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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	Motion to Amend Pleading/Amended Pleading
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Signature	/Kim J. Landsman/
Date	12/23/2009
Attachments	H0286-3210.pdf (69 pages)(2998772 bytes)

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. CREATIVE ACTION LLC, Applicant.	Opposition No. 91/166,487

MOTION TO AMEND OPPOSER'S NOTICE OF OPPOSITION AND TO SUSPEND THE PROCEEDINGS

Opposer Hasbro, Inc. ("Hasbro") respectfully requests that this Board grant Hasbro leave to amend its Notice of Opposition in the interests of justice and that the Board suspend this proceeding pending disposition of the instant motion.

Based on recent discovery, Hasbro has finally seen a sample of Applicant's Memory Magic product and been able to fully appreciate how different it is from Opposer's MEMORY® game. If the Applicant's product had been accurately described as a therapeutic activity kit for elderly patients with dementia, Hasbro would not have opposed it.

Unfortunately, Applicant Creative Action LLC's ("Creative Action") application

to register the alleged Memory Magic mark inaccurately describes its product in such a way as to suggest similarities to Hasbro's MEMORY game – and a likelihood of confusion – where there is none. As such, Hasbro has come to believe that a claim to restrict and/ or modify Applicant's description of goods pursuant to Section 18 of the Lanham Act, 15 U.S.C. § 1068 and a claim for lack of bona fide intent to use pursuant to 15 U.S.C. § 1051(b) would be most appropriate in this action. See Hasbro's Proposed Amended Notice, attached hereto as Exhibit A. An amendment to Hasbro's Notice, substituting such claims for those originally brought, would serve the interests of justice without causing any prejudice to Creative Action. Hasbro's motion should accordingly be granted.

History of the Opposition

In August 2005, Hasbro instituted this Opposition in response to Creative Action's application to register "Memory Magic" as a trademark in International Class 28. Concerned about possible confusion with its famous MEMORY mark, Hasbro objected to Creative Action's registration on several statutory grounds:

- 15 U.S.C. § 1052(a) (prohibiting registration of a mark that would lead the public to falsely believe in the existence of a relationship between Applicant and the owner of a protected trademark) (Hasbro's Notice of Opposition (hereinafter "Notice") at ¶ 11);
- 15 U.S.C. § 1052(d) (prohibiting registration of a mark sufficiently similar to a protected trademark that it would be likely to cause confusion as to the origin of Applicant's goods) (Notice ¶ 12);
- 15 U.S.C. § 1125(c)(1) (prohibiting use of a mark that would dilute the distinctive quality of a famous trademark) (Notice ¶ 13); and
- 15 U.S.C. § 1051, et seq. (setting out the intended requirements and benefits of trademark registration, which Hasbro argued would be undermined by registration of the alleged Memory Magic mark) (Notice ¶ 14).

Shortly thereafter, Hasbro sought discovery regarding the nature of Creative Action's Memory Magic product. In March 2006, Hasbro served document requests and

interrogatories on Creative Action. Declaration of Kim J. Landsman ("Landsman Decl.") ¶ 7, attached hereto as Exhibit B. Document Request No. 1 was for "Two samples of each and every actual or intended good or service by Applicant in the United States that bears the MEMORY MAGIC mark." See Landsman Decl. Exh. 1. Hasbro also noticed a deposition of Creative Action's president Dr. Ronni Sterns for June 9, 2006. See Landsman Decl. Exh. 2.

Discovery was halted, however, by a series of extensions of time and suspensions that were requested on consent and granted – first for settlement discussions and then pending disposition of Hasbro, Inc. v. MGA Entertainment, Inc., C.A. No. 06-262 S (DRI), which also involved Hasbro's MEMORY mark. For example, 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. (The September 7, 2007 order incorrectly gives the year date as 2007.) Before the discovery period for those suspensions closed, the parties moved to suspend the proceeding pending final determination of the MGA case, and that motion was granted May 9, 2008. 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. The Board then set August 20, 2009, as the date for discovery to close, which was extended to October 31, 2009, by consented motion granted August 13, 2009. As a result of Creative Action's recently denied Motion to Compel, that deadline was further extended to December 24, 2009. See Landsman Decl. ¶¶ 3-6.

Because of these numerous suspensions, as well as stalling by Creative Action, Hasbro's counsel did not see a sample of the product until October 20, 2009, the day Hasbro was finally able to take Dr. Sterns' deposition, and the sample was only obtained by paying the retail price for it. Landsman Decl. ¶ 8. As such, Hasbro only recently learned of the significant differences between the parties' products. Further, Hasbro's counsel was only permitted to

discuss these differences with Hasbro's business people as of December 4, 2009, the date Creative Action lifted its blanket designation of Dr. Stern's deposition testimony as "Confidential" by providing Hasbro with more specific confidentiality designations. Landsman Decl. ¶ 11.

The Parties' Products

Based on Hasbro's inspection of Creative Action's Memory Magic product and on the deposition testimony of Dr. Ronni Sterns, Creative Action's founder and CEO, it has become clear that Memory Magic is not really a game, that it has little in common with Hasbro's famous MEMORY game, and that there is little to no likelihood of confusion between the two, and therefore no need to oppose Creation Action's registration of its therapeutic product as accurately described.

Hasbro's MEMORY trademark is used on a game directed to preschool children. It uses colorful images rather than text, is played by matching images, and is played competitively for fun. It is sold principally through mass retailers at an inexpensive price point (about $7 a unit). Declaration of Peter Kristoffy ("Kristoffy Decl.") ¶¶ 4-6.

The principal dictionary definitions of "game" are "1. an amusement or pastime: *children's games*. 2. the material or equipment used in playing certain games . . . . 3. a competitive activity involving skill, chance, or endurance on the part of two or more persons who play according to a set of rules, usually for their own amusement or for that of spectators." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 582 (Unabridged Ed. 1983).

The Memory Magic product is none of those; it is not an amusement or pastime, nor is it a competitive activity. Quite simply, Applicant's product is *not* a game and, as Dr. Sterns simply and frankly noted of Memory Magic: "We no longer call it a game." Sterns Dep.

110:9.[1]

Memory Magic is instead, as Dr. Sterns testified, "a comprehensive therapeutic intervention for groups of people with cognitive impairments which includes dementia, stroke, head trauma, and behavior problems." Sterns Dep. 38:18-21. Its therapeutic nature is also shown by the fact that Creative Action advertises it as such and provides Medicare reimbursement codes for its purchase. See Landsman Decl. Exhs. 4-6; Sterns Dep. 46:7-8 ("it's reimbursable in therapy from one to four people").

Creative Action took great pains to design its product to appeal to and be used by the elderly and to avoid anything that would make it look like a children's game. For example, the product comes in a

> [p]lain cardboard box . . . by design. We wanted to make it therapeutic and non-toy like. We didn't want anyone -- people with dementia -- getting confused by a lot of colors, so that was really -- I was laughing, but that is by design. And we didn't want staff to be confused by colors either.

Sterns Dep. 37:18 – 38:1.

The product was developed with a $1.5 million grant from the National Institutes of Health. Sterns Dep. 47:21-22; 103:11-13. Creative Action's goal was

> to develop a program that would happily engage large groups of people with dementia for an hour at a time and lessen behavior problems so staff could get a respite and be happy as well. What I believe we have, but we haven't shown yet, is a program that keeps people with dementia at the same level of dementia longer because it uses aspects of memory that they have remaining, which is not short-term memory. They don't have short-term memory. That's the problem with dementia. It's a loss of, among other things, short-term memory.

Sterns Dep. 46:20 – 47:6.

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[1] The deposition of Dr. Ronni Sterns, Creative Action's president and CEO, was originally noticed for June 2006 and finally taken on October 20, 2009. The transcript of it will be cited herein as "Sterns Dep." followed by the page and line numbers of the transcript. Relevant excerpts are attached to the Declaration of Kim Landsman as Exhibit 3.

