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

Proceeding	91215246
Party	Defendant Empire Resorts, Inc.
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**THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

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LVGV LLC	:	Opposition 91215246
	:	
	Opposer	: Application 85/736,471
v.	:	
	:	Mark: “M (stylized)”
Empire Resorts, Inc.	:	
	:	Class: 28
	Applicant	:
	:	Interlocutory Attorney: Andrew P. Baxley

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**MOTION BY THE APPLICANT EMPIRE RESORTS, INC.  
FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Applicant Empire Resorts, Inc. (hereinafter generally “Empire”) moves this Board for entry of partial judgment on the pleadings against Opposer LVGV LLC (hereinafter generally “LVGV”), on the basis that as a matter of law there can be no likelihood of confusion as between Empire’s mark that is the subject of application serial number 85/736,471 and twelve of the sixteen LVGV United States registrations asserted against Empire in LVGV’s notice of opposition. The twelve LVGV registrations against which judgment on the pleadings is sought in this matter are: 3,667,648; 3,620,814; 3,620,816; 3,632,946; 3,544,752; 3,627,974; 3,512,483; 3,894,290; 3,920,133; 3,977,752; 3,747,310 and 3,664,380.<sup>1</sup>

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<sup>1</sup> The remaining four LVGV registrations, namely U.S. registrations 3,411,031; 3,628,876; 3,896,121; and 3,896,122 are not at issue for purposes of this Motion.

**Introduction**

Empire Resorts, Inc. filed application 85/736,471 on 27 September 2012 seeking registration of this mark:



Empire sought registration for the following goods in class 28:

“Playing cards; dice; other playthings and sporting articles, namely, dolls, baby rattles, miniature toy cars, boats, trains, airplanes, rockets and spaceships; molded toy figurines; toy guns; water pistols; rubber balls; spinning tops; tennis balls and racquets; golf clubs and golf balls; beach balls; croquet mallets and balls; table tennis paddles and balls; lawn bowling balls; lacrosse sticks and balls; footballs; hockey pucks and sticks; board games; baseball bats, balls and gloves; softball bats, balls and gloves; badminton racquets; shuttlecocks; water polo balls; billiards and pool cues.”

On March 3, 2014 LVGV opposed Empire’s application on the basis of alleged likelihood of confusion with the following sixteen United States registrations owned by LVGV:

Registration Number	Mark	Goods/Services
3,411,031		Hotel services (Class 43)

Registration Number	Mark	Goods/Services
3,628,876		Bar and restaurant services (Class 43)
3,544,752		Hotel, bar and restaurant services (Class 43)
3,627,974		Casinos; Arranging for ticket reservations for shows and other entertainment events; Entertainment in the nature of theater productions; Entertainment in the nature of visual and audio performances, and musical, variety, news and comedy shows; Entertainment in the nature of music concerts; Amusement arcades; Movie theaters; Night clubs; Health club services, namely, providing equipment in the field of physical exercise; Providing facilities for recreation activities; Conducting and providing facilities for special events featuring casino and gaming contests and tournaments; Special event planning (Class 41)
3,664,380		Barbershops; beauty salons; health spa services, namely cosmetic body care services; massage; tanning salons (Class 44)

Registration Number	Mark	Goods/Services
3,747,310	 <p style="text-align: center;">RESORT · SPA · CASINO LAS VEGAS</p>	Caps; Footwear; Golf shirts; Hats; Jackets; Pants; Polo shirts; Pullovers; Robes; Shirts; Shorts; Slippers; T-shirts; Tank tops; Warm up suits (Class 25)
3,920,133	<p style="text-align: center;"><b>M IS FOR ME</b></p>	Restaurant, bar and catering services; cocktail lounges; restaurant, hotel and bar services, namely, customer loyalty programs that provide hotel, restaurant, and bar benefits to reward repeat customers; arena services, namely, providing facilities for sports, concerts, conventions and exhibitions; providing travel agency services, namely, making reservations and bookings for temporary lodging, restaurants and meals (Class 43)
3,894,290	<p style="text-align: center;"><b>M IS FOR ME</b></p>	Casinos; Conducting and providing facilities for special events featuring casino and gaming contests and tournaments; Entertainment in the nature of theater productions; Entertainment in the nature of visual and audio performances, and musical, variety, news and comedy shows; Entertainment, namely, live music concerts; Health Club services, namely, providing equipment in the field of physical exercise; Night clubs; Providing facilities for recreation activities; Amusement arcades; Arranging for ticket

