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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.
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Date	06/03/2013
Attachments	007834.00011_Applicant's Answer to Amended Notice of Opposition as Revised by the Board in its Partial Granting of the Motion to Strike.pdf(412617 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 ANSWER TO AMENDED NOTICE OF OPPOSITION AS REVISED BY
THE BOARD IN ITS PARTIAL GRANTING OF THE MOTION TO STRIKE**

Applicant, NIKE, INC. (“NIKE” or “Applicant”), by and through its undersigned attorneys, responds to the Amended Notice of Opposition of Opposer, CHRISTOPHER A. McGRATH (“McGRATH” or “Opposer”), as revised by the Board in its order of May 15, 2013 in which it partially granted Applicant’s Motion to Strike. The Amended Notice of Opposition as revised by the Board will be referred to herein as the “Revised Amended Notice of Opposition”. A copy of the Revised Amended Notice of Opposition, that shows in redline the parts of the “Amended Notice of Opposition” that were stricken by the Board is attached hereto as Exhibit A. The answers and responses set forth below are directed to those parts of the Revised Amended Notice of Opposition that were not stricken by the Board in its Order of May 15, 2013.

With respect to the numbered paragraphs of the Revised Amended Notice of Opposition shown in Exhibit A, Applicant Answers each numbered paragraph as follows:

1. Denied.

2. The first sentence of numbered paragraph 2 in The Revised Amended Notice of Opposition appears to include some type of legal conclusion that requires no answer. Applicant has insufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations set forth in numbered paragraph 2 of the Revised Amended Notice of Opposition and, therefore, denies said allegations.

3. Denied.

4. To the extent this paragraph cross-references other paragraphs of the Revised Amended Notice of Opposition, Applicant repeats and realleges each of its answers and denials to the cross-referenced paragraphs. Applicant has insufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations set forth in numbered paragraph 4 of the Revised Amended Notice of Opposition and, therefore, denies said allegations.

5. Denied.

6. Applicant admits that Tiger Woods is a Nike-sponsored athlete. Applicant denies the remaining allegations of numbered paragraph 6 of the Revised Amended Notice of Opposition.

7. Denied.

8. The statement in paragraph 8 appears to be the prayer for relief that does not require an admission or denial of fact by Applicant. To the extent any other statements are included, Applicant has insufficient knowledge or information upon which to form a belief as to the truth of the allegations set forth in numbered paragraph 8 of the Revised Amended Notice of Opposition and, therefore, denies said allegations.

AFFIRMATIVE DEFENSES AND ALLEGATIONS

9. Opposer has failed to state a claim on which relief can be granted.

10. Opposer has failed to identify valid, protectable trademark or trade name rights in the United States that would enable it to establish priority and likelihood of confusion with Applicant's Mark.

11. Opposer is forbidden by the Board's Order dated March 28, 2012, to assert any standalone claims based on Opposer's alleged ownership of a United Kingdom Trademark.

12. Applicant affirmatively alleges that there is no likelihood of confusion.

13. The Revised Amended Notice of Opposition is barred by virtue of acquiescence.

14. The Revised Amended Notice of Opposition is barred by virtue of estoppel.

WHEREFORE, the Applicant, NIKE, INC., prays that this Opposition be dismissed and that the notice of allowance be issued.

Respectfully submitted,

Date: June 3, 2013

By: /helen hill minsker/
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Attorneys for Applicant, NIKE, INC.

EXHIBIT A: Revised Amended Notice of Opposition
With Redline Showing Allegations Ordered
Stricken by the Board in its Order of May 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, a copy of the foregoing APPLICANT'S ANSWER TO AMENDED NOTICE OF OPPOSITION AS REVISED BY THE BOARD IN ITS PARTIAL GRANTING OF THE MOTION TO STRIKE was served on the following counsel of record for Opposer 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

/Anna L. King/

EXHIBIT A

**REVISED AMENDED NOTICE OF OPPOSITION
WITH REDLINE SHOWING ALLEGATIONS ORDERED STRICKEN
BY THE BOARD IN ITS ORDER DATED MAY 15, 2013**

