

Exhibits

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In The Matter of Application Serial Nos. 76/103,447 and 76/103448  
Published In The Official Gazette of May 22, 2001  
and April 24, 2001, Respectively



Mark: HYPERSONIC

-----X

Central Mfg. Co., :

Opposer, : Opposition No. 123,765

- against- :

Paramount Parks Inc., :

Affidavit

Applicant. :

-----X

STATE OF NEW YORK )

: SS.:

COUNTY OF NEW YORK )

Lacy H. Koonce, III, being duly sworn, deposes and says:

1. I am associated with the firm of Kay & Boose LLP, counsel to Paramount Parks Inc. ("Paramount"), Applicant in the above-captioned opposition. I have personal knowledge of the matters set forth herein.

2. I submit this affidavit in support of Applicant's opposition to the motion of Opposer Central Mfg. Co. ("Central") for summary judgment, and of Applicant's cross-motions for

dismissal and for sanctions.

3. This Opposition was filed on or about September 7, 2001, on behalf of Opposer "Central Mfg. Co.", purported owner of Registration No. 1,593,157 for HYPERSONIC in International Class 28 for certain types of sporting goods. A copy of the opposition is annexed hereto as Exhibit 1. The original registrant was S Industries, Inc., but at some point S Industries assigned Registration No. 1,593,157 to Central. A copy of a trademark report showing this transfer is annexed hereto as Exhibit 2.

4. Paramount filed its answer on October 15, 2001. A copy of the answer is annexed hereto as Exhibit 3.

5. Opposer served discovery requests on Paramount on September 27, 2001, and shortly thereafter Paramount served discovery requests on Opposer. A copy of Opposer's discovery requests is annexed hereto as Exhibit 4; copies of Paramount's discovery requests are annexed hereto as Exhibit 5. Paramount produced written responses to Opposer's requests, along with responsive documents, on November 5, 2001, and stated that it would produce further, confidential documents after entry of an appropriate protective order. Applicant provided a draft confidentiality order for Opposer's review on that same date.

6. Opposer's discovery responses were originally due on December 3, 2001, but it did not serve its responses in a timely fashion. On December 11, 2001, Applicant wrote to Opposer, reminding Opposer of its discovery obligations and noting that Opposer had not addressed the issue of confidentiality. A copy of that letter is annexed hereto as Exhibit 6.

7. During this same time period, Opposer filed a series of motions with the Trademark Trial and Appeal Board, including a motion to strike certain of Applicant's affirmative

defenses; a motion to test the sufficiency of Applicant's responses to Opposer's requests for admission; and a motion for a protective order. Opposer took the position, contrary to the applicable procedural rules, that all or some of these motions stayed discovery, and refused to respond to Paramount's discovery requests for eight months.

8. In its order of July 24, 2002, the Board denied all of Opposer's motions, and rejected Opposer's argument that discovery was stayed, ordering Opposer to respond to Paramount's discovery requests within thirty days, i.e., August 24, 2002. A copy of the Board's order is annexed hereto as Exhibit 7.

9. Applicant received written responses to its discovery requests from Opposer over a week late, on September 3, 2002. The certificate of service showed a date of August 21. No responsive documents were produced at that time. Copies of Opposer's written document response is annexed hereto as Exhibit 8.

10. Opposer's response to the 28 interrogatories propounded by Applicant consisted of a lone statement that "Opposer respectfully asserts that Applicant's interrogatories when considering the definitions and instructions, along with the actual Interrogatories exceeds the limit of Interrogatories that the Applicant is allowed to put forth." Annexed hereto as Exhibit 9 is a copy of Opposer's first set of interrogatory responses. At the same time, Opposer filed yet another motion, this one to dismiss Applicant's counterclaim for abandonment.

11. Opposer responded to 10 of Applicant's document requests by stating it would produce only "representative documents". In response to Applicant's request for documents relating to the date of first use of each product sold or distributed under Opposer's mark, Opposer stated that it has no such documents. In response to other requests, Opposer stated that it has no documents

demonstrating actual confusion between Opposer's and Applicant's marks, and has no documents sufficient to identify the potential or targeted class of customers sold under Opposer's mark. Opposer objected to Applicant's request for documents sufficient to identify the annual dollar volume of goods sold under Opposer's mark on the grounds that such information is confidential, and stated that it does not have documents in its possession sufficient to identify the annual dollar volume of goods sold by Assignor and its licensees prior to assignment. Finally, Opposer objected to the production of documents relating to the manufacture, purchase, use or sale by Assignor, Opposer and their licensees of products identified in Opposer's registration, and of products listed in Applicant's application, under Opposer's mark, on the grounds that no time period was specified.