Registration Number	Mark	Goods/Services
		reservations for shows and other entertainment events (Class 41)
3,512,483	M IS FOR ME	Hotel services; Providing convention facilities (Class 43)
3,632,946		Restaurant services (Class 43)
3,667,648		Cocktail lounges; bar services (Class 43)
3,620,814		Hotel, restaurant and bar services; customer loyalty programs that provide hotel, restaurant, and bar benefits to reward repeat customers (Class 43)
3,620,816		Casino services; operation of a frequent casino players incentive program (Class 41)
3,896,121	M RESORT	Casinos; arranging for ticket reservations for shows and other entertainment events; amusement arcades; conducting and providing facilities for special events featuring casino and gaming contests and tournaments; entertainment in the nature of

Registration Number	Mark	Goods/Services
		visual and audio performances, and musical, variety, news and comedy shows; entertainment in the nature of theatre productions; entertainment, namely, live music concerts; health club services, namely providing equipment in the field of physical exercise; night clubs; providing facilities for recreation activities; special event planning. (Class 41)
3,896,122	<b>M RESORT</b>	Hotel, bar and restaurant services (Class 43)
3,977,752	<b>M RESORT</b>	Shirts, T-shirts (Class 25)

In an answer filed 14 April 2014 Empire denied any likelihood of confusion as between Empire’s mark, when used on the goods for which Empire seeks registration, and any of the sixteen LVGV registrations pleaded by LVGV as listed above.

**This Motion is Timely**

After the pleadings are closed, but within such time as not to delay the trial, any party to an *inter partes* proceeding before this Board may file a motion for judgment on the pleadings.<sup>2</sup>

In opposition proceedings such as this, the taking of testimonial depositions during the assigned testimony period corresponds to the trial in court litigation<sup>3</sup>, so the “trial” is deemed to

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<sup>2</sup> Fed. R. Civ. P. 12(c); Trademark Trial and Appeal Board Manual of Procedure, 3d Ed., Rev. 2, June 2013 (“TBMP”), § 504.

<sup>3</sup> *La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234 (Comm’r 1976).

commence with the opening of the first testimony period<sup>4</sup>. Hence, to be timely, a motion for judgment on the pleadings in an *inter partes* proceeding before this Board must be filed before the opening of the first testimony period. This motion is timely in that LVGV's testimony period in this proceeding does not open until 9 March 2015.

### **Applicable Law**

In deciding a motion for judgment on the pleadings, the Board considers the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board takes judicial notice.<sup>5</sup> The Board accepts all well pleaded factual allegations of the nonmoving party as true. Conclusions of law are not taken as admitted; all reasonable inferences from the pleadings are drawn in favor of the nonmoving party.<sup>6</sup>

Judgment on the pleadings is properly granted where there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment as a matter of law.<sup>7</sup>

In deciding likelihood of confusion, the applicable substantive law is *duPont*<sup>8</sup>. The thirteen *duPont* factors are well known. When there is evidence of record respecting any of the thirteen factors, it must be considered. In this situation, where Empire seeks partial judgment on the pleadings, the evidence consists of the pleadings alone, supplemented by any evidence of which the Board chooses to take judicial notice.

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<sup>4</sup> *Von Schorlemer v. Baron Herm. SchloremerWeikellerei GmbH*, 5 USPQ2d1376 (TTAB 1986).