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

Amended Notice of Opposition

Opposer Information

Name: Mr Christopher A McGrath

Entity: Individual: Citizenship UNITED KINGDOM
Address: 22 St John Street McG Productions Ltd
Newport Pagnell, BUCKS, MK16 8JH UNITED KINGDOM

Correspondence information:

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Applicant Information

Application No 85053714 Publication date 05/03/2011
Applicant Nike, Inc.
One Bowerman Drive, DF4
Beaverton, OR 97005 UNITED STATES

Grounds for Opposition
Priority and likelihood of confusion

Trademark Act Section 2(d),

15 U.S.C. § 1052(d)

1.To establish a violation of the Lanham Act, Opposer must and hereby avers that:

(a) Opposer has:

- i. a valid and legally protectable mark, 20XII the Honor of Sport™ - a United Kingdom registered Trademark, number 2477961 (filing date: 24 January 2008; registration date: 12 September 2008); and
- ii. an unregistered trade mark, 20XII, in the United States established through prior use, made by and on on behalf of the Opposer (see: *Bayer*, 90 USPQ2d at 1591.3).
- iii. Points (a)i and (a)ii above are noted to show economic interest and standing, developed in

paragraphs below - Opposer has a real economic interest in the outcome of this claim.

- (b) Opposer owns the mark - both as:
- i. Registrant of the United Kingdom Trademark that demonstrates economic interest (see para. 1(a)i, above); and
 - ii. as the purchaser of numerous domain names from American company GoDaddy.com to underpin that mark's use in commerce, among them a 5-year purchase of domain name 20XII.COM on 30 October 2007 (plus 20xii.us, among others) - Here, Opposer cites 15 USC § 1125, which establishes the principle that web-addresses do not operate merely as street addresses but gain protection if allied to trademarks;
 - iii. and the registration on 25 November 2008 of the mark as a commercial channel on Youtube at <http://www.youtube.com/user/20XII> to promote and sell goods and services bearing Opposer's mark.
- (c) the defendant's use of the mark to identify goods or services causes a *likelihood* of confusion that will damage Opposer's trademark (see following paragraph 1d onwards).

Case Law:

See *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198 (3rd Cir. 2000. And See Fed. R. Civ. P. 8; and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). See *Kellogg Co. v. General Mills Inc.*, 82 USPQ2d 1766, 1767 (TTAB 2007): standing based on commercial interest in the mark.

- (d) Opposer has invested a great deal of time and money creating a distinctive trademark. Further investment of time and money to build upon that uniqueness requires that its distinctiveness be maintained, its uniqueness be vigorously guarded. For Nike, Inc. to pursue a near-identical trademark, one week after being introduced to Opposer's mark, demonstrates the inherent value of Opposer's trademark since they too have undertaken to invest time and money in building what they hope to be

their new brand in sports. It's not the trademark's fame, since it is relatively new, but its distinctiveness, its uniqueness in sports that is damaged, Opposer believes, with all Nike, Inc.'s economic might drowning out the distinctiveness of Opposer's trademark, a trademark created prior to Nike, Inc.'s application, and a trademark upon which to build an international sports brand, 20XII. In other words, Opposer will be damaged by the likelihood of confusion going forward in building the brand.

2. Opposer must also show that defendant's use of the mark is *likely to cause confusion* as to the affiliation, connection or association of defendant with Opposer, or as to the origin, sponsorship, or approval of defendant's goods, services or commercial activities by plaintiff. See [1-800 Contacts, Inc. v. WhenU.com, Inc.](#), 414 F.3d 400 (2d Cir. 2005). Thus, "use," "in commerce," and "likelihood of confusion" are three distinct elements necessary to establish a trademark infringement claim. And Opposer relies on the inherent distinctiveness of the image created by the use of 20XII itself to assert that 20XI would be likely to cause confusion in this regard.

