

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

9/25/08
Opposition No. 91164764



09-25-2008

U.S. Patent & Trademark Office Report Form #54

**APPLICANT BRINKMANN'S MOTION FOR PARTIAL SUMMARY
JUDGMENT TO DISMISS OPPOSER'S CLAIM OF DILUTION**

I.

INTRODUCTION

Pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE and 37 C.F.R. § 2.127(e)(1), Applicant The Brinkmann Corporation ("Brinkmann") respectfully submits this motion for partial summary judgment to dismiss the claim of dilution asserted by Opposer Brink's Network, Incorporated ("Brink's Network").

Opposer's allegation of dilution under Section 43(c) of the Trademark Act fails as a matter of law because, based on the undisputed record, Opposer is guilty of laches. Opposer has had constructive notice of Applicant Brinkmann's mark BRINKMANN *for nearly 30 years* without objecting to it. Not only has Opposer never challenged Applicant Brinkmann's pre-existing BRINKMANN registrations, but its opposition is limited to just a few goods in one class

of Applicant Brinkmann's multi-class application, which itself is fatal to Opposer's claim of alleged dilution. Applicant Brinkmann is threatened with material economic prejudice resulting from Opposer's unreasonable delay in asserting its rights, because Applicant has continued to use and expanded use of the BRINKMANN mark as its house mark *for nearly all of its products* and has spent over 30 years investing in and developing the mark's valuable goodwill. To change its mark now, based on Opposer's unreasonable and belated objection, is simply out of the question.

In addition, Opposer cannot even demonstrate that its use of the marks in six out of the eight current registrations¹ asserted in its NOTICE OF OPPOSITION began prior to Applicant's first use of its BRINKMANN mark, much less that they became famous prior to Applicant's first use. Opposer's claim of dilution must fail as a matter of law on this ground as well.

Applicant's motion is based on (i) the pleadings in the present proceeding, (ii) Opposer's responses to Interrogatory Nos. 2 and 25 of Applicant's AMENDED FIRST SET OF INTERROGATORIES, (iii) Applicant's prior registrations, Reg. No. 1,153,730 and Reg. No. 2,779,986, and (iv) the Declaration of J. Baxter Brinkmann, President of Applicant Brinkmann. The foregoing evidence demonstrates that there are no genuine issues of material fact with respect to Opposer's alleged claim of dilution, such that Applicant is entitled to judgment as a matter of law on this issue.

¹ Opposer's Reg. No. 2,476,114 for BRINK'S HOME SECURITY & Design was cancelled on May 9, 2008 for failure to file a declaration of use, according to PTO records. Therefore, this registration should be given no notice or weight in this proceeding.

II.
MATERIAL UNDISPUTED FACTS

Applicant Brinkmann is a consumer products company based in Dallas, Texas. (See Declaration of J. Baxter Brinkmann, "Brinkmann Decl.," ¶ 1.) Brinkmann has used its house mark BRINKMANN—which is the surname of the company's founder, J. Baxter Brinkmann—on a variety of merchandise since 1975. (Brinkmann Decl., ¶¶ 1 & 3.) For over 30 years, Brinkmann has continued to expand and invest in its use of the BRINKMANN mark, steadily growing its business to expand its product lines, sales, advertising, and distribution channels under the BRINKMANN mark throughout the United States and abroad. (Brinkmann Decl., ¶ 3.)

On November 13, 1978, Brinkmann filed an application, Ser. No. 73/193,053, for registration of its trademark BRINKMANN in a slightly stylized form.² The application was published on September 16, 1980, and it issued as Reg. No. 1,153,730 on May 12, 1981. The registered goods are "electrical extension cords, brackets, and electric connectors for use therewith," in International Class 9, citing a date of first use of June 12, 1978 and "charcoal fired and electric roasting, grilling and barbecue cookers for domestic use and portable electric lights and filters, and replacement lamps," in International Class 11, citing a date of first use of August 24, 1978. The registration is currently in force, is valid and subsisting, and is owned by Brinkmann; it has been declared incontestable under Section 15 of the Trademark Act, 15 U.S.C. § 1065. Brinkmann has continuously used the mark for the recited goods since 1978. No third party, including Brink's Network, ever filed an opposition to registration. (See Brinkmann Decl., ¶ 4 & Exh. 1, consisting of a true and correct copy of Reg. No. 1,153,730 issued by the U.S.

² The BRINKMANN mark in Reg. No. 1,153,730 has the final two "N"s joined together.

Patent and Trademark Office showing both the current status of and current title to the registration.)

On October 11, 2000, Brinkmann filed an application, Ser. No. 76/145,244, for registration of its trademark BRINKMANN BACKYARD KITCHEN. The application was published on October 22, 2002 and issued as Reg. No. 2,779,986 on November 4, 2003, with a disclaimer of the words “backyard kitchen.” The registered goods are “combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers,” citing a date of first use of October 31, 2000. The registration is currently in force, is valid and subsisting and owned by Brinkmann. Brinkmann has continuously used the mark for the recited goods since 2000. No third party, including Brink’s Network, ever filed an opposition to registration. (See Brinkmann Decl., ¶ 5 & Exh. 2, consisting of a true and correct copy of Reg. No. 2,779,986 issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration.)

On January 17, 2003, Brinkmann filed the application at issue in this opposition, Ser. No. 76/483,115, for its trademark BRINKMANN in multiple classes to cover its then-existing lines of goods. The application was published for opposition on October 5, 2004. The current description of goods with dates of first use is as follows:

Class	Goods	Date of First Use in Class
4	Charcoal briquettes and wood chunks for use in smoking and grilling food.	Jan. 1979
6	Metal birdbaths; metal compost bins, metal garden hose hangers, and metal tubs and metal flashlight key rings.	Jan. 1979
7	Vacuum cleaners and accessories, namely, brushes and suction nozzles for vacuum cleaners, vacuum cleaner hoses and hose adapters, filters, filter bags for vacuum cleaners, vacuum cleaner extension wands, vacuum cleaner crevice tools, vacuum cleaner dollies, and accessory kits comprising vacuum cleaner brushes, suction nozzles, hoses, vacuum cleaner extension wands and vacuum cleaner crevice tools.	Jan. 1990

Class	Goods	Date of First Use in Class
8	Hand tools, namely, protractor saw guides and multi-purpose hand tools comprising pliers, knife blades, screwdrivers, hole punches, bottle openers, can openers, fish scalers and files in one unit; hand utensils, namely, meat hooks.	Jan. 1990
9	Home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets; batteries; wall mount brackets for battery chargers and flashlight; cooking thermometers; electrical extension cords; electric connectors; electric converters; electronic mineral and metal detectors, flashlight and spotlight accessories sold together or separately, namely, transmitters, lighter plugs and filter caps.	June 12, 1978
11	Barbecue grills and smokers, gas cookers and gas fryers, combined outdoor gas grills comprised of a grill, side burner, hanging rack in a warming area, kitchen sink and ice bucket; replacement parts and accessories for barbecue grills and smokers and gas cookers and gas fryers sold separately, namely, charcoal lighters and charcoal starters; lighting products, namely, flashlights, spotlights, electric and fluorescent lanterns, rechargeable lights and spotlights, low voltage and solar-powered lights, electric night lights for outdoor work use, underwater and buoy lights used for fishing; flashlight and spotlight replacement parts and accessories sold together, namely, replacement bulbs, nylon and leather carry cases and holster and belt holders; flashlight and spotlight replacement parts and accessories sold separately, namely, replacement bulbs; replacement parts and accessories for barbecue grills, smokers, gas cooker and gas fryers sold separately, namely, drip pans, racks, grates, charcoal pans and water pans; candle lanterns; and portable electric fans.	Sept. 1, 1975
12	Wheelbarrows and hand carts for carrying weighted objects and dollies.	Jan. 1990
21	House wares and garden accessories, namely, pails, rinsing tubs, dust pans, metal pans for use as drain pans, watering cans, trash cans, bird feeders.	Aug. 1992
30	Seasonings and spices.	Jan. 1979

For each of the goods in the table above, Brinkmann has continuously used the mark BRINKMANN from adoption to the present. (Brinkman Decl., ¶ 6.)

Opposer Brink's Network filed a NOTICE OF OPPOSITION on April 1, 2005.

Opposer Brink's Network objected to registration of BRINKMANN *only* in connection with "home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets," in International Class 9.

(See Brink's Network's NOTICE OF OPPOSITION at ¶ 1.) The grounds for opposition asserted by Brink's Network were (1) likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) with various marks incorporating BRINK'S; and (2) dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c), of various marks incorporating BRINK'S. (See *id.*, ¶¶ 20-21.)

Opposer Brink's Network has been on constructive notice since 1981 that Brinkmann was using the mark BRINKMANN. In all the years that Applicant Brinkmann has been using its mark BRINKMANN, Opposer Brink's Network has *never* objected to or otherwise expressed concern to Applicant Brinkmann before its pending application was published for opposition. (See Brinkmann Decl., ¶ 11.)

Applicant Brinkmann will suffer material prejudice if, after nearly 30 years of use and registration of its mark BRINKMANN, Opposer Brink's Network is allowed to challenge Brinkmann's registration of BRINKMANN on the ground of dilution. Applicant Brinkmann has adopted and used BRINKMANN as its house mark on nearly every product it makes and sells. Most Brinkmann products have a secondary or product specific mark, but the mark BRINKMANN is the one mark by which nearly all Brinkmann products are known and recognized in the marketplace. Applicant Brinkmann has invested an enormous amount of time, effort and money in promoting the mark BRINKMANN through use of it on or in connection with its products, catalogs, literature, and packaging, in advertising, at trade shows, and on its website. This has resulted in a valuable business and goodwill associated with the BRINKMANN mark. (Brinkmann Decl., ¶ 12.)

Furthermore, Brinkmann has associated its BRINKMANN mark with "security

products” since 1975 and has advertised its products as useful for “security” and “safety” in the past. (See Brinkmann Decl., ¶¶ 7-9 and Exhs. 3-6, consisting of true and correct copies of Brinkmann's advertisements, product labels and price list excerpts.) Brinkmann’s “home security system” products (as classified in Ser. No. 76/483,115), have been on the market since at least as early as 1989. (See Brinkmann Decl., ¶ 10.)

From the first introduction of the mark BRINKMANN in 1975 to the present, Applicant Brinkmann’s business has continued to grow, as demonstrated by steady expansion of its product lines under its BRINKMANN mark and by steady growth in the amount of sales, advertising and channels of trade for its consumer products under the BRINKMANN mark. (Brinkmann Decl., ¶ 13.) The pending application, with numerous different goods spread over nine classes, clearly evidences this expansion. All of this has occurred in the absence of any objection from Opposer Brink’s Network. (Brinkmann Decl., ¶¶ 11 and 13.)

In Opposer’s response to Interrogatory No. 2 in Applicant’s AMENDED FIRST SET OF INTERROGATORIES, Opposer answered as follows:

INTERROGATORY NO. 2:

For each good or service identified in Interrogatory No. 1 above, please identify the date of first use and date of first use in commerce.

ANSWER:

The dates of first use of each mark for the goods and services identified in the Answer to Interrogatory No. 1 are listed below:

- (1) BRINK’S HOME SECURITY
 - (a) Security alarm and monitoring system services. The date of first use and date of first use in commerce is April, 1984
- (2) BRINK’S HOME SECURITY & Design

(a) Residential and commercial metal safes, keyed and combination metal locks. The date of first use and date of first use in commerce is July 24, 1997.

(b) Non-metal residential and commercial safes. The date of first use and date of first use in commerce is July 24, 1997.

(3) BRINK'S

(a) Security transportation-namely, armored car transport services of currency, securities, and other valuables, domestic and international air courier services, air transport and air freight of goods. The date of first use and date of first use in commerce is January 1, 1912.

(b) Intrusion detection computer hardware and software for detecting and indicating undesirable internet signals and communications prior to entry to a customer's computer network. The date of first use and date of first use in commerce is January, 2001.

(c) Monitoring signals from computer network intrusion detection systems. The date of first use and date of first use in commerce is January, 2001.

(4) BRINK'S & Design

(a) Security alarm and monitoring system services. The date of first use and date of first use in commerce is November, 1983

(b) Intrusion detection computer hardware and software for detecting and indicating undesirable internet signals and communications prior to entry to a customer's computer network. The date of first use and date of first use in commerce is January, 2001.

(c) Monitoring signals from computer network intrusion detection systems. The date of first use and date of first use in commerce is January, 2001.

(d) Coin processing and wrapping and change services; payroll preparation and consolidation of deposits, for others; cash maintenance of bank automatic teller stations; food stamp distribution services; selling tickets and handling proceeds from conventions, exhibits and performances, for others. The date of first use and date of first use in commerce is April, 1981.

(e) Receiving and cashing checks, for others. The date of first use and date of first use in commerce is April, 1981.

(f) Security transportation-namely, armored car transport services of currency, securities and other valuables, domestic and international air courier services. The date of first use and date of first use in commerce is April, 1981.

(5) BRINK'S (Stylized)

(a) Receiving checks, cashing the same, making up payrolls, carrying same or other moneys or securities, guarding and protecting same and paying payrolls, handling clearings, selling tickets, handling proceeds from conventions, exhibitions, and performances, repairing safes, chests, cash protectors, and similar equipment. The date of first use and date of first use in commerce is January 1, 1912.

(See Declaration of Susan Hwang, "Hwang Decl.," ¶ 3 & Exh. 1, which is a true and correct copy of Applicant's Interrogatory No. 2 and Opposer's response.)

In Opposer's response to Interrogatory No. 25 in Applicant's AMENDED FIRST SET OF INTERROGATORIES, Opposer answered as follows:

INTERROGATORY NO. 25:

Please describe in full detail the factual bases for the allegation in paragraph 9 of the NOTICE OF OPPOSITION that the mark BRINK'S "had become exceedingly well-known and a famous mark . . . long prior to the filing date of the opposed application.

ANSWER:

(1) Opposer is the owner of Registration Nos. 1,412,587; 2,330,884; 1,309,375; 2,691,470; 1,411,610; 2,646,784; 1,313,790; 529,622, which are each prima facie and/or conclusive evidence of the validity of the marks BRINKS and BRINK'S and Opposer's exclusive right to use these marks in commerce.

(2) Opposer and its licensees have continuously and extensively used and advertised the marks BRINK'S and BRINKS, alone and in combination with other words and/or designs, in connection with commercial and residential security systems and related alarm and monitoring services since 1983.

(3) The survey entitled Consumer Perceptions of BRINKMANN, conducted in connection with the subject proceeding and previously produced to Applicant.

(See Hwang Decl., ¶ 4 & Exh. 2, which is a true and correct copy of Applicant's Interrogatory No. 25 and Opposer's response.)

III. ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is an appropriate method for disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. FED. R. CIV. P. 56(c). A party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Id. See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden is higher than the preponderance of the evidence burden needed to prevail at final hearing. TBMP § 528.01. A genuine issue with respect to material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *Opryland USA Inc. v. Great American Music Show, Inc.*, 23 U.S.P.Q.2d 1471 (Fed. Cir. 1992). Therefore, the court must view all facts in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in the non-moving party's favor. *Id.* at 1472-73.

B. Opposer's Alleged Dilution Claim Fails As a Matter of Law

1. The Applicable Law

Section 43(c) of the Trademark Act provides an owner of a famous and distinctive mark injunctive relief against another who, at any time after the owner's mark has become

famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury. 15 U.S.C. § 1125(c).

Dilution law is intended to protect a trademark owner's mark from dilution of the mark's value and uniqueness. *Moseley v. V Secret Catalogue Inc.*, 537 US 418, 429 (2003). Unlike traditional infringement law, the prohibitions against trademark dilution are not motivated by an interest in protecting consumers. *Id.*

Courts have held that dilution is an "extraordinary remedy." *The Toro Company v. ToroHead, Inc.*, 61 U.S.P.Q.2d 1164, 1173 (TTAB 2001), citing *Advantage Rent-A-Car Inc. v. Enterprise Rent-A-Car Co.*, 238 F.3d 378, 381, 57 U.S.P.Q.2d 1561, 1563 (5th Cir. 2001). Unlike in likelihood of confusion cases, the Trademark Trial and Appeal Board will not resolve doubts in favor of the party claiming dilution. *Toro*, 61 U.S.P.Q.2d at 1173.

In order for an owner of an allegedly famous mark to prove its claim of dilution, it must provide sufficient evidence that:

1. The owner's mark is a famous mark;
2. The owner's mark became famous prior to the applicant's use; and,
3. The applicant's mark likely to cause dilution by blurring of the

distinctiveness of the owner's mark.

7-Eleven, Inc. v. Lawrence I. Wechsler, 83 U.S.P.Q.2d 1715, 1727 (2007).

A mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. 15 U.S.C. § 1125(c)(2)(A). In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

15 U.S.C. § 1125(c)(2).

The degree of fame required under a dilution analysis is much more rigorous than an analysis for likelihood of confusion. *Toro*, 61 U.S.P.Q.2d at 1176; *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 U.S.P.Q.2d 1689, 1694 (Fed. Cir. 2005) (“Fame for likelihood of confusion purposes and fame for dilution purposes, however, are distinct concepts.”).

For dilution, “use” by a defendant refers to any use in commerce, not just confusingly similar use or the specific use objected to by a plaintiff. *See Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1336 (Fed. Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1013 (9th Cir. 2004) (holding that any commercial use of a famous mark in commerce is arguably a diluting use that fixes the time by which famousness is to be measured). Thus, a plaintiff must show that its mark became famous before any commercial use of a mark by a defendant, not just the objectionable use. *Id.*

Dilution by blurring is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). In other words, “[d]ilution refers to the whittling away of the value of a

trademark when it's used to identify different products." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002). In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

- (i) the degree of similarity between the mark or trade name and the famous mark;
- (ii) the degree of inherent or acquired distinctiveness of the famous mark;
- (iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark;
- (iv) the degree of recognition of the famous mark; and
- (v) whether the user of the mark or trade name intended to create an association with the famous mark;
- (vi) any actual association between the mark or trade name and the famous mark.

15 U.S.C. § 1125(c)(2)(B).

2. Opposer Cannot Demonstrate Prior Fame, Especially Since It is the Junior User With Respect to Six of Eight of Its Pleaded Registrations

A plaintiff asserting dilution must demonstrate that its mark became famous *before* the applicant's first commercial use of a mark. *7-Eleven, Inc. v. Lawrence I. Wechsler*, 83 U.S.P.Q.2d 1715, 1727 (2007). Opposer Brink's Network's dilution claim is fatally flawed for this reason alone, because the dates of first use alleged in six of eight of its pleaded registrations are actually later in time to Brinkmann's date of first use of 1975. The dates of first use alleged by Opposer Brink's Network in its Reg. Nos. 1,412,587 (BRINK'S HOME SECURITY), 2,330,884 (BRINK'S HOME SECURITY & Design), 2,691,470 (BRINK'S), 1,411,610 (BRINK'S & Design), 2,646,784 (BRINK'S & Design) and 1,313,790 (BRINK'S & Design), range from April 1981 to January 2001. Opposer's Reg. No. 2,476,114 was cancelled in May 2008 for failure to file a declaration of use and should be given no notice or weight in

this proceeding. Thus, it is factually impossible for Opposer Brink's Network to demonstrate that its marks, for the recited goods, became famous before Applicant Brinkmann's first use of BRINKMANN in 1975. Any allegation of dilution based on those registrations must fail and Applicant Brinkmann is entitled to judgment as a matter of law with respect to those registrations.