<sup>5</sup> *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837 (TTAB 2009).

<sup>6</sup> *Von Schorlemer, supra*.

<sup>7</sup> *Internet Inc. v. Corporation for National Research Initiatives*, 38 USPQ2d 1435 (TTAB 1996); *DAK Industries Inc. v. Daiichi Kosho Co.*, 35 USPQ2d 1434 (TTAB 1995); *Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137 (TTAB 1990).

<sup>8</sup> *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357; 177 USPQ 563 (CCPA 1973).

If the Board finds, based on the pleadings, there to be an absence of likelihood of confusion as between Empire's mark and one or more of LVGV's marks, then judgment should be entered in favor of Empire as respecting that LVGV mark.

In applying *duPont*, no matter how similar marks are, or even if the marks are identical, for marks that do not qualify as "famous", dissimilarity of the respective goods or services and separation of the intended trade channels suffices to find absence of likelihood of confusion<sup>9</sup>. If the goods/services of the parties are such that the goods/services are not likely to be encountered by persons under circumstances that would lead to a mistaken belief that the goods/services of the respective parties originate from the same source, there is no likelihood of confusion<sup>10</sup> no matter what the marks. If the goods/services of the parties are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that the goods/services originate from the same source, then even if the marks are identical, confusion is not likely<sup>11</sup>.

### **Argument**

LVGV has asserted sixteen different federal trademark registrations in opposing Empire's stylized design mark. None of LVGV's registrations are in class 28, the class for which Empire seeks registration of Empire's stylized design mark. None of LVGV's sixteen registrations recite any of the goods for which Empire seeks registration.

Empire seeks judgment on the pleadings as respecting twelve of LVGV's sixteen pleaded registrations. Empire submits that in the case of each of the twelve LVGV registrations, the applicable *duPont* factors mandate judgment for Empire and against the twelve respective LVGV

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<sup>9</sup> *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012);

<sup>10</sup> *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986).

<sup>11</sup> *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004).

registrations. As a result, the respective LVGV registrations should be stricken from the record going forward.

The Board needs no extrinsic evidence to evaluate each LVGV registration vis-à-vis Empire' mark for similarity in appearance, sound and connotation, and whether the relevant goods or services are completely unrelated and would move in widely separated, disparate trade channels. Upon the Boarding finding such, it follows that there is no likelihood of confusion between Empire's mark and each of the twelve contested LVGV registrations, and that judgment on the pleadings should be entered against the LVGV registration(s).

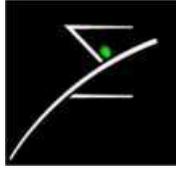
Each of the twelve LVGV registrations for which Empire solicits judgment on the pleadings is addressed below. Some of the registrations LVGV asserts are for identical marks. The LVGV registrations for identical marks have been grouped together in the following arguments. Empire's stylized design mark is presented below, adjacent to each of the LVGV marks for which Empire seeks judgment on the pleadings.<sup>12</sup>

**Judgment on the Pleadings Should be Entered  
Against LVGV's U.S. Registration 3, 667,648.**

No viable argument can be made that there is any appearance similarity as between Empire's design mark and LVGV's '648 registration mark. Here are the two marks:

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<sup>12</sup> In the Notice of Opposition, LVGV has asserted numerous wishful conclusions of law, none of which should be considered in the Board's evaluation of the instant Motion. Among these are LVGV's assertions that certain of LVGV's "M" marks are to "communicate personal relaxation and enjoyment to the consuming public", that certain of LVGV's "M" marks are "similar in sound, appearance and overall commercial impression" to Empire's mark; that LVGV has invested substantial time and resources to promote, advertise and reinforce its "M" marks; that "consumers have come to associate LVGV's "M" marks exclusively with LVGV's services" and the like. These conclusions of law, while in some cases cleverly disguised as factual pleadings, are nothing more than conclusions LVGV hopes the Board will adopt at the end of this proceeding. In deciding the instant matter, no weight or consideration should be given to those assertions as set forth in the Notice of Opposition.



