

ESTTA Tracking number: **ESTTA601596**

Filing date: **04/30/2014**

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

Proceeding	92052150
Party	Defendant Patrick Gilles AKA Wonderbread 5 and/or Wonderbread Five
Correspondence Address	MATTHEW H SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVENUE WEST, SUITE 151 VIENNA, VA 22180 UNITED STATES mswyers@TheTrademarkCompany.com
Submission	Brief on Merits for Defendant
Filer's Name	Matthew Swyers
Filer's e-mail	mswyers@TheTrademarkCompany.com
Signature	/Matthew H. Swyers/
Date	04/30/2014
Attachments	Trial Brief of the Registrant.pdf(417057 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Trademark Registration No. 3,691,948.
For the mark WONDERBREAD 5,

Wonderbread 5,	:	
	:	
Petitioner,	:	
	:	
	:	Cancellation No. 92052150
vs.	:	
	:	
Gilles, Patrick,	:	
	:	
Registrant.	:	

TRIAL BRIEF OF REGISTRANT PATRICK GILLES

THE TRADEMARK COMPANY, PLLC
Matthew H. Swyers, Esq.
344 Maple Avenue West, PMB 151
Vienna, VA 22180
Tel. (800) 906-8626
Facsimile (270) 477-4574
mswyers@TheTrademarkCompany.com
Counsel for Registrant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
PRELIMINARY STATEMENT.....	5
THE RECORD BEFORE THE BOARD.....	6
OPPOSITION TO MOTION TO STRIKE	7
STATEMENT OF FACTS.....	9
A. Patrick Gilles and Jeff Fletcher Create a Partnership for a Band	9
B. The Selection of the Name Wonderbread 5.....	11
C. The Early Years.....	11
D. Jay Siegan Presents Becomes the Band’s Booking Agent.....	13
E. Bookings and Growth under Jay Siegan.....	14
F. Pat Gilles’s Management of the Band.....	14
G. A Split Develops between Patrick Gilles and Jeff Fletcher.....	15
H. Patrick Gilles is Forced Not to Perform with the Band.....	16
I. Patrick Gilles Registers His Service Mark.....	18
J. The San Francisco Lawsuit.....	18
K. Petitioner’s Continued Infringement upon Patrick Gilles’ Rights.....	19
ARGUMENT.....	19
A. Petitioner Has Failed to Identify Itself Sufficiently to Establish Standing in this Matter.....	20
B. Mr. Gilles and Mr. Fletcher Formed a Partnership to Perform Under the Service Mark WONDERBREAD 5.....	23
C. Robi v. Reed is Not Applicable to the Instant Matter.....	27
D. Credibility and Relevance of the Witnesses.....	28
a. Fraser Lunney & Clay Bell.....	29
b. Jay Siegan.....	29
c. Tommy Rickard.....	38
d. Jeff Fletcher.....	39
E. Mr. Gilles’s Rights Were Not Purchased by the Petitioner	41
F. Mr. Gilles Did Not Commit Fraud on the U.S. Patent and Trademark Office....	42
G. Mr. Gilles Has Not Abandoned his Trademark.....	43
CONCLUSION.....	44

