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

Proceeding	91220292
Party	Plaintiff Swatch AG (Swatch SA) (Swatch Ltd)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SWATCH AG (SWATCH SA)  
(SWATCH LTD.),

Opposer,

v.

THE SPARK AGENCY, INC.,

Applicant.

Mark: SWITCH

Opp. No.: 91,220,292

Serial No.: 86/267,771

**OPPOSER’S MOTION FOR SUMMARY JUDGMENT  
DISMISSING APPLICANT’S COUNTERCLAIM UNDER RULE 2.106(b)(2)(i)  
AND  
TO SUSTAIN THE OPPOSITION UNDER THE DOCTRINE OF RES JUDICATA**

Opposer and Counterclaim Respondent Swatch AG (Swatch SA) (Swatch Ltd.)

(“Swatch”) respectfully moves the Board for summary judgment: (1) dismissing Applicant The Spark Agency, Inc.’s (“Spark”) counterclaim; and (2) entering judgment on Swatch’s likelihood of confusion claim.

This is the second Opposition proceeding between these two parties. Spark waived its counterclaim that Swatch abandoned Registration No. 3,799,562 when Spark failed to plead this compulsory counterclaim in the first action. 37 C.F.R. § 2.106(b)(2)(i). This Opposition should also be sustained on res judicata grounds because the parties have already litigated the issue of likelihood of confusion. Spark has admitted that its marks in the two actions, SWITCH and SW:TCH, have the same commercial impression, calling it “exceedingly likely . . . that

consumers would perceive and pronounce Applicant's SW:TCH mark as 'switch.'" Res Judicata frees Swatch (and the Board) from the burden and expense of re-litigating these same issues.

### **A. Background**

On May 26, 2009, Swatch filed an Opposition ("First Action") against Spark's application no. 77/505,539 for the mark SW:TCH. During the First Action, Swatch, in support of its likelihood of confusion argument, plead its US Registration No. 3,799,562 ("562 Registration"). Swatch's '562 Registration is for the mark SWATCH for advertising agency services (among other goods and services). Spark chose not to file a counterclaim against Swatch's '562 Registration in the First Action. However, Spark, in its December 23, 2013 trial brief in the First Action, argued that Swatch does not use the SWATCH mark for the goods and services in the '562 Registration. Spark argued that Swatch "does not operate any advertising agencies in the United States" and "does not provide marketing and advertising services to third-parties under the SWATCH name outside of the various companies and subsidiaries that operate under [Swatch's] umbrella." Lindenbaum Decl. at Ex. A (Spark's Trial Brief), at 3 and 9. In support of its argument, Spark cited to the April 5, 2013 testimony of Swatch's witness, Mr. Franklin Furlan.

The Board sustained Swatch's Opposition in the First Action on October 1, 2014, finding that Spark's SW:TCH mark was confusingly similar to Swatch's SWATCH mark. Lindenbaum Decl. at Ex. B. Specifically, the Board found that Swatch's SWATCH mark is famous and that the marks SWATCH and SW:TCH were similar. The Board analyzed the limited ways that Spark's SW:TCH mark could be pronounced, including as SWITCH and SWATCH, and held

that the parties' respective marks, even if Spark's mark was pronounced as SWITCH, had strong similarities. *Id.* at 11-12.

Absent a counterclaim, the Board could not consider Spark's argument in the First Action that Swatch had not used its SWATCH mark for the goods and services identified in the '562 Registration. The Board correctly held that Spark "may not collaterally attack the validity of [Swatch's] registration in the absence of a counterclaim for cancellation." *Id.* at 9 (*citing*, Rule 2.106(b)(2)(ii)).

Turning to the similarities of the parties' services, the Board also held that Spark "does not argue that [Swatch's] advertising agencies are not related to its identified services," and that "the record shows that the services of the parties are closely related, and in some ways the same." *Id.* at 9-10. The Board found that the similarity of the parties' services supported a denial of Spark's application for registration. *Id.* at 9-10. Spark did not appeal the decision reached by the Board in the First Action.

On January 21, 2015, Swatch filed a Notice of Opposition against a different Spark application, Serial No. 86/267,771 ("771 Application) for the mark SWITCH ("Present Action"). The marks in the First Action and the Present Action are almost identical: SW:TCH versus SWITCH. The services are also identical in the two actions, except Spark has slightly expanded the application in the Present Action to also include: (a) "business to consumer events" in Class 35; and (b) "exhibits for business to business events, and exhibits for business to consumer events" in Class 40. Lindenbaum Decl. at Ex. C. When Spark filed its Answer to the Notice of Opposition on February 25, 2015, it included a counterclaim against Swatch's '562 Registration, alleging that Swatch has not used the SWATCH mark for the services identified in the '562 Registration, and has therefore abandoned these rights.

**B. Spark has Waived its Right to Counterclaim that Swatch Abandoned the ‘562 Registration Because it was an Unpleaded Compulsory Counterclaim in the First Action**

Spark’s counterclaim seeking to cancel Swatch’s ‘562 Registration on grounds of abandonment was a compulsory counterclaim in the First Action. Section 2.106(b)(2)(i) states:

A defense attacking the validity of any one or more of the registrations pleaded in the opposition shall be a compulsory counterclaim if grounds for such counterclaim exist at the time when the answer is filed. If grounds for a counterclaim are known to the applicant when the answer to the opposition is filed, the counterclaim shall be pleaded with or as part of the answer. If grounds for a counterclaim are learned during the course of the opposition proceeding, the counterclaim shall be pleaded promptly after the grounds therefor are learned.

37 C.F.R. § 2.106(b)(2)(i). Failing “to abide by the TTAB’s compulsory counterclaim rule bars subsequent assertion of a challenge to the validity of a registered mark before the TTAB or in federal court.” *Zawod v. SIA "Baltmark Invest"*, 2013 U.S. Dist. LEXIS 168317, \*21 (E.D. Va. 2013); *see also, Vitaline Corp. v. General Mills, Inc.*, 891 F.2d 273, 276 (Fed. Cir. 1989) (“the rule requiring the pleading of counter claims is clearly violated by an assertion of the abandonment theory, not as a counter claim in the original proceeding, but as a purportedly new claim in a separate proceeding”); *Libertyville Saddle Shop, Inc. v. E. Jeffries & Sons Ltd.*, 1992 TTAB LEXIS 47, 24 USPQ.2d 1376, 1379 (TTAB 1992).

The fact that Spark was aware of the grounds for its abandonment claim in the First Action is evidenced by Spark’s own arguments in the First Action. In its Trial Brief, Spark argued the same as it does here, namely:

[T]he “advertising agencies” for which Opposer’s SWATCH mark is registered (Reg. No. 3,799,562) are non-existent in the United States. Opposer provides nothing more than negotiation and coordination between third-party advertising agencies and various companies owned by The Swatch Group Limited or that otherwise fall under the Swatch Umbrella.

Lindenbaum Decl. at Ex. A at 3.

There is no evidence in the record that Opposer has actually used the mark SWATCH for “advertising agencies” in the United States.

*Id.* at 4.

Opposer has no use of the SWATCH mark in the United States in connection with many of the products and services listed in the [‘562] registration. Furlan Dep., 135:14-140:2.

*Id.* at 9.

[T]he record is crystal clear that Opposer does not operate any advertising agencies in the United States under the SWATCH name. Furlan Dep., 124:20-25, 127:11-25. Opposer also does not provide marketing and advertising services to third-parties under the SWATCH name outside of the various companies and subsidiaries that operate under Opposer’s umbrella. Furlan Dep., 131:7-12, 141:1-142:4.

*Id.* at 9.

In support of its arguments in the First Action that Swatch had abandoned the ‘562 Registration, Spark cites to the April 5, 2013 testimony of Frank Furlan. Lindenbaum Decl. ¶ 4 and Ex. D. Under Rule 2.106(b)(2)(i), “[i]f grounds for a counterclaim are learned during the course of the opposition proceeding, the counterclaim shall be pleaded promptly after the grounds therefor are learned.” 37 C.F.R. § 2.106(b)(2)(i). Thus, to preserve its rights, Spark needed to have pleaded this compulsory counterclaim of abandonment of the ‘562 registration promptly after it learned of the grounds during the April 5, 2013 testimony of Mr. Furlan. Instead, Spark waited until December 23, 2013 to first raise these arguments, and then only did so in its Trial Brief, without seeking to amend its pleading to add this compulsory counterclaim.