Empire's mark is concededly a design mark, namely an encircled stylized letter "M." LVGV's '648 registration mark bears no resemblance to the letter "m" and looks more like the letter "e" in its stylization. Additionally, the circle around Empire's mark is clearly different from the blackened square background of the LVGV '648 registration mark. There is no similarity in appearance as between Empire's mark and LVGV's '648 registration mark.

As regarding sound similarity, the sound, if any, associated with LVGV's '648 registration mark would be that of the letter "e" or perhaps that of the Greek letter "sigma." Neither of these sounds at all like the sound one gets when pronouncing the letter "m." Accordingly, there is no similarity in sound as between Empire's mark and LVGV's '648 registration mark

Perhaps most telling as regarding absence of any likelihood of confusion as between these two marks is the description of LVGV's mark submitted in the course of prosecution of the application maturing into LVGV's '814 registration: "The mark consists of a dark square on which is centered a white stylized letter 'M' shown sideways; the middle of the mark features the representation of a green olive stuffed with a red pimento." From LVGV's description the only reasonable connotation for LVGV's '648 registration mark is that of a bar or consumption of an alcoholic beverage such as a martini. Contrasting, there is no connotation associated with Empire's mark.

LVGV's '648 registration recites "cocktail lounges; bar services" and is in international class 43. Contrasting, Empire seeks registration of Empire's mark (in international class 28) for

a wide variety of items such as “dolls”, “baby rattles”, “miniature toy cars”, “boats”, “trains”, “water pistols”, “spinning tops”, “molded toy figurines”, “beach balls”, and a collection of other amusement devices and sporting equipment. “Cocktail lounges” do not deal in or supply “water pistols”, “rubber balls”, “spinning tops”, “miniature toy cars”, “dolls”, or “baby rattles”, which are among the goods for which Empire seeks registration. “Water pistols”, “rubber balls”, “spinning tops”, “miniature toy cars”, “dolls”, “baby rattles”, and the remaining goods for which Empire seeks registration in international class 28 are unrelated to cocktail lounge and bar services and do not move in the same or even related trade channels as cocktail lounges and bar services. Cocktail lounges and bars do not sell baby rattles, beach balls, croquet mallets and balls, nor any of the other goods for which Empire seeks registration in class 28.

No viable argument can be made for the proposition that LVGV’s ‘648 registration is similar in appearance, in sound, or in connotation to Empire’s mark. No viable argument can be made for the proposition that the cocktail lounges and bar services of LVGV’s ‘648 registration are going to move in the same or related trade channels as Empire’s “dolls”, “baby rattles”, “water pistols”, “beach balls”, and the like. The conclusion is irrefutable: There is no possibility of likelihood of confusion as between LVGV’s ‘648 registration mark and Empire’s mark. Judgment should be entered on the pleadings against LVGV’s ‘648 registration.

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**Judgment on the Pleadings Should be Entered Against LVGV’s U.S. Registrations 3, 620,814 and 3,620,816.**

In the notice of opposition LVGV refers collectively to the sixteen registrations LVGV asserts against Empire as “the M marks.” LVGV’s notice of opposition makes much of the “M marks”, contending that LVGV’s M marks are valid and that LVGV’s M marks are inherently

distinctive when used in connection with LVGV's services. LVGV makes numerous additional assertions regarding LVGV's "M" marks, which by LVGV's definition in the notice of opposition include LVGV's U.S. registrations 3,620,814 and 3,620,816.

