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

Proceeding	91199922
Party	Defendant Nike, Inc.
Correspondence Address	HELEN HILL MINSKER BANNER & WITCOFF LTD TEN SOUTH WACKER DRIVE, SUITE 3000 CHICAGO, IL 60611 UNITED STATES hminsker@bannerwitcoff.com, bwlitdocket@bannerwitcoff.com
Submission	Other Motions/Papers
Filer's Name	Helen Hill Minsker
Filer's e-mail	hminsker@bannerwitcoff.com,bwlitdocket@bannerwitcoff.com
Signature	/helen hill minsker/
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Attachments	NIKE Reply - 2d Motion to Dismiss.pdf (3 pages)(96652 bytes)

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

CHRISTOPHER A. McGRATH, Opposer,))	Opposition No. 91199922
v.))	Serial No. 85053714
NIKE, INC., Applicant.))	Mark: 

**APPLICANT’S REPLY BRIEF IN RESPONSE TO
OPPOSER’S REPLY TO APPLICANT’S SECOND MOTION TO DISMISS**

Applicant, NIKE, INC, herewith replies to Opposer’s Reply to Defendant’s Second Motion to Dismiss.¹

In its responsive brief, filed a few hours after NIKE filed its second Motion to Dismiss, Opposer takes issue with a portion of a sentence on page 9 in NIKE’S brief that asserts that Opposer’s online store was set up “...after Opposer had learned of NIKE’s Mark, as described in paragraph 35 of the Amended Notice of Opposition.” Opposer admits that he first created his online store four months *after* NIKE’s constructive use date (the date NIKE filed its trademark application). (Opp. Reply ¶ 1) However, Opposer denies that he set up his on line store with knowledge of NIKE’s trademark application. (Opp. Reply ¶ 2) Having again reviewed the materials submitted by Opposer, Applicant notes the alleged error but states that any error was inadvertent, rather than intentional (as alleged by Opposer). Further, because the alleged error is immaterial to resolution of the grounds asserted in NIKE’s motions to dismiss, the motions should be granted and the opposition should be dismissed.

¹ NIKE’s Second Motion to Dismiss was filed on July 28, 2011 and Opposer’s responsive/answering brief, styled as a “reply” brief, also was filed on July 28, 2011. References to numbered paragraphs in Opposer’s responsive brief are cited as “Opp. Reply ¶ ____”.

The alleged error occurred due to the undersigned counsel's initial interpretation of paragraph 35 of Opposer's complex, twenty-five page Amended Notice of Opposition. The opening sentence of paragraph 35 of the Amended Notice of Opposition refers to "...Nike's allegedly innocent motive for seeking this registration..." and includes excerpts from a May 31, 2010 email from Opposer to NIKE. In referencing paragraph 35 in the motion to dismiss, Applicant's Counsel relied on this May 31, 2010 date as the date when Opposer contacted NIKE about NIKE's Mark. However, as indicated in paragraph 35, May 31, 2010 is a date that Opposer alleges he contacted NIKE that is prior to NIKE filing its application.²

Counsel did not detect the discrepancy in these dates and Opposer's allegations prior to filing the response to the opposition. Under the circumstances, it is requested that the Board give no consideration to the statement at issue when reaching its decision on Applicant's motions to dismiss. However, in view of the complex nature of Opposer's submissions and the immateriality of the statement at issue, Applicant respectfully requests that the Board decline Opposer's invitation to find willful intent to deceive, as there clearly was no intent to deceive.

For the reasons explained therein, NIKE renews its request that its motions to dismiss both the first Notice of Opposition and the Amended Notice of Opposition be granted.

Respectfully submitted,

Date: August 3, 2011

By: /Helen Hill Minsker/
Helen Hill Minsker
Banner & Witcoff, Ltd.
Attorneys for NIKE, Inc.
Ten South Wacker Drive, Suite 3000
Chicago, Illinois 60606
(T) 312-463-5000; (F) 312-463-5001
Email: hminsker@bannerwitcoff.com
bwlitdocket@bannerwitcoff.com

² Applicant notes that at this early stage of the matter there is no competent evidence of record regarding precisely when Opposer first knew of NIKE's Mark or application. Such evidence must be presented in conformance with the rules of the TTAB at the appropriate time in the proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of August, 2011, a true and complete copy of the foregoing **APPLICANT'S REPLY BRIEF IN RESPONSE TO OPPOSER'S REPLY TO APPLICANT'S SECOND MOTION TO DISMISS** has been served on Opposer Christopher A. McGrath via First Class Mail, postage prepaid, and also by email, addressed as follows:

Mr. Christopher McGrath
McG Productions Ltd.
22 St. John Street
Newport Pagnell, Milton Keynes,
United Kingdom MK16 8HJ

Email: legal@mcgproductionsltd.com

By: /Helen Hill Minsker/