

ESTTA Tracking number: **ESTTA289729**

Filing date: **06/15/2009**

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

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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Signature	/Alan S. Cooper/
Date	06/15/2009
Attachments	Reply Memorandum.pdf (32 pages)(1412117 bytes)

present motion, and Applicant would be prejudiced if the motion were granted. Each of these unfounded arguments is addressed below.³

II. ARGUMENT

A. OPPOSER'S CLAIM OF FRAUDULENT MISREPRESENTATION SATISFIES THE SUFFICIENT PARTICULARITY REQUIREMENT OF RULE 9(b) FED. R. CIV. P.

By virtue of Rule 2.116(a) of the Trademark Rules of Practice, a claim of a fraudulent misrepresentation pleaded as a ground for opposition is governed by Rule 9(b) Fed. R. Civ. P. which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See also e.g., W. R. Grace & Co. v. Arizona Feeds*, 195 USPQ 670, 672 (Comm'r Pat. 1977). Applicant's claim that the Amended Notice of Opposition does not satisfy Rule 9(b) is unfounded. As demonstrated below, the Amended Notice of Opposition plainly states the time, place and content of the alleged false representation as well as the misleading effect of that misrepresentation if the opposed application were allowed to mature into a federal registration.

The time, place, content and effect of Applicant's fraudulent misrepresentation that the June 12, 1978 date of first use is applicable to the use of the mark BRINKMANN on home security systems and components are clearly alleged in ¶¶ (2) and (24)-(32) of the Amended Notice of Opposition. Specifically, those paragraphs allege that the June 12, 1978 date of first use in connection with home security systems and components set forth in the opposed application -- which was signed by J. Baxter Brinkmann on November 22, 2002 and filed in the U.S. Patent and Trademark Office ("USPTO") on January 17, 2003 -- is false. Indeed, ¶ 3 of Applicant's Answer to the Notice of Opposition admits that the June

³ Applicant is not contesting Opposer's motions for leave to the extent that the Amended Notice of Opposition deletes three registrations pleaded in the original Notice of Opposition. (Applicant's Memorandum, p. 17.) Applicant similarly has not contested Opposer's reservation of the rights to rely on any common law rights in the marks which are the subject of the now-deleted registrations.

12, 1978 date of first use with respect to all of the goods in International Class 9 is not applicable to home security systems and components.

The misleading effect of the misrepresentation in question is set forth in ¶ 29 of the Amended Notice of Opposition. That paragraph plainly alleges that if the present opposition has not been filed, the USPTO in reliance on such misrepresentation would have issued a registration of the mark BRINKMANN that contains an admittedly false statement as to the date of first use of the mark for home security systems and components.

Applicant attacks as merely conclusory the allegation in ¶ 31 of the Amended Notice of Opposition that Mr. Brinkmann “either knew or should have known that the mark BRINKMANN was not used in connection with Applicant’s home security systems and components at least as early as June 12, 1978.” However, as described above, ¶¶ (2) and (24)-(32) of the Amended Notice of Opposition set forth the time, place, content and effect of the alleged misrepresentation, all of which demonstrate that Mr. Brinkmann either “knew or should have known” that the mark BRINKMANN was not used in connection with Applicant’s home security systems and components at least as early as June 12, 1978.

More importantly, Applicant conveniently ignores the fact that on September 19, 2008, Mr. Brinkmann executed a Declaration in support of Applicant’s motion for summary judgment dismissing Opposer’s dilution claim which states, *inter alia*, that: (a) Mr. Brinkmann has personal knowledge of the facts set forth in that Declaration (Dec. ¶ 2); (b) Applicant has used the trademark BRINKMANN on a variety of consumer products since 1975 (Dec. ¶ 3); (c) the opposed application states that the mark BRINKMANN was first used in connection with all goods in Class 9, including home security systems and components, on June 12, 1978 (Dec. ¶ 6); and (d) in 1989, Applicant “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” (Dec. ¶ 10).”⁴ These sworn statements by Mr. Brinkmann -- which were not available when the original Notice of Opposition was filed in 2005 -- fully support the allegation in ¶ 31 of the Amended Notice of Opposition and demonstrate that the allegation in question is far from “merely conclusory.” There is ample support in the record in the form of Mr. Brinkmann’s own words, submitted subject to 18 U.S.C. § 1001, for the allegation that Mr. Brinkmann either knew or should have known that the statement in the opposed application with respect to the June 12, 1978 date of first use of the mark BRINKMANN in connection with home security systems and components was not true.

