

ESTTA Tracking number: **ESTTA180880**

Filing date: **12/14/2007**

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

Proceeding	91176744
Party	Plaintiff DC Comics and Marvel Characters, Inc.
Correspondence Address	Jonathan D. Reichman Kenyon & Kenyon, LLP One Broadway New York, NY 10004 UNITED STATES
Submission	Reply in Support of Motion
Filer's Name	Jonathan D. Reichman
Filer's e-mail	jreichman@kenyon.com, mfreno@kenyon.com, plum@kenyon.com, rcollins@kenyon.com
Signature	/Jonathan D. Reichman/
Date	12/14/2007
Attachments	2007-12-14_DC-Mar_Reply_iso_Motion_for_Summary_Judgment.pdf ( 25 pages )(1325488 bytes )

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

Applicant: Michael Craig Silver  
Application Ser. No.: 78/823,155  
Filing Date: 2/24/06  
Mark: SUPER HERO  
Date of Publication in OG: 1/16/07  
Opposer: DC Comics and Marvel Characters, Inc.

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposer,

vs.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744

**ORAL ARGUMENT REQUESTED**

**OPPOSER'S REPLY BRIEF IN SUPPORT  
OF ITS SUMMARY JUDGMENT MOTION**

Opposer submits this reply to Applicant's response to Opposer's summary judgment motion, which Applicant filed electronically on November 29, 2007. As of this time, Applicant has not served its response upon Opposer, as required under 37 C.F.R. § 2.119(a). Opposer independently discovered Applicant's response through the Trademark Trial and Appeal Board

Inquiry System. However, Opposer is not objecting to the Board's consideration of Applicant's response, because Opposer has not been prejudiced by the absence of service.<sup>1</sup>

Applicant cites Registration No. 3,022,405, for SUPERHERO<sup>®</sup> in International Class 30 covering "ice cream" (Exhibit 24 hereto), as justification for approving Applicant's mark. However, this registration is owned by *Opposer*, having been assigned (while a pending application) from Driggs Farms of Indiana, Inc. See Attachment A to the Declaration of Jonathan D. Reichman. This SUPERHERO<sup>®</sup> registration thus constitutes further evidence of Opposer's rights across a variety of diverse goods. Although Applicant additionally cites Registration No. 3,103,555 (SUPER TECH HEROES) and Registration No. 3,161,912 (SUPERBUDDHA), those marks are clearly distinguishable from Opposer's SUPER HERO<sup>®</sup> and SUPER HEROES<sup>®</sup> marks, and therefore irrelevant.

Applicant further cites five ROCKSTAR trademarks to argue that similar marks owned by different parties have been approved for different product categories. However, these registrations are irrelevant. Opposer does not dispute the general legal proposition that similar marks owned by different parties can, in certain circumstances, co-exist in different markets. However, this proposition has no bearing on the instant proceeding, where the uncontroverted evidence and legal authority establish that Applicant's Class 3 products fall within Opposer's natural area of exploitation.

Finally, Applicant states: "Applicant argues that no confusion would result with the Opposer's products by the use of the Super Hero mark on the Applicant's products." Applicant's Response at 2. However, the law is clear: "[T]he nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise

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<sup>1</sup> Due to the absence of service, there is no deadline for submission of this reply brief.

provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial.”

Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 528.01 (2007); *see also* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Hence, Applicant’s argument should be rejected.

For the reasons set forth in Opposer’s opening brief and hereinabove, Opposer respectfully requests that Application Serial No. 78/823,155 be refused registration. Opposer respectfully requests oral argument on this motion.

Dated: December 14, 2007

KENYON & KENYON LLP  
By:   
Jonathan D. Reichman  
Michael J. Freno  
One Broadway  
New York, New York 10004  
(212) 425-7200  
*Attorneys for Opposer*

**EXHIBIT 24**

Int. Cl.: 30

Prior U.S. Cl.: 46

Reg. No. 3,022,405

**United States Patent and Trademark Office**

Registered Dec. 6, 2005

**TRADEMARK  
PRINCIPAL REGISTER**



DRIGGS FARMS OF INDIANA, INC. (INDIANA  
CORPORATION)  
400 SOUTH CHAMBER DRIVE  
DECATUR, IN 46733

THE MARK CONSISTS OF THE WORDING SU-  
PER HERO SUPERIMPOSED OVER A FLASH  
FLAME DESIGN.

FOR: ICE CREAM, IN CLASS 30 (U.S. CL. 46).

SER. NO. 76-526,513, FILED 6-27-2003.

FIRST USE 6-9-2003; IN COMMERCE 6-9-2003.

