the clothes are worn with; that is totally irrelevant. The commercial message resides within the mark itself; the "Flash Dare! holes" suggest peeking through somewhere that previously you've not been used to seeing through. It is impossible to miss – it so obviously tells source immediately to the public. That is the essence of the mark. The mark is rare; even the Board called it "unusual" on pg.7.

Therefore, the applicant respectfully disclaimed the flaps component on 01/06/05.

The applicant appreciates the Board's attention in this very important matter.

I can be reached by phone at 212-772-3435.

Very Respectfully,
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