It is also not a game because it very deliberately avoids any competitive nature. When asked whether Memory Magic had a "winner," Dr. Sterns answered:

> Absolutely not. There's no winner. None. That is a major point. What happens with winning and losing, it generates negative emotions and you get people getting very upset, and that's not good for the residents, for the other residents, or for staff. . . . [i]t's failure free. Whatever level of dementia you're at -- I can't say about very late stages and people who are curled up and are just not responsive, but outside of that, whatever level you're at, it lets you do whatever you can do so you feel good about it, and you don't feel as though you're in competition with the next person.

Sterns Dep. 50:10-24.

Memory Magic is quite clearly targeted, as specified by the grant from National Institute on Aging of the National Institutes of Health, "toward older adults in long-term care settings with dementia, and staff people who are caregivers in those facilities. That was clearly what the grant stated." Sterns Dep. 103:14-17, 164:7-15 (Unlike Hasbro's MEMORY game, which "is targeted to children and looks like it's for children ," Memory Magic is "for people with dementia and long-term health care facilities.").

Hasbro's MEMORY game and Creative Actions Memory Magic therapy do not compete. Sterns Dep. 117:21-23. They are not even appropriate for the same age group, and Dr. Sterns testified that there "couldn't possibly be" "any overlap of potential customers" "because there's a requirement in long-term care to have age appropriate products, and products that are for three- and four-year-olds and are very colorful like that are no longer deemed appropriate, and the state surveyors may come in and give the facility big problems." Sterns Dep. 117:24 – 118:6.

Not surprisingly, the products are not in the same channels of trade. Hasbro's MEMORY game is sold primarily by mass market retailers. Memory Magic is sold by direct sales to nursing homes/adult day care centers and, rarely, to families of elderly persons with

dementia. Sterns Dep. 120:13-17, 121:4-6, 9-11. Memory Magic's price point is in a whole other league than the MEMORY game: $339 for Memory Magic vs. $7 for the MEMORY game.

The Application's Description of the Memory Magic Product

Creative Action applied to register its mark in Class 28, which is for toys and sporting goods, further delineated as "Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees." The product is described as follows in its application:

> therapeutic game in the nature of a trivia game and a bingo game for engaging persons with memory loss consisting of game cards that contain answers to questions and calling cards that contain questions and information related thereto.

As shown above, however, the product does not belong in Class 28, because it is not a game, plaything, or sporting article. It is a therapeutic activity kit that more properly belongs in Class 10 as a medical apparatus. Its medical function is clearly indicated by the fact that Creative Action advertises the reimbursement codes that can be used to obtain Medicare/Medicaid reimbursement for the product's purchase. See Landsman Decl. Exh. 4-6.

An accurate description of Applicant's actual product would read:

> therapeutic activity kit intended for use by nursing homes and other elderly care facilities to promote the use of cognitive abilities by elderly persons with memory loss, comprised of cards that contain questions and related prompts for discussion, cards that contain an array of potential answers to the questions, and boards used by participants.

Use of the Memory Magic mark on the product described above would not be likely to cause confusion with Hasbro's preschool game.

Amending Hasbro's Notice of Opposition Would Serve the Interests of Justice

Given this, the interests of justice would best be served by allowing Hasbro to

substitute for its original claims a claim to restrict or modify the Application pursuant to Section 18 of the Lanham Act and a claim for lack of bona fide intent to use pursuant to 15 U.S.C. § 1051(b). (See

Section 18 of the Lanham Act

Section 18 of the Lanham Act allows the Director to, inter alia, "modify the application or registration [in an opposition, concurrent use, or cancellation proceeding] by limiting the goods or services specified therein" or "otherwise restrict or rectify with respect to the register the registration of a registered mark." 15 U.S.C. § 1068.

This language was put in place as part of the Trademark Law Revision Act of 1988 to give the Board the flexibility to take real-world facts into consideration in its decisions. The amendment was recommended by the United States Trademark Association (now INTA) because prior law was too limiting:

> Current law puts the Board in a straightjacket, bound by the goods and services descriptions in the relevant applications and registrations.... Not surprisingly, the Board often decides the likelihood of confusion issue on hypothetical, not real world, grounds.
>
> The Commission believes that perpetuating this artificial environment is undesirable. Actual product and trade channel differences are highly relevant and often determinative in court proceedings. The Board should be able to consider them as well, and to modify a description if it would avoid likelihood of confusion.

THE UNITED STATES TRADEMARK ASSOCIATION TRADEMARK REVIEW COMMISSION *REPORT AND RECOMMENDATIONS TO USTA PRESIDENT AND BOARD OF DIRECTORS*, 77 TRADEMARK REP. 452 (1987)

During deliberation on the bill, the Senate Judiciary Committee also averred that the Board would benefit from the ability to consider "marketplace realities" rather than simply "hypothetical facts":

> Section 18 will permit the Board to base determinations of likelihood of confusion on marketplace realities rather than on hypothetical facts.... In addition, it gives the Board flexibility when addressing the goods or services identified in an intent-to-use application. For example, if testimony about the intended use results in a factual determination that the goods or services specified in the application are stated too broadly, the Board would be permitted to modify the identification accordingly.

STAFF OF SENATE COMM. ON THE JUDICIARY, 100TH CONG., REPORT ON TRADEMARK LAW REVISION ACT OF 1988 (Comm. Print 1988).

A claim under Section 18 is properly pled when a party can demonstrate that "(i) the entry of a proposed restriction to the goods or services in its opponent's application or registration will avoid a finding of likelihood of confusion and (ii) the opponent is not using its mark on those goods or services that will be effectively excluded from the application or registration if the proposed restriction is entered." Eurostar, Inc. v. "Euro-Star" Reitmoden GMBH & Co. KG, 34 U.S.P.Q.2d 1266, 1995 WL 231387 (TTAB 1994) at *5. Based on facts uncovered by recent discovery, this appears to be just such a case.

As discussed above, Hasbro has learned through its examination of Creative Action's Memory Magic product and through its deposition of Creative Action's CEO and principal Ronni Sterns, the extent of the dissimilarities between the actual Memory Magic product (which, notwithstanding the fact that the application was based on intent to use, has been sold for some time now) and Hasbro's MEMORY game. Indeed, the application at issue should not be in Class 28 at all.

The heart of the conflict in this Opposition lies in the inaccurate description of Memory Magic in Creative Action's application, not in any likelihood of confusion between the parties' actual products. See discussion at pp. 4-7 above. Section 18 was amended to allow for flexibility in just such situations.

15 U.S.C. § 1051(b) – Lack of Bona Fide Intent to Use

A claim pursuant to 15 U.S.C. § 1051(b) is also appropriate in this case. 15 U.S.C. § 1051(b) requires that an applicant have "a bona fide intention to use" the alleged trademark in commerce for the goods identified in its application. If an applicant lacked such bona fide intent on the date of its application, registration must be refused. See, e.g., Research in Motion Ltd. V. NBOR Corp., 92 U.S.P.Q. 1926 (TTAB 2009) (refusing registration on grounds of lack of bona fide intent to use).

Here, Creative Action never intended to use the alleged Memory Magic mark for the goods listed in its Application. It never intended to use the mark in connection with a game at all. Creative has always used and always intended to use the Memory Magic mark in connection with the therapeutic activity kit it currently sells under that name. If the Application is not modified pursuant to Section 18 to accurately describe the product sold by Creative Action, it should be refused because, as of the filing date of the Application, Creative Action's lacked the requisite bona fide intent to use the Memory Magic mark in commerce in connection with the goods specified.

Leave to Amend is Liberally Granted Where Justice Requires

In an opposition proceeding, pleadings may be amended to the same extent allowed by the Federal Rules of Civil Procedure, except that an opposition may not be amended to add to the goods or services opposed. 37 CFR § 2.107. As such, a party may amend its pleading by leave of the court and "leave shall be freely given when justice so requires." Fed. R.

Civ. P. 15(a).

