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

Proceeding	91212820
Party	Defendant Apollo Investigations, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Apollo Security International, Inc.

Opposer,

v.

Apollo Investigations, Inc.

Applicant.

**Opposition No. 91212820
Serial No. 85897079**

In re Application Serial No.: 85897079

For the Mark: “Apollo Investigations, Inc.”

Filed: April 5, 2013

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APPLICANT’S TRIAL BRIEF

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COMES NOW, Applicant, Apollo Investigations, Inc., by counsel, and respectfully submits its trial brief in the above-styled matter, and furthermore states as follows:

I. INTRODUCTION

Applicant, Apollo Investigations, Inc. (hereinafter, “Applicant”) is a Virginia Corporation with its principal place of business in Manassas, Virginia. Applicant is a private investigator firm operating in Virginia, Maryland and Washington, D.C. Applicant is seeking a trademark for its name, “Apollo Investigations, Inc.” Opposer, Apollo Security International, Inc. (hereinafter, “Opposer”), does not hold the mark for “Apollo Investigations, Inc.” (hereinafter, “the mark” or the “proposed mark”). Opposer opposes Applicant’s trademark application primarily on the basis of the likelihood of confusion between the Applicant’s proposed trademark, and the Opposer’s trademarks for “Apollo International” (stylized with graphic), “Apollo Security International,” “A Apollo International,” “Apollo International” (text), “Apollo Security” (stylized with graphic), and “Apollo Security” (text).

On or about April 5, 2013, Applicant filed an application with the USPTO, seeking to register the mark primarily for private investigative services. The application was assigned Serial No. 85/897079 and published in the Trademark Official Gazette on or about September 24, 2013. On October 4, 2013, the Opposer filed its opposition to Applicant’s proposed mark.

II. DESCRIPTION OF THE RECORD

A. Written Testimony, consisting of the following:

1. Direct Testimony and Declaration of Dennis M. Crowley, III, together with Exhibits A-BB, dated October 9, 2014 (“Crowley Testimony 1”).
2. Direct Testimony and Declaration of Michael S. Youlen, dated January 7, 2015. (“Youlen Testimony”).

3. Rebuttal Testimony and Declaration of Dennis M. Crowley, III, dated March 20, 2015 (“Crowley Testimony 2”).

B. Application Files and Pleadings. Pursuant to 37 C.F.R. 2.122(b) the files of the trademark applications in connection with the Registered Marks, and the Applicant’s proposed mark, and the pleadings in this *Inter Partes* proceeding are deemed to be of record.

III. RECITATION OF FACTS

The facts of this case are fairly simple.

Applicant was established by the Virginia State Corporation Commission on September 30, 2011. (Youlen Testimony, ¶3). Applicant is licensed to do business in Virginia and operates in Virginia, Maryland and Washington, DC, focusing primarily in Virginia and Maryland. (Youlen Testimony, ¶4). Applicant is licensed as a private investigator in Virginia by the Virginia Department of Criminal Justice Services and in Maryland by the Maryland State Police. (Youlen Testimony, ¶5). Washington DC recognizes the states’ licenses so a private investigator’s license is not necessary unless you maintain a physical office there. (Id.) Applicant’s offices are located in Manassas, Virginia, and Bethesda, Maryland. (Youlen Testimony, ¶18).

Applicant markets and offers its services through the internet, or through referrals from clients located in the Washington DC Metropolitan area, particularly attorneys. (Youlen Testimony, ¶20, 23). In approximately September, 2011, Applicant began using the domain name “www.appoloinvestigationsinc.com”. (Youlen Testimony, ¶21).

Applicant is in the business of offering private investigator services to individuals, focusing primarily on matrimonial private investigations and surveillance, as well as service of process. (Youlen Testimony, ¶6). Applicant also provides an officer for a private police corporation as a Special Conservator of the Peace in Manassas, Virginia. This is not, however, a

marketed service. A complete list of Applicant's marketed services are located within Exhibit C to the Youlen Testimony. (Youlen Testimony, ¶¶6-8).