TABLE OF AUTHORITIES

Cases

Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002).....	19
Clinton Detergent Co. v. Procter & Gamble Co., 302 F.2d 745, 49 C.C.P.A. 1146, 1962 Dec. Comm'r Pat. 368, 133 USPQ 520, 522 (CCPA 1962)	20
Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).....	20
First International Services Corp. v. Chuckles Inc., 5 USPQ2d 1628 (TTAB 1988).....	20
Huer v. Dannenhoffer, 82 N.Y. 499.....	25, 28
Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).....	21, 23
Medinol Ltd. v. Neuro Vasx Inc., 67 USPQ2d 1205 (TTAB 2003).....	20
Menendez v. Holt, 128 U.S. 514 (U.S. 1888).....	25, 28
Mister Leonard Inc. v. Jacques Leonard Couture Inc., 23 USPQ2d 1064 (TTAB 1992).....	20
Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999).....	20
Robi v. Reed, 173 F.3d 736 (9 th Cir. 1999).....	27, 28
Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833 (Fed. Cir. 1982).....	19
Smith International Inc. v. Olin Corp., 209 USPQ 1033 (TTAB 1981).....	20
Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha, 186 Fed. Appx. 1005, 77 USPQ2d 1917 (TTAB 2006).....	20
Taylor v. Bothin, 5 Sawyer, 584.....	25, 28
Torres v. Cantine Torresella S.r.L., 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986).....	20
Weston v. Ketcham, 39 N.Y. Superior Ct. (7 Jones & Spencer) 54.....	25, 28
Wright v. Simpson, 15 Off. Gaz. 968.....	25, 28
Young v. Jones, 3 Hughes, 274.....	25, 28

Statutes, Cases, and Codes

§ 16101 Ca. Corp. Code.	23
§ 16102 Ca. Corp. Code.	23
CAL. LAB. CODE § 1700.4 (West 1989).....	30
TBMP § 309.03(b).....	20
TBMP § 702.01.....	7

PRELIMINARY STATEMENT

In 1996 Patrick Gilles and Jeffrey Fletcher created a partnership to form a Jackson 5 cover band in the greater San Francisco area. They formulated the concept, developed the idea, and then invited other musicians to perform with the band. Mr. Gilles and Mr. Fletcher managed the band from the onset. The band practiced in a studio built in Mr. Gilles's house and all performances for the first two years were as a result of either Mr. Fletcher or Mr. Gilles booking the band for the same.

In 1998 the band hired Jay Siegan Presents to promote the band. Under Mr. Siegan's booking agent capacity, he quickly grew the popularity of the band to the point where the extra time commitments in conjunction with outside family commitments of the performers began placing a strain on the same. During the early to mid-2000s Mr. Gilles wanted to continue to grow the band and book more and more performances. Mr. Fletcher, as well as other performers in the band, many of whom were dealing with significant lifestyle changes in their personal lives, were content with current size and state of the band. These opposite views created friction between Mr. Fletcher and Mr. Gilles, friction that would ultimately lead to the band forcing Mr. Gilles, under threat of violence, to never again show up to play with the band he and Mr. Fletcher had created, owned, and operated.

Rather than to use the barbarian-like tactics of Mr. Fletcher and the other musicians, Mr. Gilles sought protection using the state and federal laws applicable to his situation. Specifically, as one of two founding partners of the band Mr. Gilles sought and received the instant registration from the U.S. Patent and Trademark Office recognizing his rights in the name.

Mr. Gilles also sued the instant Petitioners in San Francisco seeking payment for his significant lost wages. The lawsuit never mentioned the intellectual property of the band nor did it seek any retribution therefore. It merely sought his lost wages. To resolve the lost wage

claim, Petitioners compensated Mr. Gilles in the sum of \$30,000. Of note, this did not affect any transfer of Mr. Gilles's intellectual property rights to the name at issue.

Upon learning of Mr. Gilles's federally registered service mark, the Petitioners moved to cancel the same on multiple grounds. Many of those grounds have been disposed of or otherwise viewed by the Board in previous unsuccessful motions by the Petitioner.

At issue in the instant proceeding is whether the Petitioners, a loosely identified and defined group of original and replacement musicians in the band, along with their booking agent, can claim superior rights to a band Mr. Gilles founded with one other remaining individual wherein Mr. Gilles did not leave voluntarily but was forced never again to return to the band and perform.

