

TTAB

IN THE UNITED PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

CENTRAL MFG. CO.
(a Delaware Corporation)
P.O. Box 35189
Chicago, IL 60707-0189

Opposer,

Opposition No: 91123765

vs.

Trademark: HYPERSONIC

PARAMOUNT PARKS, INC.
8720 Red Oak Blvd.
Charlotte, North Carolina 28217

Applicant

06-07-2004
U.S. Patent & TMO/tm Mail Rpt Dt. #22

Box TTAB/NO FEE

MOTION¹ FOR SUMMARY JUDGMENT²

NOW COMES the Opposer, and hereby moves for Summary Judgment pursuant to F.R.C.P. 56 of the Federal Rules of Civil Procedure and §2.116 of the Trademark Rules of

1. Opposer withdraws its motion for an extension of time.

2. The Opposer has submitted the deposition of its President, LEO STOLLER, in support of this Motion for Summary Judgment. Leo Stoller had submitted himself to a four and one half hour discovery deposition on April 21, 2004 at which time the Applicant did not care to mention during the entire course of Opposer's deposition any deficiencies in Opposer's written responses to Applicant's interrogatories and production of document requests. The Opposer has fully cooperated with the Applicant with all of its written discovery requests and including the attending of a lengthy deposition. During the course of the deposition, the Applicant had threatened to file a motion to compel against the Opposer for alleged failure to fully respond to Applicant's interrogatories and production requests. See page 173 of the Stoller deposition.

"MR. STOLLER" All I'm saying is you have had an opportunity to question me on any interrogatory you chose, my answer in any production request answer I made and I stand here and I have been here ready to answer any of those questions you had, and I think your threat to file a motion to compel when I fully complied with your request is outrageous in view of my cooperation -- my full cooperation with you, and I think the board will view it as such if you should file a baseless motion to compel.

Because I have produced -- and lastly on the record -- all the documents in my possession that I have available that I was able to locate, and as far as the interrogatories are concerned, this was your opportunity to ask any further questions regarding my objections."

Practice in its favor, sustaining its Notice of Opposition and denying Applicant's alleged Trademark Application SN: 76-103,447 and 76-103,448, for the mark **HYPERSONIC**.

This motion is made on the numerous grounds including that Application SN: 76-103,447 and 76-103,448 consist of or comprise of a mark **HYPERSONIC**, which is confusingly similar to Opposer's mark *HYPERSONIC* and tradename previously used in the United States and not abandoned, as to be likely when applied to the goods of the Applicant, *t-shirts, sweatshirts, hats, jackets, pajamas, masquerade costumes, tank tops, footwear, sweatpants and shorts*, in International Class 25, and for *paper goods and printed matter, namely, calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, postcards, gift wrapping, bumper stickers, and rubber stamps*, in International Class 16, to cause confusion or mistake or deception.

The Board should sustain Opposer's opposition based upon the facts revealed in the Applicant's responses to Opposer's discovery.

In the matter of Intent to Use Application SN: 76-103,447; Filed: August 2, 2000; Published Date: May 22, 2001, for the mark **HYPERSONIC**, Int. Cl. 25 for namely, *t-shirts, sweatshirts, hats, jackets, pajamas, masquerade costumes, tank tops, footwear, sweatpants and shorts*; and First Use Application SN: 76-103,448; Filed: August 2, 2000; Published Date: April 24, 2001, for the mark **HYPERSONIC**, Int. Cl. 16 for namely, *paper goods and printed matter, namely, calendars, fiction magazines, comic books, greeting cards, posters, a series of fiction books, trading cards, stickers, notepads, notebooks, postcards, gift wrapping, bumper stickers, and rubber stamps*.

The Opposer, hereinafter referred to as ("*HYPERSONIC*") like McDonald's Corporation, uses it's well known *HYPERSONIC* mark as a trade name, corporate name, service mark and trademark¹ since at least as early as 1988 as a Predecessor-in-Interest, and is engaged in

1. §16.13 **McCARTHY ON TRADEMARKS, II. Ownership. Who Is Owner Of Trademark, [1] Introduction**, Trademarks have often been held to be a kind of "property." In discussing "ownership of a trademark, we must recognize that we are dealing with intangible, intellectual property. "Ownership" means that one possesses a right which will be recognized and upheld in the courts: To say one has a "trademark" implies ownership and ownership implies the right to exclude others. If the law will not protect one's claim of right to exclude others from using an alleged trademark, then he does not

The Opposer also holds common law rights in the mark *HYPERSONIC* on numerous goods, including *sports racquets, namely tennis racquets, racquetball racquets, golf clubs, golf balls, tennis balls, sports balls, namely, basketballs, baseballs, footballs, soccerballs, volleyballs, crossbows, tennis racquet string and shuttlecocks*, and has priority of use on similar, competitive and related goods, See Registration No: 1,593,157, and the attached depositions of Leo Stoller and Raymon Weber and the true and correct exhibits attached there to. Therefore opposes registration of the confusingly similar mark *HYPERSONIC* , Intent to Use Application SN 76-103,447 in Int. Cl. 25 and Application SN 76-103,448 in Int. Cl. 16.