Opposer Brink's Network's two remaining registrations, Reg. Nos. 1,309,375 (BRINK'S) and 529,622 (BRINK'S stylized), assert a date of first use of 1912, but as Opposer's bare bones response to Applicant's Interrogatory No. 25 makes clear, Opposer has failed to demonstrate any facts that its mark is famous and has failed to demonstrate any facts to establish any alleged fame prior to Applicant Brinkmann's first use of its mark back in 1975. Accordingly, Opposer Brink's Network's claim of dilution must fail as a matter of law.

C. Applicant's Affirmative Defense of Laches Defeats Opposer's Alleged Claim of Dilution As a Matter of Law

1. The Applicable Law

Section 19 of the Lanham Act expressly provides that the affirmative defense of laches may be considered and applied, where applicable, in all *inter partes* proceedings. 15 U.S.C. § 1069. Laches requires a showing of undue delay in asserting rights against a claimant and prejudice resulting therefrom. *National Cable Television Association, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1580, 19 U.S.P.Q.2d 1424, 1431 (Fed. Cir. 1991). The affirmative defense of laches is applicable *both* to likelihood of confusion grounds *and* to dilution grounds. *See Hornby v. TJX Companies Inc.*, 87 U.S.P.Q.2d 1411, 1419 (TTAB 2008).

a. Oppositions based on alleged likelihood of confusion

In an opposition proceeding based on grounds of a *likelihood of confusion*, laches generally begins to run no earlier than the date the mark in question was published for

opposition. *National Cable Television Association*, 937 F.2d 1572, 1582, 19 U.S.P.Q.2d at 1432 (Fed. Cir. 1991). Opposer Brink's Network has moved for summary judgment based on this ground alone, asserting that it took the first available opportunity to oppose Applicant Brinkmann's application and that it did so in a timely manner. However, the inquiry does not end there.

For example, a laches defense in an opposition proceeding may be based upon the opposer's failure to object to an applicant's prior registration of substantially the same mark for substantially the same goods or services. See, e.g., *Acquion Partners L.P. v. Envirogard Products Ltd.*, 43 U.S.P.Q.2d 1371, 1373-74 (TTAB 1997); *Copperweld Corp. v. Astralloy-Vulcan Corp.*, 196 U.S.P.Q. 585, 590-91 (TTAB 1977); *White Heather Distillers Ltd. v. American Distilling Co.*, 200 U.S.P.Q. 466, 469 (TTAB 1978).

In *Acquion*, applicant filed an application in 1994 for the mark RAINFRESH in connection with water filters and purifiers. *Acquion*, 43 U.S.P.Q.2d at 1371. Opposer filed a notice of opposition under Section 2(d) of the Trademark Act, based on likelihood of confusion with opposer's prior registrations and alleged prior use of RAINSOFT for water filters and water treatment equipment. Applicant asserted the affirmative defense of laches, based on applicant's previous registration for the same mark RAINFRESH, for filter elements for removing taste and odor. *Id.* Applicant's previous registration issued in 1971 but expired in 1991 because of applicant's inadvertent failure to renew it. *Id.* Opposer never objected to applicant's previous registration. *Id.* at 1373. The Board ruled that applicant was allowed to assert and attempt to prove laches based on its previous expired registration, because a laches defense may be based upon an opposer's failure to object to an applicant's earlier registration of substantially the same mark for substantially the same goods. *Id.* The Board noted, "The important point is that the

mark applicant now seeks to register was published for opposition in 1971 and thereafter was registered for 20 years without objections from opposer.” *Id.* The Board denied applicant’s motion for summary judgment based on laches, however, because there was a genuine issue of material fact whether the goods in Applicant’s previous registration and pending application were the same or substantially the same goods. *Id.* at 1374.

In *Copperweld*, applicant filed an application in 1973 for the mark ASTRALLOY-V in connection with deep air hardening alloy steel compositions, plates and bars. *Copperweld*, 196 U.S.P.Q. at 586. Opposer filed a notice of opposition under Section 2(d) based on likelihood of confusion with opposer’s prior registration and alleged prior use of ARISTOLOY for ferrous alloy in the form of various shapes. *Id.* Although opposer had objected to applicant’s use of ASTRALLOY as early as 1966, opposer never followed through and took steps to stop applicant’s use of the mark. *Id.* at 591. Applicant secured five separate registrations of ASTRALLOY for various steel and alloy products between 1969 and 1973, yet opposer never opposed any of the registrations. *Id.* The Board held that opposer was guilty of laches, especially in light of “opposer’s failure on five occasions during the period in question to oppose registration of the mark to applicant.” *Id.*

In *White Heather*, applicant filed an application in 1975 for HEATHER HOUSE in connection with scotch whiskey. *White Heather*, 200 U.S.P.Q. at 467-68. Opposer filed a notice of opposition under Section 2(d) based on likelihood of confusion with opposer’s prior registrations and alleged prior use of WHITE HEATHER, PRECIOUS HEATHER and other marks for scotch whiskey. *Id.* at 468. Applicant asserted the affirmative defense of laches, based on opposer’s failure to object to applicant’s previous registration for the same mark HEATHER HOUSE for whiskey, which had been registered in 1965 but had since gone expired

for inadvertent failure to file a declaration of use. *Id.* The Board held that opposer was guilty of laches because applicant's previous registration was constructive notice to opposer of applicant's claim of ownership of the mark and yet opposer never objected to applicant's use of the mark, letting ten years pass before filing the opposition to applicant's second application. *Id.*

b. Oppositions Based on Alleged Dilution

The foregoing cases all involve the affirmative defense of laches asserted in an opposition based on alleged likelihood of confusion. In those cases, the Board scrutinized whether an applicant's prior registration that an opposer failed to oppose was for substantially the same mark for substantially the same goods or services. If an opposer believes a likelihood of confusion exists with a mark in a pending application, then the opposer should have opposed a previous application as well. The rationale for requiring the same mark for substantially the same goods or services is similar to the *Morehouse* affirmative defense, in that no added damage to the opposer will result by issuing a registration to an applicant who already has a substantially similar existing registration. *See Morehouse Mfg. Corp. v. J. Strickland & Co.*, 160 U.S.P.Q. 715, 717 (CCPA 1969).

An opposition based on alleged dilution raises different issues. Section 43(c) of the Trademark Act provides an owner of a famous and distinctive mark injunctive relief against another who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury. 15 U.S.C. § 1125(c). Dilution law is intended to protect a trademark owner's mark from dilution of the mark's value and uniqueness. *Moseley v. V Secret Catalogue Inc.*, 537 US 418, 429 (2003). Unlike traditional infringement law, the

prohibitions against trademark dilution are not motivated by an interest in protecting consumers. *Id.* For dilution, “use” by a defendant refers to any use in commerce, not just confusingly similar use or the specific use objected to by a plaintiff. See *Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1336 (Fed. Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1013 (9th Cir. 2004) (holding that any commercial use of a famous mark in commerce is arguably a diluting use that fixes the time by which famousness is to be measured).

c. Laches Applies To Opposer Brink’s Network Ground Of Opposition Based On Alleged Dilution

(1) Opposer Brink’s Network Unreasonably Delayed By Failing to Object to Applicant’s Prior Registrations

Opposer Brink’s Network is guilty of laches because for nearly 30 years it has failed to object to Applicant Brinkmann’s registration of its mark BRINKMANN, and even now only opposes selected goods in Brinkmann’s pending application. Since Opposer Brink’s Network’s ground for opposition based on alleged dilution does not depend on use of the BRINKMANN mark on similar or related goods, the affirmative defense of laches based on Applicant Brinkmann’s pre-existing registrations is applicable to a dilution claim regardless of whether the goods in the pre-existing registrations are different from the goods in the opposed application.

Applicant Brinkmann has been marketing and selling a variety of consumer products under its mark BRINKMANN since 1975. (See Brinkmann Decl., ¶ 3.) Applicant Brinkmann obtained its U.S. Reg. No. 1,153,730 for BRINKMANN in 1981. Applicant Brinkmann started selling home security products (as defined in Ser. No. 76/483,115) since at least as early as 1989. (See Brinkmann Decl., ¶ 10.) Applicant Brinkmann obtained its U.S.

Reg. No. 2,779,986 for BRINKMANN BACKYARD KITCHEN in 2003. Opposer Brink's Network has had constructive notice of Applicant Brinkmann's use and registration of the mark BRINKMANN since at least 1981. *See White Heather Distillers Ltd. v. American Distilling Co.*, 200 U.S.P.Q. 466, 469 (TTAB 1978) (holding opposer's failure to oppose applicant's five prior registrations despite constructive notice flowing from federal registration rendered opposer guilty of laches). Opposer Brink's Network also has had constructive notice of Applicant Brinkmann's use and registration of the mark BRINKMANN BACKYARD KITCHEN since 2003. *Id.* Yet Opposer Brink's Network never objected to Applicant Brinkmann's registration of either the BRINKMANN mark or the BRINKMANN BACKYARD KITCHEN mark.

Opposer Brink's Network argues disingenuously that it could not have objected to Applicant Brinkmann's application Ser. No. 76/483,115 until the application was published. However, this ignores the fact that for dilution purposes, Opposer Brink's Network can and should have objected long ago to Applicant Brinkmann's registrations of BRINKMANN and BRINKMANN BACKYARD KITCHEN. It also ignores that even when Opposer Brink's Network opposed Applicant Brinkmann's pending application, Opposer Brink's Network limited its opposition to "home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets." Brink's Network did not object to the numerous other goods that Brinkmann applied for in its application. Evidently, Opposer Brink's Network believes that the "damage" it would allegedly suffer from Applicant Brinkmann's registration of BRINKMANN for home security systems is greater than the "damage" it would allegedly suffer from Brinkmann's registration of BRINKMANN for other products. This is a faulty legal assumption, however, because *dilution does not take similarities or differences in goods into account*. If Opposer Brink's Network

believed that Applicant Brinkmann's use of BRINKMANN was diluting, then it should have objected to the very first use, because any alleged damage from Brinkmann's first use of BRINKMANN is legally the same as any subsequent use. Thus, Opposer Brink's Network delay of almost 30 years is grossly unreasonable.

**(2) Applicant Brinkmann Has Suffered Material Prejudice
Because of Opposer's Unreasonable Delay**

Opposer Brink's Network's unreasonable delay has caused material prejudice to Applicant Brinkmann that directly implicates Applicant's most important brand, and, in fact, the very identity of the company.

Mere delay in asserting a trademark right does not constitute laches. Rather, a party asserting laches must show not only unreasonable delay but also circumstances compelling enough to give rise to an estoppel, that is, that the party asserting the defense has relied upon the delay to its detriment. *Acquion Partners L.P. v. Envirogard Products Ltd.*, 43 U.S.P.Q.2d 1371, 1374 (TTAB 1997); *see also Weyerhaeuser Company v. Temporaries Incorporated*, 222 U.S.P.Q. 250, 252 (TTAB 1984). Detriment includes (a) evidentiary prejudice due to loss of evidence or memory of witnesses, or (b) economic prejudice based on loss of time or money or foregone opportunity. *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France*, 58 U.S.P.Q.2d 1460, 1463 (Fed. Cir. 2001). Economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice. *Id.*, citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821, 52 U.S.P.Q.2d 1065, 1072 (7th Cir. 1999) (the longer the use and the lengthier the period of delay, the lighter the burden of showing economic prejudice in support of the defense of laches). Prejudice "may be as simple as the development of goodwill built around a mark during petitioner's delay." *Christian Broadcasting*

Network Inc. v. ABS-CBN International, 84 U.S.P.Q.2d 1560, 1573 (TTAB 2007) (citations omitted).

In the present case, Applicant Brinkmann has adopted and used BRINKMANN as its house mark for over 30 years on nearly every product it makes and sells. Most Brinkmann products have a secondary or product specific mark, but the mark BRINKMANN is the one mark by which nearly all Brinkmann products are known and recognized in the marketplace. Applicant Brinkmann has invested an enormous amount of time, effort and money in promoting the mark BRINKMANN through use of it on or in connection with its products, catalogs, literature, and packaging, in advertising, at trade shows, and on its website. This has resulted in a valuable business and goodwill associated with the BRINKMANN mark. (Brinkmann Decl., ¶ 12.) Brinkmann's investment in its brand BRINKMANN is especially significant because Brinkmann has associated its mark BRINKMANN with "security" products since 1975. (Brinkmann Decl., ¶¶ 7-10 and Exhs. 3-6.)

From the first introduction of the mark BRINKMANN in 1975 to the present, Applicant Brinkmann's business has continued to grow, as demonstrated by steady expansion of its product lines under its BRINKMANN mark and by steady growth in the amount of sales, advertising and channels of trade for its consumer products under the BRINKMANN mark. Opposer Brink's Network lurked silently in the wings, all this time without objection. (Brinkmann Decl., ¶ 13.) To allow Opposer to try to take away Applicant Brinkmann's company identity and force Applicant Brinkmann to start all over again, after over 30 years of hard work, would be grossly unfair, to say the least.

Opposer Brink's Network's unreasonable delay in opposing Applicant

Brinkmann's application for BRINKMANN coupled with the resulting material prejudice to Applicant Brinkmann establishes the affirmative defense of laches with respect to Opposer Brink's Network's dilution claim.

IV.
CONCLUSION

For all of the foregoing reasons, Applicant Brinkmann has demonstrated that no genuine issue of material fact exists as to Applicant's affirmative defense of laches against Opposer Brink's Network's dilution claim. Opposer Brink's Network has also failed to establish a key element of its dilution claim, namely, any evidence that alleged fame of its asserted mark occurred before Applicant's first use of its BRINKMANN mark.

Thus, Applicant Brinkmann is entitled to judgment as a matter of law on Opposer Brink's Network's dilution claim. Accordingly, Applicant Brinkmann respectfully requests that the Board grant its motion for summary judgment.

Dated: September 23, 2008



Gary A. Clark
Susan Hwang
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398

Attorneys for Applicant
THE BRINKMANN CORPORATION

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

DECLARATION OF J. BAXTER BRINKMANN UNDER 37 C.F.R. § 2.20

I, J. Baxter Brinkmann, hereby declare as follows:

1. I am the president of Applicant The Brinkmann Corporation ("Brinkmann"), a consumer products company based in Dallas, Texas, which I founded and which is named after me.
2. I make this declaration in connection with an opposition proceeding, No. 91164764, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.
3. Brinkmann has used its trademark BRINKMANN on a variety of consumer products since 1975. For over 30 years, Brinkmann has continued to expand and invest in its use of the BRINKMANN mark. Over that time period, Brinkmann has expanded its product lines, sales, advertising, and distribution channels under the mark BRINKMANN throughout the United States and abroad.
4. On November 13, 1978, Brinkmann filed an application to federally register the trademark BRINKMANN. The application, Serial No. 73/193,053, was published on

September 16, 1980 and issued as Registration No. 1,153,730 on May 12, 1981. A true and correct copy of the registration issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration is attached as Exhibit 1. The registered goods are “electrical extension cords, brackets, and electric connectors for use therewith,” in International Class 9, with a date of first use of June 12, 1978 and “charcoal fired and electric roasting, grilling and barbecue cookers for domestic use and portable electric lights and filters, and replacement lamps,” in International Class 11, with a date of first use of August 24, 1978. Brinkmann is the owner of this registration and has taken all necessary steps to maintain it. No third party, including Brink’s Network, ever opposed the application or has ever sought to cancel the registration. To the best of my knowledge, the registration is valid and subsisting, and I understand that it was declared “incontestable” over 20 years ago. Brinkmann has continuously used the mark BRINKMANN for the goods since 1978.

5. On October 11, 2000, Brinkmann filed an application to federally register the trademark BRINKMANN BACKYARD KITCHEN. The application, Serial No. 76/145,244, was published on October 22, 2002 and issued as Registration No. 2,779,986 on November 4, 2003. A true and correct copy of the registration issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration is attached as Exhibit 2. The registered goods are “combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers,” with a date of first use of October 31, 2000. Brinkmann is the owner of this registration and has taken all necessary steps to maintain it. No third party, including Brink’s Network, ever opposed the application or has ever sought to cancel the registration. To the best of my knowledge, the registration is valid and subsisting. Brinkmann has continuously used the mark BRINKMANN BACKYARD KITCHEN for the goods since 2000.

6. On January 17, 2003, Brinkmann filed the application that is the subject of this proceeding, Serial No. 76/483,115, for the trademark BRINKMANN in multiple classes to cover its then-existing lines of goods. The application was published for opposition on October 5, 2004. The current description of goods with dates of first use are set forth in the following table:

Class	Goods	Date of First Use in Class
4	Charcoal briquettes and wood chunks for use in smoking and grilling food.	Jan. 1979
6	Metal birdbaths; metal compost bins, metal garden hose hangers, and metal tubs and metal flashlight key rings.	Jan. 1979
7	Vacuum cleaners and accessories, namely, brushes and suction nozzles for vacuum cleaners, vacuum cleaner hoses and hose adapters, filters, filter bags for vacuum cleaners, vacuum cleaner extension wands, vacuum cleaner crevice tools, vacuum cleaner dollies, and accessory kits comprising vacuum cleaner brushes, suction nozzles, hoses, vacuum cleaner extension wands and vacuum cleaner crevice tools.	Jan. 1990
8	Hand tools, namely, protractor saw guides and multi-purpose hand tools comprising pliers, knife blades, screwdrivers, hole punches, bottle openers, can openers, fish scalers and files in one unit; hand utensils, namely, meat hooks.	Jan. 1990
9	Home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets; batteries; wall mount brackets for battery chargers and flashlight; cooking thermometers; electrical extension cords; electric connectors; electric converters; electronic mineral and metal detectors, flashlight and spotlight accessories sold together or separately, namely, transmitters, lighter plugs and filter caps.	June 12, 1978
11	Barbecue grills and smokers, gas cookers and gas fryers, combined outdoor gas grills comprised of a grill, side burner, hanging rack in a warming area, kitchen sink and ice bucket; replacement parts and accessories for barbecue grills and smokers and gas cookers and gas fryers sold separately, namely, charcoal lighters and charcoal starters; lighting products, namely, flashlights, spotlights, electric and fluorescent lanterns, rechargeable lights and spotlights, low voltage and solar-powered lights, electric night lights for outdoor work use, underwater and buoy lights used for fishing; flashlight and spotlight replacement parts and accessories sold together, namely, replacement bulbs, nylon and leather carry cases and holster and belt holders; flashlight and spotlight replacement parts and accessories sold separately, namely, replacement bulbs; replacement parts and accessories for barbecue grills, smokers, gas cooker and gas fryers sold separately, namely, drip pans, racks, grates, charcoal pans and water pans; candle lanterns; and portable electric fans.	Sept. 1, 1975
12	Wheelbarrows and hand carts for carrying weighted objects and dollies.	Jan. 1990
21	House wares and garden accessories, namely, pails, rinsing tubs, dust pans, metal pans for use as drain pans, watering cans, trash cans, bird feeders.	Aug. 1992
30	Seasonings and spices.	Jan. 1979

For each of the goods in the table above, Brinkmann has continuously used the mark BRINKMANN from adoption to the present.

7. Brinkmann's association of its BRINKMANN mark with "security" products first began in 1975. Brinkmann had previously acquired a company called Q-Beam Corporation that made hand-held spotlights and other specialty lights. In 1975 Brinkmann introduced a spotlight that was called the "Q-Beam Security Special." It was advertised for use with policemen, state troopers and other security personnel. A true and correct copy of Brinkmann's advertisement for the spotlight from 1975 is attached as Exhibit 3. Packaging for the spotlight clearly showed both the BRINKMANN mark and "Q-BEAM SECURITY" in close proximity. A true and correct copy of product labels for the spotlight is attached as Exhibit 4. Brinkmann advertised its spotlight as the "Security Special" for a number of years.