The Board liberally grants leave to amend, as noted in Montblanc-Simplo GmbH v. United Brands International, Inc., 2009 WL 4086591 at *2 (TTAB Sept. 19, 2009):

> The Board liberally grants leave to amend pleadings at any stage of the proceeding when justice requires, unless entry of the proposed amendment would be prejudicial to the rights of the adverse party or parties, would violate settled law, or would serve no useful purpose. Fed. R. Civ. P. 15(a). See, e.g., Polaris Industries v. DC Comics, 59 U.S.P.Q.2d 1789 (TTAB 2001); Boral Ltd. V. FMC Corp., 59 U.S.P.Q.2d 1701 (TTAB 2000); and Institut National des Appellations d'Origine v. Brown-Forman Corp., 47 U.S.P.Q.2d 1875, 1896 (TTAB 1998); TBMP § 507.02 (2d ed. Rev. 2004).

This is the case even where a plaintiff seeks to amend its complaint to plead a claim other than those in its original complaint. Id. (citing Commodore Electronics Ltd. v. CMB Kabushiki Kaisha, 26 U.S.P.Q.2d 1503 (TTAB 1993) and Mamark, Ltd. V. Nutrexpa, S.A., 12 U.S.P.Q.2d 1843 (TTAB 1989)).

In this case, Hasbro does not seek to oppose additional goods or services. Hasbro's proposed amendment does not violate law and, by pleading a legally sufficient cause of action, it serves a useful purpose. See Hurley International LLC v. Paul and JoAnne Volta, 82 U.S.P.Q.2d 1339 at *2-3 (TTAB 2007). The amendment will not prejudice Creative Action. It will not require any additional discovery, since all information needed to adjudicate the amended claims is present in the deposition testimony of Dr. Sterns. Even if Creative Action disagrees and wishes to take further discovery, any prejudice could be avoided by staying this Opposition until this motion has been resolved and then extending the window for discovery.

Most importantly, the amendment will save the parties and the Board considerable time and resources. No additional discovery will be needed because we have the product and its description. Both the Section 18 claim and the 15 U.S.C. § 1051(b) claim can be decided on summary judgment based on those two simple pieces of evidence. Because Hasbro

seeks to substitute these claims for its original claims rather than add it to the original claims, the amendment would save the considerable time and effort needed to adjudicate Hasbro's original claims regarding likelihood of confusion. Among other things, adjudicating a likelihood of confusion claim would embroil the parties and the Board in time-consuming issues Creative Action has raised concerning the validity of Hasbro's incontestable trademark.

Through this motion, Hasbro seeks to amend its Notice of Opposition in such a way as to focus on the genuine conflict between the parties, protecting its interests in accordance with the terms of the Lanham Act and conserving the resources of the parties and this Board. This motion should be granted in accordance with the Board's practice of liberally granting leave to amend.

The Opposition Should be Suspended Pending Resolution of this Motion

Finally, Hasbro asks that the Board suspend this Opposition until it has ruled on the instant motion. If granted, the motion should obviate the need for any further discovery and, indeed, may obviate the need for any testimony period. As noted above, we believe that the correct description of Creative Action's product can be determined by the product itself and what Dr. Sterns has already testified to about it. At the very least, if the Board grants Hasbro's motion, it will no longer be necessary or appropriate to engage in discovery or to take testimony on issues concerning likelihood of confusion between the Memory Magic product and Hasbro's MEMORY game. Such a suspension will also provide an extra safeguard to ensure that Creative Action suffers no prejudice from the close of discovery.

It is therefore appropriate and in the interest of efficiency with respect to the parties' and the Board's resources to suspend all proceedings until this motion is decided.

Dated: December 23, 2009

Respectfully submitted,

Kim J. Landsman (C.D.F.)

Kim J. Landsman
Claire Frost
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036-6710
(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

ELECTRONIC MAILING CERTIFICATE

I hereby certify that the **MOTION TO AMEND OPPOSER'S NOTICE OF OPPOSITION AND TO SUSPEND THE PROCEEDINGS** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 23rd day of December, 2009.

Lorri Emanu

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Amend Opposer's Notice of Opposition** was served by first class mail on December 23, 2009, on the following counsel for the Applicant:

Wayne D. Porter Jr., Esq.
Law Offices of Wayne D. Porter, Jr.
1370 Ontario Street, Suite 600
Cleveland, Ohio 44113
Tel. No.: (216) 373-5545

Claire D. Frost

EXHIBIT A

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. CREATIVE ACTION LLC, Applicant.	Opposition No. 91/166,487

AMENDED NOTICE OF OPPOSITION

Hasbro, Inc. ("Opposer") believes that it will be damaged by the registration of the trademark covered by Application Serial No. 78/359,895 (the "Application") filed on January 30, 2004, by Creative Action LLC (the "Applicant"), and hereby opposes the registration of the trademark.

As grounds for opposition, it is alleged that:

1. Opposer is a Rhode Island corporation having its headquarters and its principal place of business at 1027 Newport Avenue, Pawtucket, Rhode Island 02862-1059.

2. Applicant, upon information and belief, is an Ohio limited liability company having a place of business at 680 North Portage Path, Akron, Ohio 44303.

3. Opposer markets and sells the MEMORY® card games. Opposer is the owner of certain trademarks in these games that are the subject of the following federal registrations issued on the Principal Register, all of which are in full force and effect, as shown

by the records of the U.S. Patent and Trademark Office (collectively, the "Trademarks"), including but not limited to the following (TESS/TARR and Assignment printouts are attached as Exhibits 1 and 2):

A. Registration No. 2,894,970 for MEMORY: Registered on January 1, 1966, in International Class 28 for "card games."

B. Registration No. 834,282 for MEMORY: Registered on August 29, 1967 in International Class 28 for "equipment comprising cards with many matching pairs of designs for playing a matching card game."

4. Opposer or its predecessors in interest began selling the MEMORY® card games in commerce in the United States in 1966 and have used the Trademark in United States commerce in substantially identical form in connection with the MEMORY® card games for over 40 years.

5. As illustrated in the Official Gazette dated January 30, 2005, at page TM 330, Applicant seeks to register and use the trademark "MEMORY MAGIC" in International Class 28, alleging an intent to use.

6. No issue of priority exists between Opposer's Trademark and the alleged "MEMORY MAGIC" trademark. Opposer's date of adoption and first use precedes Applicant's, as Applicant had not used its mark in commerce at the time of the Application, and sought registration based only on an intent to use.

7. In the Application, Applicant asserts that it intends to use its alleged "MEMORY MAGIC" mark in connection with a "therapeutic game in the nature of a trivia game and a bingo game for engaging persons with memory loss consisting of game cards that contain answers to questions and calling cards that contain questions and information thereto."

Count I: Restriction and Modification Under Section 18, 15 U.S.C. § 1068

8. Opposer repeats and realleges each and every allegation set forth in Paragraphs 1 through 7.

9. Applicant's identification of goods is overbroad and inaccurate. It is not using, nor does it intend to use, the "MEMORY MAGIC" mark in commerce for the goods identified in its Application. It is not using, nor does it intend to use, the "MEMORY MAGIC" mark for a "game" at all. Rather, Applicant's "MEMORY MAGIC" mark is used and intended for use only in connection with a therapeutic activity kit for elderly persons with dementia or other mental impairments as detailed below.

10. The identification of goods in the Application should be restricted under Section 18, 15 U.S.C. § 1068, to properly reflect the actual goods sold or intended to be sold by Applicant and the particular channels of trade and class of consumer for such goods as follows:

> therapeutic activity kit intended for use by and direct sale to nursing homes and other elderly care facilities to promote the use of cognitive abilities by elderly persons with memory loss, comprised of cards that contain questions and related prompts for discussion, cards that contain an array of potential answers to the questions, and boards used by participants.

11. Because the goods consist of a therapeutic kit rather than a game, the Application should be reclassified as International Class 10, not International Class 28.