The Board has already found that by failing to plead a counterclaim challenging Swatch’s ‘562 Registration in the First Action, Spark waived its challenge of the registration. This case is

similar to *Libertyville Saddle*, where the Board held that “since petitioner knew then of the basis for the claim it now asserts[,] [i]ts failure to counterclaim then now serves as a bar to the instant action under Trademark Rule 2.106(b)(2). *Libertyville Saddle Shop, Inc.*, 1992 TTAB LEXIS 47, 24 USPQ.2d 1376, 1379; *Zawod*, 2013 U.S. Dist. LEXIS 168317, \*21 (affirming Board’s decision that the over two month delay in moving to amend pleading to allege abandonment was “not sufficiently prompt under the compulsory counterclaim rule”); *Vitaline Corp.*, 891 F.2d at 276.

By failing to promptly plead its counterclaim of abandonment against Swatch’s ‘562 Registration in the First Action, Spark has waived this compulsory counterclaim. Accordingly, Spark’s counterclaim in the Present Action must be dismissed.

### **C. Swatch’s Opposition Should be Sustained Under the Doctrine of Res Judicata**

Under “res judicata principles, a prior judgment between the same parties can preclude subsequent litigation on those matters actually and necessarily resolved in the first adjudication.” *Orca Yachts L.L.C. v. Mollicam, Inc.*, 287 F.3d 316, 318 (4th Cir. 2002). The “doctrine of res judicata encompasses two concepts: 1) claim preclusion and 2) issue preclusion, or collateral estoppel.” *Id.* The “rules of claim preclusion provide that if the later litigation arises from the same cause of action as the first, then the judgment in the prior action bars litigation not only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented.” *Id.* However, “issue preclusion is more narrowly drawn and applies when the later litigation arises from a different cause of action between the same parties.” *Id.* Issue preclusion “operates to bar subsequent litigation of those legal and factual issues common to both actions that were actually and necessarily determined by a court of competent jurisdiction in the first

litigation.” *Id.* Thus, “while issue preclusion applies only when an issue has been actually litigated, claim preclusion requires only a valid and final judgment.” *Id.* Swatch’s Opposition should be sustained under either claim preclusion or issue preclusion.

A “second suit will be barred by claim preclusion if: (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first.” *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000). Here, the parties in the First Action and the Present Action are the same. A final judgment on the merits was reached in the First Action, when the Board sustained Swatch’s opposition on the grounds of likelihood of confusion, and denied registration to Spark.

The remaining question is whether the claim in the Present Action is based on the same set of transactional facts as the first. In both cases, Swatch opposed Spark’s application on grounds of likelihood of confusion. The services in the Present Action are essentially identical to the services in the First Action. *GE v. Raychem Corp.*, 204 U.S.P.Q. 148, 150 (TTAB 1979) (“res judicata is applicable in such case, not only with respect to the identical description of goods as had been previously litigated, but with respect to all goods that could be said to be encompassed by that description of goods”); *Edom Labs., Inc. v. Lichter*, 2012 TTAB LEXIS 81, \*13-14, 102 USPQ.2d 1546, 1550 (TTAB 2012) (“We need not consider applicant's remaining goods because likelihood of confusion as to one of the products listed in applicant's description of goods in that class is sufficient to support a conclusion that the opposition should be sustained”); *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 2011 TTAB LEXIS 39, 98 USPQ.2d 1066, 1073 (TTAB 2011) (“a likelihood of confusion may be found with respect to a particular class based on any item within the identification of goods for that class”).

In “determining whether two opposition proceedings, against two applications, involve the same ‘claim’ for purposes of the claim preclusion doctrine, [this Board] has looked to whether the mark involved in the first proceeding is the same mark, in terms of commercial impression, as the mark involved in the second proceeding.” *Institut Nat’l Des Appellations D’Origine v. Brown-Forman Corp.*, 1998 TTAB LEXIS 122, \*65-69, 47 U.S.P.Q.2D 1875, 1894 (TTAB 1998).

Spark’s SW:TCH mark in the First Action conveys the same commercial impression as Spark’s SWITCH mark in the Present Action. Spark’s SW:TCH mark in the First Action uses negligible stylization to design the letter “i” to appear more as a colon. But even with this stylization, the mark is still viewed as the word “switch,” a point which Spark conceded in its trial brief when it argued that it is “exceeding likely . . . that consumers would perceive and pronounce Applicant’s SW:TCH mark as “switch.” Lindenbaum Decl., Ex. A at 7. Trying at the time to distance its mark from SWATCH (with a middle letter “A”), Spark argued that the “:” in the SW:TCH mark would be perceived by consumers as the letter ‘i’ and the mark as a whole seen as SWITCH:

consumers would be substantially more likely to substitute a lowercase letter ‘i’ in place of the colon rather than the letter ‘a.’ A colon unquestionably looks much more like an ‘i’ than an ‘a’ because a colon is skinny like a typical ‘i’ and both characters are comprised of two separate parts separated by a space. In addition, the dot above the ‘i’ is identical to the top dot in the colon.

*Id.*

Spark’s own marketing materials demonstrate that the two variations of the word convey the same thing, as its uses the two different spellings of SWITCH (SWITCH and SW:TCH) interchangeably:

## About Us



Switch Liberate Your Brand

Headquartered in St. Louis, MO with 110+ full time employees and 900+ field marketing employees, Switch is an independently-held, experiential marketing agency that works with companies, brands and products who share a belief in the power of engagement to drive behavior-changing results. Switch specializes in the design and execution of live events, field marketing, sponsor activation, digital media, exhibits and environments.

For more information, visit [www.liberateyourbrand.com](http://www.liberateyourbrand.com).

Client Services

Experiential

Digital

Design

Lindenbaum Decl. Ex. E.



*Id. see also*, Lindenbaum Decl. Ex. E at 20 (“We are doing business under the name Switch Liberate Your Brand . . . Switch Liberate your Brand spelled S-W-I-T-C-H”).

In the First Action, the Board already considered the commercial impression of both the SW:TCH and SWITCH marks. Specifically, the Board concluded that “there are only a few ways that Applicant’s mark can be pronounced . . . if the colon is pronounced as an “I,” SW:TCH is likely to be pronounced as ‘switch’ . . . [and] the difference in pronunciation

between ‘swatch’ and variations of ‘sw:tch’ is slight and both marks rhyme. This similarity in sound, as well as the similarity in appearance, reinforces the similarity in connotation and commercial impression.” Lindenbaum Decl. at Ex. B at 11-12.

Accordingly, the Board not only found that a likely pronunciation of SW:TCH is SWITCH, but it sustained the opposition because even if pronounced as SWITCH, the mark is confusingly similar to Swatch’s SWATCH mark.<sup>1</sup> Thus the likelihood of confusion between SWATCH and SWITCH has already been reviewed and analyzed by the Board for the same services at issue in the Present Action. Under both claim preclusion and issue preclusion, Judgment should be entered in the Present Action in favor of Swatch.

The slight difference in the stylized (or non-stylized) appearance of the letter “i” in the SWITCH (or SW:TCH) mark is not sufficient to create a different commercial impression. In refusing registration under the doctrine of res judicata, the Board in *Miller Brewing Co.* stated that it “does not wish to encourage losing parties to insignificantly modify their marks after an adverse ruling and thereby avoid the res judicata effect of the prior adjudication.” *Miller Brewing Co. v. Coy Int’l Corp.*, 1986 TTAB LEXIS 159, 230 USPQ 675 (TTAB 1986) (finding that new design which added the words “Cask No. 32” and additional sheaves of grain created “substantially the same commercial impression and the minor alternations do not rise to the level of a new mark sufficient, under the circumstances, to allow applicant to seek registration herein”); *see also, Virgin Enters. v. Holt’s Co.*, 2008 TTAB LEXIS 495 (TTAB 2008)(non-precedential)(removing certain words and design did not change commercial impression); *Morton Int’l, Inc. v. Asahi Denka Kogyo Kabushiki Kaisha*, 2001 TTAB LEXIS 820, 21-22 (TTAB 2001)(non-precedential)(“Applicant’s mark ADK STAB involved in the prior proceeding

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<sup>1</sup> The other core likelihood of confusion factors, including the fame of the SWATCH mark, and the similarity of the parties’ services were also fully litigated by the parties and resolved by the Board. Lindenbaum Decl. Ex B at 6-10. These factors should not be re-litigated.

and the mark ADKSTAB here are nearly identical and create very similar commercial impressions”); *Finck Cigar Co. v. El Duque Group, Inc.*, 2001 TTAB LEXIS 42, 10-11 (TTAB 2001)(non-precedential)(“ petitioner's marks ALAMO CIGARS and ALAMO create the same commercial impression).

