

ESTTA Tracking number: **ESTTA315690**

Filing date: **11/06/2009**

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

Proceeding	91166487
Party	Plaintiff HASBRO, INC.
Correspondence Address	PAUL N. VANASSE HASBRO INC 1027 NEWPORT AVENUE PAWTUCKET, RI 02862 UNITED STATES IPDOCKETING@PBWT.COM
Submission	Opposition/Response to Motion
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Signature	/Kim J. Landsman/
Date	11/06/2009
Attachments	Landsman Dec without Exhibits.pdf ( 6 pages )(122561 bytes )

**Exhibit 5 of This Document Contains Information that Applicant Has Designated Confidential Pursuant to the Stipulation and Order for Protection and Confidentiality**

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

In the Matter of Application Serial No. 78/359,895  
Filed: January 30, 2004  
For the Mark: MEMORY MAGIC in International Class 28  
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91/166,487
	:	
CREATIVE ACTION LLC,	:	
	:	
Applicant.	:	

**DECLARATION OF KIM J. LANDSMAN**

KIM J. LANDSMAN, under penalty of perjury, declares as follows:

1. I am a member of the firm of Patterson Belknap Webb & Tyler LLP, attorneys for opposer Hasbro, Inc. ("Hasbro"), and am a member of the bar of the State of New York. I submit this declaration based on personal knowledge in opposition to applicant's motion to compel. Its purpose is to summarize for the Board pertinent facts concerning prior proceedings herein (including discovery requested and taken), to provide the Board with information concerning other Hasbro litigation concerning its MEMORY<sup>®</sup> trademark, and to place in the record certain information about Applicant's product from its website.

### **Prior Suspensions of this Proceeding**

2. This opposition proceeding was initiated by Hasbro in August 2005. For the majority of time since then, the opposition has been suspended.

3. A series of extensions of time and suspensions were requested on consent and granted – first for settlement discussions and then pending disposition of Hasbro v. MGA Entertainment, Inc., CA No. 06-262 S, in the United States District Court for the District of Rhode Island.

4. On August 4, 2006, March 5, 2007, and September 7, 2007, the Board granted suspensions that collectively suspended the proceedings through March 3, 2008, pending settlement negotiations.

5. Before the discovery period for those suspensions closed, the parties moved to suspend the proceeding pending final determination of the MGA case. That motion was granted on May 9, 2008. All of the above orders suspending proceedings are of record.

6. On October 22, 2008 Hasbro notified the Board that the MGA case was over and attached a copy of the final judgment in that action. A copy of that judgment is attached hereto as Exhibit 1.

### **Relevant Discovery from Applicant**

7. In March 2006, before the series of suspensions began, Hasbro served document requests and interrogatories on Creative Action. A copy of Hasbro's document requests is attached hereto as Exhibit 2; a copy of Hasbro's interrogatories is attached hereto as Exhibit 3. Document Request No. 1 called for production of two samples of Creative Action's product. Only one was finally produced on October 20, 2009, and only after Hasbro agreed to pay the retail price of \$399 for it.

8. Hasbro first noticed the deposition of Dr. Ronni Sterns for June 9, 2006.

A copy of the deposition notice is attached hereto as Exhibit 4. Because of the many suspensions in this proceeding, as well as stalling by Creative Action, she was not produced for deposition until October 20, 2009. It was at that deposition that Hasbro's counsel was finally able to view a sample of the Memory Magic product.

9. Creative Action and Hasbro agreed to a Stipulation And Order for Protection and Confidentiality in this proceeding, which was signed by the parties on June 5, 2006, and accepted by the Board noted the protective order on June 8, 2006, and is therefore of record.

10. A copy of the transcript of the deposition of Dr. Ronni Sterns is attached hereto as Exhibit 5. It is the only part of this Declaration that needs to be filed under seal.