12. The requested restriction and modification of the Application pursuant to Section 18 of the Lanham Act, 15 U.S.C. § 1068, will avoid any likelihood of harm to Opposer by avoiding any likelihood of confusion with Opposer's MEMORY mark.

Count II: Lack of Bona Fide Intent to Use Under 15 U.S.C. § 1051(b)

13. Opposer repeats and realleges each and every allegation set forth in Paragraphs 1 through 12.

14. Applicant lacked the requisite bona fide intent to use the mark in commerce under 15 U.S.C. § 1051(b) on or in connection with the goods listed in the Application as of the filing date of the Application.

15. Accordingly, the Application is void and should be refused registration.

WHEREFORE, Opposer prays that this Opposition be sustained, and that the Application for "MEMORY MAGIC" be refused, restricted, and/or modified by this Board as set forth above.

Please recognize Kim J. Landsman and Claire D. Frost, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036-6710, both members of the Bar of the State of New York, as the attorneys for the Opposer in this proceeding. All communications are to be directed to Kim J. Landsman at the address identified above.

Dated: December 23, 2009

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP

By Kim J. Landsman (C.D.F.)

Kim J. Landsman, Esq.
Claire D. Frost, Esq.
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

ELECTRONIC MAILING CERTIFICATE

I hereby certify that the **Amended Notice of Opposition** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 23rd day of December, 2009.

Lorri Emanu

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Amended Notice of Opposition** was served by first class mail on December 23, 2009, on the following counsel for the Applicant:

Wayne D. Porter, Jr., Esq.
Law Offices of Wayne D. Porter, Jr.
1370 Ontario Street, Suite 600
Cleveland, Ohio 44133
Tel. No.: (216) 373-5545

Claire D. Frost

AMENDED NOTICE EXHIBIT 1

Int. Cl.: 28

Prior U.S. Cls.: 22, 23, 38 and 50

Reg. No. 2,894,970

United States Patent and Trademark Office

Registered Oct. 19, 2004

TRADEMARK
PRINCIPAL REGISTER

MEMORY

HASBRO, INC. (RHODE ISLAND CORPORATION)
1027 NEWPORT AVENUE
PAWTUCKET, RI 02862

FOR: CARD MATCHING GAMES, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 1-1-1966; IN COMMERCE 1-1-1966.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 76-556,433, FILED 11-4-2003.

SUSAN HAYASH, EXAMINING ATTORNEY

AMENDED NOTICE EXHIBIT 2

United States Patent Office

834,282
Registered Aug. 29, 1967

PRINCIPAL REGISTER
Trademark

Ser. No. 244,660, filed May 2, 1966

memory

Milton Bradley Company (Massachusetts corporation)
74 Park St.
Springfield, Mass.

For: EQUIPMENT COMPRISING CARDS WITH MANY MATCHING PAIRS OF DESIGNS FOR PLAYING A MATCHING CARD GAME, in CLASS 22.
First use Jan. 1, 1966; in commerce Jan. 1, 1966.

EXHIBIT B

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. CREATIVE ACTION LLC, Applicant.	Opposition No. 91/166,487

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® 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. The Board then set August 20, 2009, as the date for discovery to close, which was extended to October 31, 2009, by consented motion granted August 13, 2009. As a result of Creative Action's recently denied Motion to Compel, that deadline was further extended to December 24, 2009.

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 1. 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 2. 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. Relevant excerpts from the transcript of the deposition of Dr. Ronni Sterns are attached hereto as Exhibit 3.

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. As a courtesy, Hasbro allowed Creative Action to extend this protection until December 4, 2009, when Creative Action provided Hasbro with more detailed confidentiality designations. Only then was Hasbro's counsel permitted to discuss Dr. Stern's testimony with Hasbro's business people.

Information about Hasbro's MEMORY® Game

12. On November 3, 2009, Peter Kristoffy, Hasbro's Director of Global Brands-Games, submitted a Declaration in opposition to Creative Action's motion to compel and in support of Hasbro's motion to lift the stay in place at that time. Kristoffy's Declaration provides basic information about Hasbro's MEMORY® game and is a matter of record in this proceeding.

Information About Memory Magic from Creative Action's Website

13. Creative Action's website advertises Memory Magic as a therapeutic product. A printout from Creative Action's website is attached hereto as Exhibit 4.

14. 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 5. A copy of this document, obtained through the link on Creative Action's website, is attached hereto as Exhibit 6.

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

Executed on December 22, 2009, in New York, New York.

Kim J. Landsman

Electronic Mailing Certificate

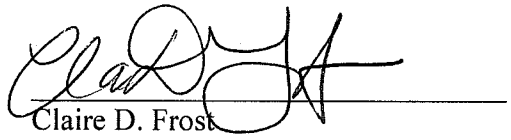
I hereby certify that the **Declaration of Kim J. Landsman** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 23rd day of December, 2009.

Lorri Emanu

Certificate of Service

I hereby certify that a copy of the **Declaration of Kim J. Landsman** was served by first class mail on December 23, 2009, on the following counsel for the Applicant:

Wayne D. Porter, Jr., Esq.
Law Offices of Wayne D. Porter, Jr.
1370 Ontario Street, Suite 600
Cleveland, Ohio 44133



Claire D. Frost

LANDSMAN DECLARATION
EXHIBIT 1

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. CREATIVE ACTION, LLC, Applicant.	Opposition No. 91/166,487

OPPOSER'S FIRST SET OF REQUESTS TO APPLICANT
FOR PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer Hasbro, Inc. ("Opposer"), by its attorneys of record, Patterson Belknap Webb & Tyler LLP, hereby requests that, within 30 days, Applicant Creative Action, LLC ("Applicant"), produce at the offices of Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, New York 10036, the following documents and things in Applicant's or its affiliates', agents', or representatives' possession, custody or control for inspection and copying.

DEFINITIONS AND INSTRUCTIONS

A. "Applicant" shall refer to Creative Action, LLC and to any and all affiliates, agents, representatives, employees, attorneys, accountants, and all the persons or

entities acting or purporting to act on Creative Action, LLC's behalf or under its control, or any one of the foregoing.

B. The term "person" is defined as any natural person or any business, corporation, partnership, legal or governmental entity or association.

C. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

D. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a) and Trademark Rule 2.120, including but not limited to any written, graphic or recorded material of any kind or nature, whether drafts, originals or non-identical copies (including without limitation, audio or video tapes, cartridges, graphic matter, computer tape, computer discs or any other computer retrievable form, records of telephone messages, appointment calendars, etc.), regardless of origin.

E. The term "communication" shall mean oral, written and electronic communications (including but not limited to e-mail), as well as any note, memorandum or other record thereof.

F. The following rules of construction apply:

(1) The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside the scope.

(2) The use of the singular form of any word includes the plural and vice versa.

G. As to each document (or portion thereof) that Applicant declines to produce on the ground of privilege, Applicant shall provide the following information:

(1) the type of document, e.g., letter or memorandum;

(2) the general subject matter of the document;

(3) the date of the document;

(4) the author(s) of the document;

(5) the name of each person to whom such document was addressed, given or sent, or who received such document or a copy thereof and the relationship of the author(s), addressee(s), and recipient(s) to each other;

(6) the identity of each person having possession, custody or control of such document, or a copy thereof; and

(7) the nature of the privilege claimed.

H. Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, Applicant has a continuing duty to furnish additional and supplemental documents and responses as and where such further documents and responses become known or available between the time of the initial response thereunder and the time of the hearing or trial in this proceeding.

DOCUMENTS AND THINGS REQUESTED

1. Two samples of each and every actual or intended good or service by Applicant in the United States that bears the MEMORY MAGIC mark.

2. All documents concerning the conception, selection or decision by Applicant to use or register the MEMORY MAGIC mark, including, but not limited to, documents concerning any other names contemplated or considered, any trademark search(es)

conducted, and any comments or opinions concerning whether the mark was available or registrable, and whether anyone else had used or might have rights to the MEMORY MAGIC mark.