But even assuming *arguendo* that Mr. Brinkmann had a good faith belief that the June 12, 1978 date was accurate, such a belief does not excuse the obligation on both an applicant and its counsel to make certain that factual statements set forth in an application for registration are accurate. *See Hachette Filipacci Presse v. Elle Belle LLC*, 85 USPQ2d 1090, 1094 (TTAB 2007); *Hurley International LLC v. Volta*, 82 USPQ2d 1339, 1345 (TTAB 2007). Similarly, even if Mr. Brinkmann had no personal knowledge as to whether the mark BRINKMANN was in use on all of the goods in International Class 9, which is inconsistent with his Declaration, such a lack of personal knowledge is not a defense because he had a duty to make a reasonable inquiry into the facts supporting the statement before signing the opposed application. *See e.g., Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 USPQ2d 1917, 1927-28 (TTAB 2006), *appeal dismissed*, 186 Fed. Appx. 1005 (Fed. Cir. 2006).

⁴ Attached hereto as Appendix A is a true copy of the Declaration of J. Baxter Brinkmann Under 37 C.F.R. § 2.20, dated September 19, 2008, filed in support of Applicant’s Motion for Partial Summary Judgment To Dismiss Opposer’s Claim of Dilution. The Declaration of J. Baxter Brinkmann also was filed in connection with Applicant’s memorandum in opposition to Opposer’s motion for summary judgment to dismiss the laches defense.

B. THE CLAIM OF FRAUDULENT MISREPRESENTATION IS SUPPORTED BY UNCONTESTED, RELEVANT FACTS AND IS WELL-FOUNDED AS A MATTER OF LAW

Applicant's argument that the fraudulent misrepresentation claim alleged in the Amended Notice of Opposition is factually unfounded is totally lacking in merit. The basic facts supporting this claim are uncontested, namely, that: (a) the opposed application states that the mark BRINKMANN was first used in commerce on all goods in Class 9, including home security systems and components, on June 12, 1978; (b) the mark BRINKMANN actually was not used on such goods until 1989; (c) Mr. J. Baxter Brinkmann, by virtue of his own Declaration (Appendix A), either knew or should have known of the misrepresentation as to the date of first use for home security systems and components; and (d) Applicant, which has been represented by the same counsel in the prosecution of the opposed application and the defense of this proceeding, took no steps to comply with the requirement of TMEP § 903.09.

Applicant also contends that Opposer's fraudulent misrepresentation claim fails to state a legal cause of action. Brinkmann asserts in that respect that TMEP § 903.09 does not have the force of law. However, § 1(a)(4) of the Federal Trademark Act specifically requires that an applicant must comply with rules and regulations prescribed by the Commissioner with respect to the requirements for obtaining a federal registration. Because of that express statutory direction, the rules contained in the TMEP take on an added significance and should be treated as mandatory in this context.