#### **D. Conclusion**

Spark’s counterclaim of abandonment of the ‘562 registration was a compulsory counterclaim in the First Action. Spark waived this counterclaim by failing to promptly plead it in the First Action. Accordingly, Spark’s counterclaim should be dismissed. The Board should sustain this Opposition in favor of Swatch. The Parties already litigated the issue of likelihood of confusion in the First Action. The slight variation in the appearance of the letter ‘i’ in the marks SWITCH and SW:TCH does not change the overall commercial impression of the mark.

Respectfully submitted for Opposer,

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(SWATCH SA) (SWATCH LTD)*

Dated: March 13, 2015

SHOULD ANY OTHER FEE BE REQUIRED, THE PATENT AND TRADEMARK OFFICE IS HEREBY REQUESTED TO CHARGE SUCH FEE TO OUR DEPOSIT ACCOUNT 03-2465.



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

SWATCH AG (SWATCH SA)  
(SWATCH LTD.),

Opposer,

v.

THE SPARK AGENCY, INC.,

Applicant.

Mark: SWITCH

Opp. No.: 91,220,292

Serial No.: 86/267,771

**DECLARATION OF JEFFREY A. LINDENBAUM**

I, Jeffrey A. Lindenbaum, declare as follows:

1. I am a partner at the law firm Collen IP, counsel for the Opposer in the above-captioned action. I submit this declaration in support of Opposer's Motion for Summary Judgment.
2. Attached as **Exhibit A** is a true and correct copy of the Applicant's Trial Brief, as submitted to the Board on December 23, 2013, in Opposition No. 91,190,380.
3. Attached as **Exhibit B** is a true and correct copy of the Board's October 1, 2014 Decision, sustaining Opposition No. 91,190,380.
4. Attached as **Exhibit C** is a true and correct printout from the USPTO website showing the Applicant's application no. 77/505,539.

5. The deposition of Franklin Furlan was conducted on April 5, 2013. Counsel for Applicant attended and participated in the Furlan deposition on April 5, 2013. Attached as **Exhibit D** is the cover page from the Furlan deposition transcript, further evidencing the date upon which the deposition was conducted.

6. Attached as **Exhibit E** are true and correct copies of the Applicant's marketing materials that were introduced as exhibits during the Applicant's February 1, 2012 deposition in the First Action, as well as a true and correct portion of the Applicant's February 1, 2012 deposition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed March 13, 2015.

\_\_\_\_\_  
/Jeffrey A. Lindenbaum/  
Jeffrey A. Lindenbaum

EXHIBIT A

EXHIBIT A

ESTTA Tracking number: **ESTTA578574**

Filing date: **12/23/2013**

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

Proceeding	91190380
Party	Defendant The Spark Agency, Inc.
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Date	12/23/2013
Attachments	Spark Agency Trial Brief.pdf(41687 bytes )

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

Swatch AG (Swatch SA) (Swatch Ltd.) )  
Opposer, )  
v. ) Opposition No. 91190380  
The Spark Agency, Inc. )  
Applicant. )  
\_\_\_\_\_ )

**TRIAL BRIEF OF APPLICANT THE SPARK AGENCY, INC.**

Applicant The Spark Agency, Inc. hereby files this brief in support of its position that  
Opposer's Notice of Opposition against Application Serial No. 77/505539 should be dismissed  
with prejudice.

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGES</b>
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<i>Norton Company v. Bear Manufacturing Company,</i> 169 U.S.P.Q. 44 (C.C.P.A. 1971).....	5
<i>Recot Inc. v. M.C. Becton,</i> 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000).....	6

**I. PRELIMINARY STATEMENT**

Opposer is the owner of the trademark SWATCH. Applicant seeks registration of the trademark SW:TCH (pronounced “switch”). By ignoring common sense and speculating as to consumer behavior, Opposer attempts to convince the Board that Applicant’s mark is too similar in terms of appearance, sound, meaning, and commercial impression to coexist with Opposer’s mark on the Principal Register. However, as explained more fully below, the fact remains that Applicant’s SW:TCH mark and Opposer’s SWATCH mark are wholly distinct from one another.

Opposer also relies heavily on the alleged fame of its SWATCH mark among U.S. consumers. Although the evidence submitted by Opposer may indicate that the SWATCH mark is quite well-known for products and services related to watches and jewelry, Opposer utterly fails to demonstrate how such fame in the consumer fashion industry translates into fame in the corporate advertising agencies industry.

In addition, the “advertising agencies” for which Opposer’s SWATCH mark is registered (Reg. No. 3,799,562) are non-existent in the United States. Opposer provides nothing more than negotiation and coordination between third-party advertising agencies and various companies owned by The Swatch Group Limited or that otherwise fall under the Swatch umbrella.

Finally, contrary to the misleading statements in Opposer’s trial brief, Applicant did not adopt its SW:TCH mark in bad faith for use in connection with the advertising and marketing services outlined in its application.

In view of the above, Opposer’s Notice of Opposition should be dismissed with prejudice and Applicant’s application should be allowed for registration.

## **II. ISSUE PRESENTED FOR REVIEW**

Should the Board dismiss Opposer's opposition to the registration of Applicant's SW:TCH trademark with prejudice on the basis that Opposer has failed to prove that Applicant's mark is likely to cause confusion with Opposer's registered SWATCH trademarks?

## **III. DESCRIPTION OF THE RECORD**

Applicant adopts the Description of the Record set forth by Opposer in its trial brief.

## **IV. STATEMENT OF THE CASE**

Opposer is the owner of a number of federal registrations for the mark SWATCH. The vast majority of these registrations are for products and services related to watches and jewelry. Opposer is also the owner of U.S. Registration No. 3,799,562 for SWATCH for "advertising agencies" in International Class 35.<sup>1</sup> This registration is based on §44(e) and covers at least one hundred other products and services categorized in twenty international classes. There is no evidence in the record that Opposer has actually used the mark SWATCH for "advertising agencies" in the United States.

On June 23, 2008, Applicant filed an application under §1(a) for the mark SW:TCH (pronounced "switch") for the following services (Serial No. 77/505539):

Marketing and promotional services, namely, planning, conducting, and organizing mobile marketing exhibits, trade show exhibits, point of sale exhibits, and marketing displays for business meetings and business events for advertising purposes; Design of advertising multimedia presentations and themed graphics for use in marketing campaigns for others for trade shows, business meetings, and business to business events (International Class 35)

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<sup>1</sup> The underlying application was filed under §1(b) on December 13, 2002. On June 18, 2009, the USPTO granted Opposer's petition to convert the filing basis from §1(b) to §44(e).

Custom manufacture of mobile marketing exhibits and trade show exhibits (International Class 40)

Design and development of websites for others (International Class 42)

On May 26, 2009, Opposer filed a Notice of Opposition against Applicant's application on the basis of priority and likelihood of confusion with Opposer's registered SWATCH mark. Applicant seeks dismissal of Opposer's Notice of Opposition with prejudice since Opposer has failed to demonstrate a likelihood of confusion between its SWATCH mark and Applicant's SW:TCH mark.

## V. LEGAL ARGUMENT

In every case turning on likelihood of confusion, it is the duty of the Board to find, upon consideration of all the evidence, whether or not confusion appears likely. *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 568 (C.C.P.A. 1973). The Lanham Act refers to likelihood of confusion, not the mere possibility thereof. *Bongrain International (American) Corporation v. Delice de France Inc.*, 1 U.S.P.Q.2d 1775, 1779 (Fed. Cir. 1987). Mere possibility of confusion will not, under the law, prevent registration. *Norton Company v. Bear Manufacturing Company*, 169 U.S.P.Q. 44, 45 (C.C.P.A. 1971).

A likelihood of confusion determination is based on the Board's analysis of all of the probative facts in evidence relevant to the issue of likelihood of confusion (the *du Pont* factors). *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. at 567. "Not all of the *DuPont* factors may be relevant or of equal weight in a given case" and "any one of the factors may control a particular case." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003), citing *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1406, 41 U.S.P.Q.2d 1531, 1533 (Fed. Cir. 1997). Therefore, the Board may focus on the factors it finds dispositive. *See*

*Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 U.S.P.Q.2d 1557, 1559 (Fed. Cir. 2001), *citing In re Dixie*, 105 F.3d at 1406.