8. In the early 1980s, Brinkmann also advertised its portable lights for use with "Home Security" and "For Safety . . . Security . . . Convenience." A true and correct copy of the cover of Brinkmann's price list from 1981 is attached as Exhibit 5.

9. In about 1984, Brinkmann began using its BRINKMANN mark for rechargeable lights that were advertised as "rechargeable security lights." A true and correct copy of the cover and the relevant page from Brinkmann's July 26, 1984 price list is attached as Exhibit 6.

10. In 1989, Brinkmann introduced "home security system" products including the motion sensitive lights, detectors, receivers, transmitters, and adapters, which are at issue in this proceeding, under the BRINKMANN mark and has continuously used its mark for such products to date.

11. In all the years that Brinkmann has been using its mark BRINKMANN, Brink's Network never objected to Brinkmann's use of the mark on any products, including security-related products, prior to the time that Brinkmann's pending application was published for opposition.

12. Brinkmann will suffer material prejudice if, after over 30 years of use and nearly 30 years of registration of its mark BRINKMANN, Brink's Network is allowed to

challenge Brinkmann's registration of BRINKMANN. Brinkmann has adopted and used BRINKMANN as its house mark on nearly every product it makes and sells. Most Brinkmann products have a secondary or product specific mark, but the mark BRINKMANN is the one mark by which nearly all Brinkmann products are known and recognized in the marketplace. Brinkmann has invested an enormous amount of time, effort and money in promoting the mark BRINKMANN through use of it on or in connection with its products, catalogs, literature, and packaging, in advertising, at trade shows, and on its website. This has resulted in a valuable business and goodwill associated with the BRINKMANN mark.

13. From the first introduction of the mark BRINKMANN in 1975 to the present, Brinkmann's business has continued to grow, as demonstrated by steady expansion of its product lines under its BRINKMANN mark and by steady growth in the amount of sales, advertising and channels of trade for its consumer products under the BRINKMANN mark. All of this has occurred in the absence of any objection from Brink's Network.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Date: September 19th, 2008

By: 
J. BAXTER BRINKMANN

Exhibit 1



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

**UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office**

September 16, 2008

**THE ATTACHED U.S. TRADEMARK REGISTRATION 1,153,730 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.**

**REGISTERED FOR A TERM OF 20 YEARS FROM *May 12, 1981*
1st RENEWAL FOR A TERM OF 10 YEARS FROM *May 12, 2001***

SECTION 8 & 15

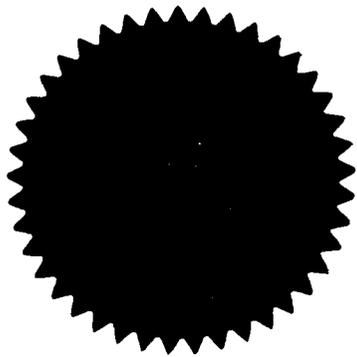
LESS GOODS

SAID RECORDS SHOW TITLE TO BE IN:

***THE BRINKMANN CORPORATION
A CORPORATION OF TEXAS***

**By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office**

Gloria A. Murray
GLORIA A MURRAY
Certifying Officer



Int. Cls.: 9 and 11

Prior U.S. Cls.: 21, 26 and 34

United States Patent and Trademark Office

Reg. No. 1,153,730

Registered May 12, 1981

TRADEMARK

Principal Register

BRINKMANN

The Brinkmann Corporation (Texas corporation)
4215 McEwen Rd.
Dallas, Tex. 75240

For: ELECTRICAL EXTENSION CORDS,
BRACKETS, ~~RADAR DETECTORS, AND~~
~~ELECTRONIC METAL DETECTORS, HEAD~~
~~PHONES AND SEARCH COILS, AND ELEC-~~
TRIC CONNECTORS FOR USE THEREWITH, in
CLASS 9 (U.S. Cls. 21 and 26).

First use Jun. 12, 1978; in commerce Jun. 12, 1978.

For: CHARCOAL FIRED AND ELECTRIC
ROASTING, GRILLING AND BARBECUE
COOKERS FOR DOMESTIC USE AND PORTA-
BLE ELECTRIC LIGHTS AND FILTERS, AND
REPLACEMENT LAMPS, in CLASS 11 (U.S. Cls.
21 and 34).

First use Aug. 24, 1978; in commerce Aug. 24,
1978.

Ser. No. 193,053, filed Nov. 13, 1978.

ABRAM I. SACHS, Primary Examiner

BM 013039

Exhibit 2

1719551



THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:
UNITED STATES DEPARTMENT OF COMMERCE**

United States Patent and Trademark Office

September 16, 2008

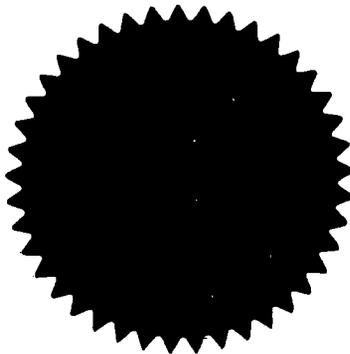
**THE ATTACHED U.S. TRADEMARK REGISTRATION 2,779,986 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.**

REGISTERED FOR A TERM OF 10 YEARS FROM *November 04, 2003*

**SAID RECORDS SHOW TITLE TO BE IN:
THE BRINKMANN CORPORATION
*A CORPORATION OF TEXAS***

**By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office**

Gloria A. Murray
GLORIA A MURRAY
Certifying Officer



Int. Cl.: 11

Prior U.S. Cls.: 13, 21, 23, 31, and 34

Reg. No. 2,779,986

United States Patent and Trademark Office

Registered Nov. 4, 2003

**TRADEMARK
PRINCIPAL REGISTER**

BRINKMANN BACKYARD KITCHEN

BRINKMANN CORPORATION, THE (TEXAS
CORPORATION)
4215 MCEWEN ROAD
DALLAS, TX 75244

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "BACKYARD KITCHEN", APART
FROM THE MARK AS SHOWN.

FOR: COMBINED OUTDOOR GRILL AND
KITCHEN APPLIANCE UNITS COMPRISED OF
GAS GRILLS, SINKS AND COOLERS, IN CLASS 11
(U.S. CLS. 13, 21, 23, 31 AND 34).

SN 76-145,244, FILED 10-11-2000.

FIRST USE 10-31-2000; IN COMMERCE 10-31-2000.

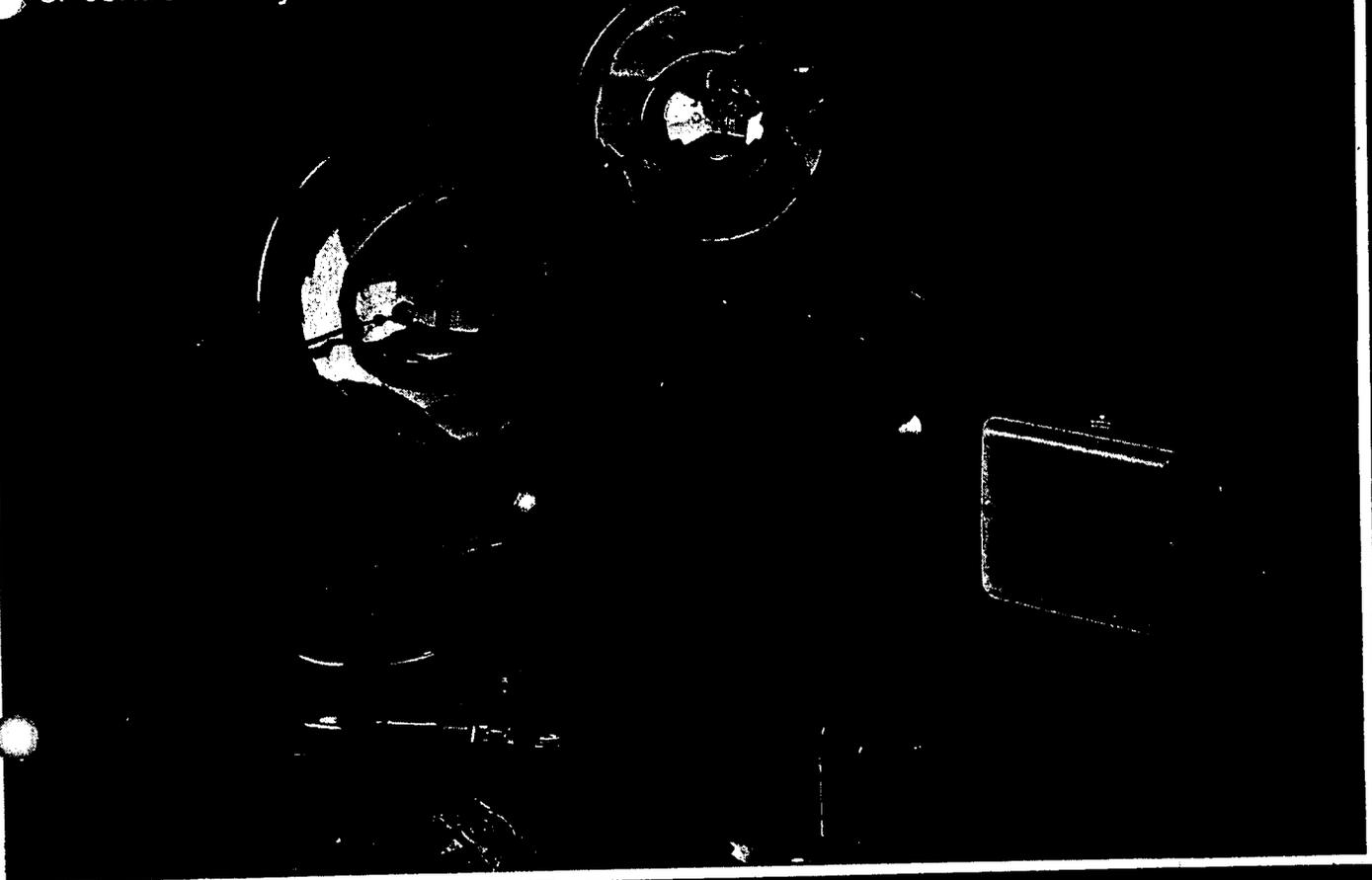
RAUL CORDOVA, EXAMINING ATTORNEY

Exhibit 3

Q-Beam[®]

SPECIALTY LIGHTS

For control of any situation.



Magnetic Base

Q-Beam's Magnetic Base Light fastens to any steel or iron surface with the staying power only a 50-pound-pull magnet can provide. Mounted on rust-proof swivel base, features 180 degree vertical, 360 degree horizontal swivel. Thousands of agricultural, industrial, emergency and recreational applications. A must when steady light is required. Available in 200,000/100,000 candlepower Spot/Flood and 200,000 candlepower Super Spot models. Complete with 15-foot heavy-duty insulated cord. Plugs into any cigarette lighter. Operates on any 12-volt DC source.

Security Special

The Q-Beam Security Special is a rugged 200,000 candlepower high intensity hand light with special features for policemen, state troopers, firemen, game wardens, and other security personnel. Momentary switch is designed to operate only when depressed. Perfect for use around warehouses, docks, office buildings, stores. Accessories include amber snap-on lens for caution light and red snap-on lens for stop warnings. Blue filter and blinker model (Security Deluxe) also available. Other options include separate adapter unit for use when cigarette lighter not available as power source.

Varmint Special

The 200,000 candlepower light for nighttime hunters. Red filter won't spook wild animals. Lets you focus light directly on wily predators as they answer your calls. Exclusive shooters' hood eliminates glare and protects night vision. Removable red filter permits use as standard Super Spot. 15-foot heavy-duty cord with cigarette lighter plug.

Moonliter[™]

A mini-light that packs a powerful punch. Dual bulbs for greater illumination. A heavy-duty rheostat lets you control illumination. A perfect companion for night fishing (soft light) or fixing flat tires (full light). Equipped with translucent lens. Insect-repelling amber lens optional. Moonliter has stainless steel handle for hanging and suction cup base for mounting. Moonliter features 8-foot cord with battery clips for direct 12-volt battery tie-in or cigarette lighter plug.

ITEM	MODEL	DESCRIPTION
Magnetic Base	1500	Black, 3¼ lbs., Super Spot W/magnet base swivel, 15-ft. cord/cigarette lighter plug
	1501	Black, 3¼ lbs., Spot/Flood W/magnet base swivel, 15-ft. cord/cigarette lighter plug
Security Special	1502	Black, 3¼ lbs., Super Spot W/magnet base flasher, 2 filters, 15-ft. cord/cigarette lighter plug
	1503	Black, 3¼ lbs., Super Spot W/hand grip, momentary switch, 15-ft. cord/cigarette lighter plug
	1504	Black, 2¾ lbs., Super Spot Deluxe W/hand grip, flasher, 2 filters, 8-ft. coil cord/cigarette lighter plug
Varmint Special	1505	Black, 3 lbs., W/hood and red filter, 15-ft. cord with cigarette lighter plug
Moonliter	1506	Black, 3/4 lbs., W/rheostat and dual bulbs, 8-ft. cord with battery clips
	1507	Black, 3/4 lbs., W/rheostat and dual bulbs, 8-ft. cord with cigarette lighter plug

Exhibit 4



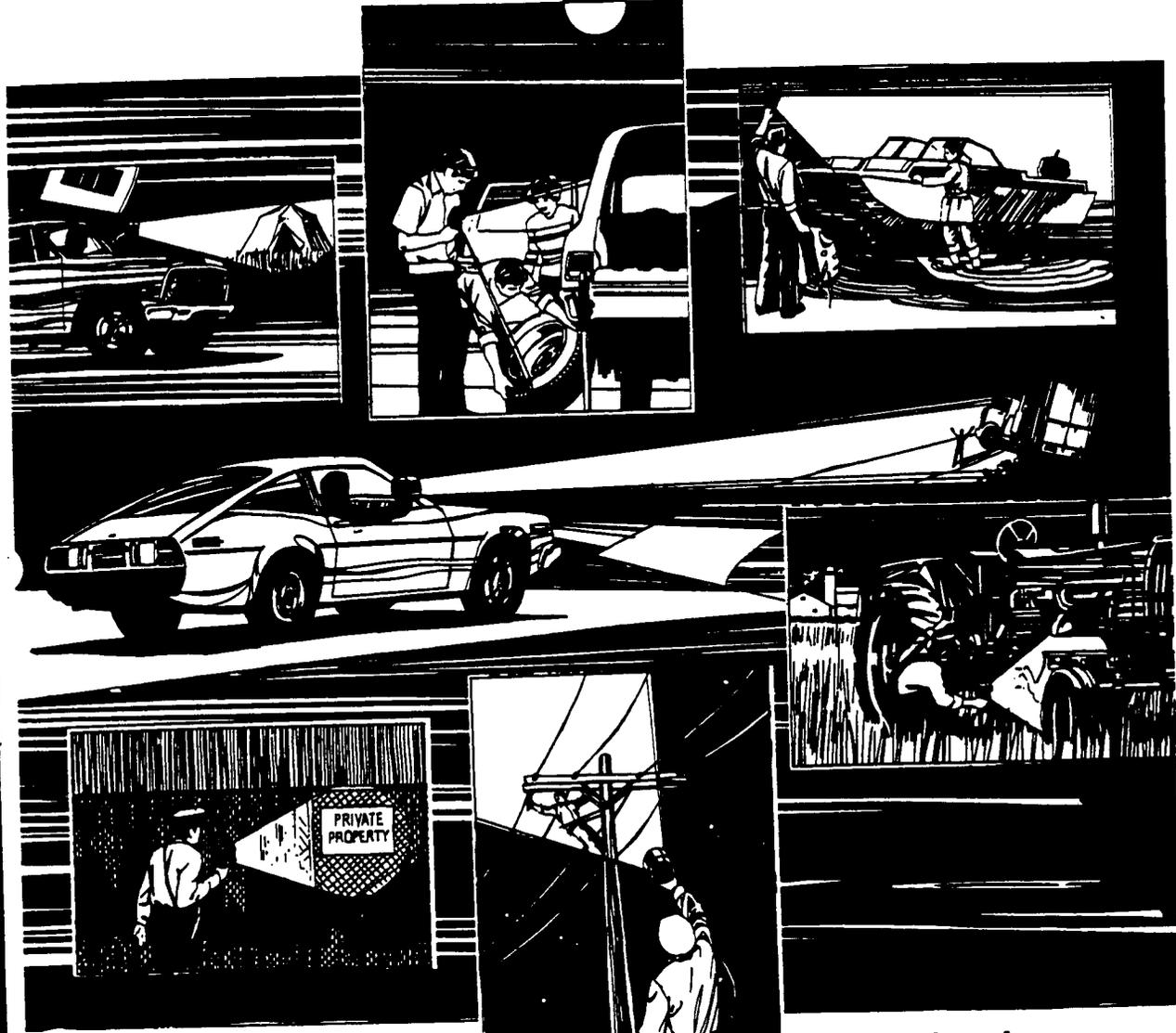
Exhibit 5

Kitchen - W/D Get - new side case.

BRINKMANN[®]

1981

Q-Beam[®] — The Ultimate in High-Intensity Portable Lighting Systems



- Farm ● Fleet
- Marine
- Off-Road ● Home Security ● 4x4 ● Industrial
- Auto Utility ● D.I.Y. ● Emergency ● Camping

FOR SAFETY...SECURITY...CONVENIENCE

Exhibit 6

BRINKMANN

CONFIDENTIAL DISTRIBUTOR PRICE LIST

JULY 26, 1984

Karnis copy



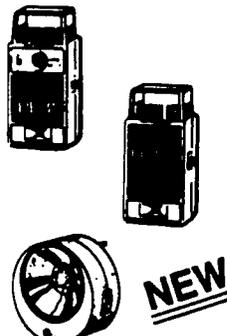
Q-Beam[®]
MAXLITE[™]
VOYAGER[™]
TROUBLE SHOOTER[™]
SMOKE 'N PIT[®]
Small Fry[™]
Sportsman Smoker[™]
SMOKE 'N GRILL[®]
country cooker[™]
treasure
SENSOR[®]

BRINKMANN[®] puts Adventure and Excitement
into Your Sales Program

CONFIDENTIAL

BM001828

BRINKMANN® RECHARGEABLE SPOTLIGHTS AND 6-VOLT LANTERNS AND ACCESSORIES

ITEM	MODEL	DESCRIPTION	CASE PACK	WHSLE.	DISTR.
Rechargeable Security Lights 	827-0391-0	PF3, Rechargeable 5-in-1 Security Light, for use as power failure light, emergency flashlight, 360° area light and glowing night light. Complete with audio alert. 2-cell NiCad battery system. U.L. listed. Master pack: (6) 7½ x 9 x 7½", wt. 2 lbs. 6 oz. (.29 cu. ft.)	6	16.76	13.97
	827-0360-0	PF2, Rechargeable 4-in-1 Security Light, for use as power failure light, emergency flashlight, 360° area light and glowing night light. 2-cell NiCad battery system. U.L. listed. Master pack (6) 7½ x 14½ x 7½", wt. 3 lbs. (.47 cu. ft.)	6	13.16	10.97
	827-0365-0	3-in-1 Rechargeable Safety Light, for use as power failure light, emergency flashlight and glowing night light. 2-cell NiCad battery system. U.L. listed. Master pack: (6) 8½ x 9 x 8½", wt. 3 lbs. (.38 cu. ft.)	6	11.96	9.97
6-Volt Fluorescent Lanterns 	827-0603-0	F-1F Fluorescent Lantern with warning system. Black rugged case. Unbreakable lens. Steady or flasher light. Includes set of emergency messages. Uses 1 6-volt lantern battery.	4	29.96	24.97
	827-0600-0	F-1 Fluorescent Lantern. Black rugged case. Unbreakable lens. Weather-protected switch. Versatile handle: hang, carry or wall mount. Unique and economical power system; uses only 1 6-volt lantern battery.	4	17.96	14.97
	827-0621-0	Same as above with black/ultraviolet light. Master pack: (4) 7½ x 14½ x 10½", wt. 6 lbs. 4 oz. (.63 cu. ft.)	4	23.96	19.97
Accessories 	450-9920-0	Bulb Cap Set, red and amber.	1	1.16	.97
	450-9700-0	Adjustable Shoulder Strap with detachable snaps.	1	1.32	1.10
	119-9006-0	Amber Bug Lens for F-1 Fluorescent Lantern.	1	1.68	1.40
	450-9716-0	Custom Lantern Bracket with screws.	1	1.50	1.25
	190-9102-0	Heavy Duty Mailer Carton.	1	.48	.40
	070-9150-0	6-Volt Lantern Battery with spring terminals	1	2.88	2.40
	070-9151-0	6-Volt Heavy Duty Lantern Battery with spring terminals.	1	3.72	3.10

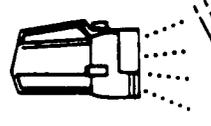
KEY TO SELLING MORE BRINKMANN® RECHARGEABLE SPOTLIGHTS AND 6-VOLT LANTERNS



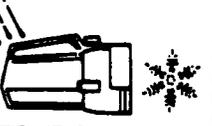
AC & DC RECHARGEABLE
Built-in AC & DC chargers allow recharge wherever you are!