Opposer has established that it has priority of use and continuous use of the mark *HYPERSONIC* on similar, related and competitive goods, through clear and convincing and unrefuted, unrebuted evidence which is contained in the attached depositions of RAYMOND WEBER, a customer of the Opposer, and LEO STOLLER's deposition with verified attachments which clearly proves beyond a reasonable doubt that Opposer is the *senior* user of the *HYPERSONIC* mark. Secondly, the Opposer has continuous use of the *HYPERSONIC* mark which the Opposer requests that the Board dismiss Applicant's counterclaim for cancellation. Thirdly, that there is actual confusion between the Applicant's *HYPERSONIC* mark and the Opposer's *HYPERSONIC* mark. See Raymond Weber deposition and exhibits attached thereto.

The Opposer has through the sworn depositions of LEO STOLLER and RAYMOND WEBER, submitted evidence that demonstrates Opposer's use of its mark in connection with the identified goods years prior to Applicant's said application to register.

The Opposer, in another decision dated April 28, 2004, issued by Judges Quinn, Holtzman and Rogers, Cancellation No. 92042735, *Daymen Photo Marketing, Ltd. v. Central Mfg. Inc.*,

...Continued...

own a "trademark", for that which all are free to use cannot be a trademark. Application of Deister Concentrator Co., 48 CCPA 952, 289 F.2d 496, 129 USPQ 314 (1961). Trademark ownership inures to the legal entity who is in fact using the mark as a symbol of origin. The Federal Trademark Register can be rectified in order to correct the ownership of a registered mark or a pending application. Chapman v. Mill Valley Cotton, 17 USPQ2d 1414 (TTAB 1990) (Opposer Alpha alleged that she, not applicant, owned the mark. Applicant was a joint venture composed of parties Alpha and Beta. After some litigation in state court, the parties filed an assignment from party Beta to party Alpha amounting to a concession that Alpha was indeed the owner of the mark. The Board viewed the TLRA 1989 amended version of §18, which permits rectifying the "register" as broad enough to include changing the name of the owner of an application, as well as of an issued registration.

submitted the identical type of evidence that was submitted and verified through the depositions of LEO STOLLER and RAYMOND WEBER. The Board found that Opposer's evidence submitted in the *Daymen Photo Marketing* case "... purports to demonstrate that it did use its mark in connection with the identified goods - ten years prior to its application to register. This evidence - if unrebutted - would appear to clearly negate petitioner's ground for cancellation." In the case at bar, Opposer's evidence submitted through the said depositions, is unrebutted and clearly negate Petitioner's counterclaim for cancellation and supports the central allegations contained in Opposer's Notice of Opposition. The Opposer is the senior user of the mark *HYPERSONIC*. The Applicant is the junior user. The Opposer has unrebutted evidence which establishes that it used the mark *HYPERSONIC* on identical and/or closely related goods of the Applicant. The Opposer has demonstrated through the RAYMOND WEBER deposition, actual confusion, as between the parties' marks.

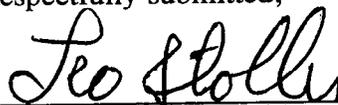
In summary, through the unrebutted discovery depositions of LEO STOLLER and RAYMOND WEBER and the verified exhibits attached thereto, the Opposer has clearly established its superior rights in and to the mark *HYPERSONIC* on similar, competitive and related goods to those of the Applicant.

WHEREFORE, the Opposer prays that the Board grant its Motion for Summary Judgment, denying Applicant registration of the mark sought to be registered, and to dismiss Applicant's counterclaim for cancellation with prejudice.

Opposer's motion is supported by true and correct copies of:

- (1) Discovery Deposition of Leo Stoller;
And attached exhibits.
- (2) Discovery Deposition of Raymond Weber;
And attached exhibits.
- (3) Declaration of Leo Stoller;
- (4) Opposer's said *HYPERSONIC* Registration;

Respectfully submitted,



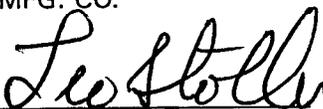
By: Leo Stoller, President
CENTRAL MFG. CO, Opposer
P.O. Box 35189
Chicago, Illinois 60707-0189
773 283-3880 FAX 708 453-0083

Dated: June 4, 2004

DECLARATION

The undersigned, Leo Stoller, declares that he is the President of CENTRAL MFG. CO., that he is authorized to execute this document on its behalf, that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

All documents that are hereto attached are verified as copies of original documents. Opposer declares that it is the owner of all of the said HYPERSONIC registration that is relied upon in the Notice of Opposition. The Registrant of Record is CENTRAL MFG. CO.

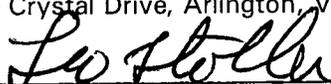
By: 
Leo Stoller, as President of
CENTRAL MFG. CO., Opposer

Dated: June 4, 2004

Certification of Mailing

I hereby certify that this Motion for Summary Judgment is being deposited with the U. S. Postal Service as first class mail in an envelope addressed to:

Box TTAB/NO FEE
Assistant Commissioner of Parents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513



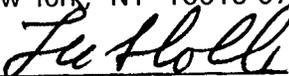
Leo Stoller

Date: June 4, 2004

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing MOTION FOR SUMMARY JUDGMENT to be served upon the Applicant by mailing a copy by **Express Mail No: ER 856126882 US** with the U.S. Postal Service, postage prepaid, addressed to:

Lance Koonce
DAVIS WRIGHT TREMAINE LLP.
1633 Broadway
New York, NY 10019-6708



Leo Stoller

Date: June 4, 2004

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