1. Applicant's SW:TCH Mark is Not Confusingly Similar to Opposer's SWATCH Mark When Compared in Their Entireties.

A determination of similarity or dissimilarity under *du Pont* requires an examination of the marks in their entireties. *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). A key issue is the similarity of the marks “as to appearance, sound, connotation, and commercial impression.” *In re Majestic Distilling Co., Inc.*, 65 U.S.P.Q.2d 1201, 1203 (Fed. Cir. 2003). All relevant facts pertaining to appearance, sound, and connotation must be taken into account. *Recot Inc. v. M.C. Becton*, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000).

With regard to appearance, Applicant does not dispute that its SW:TCH mark differs from Opposer's SWATCH mark by only a single character. However, Applicant strongly disagrees with Opposer's unsupported characterization of the colon in Applicant's SW:TCH mark as a “place holder for a missing letter.” Opposer's Brief, p. 9. The term “place holder” connotes that the colon refers to something that is irrelevant or unknown. There is absolutely no evidence in the record indicating that the colon is functioning as a place holder. Rather, the colon is an integral, unique, and distinctive visual portion of Applicant's SW:TCH mark that significantly differentiates it from Opposer's SWATCH mark.

Moreover, Opposer asserts that the colon in Applicant's mark is just as likely to be “replaced” with the letter “A” to form the SWATCH mark as it is to imply the letter “I.” Opposer's Brief, p. 9. As explained above, there is no evidence in the record that the colon is meant to be “replaced” with any letter. Moreover, Opposer's assertion is nothing more than pure speculation since Opposer has inexplicably failed to submit any empirical or survey evidence

tending to illustrate such consumer behavior. Nonetheless, common sense dictates that consumers would be substantially more likely to substitute a lowercase letter “i” in place of the colon rather than the letter “a.” A colon unquestionably looks much more like an “i” than an “a” because a colon is skinny like a typical “i” and both characters are comprised of two separate parts separated by a space. In addition, the dot above the “i” is identical to the top dot in the colon. It goes without saying that a colon and an “a” share no features whatsoever.

If common sense is indeed relevant to the issue of likelihood of confusion, then it quickly becomes apparent that the meaning, connotation, and commercial impressions of the marks at issue are wholly distinct from one another. SWATCH has no English language meaning, and seeing that the vast majority of Opposer’s products and services revolve around watches and jewelry, it is reasonable to assume that most consumers would perceive Opposer’s mark to merely consist of the generic word “watch” preceded by the letter “s.” On the other hand, in the exceedingly likely event that consumers would perceive and pronounce Applicant’s SW:TCH mark as “switch,”<sup>2</sup> the literal meaning and associated connotations of this common English language word have nothing to do with those of SWATCH.

Finally, there is no evidence in the record that Opposer has ever adopted, used, or applied to register SWATCH with a colon or other punctuation mark. As such, consumers would not be conditioned to seeing Opposer’s mark with punctuation and would tend not to associate Applicant’s SW:TCH mark with Opposer’s SWATCH mark.

In light of Opposer’s failure to demonstrate any meaningful similarities between its SWATCH mark and Applicant’s SW:TCH mark in terms of appearance, sound, meaning, or

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<sup>2</sup> In fact, Applicant is the owner of U.S. Registration No. 3,469,006 for SWITCH LIBERATE YOUR BRAND for services identical to those listed in its application for SW:TCH.

commercial impression, this *du Pont* factor weighs heavily in favor of dismissing Opposer's Notice of Opposition with prejudice.

2. Opposer's SWATCH Mark is Not Famous for "Advertising Agencies."

Opposer dedicates seven pages of its trial brief to arguing that its SWATCH mark is famous for purposes of a likelihood of confusion analysis. Opposer's Brief, pp. 14-20.

Although the facts and financial figures offered by Opposer certainly seem quite impressive at first glance, *none* of them have any relationship to the "advertising agencies" services for which Opposer's SWATCH mark is registered. *Id.* All of the information, data, financials, unsolicited media attention, and accolades provided by Opposer have solely to do with the advertising, marketing, promotion, sale, and distribution of watches and jewelry to the general public. *Id.* It would be a huge and unsubstantiated leap to attach Opposer's alleged fame in the consumer fashion industry to the completely unrelated corporate advertising agency industry. In other words, the Board should not automatically equate fame in one industry to fame in another industry, especially when no evidence has been presented as to the relationship between the industries and whether it is common for a single source to operate in both industries under the same trademark. Therefore, the Board should give Opposer's evidence of alleged fame no weight at all.

3. The Services Recited in Applicant's Application for SW:TCH are Unrelated to the Services Provided by Opposer.

Nearly all of the registrations owned by Opposer for the SWATCH mark are for products and services related to watches and jewelry. Nowhere in its trial brief does Opposer argue that the services recited in Applicant's application for SW:TCH are similar or related to any of these particular products and services. Rather, Opposer almost exclusively relies on its registration for SWATCH for "advertising agencies," in International Class 35 (Registration No. 3,799,562).

Applicant notes that Opposer's registration is based on §44(e) and encompasses at least one hundred other products and services in twenty international classes. Opposer has no use of the SWATCH mark in the United States in connection with many of the products and services listed in the registration. Furlan Dep., 135:14 – 140:2.

Although Applicant is aware that Opposer's registration is *prima facie* evidence of Opposer's ownership and use of the SWATCH mark in connection with the products and services recited in the registration, the record is crystal clear that Opposer does not operate any advertising agencies in the United States under the SWATCH name. Furlan Dep., 124:20-25, 127:11-25. Opposer also does not provide marketing and advertising services to third-parties under the SWATCH name outside of the various companies and subsidiaries that operate under Opposer's umbrella. Furlan Dep., 131:7-12, 141:1 - 142:4.

4. Applicant Did Not Adopt the SWATCH Mark in Bad-Faith.

Opposer argues that Applicant adopted its SWATCH mark in bad faith because it was aware of Opposer's SWATCH mark at the time of adoption. Opposer's Brief, p. 24. Opposer's statement is intentionally misleading to the Board since it fails to mention that Applicant was only aware of Opposer as a manufacturer and retailer of watches, not as an alleged advertising agency. Quigley Disc. Tr., 82:5-23. Therefore, the Board should completely disregard Opposer's "evidence" of bad faith in its entirety.

5. The Remaining *du Pont* Factors

Although Opposer addresses all of the other *du Pont* factors in its trial brief, there has been no direct evidence presented on any of them by either Opposer or Applicant. Therefore, the Board should consider these factors neutral.



**EXHIBIT B**

**EXHIBIT B**

**This Opinion is not a  
Precedent of the TTAB**

Oral Hearing: June 11, 2012

Mailed: October 1, 2014

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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*Swatch AG (Swatch SA) (Swatch Ltd.)*<sup>1</sup>

*v.*

*The Spark Agency, Inc.*

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Opposition No. 91190380

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Jess M. Collen and Jeffrey A. Lindenbaum of Collen IP for Swatch AG.

Annette P. Heller of Heller Associates for The Spark Agency, Inc.

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Before Zervas, Shaw, and Hightower, Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Applicant, The Spark Agency, Inc., filed a use-based application on the Principal Register to register the mark **SW:TCH**, in standard character form, for the following services:<sup>2</sup>

Marketing and promotional services, namely, planning, conducting, and organizing mobile marketing exhibits, trade show exhibits, point of sale exhibits, and marketing displays for business meetings and business events for advertising purposes; Design of advertising multimedia presentations and themed graphics for use in marketing

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<sup>1</sup> Opposer is a Swiss corporation. The parentheticals are part of its name.

<sup>2</sup> Serial No. 77505539, filed June 23, 2008. Applicant claimed dates of first use anywhere and dates of first use in commerce of at least as early as February 2008.

campaigns for others for trade shows, business meetings, and business to business events, in International Class 35;

Custom manufacture of mobile marketing exhibits and trade show exhibits, in International Class 40; and

Design and development of websites for others, in International Class 42.

Opposer, Swatch AG, opposed the registration of Applicant's mark on the grounds of priority and likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d).<sup>3</sup> Opposer pleaded ownership of ten SWATCH-formative registered marks for a variety of goods and services, including advertising agency services.<sup>4</sup>

Applicant admitted that Opposer owns its pleaded registrations and that some of them are incontestable, but denied the remaining allegations in the notice of opposition.