THE RECORD BEFORE THE BOARD

The record before the Board includes the testimonial depositions of six witnesses and one notice of reliance as set forth below:

Trial Testimony

<u>Witness</u>	<u>Title</u>	<u>Date</u>
1. Clay Bell	Former Substitute Musician, Wonderbread 5	09/25/2013
2. Fraser Lunney	Former Substitute Musician, Wonderbread 5	09/25/2013
3. Stephenson Brooks	Former Musician, Wonderbread 5	09/25/2013
4. Tommy Rickard	Musician, Wonderbread 5	09/26/2013
5. Jay Siegan	Booking Agent, Wonderbread 5	10/08/2013
6. Patrick Gilles	Founder, Wonderbread 5	12/11/2013

Notice of Reliance

<u>Submitting Party</u>	<u>Title</u>	<u>Filed</u>
Petitioner	Petitioner's Notice of Reliance	10/17/2013

OPPOSITION TO MOTION TO STRIKE TESTIMONY AND EXHIBITS

As a threshold issue, counsel for Petitioner has set forth a very minimal argument requesting the Board “disregard Registrant’s Testimony Deposition” based upon the allegation that Registrant’s pre-trial disclosures were never effectively served. Petitioner’s Main Brief on the Case at p. 2. See also Exhibit A to Petitioner’s Main Brief on the Case.

Even assuming that said service was not received by Petitioner’s counsel’s office, as there has been no affidavit or other evidence to attest to this fact, Petitioner seeks a remedy that is far too harsh when, if it truly believed that it had not received Registrant’s pre-trial disclosures prior to the deposition of Mr. Gilles, a remedy within TBMP § 702.01 in the nature of a request for an extension of time or otherwise would be appropriate. To strike the Registrant’s entire testimony on an assumption that Petitioner’s counsel did not receive Registrant’s pre-trial disclosures is simply not warranted in this case.

Moreover, given the proximity of respective the office of the respective counsel, Petitioner’s counsel was consulted and agreed to a specific date to hold the deposition of Mr. Gilles. Specifically, the deposition of Mr. Gilles was, in fact, held in Petitioner’s counsel’s office by consent and arrangement of all parties. See Deposition of Patrick Gilles dated December 11, 2014.

It is thus submitted that Petitioner’s motion seeks too harsh of a remedy given the facts in this case. First, the pre-trial disclosures were served. Second, Petitioner never states that they were not received, just that they had an old address thereon. Third, despite these issues, Petitioner and Registrant’s counsel worked together to find a time for the deposition with Petitioner’s counsel even graciously offering to host the same.

In short, striking the testimony of Mr. Gilles on this record cannot be justified. If counsel needed additional time to prepare and they truly felt prejudiced by these alleged inadequacies an extension would have gladly been agreed to. However, as the history of this case has shown, counsel for the Petitioner would rather attempt to create larger issues than are warranted when notice was properly served.

Additionally, counsel for Petitioner has provided a chart of evidence it believes should be excluded under the theory that (1) it was not properly identified in Registrant's pre-trial disclosures or (2) was not provided in discovery.

In regard to the first objection, all of these documents were submitted during discovery. To the extent Registrant does not believe they were adequately identified in pretrial disclosures exclusion of the same is far too harsh of a remedy at this juncture. Especially where many, if not all, of the documents sought to be excluded were already put into evidence by and through Petitioner's witnesses themselves.

In regard to Petitioner's objection as to Registrant's alleged failure to produce certain documents, the same were not responsive to discovery requests nor has a record been made to the alternative. As the need for the same was only created during Petitioner's witnesses' testimony, the use of the same is permissible, as argued during the respective depositions, under the rules governing rebuttal evidence.

For this reason, it is requested that the Board not strike the testimony of the Registrant in the instant matter nor the documents used during Registrant's trial deposition.

STATEMENT OF FACTS

A. Patrick Gilles and Jeff Fletcher Form A Partnership for the Wonderbread 5

In 1996 Patrick Gilles was the lead singer and guitarist for the band the Fabulous Flesh Weapons. Trial Deposition of Patrick Gilles dated December 11, 2013 (hereinafter “Gilles Depo.”) at pp 12-13. The Fabulous Flesh Weapons was a cover band that played in and around the San Francisco Bay area from roughly 1988 through 1996. See *id.* The band covered songs from all genres of music including rock, disco, country and even some from The Jackson 5. *Id.* Mr. Gilles was the primary song writer for the Fabulous Flesh Weapons and was also responsible for booking 80 percent of their shows as well as handling the finances of the band. *Id.* at pp. 13-14.