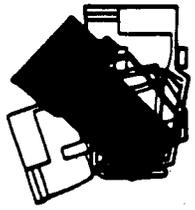
TOUGH AND RUGGED
High density polyethylene case.



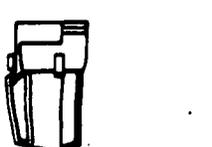
MOST POWERFUL BEAM
using a 6-volt lantern battery. Focus adjusts from spot to flood on all models.



IT'S WEATHERPROOF



120° SWIVEL STAND
Available on many models
Heavy-gauge metal bracket is chrome-plated to resist rust and corrosion. Adds versatility, because it holds the lantern stable in any position with a 120° arc. Stand is removable.



NO RUST OR CORROSION
Silvered switch contacts resist acids and alkalis.



AIR SPACE SURROUNDING BATTERY
Eliminates condensation inside case. Operates in colder temperatures.



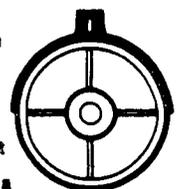
IT FLOATS
"O" ring sealed switch and pressure fitted rim.



NON-GLARE SHIELD



LENS SEAL GLOWS
in the dark



SUPER II REFLECTOR
The most dramatic change in a lantern design in 50 years. The "SUPER II" system features a COMPUTER DESIGNED PARABOLIC REFLECTOR WITH A BOOSTER. Its super efficient beam actually produces 50% MORE CANDLEPOWER for a much brighter beam.

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

DECLARATION OF SUSAN HWANG UNDER 37 C.F.R. § 2.20

I, Susan Hwang, hereby declare as follows:

1. I am an associate at the law firm of Sheppard, Mullin, Richter & Hampton LLP, counsel of record for Applicant The Brinkmann Corporation.
2. I make this declaration in connection with an opposition proceeding, No. 91164764, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.
3. Attached as Exhibit 1 is a true and correct copy of Applicant's Interrogatory No. 2 and Opposer's response.
4. Attached as Exhibit 2 is a true and correct copy of Applicant's Interrogatory No. 25 and Opposer's response.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any

registration resulting therefrom, declares that all statements made of her own knowledge are true;
and all statements made on information and belief are believed to be true.

Date: September 23, 2008

By:  _____
SUSAN HWANG

Exhibit 1

- (5) BRINK'S (Stylized)
- (a) Receiving checks, cashing the same, making up payrolls, carrying same or other moneys or securities, guarding and protecting same and paying payrolls, handling clearings, selling tickets, handling proceeds from conventions, exhibitions, and performances, repairing safes, chests, cash protectors, and similar equipment.

INTERROGATORY NO. 2:

For each good or service identified in Interrogatory No. 1 above, please identify the date of first use and date of first use in commerce.

ANSWER:

The dates of first use of each mark for the goods and services identified in the Answer to Interrogatory No. 1 are listed below:

- (1) BRINK'S HOME SECURITY
- (a) Security alarm and monitoring system services. The date of first use and date of first use in commerce is April, 1984.
- (2) BRINKS HOME SECURITY & Design
- (a) Residential and commercial metal safes, keyed and combination metal locks. The date of first use and date of first use in commerce is July 24, 1997.
- (b) Non-metal residential and commercial safes. The date of first use and date of first use in commerce is July 24, 1997.
- (3) BRINK'S
- (a) Security Transportation, namely, armored car transport services of currency, securities, and other valuables; domestic and international

air courier services; air transport and air freight of goods. The date of first use and date of first use in commerce is January 1, 1912.

- (b) Intrusion detection computer hardware and software for detecting and indicating undesirable Internet signals and communications prior to entry to a customer's computer network. The date of first use and date of first use in commerce is January, 2001.
- (c) Monitoring signals from computer network intrusion detection systems. The date of first use and date of first use in commerce is January, 2001.

(4) BRINKS & Design

- (a) Security alarm and monitoring system services. The date of first use and date of first use in commerce is November, 1983.
- (b) Intrusion detection computer hardware and software for detecting and indicating undesirable Internet signals and communications prior to entry to a customer's computer network. The date of first use and date of first use in commerce is January, 2001.
- (c) Monitoring signals from computer network intrusion detection systems. The date of first use and date of first use in commerce is January, 2001.
- (d) Coin processing and wrapping and change services; payroll preparation and consolidation of deposits for others; cash maintenance of bank automatic teller stations; food stamp distribution services; selling tickets and handling proceeds from conventions, exhibits and performances for others. The date of first use and date of first use in commerce is April, 1981.

- (e) Receiving and cashing checks for others. The date of first use and date of first use in commerce is April, 1981.
 - (f) Security transportation, namely, armored car transport services of currency, securities and other valuables, domestic and international air courier services. The date of first use and date of first use in commerce is April, 1981.
- (5) BRINK'S (Stylized)
- (a) Receiving checks, cashing the same, making up payrolls, carrying same or other moneys or securities, guarding and protecting same and paying payrolls, handling clearings, selling tickets, handling proceeds from conventions, exhibitions, and performances, repairing safes, chests, cash protectors, and similar equipment. The date of first use and date of first use in commerce is January, 1912.

INTERROGATORY NO. 3:

Please identify Opposer's personnel who are most knowledgeable with respect to the use of the Brink's Marks in connection with the Brink's Products and Services identified in the Notice of Opposition.

ANSWER:

The person who is most knowledgeable with respect to the use and promotion of the marks pleaded in the Notice of Opposition is:

Mr. Dwayne R. Sigler
Senior Vice President of Marketing
Brink's Home Security
8880 Esters Boulevard
Irving, Texas 75063

Exhibit 2

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

BRINK'S NETWORK, INCORPORATED)
)
 Opposer)
)
 v.) Opposition No. 91164764
)
 THE BRINKMANN CORPORATION)
)
 Applicant)

OPPOSER'S ANSWERS TO APPLICANT'S
AMENDED FIRST SET OF INTERROGATORIES

Opposer Brink's Network, Incorporated responds as follows to Applicant's Amended First Set of Interrogatories. The following answers are submitted to the extent that Applicant's Amended First Set of Interrogatories are understood and are based on information available at the present time. Opposer reserves the right to supplement its answers at such time as additional information, documents and facts come to its attention as a result of further case investigation, discovery or otherwise.

GENERAL OBJECTIONS

Opposer asserts the following general objections in addition to the specific objections stated in response to particular interrogatories:

(1) By supplying information responsive to each interrogatory, Opposer does not concede the relevance, materiality, or admissibility of such documents or information, and reserves all objections thereto.

(2) Opposer objects to each interrogatory to the extent that they purport to require the disclosure of communications, documents or information prepared in anticipation of

other words and/or designs, in connection with commercial and residential security systems and related alarm and monitoring services since 1983.

- (3) The survey entitled Consumer Perceptions of BRINKMANN conducted in connection with the subject proceeding and previously produced to Applicant.

INTERROGATORY NO. 25:

Please describe in full detail the factual bases for the allegation in paragraph 9 of the Notice of Opposition that the mark BRINK'S "had become exceedingly well-known and a famous mark...long prior to the filing date of the opposed application."

ANSWER:

- (1) Opposer is the owner of Registration Nos. Registration Nos. 1,412,587; 2,330,884; 1,309,375; 2,691,470; 1,411,610; 2,646,784; 1,313,790; 529,622, which are each *prima facie* and/or conclusive evidence of the validity of the marks BRINKS and BRINK'S and Opposer's exclusive right to use these marks in commerce.
- (2) Opposer and its licensees have continuously and extensively used and advertised the marks BRINK'S and BRINKS, alone and in combination with other words and/or designs, in connection with commercial and residential security systems and related alarm and monitoring services since 1983.
- (3) The survey entitled Consumer Perceptions of BRINKMANN, conducted in connection with the subject proceeding and previously produced to Applicant.

CERTIFICATE OF MAILING UNDER 37 C.F.R. § 1.8

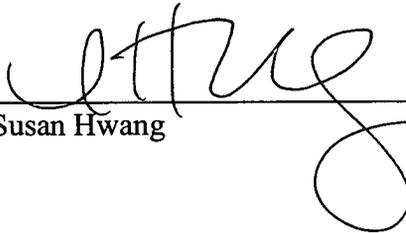
I hereby certify that the foregoing APPLICANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS OPPOSER'S CLAIM FOR DILUTION is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on September 23, 2008



Susan Hwang

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing APPLICANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS OPPOSER'S CLAIM FOR DILUTION upon Nancy S. Lapidus, counsel for Opposer, at Howrey LLP, 1299 Pennsylvania Ave., N.W., Washington, D.C. 20004, via first class mail, postage prepaid, on September 23, 2008.



Susan Hwang

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

APPLICANT BRINKMANN'S OPPOSITION TO OPPOSER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS
APPLICANT'S LACHES DEFENSE

I.

INTRODUCTION

Pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE and 37 C.F.R. § 2.127(e)(1), Applicant The Brinkmann Corporation ("Brinkmann") respectfully submits this opposition to the motion for partial summary judgment to dismiss Applicant's affirmative defense of laches filed by Opposer Brink's Network, Incorporated ("Brink's Network").

Opposer Brink's Network's motion is premised on a faulty legal theory, which focuses *only* on the affirmative defense of laches as applied to its ground of opposition based on alleged *likelihood of confusion*. Opposer Brink's Network's motion improperly ignores its other ground of opposition based on alleged *dilution*, and the fact that Applicant Brinkmann first

registered its mark BRINKMANN *nearly 30 years ago*. In all this time, Opposer Brink's Network has been on constructive notice of Applicant Brinkmann's registration and use of BRINKMANN, and yet Opposer *never once* raised any objection prior to this opposition. Even then, Opposer Brink's Network still has not objected to Applicant Brinkmann's pre-existing BRINKMANN registrations.

What is more, not only has Opposer Brink's Network never challenged Applicant Brinkmann's pre-existing BRINKMANN registrations, but Opposer limited this very opposition to just a few goods in one class of Applicant Brinkmann's multi-class application. Despite alleging dilution as a ground of opposition, Opposer Brink's Network did not object to Applicant Brinkmann's application to register BRINKMANN either in connection with other goods in the same class as the opposed goods or in connection with any goods in the eight other classes of the application. This itself is fatal to Opposer Brink's Network's motion.

Because Opposer Brink's Network based its opposition on both likelihood of confusion and dilution grounds, and because Applicant Brinkmann has a viable laches defense to the dilution grounds, Opposer's motion should be denied.

II.

STATEMENT OF RELEVANT FACTS

Applicant Brinkmann is a consumer products company based in Dallas, Texas. (See Declaration of J. Baxter Brinkmann, "Brinkmann Decl.," ¶ 1.) Brinkmann has used its house mark BRINKMANN—which is the surname of the company's founder, J. Baxter Brinkmann—on a variety of merchandise since 1975. (Brinkmann Decl., ¶¶ 1 & 3.) For over 30 years, Brinkmann has continued to expand and invest in its use of the BRINKMANN mark, steadily growing its business to expand its product lines, sales, advertising, and distribution

channels under the BRINKMANN mark throughout the United States and abroad. (Brinkmann Decl., ¶ 3.)

On November 13, 1978, Brinkmann filed an application, Ser. No. 73/193,053, for registration of its trademark BRINKMANN in a slightly stylized form.¹ The application was published on September 16, 1980, and it issued as Reg. No. 1,153,730 on May 12, 1981. The registered goods are “electrical extension cords, brackets, and electric connectors for use therewith,” in International Class 9, citing a date of first use of June 12, 1978 and “charcoal fired and electric roasting, grilling and barbecue cookers for domestic use and portable electric lights and filters, and replacement lamps,” in International Class 11, citing a date of first use of August 24, 1978. The registration is in force, is valid and subsisting, and is owned by Brinkmann; also, it has been declared incontestable under Section 15 of the Trademark Act, 15 U.S.C. § 1065. Brinkmann has continuously used the mark for the recited goods since 1978. No third party, including Brink’s Network, ever filed an opposition to registration. (See Brinkmann Decl., ¶ 4 & Exh. 1 thereto, consisting of a true and correct copy of Reg. No. 1,153,730 issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration.)

On October 11, 2000, Brinkmann filed an application, Ser. No. 76/145,244, for registration of its trademark BRINKMANN BACKYARD KITCHEN. The application was published on October 22, 2002 and issued as Reg. No. 2,779,986 on November 4, 2003, with a disclaimer of the words “backyard kitchen.” The registered goods are “combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers,” citing a date of first use of October 31, 2000. The registration is in force, is valid and subsisting, and is owned by

¹ The BRINKMANN mark in Reg. No. 1,153,730 has the final two “N”s joined together.

Brinkmann. Brinkmann has continuously used the mark for the recited goods since 2000. No third party, including Brink's Network, ever filed an opposition to registration. (See Brinkmann Decl., ¶ 5 & Exh. 2, consisting of a true and correct copy of Reg. No. 2,779,986 issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration.)

On January 17, 2003, Brinkmann filed the application at issue in this opposition, Ser. No. 76/483,115, for its trademark BRINKMANN in multiple classes to cover its then-existing lines of goods. The application was published for opposition on October 5, 2004. The current description of goods with dates of first use is as follows:

Class	Goods	Date of First Use in Class
4	Charcoal briquettes and wood chunks for use in smoking and grilling food.	Jan. 1979
6	Metal birdbaths; metal compost bins, metal garden hose hangers, and metal tubs and metal flashlight key rings.	Jan. 1979
7	Vacuum cleaners and accessories, namely, brushes and suction nozzles for vacuum cleaners, vacuum cleaner hoses and hose adapters, filters, filter bags for vacuum cleaners, vacuum cleaner extension wands, vacuum cleaner crevice tools, vacuum cleaner dollies, and accessory kits comprising vacuum cleaner brushes, suction nozzles, hoses, vacuum cleaner extension wands and vacuum cleaner crevice tools.	Jan. 1990
8	Hand tools, namely, protractor saw guides and multi-purpose hand tools comprising pliers, knife blades, screwdrivers, hole punches, bottle openers, can openers, fish scalers and files in one unit; hand utensils, namely, meat hooks.	Jan. 1990
9	Home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets; batteries; wall mount brackets for battery chargers and flashlight; cooking thermometers; electrical extension cords; electric connectors; electric converters; electronic mineral and metal detectors, flashlight and spotlight accessories sold together or separately, namely, transmitters, lighter plugs and filter caps.	June 12, 1978
11	Barbecue grills and smokers, gas cookers and gas fryers, combined outdoor gas grills comprised of a grill, side burner, hanging rack in a warming area, kitchen sink and ice bucket; replacement parts and accessories for barbecue grills and smokers and gas cookers and gas fryers sold separately, namely, charcoal lighters and charcoal starters; lighting products, namely, flashlights, spotlights, electric and fluorescent lanterns, rechargeable lights and spotlights,	Sept. 1, 1975

Class	Goods	Date of First Use in Class
	low voltage and solar-powered lights, electric night lights for outdoor work use, underwater and buoy lights used for fishing; flashlight and spotlight replacement parts and accessories sold together, namely, replacement bulbs, nylon and leather carry cases and holster and belt holders; flashlight and spotlight replacement parts and accessories sold separately, namely, replacement bulbs; replacement parts and accessories for barbecue grills, smokers, gas cooker and gas fryers sold separately, namely, drip pans, racks, grates, charcoal pans and water pans; candle lanterns; and portable electric fans.	
12	Wheelbarrows and hand carts for carrying weighted objects and dollies.	Jan. 1990
21	House wares and garden accessories, namely, pails, rinsing tubs, dust pans, metal pans for use as drain pans, watering cans, trash cans, bird feeders.	Aug. 1992
30	Seasonings and spices.	Jan. 1979

For each of the goods in the table above, Brinkmann has continuously used the mark BRINKMANN from adoption to the present. (Brinkman Decl., ¶ 6.)

Opposer Brink's Network filed a NOTICE OF OPPOSITION on April 1, 2005. Brink's Network objected to registration of BRINKMANN *only* in connection with "home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets," in International Class 9. (See Opposer Brink's Network's NOTICE OF OPPOSITION, ¶ 1.) The grounds for opposition asserted by Brink's Network are (1) likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) with various marks incorporating BRINK'S; and (2) dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c), of various marks incorporating BRINK'S. (See *id.*, ¶¶ 20-21.)

Brinkmann has associated its BRINKMANN mark with "security products" since 1975 and has advertised its products as useful for "security" and "safety" in the past. (See Brinkmann Decl., ¶¶ 7-9 and Exhs. 3-6, consisting of true and correct copies of Brinkmann's

advertisements, product labels and price list excerpts.) Brinkmann's "home security system" products (as defined in Ser. No. 76/483,115), have been on the market since at least as early as 1989. In all the years that Brinkmann has been using its mark BRINKMANN, Brink's Network has never objected to or otherwise expressed concern to Brinkmann prior to the time that Brinkmann's pending application was published for opposition. (See Brinkmann Decl., ¶ 11.)

Brink's Network has now moved for partial summary judgment, seeking to dismiss Brinkmann's affirmative defense of laches in its entirety.

III.

ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is an appropriate method for disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. FED. R. CIV. P. 56(c). A party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Id. See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden is higher than the preponderance of the evidence burden needed to prevail at final hearing. TBMP § 528.01. A genuine issue with respect to material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *Opryland USA Inc. v. Great American Music Show, Inc.*, 23 U.S.P.Q.2d 1471 (Fed. Cir. 1992). Therefore, the court must view all facts in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in the non-moving party's favor. *Id.* at 1472-73.

B. Material Facts in Dispute

In its memorandum, Opposer Brink's Network set forth alleged material facts that both are incorrect and fail to show that it is entitled to summary judgment as a matter of law.