A Special Conservator of the Peace (SCOP) is appointed under Va. Code Ann. §19.2-13 by the Circuit Court of Virginia in the County/City where they operate. A SCOP has arrest and police powers under Virginia law, and is trained in the same manner as police officers. A SCOP is treated the same as a law enforcement officer/police officer within the territorial limits of their appointment and has the right to use a police marked vehicle, carry a badge stating "police" and to use a firearm and police equipment in the course of their duties. A SCOP is not a security guard and is not charged with asset protection. A SCOP can enforce all laws within their territory, including, but not limited to, issuing court summonses, appearing in Court for their criminal docket, and making authoritative arrests for speeding tickets, reckless driving, driving while intoxicated, larceny, loitering, assault and battery, assault on a police officer, illegally carrying a concealed weapon, drug possession, etc. (Youlen Testimony, ¶¶9-11).

The Opposer has several registered trademarks, but none of these apply to private investigator services offered to the general public. Opposer provides asset protection services concerning trademark violations, product diversion, product counterfeiting, trade secrets theft, employee theft, workplace drug abuse, time theft, fraud, sabotage, and other similar threats to the assets of corporations or institutions. (Crowley Testimony 1, Exhibits M, U-T).

According to Exhibit M of Crowley Testimony 1, Opposer does not market its investigative services to outside companies, and limits their investigative services to clients of the security services. Opposer backtracked from Exhibit M to Crowley Testimony 1, when Mr. Crowley later stated that it does offer investigative services to the general public. (Crowley Testimony 2, ¶¶ 2-5). However, such backtracking does not appear correct since Mr. Crowley

had earlier described Opposers' business relationships and how its investigative services are engaged by existing asset protection clients to check into thefts of assets that the Opposer is protecting (Crowley Testimony 1, ¶31).

Opposer is not licensed in Virginia as a private investigator service, and apparently uses the investigator license of an unnamed "affiliate" in Maryland for its asset protection work, but is not itself licensed. (Crowley Testimony 2, ¶7).

There are other local private investigator firms using the term Apollo in connection with their services that Opposer has apparently never sought to stop, and are not mentioned in the Opposer's evidence. (Youlen Testimony, ¶30, Exhibit E).

Applicant's annual revenue for use with the proposed mark is approximately \$125,000.00 to \$175,000.00. (Youlen Testimony, ¶19). Opposer's approximate revenue from business conducted under its registered marks is approximately \$60 million in 2013. (Crowley Testimony 1, ¶18).

At no point does Opposer provide clear evidence or even a simple statement that it is actually offering stand-alone private investigator services for the individual consumer. All of Opposer's evidence shows that it is a large asset and personal protection firm representing primarily corporations or institutions, which appears to only investigate sabotage, destruction and/or theft of assets it is already protecting. In other words, it is a large-scale international security company, not a local private investigator or Special Conservator of the Peace.

In this regard, it is clear that the services offered in commerce by the parties are dissimilar. Apollo Investigations, Inc., is likely to receive a call from a housewife seeking to hire Applicant to take pictures of her cheating husband at a local hotel. Opposer is likely to receive a contract bid proposal from an international hotel chain for purposes of providing personal protection

(bodyguards) for its managers at several hotels in hotspots in the Middle East. Applicant is likely to receive a call from a local attorney seeking to hire a process server to deliver a Complaint for a lawsuit a few counties down the road. Opposer is likely to receive a contract bid proposal to provide uniformed security at various offices of a large multi-city law firm. Applicant is likely to receive a call from a father seeking a missing person's search to locate his estranged daughter. Opposer is likely to receive a contract bid proposal for tracking down stolen retail inventory from warehouses throughout the Northeast United States.

This dichotomy between the services and scope of services offered by the parties make it clear that confusion between their firms is extremely unlikely.