12. Another attorney in this office called Opposer on September 4, 2002 to discuss Opposer's responses, and spoke to its president, Leo Stoller ("Stoller"), who refused to explain how Applicant's 28 interrogatories exceeded the 75 permitted under TTAB rules, and demanded that Applicant delete the instructions and definitions in Applicant's request. Stoller confirmed that Opposer was refusing to produce all responsive documents for those responses in which Opposer stated that only "representative" documents would be produced.

13. I spoke to Stoller a week later, and in that conversation, Stoller agreed to answer Paramount's interrogatories and produce documents no later than September 27, 2002. I agreed to send Stoller yet another draft confidentiality agreement, and Stoller agreed to waive any objections as to confidentiality once that agreement was signed. Further, I told Stoller that Applicant would agree to preliminarily limit its document requests to a four-year time period, in exchange for an agreement from Opposer to produce all responsive documents (rather than representative ones). Reminded of Applicant's similar courtesy the previous year, Opposer agreed to produce copies of

the responsive documents to us in New York, rather than force us to review those documents in Chicago. A copy of a letter confirming this conversation is annexed hereto as Exhibit 10.

14. In late September, Opposer served revised written responses to Applicant's interrogatories. A copy of that response is annexed hereto as Exhibit 11. In its responses, Opposer refused to respond to half of the requests, including virtually every interrogatory related to the use and licensing of Opposer's mark. Opposer also did not provide documents as promised, but instead stated in its cover letter that the documents would be "made available were [sic] our records are maintained herein [sic] Chicago." A copy of that letter is annexed hereto as Exhibit 12.

15. We immediately wrote to Opposer requesting an explanation for the deficiencies, giving Opposer a deadline of October 8 for response. A copy of that letter is annexed hereto as Exhibit 13. On October 4, Stoller wrote back stating that he would be out of his office the following week and that Opposer would "file our response" on October 11. A copy of Stoller's letter is annexed hereto as Exhibit 14. In response to a request for clarification of what Opposer would be producing on October 11, Stoller faxed another cryptic reply stating "Today is Friday 10/4//02. I will not be in my office until Thursday Oct 10, 2002." A copy of the request for clarification and Stoller's response is annexed hereto as Exhibit 15.

16. This statement (among others) was clearly disingenuous. On October 7, Applicant received a letter from Opposer stating that Opposer filed on October 5, 2002 the current motion for summary judgment and that all proceedings were thereby suspended, and threatening Applicant with a Rule 11 motion if Applicant filed any subsequent motions during the pendency of the motion for summary judgment. A copy of that letter is annexed hereto as Exhibit 16. Although this letter was delivered by facsimile, only the first page of the motion was included. On October

10 we wrote to Opposer asking for a service copy. A copy of that letter is annexed hereto as Exhibit 17. Rather than providing a copy, Stoller sent a facsimile stating that the mail outside of Chicago was slow and that Opposer would stipulate that Applicant would have 20 days from actual receipt to oppose the motion; however, this apparent courtesy was followed the next day with a request for more time to produce documents. Applicant denied this request. Copies of Stoller's faxes and the responses thereto are annexed hereto as Exhibit 18.

17. We finally received Opposer's motion on October 15, 2002 (postmarked October 10). Review of those papers revealed that the first page differed in content from the purported first page of the motion faxed to us on October 7, including differences in the purported certificate of mailing to the TTAB, suggesting that the version of the motion actually filed and served was revised after Stoller's letter of October 7, which suggested it had already been filed. Copies of the first pages of Central's motion and memorandum, and certificates of mailing and service, are annexed hereto as Exhibit 19. Subsequent conversations between the parties ensued, in which Opposer rejected Applicant's request to inspect documents immediately, stating that the first day that was possible was October 30. Applicant agreed to that date, but in the interim received a suspension order from the Board stating that all proceedings were suspended until Opposer's motion to dismiss was decided. No further discovery has been taken in this proceeding.

18. Based on research on the Patent & Trademark Office's website, there appear to be several other third party word marks for HYPERSONIC that have been registered since Opposer registered its mark, in International Classes no less similar to the one in which Opposer's mark is registered. A copy of the relevant website search is annexed hereto as Exhibit 20.

19. Based on research in public sources of information such as the Internet, we have been unable to locate any references to actual sales by Central of any types of goods bearing the mark HYPERSONIC.

Lacy H. Koonce, III

LACY H. KOONCE, III

Subscribed and sworn to before me  
this 11<sup>th</sup> day of April, 2003

Loretta E. Perry

Notary Public

LORETTA E. PERRY  
NOTARY PUBLIC, State of New York  
No. 24-4931617  
Qualified in Kings County  
Commission Expires August 1,

2006