The facts listed below, each asserted by Opposer in support of its motion, are in dispute and are material because they affect the outcome of the case:

1. "The principal ground for opposition is that Applicant's use of the mark BRINKMANN for home security systems and components therefor is likely to cause confusion as to the source and/or sponsorship of Applicant's goods within the meaning of § 2(d) of the Federal Trademark Act." OPPOSER'S MEMORANDUM, pp. 2-3.

2. "Opposer's Interrogatory No. 22 inquired as to the factual basis of Applicant's laches defense pleaded in ¶ 26 of Applicant's answer. Applicant's answer to Opposer's Interrogatory No. 22 makes the following statement with respect to the factual basis for the unreasonable delay element of the laches defense:

Brinkmann's home security system products have been on the market since at least as early as October 1989. Presumably Brink's Network has known, and certainly should have known, about Brinkmann and its home security system products for many years prior to this opposition proceeding. Brink's Network has unreasonably delayed in filing this opposition proceeding after first learning about Brinkmann and its home security products." OPPOSER'S MEMORANDUM, p. 3.

3. "During the deposition of Applicant's deponent Helen Dunham, she was asked in her Rule 30(b)(6) capacity whether Applicant was aware of any relevant facts demonstrating laches other than those set forth in the Answer to Opposer's Interrogatory No. 22 and answered that Applicant was not aware of any other facts." OPPOSER'S MEMORANDUM, p. 3.

Applicant Brinkmann disputes these facts. Specifically, Applicant Brinkmann points to the following evidentiary facts that controvert the facts above asserted by Brink's Network:

1. Opposer Brink's Network is incorrect that the principal ground for opposition is likelihood of confusion under § 2(d) of the Federal Trademark Act. Opposer Brink's Network also asserts dilution under § 43(c) of the Federal Trademark Act as a ground for opposition of Brinkmann's application Ser. No. 76/483,115. *See* Opposer Brink's Network's NOTICE OF OPPOSITION, ¶ 21. Therefore, two grounds for opposition are equally asserted in Opposer Brink's Network's NOTICE OF OPPOSITION, not just the one argued by Opposer in its motion.
2. Opposer Brink's Network is incorrect that the only factual basis for Applicant Brinkmann's laches defense is Opposer's actual knowledge of Applicant's home security products, as set forth in Applicant's first amended response to Opposer's Interrogatory No. 22. Applicant has served a second amended and supplemental response to Opposer's Interrogatory No. 22, supplementing its response and particularly pointing out Applicant's pre-existing registrations of BRINKMANN (Reg. No. 1,153,730) and BRINKMANN BACKYARD KITCHEN (Reg. No. 2,779,986), to which Opposer has never objected, and the fact that Opposer has limited this opposition to selected goods in one class of Applicant's multi-class application.²

² A true and correct copy of Brinkmann's SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 22 IN BRINK'S NETWORK'S FIRST SET OF INTERROGATORIES is attached hereto as Exhibit A. This supplemental response, along with Brinkmann's two pre-existing registrations for BRINKMANN (Reg. No. 1,153,730) and BRINKMANN BACKYARD KITCHEN (Reg. No. 2,779,986), and the limited nature of Opposer's opposition, should be considered as relevant evidence of record. To the extent that Opposer Brink's Network relied solely on Brinkmann's first amended responses and Brinkmann's Rule 30(b)(6) deposition testimony in filing the present motion for summary judgment, such reliance is not considered prejudice. *See, e.g., Giersch v. Scripps Networks Inc.*, 85 U.S.P.Q.2d 1306, 1309 (TTAB 2007) ("While the Board recognizes that petitioners relied on the admissions in filing their motion for summary judgment, such reliance does not rise to the level of "prejudice" as contemplated under Rule 36(b) [allowing respondent to withdraw or amend admissions]"); *FDIC v. Prusia*, 18 F.3d 637 (8th Cir. 1994) (holding that "the mere fact that a party may have prepared a summary judgment motion in reliance on an opposing party's erroneous admission does not constitute 'prejudice' such as will preclude grant of a motion to withdraw admissions").

3. Opposer Brink's Network is incorrect that Applicant Brinkmann is not aware of any facts demonstrating laches other than the facts set forth in Applicant's original response to Opposer's Interrogatory No. 22. Again, Applicant's supplemental response to Opposer's Interrogatory No. 22, supplementing its prior response, points out that Opposer has never objected to Applicant's pre-existing registrations of BRINKMANN (Reg. No. 1,153,730) and BRINKMANN BACKYARD KITCHEN (Reg. No. 2,779,986), and has limited its opposition to selected goods in Applicant's pending application.

4. Opposer Brink's Network's reliance on its Rule 30(b)(6) deposition of Applicant Brinkmann is misplaced. A Rule 30(b)(6) witness is a factual witness who should be questioned as to *facts*, not legal *contentions*. Opposer designated a topic which should properly have been the subject of an interrogatory rather than a Rule 30(b)(6) deposition, and Applicant duly made an objection on this ground. (See Declaration of Susan Hwang, "Hwang Decl.," ¶ 3 & Exh. 1, which is a true and correct copy of Applicant's Response to Opposer Brink's Network's Notice of Taking Discovery Deposition.) In fact, during Ms. Dunham's deposition, counsel for Opposer actually asked, "do you have an understanding of what the 'defense of laches' [sic] means?" And Ms. Dunham answered, "No." (Hwang Decl., ¶ 4 & Exh. 2, which is a true and correct copy of excerpts from Ms. Dunham's deposition.) Opposer clearly knew that asking Ms. Dunham whether she was aware of any other facts demonstrating laches was: (1) an improper question based on a legal contention; and (2) a fruitless exercise since Ms. Dunham, as a lay witness, did not even understand what the legal term meant. Accordingly, any reliance by Opposer Brink's Network on Ms. Dunham's

In *Giersch*, the Board noted that—as in this case—the petitioners filed their motion for summary judgment *before* the close of discovery and any potential prejudice could be mitigated by extending the discovery period as necessary to permit additional discovery based on respondent's amended admissions. *Giersch* at 1309. In this case, Brink's Network cannot even assert a need to conduct additional discovery with respect to Brinkmann's pre-existing registrations, because no amount discovery could change the fact of Brinkmann's earlier registrations or Brink's Network's *constructive* knowledge of them. *White Heather Distillers Ltd. v. American Distilling Co.*, 200 U.S.P.Q. 466, 469 (TTAB 1978).

deposition in bringing its motion for summary judgment is obviously misplaced and Opposer cannot legitimately claim any reliance or prejudice on such a basis.

Opposer Brink's Network's motion also reflects its mistaken understanding of "unreasonable delay." As more fully explained below, Applicant Brinkmann's two pre-existing registrations for BRINKMANN (Reg. No. 1,153,730) and BRINKMANN BACKYARD KITCHEN (Reg. No. 2,779,986), and the fact that the current opposition is limited to selected goods in Applicant's pending application, establish Opposer Brink's Network's unreasonable delay in asserting that Applicant Brinkmann's registration of its mark BRINKMANN will dilute Opposer's rights in its BRINK'S marks.

C. Laches Based Upon Failure to Object to Prior Registration

1. The Applicable Law

Section 19 of the Lanham Act expressly provides that the affirmative defense of laches may be considered and applied, where applicable, in *all inter partes* proceedings. 15 U.S.C. § 1069. Laches requires a showing of undue delay in asserting rights against a claimant and prejudice resulting therefrom. *National Cable Television Association, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1580, 19 U.S.P.Q.2d 1424, 1431 (Fed. Cir. 1991). The affirmative defense of laches is applicable *both* to likelihood of confusion grounds *and* to dilution grounds. *See Hornby v. TJJ Companies Inc.*, 87 U.S.P.Q.2d 1411, 1419 (TTAB 2008).

2. Oppositions based on alleged likelihood of confusion

In an opposition proceeding based on the ground of *likelihood of confusion*, laches generally begins to run no earlier than the date the mark in question was published for opposition. *National Cable Television Association*, 937 F.2d 1572, 1582, 19 U.S.P.Q.2d at 1432 (Fed. Cir. 1991). Opposer Brink's Network has moved for summary judgment based on this

ground alone, asserting that it took the first available opportunity to oppose Brinkmann's application and that it did so in a timely manner. However, the inquiry does not end there.

For example, a laches defense in an opposition proceeding may be based upon the opposer's failure to object to an applicant's prior registration of substantially the same mark for substantially the same goods or services. *See, e.g., Acquion Partners L.P. v. Envirogard Products Ltd.*, 43 U.S.P.Q.2d 1371, 1373-74 (TTAB 1997); *Copperweld Corp. v. Astralloy-Vulcan Corp.*, 196 U.S.P.Q. 585, 590-91 (TTAB 1977); *White Heather Distillers Ltd. v. American Distilling Co.*, 200 U.S.P.Q. 466, 469 (TTAB 1978).

In *Acquion*, Applicant filed an application in 1994 for the mark RAINFRESH in connection with water filters and purifiers. *Acquion*, 43 U.S.P.Q.2d at 1371. Opposer filed a notice of opposition under Section 2(d) of the Trademark Act, based on likelihood of confusion with opposer's prior registrations and alleged prior use of RAINSOFT for water filters and water treatment equipment. Applicant asserted the affirmative defense of laches, based on applicant's previous registration for the same mark RAINFRESH, for filter elements for removing taste and odor. *Id.* Applicant's previous registration issued in 1971 but expired in 1991 because of applicant's inadvertent failure to renew it. *Id.* Opposer never objected to applicant's previous registration. *Id.* at 1373. The Board ruled that applicant was allowed to assert and attempt to prove laches based on its previous expired registration, because a laches defense may be based upon an opposer's failure to object to an applicant's earlier registration of substantially the same mark for substantially the same goods. *Id.* The Board noted, "The important point is that the mark applicant now seeks to register was published for opposition in 1971 and thereafter was registered for 20 years without objections from opposer." *Id.* The Board denied applicant's motion for summary judgment based on laches, however, because there was a genuine issue of

material fact whether the goods in applicant's previous registration and pending application were the same or substantially the same goods. *Id.* at 1374.

In *Copperweld*, applicant filed an application in 1973 for the mark ASTRALLOY-V in connection with deep air hardening alloy steel compositions, plates and bars. *Copperweld*, 196 U.S.P.Q. at 586. Opposer filed a notice of opposition under Section 2(d) based on likelihood of confusion with opposer's prior registration and alleged prior use of ARISTOLOY for ferrous alloy in the form of various shapes. *Id.* Although opposer had objected to applicant's use of ASTRALLOY as early as 1966, opposer never followed through and took steps to stop applicant's use of the mark. *Id.* at 591. Applicant secured five separate registrations of ASTRALLOY for various steel and alloy products between 1969 and 1973, yet opposer never opposed any of the registrations. *Id.* The Board held that opposer was guilty of laches, especially in light of "opposer's failure on five occasions during the period in question to oppose registration of the mark to applicant." *Id.*

In *White Heather*, applicant filed an application in 1975 for HEATHER HOUSE in connection with scotch whiskey. *White Heather*, 200 U.S.P.Q. at 467-68. Opposer filed a notice of opposition under Section 2(d) based on likelihood of confusion with opposer's prior registrations and alleged prior use of WHITE HEATHER, PRECIOUS HEATHER and other marks for scotch whiskey. *Id.* at 468. Applicant asserted the affirmative defense of laches, based on opposer's failure to object to applicant's previous registration for the same mark HEATHER HOUSE for whiskey, which had been registered in 1965 but had since gone expired for inadvertent failure to file a declaration of use. *Id.* The Board held that opposer was guilty of laches because applicant's previous registration was constructive notice to opposer of applicant's claim of ownership of the mark and yet opposer never objected to applicant's use of the mark,

letting ten years pass before filing the opposition to applicant's second application. *Id.*

3. Oppositions Based on Alleged Dilution

The foregoing cases all involve the affirmative defense of laches asserted in an opposition based on alleged likelihood of confusion. In those cases, the Board scrutinized whether an applicant's prior registration that an opposer failed to oppose was for substantially the same mark for substantially the same goods or services. If an opposer believes a likelihood of confusion exists with a mark in a pending application, then the opposer should have opposed a previous application as well. The rationale for requiring the same mark for substantially the same goods or services is similar to the *Morehouse* affirmative defense, in that no added damage to the opposer will result by issuing a registration to an applicant who already has a substantially similar existing registration. See *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 160 U.S.P.Q. 715, 717 (CCPA 1969).

An opposition based on alleged dilution raises different issues. Section 43(c) of the Trademark Act provides that an owner of a famous and distinctive mark can obtain injunctive relief against another who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, *regardless* of the presence or absence of actual or likely confusion, of competition, or of actual economic injury. 15 U.S.C. § 1125(c). Dilution law is intended to protect a trademark owner's mark from dilution of the mark's value and uniqueness. *Moseley v. V Secret Catalogue Inc.*, 537 US 418, 429 (2003). Unlike traditional infringement law, the prohibitions against trademark dilution are not motivated by an interest in protecting consumers. *Id.*

Dilution by blurring is an association arising from the similarity between a mark

or trade name and a famous mark that impairs the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). In other words, “[d]ilution refers to the whittling away of the value of a trademark when it’s used to identify different products.” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002). In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

- (i) the degree of similarity between the mark or trade name and the famous mark;
- (ii) the degree of inherent or acquired distinctiveness of the famous mark;
- (iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark;
- (iv) the degree of recognition of the famous mark; and
- (v) whether the user of the mark or trade name intended to create an association with the famous mark;
- (vi) any actual association between the mark or trade name and the famous mark.

15 U.S.C. § 1125(c)(2)(B).

Significantly, similarity of the respective goods or services is not a listed factor. For dilution, “use” by a defendant refers to any use in commerce, not just confusingly similar use or the specific use objected to by a plaintiff. See *Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1336 (Fed. Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1013 (9th Cir. 2004) (holding that any commercial use of a famous mark in commerce is arguably a diluting use that fixes the time by which famousness is to be measured).

4. Laches Applies To Opposer Brink’s Network’s Opposition Because It Is Based On Alleged Dilution

Opposer Brink’s Network is guilty of laches because for the nearly 30 years it has been on constructive notice of Applicant Brinkmann’s registration of its mark BRINKMANN,

Brink's Network has failed to object and even now only opposes selected goods in Applicant Brinkmann's pending application. Since Opposer Brink's Network's ground for opposition based on alleged dilution does *not* depend on use of the BRINKMANN mark on similar or related goods, the affirmative defense of laches based on Applicant Brinkmann's pre-existing registrations is applicable to a dilution claim regardless of whether the goods in the pre-existing registrations are different from the goods in the opposed application.

Applicant Brinkmann has been marketing and selling a variety of consumer products under its mark BRINKMANN since 1975. (*See* Brinkmann Decl., ¶ 3.) Applicant Brinkmann obtained its U.S. Reg. No. 1,153,730 for BRINKMANN in 1981. Applicant Brinkmann has been selling home security products since at least as early as 1989. Brinkmann obtained its U.S. Reg. No. 2,779,986 for BRINKMANN BACKYARD KITCHEN in 2003.

Opposer Brink's Network thus has had constructive notice of Applicant Brinkmann's use and registration of the mark BRINKMANN since at least 1981. *See White Heather Distillers Ltd. v. American Distilling Co.*, 200 U.S.P.Q. 466, 469 (TTAB 1978) (holding opposer's failure to oppose applicant's five prior registrations despite constructive notice flowing from federal registration rendered opposer guilty of laches). Brink's Network also has had constructive notice of Brinkmann's use and registration of the mark BRINKMANN BACKYARD KITCHEN (with a disclaimer of the words "backyard kitchen") since 2003. *Id.* Yet Opposer Brink's Network has never objected to Applicant Brinkmann's registrations of either the BRINKMANN mark or the BRINKMANN BACKYARD KITCHEN mark.

Opposer Brink's Network argues disingenuously that it could not have objected to Brinkmann's application Ser. No. 76/483,115 until the application was published. However, this ignores the fact that for dilution purposes, Brink's Network can and should have objected long

ago to Brinkmann's pre-existing registrations of BRINKMANN and BRINKMANN BACKYARD KITCHEN. It also ignores that even when Brink's Network opposed Brinkmann's pending application, Brink's Network limited its opposition to "home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets." Brink's Network did not object to the numerous other goods that Brinkmann applied for in its application.

The ground for opposition of dilution is not the same as the ground of likelihood of confusion. Likelihood of confusion compares use of a same or confusingly similar mark for the same or confusingly similar goods. Dilution, on the other hand, compares marks without regard to the similarity of the goods. Use is tied to any commercial use by a defendant, not just confusingly similar or objectionable use.

Why, then, did Opposer Brink's Network never object to Applicant Brinkmann's U.S. Reg. No. 1,153,730 for BRINKMANN, issued in 1981, or U.S. Reg. No. 2,779,986 for BRINKMANN BACKYARD KITCHEN, issued in 2003? Twenty-seven years have passed since Opposer Brink's Network's constructive notice of Applicant Brinkmann's federal registration and use of BRINKMANN, yet Opposer sat on its alleged rights and never raised an objection. Even now, Applicant Brinkmann has applied for a laundry list of goods in its pending application Ser. No. 76/483,115, all of which should be analyzed equally for purposes of a dilution claim, yet Opposer Brink's Network does not object to any of these other recited goods.

Opposer Brink's Network is guilty of laches because it had actual and constructive notice of Applicant Brinkmann's use and prior registration of BRINKMANN but never objected to or filed an opposition against registration. Any alleged "damage" through blurring caused by Applicant Brinkmann's registration of BRINKMANN now would be the

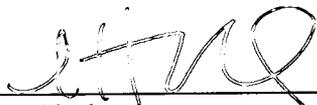
same "damage" that occurred nearly 30 years ago when Brinkmann first registered its mark BRINKMANN. If Opposer Brink's Network failed to object back then, it cannot be heard to object now. The prejudice to Applicant Brinkmann is manifest. (See Brinkmann Decl., ¶¶ 3 & 11-13.) Opposer Brink's Network's unreasonable delay in opposing Brinkmann's application for BRINKMANN coupled with the resulting prejudice to Brinkmann establishes the affirmative defense of laches with respect to Brink's Network's dilution claim.

IV.

CONCLUSION

For all of the foregoing reasons, Applicant Brinkmann has demonstrated that Opposer Brink's Network is not entitled to judgment as a matter of law on Applicant Brinkmann's laches defense. Accordingly, Applicant Brinkmann respectfully requests that the Board deny Opposer's motion for summary judgment.

Dated: September 23, 2008



Gary A. Clark
Susan Hwang
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398
Attorneys for Applicant
THE BRINKMANN CORPORATION

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

DECLARATION OF J. BAXTER BRINKMANN UNDER 37 C.F.R. § 2.20

I, J. Baxter Brinkmann, hereby declare as follows:

1. I am the president of Applicant The Brinkmann Corporation ("Brinkmann"), a consumer products company based in Dallas, Texas, which I founded and which is named after me.
2. I make this declaration in connection with an opposition proceeding, No. 91164764, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.
3. Brinkmann has used its trademark BRINKMANN on a variety of consumer products since 1975. For over 30 years, Brinkmann has continued to expand and invest in its use of the BRINKMANN mark. Over that time period, Brinkmann has expanded its product lines, sales, advertising, and distribution channels under the mark BRINKMANN throughout the United States and abroad.
4. On November 13, 1978, Brinkmann filed an application to federally register the trademark BRINKMANN. The application, Serial No. 73/193,053, was published on

September 16, 1980 and issued as Registration No. 1,153,730 on May 12, 1981. A true and correct copy of the registration issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration is attached as Exhibit 1. The registered goods are “electrical extension cords, brackets, and electric connectors for use therewith,” in International Class 9, with a date of first use of June 12, 1978 and “charcoal fired and electric roasting, grilling and barbecue cookers for domestic use and portable electric lights and filters, and replacement lamps,” in International Class 11, with a date of first use of August 24, 1978. Brinkmann is the owner of this registration and has taken all necessary steps to maintain it. No third party, including Brink’s Network, ever opposed the application or has ever sought to cancel the registration. To the best of my knowledge, the registration is valid and subsisting, and I understand that it was declared “incontestable” over 20 years ago. Brinkmann has continuously used the mark BRINKMANN for the goods since 1978.