IV. ARGUMENT

Applicant will concede that Opposer has standing to challenge the mark and that Opposer used its first trademark beginning in 1991. However, that is not the main point of this proceeding. This proceeding comes down to two main issues. First, whether there is a likelihood of confusion between the mark and Opposer's registered trademarks. Second, Applicant's affirmative defense that Opposer has not been vigilant in defending its trademarks. These two two primary issues will be addressed in turn. As a secondary issue, Opposer has indicated that the application should be refused because of a defect in the specimen submitted with the application and that Applicant has sought to register a trade name only. This matter will be briefly addressed at the end of this brief.

A. There is no likelihood of confusion between Applicant's proposed Trademark and Opposer's registered marks.

This board must review the factors set forth in E.I. DuPont DeNemours & Co., 476 F.2d 1357 1361, 177 USPQ 563, 567 (C.C.P.A. 1973), which are (1) the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression; (2)

the similarity or dissimilarity and nature of the goods described in the application or registration of the mark, or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and the buyers to whom sales are made; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between the applicant and the owner of a prior mark; (11) the extent to which the applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion; and (13) any other established fact probative of the effect of use. Factors 1, 2, 3, 4, 7, 8 and 12, from the DuPont case require approval of the application for the mark. There is little evidence concerning factors 5, 9, 10 and 11, but these are of lesser import in this case.

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

Applying the first of these factors, it is clear from the evidence that the marks are not similar in appearance, sound, connotation or commercial impression. The crucial difference being the use of the words “security” and “international”, or both, by the Opposer, and the use of “Investigations, Inc.” by Applicant. Compare, On-line Careline, Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000) (Use of “ONLINE TODAY” vs. “ON-LINE TODAY”). See also, In re Nat'l Data Corp., 753 F.2d 1056, 1058 (Fed.Cir.1985) (“In articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. ...”). In addition, two of Opposer’s stronger marks contain a graphic, and there is no evidence that

Applicant is using the same or similar graphic. Therefore, there is slim likelihood of confusion under factor 1.

(2) The similarity or dissimilarity and nature of the goods described in the application or registration of the mark, or in connection with which a prior mark is in use.

Applying the second of these factors, and as set forth in the Recitation of Facts above, the Opposer's business is primarily asset and personal protection for larger corporations and institutions. Its investigative services have been, at least for a time in the past, limited by company policy to its asset protection clients and not offered to the general public. While there is some conflicting evidence of an expansion of services to non-asset protection clients, it still appears that any investigation is in the nature of internal theft, fraud, sabotage, etc., of business assets, inventory, etc. In comparison, the Applicant's services are for local traditional Private Investigator Services, such as matrimonial investigations, missing persons, service of process, etc. These services are sold to individuals. Applicant also employs Special Conservator(s) of the Peace, which is a creature unique to Virginia law. There is little overlap in the nature of the services of the parties given the evidence presented.

(3) The similarity or dissimilarity of established, likely-to-continue trade channels.

The Applicant receives his business primarily from existing clients, referrals from local attorneys, etc. The Opposer provided evidence that they it has advertised its "investigative services" at trade shows. There is no evidence that Applicant has ever attended a trade show, and there is no evidence of any overlap in these referral sources and channels of trade.

However, Applicant and Opposer both advertise via the internet, but the Opposer's website is specifically "apollosecurity.com" and Applicant's is "apolloinvestigationsinc.com". Opposer has presented no evidence of any confusion resulting from the use of these domain

names which match the Opposer's registered marks, and the Applicant's proposed mark.

(4) The conditions under which and the buyers to whom sales are made.

As stated in the Recitation of Facts, above, it is clear that the conditions under which and the buyers to whom services are offered in commerce by the parties are dissimilar. Applicant is hired by local individuals for local work, such as spousal investigations, service of process and skip traces (missing person's search). Opposer represents large corporations and institutions on large contracts with tens of millions of dollars of annual revenue. They do not compete for customers, and they do not offer the same type of services.