3. Pursuant to point 1a)i and 1a)ii above, Opposer has a valid and legally protectable mark: 20XII The Honor of Sport™ is a UK trademark in use in the United States prior to the Applicant's application, thus establishing priority. *First Niagara Ins. Brokers Inc. v. First Niagara Financial Group, Inc.*, (77 USPQ2d 1334 (TTAB 2005), rev'd, 476 F.3d 867 (Fed. Cir. 2007)), states that foreign and domestic trademark owners can oppose United States trademark applications *on the basis of likelihood of confusion*, even if they do not own a trademark registration in the United States. A trademark owner need only show prior use of its trademark in the United States. It is not necessary that the trademark owner use its trademark in a type of commerce lawfully regulated by United States Congress, such as interstate commerce. Mere use in the United States is sufficient. Opposer cites this case not as a standalone reason to oppose, but to underpin prior use and claim likelihood of confusion grounds in the following paragraphs, pursuant to Section 2(d) of the Lanham Act.

4. Pursuant to paragraph 1b) above, Opposer owns the mark:

a) The Honor of Sport™ is owned by Opposer as the legal registrant of the UK-registered trademark, establishing a commercial interest in the mark 20XII.

b) 20XII, intended and used as a trademark, was established and referenced commercially in the United States prior to the Defendant's application, firstly in relation to purchases in October 2007 of multiple web-addresses, all named 20xii (e.g. 20xii.com, 20xii.us, etc, showing clear commercial, long-term intent) and then in relation to an online sports game, a treasure hunt, GoldenKeyQuest.com, registered on 5th February, 2008, which was designed to introduce Opposer's sports-related trademark, 20XII The Honor of Sport™, to the international market, with the later registration of the name "20XII" on the website Youtube.com (commercial channel web address: <http://www.youtube.com/user/20XII>, created 25 November 2008), wherein the terms of service confirmed that registration of a Youtube Channel comprised a legal agreement between Opposer and YouTube (where "YouTube" means YouTube LLC, whose principal place of business is at 901 Cherry Avenue, San Bruno, CA 94066, United States), the commercial channel being created by Opposer for the express purpose of maintaining an original channel to promote 20XII as a business, as per Youtube's terms of service, in this case a business of sports-related goods and services in line with the United Kingdom's registration of 20XII The Honor of Sport™ and its class of goods, as follows:

b.i Class 25: Clothing, footwear, headgear.

b.ii Class 35: Advertising; dissemination of advertising matter via all media, in particular in the form of thematic messages centred on human values; publicity through sponsoring; business management; business administration; office functions; the organisation, operation and supervision of loyalty and incentive schemes; advertising services provided via the Internet; production of television and radio advertisements; promoting the goods and services of others by means of contractual agreements, in particular of sponsoring and licensing, enabling partners to gain additional notoriety and/or image and/or liking derived from those of cultural and sporting events, in particular international; promoting the goods and services of others by means of image transfer; rental of advertising space of all kinds

and on all carriers, digital or not; administration of the participation of national teams to an international athletic competition, and promoting the support to said teams with the public and the concerned circles; accountancy; auctioneering; trade fairs; opinion polling; data processing; provision of business information.

5. Pursuant to paragraph 1c) above, the Defendant's use of the mark to identify goods or services causes a *likelihood* of confusion:

a) based on its appearance: a likelihood of confusion exists when consumers viewing the allegedly infringing mark would probably assume that the product or service it represents is associated with the source of a different product or service identified with a similar mark. Opposer understands that Courts conducting a likelihood of confusion analysis apply a different standard to directly competing, as opposed to non-competing, goods. See *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198 (3rd Cir. 2000). When the alleged infringer and the trademark owner deal in competing goods or services, the court rarely needs to look beyond the mark itself; infringement will usually be found if the two marks at issue are sufficiently similar that consumer confusion can be expected.

i) Opposer invites the court to delimit the scope of the matter in hand by a simple comparison of the two competing marks:

20XII & 20XI

ii) These are marks so self-evidently similar as to cause immediate confusion: A twenty, an X and two i's, as opposed a twenty, an X and one i. And they are more 'image' and 'impression' than precise meaning, so that the immediacy of the impression when purchasing would be more likely to cause confusion, since the buyer is not invited to remember a known word or known phrase that they can remember, but rather to gain an immediate impression of a memorable image. The slippage between 20XII and 20XI is therefore likely to be far greater and damage the economic prospects for 20XII as a result, as its uniqueness is not designed to trade off of Nike's global name, but to build its own unique mark in the commercial sports field. It cannot do that if it

has to fight for its distinctiveness in constant opposition to Nike, Inc.'s 20XI. Therein lies the damage.