5. On October 11, 2000, Brinkmann filed an application to federally register the trademark BRINKMANN BACKYARD KITCHEN. The application, Serial No. 76/145,244, was published on October 22, 2002 and issued as Registration No. 2,779,986 on November 4, 2003. A true and correct copy of the registration issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registration is attached as Exhibit 2. The registered goods are “combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers,” with a date of first use of October 31, 2000. Brinkmann is the owner of this registration and has taken all necessary steps to maintain it. No third party, including Brink’s Network, ever opposed the application or has ever sought to cancel the registration. To the best of my knowledge, the registration is valid and subsisting. Brinkmann has continuously used the mark BRINKMANN BACKYARD KITCHEN for the goods since 2000.

6. On January 17, 2003, Brinkmann filed the application that is the subject of this proceeding, Serial No. 76/483,115, for the trademark BRINKMANN in multiple classes to cover its then-existing lines of goods. The application was published for opposition on October 5, 2004. The current description of goods with dates of first use are set forth in the following table:

Class	Goods	Date of First Use in Class
4	Charcoal briquettes and wood chunks for use in smoking and grilling food.	Jan. 1979
6	Metal birdbaths; metal compost bins, metal garden hose hangers, and metal tubs and metal flashlight key rings.	Jan. 1979
7	Vacuum cleaners and accessories, namely, brushes and suction nozzles for vacuum cleaners, vacuum cleaner hoses and hose adapters, filters, filter bags for vacuum cleaners, vacuum cleaner extension wands, vacuum cleaner crevice tools, vacuum cleaner dollies, and accessory kits comprising vacuum cleaner brushes, suction nozzles, hoses, vacuum cleaner extension wands and vacuum cleaner crevice tools.	Jan. 1990
8	Hand tools, namely, protractor saw guides and multi-purpose hand tools comprising pliers, knife blades, screwdrivers, hole punches, bottle openers, can openers, fish scalers and files in one unit; hand utensils, namely, meat hooks.	Jan. 1990
9	Home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets; batteries; wall mount brackets for battery chargers and flashlight; cooking thermometers; electrical extension cords; electric connectors; electric converters; electronic mineral and metal detectors, flashlight and spotlight accessories sold together or separately, namely, transmitters, lighter plugs and filter caps.	June 12, 1978
11	Barbecue grills and smokers, gas cookers and gas fryers, combined outdoor gas grills comprised of a grill, side burner, hanging rack in a warming area, kitchen sink and ice bucket; replacement parts and accessories for barbecue grills and smokers and gas cookers and gas fryers sold separately, namely, charcoal lighters and charcoal starters; lighting products, namely, flashlights, spotlights, electric and fluorescent lanterns, rechargeable lights and spotlights, low voltage and solar-powered lights, electric night lights for outdoor work use, underwater and buoy lights used for fishing; flashlight and spotlight replacement parts and accessories sold together, namely, replacement bulbs, nylon and leather carry cases and holster and belt holders; flashlight and spotlight replacement parts and accessories sold separately, namely, replacement bulbs; replacement parts and accessories for barbecue grills, smokers, gas cooker and gas fryers sold separately, namely, drip pans, racks, grates, charcoal pans and water pans; candle lanterns; and portable electric fans.	Sept. 1, 1975
12	Wheelbarrows and hand carts for carrying weighted objects and dollies.	Jan. 1990
21	House wares and garden accessories, namely, pails, rinsing tubs, dust pans, metal pans for use as drain pans, watering cans, trash cans, bird feeders.	Aug. 1992
30	Seasonings and spices.	Jan. 1979

For each of the goods in the table above, Brinkmann has continuously used the mark BRINKMANN from adoption to the present.

7. Brinkmann's association of its BRINKMANN mark with "security" products first began in 1975. Brinkmann had previously acquired a company called Q-Beam Corporation that made hand-held spotlights and other specialty lights. In 1975 Brinkmann introduced a spotlight that was called the "Q-Beam Security Special." It was advertised for use with policemen, state troopers and other security personnel. A true and correct copy of Brinkmann's advertisement for the spotlight from 1975 is attached as Exhibit 3. Packaging for the spotlight clearly showed both the BRINKMANN mark and "Q-BEAM SECURITY" in close proximity. A true and correct copy of product labels for the spotlight is attached as Exhibit 4. Brinkmann advertised its spotlight as the "Security Special" for a number of years.

8. In the early 1980s, Brinkmann also advertised its portable lights for use with "Home Security" and "For Safety . . . Security . . . Convenience." A true and correct copy of the cover of Brinkmann's price list from 1981 is attached as Exhibit 5.

9. In about 1984, Brinkmann began using its BRINKMANN mark for rechargeable lights that were advertised as "rechargeable security lights." A true and correct copy of the cover and the relevant page from Brinkmann's July 26, 1984 price list is attached as Exhibit 6.

10. In 1989, Brinkmann introduced "home security system" products including the motion sensitive lights, detectors, receivers, transmitters, and adapters, which are at issue in this proceeding, under the BRINKMANN mark and has continuously used its mark for such products to date.

11. In all the years that Brinkmann has been using its mark BRINKMANN, Brink's Network never objected to Brinkmann's use of the mark on any products, including security-related products, prior to the time that Brinkmann's pending application was published for opposition.

12. Brinkmann will suffer material prejudice if, after over 30 years of use and nearly 30 years of registration of its mark BRINKMANN, Brink's Network is allowed to

challenge Brinkmann's registration of BRINKMANN. Brinkmann has adopted and used BRINKMANN as its house mark on nearly every product it makes and sells. Most Brinkmann products have a secondary or product specific mark, but the mark BRINKMANN is the one mark by which nearly all Brinkmann products are known and recognized in the marketplace. Brinkmann has invested an enormous amount of time, effort and money in promoting the mark BRINKMANN through use of it on or in connection with its products, catalogs, literature, and packaging, in advertising, at trade shows, and on its website. This has resulted in a valuable business and goodwill associated with the BRINKMANN mark.

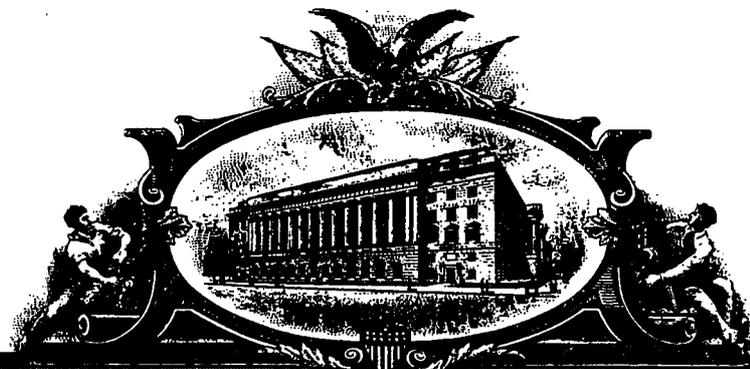
13. From the first introduction of the mark BRINKMANN in 1975 to the present, Brinkmann's business has continued to grow, as demonstrated by steady expansion of its product lines under its BRINKMANN mark and by steady growth in the amount of sales, advertising and channels of trade for its consumer products under the BRINKMANN mark. All of this has occurred in the absence of any objection from Brink's Network.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Date: September 19th, 2008

By: 
J. BAXTER BRINKMANN

Exhibit 1



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

**UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office**

September 16, 2008

**THE ATTACHED U.S. TRADEMARK REGISTRATION 1,153,730 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.**

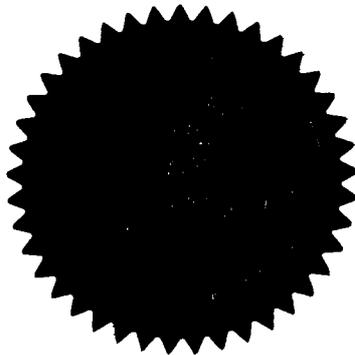
**REGISTERED FOR A TERM OF 20 YEARS FROM *May 12, 1981*
1st RENEWAL FOR A TERM OF 10 YEARS FROM *May 12, 2001*
SECTION 8 & 15
LESS GOODS**

SAID RECORDS SHOW TITLE TO BE IN:

***THE BRINKMANN CORPORATION
A CORPORATION OF TEXAS***

**By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office**

Gloria A. Murray
GLORIA A MURRAY
Certifying Officer



Int. Cls.: 9 and 11

Prior U.S. Cls.: 21, 26 and 34

United States Patent and Trademark Office

Reg. No. 1,153,730

Registered May 12, 1981

TRADEMARK
Principal Register

BRINKMANN

The Brinkmann Corporation (Texas corporation)
4215 McEwen Rd.
Dallas, Tex. 75240

For: ELECTRICAL EXTENSION CORDS,
BRACKETS, ~~RADAR DETECTORS, AND~~
~~ELECTRONIC METAL DETECTORS, HEAD~~
~~PHONES AND SEARCH COILS, AND ELEC-~~
TRIC CONNECTORS FOR USE THEREWITH, in
CLASS 9 (U.S. Cls. 21 and 26).

First use Jun. 12, 1978; in commerce Jun. 12, 1978.

For: CHARCOAL FIRED AND ELECTRIC
ROASTING, GRILLING AND BARBECUE
COOKERS FOR DOMESTIC USE AND PORTA-
BLE ELECTRIC LIGHTS AND FILTERS, AND
REPLACEMENT LAMPS, in CLASS 11 (U.S. Cls.
21 and 34).

First use Aug. 24, 1978; in commerce Aug. 24,
1978.

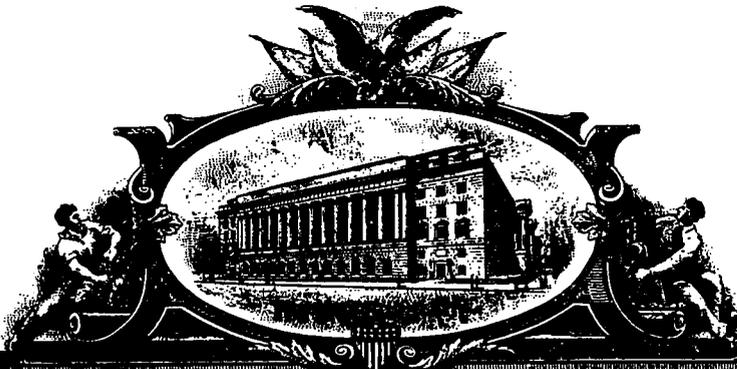
Ser. No. 193,053, filed Nov. 13, 1978.

ABRAM I. SACHS, Primary Examiner

BM 013039

Exhibit 2

1719551



THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:
UNITED STATES DEPARTMENT OF COMMERCE**

United States Patent and Trademark Office

September 16, 2008

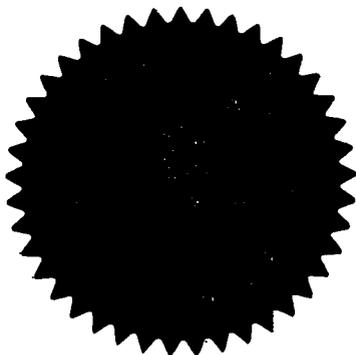
THE ATTACHED U.S. TRADEMARK REGISTRATION 2,779,986 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF 10 YEARS FROM *November 04, 2003*

SAID RECORDS SHOW TITLE TO BE IN:
THE BRINKMANN CORPORATION
A CORPORATION OF TEXAS

By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office

Gloria A. Murray
GLORIA A MURRAY
Certifying Officer



BM 013040

Int. Cl.: 11

Prior U.S. Cls.: 13, 21, 23, 31, and 34

United States Patent and Trademark Office

Reg. No. 2,779,986

Registered Nov. 4, 2003

**TRADEMARK
PRINCIPAL REGISTER**

BRINKMANN BACKYARD KITCHEN

**BRINKMANN CORPORATION, THE (TEXAS
CORPORATION)
4215 MCEWEN ROAD
DALLAS, TX 75244**

**NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "BACKYARD KITCHEN", APART
FROM THE MARK AS SHOWN.**

**FOR: COMBINED OUTDOOR GRILL AND
KITCHEN APPLIANCE UNITS COMPRISED OF
GAS GRILLS, SINKS AND COOLERS, IN CLASS 11
(U.S. CLS. 13, 21, 23, 31 AND 34).**

SN 76-145,244, FILED 10-11-2000.

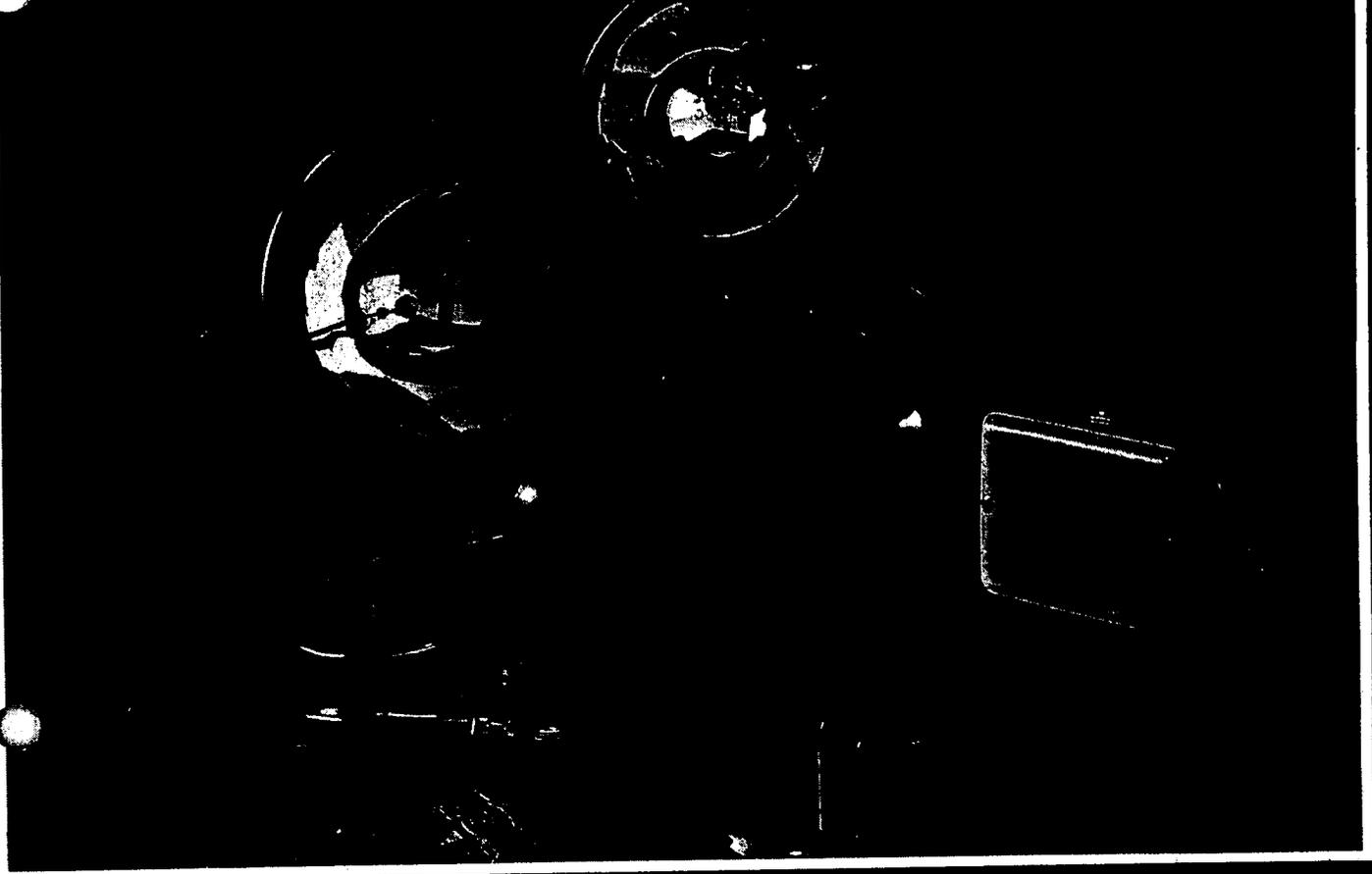
FIRST USE 10-31-2000; IN COMMERCE 10-31-2000.

RAUL CORDOVA, EXAMINING ATTORNEY

Exhibit 3

Q-Beam[®] SPECIALTY LIGHTS

For control of any situation.



Magnetic Base

Q-Beam's Magnetic Base Light fastens to any steel or iron surface with the staying power only a 50-pound-pull magnet can provide. Mounted on rust-proof swivel base, features 180 degree vertical, 360 degree horizontal swivel. Thousands of agricultural, industrial, emergency and recreational applications. A must when steady light is required. Available in 200,000/100,000 candlepower Spot/Flood and 200,000 candlepower Super Spot models. Complete with 15-foot heavy-duty insulated cord. Plugs into any cigarette lighter. Operates on any 12-volt DC source.

Security Special

The Q-Beam Security Special is a rugged 200,000 candlepower high intensity hand light with special features for policemen, state troopers, firemen, game wardens, and other security personnel. Momentary switch is designed to operate only when depressed. Perfect for use around warehouses, docks, office buildings, stores. Accessories include amber snap-on lens for caution light and red snap-on lens for stop warnings. Blue filter and blinker model (Security Deluxe) also available. Other options include separate adapter unit for use when cigarette lighter not available as power source.

Varmint Special

The 200,000 candlepower light for nighttime hunters. Red filter won't spook wild animals. Lets you focus light directly on wily predators as they answer your calls. Exclusive shooters' hood eliminates glare and protects night vision. Removable red filter permits use as standard Super Spot. 15-foot heavy-duty cord with cigarette lighter plug.

Moonliter[®]

A mini-light that packs a powerful punch. Dual bulbs for greater illumination. A heavy-duty rheostat lets you control illumination. A perfect companion for night fishing (soft light) or fixing flat tires (full light). Equipped with translucent lens. Insect-repelling amber lens optional. Moonliter has stainless steel handle for hanging and suction cup base for mounting. Moonliter features 8-foot cord with battery clips for direct 12-volt battery tie-in or cigarette lighter plug.