3. All documents concerning the decision to register or not register the MEMORY MAGIC mark.

4. All documents concerning any registration or application for registration or other attempt to protect the MEMORY MAGIC mark.

5. All documents concerning the circumstances under which the Applicant first learned or became aware of Opposer's use of its MEMORY® mark.

6. All documents concerning the actual or intended date of first use of Applicant's MEMORY MAGIC mark and, if different, the first use in commerce in the United States of Applicant's MEMORY MAGIC mark.

7. All documents setting forth, referring or relating to any business, marketing or media plans or the like prepared by or for Applicant referring or relating to any service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark.

8. All documents or things concerning Applicant's actual or intended sale, provision, distribution, marketing, advertising or promotion of each and every actual or intended good or service using, adopting or affiliated with the MEMORY MAGIC mark.

9. Samples of all the correspondence, advertisements, promotional or marketing materials, documents and things sufficient to show the cost, placement and nature of Applicant's advertising, marketing, client or consumer relations and public relations related to its MEMORY MAGIC mark.

10. Copies of any advertisements, website, promotional or marketing

materials relating to any products or services bearing, using, adopting or affiliated with Applicant's "MEMORY MAGIC" mark.

11. Documents sufficient to identify the channels of trade in the United States through which good(s) or service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark have been or will be sold or provided.

12. Documents sufficient to identify the geographic area in the United States in which good(s) or service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark have been or will be sold or provided.

13. Documents sufficient to identify the demographics of actual or intended clients and consumers for good(s) or service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark.

14. Documents sufficient to show by quarter the sales or anticipated sales and gross revenues, net revenues and revenues for each year of every actual or intended good(s) or service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark.

15. All documents concerning any actual or intended licensing or assignment arrangement between Applicant and any person concerning the use of the MEMORY MAGIC mark in the United States or elsewhere, including, but not limited to, any proposals, inquiries and/or requests by any third party in securing a license or assignment of the MEMORY MAGIC mark.

16. All documents concerning any mention by the media in the United States of Applicant's MEMORY MAGIC mark or any service(s) bearing, using, adopting or affiliated with the MEMORY MAGIC mark.

17. All documents concerning clients' or consumers' awareness of or perceptions concerning the MEMORY MAGIC mark in the United States, including but not limited to client or consumer research, studies, surveys, analysis, business plans, focus groups or market research concerning the sale, provision or marketing of any service(s) bearing the MEMORY MAGIC mark.

18. All documents that set forth, refer or relate to any actual or potential confusion or likelihood of confusion between Applicant, its affiliated businesses or partnerships, or its MEMORY MAGIC mark and Opposer or its MEMORY® mark, including but not limited to, all documents concerning letters or other communications from Applicant's agents, attorneys, affiliates, consultants, or other advisors, or actual or potential clients or consumers, evidencing actual or potential confusion or likelihood of confusion or referring to Opposer's MEMORY® mark.

19. All documents that refer or relate to Opposer or its MEMORY® mark.

20. All documents relating to the prosecution of Applicant's application for MEMORY MAGIC, Serial No. 78/359,895, or any other application in the United States or elsewhere for MEMORY MAGIC.

21. All documents that support the contention in paragraph 31 of Applicant's Response to Notice of Opposition that Opposer's MEMORY® marks are incapable of functioning as trademarks for matching (or recall) card games.

22. All documents that support the contention in paragraph 32 of Applicant's Response to Notice of Opposition that Opposer's MEMORY® marks do not have significance as trademarks and have been abandoned.

Dated: New York, New York
March 3, 2006

PATTERSON BELKNAP WEBB & TYLER LLP

By: _____

Kim J. Landsman
Michael D. Sant'Ambrogio
1133 Avenue of the Americas
New York, New York 10036-6710
(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

LANDSMAN DECLARATION
EXHIBIT 2

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. CREATIVE ACTION, LLC, Applicant.	Opposition No. 91/166,4870 **NOTICE OF VIDEOTAPED DEPOSITION**

To: Wayne D. Porter Jr., Esq.
Rankin Hill Porter & Clark LLP
925 Euclid Avenue, Suite 700
Cleveland, OH 44115

Attorneys for Applicant Creative Action, LLC

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 30 and 37 C.F.R. 2.123, Opposer Hasbro, Inc. ("Hasbro") will take the deposition of Ronni S. Sterns, President of Applicant, Creative Action, LLC ("Applicant") commencing on June 9, 2006, at 9:00 a.m., and continuing thereafter until completed, at a location mutually agreed by counsel for the parties or ordered by the Board, before a Notary Public or other officer duly authorized to administer oaths, to be recorded by stenographic means and by videotape.

Hasbro reserves the right to adjourn the deposition if Applicant has not completed its production of documents and things sufficiently in advance of the deposition.

Dated: New York, New York
May 8, 2006

PATTERSON BELKNAP WEBB & TYLER LLP

By: _____
Kim J. Landsman
Michael D. Sant'Ambrogio
1133 Avenue of the Americas
New York, New York 10036-6710
(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

LANDSMAN DECLARATION
EXHIBIT 3

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

HASBRO, INC.,	)	
	)	
Opposer,	)	Opposition No.
	)	91166487
vs.	)	THIS TRANSCRIPT
	)	CONTAINS CONFIDENTIAL
CREATIVE ACTION LLC,	)	INFORMATION
	)	
Applicant.	)	

- - - - -

DEPOSITION OF RONNI STERNS, Ph.D.
Tuesday, October 20, 2009

- - - - -

Deposition of RONNI STERNS, Ph.D., called by the Opposer for examination, taken before me, the undersigned, Rebecca L. Brown, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the Law Offices of Wayne D. Porter, Jr., 1370 Ontario Street, Suite 600, Cleveland, Ohio 44113, commencing at 9:20 a.m. the day and date above set forth.

- - - - -

1 Q And who is responsible for product development?
2 A Depends upon the product. And in any case, it's
3 always been a committee.
4 Q When you say it's always been a committee, who
5 would that committee consist of?
6 A It consists of whoever is on the grant for that
7 product.
8 Q Who is responsible for packaging design?
9 A No one person.
10 Q Who shares the responsibility?
11 A Nobody shares it. It depends upon the product.
12 So we have virtually no packaging on anything we do.
13 This is the package.
14 Do you see the package? Would you call that
15 package design?
16 MS. FROST: For the record,
17 the witness is gesturing at --
18 A Plain cardboard box.
19 MS. FROST: -- the product
20 Memory Magic.
21 A But actually that was by design. We wanted to
22 make it therapeutic and non-toy like. We didn't want
23 anyone -- people with dementia getting confused by a
24 lot of colors, so that was really -- I was laughing,
25 but that is by design. And we didn't want staff to be

1 confused by colors either.
2 Q So when you say that the packaging was by design,
3 that was based on your decision?
4 A Yes.
5 Q Okay. Did you discuss it with anyone else within
6 Creative Action?
7 A Yeah. We probably had a meeting and said what
8 should we do, and our research showed that people with
9 dementia are confused by color.
10 Q So you decided not to use color in the
11 packaging.
12 A And didn't make a red box to attract staff who
13 might be attracted by a red box. But, no, we kept it
14 very plain and simple and antiseptic, so to speak, for
15 the setting in which it was designed, which was
16 long-term care facilities.
17 Q How would you describe Memory Magic?
18 A It's a comprehensive therapeutic intervention for
19 groups of people with cognitive impairments which
20 includes dementia, stroke, head trauma, and behavior
21 problems. It lets people use their remaining
22 abilities, which is why it's successful.
23 MS. FROST: I'd like to enter
24 a unit of Memory Magic into evidence
25 as Plaintiff's Exhibit C.