Here is LVGV's '814 and '816 mark on the left and Empire's mark on the right:



LVGV's '814 and '816 registrations are for the identical mark, but these are not "M" marks.<sup>13</sup> When LVGV described the '814 and '816 marks to the United States Patent and Trademark Office, LVGV stated in each case that "...The mark consists of the stylized *word* "imagine" over the word "rewards."” Hence, by LVGV's own admission, LVGV's '814 and '816 marks are not "M" marks.

It is an impossible stretch to assert that there is visual similarity between a mark consisting of the stylized word "imagine" over the word "rewards" and a mark consisting of a stylized "m" within a circle. There is no visual similarity as between LVGV's '814 and '816 marks and Empire's mark.

Respecting sound, it is well established that there is no correct or defined way to pronounce a trademark that is not a recognized word<sup>14</sup> (such as Empire's mark). LVGV's word mark consisting of "imagine" over the word "rewards" would be pronounced "imagine rewards." Contrasting, for purposes of this motion only Empire concedes that Empire's mark might be pronounced "em" or perhaps "em within a circle" or even perhaps "circle em" These

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<sup>13</sup> See LVGV's notice of opposition and the attachments thereto.

<sup>14</sup> *In re Belgrade Shoe Co.*, 411 F.2d 1352, 1353 (C.C.P.A. 1969)

pronunciations/sounds are highly dissimilar from “image rewards”; no reasonable person would find these competing marks similar in sound.

Respecting connotation, “imagine rewards” connotes imagining some type of a reward, just as the two words suggest. There is no connotation associated with Empire’s mark.

Regarding trade channels, LVGV’s ‘814 mark is for “hotel, restaurant and bar services; customer loyalty programs that provide hotel, restaurant and bar benefits to reward repeat customers”, and LVGV’s ‘816 mark is for “casino services; operation of a frequent casino player’s incentive program.”

Contrasting, Empire seeks registration of its mark for class 28 goods including “dolls”, “baby rattles”, “miniature toy cars, boats, trains, airplanes, rockets and spaceships”, and “molded toy figures”, as well as a variety of athletic and sports equipment. These products would not move in the same trade channels, nor be offered to the consumers and customers to whom LVGV’s hotel, restaurant and bar services, and loyalty programs that provide hotel, restaurant and bar benefits to reward repeat customers are directed, nor to LVGV’s customers that partake of LVGV’s “casino services” and operation of “a frequent casino player’s incentive program” as set forth in LVGV’s ‘814 and ‘816 registrations.

Given the distinct differences in appearance, sound, connotation, and trade channels as between LVGV’s ‘814 and ‘816 registrations, and Empire’s mark and Empire’s goods, judgment on the pleadings should be entered against LVGV’s ‘814 and ‘816 registrations.

**Judgment on the Pleadings Should be Entered  
Against LVGV's U.S. Registration 3, 632,946.**

As respecting visual similarity between LVGV's '946 registration and Empire's mark, one is hard pressed to find any element of visual similarity as between the two:



LVGV describes its '946 registration as “a stylized M over the word ‘café’.” For purposes of this Motion only, Empire concedes that LVGV's '946 mark includes a “stylized M.” In evaluating visual similarity, marks must be considered in their entireties. With this in mind, LVGV's mark visually is the letter “m” above the word “café.” Contrasting, there is no word associated with or forming a part of Empire's mark; Empire's mark consists of a stylized letter “m” surrounded by a circle. When considered in their entities, there is no similarity in appearance as between these two marks.

Respecting sound similarity, it is well established that there is no correct or defined way to pronounce a trademark (such as Empire's mark) that is not a recognized word.<sup>15</sup> The sound of LVGV's mark is “m café.” For purposes of this motion only Empire concedes that Empire's mark might be pronounced “em” or perhaps “em within a circle” or even perhaps “circle em” These pronunciations/sounds are certainly highly dissimilar from “m café”. No reasonable person would find these competing marks similar in sound.

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<sup>15</sup> *In re Belgrade Shoe Co., supra.*

The connotation of LVGV's mark is that of a bar or a café that serves alcoholic beverages. There is no connotation associated with Empire's mark.