#### The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file. In addition, the parties introduced the following testimony and evidence:

- A. Status and title copies of Opposer's pleaded U.S. Trademark Registrations, submitted with Opposer's notice of reliance:

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<sup>3</sup> Opposer also asserted a claim of dilution in the Notice of Opposition. However, insofar as Opposer has not argued any dilution claim in its brief we find, in accordance with the Board's usual practice, that this claim has been waived. *See, e.g., Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

<sup>4</sup> Amended Notice of Opposition ¶ 3. Opposer amended its notice of opposition to remove Registration No. 3291129 which was cancelled during this proceeding and to add Registration No. 3799562 which matured into a registration during this proceeding. The Board approved the amendment to the notice of opposition on October 1, 2012.

1. SWATCH (stylized), Registration No. 1356512 for watches and parts thereof, in International Class 14;
2. SWATCH, Registration No. 1671076 for watches, clocks and parts thereof, in International Class 14;
3. SWATCH (stylized), Registration No. 1799862 for retail store services, namely, retail shops featuring watches, watch parts and watch accessories, in International Class 42;
4. SWATCH (stylized), Registration No. 1849657 for retail store services; namely, retail shops featuring, sunglasses and electronics, in International Class 42;
5. SWATCH, Registration No. 2752980 for jewelry, namely, earrings, necklaces, pendants, bracelets and rings, in International Class 14;
6. SWATCH (stylized), Registration No. 2050210 for books and periodicals, namely a series of books illustrating collectable articles; magazines for watch collectors, in International Class 16;
7. SWATCH, Registration No. 2100605 for pens, in International Class 16; suitcases, travel bags, handbags, umbrellas, in International Class 18; and non-metal keyholders, in International Class 20;
8. ISWATCH (stylized), Registration No. 3567953 for precious metals and their alloys, namely, white gold, yellow gold, pink gold, jewelry watches, precious stones, namely, diamond, sapphire, ruby, emerald, horological and chronometric instruments, namely, watch cases, chronographs, chronometers for use as watches, watches, watch movements, in International Class 14; retail store services in the field of horological instruments and jewellery, on-line retail store services in the field of horological instruments and jewellery, in International Class 35; and repair and maintenance of horological products and jewellery, in International Class 37;
9. ESWATCH (stylized), Registration No. 3554475 for precious metals and their alloys, namely, white gold, yellow gold, pink gold, jewelry watches, precious stones, namely, diamond, sapphire, ruby, emerald, horological and chronometric instruments, namely, watch cases, chronographs, chronometers for use as watches, watches, watch movements, in International Class 14; retail store services in the field of horological instruments and jewellery, on-line retail store services in the field of horological instruments and jewellery, in International Class 35; repair and maintenance of horological products and jewellery, in International Class 37; and

10. SWATCH, Registration No. 3799562 for, *inter alia*, management of business; advertising agencies; computer assisted processing of data derived from the timing of sporting activities for use in education, entertainment and publicity, in International Class 35.

B. The Trial Testimony of Opposer's witness, Frank Furlan, President, Swatch Group U.S. ("Furlan testimony") and related exhibits.

C. Portions of the Rule 30(b)(6) Discovery Deposition of Applicant's corporate representative, Kevin Quigley, Executive Vice President and co-owner ("Quigley deposition") and related exhibits, submitted by Opposer's Notice of Reliance.

D. The Trial Testimony of Kevin Quigley ("Quigley testimony") and related exhibits.

E. Applicant's responses to certain Interrogatories and Requests for Admissions propounded by Opposer, submitted with Opposer's Notice of Reliance.

F. Printed publications submitted with Opposer's Notice of Reliance.

G. Internet materials submitted with Opposer's Notice of Reliance.

#### Standing and Priority

Applicant does not dispute Opposer's standing or priority in the SWATCH marks. Opposer's standing to oppose registration of Applicant's mark is established by its pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's ownership of pleaded registration establishes standing). In addition, because Opposer's pleaded registrations are of record, priority is not an issue with respect to the goods and services covered by

Opposer's pleaded registrations. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). This is true even as to Opposer's registration that issued after Applicant's mark published of for opposition.

#### Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

We focus our analysis on Registration No. 3799562 for the mark SWATCH as the mark and the identified services are most similar to Applicant's mark and services. If confusion is likely between that mark and Applicant's mark, there is no need for us to consider the likelihood of confusion with Opposer's other SWATCH marks, while if there is no likelihood of confusion between Applicant's mark and the mark

in Registration No. 3799562, then there would be no likelihood of confusion with Opposer's other SWATCH marks. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. Fame of Opposer's Marks

We start our analysis with the fifth *du Pont* factor, the fame of SWATCH marks. Opposer argues that its SWATCH marks are famous and therefore are "entitled to the broadest possible scope of protection."<sup>5</sup>

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales and advertising expenditures of the goods and services identified by the marks at issue, "by the length of time those indicia of commercial awareness have been evident," by widespread critical assessments and notice by independent sources of the products identified by the marks, as well as by the general reputation of the products and services. *Bose Corp.*, 63 USPQ2d at 1305-06 and 1309.

Opposer has been selling its watches and jewelry under the SWATCH marks in the United States for over 30 years. Opposer's confidential sales and advertising

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<sup>5</sup> Reply Br. at 4.

figures, number of retail stores, extensive advertising in a variety of media, brand recognition by third parties, and prolonged and widespread consumer exposure to its marks are all significant and are sufficient to establish the fame of Opposer's SWATCH marks with respect to watches and jewelry. Applicant does not seriously contest the fame of Opposer's marks for watches and jewelry.<sup>6</sup>

Although Opposer offers a variety of other products and services under its SWATCH marks, virtually all of the advertisements and unsolicited articles produced by Opposer relate to Opposer's watches and jewelry. Applicant argues that the Board, therefore, should give Opposer's evidence of fame "no weight at all" inasmuch as there is no evidence that Opposer has established fame with respect to "advertising agencies."<sup>7</sup> In contrast, Opposer argues that the fame of its SWATCH mark "must be accorded its full weight regardless of the relatedness of the parties' goods and services."<sup>8</sup>

Fame is not an all-or-nothing proposition. "Fame for purposes of likelihood of confusion is a matter of degree that 'varies along a spectrum from very strong to very weak.'" *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012), quoting *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1375 (Fed. Cir. 2005). Moreover, fame does not create a right in gross in a mark regardless of the goods or services offered by a party. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 507

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<sup>6</sup> Applicant's Br. at 3.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Reply Br. at 1.

(Fed. Cir. 1983) (“It must also be established that there is a reasonable basis for the public to attribute the particular product or service of another to the source of the goods or services associated with the famous mark.”). We agree that Opposer has not shown SWATCH is famous for its advertising agencies. Nevertheless, the fame of the SWATCH marks for watches and jewelry casts a long shadow which may include other goods or services. *See Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992) (“A strong mark ... casts a long shadow which competitors must avoid.”). Here, Opposer’s registration of the SWATCH mark for advertising agencies and its use of the SWATCH marks in connection with a variety of goods and services support Opposer’s argument that there is a reasonable basis for the public to associate the advertising agencies with Opposer’s famous mark used on watches and jewelry. *See Notre Dame*, 217 USPQ at 507. Accordingly, we find that SWATCH is a strong mark when used in connection with Opposer’s advertising agency services. This *du Pont* factor favors a finding of likelihood of confusion.

## 2. Similarity or Dissimilarity of the Services

This *du Pont* factor requires us to determine the similarity or dissimilarity of the services as identified in Applicant’s application and in the cited registrations, respectively. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Opposer's services most similar to Applicant's services are "advertising agencies," in International Class 35. Applicant's services are identified as:

Marketing and promotional services, namely, planning, conducting, and organizing mobile marketing exhibits, trade show exhibits, point of sale exhibits, and marketing displays for business meetings and business events for advertising purposes; Design of advertising multimedia presentations and themed graphics for use in marketing campaigns for others for trade shows, business meetings, and business to business events, in International Class 35;

Custom manufacture of mobile marketing exhibits and trade show exhibits, in International Class 40; and

Design and development of websites for others, in International Class 42.

