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

Proceeding	91215087
Party	Defendant Peter J. Healy
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>UNITED STATES MARINE CORPS</p> <p>v.</p> <p>PETER J. HEALY</p>	<p>Opposition No. 91215087</p> <p>Serial No. 85936128</p>
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TRIAL BRIEF
OF DEFENDANT PETER J. HEALY

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INTRODUCTION

The Opposer in this action seeks to suppress and deny Applicant Peter J. Healy (“Applicant”) the right to market, with the benefit of trademark protection, a product in the creative entertainment arts, which Opposer, a unit of the federal government, and most powerful military force in the history of mankind, believes would injure the reputation and pride of the United States Marine Corps (“Opposer”) such that the ability of the Marine Corps to sell certain coffee mugs, neckties, and other related gift shop items, would be materially imperiled. Opposer seeks to have the Appeal Board lend its authority to prior restraint of speech in the commercial arts by impairing the economic viability of trade in a product whose branding Opposer argues could be construed to suggest an aviation squadron operated by the Marine Corps may, under some imagined scenario, fail in its mission. The speech content suppression, sought by Opposer in its immediate misadventure, has no sound basis in the law. Applicant respectfully prays the Appeal Board exercise its wisdom and authority in defeating Opposer ill advised flanking maneuver around the 1st Amendment of the U.S. Constitution.

STATEMENT OF CASE ISSUES

Opposer concedes that its primary line of business is the projection of military force. Opposer concedes that no aircraft of its “HMX-1” helicopter squadron even may take on the moniker “Marine One,” except for such limited time as a certain elected official, the President of the United States, is on board one of many potentially utilized HMX-1 craft. As such, Opposer, implicitly concedes that the Marine Corps is not within its rights to

utilize the “Marine One” aviation call sign in the absence of a certain single passenger, in his or her sole discretion, having chosen to be on board one of various Marine Corp helicopters.—begging the question: What business does the Marine Corps have to claim of common law trade mark of an aviation call-sign that only attaches to a Marine Corp aircraft when the President chooses to ride on it? For that matter, what authority does the Marine Corps cite in support of its proposition that an aviation call-sign can be trademarked at all—especially a military call-sign?

How is what the Marine Corp seeks to do, by way of its present action, in suppressing a hybrid of commercial, artistic, and political speech, any different than that of the following hypothetical: Imagine, hypothetically, the Marine Corps setting about the routine practice of merchandising coffee mugs branded with each of its military operations, such as “Desert Storm.” Could the Marine Corps then have the Appeals Board strip any product of its novelty protective trademark, thereby impeding its commercial viability—because, as Opposer argues in the present case, the product's iconoclastic incorporation of the reference to Desert Storm cast doubt on the wisdom of the military operation, and therefore besmirched Opposer's de minimis commerce in Marine Corps trademarked “Desert Storm” coffee mugs?

Opposer Marine Corps argues that because it has expanded beyond its primary business of global military force projection, to fight for a toehold in the coffee mug and neckwear merchandising arena, it should be able to attack and terminate the trademark of any product it fears may cast any one of its mug inscribed military units in a less than flattering light.

TRADEMARK VIOLATES NO STATUTE, REGULATION, OR AUTHORITY

Opposer can do no better than resort to tangentially related authority—10 U.S.C. § 7881, 32 CFR 765.14, and SECNAV Instruction 5030.7—Federal code and regulations setting out discretionary authority of Defense Department officials with respect to licensing of certain Defense Department affiliated commercial products and services. Opposer then argues that the subject product, distinguishably absent affiliation with, or endorsement by the Defense Department, is undeserving of trademark protections, for lack of such commercial license. There is no logic to such a position, given that, even if, *arguendo*, the cited authority were to limit Defense Department commercial licensing to certain sorts of products, that hardly would render *malum prohibitum* introduction into the marketplace of a product that neither bore such an endorsing license, nor were susceptible to being confused for a product bearing such endorsement.

OPPOSER ARGUES PUBLIC WOULD BELIEVE

MARINE CORPS ENDORSES DOWNING MARINE ONE?

Is Opposer actually asking the Appeal Board to render a decision founded on the arch supposition that the public is likely to presume that the Marine Corps would have endorsed a fictional entertainment product premised upon the downing of the President's helicopter? Opposer provides no evidence whatsoever in support of that notion. Absent the slightest evidenced susceptibility on the part of the American public toward a mistaken belief that the source of any product bearing the subject trademark would have been the United States Marine Corps, then Opposer's allegation of deceptiveness must be understood for what it plainly is—a whole cloth absurdity.

Opposer has failed to produce evidence upon which to find that consumers could make a false connection between the subject mark and the United States Marine Corps (“USMC”).

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Opposer has failed to produce evidence upon which to find that a video game branded “Marine One Down” would amount to a deceptive misdescription. Opposer does not even suggest what that alleged misdescription might be—none to surprising given that Opposer has succeeded in (its probable underlying goal of) impeding investment in the products creative development, leaving Opposer only to speculated in its derision.

Opposer has failed to produce evidence upon which to find that the subject mark would inflict upon Opposer unprotected speech content comprising actionable dilution of the United States Marine Corps brand.

COURTS INCREASINGLY DISFAVOR

SPEECH SUPPRESSION OF SORT SOUGHT BY OPPOSER

“Courts have been slow to appreciate the expressive power of trademarks.

Words—even a single word—can be powerful.”

(In re Tam, en banc Fed. Cir., No. 2014-1203)

On Dec. 22, 2015, the panel opinion in *In re Tam* was vacated and reversed by the full Federal Circuit sitting en banc. In a powerful opinion written by Judge Kimberly

Ann Moore, the Federal Circuit declared Sec. 2(a) of the Lanham Act unconstitutional. The Court properly identified Sec. 2(a) as a plainly unconstitutional exercise in viewpoint and content discrimination. In a stirring opening, the Court pronounced:

The government enacted this law – and defends it today – because it disapproves of the messages conveyed by disparaging marks. It is a bedrock principle underlying the First Amendment that the government may not penalize private speech merely because it disapproves of the message it conveys. That principle governs even when the government’s message-discriminatory penalty is less than a prohibition.

In *United States v. Alvarez* (2012) 132 S. Ct. 2537, the Supreme Court held, in a plurality opinion with a two-justice concurrence, that even having established a compelling interest in defending the integrity of military awards, the government was able to proven neither that false claims to military honors devalued public perception of such awards, nor that "counterspeech would not suffice" to prevent potential harm.

If above cited recent decisions *In re Tam*, and *United States v. Alvarez*, are any indication, the Supreme Court is far more likely to find the 1st Amendment rights of an iconoclastic trademark applicant to be imperiled and justifying its certiorari intercession, than it is to consider the Marine Corps honor at risk in the absence of its protection.

CONCLUSION

One the basis of the aforestated, the entire record in this action, and the failure of Opposer to put forward minimally adequate evidence, argument, or citation to authority, Applicant and Defendant Peter J. Healy prays that all of Opposer's objections to the

subject trademark registration be overruled, and that any and all orders and relief sought by Opposer be denied.

Respectfully submitted

March 7, 2016



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing TRIAL BRIEF OF DEFENDANT AND APPLICANT PETER J. HEALY was served on this 7th day of March, 2016, by postage prepaid first-class mail, from Sacramento, California, to the following:

Counsel for Opposer and Plaintiff:

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March 7, 2016



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