LVGV's '946 registration is for "restaurant services" in class 43. Empire's mark is not for anything edible or anything associated with a restaurant or food service. Empire seeks registration of its mark in connection with a variety of goods in international class 28, notably "dolls", "baby rattles", "miniature toy cars", "boats, trains, airplanes, rockets and space ships" and "molded toy figurines", as well as some athletic and game equipment, such as "beach balls", "golf balls", "croquet mallets and balls", and the like. Empire's "dolls", "baby rattles", "beach balls", "croquet mallets", etc., are not going to be offered in the same or even related trade channels as the café restaurant services offered under the LVGV '946 registration mark.

There being no similarity in appearance, sound, connotation or trade channels as between the two marks, judgment on the pleadings should be entered against LVGV's '946 registration.

**Judgment on the Pleadings Should be Entered Against  
LVGV's U.S. Registrations 3,544,752; 3,627,974; 3,664,380; and 3,747,310**

The marks that are the subject of LVGV's U.S. registrations 3,544,752; 3,627,974; 3,664,380; and 3,747,310 are identical. During prosecution LVGV described each of the marks as follows: "The mark consists of a styled M above the words "Resort Spa Casino (separated by dots) above the word 'Las Vegas'."

Looking at LVGV's mark vis-à-vis Empire's mark immediately reveals lack of any visual similarity. Here are the competing marks:



Empire's "stylized m" is contained within a circle, LVGV's mark has an arguable stylized "m" (which Empire concedes for purposes of this Motion only), together with the word "resort", together with the word "spa", together with the word "casino", together with the geographic identifier "Las Vegas", together with separator dots. All of these disparate parts of the LVGV mark, when taken together, make the competing marks completely different in appearance. Presence of the words "resort·spa·casino" and the geographic designator "Las Vegas" takes the LVGV mark visually far, far afield from the Empire mark at issue.

Respecting sound, there is no correct or defined way to pronounce a trademark that is not a recognized word<sup>16</sup> (such as Empire's mark); the rule is clear that there is no set way to pronounce arbitrary design marks that are not recognized words. The pronunciation of the LVGV mark when one speaks is self-evident – "Stylized M Resort Spa Casino Las Vegas." Hence there is no aural similarity as between LVGV's mark and Empire's.

The connotation of LVGV's mark is established by the English language words forming a part of the mark, namely a resort, a spa, and a casino located in Las Vegas. There is no connotation associated with Empire's mark, consisting only of a single stylized letter "m" within a circle.

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<sup>16</sup> *In re Belgrade Shoe Co., supra.*

LVGV's '752 registration is for "hotel, bar and restaurant services." LVGV's '974 registration is for a wide panoply of entertainment-type services such as "casinos"; "arraigning for ticket reservations for shows and other entertainment events"; "entertainment in the nature of theatre productions" and the like. LVGV's '380 registration is for "babershops; beauty salons; health spa services, namely cosmetic body care services; massage; tennis salons." These services are to be contrasted with the goods for which Empire seeks registration in class 28, namely a variety of toys, and game and sports equipment including "dolls", "baby rattles", "miniature toy cars, boats, trains, airplanes, rockets, and space ships" and "molded toy figurines", etc. None of these would move in the same trade channels as casino services or arraigning for ticket reservations for shows and other entertainment events or the services of entertainment in the nature of theatre productions and the like, as recited in LVGV's '974 registration.

Similarly, the none of the goods for which Empire seeks registration in class 28, namely toys and games and sports equipment, including "dolls", "baby rattles", "miniature toy cars, boats, trains, airplanes, rockets and space ships", and "molded toy figurines" and the like, would move in the same trade channels as the "hotel, bar and restaurant services" recited in the LVGV's '752 registration.