1 lower functioning people. But it could be a staff
2 person, it could be a family member when they come to
3 visit their loved one in the facility, it could a
4 volunteer.
5 Q How many people play at a time?
6 A Well, we have it in sets of 10. So it sort of
7 works like this. It's reimbursable in therapy from
8 one to four people, but activities really needs 10 or
9 more because in activities there are many people at
10 different levels of cognitive functioning that come
11 together, and it's very difficult to provide a program
12 for them and keep them happily engaged and staying
13 with you, not getting up and leaving, not falling
14 asleep, not wandering, not anxious and calling out,
15 asking repetitive questions. So that's what this was
16 designed to overcome and it does.
17 Q What would you describe is the goal of the game?
18 A That is the goal of the game, to -- well, I'd say
19 there's another goal, but the original goal in our
20 grant was to develop a program that would happily
21 engage large groups of people with dementia for an
22 hour at a time and lessen behavior problems so staff
23 could get a respite and be happy as well.
24 What I believe we have, but we haven't shown yet,
25 is a program that keeps people with dementia at the

1 same level of dementia longer because it uses aspects
2 of memory that they have remaining, which is not
3 short-term memory. They don't have short-term
4 memory. That's the problem with dementia. It's a
5 loss of, among other things, short-term memory. You
6 lose other things, too.
7 Q On the printout of your website that's marked as
8 Exhibit A --
9 A Yes. I have Exhibit B.
10 Q Pardon me. Exhibit B.
11 A Okay.
12 Q Four pages from the end, there's a page entitled,
13 "Memory Magic Game." It says there that the game has
14 proven to be effective for engaging people with
15 cognitive disabilities. It sounds like that -- is
16 that what you were describing when you talk about the
17 goal of the game?
18 A Absolutely.
19 Q What proof have you developed regarding the
20 efficacy of the game?
21 A Well, we had a million and a half dollars in your
22 tax money and mine to develop it. So every single
23 feature was ergonomically tested for one with
24 residents and staff. We held focus groups with staff,
25 and we tested it in nine different locations, three

1 the game is to bring out long-term memories for the
2 players or participants?
3 A That's an objective, yes.
4 Q And to enable failure free social interaction and
5 enjoyment?
6 A Yes.
7 Q Is there a winner --
8 A No.
9 Q -- to this game?
10 A Absolutely not. There's no winner. None. That
11 is a major point. What happens with winning and
12 losing, it generates negative emotions and you get
13 people getting very upset, and that's not good for the
14 residents, for the other residents, or for staff.
15 That's why it has to be win-win, which is a major
16 departure from most games.
17 Q And does it also increase self-esteem?
18 A Yes. Exactly. Because it's failure free.
19 Whatever level of dementia you're at -- I can't say
20 about very late stages and people who are curled up
21 and are just not responsive, but outside of that,
22 whatever level you're at, it lets you do whatever you
23 can do so you feel good about it, and you don't feel
24 as though you're in competition with the next person.
25 And the higher functioning people don't get mad at the

1 low levels of dementia. I don't see -- this just says
2 3 plus, so I don't know -- I mean, would an
3 eight-year-old want to play it? Maybe. I don't know.
4 Q When you mentioned a staff person or family
5 member utilizing the cards, would it be fair to say
6 that Memory Magic requires a moderator to be played?
7 A Absolutely. Yes, it does.
8 Q When the Memory Magic product was being
9 developed, was any thought given to the potential
10 market?
11 A It had to be targeted to older adults. The grant
12 came from the National Institute on Aging. National
13 Institute of Health, National Institute on Aging. So
14 that being the case, it was targeted toward older
15 adults in long-term care settings with dementia, and
16 staff people who are caregivers in those facilities.
17 That was clearly what the grant stated.
18 Q When the product was being developed, was any
19 consideration given to what its competition might be?
20 MR. PORTER: Assumes that
21 there would be competition.
22 MS. FROST: Assumes that the
23 question was asked whether or not
24 there would be.
25 MR. PORTER: In other words,

1 A I don't know that.
2 Q But it does utilize, as you said, long-term
3 memory.
4 A It does, with cueing and repetition.
5 Q If you were to tell someone unfamiliar with the
6 product that it was a game and its name was Memory
7 Magic, do you think that they would immediately know
8 what the game is --
9 A We no longer call it a game.
10 Q -- what the product is?
11 A If I told someone unfamiliar with it would they
12 know what it is?
13 Q Based on the name.
14 A I have no idea.
15 Q Does the name "Memory" immediately convey to you
16 what Hasbro's game is?
17 A No.
18 MR. PORTER: Say that again.
19 What was that question?
20 Q The question was does the name "Memory"
21 immediately convey to you what Hasbro's game is?
22 A Not to me, no. Because when I saw it, I thought
23 oh, Memory. I wonder how that's played?
24 Q Does it tell you anything about the game?
25 A What?

1 Q Did you discuss with any others at Creative
2 Action whether or not Memory Magic was a good name for
3 the product?
4 A Yeah, I'm sure.
5 Q Did everyone agree that it was?
6 A Yeah.
7 Q Did anyone express any reservations?
8 A Absolutely not.
9 Q Did anyone propose any alternative names?
10 A No.
11 Q In discussing the name for the product, did
12 anyone else mention other products with memory in the
13 name?
14 A No. Because it's more than one word.
15 Q So who was the target consumer for Memory Magic?
16 MR. PORTER: I think that's
17 been asked and answered.
18 Q Would it be fair to say long-term care
19 facilities?
20 A Yes.
21 Q Do you believe that Memory Magic and Hasbro's
22 Memory product compete?
23 A No.
24 Q Do you believe that there's any overlap of
25 potential customers?

1 Q You can answer.
2 A I think it was in 2007 just before we moved.
3 Q Was anyone working for Creative Action as a
4 salesperson prior to that time?
5 A There was a woman named Ramona. Ramona. I don't
6 remember her last name. I'm sure it will come to me.
7 Q When did she start working with Creative Action?
8 A Probably 2006. She worked with us for 18 months.
9 Q And prior to her was there another salesperson?
10 A No.
11 Q Who was responsible for sales before her hire?
12 A I was.
13 Q Has this product, to the best of your knowledge,
14 been sold to anyone other than long-term care
15 facilities?
16 A Adult day care centers, but -- adult day care
17 centers. And nobody mentioned also having children.
18 Nobody. You know, an intergenerational program,
19 nobody's ever told us that.
20 Q No other type of entity?
21 A Huh-huh.
22 Q Have any --
23 A Oh, occasional individuals have purchased it. We
24 have sold one or two boards and the cards for use at
25 home with an elderly parent who has dementia. We sold

1 very few of them. Maybe count them on one hand. And
2 that's because they call and ask, and we feel sorry
3 for them.
4 Q Does Creative Action sell Memory Magic by any
5 means other than the direct sales that you described?
6 A No.
7 Q What is the unit price?
8 A $399.
9 Q Is the product sold to the people who play the
10 game or the staff at nursing homes or facilities?
11 A It's sold to a facility. It's generally not the
12 staff person who buys it themself, although an
13 occasional staff person does, and then they keep it
14 and take it with them when they leave, but generally
15 it's the facility or a chain, the corporate office
16 that purchases it.
17 Q Has it ever been purchased directly by the
18 players of the game?
19 A The people with dementia who live in long-term
20 care or the people at home with dementia? No.
21 Q Do you sell any services in conjunction with
22 Memory Magic?
23 A We do have training.
24 Q And what is the price of the training?
25 A Well, sometimes it's free. It's now $500 for an

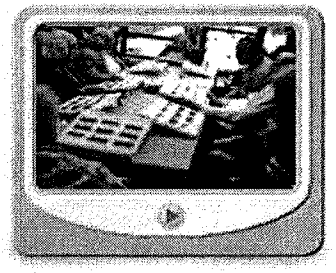
1 gone over this. Okay. I'm sorry.
2 Answer the question.
3 There's been a whole lot of
4 testimony about the differences
5 between these games.
6 Q You can answer.
7 A There are very strong differences. One is
8 targeted to children and looks like it's for children,
9 and clearly -- that clearly deals with memory -- the
10 Original Memory Game clearly deals with short-term
11 memory, and it has "memory" in the title.
12 This is Memory Magic which clearly is -- I don't
13 know if it's clearly, actually, but we made it look
14 like perhaps for people with dementia and long-term
15 care facilities. And no one has ever confused it.
16 Q No one has ever contacted Creative Action asking
17 about the source of Memory Magic?
18 A No. Other than where can we get it? Can we get
19 it from you?
20 Q Has anyone ever contacted Creative Action asking
21 about the source of Hasbro's Memory Game?
22 A Absolutely not.
23 Q Has anybody expressed any confusion to Creative
24 Action about the source of these two products?
25 A No.