ITEM	MODEL	DESCRIPTION
Magnetic Base	1500	Black, 3¼ lbs., Super Spot W/magnet base swivel, 15-ft. cord/cigarette lighter plug
	1501	Black, 3¼ lbs., Spot/Flood W/magnet base swivel, 15-ft. cord/cigarette lighter plug
Security Special	1502	Black, 3¼ lbs., Super Spot W/magnet base flasher, 2 filters, 15-ft. cord/cigarette lighter plug
	1503	Black, 3¼ lbs., Super Spot W/hand grip, momentary switch, 15-ft. cord/cigarette lighter plug
	1504	Black, 2¾ lbs., Super Spot Deluxe W/hand grip, flasher, 2 filters, 8-ft. coil cord/cigarette lighter plug
Varmint Special	1505	Black, 3 lbs., W/hood and red filter, 15-ft. cord with cigarette lighter plug
Moonliter	1506	Black, 3/4 lbs., W/rheostat and dual bulbs, 8-ft. cord with battery clips
	1507	Black, 3/4 lbs., W/rheostat and dual bulbs, 8-ft. cord with cigarette lighter plug

Exhibit 4



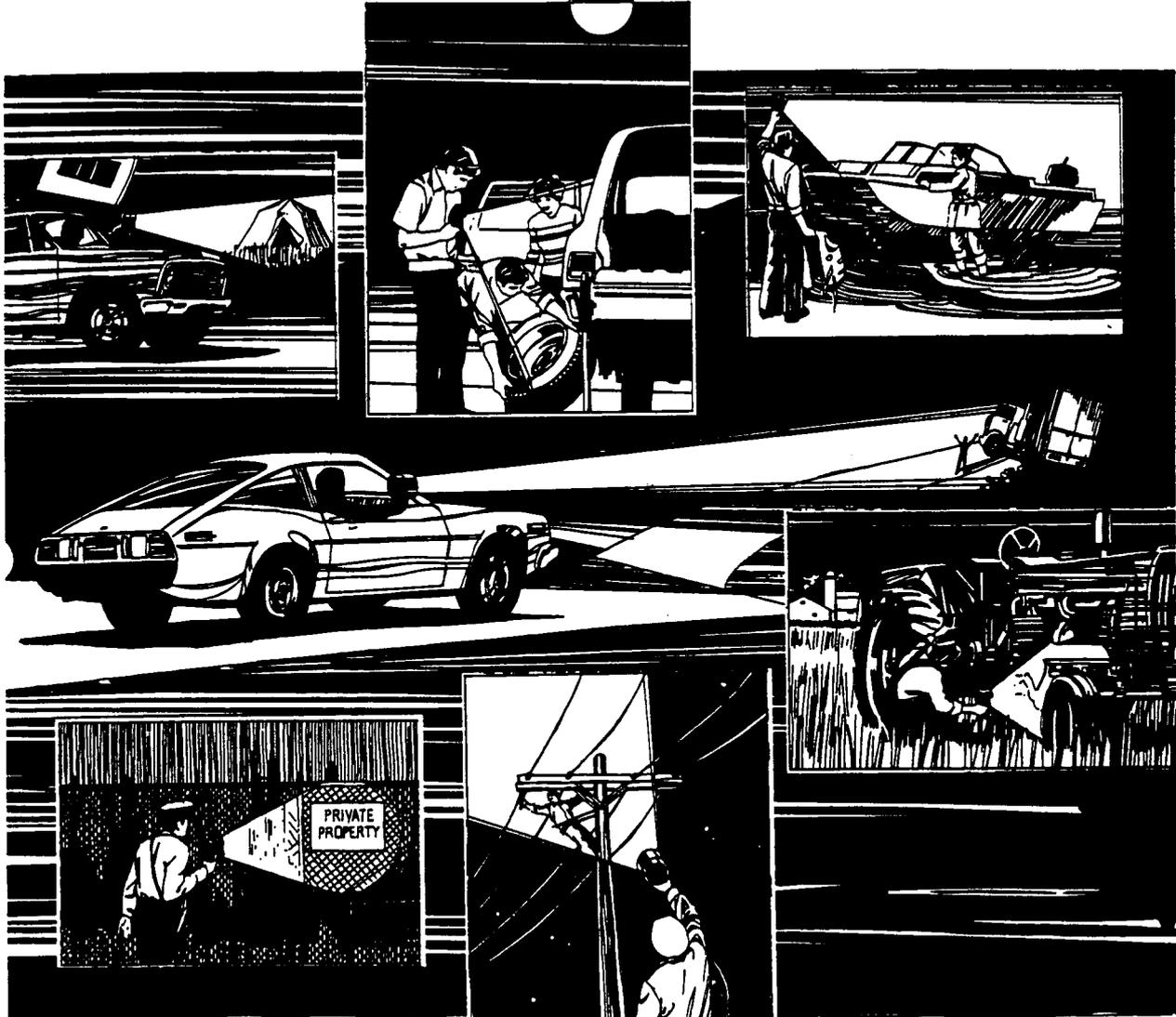
Exhibit 5

Kitchen - W/D. Get. New side door.

BRINKMANN®

1981

Q-Beam® — The Ultimate in High-Intensity Portable Lighting Systems



- Farm • Fleet
- Marine
- Off-Road • Home Security • 4x4 • Industrial
- Hunting
- Construction
- Auto Utility • D.I.Y. • Emergency • Camping

FOR SAFETY...SECURITY...CONVENIENCE

Exhibit 6

BRINKMANNTM

CONFIDENTIAL DISTRIBUTOR PRICE LIST

JULY 26, 1984

Karnis copy



Q-Beam[®]

MAXLITETM

VOYAGERTM

TROUBLE SHOOTERTM

SMOKE 'N PIT[®]

Small FryTM

Sportsman SmokerTM

SMOKE 'N GRILL[®]

country cookerTM

treasure

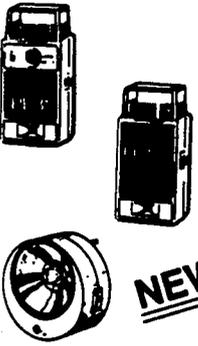
SENSOR[®]

BRINKMANN[®] puts Adventure and Excitement
into Your Sales Program

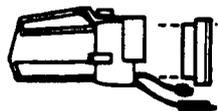
CONFIDENTIAL

BM001828

BRINKMANN® RECHARGEABLE SPOTLIGHTS AND 6-VOLT LANTERNS AND ACCESSORIES

ITEM	MODEL	DESCRIPTION	CASE PACK	WHSLE.	DISTR.
	827-0391-0	PF3, Rechargeable 5-in-1 Security Light, for use as power failure light, emergency flashlight, 360° area light and glowing night light. Complete with audio alert. 2-cell NiCad battery system. U.L. listed.	6	16.76	13.97
	827-0360-0	PF2, Rechargeable 4-in-1 Security Light, for use as power failure light, emergency flashlight, 360° area light and glowing night light. 2-cell NiCad battery system. U.L. listed.	6	13.16	10.97
	827-0365-0	3-in-1 Rechargeable Safety Light, for use as power failure light, emergency flashlight and glowing night light. 2-cell NiCad battery system. U.L. listed.	6	11.96	9.97
		Master pack: (6) 7½ × 9 × 7½", wt. 2 lbs. 6 oz. (.29 cu. ft.)			
		Master pack (6) 7½ × 14½ × 7½", wt. 3 lbs. (.47 cu. ft.)			
		Master pack: (6) 8½ × 9 × 8½", wt. 3 lbs. (.38 cu. ft.)			
	827-0603-0	F-1F Fluorescent Lantern with warning system. Black rugged case. Unbreakable lens. Steady or flasher light. Includes set of emergency messages. Uses 1 6-volt lantern battery.	4	29.96	24.97
	827-0600-0	F-1 Fluorescent Lantern. Black rugged case. Unbreakable lens. Weather-protected switch. Versatile handle: hang, carry or wall mount. Unique and economical power system; uses only 1 6-volt lantern battery.	4	17.96	14.97
	827-0621-0	Same as above with black/ultraviolet light.	4	23.96	19.97
		Master pack: (4) 7½ × 14¼ × 10¼", wt. 6 lbs. 4 oz. (.63 cu. ft.)			
	450-9920-0	Bulb Cap Set, red and amber.	1	1.16	.97
	450-9700-0	Adjustable Shoulder Strap with detachable snaps.	1	1.32	1.10
	119-9006-0	Amber Bug Lens for F-1 Fluorescent Lantern.	1	1.68	1.40
	450-9716-0	Custom Lantern Bracket with screws.	1	1.50	1.25
	190-9102-0	Heavy Duty Mailer Carton.	1	.48	.40
	070-9150-0	6-Volt Lantern Battery with spring terminals	1	2.88	2.40
	070-9151-0	6-Volt Heavy Duty Lantern Battery with spring terminals.	1	3.72	3.10

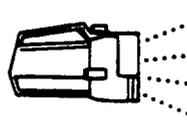
KEY TO SELLING MORE BRINKMANN® RECHARGEABLE SPOTLIGHTS AND 6-VOLT LANTERNS



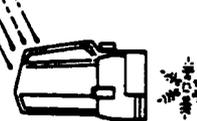
AC & DC RECHARGEABLE
Built-in AC & DC chargers allow recharge wherever you are!



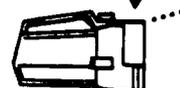
TOUGH AND RUGGED
High density polyethylene case.



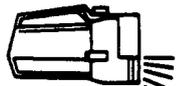
MOST POWERFUL BEAM
using a 6-volt lantern battery. Focus adjusts from spot to flood on all models.



IT'S WEATHERPROOF



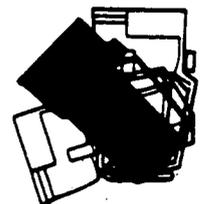
NON-GLARE SHIELD



LENS SEAL GLOWS
IN THE DARK

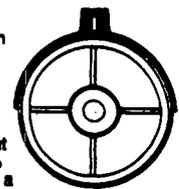
120° SWIVEL STAND
Available on many models

Heavy-gauge metal bracket is chrome-plated to resist rust and corrosion. Adds versatility, because it holds the lantern stable in any position with a 120° arc. Stand is removable.



SUPER II REFLECTOR

The most dramatic change in a lantern design in 50 years. The "SUPER II" system features a COMPUTER DESIGNED PARABOLIC REFLECTOR WITH A BOOSTER. Its super efficient beam actually produces 50% MORE CANDLEPOWER for a much brighter beam.



NO RUST OR CORROSION
Silvered switch contacts resist acids and alkalis.



AIR SPACE SURROUNDING BATTERY
Eliminates condensation inside case. Operates in colder temperatures.



IT FLOATS
"O" ring sealed switch and neoprene fitted rim

CONFIDENTIAL

BM001838

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

DECLARATION OF SUSAN HWANG UNDER 37 C.F.R. § 2.20

I, Susan Hwang, hereby declare as follows:

1. I am an associate at the law firm of Sheppard, Mullin, Richter & Hampton LLP, counsel of record for Applicant The Brinkmann Corporation.
2. I make this declaration in connection with an opposition proceeding, No. 91164764, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.
3. Attached as Exhibit 1 is a true and correct copy of Applicant's Response to Opposer Brink's Network's Notice of Taking Discovery Deposition, served on Opposer on October 12, 2005.
4. Attached as Exhibit 2 is a true and correct copy of excerpts from Ms. Dunham's deposition, taken on February 16, 2007.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any

registration resulting therefrom, declares that all statements made of her own knowledge are true; and all statements made on information and belief are believed to be true.

Date: September 23, 2008

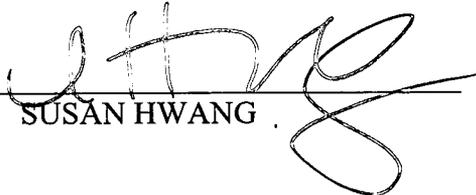
By: _____
SUSAN HWANG . 

Exhibit 1

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**APPLICANT BRINKMANN'S RESPONSE TO OPPOSER BRINK'S NETWORK'S
NOTICE OF TAKING DISCOVERY DEPOSITION**

Applicant The Brinkmann Corporation ("Brinkmann") hereby responds and objects to OPPOSER BRINK'S NETWORK, INCORPORATED'S NOTICE OF TAKING DISCOVERY DEPOSITION served by Opposer Brink's Network, Incorporated ("Brink's Network").

GENERAL OBJECTIONS

The following Objections are made to the entirety of Opposer's Notice, including each topic for testimony identified in a separately numbered or lettered paragraph therein:

1. Brinkmann objects to the date, time and location of the deposition as inconvenient and unduly burdensome.
2. Brinkmann objects to the Notice to the extent Opposer intends to exceed the maximum duration of seven (7) hours prescribed by FED. R. CIV. P. 30(d)(2).

3. Brinkmann objects to the Notice to the extent that any topic for testimony purports, through definitions or otherwise, to impose obligations beyond those contained in the FEDERAL RULES OF CIVIL PROCEDURE.

4. Brinkmann objects to each of the topics for testimony insofar as they are unnecessary, burdensome, and vexatious in that they are cumulative and/or duplicative of documents or information already requested in Opposer's production requests and interrogatories.

5. Brinkmann objects to each of the topics for testimony insofar as they lack the reasonable particularity required by RULE 30(b)(6), or are vague, overly broad, oppressive, harassing or vexatious; impose burden or expense that outweighs their likely benefit; seek a legal conclusion; and/or seek information not relevant to the subject matter of this litigation.

6. Brinkmann objects to each of the topics for testimony insofar as they are overly broad, unduly burdensome, and not relevant to the extent that any topic for testimony is unlimited in temporal scope or otherwise not limited to a time frame relevant to this litigation.

7. Brinkmann objects to each of the topics for testimony insofar as they seek information protected against disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege or rule of confidentiality.

8. Brinkmann objects to each of the topics for testimony insofar as they seek disclosure of information that would violate the privacy rights of individuals or request disclosure of confidential commercial information, trade secrets, and/or proprietary information.

SPECIFIC OBJECTIONS

The following objections are made to the individual topics for testimony identified in Opposer's Notice.

TOPIC NO. 1:

Applicant's creation, design, selection, adoption, clearance and investigation of the mark BRINKMANN, which is the subject of Application No. 76/483,115, in connection with home security systems and components therefor and/or motion sensitive home security lights, detectors, receivers, transmitters, adapters and/or wall mount brackets.

RESPONSE TO TOPIC NO. 1:

Subject to and without waiving the General Objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 2:

Applicant's use of the mark BRINKMANN in connection with home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters or wall mount brackets.

RESPONSE TO TOPIC NO. 2:

Subject to and without waiving the General Objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 3:

Applicant's registration of the mark BRINKMANN in connection with any of the following products: home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters or wall mount brackets.

RESPONSE TO TOPIC NO. 3:

Subject to and without waiving the General Objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 4:

Applicant's decision to seek registration of the mark BRINKMANN for home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters or wall mount brackets.

RESPONSE TO TOPIC NO. 4:

Subject to and without waiving the General Objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 5:

Applicant's awareness of Opposer's use and/or registration of the trade name BRINK'S and/or the marks BRINK'S, BRINK'S (Stylized), BRINKS & Design, BRINK'S HOME SECURITY, and BRINK'S HOME SECURITY & Design prior to the time Applicant decided to use and/or attempt to register the mark BRINKMANN in connection with the home

security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets

RESPONSE TO TOPIC NO. 5:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as vague and ambiguous in that it is not clear what Brink's Network means by "Applicant's awareness".

Subject to and without waiving the foregoing objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 6:

Applicant's offering for sale, advertising and sale of home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets and any related goods or services under the mark BRINKMANN, including, but not limited to:

- a. The manner(s) in which Applicant uses the mark BRINKMANN on the goods and packaging therefor;
- b. The specific types of goods offered for sale and sold by Applicant under the mark BRINKMANN;
- c. The classes of purchasers and prospective purchasers of the goods offered for sale and sold by Applicant under the mark BRINKMANN;
- d. The channels of trade in which the goods offered for sale and sold by Applicant under the mark BRINKMANN are sold;

- e. The amounts spent by Applicant on advertising and promoting home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets and any related goods or services under the mark BRINKMANN since the date of first use of that mark in connection with such goods; and
- f. The revenues generated by Applicant's sale of home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets and any related goods or services under the mark BRINKMANN since the date of first use of that mark in connection with such goods.

RESPONSE TO TOPIC NO. 6:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic on the grounds that it is overbroad, unduly burdensome, seeks the disclosure of information that is not reasonably calculated to lead to the discovery of admissible evidence.

Brinkmann objects to this topic to the extent it seeks confidential and proprietary information. Brinkmann will not produce a witness to testify about confidential information until after the parties have agreed to and the Board has entered a protective order in this proceeding.

TOPIC NO. 7:

Any instance when any person, firm, corporation, association, or other entity indicated by correspondence, oral statement, telephone or otherwise that he, she or it is or was

confused or mistaken as to the source and/or sponsorship of the home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets and any related goods or services sold by Applicant under the mark BRINKMANN.

RESPONSE TO TOPIC NO. 7:

Subject to and without waiving the General Objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information exists and is known or reasonably available to Brinkmann.

TOPIC NO. 8:

Any surveys or marketing research considered or conducted by Applicant, or on its behalf, in connection with its defense of this opposition proceeding.

RESPONSE TO TOPIC NO. 8:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as vague and ambiguous in its reference to "marketing research".

Brinkmann objects to this topic on the grounds that it seeks the disclosure of information protected by the attorney-client privilege and work product doctrine.

Brinkmann will not produce a witness to testify on this topic at this time.

TOPIC NO. 9:

The factual basis and all documents on which Applicant will rely in support of the denial in ¶ 20 of its Answer of the allegation that Applicant's mark BRINKMANN, as used in

connection with home security systems and components therefor, so resembles Opposer's previously used and/or registered marks as to be likely to cause confusion, to cause mistake or to deceive within the meaning of § 2(d) of the Federal Trademark Act.

RESPONSE TO TOPIC NO. 9:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as overly broad and unduly burdensome to the extent it seeks all subsidiary facts in support of Brinkmann's position.

Brinkmann objects to this topic to the extent it seeks Brinkmann's contentions, which should be the subject of an interrogatory.

Brinkmann objects to this topic to the extent it seeks contention discovery on issues as to which Brink's Network bears the burden of proof, and as to which Brink's Network has not provided its contentions, or the facts and evidence and documents in support thereof, so that Brinkmann knows what contentions, facts, documents and other evidence may require rebuttal.

Brinkmann objects to this topic as premature because discovery has just commenced, and Brinkmann does not yet know, and cannot be expected to know without further investigation and discovery, all facts, information, documents and other evidence on which it will rely in support of its position. In this regard, Brinkmann notes that Opposer has not yet provided any discovery to Brinkmann.

Brinkmann objects to this topic on the grounds that it seeks the disclosure of information protected by the attorney-client privilege and work product doctrine.

Subject to and without waiving the foregoing objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information or documents exist and are known or reasonably available to Brinkmann.

TOPIC NO. 10:

The factual basis and all documents on which Applicant will rely in support of the denial in ¶ 21 of its Answer of the allegation that Applicant's use of the mark BRINKMANN in connection with home security systems and components therefor dilutes and/or is likely to dilute the distinctiveness of Opposer's famous mark BRINK'S within the meaning of § 43(c) of the Federal Trademark Act.

RESPONSE TO TOPIC NO. 10:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as overly broad and unduly burdensome to the extent it seeks all subsidiary facts in support of Brinkmann's position.

Brinkmann objects to this topic to the extent it seeks Brinkmann's contentions, which should be the subject of an interrogatory.

Brinkmann objects to this topic to the extent it seeks contention discovery on issues as to which Brink's Network bears the burden of proof, and as to which Brink's Network has not provided its contentions, or the facts and evidence and documents in support thereof, so that Brinkmann knows what contentions, facts, documents and other evidence may require rebuttal.

Brinkmann objects to this topic as premature because discovery has just commenced, and Brinkmann does not yet know, and cannot be expected to know without further

investigation and discovery, all facts, information, documents and other evidence on which it will rely in support of its position. In this regard, Brinkmann notes that Opposer has not yet provided any discovery to Brinkmann.

Brinkmann objects to this topic on the grounds that it seeks the disclosure of information protected by the attorney-client privilege and work product doctrine.

Subject to and without waiving the foregoing objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information or documents exist and are known or reasonably available to Brinkmann.