iii) This confusion is compounded by the fact that Opposer and Defendant's marks are vying for the same commercial market, so that commercial use is too similar also:

Goods/Services applied for by Defendant:

Class 018. All goods and services in the class are opposed, namely: Bags, namely, all-purpose sports bags, tote bags, duffle bags, messenger bags, backpacks, purses, umbrellas, luggage, cosmetic and toiletry cases sold empty

Class 025. All goods and services in the class are opposed, namely: Footwear; apparel, namely, pants, shorts, shirts, t-shirts, pullovers, sweat shirts, sweat pants, underwear, sports bras, dresses, skirts, sweaters, jackets, socks, sweatbands, gloves, belts, hosiery, armbands, coats, vests, headwear, namely, hats, caps; cleats for playing football, baseball, softball, golf, cricket

Class 028. All goods and services in the class are opposed, namely: Sports balls; bags for sporting equipment, namely, balls; bats, namely, baseball, softball, cricket; gloves used in baseball, softball, golf; golf clubs, golf balls, golf club grips, golf bags, golf tees, head covers for golf clubs, golf ball markers; protective padding for playing baseball, football, hockey, softball, cricket, basketball; hockey sticks, baseball mitts, softball mitts, personal exercise mats, snowboards, skateboards, stumps for playing cricket

Class 035. All goods and services in the class are opposed, namely: Retail store services in the field of apparel, headwear, footwear, bags of all kinds, accessories made of leather and imitation leather, umbrellas, sports equipment, golf equipment, and accessories for all the aforesaid goods; advertising and marketing.

iv) Moreover, Opposer's mark, 20XII, comes with the unique sports-related identifier of 'the Honor of

Sport', in which sports-related field, Nike, Inc is internationally known.

- b) Pursuant to paragraph 1c) above, the Defendant's use of the mark to identify goods or services causes a *likelihood* of confusion: as to the affiliation, connection or association of Defendant with Opposer, or as to the origin, sponsorship, or approval of defendant's goods, services or commercial activities by plaintiff:

Opposer wishes to maintain the uniqueness of the combination of Roman and Arabic numerals, 20XII, in relation to sport, and 20XI is quite plainly and obviously a too similar resemblance to go without *likelihood* of confusion in this regard, as the two directly compete for sales in the same commercial arena, as per the Trademark registration cross-over class of goods cited above.

- c) Pursuant to paragraph 1c) above, the Defendant's use of the mark to identify goods or services causes a *likelihood* of confusion to which the following Case Law applies:

i. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both defendant's and opposer's mark:

See *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii).

ii. The goods and services of the parties need not be identical or directly competitive to find a likelihood of confusion:

See *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); see, e.g., *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

iii. Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark:

See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); see also *Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions, so that 20XII and 20XI are effectively indistinguishable).

iv. Font changes do not avoid a likelihood of confusion: a mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element itself and not in any particular display. TMEP §1207.01(c)(iii); see 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters or otherwise in special form generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. See, e.g., *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). When a mark consists of a word portion and a design portion, the word portion

is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729, 735TAB 1976); TMEP §1207.01(c) (ii).

6) Pursuant to the statutory requirement to allege facts that an alleged infringing use of a trademark be "in commerce" to establish a claim of infringement under the Lanham Act, Opposer cites activities that meet the "in commerce" requirement, as follows: the Defendant has, since applying for the mark 20XI, employed internationally renowned golfer, Tiger Woods, to underpin a rapidly burgeoning marketing campaign through resellers on and off the internet to sell golf balls and golf hats bearing the 20XI mark.

