

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

In the matter of Application Serial No. 76/671,752

Filter Mfg.	:	
	:	
	:	
Opposer,	:	Opposition No. 91181001
	:	
v.	:	
	:	
Victor Dyment	:	
	:	January 21, 2008
Applicant.	:	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451



01-24-2008

MOTION FOR SUMMARY JUDGMENT

U.S. Patent & TMO/TM Mail Rept Dt #22

Applicant hereby moves for summary judgment dismissing the Opposition pursuant to 37 C.F.R. §2.132 for the reasons set forth in the Memorandum of Law submitted herewith. Applicant requests that the Trademark Trial and Appeal Board, pursuant to Rule 56 of the Federal Rules of Civil Procedure, grant summary judgment because there is no genuine issue of material fact.

Respectfully submitted,
MARK LEVY & ASSOCIATES, PLLC

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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Applicant, Victor Dymnt, moves the Honorable Trademark Trial and Appeal Board for summary judgment in his favor in the above-identified Opposition. Because the record shows no genuine issue of material fact, Applicant is entitled to summary judgment. Fed. R. Civ. P. 56. When a rational jury, looking at the record as a whole, could not find for the nonmoving party, no genuine issue of material fact exists and summary judgment is proper. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

APPLICANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

1. Applicant has been using his mark, FREQUENCY FILTER since at least as early as August 23, 2004.

2. Applicant filed his trademark application on January 23, 2007.

3. Applicant's mark was published October 30, 2007.

4. Opposer obtained its registration for FILTER for "Clothing, namely, button down shirts, polo shirts, dress shirts, sweaters, jeans, skirts, blouses, T-shirts, jackets, surf trunks, namely, swimming trunks, walking shorts; outerwear, namely, lined jackets, coats, wind resistant jackets, warm-up jackets, sweatshirts, and sweat pants; headwear, namely, hats, caps, and visors not sold at concert venues, or sold via concert related merchandise outlets" on June 16, 1998.

5. The impression that FREQUENCY FILTER as a whole creates on the average consumer based on sound, appearance, and connotation is not the same as the impression of FILTER.

6. The likelihood of confusion between FREQUENCY FILTER and FILTER is eliminated because the word FILTER is common and generic and, therefore, weak. In In re Gruner + Jahr USA Publishing v.

Meredith Corp., 991 F.2d 1072, 26 U.S.P.Q.2d 1583 (2d Cir. 1993), the court ruled that there was no likelihood of confusion between PARENTS vs. PARENTS DIGEST for magazines because the PARENTS portion "was extremely weak."

7. No actual confusion has been found or is alleged. Even isolated instances of actual confusion are de minimis and insufficient to establish a genuine issue of material fact. Universal Money Ctrs., Inc. v. American Tel. & Tel. Co., 22 F.3d 1535 (10th Cir. 1994)

8. The audiences to which the two lines of goods are geared are different. Registrant's mark is used for a clothing line that caters to a young teenage audience, whereas Applicant's goods are for people seeking alternative therapy and healing. The target consumers of the two organizations are distinct, eliminating the likelihood of confusion. TNT Limited v. TNT Messenger Service Inc., 13 USPQ2d 1649 (S.D.N.Y. 1989); D. Brooks Ltd. V. Brooks Fashion Stores Inc., 1 USOQ2d 1128 (DCDC 1986); Reynolds and Reynolds Co. v. I.E. Systems Inc., 5 USPQ2d 1749 (TTAB 1987).

9. Conflicting marks must be compared in their entireties. The likelihood of confusion cannot be predicted on dissection of a mark, that is, on only part of a mark. It is the impression that the mark as a whole creates on the average discriminating consumer and not the parts, that is important. In re National Data Corp., 224 USPQ 749

(Fed. Cir. 1985). In their entirety, FREQUENCY FILTER and FILTER are sufficiently different in sound, appearance, and connotation to negate likelihood of confusion under the Lanham Act.