Accordingly, there being no similarity in sound, appearance, or connotation, as between the LVGV registration mark and Empire's mark, and there being no relationship between the respective goods and services and the distinct different trade channels in which these goods and services would move, judgment on the pleadings should be entered against LVGV's opposition based on U.S. registrations 3,544,752, 3,627,974, and 3,664,380.

LVGV's '310 registration is for "caps; footwear; golf shirts; hats; jackets; pants; polo shirts; pull overs; robes; shirts; shorts; slippers; t-shirts; tank tops; and warm-up suits in international class 25. These goods are to be contrasted with the goods for which Empire seeks registration in class 28, namely toys and games, including "dolls", "baby rattles", "miniature toy cars, boats, trains, airplanes, rockets and spaceships", and "molded toy figurines." Caps, footwear, golf shirts and the like are not sold in toy stores. Similarly, toys such as dolls, baby rattles, miniature toy cars, boats, trains, airplanes, rockets and spaceships are not sold in apparel outlets. Accordingly, the trade channels within which Empire's goods for which Empire seeks registration of Empire's mark "M (stylized)" in class 28 are distinctly different and separated from the trade channels in which LVGV's '310 registration goods in class 25 would be sold. In light of the distinctness of the trade channels and the clear difference in appearance, sound and connotation of the LVGV '310 registration mark, vis-à-vis that of Empire's "M (stylized)" mark, there is no likelihood of confusion as between the two marks and judgment on the pleadings should be entered against LVGV's opposition based on U.S. registration 3,747,310.

**Judgment on the Pleadings Should be Entered Against  
LVGV's U.S. Registrations 3,512,483; 3,894,290 and 3,920,133.**

LVGV's registrations 3,513,483; 3,894,290; and 3,920,133 are all for the same mark, namely "M IS FOR ME." There is no appearance similarity between the LVGV mark and Empire's mark. Here are the two marks:

M IS FOR ME



The only thing in common between the two marks is the letter “M”, in an unstylized form in the LVGV word mark, and in a stylized encircled form in Empire’s design mark. Lacking anything more in common, there can be no finding of appearance similarity as between these two marks.

Concerning aural similarity, LVGV’s mark sounds just as one would pronounce it, namely “m is for me.” Contrasting, Empire’s mark has no sound at all or, at best and for purposes of this Motion only, perhaps the sound of “em within a circle.” One need only pronounce the LVGV mark, then consider the putative pronunciation of Empire’s mark, and the conclusion is clear – there is no aural similarity as between these two marks.

There is no connotation associated with Empire’s mark. The connotation of LVGV’s mark is very much in the observer’s mind and would depend on what one associated with the letter “m” (a martini? a milkshake?) as being for that particular person. There cannot be any similarity in connotation where one mark, namely Empire’s, has no connotation.

LVGV’s ‘483 registration of “M IS FOR ME” is for hotel services and providing convention facilities. Hotel services and providing convention facilities would not move in the same service trade channels as the class 28 goods for which Empire seeks registration of its mark, namely “dolls”, “baby rattles”, “miniature toy cars, boats, trains, airplanes, rocket and spaceships”, “molded toy figurines” and a variety of equipment used in playing various sports and games, such as golf clubs, golf balls, beach balls, croquet mallets, and the like. Certainly this Board should find that there is no commonality or relationship between the trade channels in which Empire’s Class 28 goods would move and the hotel services and providing convention facility services for which LVGV’s ‘483 “M IS FOR ME” registration services would be offered.

Regarding LVGV's '290 registration of "M IS FOR ME" much the same holds true. "Casinos", "conducting and providing facilities for special events, featuring casino and gaming contests and tournaments" and the like would not move in the same trade channels as Empire's "dolls", "baby rattles", etc. as noted above. Accordingly, the Board should reach the same conclusion – there is no likelihood of confusion as between LVGV's '290 registration and Empire's mark.

