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

Proceeding	91176701
Party	Plaintiff Gas Pump Heaven, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GAS PUMP HEAVEN, INC.,)	Opposition No. 91176701
)	
Opposer,)	Serial no. 78849739
)	
vs.)	Filing Date: March 30, 2006
)	
ANDERSON, SCOTT d/b/a TIME)	Publication Date: March 14, 2007
PASSAGES, LTD.,)	
)	
Applicant.)	
)	
)	OPPOSER'S BRIEF IN OPPOSITION TO
)	APPLICANT'S MOTION FOR
)	INVOLUNTARY DISMISSAL
)	

Opposer, Gas Pump Heaven, Inc. ("Gas Pump Heaven"), respectfully submits that Applicant Anderson, Scott d/b/a Time Passages, Ltd.'s Motion for Involuntary Dismissal should be denied because it has been untimely filed, but more importantly because judgment on the merits may be rendered based upon the admissions contained in the pleadings in this action, and the Motion for Involuntary Dismissal is therefore without merit, both procedurally and substantively.

ARGUMENT

I. APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL IS UNTIMELY.

Pursuant to 37 C.F.R. § 2.132, a motion for involuntary dismissal for failure to take testimony under that section "must" be filed before the opening of the testimony period of the moving party. Here, the opening of the testimony period of the Applicant was February 26,

2008, yet, the instant motion was not filed until March 10, 2008.¹ The Motion can be denied on this basis alone.

II. OPPOSER IS ENTITLED TO RELY UPON ITS OPPOSITION, AND APPLICANT'S ANSWER THERETO.

Trademark Trial & Appeal Board ("TTAB") proceedings are generally governed by the Federal Rules of Evidence. (37 CFR § 2.122(a)). Admissions contained in the pleadings in this matter are part of the record and may properly be considered by the TTAB in rendering its decision. (TBMP § 704.06).

On March 30, 2006, Applicant filed, under Serial No. 78/849739, an Application for Registration of the Mark "CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO." for use in connection with glass lantern globes used for advertising petroleum products in International Class 11. Gas Pump Heaven and Applicant have both used the trademark aesthetically on their gas pump replicas for years. (Notice of Opposition, ¶3; Answer, ¶3).² Applicant admits that both Opposer and Applicant have placed the "CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO." Mark on their gas pump replicas at the same place the original antique gas pumps were marked with this designation. (Notice of Opposition, ¶¶4 & 6; Answer ¶¶4 & 6). The Notice of Opposition paragraph 7 asserts "the Applicant's Mark is a replication of the original patent notification for Reg. Pat. No. 1,933,866, that was placed on the glass globes of original antique gas pumps by the Cincinnati Advertising Products Co., an Ohio entity that has been dissolved since December of 1955." Applicant's Answer acknowledges that the Cincinnati

¹ As noted by the Certificate of Service on the Motion for Involuntary Dismissal and the Brief in Support thereof, Applicant electronically filed these pleadings with the TTAB, but neglected to serve copies upon attorneys for Opposer, until specifically asked to do so three days later.

² Gas Pump Heaven is mindful that statements in pleadings generally only have evidentiary value as admissions against interest by the party that made them (TBMP § 704.06(a)), and offer the statements made in its Opposition only to show the factual basis for the Applicant's admissions contained in its Answer.

Advertising Products Co. was dissolved before the Applicant purchased the replica gasoline pump globe frames upon which that company's previous Mark is applied. This is sufficient basis upon which the TTAB can conclude that the Application for the mark be denied and this Opposition allowed to proceed on the merits.

The foregoing admissions made in Applicant's Answer demonstrate that the Mark for "CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO." is merely attractive and ornamental, but is not functional and thus cannot be entitled to trademark protection. *See Liberty Mutual Insurance Co. v. Liberty Insurance Company of Texas*, 185 F.Supp. 895, 902 (E.D. Ark. 1960):

In order for a mark to be entitled to protection under the Act it must be more than merely attractive or ornamental; it must be functional as well. That is to say, it must perform the function of identifying the origin of the goods or services, or of guaranteeing their quality, or it must possess an inherent advertising appeal which serves to create a market for the goods or services involved.

(Citation omitted). The proposed Mark does not possess an inherent advertising appeal which serves to create a market for goods or services involved. (*Id.*). It is clear that the CAPCOLITE Mark does not identify the origin of the goods, guarantee the quality of the goods, or possess an inherent advertising appeal which serves to create a market for the goods involved. (*Id.*).

Further, the fact that both Applicant and Opposer both have used and continue to use the Mark in identical fashion to the original Cincinnati company, by affixing the Mark to the identical place on their gas pump replicas for years bars registration of the Mark. Because of the similarity between the marks and because the marks are used on the same or similar goods, consumers are likely to mistakenly believe that the goods come from the same source. For these reasons registration of the applicant's mark should be refused in accordance with 15 U.S.C. § 1052(d).

CONCLUSION

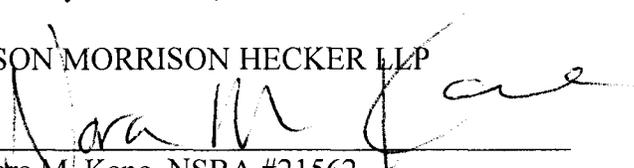
Based upon the foregoing, Gas Pump Heaven respectfully submits this Motion be denied and this matter allowed to proceed on the merits.

DATED this 25th day of March, 2008.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By:



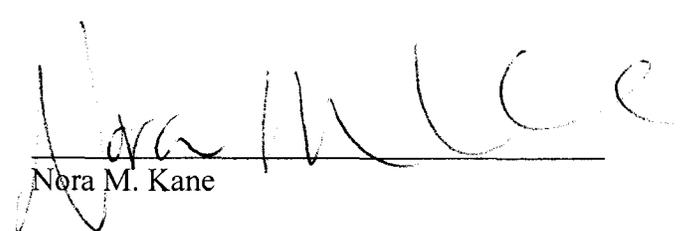
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ATTORNEYS FOR OPPOSER
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2008, a true and correct copy of the foregoing Opposer's Brief in Opposition to Applicant's Motion for Involuntary Dismissal was deposited in the U.S. Mail, postage prepaid to:

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