Furthermore, "(p)urchaser sophistication may tend to minimize likelihood of confusion." Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 1329, 54 USPQ2d 1894 (Fed. Cir., 2000). According to Opposer's evidence, their customers are sophisticated corporate or institutional entities in need of security and asset-protection services, including Boston Scientific Group, Putnam Investments, Shriner's Hospital for Children, Fidelity Investments, GTE, etc. (Crowley Testimony 1, ¶18). It is unlikely that these types of large-scale corporate clients are going to confuse a \$60 million dollar security and asset protection firm with a small private investigator's office from Manassas, Virginia.

(7) The nature and extent of any actual confusion.

There is no evidence of any actual confusion in this case, and the absence of such evidence is telling in this case. In other words, Opposer has no evidence indicating that there has ever once been any actual or potential confusion wherein Opposer's customer sought Applicant's services thinking they were offered by Opposer.

(8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.

The Opposer has been using its marks and the Applicant has been using the proposed mark for approximately four (4) years without any evidence of any actual confusion wherein someone was seeking Opposer, but found Applicant instead.

(12) The extent of potential confusion.

Under the facts of this case, there does not appear to be any potential confusion due to the fact that the parties serve different clients with different services. The term “investigation” is a fairly broad term that can cover many activities, but the Opposer (assuming, *arguendo*, that the Opposer offers such services to persons or companies other than asset protection clients) and the Applicant do not offer the same types of investigations. Any investigations performed by Opposer are in service to its asset protection business, such as employee theft, sabotage, fraud, intellectual property infringement, etc. Applicant’s business is for traditional local private investigative services, and the provision of Special Conservator(s) of the Peace, which is a creature unique to Virginia law. If there was confusion, it would be of a very small extent given these facts.

In addition, Opposer cannot provide the services of Applicant in Virginia and Maryland because it is not licensed to do so. Opposer apparently has an “affiliate” in Maryland who handles investigations for Opposer. Opposer also has a consulting office in Virginia that sometimes hires independent investigators as needed. However, the corporate entity of Opposer, in and of itself (without regard to affiliates and contractors), apparently cannot provide services in Maryland and Virginia because it is not licensed to do so. Opposer has not provided any significant evidence of services offered in Washington, DC. Therefore, it is apparent that the licensure problems faced by Opposer prevent it from offering the same services directly to those individual consumers whom Applicant serves.

For these reasons, the DuPont factors weigh heavily in favor of approving the Applicant’s

application.

B. Opposer has failed to adequately protect its registered trademarks.

Opposer's only evidence of protecting its registered marks comes down to four cease and desist letters and a default judgment. However, this ignores the many companies that are still using the term "Apollo" in conjunction with investigative services. (See Youlen Testimony, ¶30, Exhibit E).

C. Applicant is not seeking to register a trade name, but rather, a trademark for private investigator services.

Opposer seeks refusal of Applicant's application based on the specimen provided by the Applicant. Opposer seeks to have this refused because it is merely letterhead and does not describe services. See, T.M.E.P. §1202.01. See also, Martahas v. Video Duplication Services, Inc., 3 F.3d 417, 27 U.S.P.Q.2d 1846 (Fed. Cir. 1993).

The specimen provided by Apollo is more than simply letterhead. The specimen contains Apollo's badge identification similar to that used by its Special Conservator of the Peace officer, and containing the word "investigator." It also contains the logo of the Private Investigator's Association of Virginia, as well as the Virginia Private Investigator's License Number for the Applicant. In other words, the specimen describes the services offered by the Applicant. It shows that the Applicant provides private investigative services, and it provides the license number for the primary jurisdiction in which it operates. It is not merely a Trade Name.

V. CONCLUSION

For the foregoing reasons, Opposer's Opposition should be dismissed, and the Application should be approved.

Respectfully submitted,

Apollo Investigations, Inc.
By its attorney,

Date: July 7, 2015

/s/ Daniel A. Harvill

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July 2015, I caused the foregoing to be served via first class mail, postage prepaid, and via e-mail on:

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