Applicant argues that Opposer failed to consider TMEP § 903.09 in its entirety because TMEP § 903.09 acknowledges that it may be cumbersome for applicants to designate individual dates of first use for all items in a description of goods. That acknowledgement, however, is not tantamount to a free pass to assert a date of first use and mislead the USPTO and the public. Rather, where the designation of a date of first use

for all individual items in a class is cumbersome, TMEP § 903.09 specifically provides that the applicant should specify the particular items to which the claimed date of first use pertains. It is Applicant who has failed to consider TMEP § 903.09 at all, much less in its entirety. TMEP § 903.09 expressly states that the USPTO “will presume that the dates of use apply to all the goods or services unless the applicant states otherwise.” Accordingly, Applicant knew or should have known that the USPTO would presume that the June 12, 1978 claimed date of first use set forth in the opposed application for all goods in Class 9 applies to the home security systems and components, in the absence of any statement to the contrary.

Applicant’s attempt to distinguish the application of TMEP §903.09 between use-based applications, on the one hand, and statements of use and amendments to allege use, on the other hand, has no basis in law. The language of TMEP § 903.09 does not expressly or impliedly state that its terms apply only to amendments to allege use and statements of use, but not to use-based applications. Nor does Applicant cite any case law or other authority to support such a distinction. The provisions of TMEP § 903.09 apply to all claims of use, regardless of whether that claim is made in the original application or in a later-filed paper.⁵

Applicants reliance, at pp. 9-10 of its Memorandum, on *Sunshine Biscuits, Inc. v. Berke Bakeries, Inc.*, 106 USPQ 222 (Comr. 1955), and *Lyon Metal Products, Inc. v. Lyon Inc.*, 134 USPQ 31 (TTAB 1962), to demonstrate that its violation of TMEP § 903.09 does not rise to the level of fraud is entirely misplaced. In both *Sunshine Biscuits* and *Lyon Metal Products*, the applications at issue were filed long prior to the time the USPTO directed

⁵ Even if 37 CFR § 2.34(a)(1) is silent as to the designation of the particular goods applicable to the claimed date of first use, TMEP § 903.09 was in force at the time the opposed application was executed and filed and, by its own terms, references use-based application filed pursuant to 37 C.F.R. § 2.34(a)(1).

applicants to designate the particular goods to which the date of first use applies where that date does not apply to all goods in a single class description. Indeed, the *Sunshine Biscuits* decision states, in pertinent part, as follows:

“Prior to 1951 there was some confusion and uncertainty with respect to the manner of alleging the date of first use when the application recited a number of different items and use of the mark on these items had commenced at different times. In *Ex parte Wayne Pump Co.*, 88 USPQ 437 (1951) it was held, apparently for the first time, that a statement of the date of first use similar to that present here and made under similar circumstances was misleading and it was required that the application should make it clear that the first dates of use alleged did not apply to each of the items recited.” 106 USPQ at 224.

The opposed application was filed in 2003, more than 40 years after the decisions in *Ex parte Wayne*, *Sunshine Biscuits* and *Lyon Metal* were rendered.⁶ The requirements of TMEP § 903.09 clearly were in place in 2003; these early decisions which long predate § 903.09 do not excuse Applicant’s knowing failure to comply with the mandate of that provision.

Opposer has challenged Applicant’s right to register the mark BRINKMANN in connection with specific goods in Class 9 in the opposed application. Therefore, the fraudulent misrepresentation would render the opposed application void *ab initio* in connection with the particular goods at issue, namely, home security systems and components. Contrary to Applicant’s argument, Opposer does not maintain that a finding of fraud in this context would render the application in its entirety, *i.e.*, covering goods other than those in issue in the proceeding, void *ab initio*.

⁶ In both *Sunshine Biscuits* and *Lyon Metal*, the applications at issue were filed based on use in commerce under § 1(a). There is no suggestion in either case that such a use-based application does not need to designate the particular goods to which a date claimed date of first use applies.

C. OPPOSER WAS NOT DILATORY IN FILING THE MOTION SEEKING LEAVE TO ASSERT THE FRAUDULENT PROCUREMENT CLAIM

It is correct, as noted at pp. 14-15 of Applicant's Memorandum, that the discrepancy between the July 12, 1978 date of first use for all of the goods in International Class 9 set forth in the opposed application and the actual 1989 date of first use admitted by Applicant came to light relatively early in the proceeding. However, the factual basis for the key allegation in ¶ (31) of the Amended Notice of Opposition that Mr. J. Baxter Brinkmann either knew or should have known of that misrepresentation at the time the application was signed only became readily apparent when Applicant submitted Mr. Brinkmann's Declaration in support of its motion for summary judgment (Appendix A) in September, 2008.