TOPIC NO. 11:

The factual basis for and documents on which Applicant will rely in support of the denial in ¶ 24 of its Answer of the allegation that Applicant's use of the registration symbol ® in association with the mark BRINKMANN for home security systems and components therefor constitutes a misuse of the registration symbol in violation of § 29 of the Federal Trademark Act and deceives the consuming public into believing that the mark is registered.

RESPONSE TO TOPIC NO. 11:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as overly broad and unduly burdensome to the extent it seeks all subsidiary facts in support of Brinkmann's position.

Brinkmann objects to this topic to the extent it seeks Brinkmann's contentions, which should be the subject of an interrogatory.

Brinkmann objects to this topic to the extent it seeks contention discovery on issues as to which Brink's Network bears the burden of proof, and as to which Brink's Network

has not provided its contentions, or the facts and evidence and documents in support thereof, so that Brinkmann knows what contentions, facts, documents and other evidence may require rebuttal.

Brinkmann objects to this topic as premature because discovery has just commenced, and Brinkmann does not yet know, and cannot be expected to know without further investigation and discovery, all facts, information, documents and other evidence on which it will rely in support of its position. In this regard, Brinkmann notes that Opposer has not yet provided any discovery to Brinkmann.

Brinkmann objects to this topic on the grounds that it seeks the disclosure of information protected by the attorney-client privilege and work product doctrine.

Subject to and without waiving the foregoing objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information or documents exist and are known or reasonably available to Brinkmann.

TOPIC NO. 12:

The factual basis for and documents on which Applicant will rely in support of its affirmative defense of laches pleaded in ¶ 26 of the Answer filed by Applicant in the instant proceeding.

RESPONSE TO TOPIC NO. 12:

In addition to the grounds set forth in the General Objections, Brinkmann objects to this topic on the following grounds:

Brinkmann objects to this topic as overly broad and unduly burdensome to the extent it seeks all subsidiary facts in support of Brinkmann's position.

Brinkmann objects to this topic to the extent it seeks Brinkmann's contentions, which should be the subject of an interrogatory.

Brinkmann objects that this topic is premature because discovery has just commenced, and Brinkmann does not yet know, and cannot be expected to know without further investigation and discovery, all facts, information, documents and other evidence on which it will rely in support of its position.

Brinkmann objects to this topic on the grounds that it seeks the disclosure of information protected by the attorney-client privilege and work product doctrine.

Subject to and without waiving the foregoing objections, Brinkmann will produce a witness to testify regarding this topic to the extent that any responsive information or documents exist and are known or reasonably available to Brinkmann.

Dated: October 12, 2005



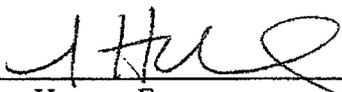
Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398

Attorneys for Applicant
THE BRINKMANN CORPORATION

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing "Applicant Brinkmann's Response to Opposer Brink's Network's Notice of Taking Deposition" by placing a copy in the United States Mail, postage pre-paid, addressed as follows: Nancy S. Lapidus, counsel for Opposer, at Howrey LLP, 1299 Pennsylvania Avenue, N.W., Washington, DC 20004.

Dated: October 12, 2005



Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398

Attorneys for Applicant
THE BRINKMANN CORPORATION

Exhibit 2

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

BRINK'S NETWORK)	
INCORPORATED,)	
)	
VS. Opposer,)	
)	Opposition No. 91164764
)	
THE BRINKMANN CORPORATION)	
)	
Applicant.)	
)	
)	

ORAL DEPOSITION OF

HELEN DUNHAM

FEBRUARY 16, 2007

VOLUME I

ORAL DEPOSITION OF HELEN DUNHAM, produced as a witness at the instance of the Opposer, and duly sworn, was taken in the above-styled and numbered cause on the 16th day of February, 2007, from 9:03 a.m. to 10:57 a.m., before Stacey R. Cruz, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Carrington Coleman, Sloman & Blumenthal, located at 901 Main Street, Dallas, Texas, in accordance with the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 opposition proceeding. She did not testify that portable
2 electric lights are not security products.

3 MR. COOPER: She testified that they were not
4 among the home security products as listed in the
5 response to interrogatory number 6 at page 8 of
6 Exhibit 2. Her testimony stands. I'm not going to --

7 MR. CLARK: Right. This is a different issue
8 and a different question.

9 MR. COOPER: The board will decide that on
10 our motion for summary judgment.

11 MR. CLARK: And you know that, counsel. It's
12 a different issue.

13 Q. (BY MR. COOPER) Ms. Dunham, I'd like to direct
14 your attention to the answer to interrogatory number 22
15 in Exhibit 2, which is directed to the factual basis for
16 applicant's affirmative defense pleaded in paragraph 26
17 of the answer, which is the affirmative defense of
18 latches. I'm not inquiring as to any specific
19 communications you've had with Mr. Clark or any other
20 attorney, but do you have an understanding of what the
21 "defense of latches" means?

22 A. No.

23 MR. COOPER: Mr. Clark, paragraph 12 of her
24 notice says, The factual basis for the affirmative
25 defense of latches. It would seem to me that a 30(b)(6)

1 witness ought to at least have a very basic definition of
2 what latches is. And if you want to take a break and
3 provide that, I'd be glad to continue.

4 MR. CLARK: And I disagree, counsel. The
5 witness is here as a factual witness. Facts are
6 presented in response to interrogatory number 22. You
7 can ask her if she has been provided any additional facts
8 to -- to -- go forward with the --

9 MR. COOPER: All right. Let's try to --

10 MR. CLARK: -- deposition and you can ask her
11 about the facts that are stated there. She's not here as
12 a legal witness to argue our case.

13 MR. COOPER: Well, answers is peculiarly
14 factual. I'm entitled to interrogate a witness on these
15 points, and I'll proceed by focusing on the answer to
16 interrogatory number 22.

17 Q. (BY MR. COOPER) Ms. Dunham -- and I'm asking you
18 this in your 30(b)(6) capacity -- are you aware of any
19 relevant facts demonstrating latches other than the ones
20 listed at passages 24 and 25 of Exhibit 2?

21 A. No, I'm not.

22 Q. Are you aware of any documents that support the
23 latches defense -- any documents that support -- let's do
24 this one at a time.

25 Are you aware of any documents that support

1 or relate to the statement in the first bullet point, the
2 second sentence, quote, Presumably, Brink's Network has
3 known and certainly it should have known about Brinkmann
4 and its home security products for many years prior to
5 this opposition proceeding, closed quotes?

6 A. I'm sorry. Where is that?

7 Q. I'm sorry. I'm looking at the first bullet point
8 at the bottom of page 24 --

9 A. Okay.

10 Q. -- in Exhibit 2. And I just read the second
11 sentence.

12 A. Okay.

13 Q. Are you aware of any documents that support that
14 statement?

15 A. No.

16 Q. Look at the second sentence in that bullet point.
17 Quote, Brink's Network has unreasonably delayed in filing
18 this opposition proceeding after first learning about
19 Brinkmann and its home security system products, closed
20 quotes. You see that?

21 A. Yes.

22 Q. Are you aware of any documents that support that
23 statement?

24 A. No.

25 Q. The next bullet point, the first sentence,

1 Brinkmann has suffered prejudice as a result of Brink's
2 Network's unreasonable delay in filing the opposition
3 proceeding, closed quotes. Are you aware any of
4 documents that support that sentence?

5 A. No.

6 Q. Ms. Dunham, it's Brinkmann Corporation position
7 and its belief, is it not, that its use of the trademark
8 "Brinkmann" for home security products is not likely to
9 cause confusion, correct?

10 A. Yes.

11 Q. And it's the position and belief of Brinkmann
12 Corporation that its use of the trademark "Brinkmann" is
13 not likely to cause dilution of the distinctive qualities
14 of the Brinks trademark, correct?

15 A. Yes.

16 Q. And Brinkmann Corporation has proceeded in
17 defending this opposition based on those positions and
18 beliefs, correct?

19 A. Yes.

20 MR. COOPER: Mr. Clark, are there any
21 specific documents among those that have been produced
22 that would be relied on to support the opposition defense
23 or it is your position that all of them support the
24 latches defense?

25 MR. CLARK: No, I wouldn't say that all of

1 them support the latches defense, counsel, but certainly
2 the sales history documents and the advertising documents
3 support the position that Brinks should have known about
4 Brinkmann and its home security systems and they also
5 support the prejudice, the continued investment, in those
6 products and the use of the "Brinkmann" mark in those
7 products.

8 MR. COOPER:: Well, this is not a question,
9 but I think we probably will be moving for summary
10 judgment and dismissing the latches defense, and we'll
11 test some of these points in that context. Give me just
12 a minute, please. Go off the record.

13 (Break taken.)

14 MR. COOPER: I have no further questions
15 under direct examination.

16 MR. CLARK: I have no questions.

17 (Proceedings concluded.)

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Exhibit A

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

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**APPLICANT BRINKMANN'S SUPPLEMENTAL RESPONSE TO
OPPOSER BRINK'S NETWORK'S INTERROGATORY NO. 22**

Pursuant to FED. R. CIV. P. 33, Applicant The Brinkmann Corporation ("Brinkmann") hereby supplements its response to Interrogatory No. 22 in OPPOSER BRINK'S NETWORK, INCORPORATED'S FIRST SET OF INTERROGATORIES served by Opposer Brink's Network, Incorporated ("Brink's Network") by mail on February 15, 2007.

GENERAL OBJECTIONS

1. Brinkmann objects to each interrogatory insofar as it is vague, overly broad, oppressive, harassing or vexatious; imposes burden or expense that outweighs its likely benefit; seeks a legal conclusion; and/or seeks information not relevant to the claim or defense of any party.

2. Brinkmann objects to each interrogatory insofar as it seeks information or documents protected against disclosure by the attorney client privilege, the work product doctrine, or any other applicable privilege or rule of confidentiality. Such information and documents shall not be provided in response to Brink's Network's interrogatories, and any inadvertent disclosure thereof shall not be deemed a waiver of any privilege with respect to such information or of any work product immunity that may attach thereto.

3. Brinkmann objects to identifying information or documents withheld from production on grounds of attorney client privilege or the work product doctrine to the extent such information or documents were generated after the commencement of this action, as unduly burdensome, oppressive, harassing and vexatious, and because the burden and expense outweighs its likely benefit.

4. Brinkmann objects to each interrogatory to the extent that it: (1) seeks disclosure of information that would violate the privacy rights of individuals; or (2) requests disclosure of confidential commercial information, trade secrets, and/or proprietary information, including financial information and documents, of Brinkmann or third parties. To the extent that Brinkmann responds to Brink's Network's interrogatories by stating that it will provide information which it, any other party to this litigation, or any third party deems to embody material that is private, business confidential, proprietary, trade secret or otherwise protected from disclosure pursuant to FED. R. CIV. P. 26(c)(7), FED. R. EVID. 501, or otherwise, Brinkmann will do so only in accordance with a protective order entered in this action.

5. Brinkmann objects to each interrogatory to the extent it is compound and it may be deemed to contain multiple sub-parts that should be counted as separate interrogatories.

6. Brinkmann objects to each interrogatory to the extent it seeks information not currently in Brinkmann's possession, custody, or control, or refers to persons, entities, or events not known to it, on the grounds that such interrogatory seeks to require more of Brinkmann than any obligation imposed by law, would subject Brinkmann to unreasonable and undue annoyance, oppression, burden, and expense, and seeks to impose upon Brinkmann an obligation to investigate or discover information from third parties or sources who are equally accessible to Brink's Network.

7. In responding to these interrogatories, Brinkmann does not waive the foregoing objections or the specific objections that are set forth in response to particular interrogatories. In addition, Brinkmann does not concede by responding that the information or documents sought or provided are relevant to the subject matter of this action or admissible in trial or in any other proceeding in this action. Brinkmann expressly reserves the right to object to further discovery into the subject matter of these interrogatories, to object to the introduction into evidence of any responses to any of these interrogatories, and to supplement its responses should further investigation and discovery uncover responsive information.

8. Brinkmann's responses to Brink's Network's interrogatories are made to the best of its current employees' present knowledge, information and belief based upon reasonable investigation and inquiry. The responses are at all times subject to such additional or different information that discovery or further investigation may disclose, and are subject to such refreshing of recollection and such additional knowledge of facts as may result from further discovery or investigation. Brinkmann reserves the right to make any use of, or to introduce at any hearing and at trial, information and/or documents responsive to Brink's Network's

interrogatories but discovered subsequent to the date of this response, including, but not limited to, any such information or documents obtained in discovery herein.

SPECIFIC OBJECTIONS AND RESPONSES
TO BRINK'S NETWORK'S INTERROGATORIES

INTERROGATORY NO. 22:

State the factual basis for Applicant's affirmative defense pleaded in ¶ 26 of the Answer that the doctrine of laches bars the relief sought by Opposer.

RESPONSE TO INTERROGATORY NO.22:

In addition to the grounds set forth in the General Objections, which are incorporated by reference, Brinkmann objects to this interrogatory on the following grounds:

Brinkmann objects that this interrogatory is premature because discovery has just commenced, and Brinkmann does not yet know, and cannot be expected to know without further investigation and discovery, the facts on which it will rely in support of its position. In this regard, Brinkmann notes that Opposer has not yet provided any discovery to Brinkmann.

Brinkmann objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and/or the work product doctrine.

Subject to and without waiving the foregoing objections, Brinkmann provides the following response:

As presently advised, the relevant facts demonstrating laches include, but are not limited to, the following:

- Brinkmann's home security system products have been on the market since at least as early as October 1989. Presumably Brink's Network has known, and certainly it should have known, about Brinkmann and its home security

system products for many years prior to this opposition proceeding. Brink's Network has unreasonably delayed in filing this opposition proceeding after first learning about Brinkmann and its home security system products.

- Brinkmann has suffered prejudice as a result of Brink's Network unreasonable delay in filing the opposition proceeding. At a minimum, such prejudice includes Brinkmann's continued investment in its home security system products and "Brinkmann" mark for such products.

Brinkmann reserves the right to amend and/or supplement this response as its investigations and discovery progress.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 22:

- Brinkmann's association of its BRINKMANN mark with "security" products first began in 1975. Brinkmann had previously acquired a company called Q-Beam Corporation that made hand-held spotlights and other specialty lights. In 1975 Brinkmann introduced a spotlight that was called the "Q-Beam Security Special." It was advertised for use with policemen, state troopers and other security personnel. Packaging for the spotlight clearly showed both the BRINKMANN mark and "Q-BEAM SECURITY" in close proximity. Brinkmann advertised its spotlight as the "Security Special" for a number of years.
- In the early 1980s Brinkmann advertised its portable lights for use with "Home Security" and "For Safety...Security...Convenience."
- In about 1984, Brinkmann began using its BRINKMANN mark for rechargeable lights that were advertised as "rechargeable security lights."

- In 1989, Brinkmann introduced "home security system" products including the motion sensitive lights, detectors, receivers, transmitters, and adapters, which are at issue in this proceeding, under the BRINKMANN mark and has continuously used its mark for such products to date.
- In all the years that Brinkmann has been using its mark BRINKMANN, Brink's Network never objected to Brinkmann prior to the time that Brinkmann's pending application was published for opposition.
- On November 13, 1978, Brinkmann filed its trademark application for registration of the mark BRINKMANN, which was published on September 16, 1980 and issued on May 12, 1981 under Reg. No. 1,153,730. The registered goods are "electrical extension cords, brackets, and electric connectors for use therewith," in International Class 9, citing a date of first use of June 12, 1978 and "charcoal fired and electric roasting, grilling and barbecue cookers for domestic use and portable electric lights and filters, and replacement lamps," in International Class 11, citing a date of first use of August 24, 1978. The registration is currently in force and incontestable under Section 15 of the Trademark Act, 15 U.S.C. § 1065. Brinkmann has continuously used the mark BRINKMANN for the goods since 1978. No third party, including Brink's Network, ever filed an opposition against registration.
- On October 11, 2000, Brinkmann filed its trademark application for registration of the mark BRINKMANN BACKYARD KITCHEN, which was published on October 22, 2002 and issued on November 4, 2003 under Reg.

No. 2,779,986. The registered goods are "combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers," citing a date of first use of October 31, 2000. The registration is currently in force.

Brinkmann has continuously used the mark BRINKMANN BACKYARD KITCHEN for the goods since 2000. No third party, including Brink's Network, ever filed an opposition against registration.

- Brink's Network only objected to "home security systems and components therefor, namely, motion sensitive home security lights, detectors, receivers, transmitters, adapters and wall mount brackets" in Brinkmann's U.S. Application Serial No. 76/483,115, but not any of the other various goods identified in the application, even though those goods are arguably as dilutive as the home security system products.
- Brinkmann will suffer material prejudice if, after over 30 years of use and nearly 30 years of registration of its mark BRINKMANN, Brink's Network is allowed to challenge Brinkmann's registration of BRINKMANN. Brinkmann has adopted and used BRINKMANN as its house mark on nearly every product it makes and sells. Most Brinkmann products have a secondary or product specific mark, but the mark BRINKMANN is the one mark by which nearly all Brinkmann products are known and recognized in the marketplace. Brinkmann has invested an enormous amount of time, effort and money in promoting the mark BRINKMANN through use of it on or in connection with its products, catalogs, literature, and packaging, in advertising, at trade shows,

and on its website. This has resulted in a valuable business and goodwill associated with the BRINKMANN mark.

- From the first introduction of the mark BRINKMANN in 1975 to the present, Brinkmann's business has continued to grow, as demonstrated by steady expansion of its product lines under its BRINKMANN mark and by steady growth in the amount of sales, advertising and channels of trade for its consumer products under the BRINKMANN mark. All of this has occurred in the absence of any objection from Brink's Network.

Brinkmann reserves the right to amend and/or supplement this response as its investigations and discovery progress.

Interrogatory No. 22 in Opposer's FIRST SET OF INTERROGATORIES is answered on behalf of Applicant by the undersigned as its duly authorized agent. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

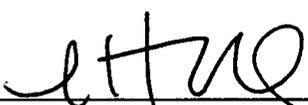
Dated: September 19th, 2008



J. Baxter Brinkmann

As to objections:

Dated: September 23, 2008



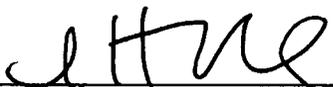
Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398

Attorneys for Applicant
THE BRINKMANN CORPORATION

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing "Applicant The Brinkmann Corporation's Supplemental Response to Interrogatory No. 22 in Opposer Brink's Network, Incorporated's First Set of Interrogatories" by placing a copy in the United States Mail, postage pre-paid, addressed as follows: Nancy S. Lapidus, counsel for Opposer, at Howrey LLP, 1299 Pennsylvania Avenue, N.W., Washington, DC 20004.

Dated: September 23, 2008



Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
Tel.: (213) 620-1780
Fax: (213) 620-1398

Attorneys for Applicant
THE BRINKMANN CORPORATION

CERTIFICATE OF MAILING UNDER 37 C.F.R. § 1.8

I hereby certify that the foregoing APPLICANT BRINKMANN'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING APPLICANT'S LACHES DEFENSE is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on September 23, 2008.



Susan Hwang

CERTIFICATE OF SERVICE

This is to certify that I have this day, September 23, 2008, caused to be served a copy of the foregoing APPLICANT BRINKMANN'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING APPLICANT'S LACHES DEFENSE by placing a copy in the United States Mail, postage pre-paid, addressed as follows: Nancy S. Lapidus, counsel for Opposer, at Howrey LLP, 1299 Pennsylvania Avenue, N.W., Washington, DC 20004.

A handwritten signature in cursive script, appearing to read 'SHWANG', is written over a horizontal line.

Susan Hwang