11. Counsel for Creative Action exercised his right under Section 3 of the confidentiality order to designate the entire deposition transcript "Confidential" for 20 days after receipt of the transcript. This prohibits us as counsel from discussing the contents of Dr. Sterns' deposition with Hasbro's business people, but I can represent to the Board that the information disclosed about the Memory Magic product is likely to lead to a dramatic change in the focus of this proceeding from an opposition based on likelihood of confusion to one based on Section 18 of the Lanham Act, 15 U.S.C. § 1068, to correct and limit the description in the application to the actual product.

**The Document Request Creative Action Seeks to Compel**

Creative Action seeks to compel Hasbro to produce documents in response to an extremely broad request for

All documents that relate to any inter partes proceedings or litigation in which the [sic] Hasbro has been or is involved that

refers to or relates to the mark MEMORY, other than the instant proceeding, including, but not limited to, pleadings, discovery documents, documents, depositions, and transcripts relating to such proceedings or litigation.

Hasbro responded as follows:

Hasbro objects to this request as overbroad, unduly burdensome, duplicative of other requests, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Hasbro further objects to the extent the request seeks information protected by the attorney-client privilege, attorney work product, or other privilege. Subject to and without waiving the foregoing and the General Objections, Hasbro will produce publicly filed documents, if any, from inter partes proceedings or litigation in which the Hasbro has been or is involved over the right to use the MEMORY® trademark.

A copy of Hasbro's Response to Applicant's First Request for Production of Documents and Things is attached hereto as Exhibit 6.

12. Hasbro's counsel later wrote to Creative Action's counsel offering to produce the documents in the public files provided that Creative Action agreed to pay for the copying. A copy of that letter is attached hereto as Exhibit 7. Creative Action never responded to that offer.

#### **The Onerous Nature of the Document Request at Issue**

13. Hasbro has sued twice for infringement of its MEMORY mark.

14. The first suit was Hasbro, Inc. v. Kellogg Company et ano., 03 Civ. 3645 (LAP), in the Southern District of New York. That case was settled and voluntarily withdrawn by Hasbro pursuant to a confidential agreement in June 2003.

15. The second suit was Hasbro, Inc. v. MGA Entertainment, Inc., C.A. No. 06-262 S, in the District of Rhode Island.

16. Since Hasbro served its discovery responses, another TTAB inter partes proceeding involving the MEMORY mark was commenced. That proceeding is Hasbro v. Bold Well Industrial, Inc., Opposition Number 91189834. It is in the process of settlement.

17. To retrieve and produce all the documents from prior litigation would be daunting. Documents relating to the MGA case alone include, but are not limited to, hundreds of emails and other documents protected by the attorney-client and work-product doctrine; more than 500 documents, totaling more than 50,000 pages, exchanged by the parties during discovery; more than 200 trial exhibits and demonstratives; more than 35 motions, many of which are under seal; 17 deposition transcripts and video recordings, with more than 100 associated exhibits; transcripts from seven days of evidentiary hearings that Court ordered placed under seal; reports and related documents from seven different experts.

18. A large portion of those documents were marked Confidential or Confidential – Outside Counsel Only pursuant to the protective order in the MGA case. Such documents may not be produced to anyone not specified in the protective order and may only be used in that litigation. Accordingly, to produce them here would violate the district court’s protective order. A copy of that protective order is attached hereto as Exhibit 8.

**Information About Memory Magic from Creative Action’s Website**

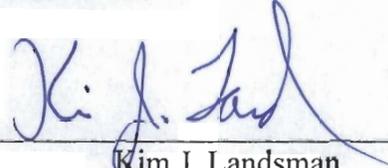
19. Creative Action’s website advertises Memory Magic as a therapeutic product. A printout from Creative Action’s website is attached hereto as Exhibit 9.

20. Creative Action’s website links to a document listing the diagnostic codes for which Memory Magic is reimbursable under Medicare and Medicaid. The link appears under the heading “Therapeutic Benefits & ICD9 Codes for Reimbursement,” on page 1 of Exhibit 9.

A copy of this document, obtained through the link on Creative Action's website, is attached hereto as Exhibit 10.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2009, in New York, New York.



Kim J. Landsman