Although Opposer learned of the nature and extent of Mr. Brinkmann's relevant knowledge in September 2008, Opposer could not move for leave to plead the fraudulent misrepresentation claim until the Board rendered its March 16, 2009 decision which lifted the suspension of proceedings in place since September 25, 2008 when Applicant's motion for summary judgment was filed.⁷ Opposer's motion seeking leave to amend the Notice of Opposition was filed on April 30, 2009, within six weeks following the Board's March 16, 2009 decision. Opposer respectfully submits that under these circumstances the filing of the present motion should not be considered dilatory.

D. APPLICANT'S ASSERTION THAT IT WOULD BE PREJUDICED IF THE PRESENT MOTION WERE GRANTED IS FACTUALLY AND LEGALLY SPECIOUS

The "complications" referred to at p. 16 of Applicant's Memorandum hardly rise to the level of prejudice that should be considered by the Board in determining the merits of Opposer's motion for leave to amend.

⁷ Opposer's motion for summary judgment dismissing Applicant's laches defense, filed on August 12, 2008, also resulted in a suspension of proceedings. The Board granted Opposer's motion in the March 16, 2009 decision.

Applicant notes "in passing" that Opposer did not meet and confer with Applicant before filing the motion for leave to amend. Rule 2.120(e)(1) of the Trademark Rules of Practice requires a party filing a motion to compel discovery include "a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences." However, Rule 2.127, which generally governs motions before the Board, contains no such requirement. Indeed, Applicant failed to cite to any authority which would indicate that such a requirement exists.

Applicant contends that its counsel in this proceeding may have to withdraw from representation in the event Opposer's motion for leave to amend is granted because that counsel prepared and filed the opposed application. However, the possibility that one of Applicant's outside counsel may be in the position of both attorney and witness in this proceeding because counsel rendered advice as to the date of first use of the opposed application at the time it was filed does not amount to prejudice sufficient to require denial of this motion. The fact that counsel prepared an application is of no consequence in a fraud analysis; indeed, the Board has routinely made findings of fraud despite the fact that counsel was involved in preparing the application at issue.⁸ Accordingly, the fact that Applicant's counsel in this proceeding prepared the application at issue should be given no consideration by the Board when ruling on Opposer's motion for leave to amend.⁹

⁸ See e.g., *Hachette Filipacci Presse v. Elle Belle LLC*, 85 USPQ2d 1090, 1094 (TTAB 2007) (finding fraud despite "the misunderstanding on the part of respondent's attorney"); *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033, 1047-48 (TTAB 1981) ("Even if the affidavit was prepared by its attorney, Smith must be held accountable for any false or misleading statements made therein."); *Ets. Lardenois v. Lazarus*, 168 USPQ 604, 605 (TTAB 1970) (finding fraud despite the respondent's arguments that "All statements made . . . in his application . . . were prepared by his attorneys.").

⁹ According to Rule 3.7(b) of the ABA's Model Rules of Professional Conduct, "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Rules 1.7 (conflicts of interest) and 1.9

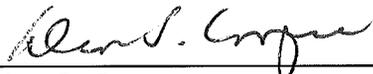
Contrary to Applicant's assertion, no "key" individual would need to be deposed again if Opposer's motion for leave to amend were granted. Mr. Brinkmann, who signed the application, has not yet been deposed.¹⁰ But more importantly, Applicant does not need not take any additional discovery to provide a defense to the fraudulent misrepresentation claim because all of the relevant information is within its knowledge and control.¹¹

III. CONCLUSION

For all of the reasons stated above and in the Memoranda in support of Opposer's motions for leave to file an Amended Notice of Opposition, the relief which Opposer seeks should be granted.