Applicant does not argue that advertising agencies are not related to its identified services, but instead argues that "Opposer has no use of the SWATCH mark in the United States in connection with many of the products and services listed in [Registration No. 3799562]."<sup>9</sup> This argument is unavailing. Applicant may not collaterally attack the validity of Opposer's registration in the absence of a counterclaim for cancellation. Trademark Rule 2.106(b)(2)(ii). See *Cosmetically Yours, Inc. v. Clairol, Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970) ("[I]n the absence of a counterclaim for cancellation ... it is not open to an applicant to prove abandonment of the opposer's registered mark."); *Nasdaq Stock Market, Inc. v. Antartica, S.R.L.*, 69 USPQ2d 1718, 1735 (TTAB 2003) ("The law, of course, is well settled that an applicant cannot collaterally attack opposer's registration in the absence of a counterclaim for cancellation."); *Edom Labs. Inc. v. Lichter*, 102

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<sup>9</sup> Applicant's Br. at 9.

USPQ2d 1546, 1549 n.6 (TTAB 2012) (Board will not consider collateral attack on the validity of Opposer's pleaded registration absent properly filed counterclaim). Accordingly, Applicant's argument relating to Opposer's use of the SWATCH mark for "advertising agencies" is given no further consideration.

The record shows that the services of the parties are closely related, and in some ways the same, in that they are all directed to advertising. Applicant's Executive Vice President, James Quigley, testified that Applicant is "a marketing, communication, advertising, [and] sales promotion agency" whose main businesses are "Sales promotion, advertising, digital advertising, out-of-home advertising, point-of-sale advertising, large consumer events.... Field sampling. Mobile marketing ... all focused on getting brands connected to their consumers."<sup>10</sup> Applicant's identification of services in Class 35 indicates that Applicant's "marketing and promotional services" are conducted "for advertising purposes." Applicant also identifies its "multimedia presentations and themed graphics" as "advertising." Similarly, the "custom manufacture of mobile marketing exhibits and trade show exhibits" in Class 40 and the "design and development of websites for others" in Class 42 both fall within the commonly understood purview of advertising agencies.<sup>11</sup> This *du Pont* factor favors a finding of likelihood of confusion.

### 3. Similarities or Dissimilarities of the Marks

Next, we consider the *du Pont* factor of the similarities or dissimilarities of the marks. We must compare the marks "in their entirety as to appearance, sound,

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<sup>10</sup> Quigley Testimony, pp. 8-9 (TTABVUE 35 pp. 11-12).

<sup>11</sup> *Id.*

connotation and commercial impression” to determine the similarity or dissimilarity between them. *Du Pont*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 101 USPQ2d at 1721, citing *Leading Jewelers Guild v. JLOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007).

Viewing the appearance of the marks in their entirety, we find them to be more similar than dissimilar. Both marks begin with the letters “SW” and end with the letters “TCH.” The only difference between the marks is the letter “A” in the middle of Opposer’s mark and a colon in the middle of Applicant’s mark. Applicant argues that the colon in its mark “is an integral, unique, and distinctive visual portion of Applicant’s SW:TCH mark that significantly differentiates it from Opposer’s SWATCH mark.”<sup>12</sup> But when the marks are spoken or pronounced, it is likely that the marks have a similar sound. We assume that each mark is susceptible to varying pronunciations; nevertheless, there are only a few ways that Applicant’s mark can be pronounced and all of them rhyme with SWATCH. See *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985) (“HUGGIES and DOUGIES sound much alike and actually rhyme....”). Thus, if the colon is pronounced as an “I,” SW:TCH is likely to be pronounced as “switch.” Alternatively, if the colon is pronounced as an “A” or not pronounced at all, SW:TCH is likely to be pronounced as “swatch.” In any case, the difference in pronunciation

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<sup>12</sup> Applicant’s Br. at 6.

between “swatch” and variations of “sw:tch” is slight and both marks rhyme. This similarity in sound, as well as the similarity in appearance, reinforces the similarity in connotation and commercial impression.

Considering the marks in their entirety, Applicant’s SW:TCH mark bears strong similarities to Opposer’s SWATCH mark, especially as to likely pronunciation. This *du Pont* factor regarding the similarities of the marks favors a finding of likelihood of confusion.

#### 4. Bad Faith

Opposer argues that Applicant adopted its applied-for mark in bad faith because it “was aware” of the SWATCH marks.<sup>13</sup> We disagree.

To show bad faith adoption of a mark, Opposer must establish that Applicant had more than mere knowledge of Opposer’s prior mark. *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 1565, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987) (“[A]n inference of ‘bad faith’ requires something more than mere knowledge of a prior similar mark.”). Here, the evidence does not show anything more than Applicant’s mere knowledge of Opposer’s mark. This is insufficient to show bad faith on Applicant’s part. The factor of Applicant’s intent therefore is neutral.

#### 5. Balancing the Factors

We have carefully considered all of the parties’ evidence and argument, including that which we have not specifically discussed. We find that Opposer enjoys significant renown in its pleaded SWATCH marks and that parties’ respective services are closely related. We further find that the parties’ marks share

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<sup>13</sup> Opposer’s Br. at 24.

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significant similarities. We therefore conclude that Applicant's registration of its SW:TCH mark for the identified services is likely cause confusion with Opposer's registered and previously used SWATCH marks.

**Decision:** The opposition is SUSTAINED and registration to Applicant is refused in Application No. 77505539.

EXHIBIT C

EXHIBIT C

Generated on: This page was generated by TSDR on 2015-03-09 15:08:44 EDT

Mark: SW:TCH

SW:TCH

US Serial Number: 77505539

Application Filing Date: Jun. 23, 2008

Register: Principal

Mark Type: Service Mark

Status: Abandoned after an inter partes decision by the Trademark Trial and Appeal Board. For further information, see TTABVue on the Trademark Trial and Appeal Board web page.

Status Date: Dec. 15, 2014

Publication Date: Nov. 25, 2008

Date Abandoned: Dec. 15, 2014

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## Mark Information

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Mark Literal Elements: SW:TCH

Standard Character Claim: Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type: 4 - STANDARD CHARACTER MARK

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## Goods and Services

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Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((...)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks \*..\* identify additional (new) wording in the goods/services.

**For:** Marketing and promotional services, namely, planning, conducting, and organizing mobile marketing exhibits, trade show exhibits, point of sale exhibits, and marketing displays for business meetings and business events for advertising purposes; Design of advertising multimedia presentations and themed graphics for use in marketing campaigns for others for trade shows, business meetings, and business to business events

International Class(es): 035 - Primary Class

U.S Class(es): 100, 101, 102

Class Status: ABANDONED

Basis: 1(a)

First Use: Feb. 2008

Use in Commerce: Feb. 2008

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**For:** Custom manufacture of mobile marketing exhibits and trade show exhibits

International Class(es): 040 - Primary Class

U.S Class(es): 100, 103, 106

Class Status: ABANDONED

Basis: 1(a)

First Use: Feb. 2008

Use in Commerce: Feb. 2008

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**For:** Design and development of websites for others

International Class(es): 042 - Primary Class

U.S Class(es): 100, 101

Class Status: ABANDONED

Basis: 1(a)

First Use: Feb. 2008

Use in Commerce: Feb. 2008

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## Basis Information (Case Level)

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Filed Use: Yes

Currently Use: Yes

Amended Use: No

Filed ITU: No

Currently ITU: No

Amended ITU: No

Filed 44D: No

Currently 44D: No

Amended 44D: No

Filed 44E: No

Currently 44E: No

Amended 44E: No

Filed 66A: No

Currently 66A: No

Filed No Basis: No

Currently No Basis: No

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## Current Owner(s) Information

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Owner Name: The Spark Agency, Inc.