7) If the goods in question are related but do not directly compete for sales, Opposer understands that the likelihood of confusion analysis becomes more complex, using the Lapp test, a non-exhaustive list of factors to be considered in determining whether there is a likelihood of confusion between marks. Opposer trusts the Lapp test is not required, given paragraphs 5a, 5b and 5c above, but to address those Lapp factors relevant to a determination of likelihood of confusion, Opposer notes as follows:

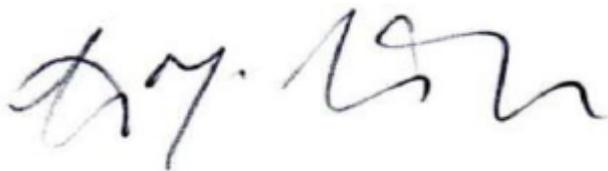
- a) the strength of the trademark owner's mark (Opposer contends it is so highly distinctive that it is this which prompted Nike, Inc. to start the trademark process for 20XI one week after Opposer emailed an introduction to Opposer's mark, 20XII The Honor of Sport™ - their electronic reply to that introduction was timed by the Godaddy.com server at Tue, Jun 01, 2010 7:49am);
- b) the degree of similarity between the trademark owner's mark and the allegedly infringing mark (see paragraph 5a(i), above);
- c) the marketing channels used (areas of economic interest overlap, as shown above in trade class similarities, which will, it seems reasonable to suppose, be likely to cause confusion for the buying public).
- d) the type of goods involved (again see the cross-over in class of goods to which both marks apply, above); and
- e) the degree of care likely to be exercised by the purchaser (given the marketing might of Nike, Inc., it

- seems reasonable to suppose that anything with a similar mark on sports goods will easily be confused with Opposer's mark in the same commercial arena);
- f) the alleged infringer's intent in selecting the mark (on this point, Opposer alleges Nike, Inc. were introduced to Opposer's mark one week prior to starting their own Trademark Application for the near identical mark, allowing for the reasonable inference that the intent was to damage trade in Opposer's mark and/or simply to appropriate the uniqueness of the mark for their own commercial ends);
- g) and other facts showing that the consuming public is likely to expect the trademark owner to manufacture a product in the alleged infringer's market, or is likely to expand into that market. See Interpace Corp. v. Lapp, Inc., 721 F.2d 460 (3d Cir. 1983) (Opposer's linkage between the online treasure hunt, Golden Key Quest.com, as it is known, and the launch worldwide of the sports brand 20XII, and specifically on Youtube's commercial channel, was a linkage picked up by players in the online sport (including American players), who noted whilst playing the game that the mark had been registered as a trademark in the United Kingdom with its sports-goods commercial intention, and so it is reasonable to suppose that as far back as 2008, potential purchasers of the goods understood then that 20XII was gearing up for expansion into the same commercial market as that occupied by Nike, Inc., and since that time, online sportswear is for sale bearing Opposer's trademark).

7) Opposer respectfully moves the Trademark trial and Appeal Board to summarily dismiss the Applicant's Trademark application or move to an expedited resolution at trial.

Respectfully submitted,

Mr. Christopher Anthony McGrath.



6 August 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2012, a true and complete copy of the foregoing OPPOSER'S AMENDED OPPOSITION has been served by email on the Defendant at: hminsker@bannerwitcoff.com, bwlitdocket@bannerwitcoff.com to be followed by first class registered prepaid post to:

Correspondence: HELEN HILL MINSKER
BANNER & WITCOFF LTD
TEN SOUTH WACKER DRIVE, SUITE 3000
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UNITED STATES

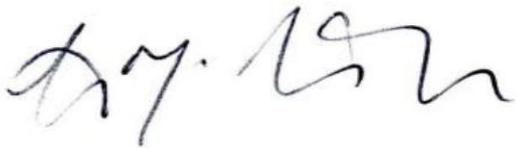
And that similar service of OPPOSER'S AMENDED OPPOSITION was made by email on 6 August 2012 with follow-up first class, registered prepaid post to the United States Patent and Trademark Commissioner for Trademarks Office PO BOX 1451, Alexandria, VA 22313-1451.

By: /Christopher A McGrath/

STATEMENT OF TRUTH:

Opposer believes the facts stated in this AMENDED OPPOSITION NOTICE between (1) CHRISTOPHER ANTHONY McGRATH, (the Opposer) - and - Nike, Inc. (the Defendant) are true.

Signature of Opposer:

A handwritten signature in black ink, appearing to read "C.A. McGrath", written in a cursive style.

Date: 6 August 2012