BRINK'S NETWORK, INC.

Date: June 15, 2009

By: 
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Attorneys for Opposer

(obligations to former clients) do not apply in this instance. Therefore, even if Applicant's attorney who prepared the opposed application were to testify as a fact witness, other lawyers at the same firm can continue to represent Applicant in this proceeding.

¹⁰ Applicant's answers to Opposer's recently served interrogatories identify Mr. Brinkmann as one of its expected witnesses during the testimony period. Accordingly, counsel for Opposer has informed counsel for Applicant that Opposer intends to take the discovery deposition of Mr. Brinkmann and proposed several dates for taking of said deposition. Applicant has not yet responded with any dates when Mr. Brinkmann would be available.

¹¹ Each of the three cases cited at p. 15 of Applicant's Memorandum is factually distinguishable. In *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998), the court denied plaintiff's motion to amend the complaint where the plaintiff sought to amend his complaint five months after the discovery deadline had closed. In *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, 807 (6th Cir. 2005), the court denied plaintiff's motion to amend the complaint on the ground of untimeliness where, among other things, the district court *required* that any amendment be sought in sufficient time such that discovery could be completed by a certain date. In *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998), the court denied plaintiff's motion to amend where the plaintiff sought to amend the complaint after the discovery deadline and five weeks before trial. None of the circumstances cited in the *McKnight*, *Bridgeport Music* or *Bell* cases are present in this matter.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply Memorandum in Support of Opposer's Motions for Leave to File Amended and Second Amended Notices of Opposition was served on the following counsel for Applicant by Federal Express overnight courier service, with confirming service by depositing the same in the U.S. mail, first class and postage prepaid this 15th day of June, 2009:

Gary Clark, Esq.
Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071



APPENDIX 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

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.

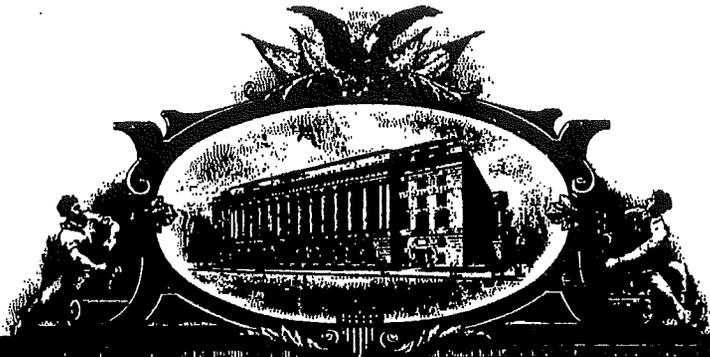
The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares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

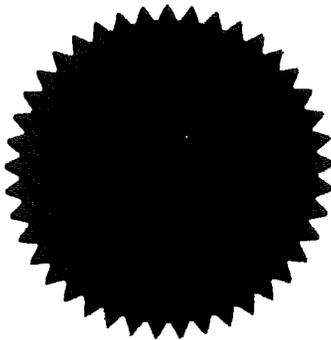
By Authority of the

**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 ELECTRIC 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 PORTABLE 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.

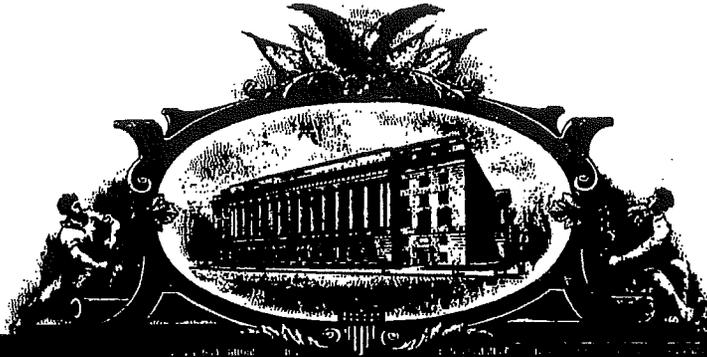
Ser. No. 193,053, filed Nov. 13, 1978.