BARBARA A. GOLD, EXAMINING ATTORNEY

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Prior U.S. Cl.: 46

Reg. No. 3,022,405

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Registered Dec. 6, 2005

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BARBARA A. GOLD, EXAMINING ATTORNEY



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**Word Mark** SUPERHERO

**Goods and Services** IC 030. US 046. G & S: ice cream. FIRST USE: 20030609. FIRST USE IN COMMERCE: 20030609

**Mark Drawing Code** (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

**Design Search Code** 01.15.04 - Explosions; Fireworks display; Sparks  
 26.03.07 - Ovals with a decorative border, including scalloped, ruffled and zig-zag edges  
 26.03.21 - Ovals that are completely or partially shaded  
 26.03.28 - Miscellaneous designs with overall oval shape, including amoeba-like shapes and irregular ovals; Oval shape (miscellaneous overall shape)

**Serial Number** 76526513

**Filing Date** June 27, 2003

**Current Filing Basis** 1A

**Original Filing Basis** 1A

**Published for Opposition** September 13, 2005

**Registration Number** 3022405

**Registration Date** December 6, 2005

**Owner** (REGISTRANT) Driggs Farms of Indiana, Inc. CORPORATION INDIANA 400 South Chamber Drive Decatur INDIANA 46733

**Assignment Recorded** ASSIGNMENT RECORDED

**Attorney of Record** Lyman F. Spitzer

**Description of Mark** The mark consists of the wording Super Hero superimposed over a flash flame design.

**Type of Mark** TRADEMARK

**Register** PRINCIPAL

**Live/Dead Indicator** LIVE

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Assignments on the Web > Trademark Query

Trademark Assignment Abstract of Title

Total Assignments: 1

Serial #: 76526513 Filing Dt: 06/27/2003 Reg #: 3022405 Reg. Dt: 12/06/2005  
Registrant: *Driggs Farms of Indiana, Inc.*  
Mark: *SUPERHERO*

Assignment: 1

Reel/Frame: 3177/0938 Received: 10/19/2005 Recorded: 10/19/2005 Pages: 4  
Conveyance: *ASSIGNS THE ENTIRE INTEREST*  
Assignor: *DRIGGS FARMS OF INDIANA, INC.*

Assignees: *DC COMICS*  
*1700 BROADWAY*  
*NEW YORK, NEW YORK 10019*  
*MARVEL CHARACTERS, INC.*  
*9242 BEVERLY BOULEVARD*  
*SUITE 350*  
*BEVERLY HILLS, CALIFORNIA 90210*

Exec Dt: 09/27/2005  
Entity Type: *CORPORATION*  
Citizenship: *INDIANA*  
Entity Type: *GENERAL PARTNERSHIP*  
Citizenship: *NEW YORK*  
Entity Type: *CORPORATION*  
Citizenship: *DELAWARE*

Correspondent: *JONATHAN D. REICHMAN, ESQ.*  
*ONE BROADWAY*  
*NEW YORK, NY 10004*

Search Results as of: 12/14/2007 02:18 PM  
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Michael Craig Silver  
Application Ser. No.: 78/823,155  
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Marvel: DC Comics and Marvel Characters, Inc.

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposer,

vs.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744

**OPPOSER'S DECLARATION OF JONATHAN D. REICHMAN**

I, Jonathan D. Reichman, hereby declare as follows:

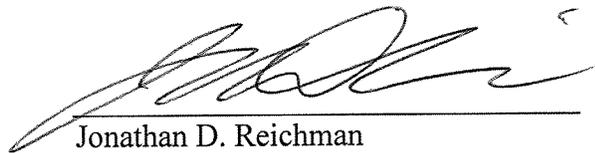
1. I am an attorney-at-law of the State of New York and a partner of Kenyon & Kenyon LLP, counsel for Opposers DC Comics and Marvel Characters, Inc.
2. Attached hereto as Attachment A is a true and correct copy of the September 27, 2005 assignment of U.S. Registration No. 3,022,405 from Driggs Farms of Indiana, Inc. to

Marvel Characters, Inc. and DC Comics. (At the time of assignment, the subject mark was pending as Application Serial No. 76/526,513.)

3. I negotiated the assignment on behalf of Opposer, and therefore have personal knowledge of the facts stated herein.

I declare that the foregoing is true and accurate to the best of my knowledge under penalty of perjury of the laws of the United States.

Dated: December 14, 2007



Jonathan D. Reichman

# ATTACHMENT A

**McCarthy, Asiyah**

---

**From:** etas-server@uspto.gov  
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**Conversation:** Assignment confirmation receipt ID:TM40180  
**Posted To:** TMDocketNY  
  
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If you have a technical question, comment or concern about your ETAS submission call 571-272-3350 during business hours or e-mail to [etas@uspto.gov](mailto:etas@uspto.gov). Please have your ETAS receipt ID which is 'EASTM40180' available when calling or writing for assistance.