Owner Address: 6600 Manchester  
St Louis, MISSOURI 63139  
UNITED STATES

Legal Entity Type: CORPORATION

State or Country Where Organized: DELAWARE

## Attorney/Correspondence Information

### Attorney of Record

Attorney Name: Annette P. Heller  
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Attorney Email Authorized: No

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Correspondent e-mail Authorized: Yes

### Domestic Representative - Not Found

## Prosecution History

Date	Description	Proceeding Number
Dec. 15, 2014	ABANDONMENT NOTICE MAILED - INTER PARTES DECISION	
Dec. 15, 2014	ABANDONMENT - AFTER INTER PARTES DECISION	
Dec. 15, 2014	OPPOSITION TERMINATED NO. 999999	190380
Oct. 01, 2014	OPPOSITION SUSTAINED NO. 999999	190380
Jun. 01, 2014	APPLICANT/CORRESPONDENCE CHANGES (NON-RESPONSIVE) ENTERED	88888
Jun. 01, 2014	TEAS CHANGE OF OWNER ADDRESS RECEIVED	
May 01, 2011	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
May 26, 2009	OPPOSITION INSTITUTED NO. 999999	190380
Dec. 24, 2008	EXTENSION OF TIME TO OPPOSE RECEIVED	
Nov. 25, 2008	PUBLISHED FOR OPPOSITION	
Nov. 05, 2008	NOTICE OF PUBLICATION	
Oct. 21, 2008	LAW OFFICE PUBLICATION REVIEW COMPLETED	78288
Oct. 20, 2008	ASSIGNED TO LIE	78288
Oct. 06, 2008	APPROVED FOR PUB - PRINCIPAL REGISTER	
Sep. 26, 2008	ASSIGNED TO EXAMINER	76625
Jun. 27, 2008	NOTICE OF PSEUDO MARK MAILED	
Jun. 26, 2008	NEW APPLICATION ENTERED IN TRAM	

## TM Staff and Location Information

### TM Staff Information

TM Attorney: SUAREZ, MARIA VICTORIA  
Law Office Assigned: LAW OFFICE 102

### File Location

Current Location: TTAB  
Date in Location: Dec. 15, 2014

## Proceedings

### Summary

Number of Proceedings: 2

### Type of Proceeding: Opposition

Proceeding Number: [91190380](#)  
Status: Terminated  
Filing Date: May 26, 2009  
Status Date: Dec 15, 2014

Interlocutory Attorney: ELIZABETH A DUNN

**Defendant**

**Name:** The Spark Agency, Inc.

**Correspondent Address:** ANNETTE P HELLER  
HELLER & ASSOCIATES  
400 CHESTERFIELD CENTER, SUITE 400  
CHESTERFIELD MO , 63017-5734  
UNITED STATES

**Correspondent e-mail:** [Tmattorneyheller@aol.com](mailto:Tmattorneyheller@aol.com) , [tmattorneyturek@aol.com](mailto:tmattorneyturek@aol.com)

**Associated marks**

Mark	Application Status	Serial Number	Registration Number
SW:TCH	Abandoned - After Inter-Partes Decision	<a href="#">77505539</a>	

**Plaintiff(s)**

**Name:** Swatch AG (Swatch SA) (Swatch Ltd.)

**Correspondent Address:** JEFFREY A LINDENBAUM  
COLLEN IP INTELLECTUAL PROPERTY LAW PC  
THE HOLYOKE MANHATTAN BUILDING, 80 SOUTH HIGHLAND AVENUE  
OSSINING NY , 10562  
UNITED STATES

**Correspondent e-mail:** [jlindenbaum@collenip.com](mailto:jlindenbaum@collenip.com) , [docket@collenip.com](mailto:docket@collenip.com)

**Associated marks**

Mark	Application Status	Serial Number	Registration Number
SWATCH	Renewed	<a href="#">73506848</a>	<a href="#">1356512</a>
SWATCH	Renewed	<a href="#">74079220</a>	<a href="#">1671076</a>
SWATCH	Renewed	<a href="#">74801004</a>	<a href="#">1799862</a>
SWATCH	Renewed	<a href="#">74248413</a>	<a href="#">1849657</a>
SWATCH	Renewed	<a href="#">78124477</a>	<a href="#">2752980</a>
SWATCH	Renewed	<a href="#">74641474</a>	<a href="#">2050210</a>
SWATCH	Renewed	<a href="#">74579325</a>	<a href="#">2100605</a>
ISWATCH	707	<a href="#">79053142</a>	<a href="#">3567953</a>
ESWATCH	707	<a href="#">79053143</a>	<a href="#">3554475</a>
SWATCH INDIVIDUAL STATEMENT	709	<a href="#">79022289</a>	<a href="#">3291129</a>

**Prosecution History**

Entry Number	History Text	Date	Due Date
1	FILED AND FEE	May 26, 2009	
2	NOTICE AND TRIAL DATES SENT; ANSWER DUE:	May 26, 2009	Jul 05, 2009
3	PENDING, INSTITUTED	May 26, 2009	
4	D MOT FOR EXT W/ CONSENT	Jun 19, 2009	
5	EXTENSION OF TIME GRANTED	Jun 19, 2009	
6	D MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Aug 26, 2009	
7	SUSPENDED	Aug 26, 2009	
8	D MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Dec 01, 2009	
9	SUSPENDED	Dec 01, 2009	
10	D MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Jan 25, 2010	
11	SUSPENDED	Jan 25, 2010	
12	D MOT FOR EXT W/ CONSENT	Mar 29, 2010	
13	EXTENSION OF TIME GRANTED	Mar 29, 2010	
14	ANSWER	May 25, 2010	
15	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Nov 19, 2010	
16	SUSPENDED	Nov 19, 2010	
17	P MOT FOR EXT W/ CONSENT	Jan 25, 2011	
18	EXTENSION OF TIME GRANTED	Jan 25, 2011	

19	P MOT FOR EXT W/ CONSENT	Mar 25, 2011
20	EXTENSION OF TIME GRANTED	Mar 28, 2011
21	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	May 26, 2011
22	SUSPENDED	May 26, 2011
23	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Aug 24, 2011
24	SUSPENDED	Aug 26, 2011
25	P MOT FOR EXT W/ CONSENT	Oct 21, 2011
26	EXTENSION OF TIME GRANTED	Oct 21, 2011
27	D CHANGE OF CORRESP ADDRESS	Oct 26, 2011
28	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Feb 07, 2012
29	SUSPENDED	Apr 12, 2012
30	P MOT TO AMEND PLEADING/AMENDED PLEADING	Apr 16, 2012
31	P MOT TO AMEND PLEADING/AMENDED PLEADING	Apr 16, 2012
32	D OPP/RESP TO MOTION	Apr 25, 2012
33	P REPLY IN SUPPORT OF MOTION	May 14, 2012
34	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Jun 04, 2012
35	P MOT FOR EXT W/ CONSENT	Jul 16, 2012
36	P NOTICE OF RELIANCE	Jul 19, 2012
37	SUSPENDED	Sep 04, 2012
38	PROCEEDINGS RESUMED	Oct 01, 2012
39	AMENDED ANSWER	Oct 09, 2012
40	STIPULATED PROTECTIVE ORDER	Nov 26, 2012
41	P MOT TO SUSP W/ CONSENT PEND SETTL NEGOTIATIONS	Dec 14, 2012
42	PROCEEDINGS RESUMED	Jan 17, 2013
43	STIPULATION CONFIRMING ACCEPTANCE OF P'S NOTICE OF RELIANCE FILED 7/19/12	Apr 05, 2013
44	STIPULATION AS TO FILING AND SEALING OF TESTIMONY DEPOSITION	Jun 03, 2013
45	D TESTIMONY	Jun 05, 2013
46	D EXHIBITS	Jun 21, 2013
47	D EXHIBITS	Jun 21, 2013
48	P TESTIMONY	Jul 19, 2013
49	P TESTIMONY	Jul 19, 2013
50	P TESTIMONY	Jul 19, 2013
51	P TESTIMONY	Jul 19, 2013
52	P TESTIMONY	Jul 19, 2013
53	P TESTIMONY	Jul 19, 2013
54	P CONFIDENTIAL TESTIMONY	Jul 19, 2013
55	TRIAL DATES REMAIN AS SET	Jul 30, 2013
56	P MOT FOR EXT W/ CONSENT	Aug 15, 2013
57	EXTENSION OF TIME GRANTED	Aug 21, 2013
58	P FINAL BRIEF: TM RULE 2.128	Oct 18, 2013
59	P CONFIDENTIAL FINAL BRIEF: TM RULE 2.128	Oct 18, 2013
60	D MOT FOR EXT W/ CONSENT	Nov 13, 2013
61	D FINAL BRIEF: TM RULE 2.128	Dec 23, 2013
62	P REPLY BRIEF OR REBUTTAL BRIEF ON COUNTERCLAIM: TM RULE 2.128	Jan 07, 2014
63	P CONFIDENTIAL REBUTTAL BRIEF	Jan 07, 2014
64	P REQ FOR ORAL HEARING	Jan 17, 2014
65	REQUEST FOR AN ORAL HEARING ACKNOWLEDGED	Feb 24, 2014
66	P CHANGE OF CORRESP ADDRESS	Feb 26, 2014