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

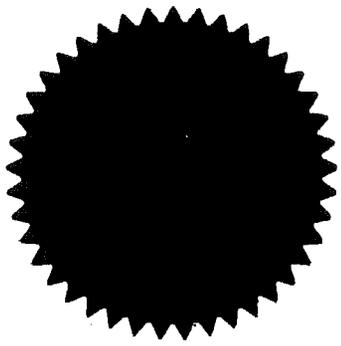
**THE ATTACHED U.S. TRADEMARK REGISTRATION 2,779,986 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.**

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

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.

Moonlitter

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. Moonlitter has stainless steel handle for hanging and suction cup base for mounting. Moonlitter 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, 3 1/4 lbs. Super Spot W/magnet base swivel, 15-ft. cord, cigarette lighter plug
	1501	Black, 3 1/4 lbs. Spot/Flood W/magnet base swivel, 15 ft. cord cigarette lighter plug
Security Special	1502	Black, 3 1/4 lbs. Super Spot W/magnet base flasher, 2 filters, 15-ft. cord cigarette lighter plug
	1503	Black, 3 1/4 lbs. Super Spot W. hand grip, momentary switch, 15-ft. cord/ cigarette lighter plug
	1504	Black, 2 1/4 lbs. Super Spot Deluxe W. hand grip, flasher, 2 filters, 8-ft. cord cigarette lighter plug
Varmint Special	1505	Black, 3 lbs. W/hood and red filter 15 ft. cord with cigarette lighter plug
Moonlitter	1506	Black, 3 1/4 lbs. W/rheostat and dual bulbs, 8-ft. cord with battery clips
	1507	Black, 3 1/4 lbs. W/rheostat and dual bulbs, 8-ft. cord with cigarette lighter plug