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<b>EFFECTIVE DATE:</b>	09/27/2005		
<b>CONVEYING PARTY DATA</b>			
<b>Name</b>	<b>Formerly</b>	<b>Execution Date</b>	<b>Entity Type</b>
Driggs Farms of Indiana, Inc.		09/27/2005	CORPORATION: INDIANA
<b>RECEIVING PARTY DATA</b>			
<b>Name:</b>	DC Comics		
<b>Street Address:</b>	1700 Broadway		
<b>City:</b>	New York		
<b>State/Country:</b>	NEW YORK		
<b>Postal Code:</b>	10019		
<b>Entity Type:</b>	General partnership: NEW YORK		
<b>Name:</b>	Marvel Characters, Inc.		
<b>Street Address:</b>	9242 Beverly Boulevard		
<b>Internal Address:</b>	Suite 350		
<b>City:</b>	Beverly Hills		
<b>State/Country:</b>	CALIFORNIA		
<b>Postal Code:</b>	90210		
<b>Entity Type:</b>	CORPORATION: DELAWARE		
<b>PROPERTY NUMBERS Total: 1</b>			

Property Type	Number	Word Mark
Serial Number:	76526513	SUPERHERO

**CORRESPONDENCE DATA**

Fax Number: (212)425-5288  
*Correspondence will be sent via US Mail when the fax attempt is unsuccessful.*  
 Phone: 212-425-7200  
 Email: tmdocketny@kenyon.com  
 Correspondent Name: Jonathan D. Reichman, Esq.  
 Address Line 1: One Broadway  
 Address Line 4: New York, NEW YORK 10004

ATTORNEY DOCKET NUMBER:	45555/87001
NAME OF SUBMITTER:	Jonathan D. Reichman, Esq.
Signature:	/Jonathan D. Reichman/
Date:	10/19/2005

Total Attachments: 2  
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NAME OF SUBMITTER:	Jonathan D. Reichman, Esq.
Signature:	/Jonathan D. Reichman/
Date:	10/19/2005

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<b>Signature:</b>	/Jonathan D. Reichman/
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<b>Fax Number:</b>	(212)425-5288	
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<b>Phone:</b>	212-425-7200	
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<b>Correspondent Name:</b>	Jonathan D. Reichman, Esq.	
<b>Address Line 1:</b>	One Broadway	
<b>Address Line 4:</b>	New York, NEW YORK 10004	
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10/19/2005 02:32 PM EDT

**TRADEMARK ASSIGNMENT**

This Assignment is made this 27 day of Sept, 2005 by Driggs Farms of Indiana, Inc., an Indiana corporation with a principal place of business at 400 South Chamber Drive, Decatur, Indiana 46933 (the ASSIGNOR), to DC Comics, a New York general partnership with a principal place of business at 1700 Broadway, New York, New York 10019, and Marvel Characters, Inc., a Delaware corporation with a principal place of business at 9242 Beverly Boulevard, Suite 350, Beverly Hills, California 90210 (collectively, the ASSIGNEES).

**WITNESSETH THAT:**

WHEREAS, ASSIGNOR has applied to register and has used the trademark listed on the attached Schedule "A" (the "Mark"); and

WHEREAS, ASSIGNEES wish to acquire from ASSIGNOR, and ASSIGNOR wishes to grant to ASSIGNEES, any and all right, title and interest held by ASSIGNOR in and to the Mark,

NOW, THEREFORE, in consideration of the promises and the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ASSIGNOR hereby assigns, sells, conveys, bequeaths, grants and transfers unto ASSIGNEES, any and all right, title and interest which ASSIGNOR may hold in and to the Mark, including without limitation each of its component elements; any and all goodwill of the business directly associated with the Mark; any and all common law rights in and to the Mark and each of its component elements; the application for registration identified in Schedule "A"; and the right to sue and recover for the past, present or future infringement or dilution thereof, to be held and enjoyed by ASSIGNEES, their respective successors and assigns, to the same extent that such would have been held and enjoyed by ASSIGNOR had such assignment not been made.

**DRIGGS FARMS OF INDIANA, INC.**

Dated: 27 Sept 2005

By   
Name :  
Title : President

**SCHEDULE A**

**TRADEMARK**

**APPLN. NO.**

**FILING DATE**

SUPERHERO and Design

76/526,513

June 27, 2003

## PROOF OF SERVICE

I hereby certify that a true and complete copy of OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION, along with its attachment, and OPPOSER'S DECLARATION OF JONATHAN D. REICHMAN has been served by mailing said copy on December 14, 2007, via first-class mail, to:

Michael Craig Silver  
200 Broadway Street #609  
San Francisco, California 94115  
[silver\\_michael@sbcglobal.net](mailto:silver_michael@sbcglobal.net)  
530.320.6488

A handwritten signature in black ink, appearing to read "Michael Silver", is written over a horizontal line.