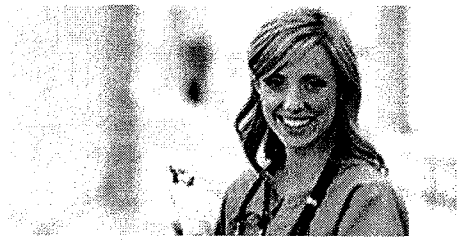
LANDSMAN DECLARATION
EXHIBIT 4

Memory Magic™ PROGRAM

A comprehensive, **therapeutic program** for people with a range of cognitive abilities.

Order now before shipping rates increase after the New Year!





Now in use by over 1000 facilities including

The Memory Magic™ Program, a comprehensive therapeutic intervention, uses Montessori principles with a person-centered approach. Engages individuals, small or large groups with a broad range of cognitive abilities for 60-minutes with one leader.

more benefits...

Watch the level of social interaction, positive feelings, and demonstrated ability of participants when provided with these scientifically developed and researched therapeutic tools.

play videos...

many of the nations largest chains, read what actual administrators, professionals, and staff are saying about their experiences with residents with dementia and other cognitive impairments.

testimonials & customer list...

Creative Action is a world-class leader in research, development and marketing of products and services to improve lives and to meet social and health needs. Products and services emphasize enhancing function and quality of life for older adults, the disabled, consumers, workers, families and communities.

441 Wolf Ledges Pkwy, Suite 100, Akron, OH 44311 :: toll free 1-877-281-6336 :: tel 330-867-9978 :: CreativeActionLLC.com

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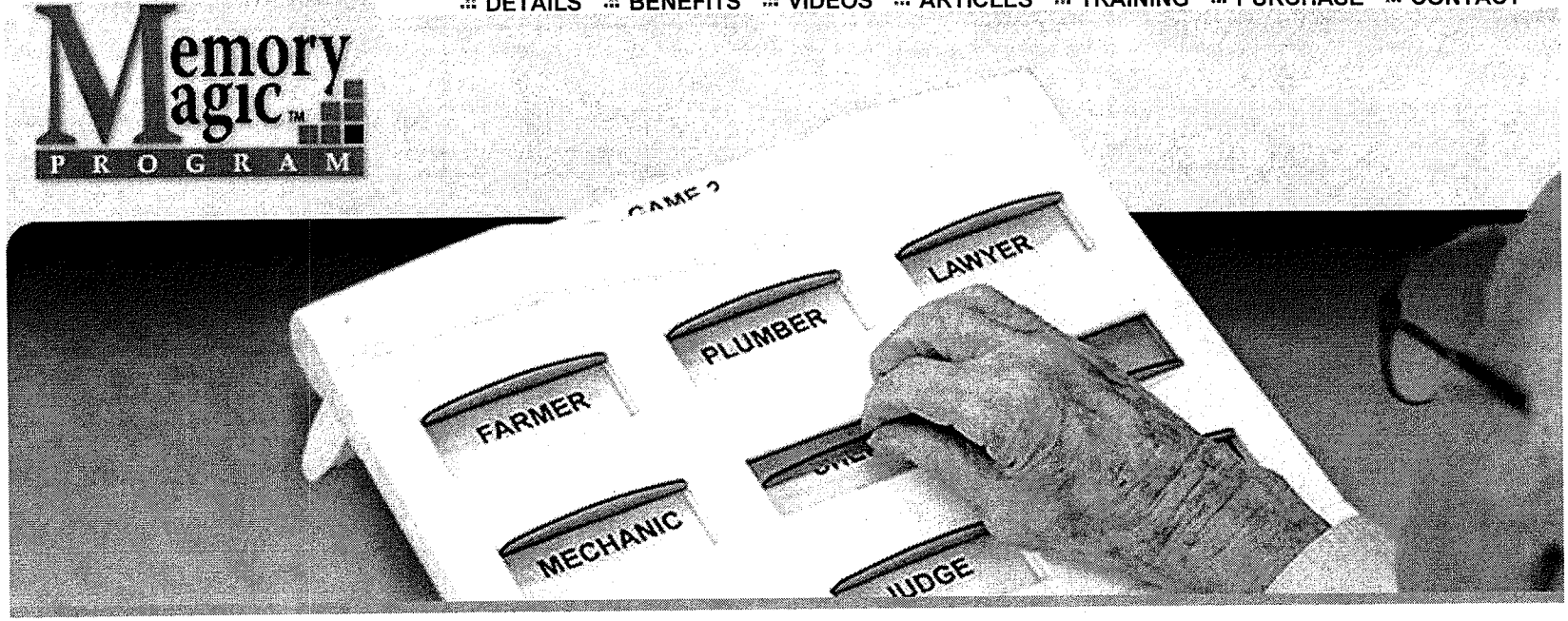
LANDSMAN DECLARATION
EXHIBIT 5



FEATURED TESTIMONIALS

"I think the residents love it. In fact, I know they do. They spend hours on it. Yes, they love it. It's easy for them to do. And that's really smart to have something that's so easy when they're challenged in that regard sometimes." (What do the staff think?) "It's easy, so

Memory Magic PDF Articles

Therapeutic Benefits & ICD9 Codes for Reimbursement Sheet

8/1/2009,

Provides an overview of benefits to residents and their families, staff, administrators and managers, and therapy staff. We provide a comprehensive list of ICD9 codes that allow reimbursement when providing therapies for residents with a wide variety of diagnoses.PDF Article: [Reimbursement Codes]

it's real easy to lead."

Marge Carey
UltraCare
Wadsworth, OH

more testimonials...

FEATURED CLIENTS

Hillcrest Healthcare

customer list...

email this page to a friend

Ontario Long Term Care Association Newsletter

04/02/2009, *Deron Hamel*

Providing residents with social and emotional benefits

The Ontario Long Term Care Association reports that the Memory Magic Program is providing residents with social and emotional benefits. The program promotes all-around success for residents, says therapist Gail Jones of Alexander Place. She is using the Memory Magic™ Program as a key element in their Cognitive Retention Therapy.

PDF Article: [OLTCA Article]

Gerontechnology: Proceedings of the International Gerontechnology Society, Pisa, Italy

June 2008, *Anthony Sterns, Harvey Sterns, and Ronni Sterns*

Human factors design of a group activity for people with dementia

Memory Magic™ was developed as a group activity for persons with dementia. Using Montessori principles and human factors research, we designed the activity to successfully engage individuals with varying levels of cognitive and physical ability. The design process began with testing of a number of design parameters to determine which design structure was most ergonomically sound and would best accommodate visual and perceptual deficits common to aging and dementia. As a result of the pilot testing, a prototype design for the activity was developed and 15 models were constructed. The models were then tested in long term care, adult day care, and assisted living settings. Results indicate that Memory Magic™ elicited more positive engagement, improved affect, and a reduction of negative behaviors in 24 participants.

PDF Article: [Gerontechnology: Proceedings of the IGS, Pisa, Italy]

McKnight's Long-Term Care News

April 2008, *McKnight's*

Memory enhancement

The Memory Magic Program is a therapeutic, Montessori-based memory game that engages people with a wide range of cognitive abilities. It uses lifelong habits and skills to promote long-term memory, reading, social interaction, positive emotions and motor skills. It also has been shown to help reduce disruptive behavior.