67	ORAL HEARING SCHEDULED	Apr 28, 2014
68	ORAL HEARING APPEARANCE RECORD	Jun 26, 2014
69	BD DECISION: SUSTAINED	Oct 01, 2014
70	TERMINATED	Dec 15, 2014

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**Type of Proceeding: Extension of Time**

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**Proceeding Number:** [77505539](#) **Filing Date:** Dec 24, 2008  
**Status:** Terminated **Status Date:** May 27, 2009

**Interlocutory Attorney:**

**Defendant**

**Name:** The Spark Agency, Inc.

**Correspondent Address:** ANNETTE P. HELLER  
HELLER & ASSOCIATES  
14323 S OUTER 40 STE 512S  
CHESTERFIELD MO , 63017-5734  
UNITED STATES

**Associated marks**

Mark	Application Status	Serial Number	Registration Number
SW:TCH	Abandoned - After Inter-Partes Decision	<a href="#">77505539</a>	

**Potential Opposer(s)**

**Name:** SWATCH AG (SWATCH SA) (SWATCH LTD)

**Correspondent Address:** Jess M. Collen  
Collen IP, Intellectual Property Law, P.C.  
The Holyoke-Manhattan Building, 80 South Highland Avenue  
Ossining NY , 10562  
UNITED STATES

**Correspondent e-mail:** [jcollen@collenip.com](mailto:jcollen@collenip.com) , [pmulhern@collenip.com](mailto:pmulhern@collenip.com) , [agiuriceo@collenip.com](mailto:agiuriceo@collenip.com)

**Associated marks**

Mark	Application Status	Serial Number	Registration Number
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**Prosecution History**

Entry Number	History Text	Date	Due Date
1	INCOMING - EXT TIME TO OPPOSE FILED	Dec 24, 2008	
2	EXTENSION OF TIME GRANTED	Dec 24, 2008	
3	INCOMING - EXT TIME TO OPPOSE FILED	Mar 23, 2009	
4	EXTENSION OF TIME GRANTED	Mar 23, 2009	

EXHIBIT D

EXHIBIT D

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

-----X  
SWATCH AG (SWATCH SA)  
(SWATCH LTD.),

Opposer,

-against-

THE SPARK AGENCY,

Applicant.

-----X

NON-CONFIDENTIAL PORTION

DEPOSITION OF FRANKLIN J. FURLAN  
APRIL 5, 2013  
NEW YORK, NEW YORK

Reported by:  
Angela Castoro

EXHIBIT E

EXHIBIT E

# About Us



## Switch Liberate Your Brand

Headquartered in St. Louis, MO with 110+ full time employees and 900+ field marketing employees, Switch is an independently-held, experiential marketing agency that works with companies, brands and products who share a belief in the power of engagement to drive behavior-changing results. Switch specializes in the design and execution of live events, field marketing, sponsor activation, digital media, exhibits and environments.

For more information, visit [www.liberateyourbrand.com](http://www.liberateyourbrand.com).

## Client Services

### Experiential

field marketing + sampling  
event design  
business meetings  
brand + sponsor activation  
trade shows

### Digital

strategy  
social media  
web + interactive  
motion graphics  
video production

### Design

sales promotion  
spatial design  
POS/POP  
3D

## Client Expertise



## Management Team

**John Nickel**  
President

**Kevin Quigley**  
Executive Vice President

**Mike O'Neill**  
CEO

**Julie Suntrup**  
SVP, Agency Marketing +  
Business Development

**Terry Hobbs**  
SVP, Production Operations

**Eduardo Nieuwenhuyzen**  
Sr. Director, Visual +  
Dimensional Design

**Annie Castellano**  
Chief Creative Officer

**John Lubus**  
VP, Finance

**Shelley Hibdon**  
Director, Human Resources

## Contact Us

### Location

Switch  
6600 Manchester Ave  
Saint Louis, MO 63139  
314.206.7700

### Employment

[employment@theswitch.us](mailto:employment@theswitch.us)

### Business Inquiries

[switch@theswitch.us](mailto:switch@theswitch.us)

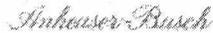
### Online

[liberateyourbrand.com](http://liberateyourbrand.com)  
[liberateyourbrand.com/blog](http://liberateyourbrand.com/blog)  
[twitter.com/liberate](https://twitter.com/liberate)  
[facebook.com/liberateyourbrand](https://facebook.com/liberateyourbrand)





vitaminwater  
NATIONWIDE SAMPLING PROGRAM



SWITCH: AN INDEPENDENTLY-HELD AGENCY DRIVING PRODUCTS & BRANDS FROM CONSIDERATION TO PURCHASE THROUGH **CONSUMER EVENTS**

GET THE FACTS

BEVERAGE

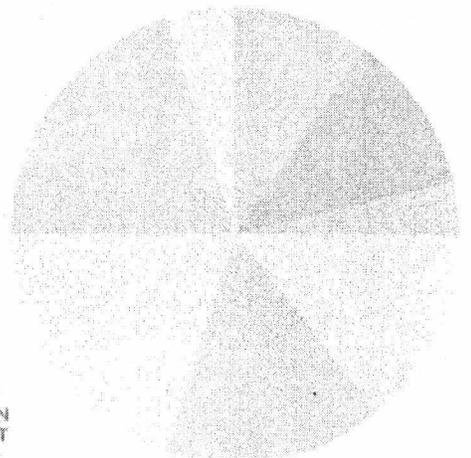
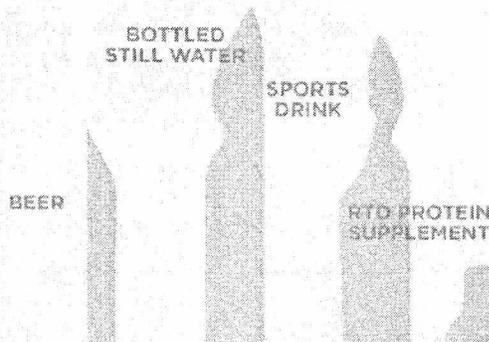
FIELD ACTIVATION

SAMPLING

SOCIAL

STRATEGY

The average person in the United States consumes 686 bottled/canned beverages in a year ... we're quite the thirsty bunch! Also worth noting, the three most rapid growing CPG categories are beverages. At Switch, we're fortunate to work with a few of the most iconic and recognized beverage brands in the world, here's a taste...



Blumberg No. 5119  
PLAINTIFF'S EXHIBIT  
13

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

SWATCH AG (SWATCH SA)	)	
(SWATCH LTD.,)	)	
	)	
OPPOSER,	)	
	)	
vs.	)	MARK: SW:TCH
	)	OPP. NO. 91190380
THE SPARK AGENCY, INC.,	)	SERIAL NO.: 77/505,539
	)	
APPLICANT.	)	

DEPOSITION OF KEVIN QUIGLEY  
CONTAINS NON-ATTORNEYS' EYES ONLY PORTIONS  
TAKEN BY JEFFREY LINDENBAUM, ESQ.  
ON BEHALF OF THE OPPOSER  
FEBRUARY 1, 2012

REPORTED BY CINDY J. TAYLOR, CCR, CSR, RPR  
CCR NO. 552  
CSR NO. 084.003874



Toll Free: 800.211.DEPO  
Facsimile: 212.557.5972  
1384 Broadway - 19th Floor  
New York, NY 10118  
www.esquiresolutions.com

1 Creative Service Corp name?

2 A. Correct.

3 Q. Okay. And you came up with a new name  
4 for the company?

5 A. Yes.

6 Q. And what was that name?

7 A. The Spark Agency, Inc.

8 Q. Okay. And that's still the name of the  
9 company today?

10 A. That's the legal name of the company.

11 Q. Okay.

12 A. We are doing business under the name  
13 Switch Liberate your Brand?

14 Q. Switch Liberate your Brand spelled  
15 S-W-I-T-C-H?

16 A. Correct.

17 Q. Okay. Can you describe what the Spark  
18 Agency does?

19 A. We continue to do business meetings.  
20 We continue to do temporary point of sale, sales  
21 promotion. We also do mobile design and operations.  
22 And these are all services that we provide our  
23 corporate clients. We produce digital media,  
24 including websites interactive kiosks. I'm trying to  
25 think of -- I'm going down the line. Mobile field