LVGV's '133 registration for "ME IS FOR ME" is for "restaurant, bar and catering services; cocktail lounges" and a variety of other services arguably ancillary thereto in class 43. Empire's baby rattles, etc. are not going to be sold in the same trade channels as those in which LVGV's catering services and cocktail lounge services are offered. Babies are not old enough to drink alcoholic beverages. Baby rattles and the like and toys for children do not move in the same trade channels as the trade channels, namely cocktail lounges, in which alcoholic beverages are offered and consumed.

There being no similarity in appearance, sound, connotation, or trade channels, this Board should enter judgment against LVGV's '133 registration for the mark "M IS FOR ME" as respecting the opposition brought against Empire's '471 application for Empire's design mark "M (stylized)" in class 28.

**Judgment on the Pleadings Should be Entered Against LVGV's U.S. Registration 3,977,752**

LVGV's registration 3,977,752 is for the mark "M RESORT." There is no appearance similarity between the LVGV mark and Empire's mark. Here are the two marks:

M RESORT



As with LVGV's '483; '290; and '133 registrations, the only thing in common between these two marks is the letter "m" in an unstylized format in the LVGV word mark and in a stylized and circled form in Empire's design mark. Lacking anything more in common between the two marks, there can be no finding of appearance similarity as between these marks. Word marks such as LVGV's '752 registration mark and design marks such as Empire's mark simply do not have any similarity in appearance.

Regarding aural or sound similarity, LVGV's '752 registration word mark sounds just as one would pronounce it, namely "m resort." Contrasting, as noted above, Empire's design mark has no sound at all. For purposes of this Motion only, Empire will concede that perhaps Empire's mark has the sound of "em within a circle", or perhaps "encircled m" or "circle me." One need only pronounce the LVGV mark, namely "m resort" and consider the putative pronunciation for Empire's design mark as speculated above, and the conclusion follows inexorably – there is no aural or sound similarity between these two marks.

There is no connotation associated with Empire's mark. As with the LVGV '483; '290; and '133 registrations, the connotation of LVGV's '752 registration word mark is very much in one's mind and would depend on what one associated with the letter "m" as being for some resort. There cannot be any *duPont* connotation similarity where one mark, namely Empire's, has no connotation.

LVGV's '752 registration for "M RESORT" is for "shirts and t-shirts in class 25."

Empire's baby rattles, toys and sporting goods are not likely to be sold in the same trade channels as LVGV's shirts and t-shirts. Persons interested in purchasing playing cards, dice, other play things and sporting articles such as "dolls", "baby rattles", "miniature toy cars" and the like are not inclined to be looking to purchase shirts or t-shirts. Toy stores simply do not carry t-shirts as a matter of course, just as apparel outlets do not sell dolls, baby rattles, games or sporting goods. Hence the trade channels in which the goods of the respective parties would move are different. There being no similarity in appearance, sound, connotation or trade channels, this Board should enter judgment against LVGV's '752 registration for Empire's design mark "M RESORT" as respecting the opposition brought against Empire's '471 application for the mark "M (stylized)" in class 28.

### **Empire's Prayer for Relief**

For the foregoing reasons, and on the basis of the authorities cited, Empire respectfully submits that judgment on the pleadings should be entered against LVGV's United States registrations 3,667,648; 3,620,814; 3,620,816; 3,632,946; 3,544,752; 3,627,974; 3,664,380; 3,747,310; 3,512,483; 3,894,290; 3,920,133; and 3,977,752.

Date: 15 September 2014

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**THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

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LVGV LLC	:	
	:	Opposition 91215246
	:	Opposer
v.	:	Application 85/736,471
	:	
Empire Resorts, Inc.	:	Mark: "M" (stylized)
	:	
	:	Applicant
	:	

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of Empire Resorts, Inc.'s Motion for Judgment on the Pleadings was served on Opposer's counsel on the date listed below by email, pursuant to an agreement between the parties, addressed as follows:

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Date: 15 September 2014

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