10. The first part of a mark is most likely to be impressed upon the mind of a purchaser and remembered. Presto Products Inc. v. Nice-Pak Products, 9 USPQ2d 1897 (TTAB 1988). The first portion of Applicant's mark, FREQUENCY, is dominant and therefore would most likely be remembered in the minds of consumers. The first word, prefix, or syllable in a mark is often the dominant part. McCarthy, J. Thomas. MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION. 3rd Ed. §23.15[4]

11. Applicant is under no obligation to protect the negligent and inattentive purchaser from confusion resulting from indifference. AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 204 USPQ 808 (9th Cir. 1979). A reasonable prudent consumer is expected to exercise that degree of "care, caution and power of perception" appropriate to the kind of choice he/she faces in the marketplace. Volkswagenwerk Aktiengesellschaft v. Church, 411 F.2d 350, 161 USPQ 769 (9th Cir. 1969), supp. op., 413 F.2d 1126 (9th Cir. 1969).

12. Many marks having identical words in common have been found to have no likelihood of confusion. M-F-G Corp. v. Emra Corp, 2 USPQ2d 1538 (CA 7th Cir. 1987); PaperCutter, Inc. v. Fay's Drug Co.,

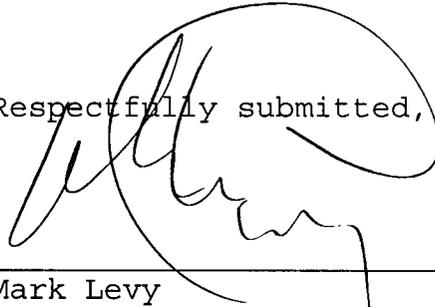
Inc., 14 USPQ2d 1450 (CA 2nd Cir. 1990); Berliner d/b/a Hall of Fame Music Co. v. Record Craft Sales Corp., 2 USPQ2d 1013 (DC SDNY 1987).

13. Even a suggestion of the same goods or services is insufficient to lead to a likelihood of confusion where the marks otherwise differ in sound and appearance. Calgon Corporation v. John H. Breck, Inc., 160 USPQ 344 (TTAB 1968); American Pharmaceutical Company v. Stevens, 150 USPQ 208 (TTAB 1966).

14. FILTER and FREQUENCY FILTER differ both in sound and appearance. The number of letters and syllables used in each mark is different. FREQUENCY FILTER resembles the registered mark, FILTER in only six of fifteen letters. In TNT Limited v. TNT Messenger Service, 13 USPQ2d 1649 (S.D.N.Y. 1989), the court dismissed a complaint that the marks, TNT SKYPAK and TNT MESSENGER were likely to be confused. Sharing three of the same letters in an eight-letter mark was not sufficient to cause confusion. Here, sharing only six letters out of fifteen is similarly not enough to render confusion likely.

For the foregoing reasons and since there is no genuine issue of material fact, Applicant respectfully requests that the Trademark Trial and Appeal Board grant Applicant's motion for summary judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Levy', is written over a horizontal line. The signature is cursive and somewhat stylized.

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing MOTION FOR SUMMARY JUDGMENT re: Filter Manufacturing v. Victor Dymont, Opposition No. 91181001, was served on counsel for the Opposer, this ___ day of January, 2008, by sending same via United States mail, postage prepaid, to:

Craig O. Correll, Esq.
Attorney for Opposer
Craig O. Correll, Attorney at Law
4245 Sunnyhill Drive
Carlsbad, CA 92008

Respectfully submitted,
Mark Levy & Associates, PLLC

Date: 22 January 2008



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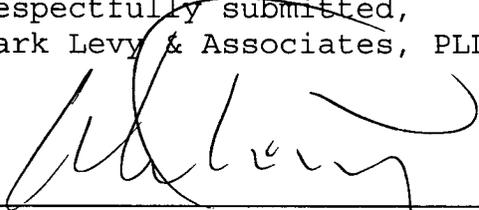
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I hereby certify a copy of the foregoing MOTION FOR SUMMARY JUDGMENT re: Filter Manufacturing v. Victor Dymnt, Opposition No. 91181001, was served on the Trademark Trial and Appeal Board, this ___ day of January, 2008, by sending same via United States mail, postage prepaid, to:

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Respectfully submitted,
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Date: 22 January 2008



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