PDF Article: [McKnight's Vol. 29 No. 4]

Advance for LPN

March 26, 2007, *Nick Schaefer*

Beyond Bingo, residents at some LTC facilities are playing "Mind Games" to improve their cognitive ability.

While some facility administrators are turning to technology to help improve their residents' cognitive health, others are sticking to a more traditional activity to meet this goal. Janet Mullen, Division Director of Quality of Life of Golden Living (formerly Beverly) is working to implement The Memory Magic Program across the country. "The game is a great activity for residents of all cognitive abilities. Residents with dementia often have problematic behavior such as wandering and agitation because they are bored," Mullen explained. "Memory Magic gives patients who are prone to these behaviors something to do to keep them busy while also helping to improve their memory."

PDF Article: [Advance for LPN Vol. 7 No. 3]

Creative Forecasting

February 2006, *Pegi Schils, CTRS, ACC*

Resource Spotlight: The Memory Magic™ Program

Memory Magic™ Program is an innovative, therapeutic program that combines trivia with reminiscence. This product was developed to provide an interesting and entertaining activity for people with memory problems. Memory Magic™ Program is a game that is played by an individual or a group of up to 20 people. An activity professional can engage a group for up to 60 minutes. Memory Magic™ Program is a well-designed product that can be used easily by staff and volunteers. It is versatile and a successful activity for people with memory problems that will get a lot of use. It is well constructed that will ensure use for many years.

PDF Article: [Creative Forcasting Vol. 18 No. 2]

Akron Beacon Journal - "Mind Games"

Tue, Sep. 21, 2004, *By Cheryl Powell*

'Bingo with words' game developed in Akron tested nationwide as aid to Alzheimer's patients

Beacon Journal medical writer Cheryl Powell reports: Alzheimer's disease is a cruel intruder that unrelentingly takes over a person's brain and steals memories and skills, bit by agonizing bit. Routine daily activities become struggles. Loved ones turn into strangers. But a local company has developed a program to let people with Alzheimer's and related forms of dementia use and enjoy the skills they have left in a social setting.

PDF Article: [Akron Beacon Journal Article]

Gerontechnology: Proceedings of the International Gerontechnology Society, Nagoya, Japan

May 2005, *Anthony Stems, Ronni Stems, Harvey Stems, and Vincent Antenucci*

A low-tech intervention and therapy for large groups of persons with dementia

The Memory Magic concept (copyrighted, patent pending) is an innovative, engaging activity for an individual or a group of 10 to 20 or more persons with cognitive disabilities in both institutional and home care settings. A single activity staffer can run the activity leaving other staff to complete other tasks. One hundred persons with dementia were observed in 3 states and in each of 3 different care settings; skilled nursing (including general populations and memory care units), adult day care, and assisted living. At least three observations playing Memory Magic and three observations playing a comparable activity were completed for each participant. MMSE and WRAT-3 scores were also collected. Engagement was measured using the Menorah Park Engagement Scale (Camp, 2002). The game was shown to be significantly more effective for constructively engaging people with dementia in all three settings.

PDF Article: [Gerontechnology: Proceedings of the IGS, Nagoya, Japan]

Press Release

February 14, 2006, *Vice Pres. of Marketing, Creative Action LLC*

National Institute on Aging study finds unique therapeutic activity produces dramatic results for people with dementia.

- Study shows Memory Magic™ Activity stimulates elderly in nursing homes and adult day care centers to socialize, share memories, and smile- and it's also the highest rated activity of caregivers.
- Results prompt nation's largest long-term care provider, Beverly Healthcare, to initiate implementation of the activity nation-wide.

PDF Article: [FOR IMMEDIATE RELEASE]

Resident Care Products Magazine

March/April 2008, *RCP Magazine*

Group activity program

Creative Action's Memory Magic therapeutic program uses life-long habits and skills to promote long-term memory, reading, speaking, social interaction, positive emotions, and fine and gross motor skills. The program can reduce disruptive behavior while engaging groups of 10 to 20 residents for up to one hour. Each Memory Magic set includes 10 therapy boards, 40 card inserts, and 240 calling cards for the activity leader, all of which can be sanitized.

PDF Article: [Resident Care Products Vol. 2 No. 2]

Creative Action is a world-class leader in research, development and marketing of products and services to improve lives and to meet social and health needs. Products and services emphasize enhancing function and quality of life for older adults, the disabled, consumers, workers, families and communities.

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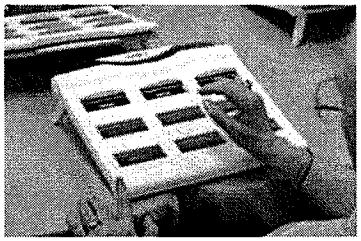
LANDSMAN DECLARATION
EXHIBIT 6

Memory Magic™ PROGRAM

Comprehensive Therapeutic Intervention

Residents & their families



- Person-centered
- Promotes use of cognitive abilities
- Promotes the use of fine and gross motor skills
- Stimulates social interaction
- Increases levels of engagement
- Increases positive emotions
- Reduces disruptive behavior
- Family members and volunteers easily connect or reminisce

Staff

- Improves job satisfaction
- Enhances efficiency
- Reduces staff care demand load
- Can be used with one resident or groups of 20+
- No pieces to lose or hoard
- Quick setup time
- Sanitizable
- Keeps participants involved for one hour or more

Administrators & Managers

- Can be used successfully in a range of healthcare settings or throughout the facility
- Meets new Federal Guidelines for F-TAGs 248 & 249 activities & programming
- Achieves quality compliance
- Increases Medicare & Medicaid reimbursement levels
  - With RAI Manual Restorative Nursing Communication Codes
  - Using ICD-9 Codes for ST & OT Rehabilitation Therapy

Speech

- Symbolic Dysfunction
- Cognitive Impairment
- Dementia
- Expressive Aphasia
- Speech & Hearing Training
- Psychosocial - social deficits, depression
- Recall ability

Occupational

- Dexterity
- Hand Eye Coordination

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Reimbursable when providing therapies for residents with these diagnoses

Symbolic dysfunction	784.6
Mild cognitive impairment	331.83
Altered mental status	780.97
Cerebral degeneration	331.0-331.9
Change in mental status	780.97
Cognitive deficits following (late effects of) cerebral hemorrhage or infarction	438.0
Cognitive impairment due to intracranial or head injury	850-854, 959.01
Cognitive impairment due to late effect of intracranial injury	907.0
Dementia	290.0-290.43, 294.8
Mild memory disturbance	310.8
Neurologic neglect syndrome	781.8
Personality change, nonpsychotic	310.1
Alcohol-induced persisting dementia	291.2
Presenile dementia	290.1
Vascular dementia with delirium	290.41
Senile dementia with delirium	290.3
Vascular dementia with delusions	290.42
Other frontotemporal dementia	331.19
Dementia with Lewy bodies	331.82
Vascular dementia	290.4
Presenile dementia with delirium	290.11
Presenile dementia with delusional features	290.12
Presenile dementia with depressive features	290.13
Vascular dementia	290.40
Vascular dementia with depressed mood	290.43
Other persistent mental disorders due to conditions classified elsewhere	294.8
Senile dementia with delusional features	290.20
Dementia in conditions classified elsewhere without behavioral disturbance	294.10
Transient mental disorders due to conditions classified elsewhere	293
Frontotemporal dementia	331.1
Senile dementia with depressive features	290.21
Drug-induced persisting dementia	292.82
Parkinson's disease	332
General paresis	094.1
Dementia in conditions classified elsewhere with behavioral disturbance	294.11
Other cerebral degenerations	331
Expressive aphasia	438.11
Expressive language disorder	315.31
Aphasia	784.3
Aphasia	438.11
Mixed receptive-expressive language disorder	315.32
Other speech disturbance	784.5
Speech therapy	V57.3
Speech and language deficits	438.1
Other speech and language deficits	438.19
Social maladjustment	V62.4
Transient ischemic attack	V12.54
Late effects of cerebrovascular disease	438