Exhibit 4



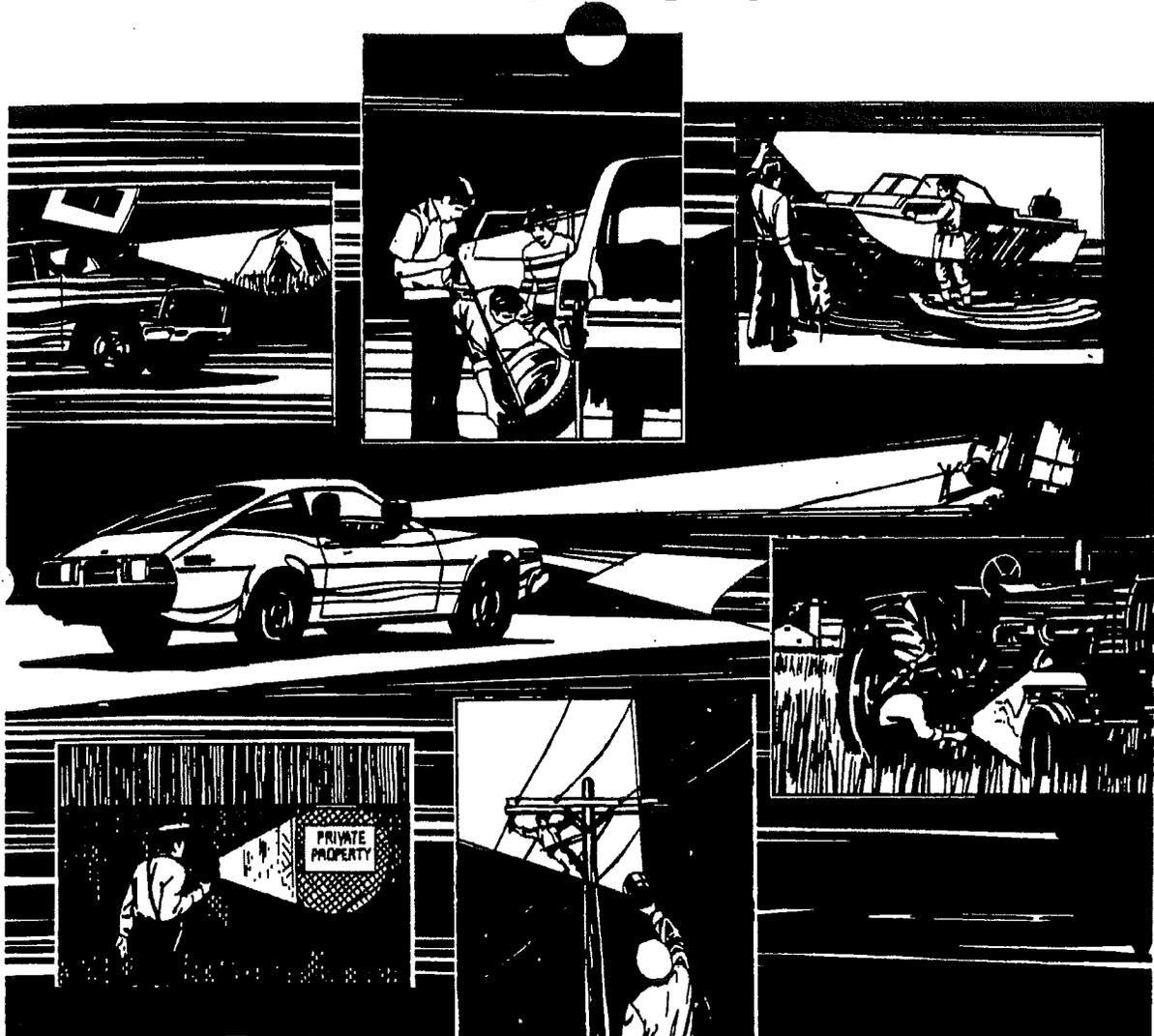
Exhibit 5

Kilham - W/D. Get. New side cover.

BRINKMANN

1981

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



● Farm ● Fleet

● Marine

● Off-Road

● Auto Utility

● Home Security

● D.I.Y.

● 4x4

● Emergency

● Hunting

● Construction

● Industrial

● 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

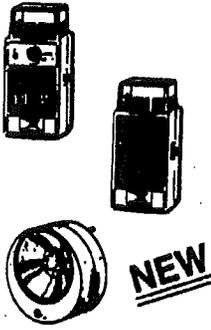
SENSOR[®]

**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.
 <p>Rechargeable Security Lights</p>	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
 <p>6-Volt Fluorescent Lanterns</p>	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
 <p>Accessories</p>	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
	119-8006-0	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

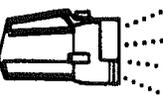
KEY TO SELLING MORE BRINKMANN® RECHARGEABLE SPOTLIGHTS AND 6-VOLT LANTERNS



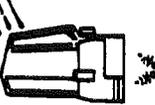
AC & DC RECHARGEABLE
Built-in AC & DC chargers allow recharge wherever you are!



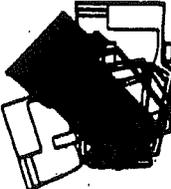
TOUGH AND RUGGED
High density polyethylene case.



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.



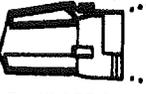
NO RUST OR CORROSION
Silvered switch contacts resist acids and alkalis.



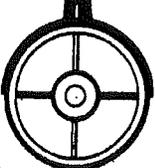
AIR SPACE SURROUNDING BATTERY
Eliminates condensation inside case. Operates in colder temperatures.



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



NON-GLARE SHIELD



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.



LENS SEAL GLOWS
As your lens glows

CONFIDENTIAL

BM001838