In 1996 Jeff Fletcher¹ was in a cover band called OBGYN. Gilles Depo. at p. 14. Mr. Fletcher was the drummer for OBGYN. *Id.* Mr. Fletcher frequented many of the Fabulous Flesh Weapons’s shows in the San Francisco area. *Id.* at p. 15. From time-to-time, he would join the Fabulous Flesh Weapons on stage to sing specific songs. *Id.* Specifically, the Fabulous Flesh Weapons frequently performed at a club known as the Faultline in San Rafael, California. *Id.* at p. 16. Mr. Fletcher would sing Journey and other highly specialized vocal songs with the Fabulous Flesh Weapons as he had a uniquely high voice with accompanying falsetto. *Id.* at pp. 15-16. As a result, Mr. Gilles and Mr. Fletcher became friends. *Id.* at p. 16.

As things wound down with the Fabulous Flesh Weapons and it became apparent the band would soon be ceasing operations. In that regard, one night at the Faultline Mr. Gilles and Mr. Fletcher began discussing forming a band to perform Jackson 5 cover songs. Gilles Depo. at p. 17. Given their respective talents, Mr. Gilles and Mr. Fletcher formed a partnership that

¹ Although allegedly a member of the Petitioner, Mr. Fletcher was not called to testify in this matter by the Petitioner during its main or rebuttal trial period.

evening to create a Jackson 5 cover band featuring Mr. Fletcher's unique, high, falsetto voice and Mr. Gilles's guitar and vocals. Id. They determined that the configuration of the band should be a 5-piece band because they were going to perform Jackson 5 hits. Id. p. 18. They agreed the band would wear over-the-top outfits and wigs. Id. They agreed Mr. Fletcher would locate and get other musicians to play for the band and Mr. Gilles would build a rehearsal studio in his home so that the band would have a place to practice. Id. at pp. 18-19.

Prior to concluding the meeting that night, Mr. Fletcher and Mr. Gilles agreed that they would not ask any musician from the Fabulous Flesh Weapons to perform with their new venture but would ask one musician, Chris Adams ("Mr. Adams"), the keyboard player for OBGYN, to be the keyboard player for Mr. Gilles's and Mr. Fletcher's new band. Id. at p. 19. That first night the partnership was formed, a partnership exclusively between Mr. Fletcher and Mr. Gilles, the partnership to form and run the band that would become known as the Wonderbread 5. Id. at p. 20.

For two or three weeks following the initial meeting Mr. Gilles and Mr. Fletcher discussed and laid out plans for the band before contacting any musicians to perform for the same. Gilles Depo. at p. 21. Mr. Gilles and Mr. Fletcher discussed potential musicians to add to the lineup prior to Mr. Fletcher initially contacting them. Id. at pp. 21-22. Initially, Mr. Gilles and Mr. Fletcher discussed, among other potential musicians, Mr. Adams from Mr. Fletcher's then current band. Id. at p. 22. However, Mr. Adams was not asked to be a musician for the band as Mr. Fletcher did not believe he could handle the keyboard work for the style of music they would be playing. Id. Thereafter Mr. Fletcher and Mr. Gilles decided upon the musicians they wanted to perform for the band and, thereafter, Mr. Fletcher contacted Stevenson Brooks (Mr. Brooks), John McDill ("Mr. McDill"), as well as Tommy Rickard ("Mr. Rickard")

(collectively the “other musicians”) to play in he and Mr. Gilles’s band. Id. at p. 21. Specifically, Mr. Rickard was brought in to play the drums, Mr. McDill the bass, and Mr. Brooks the keyboards. Id. at pp. 23-24.

As such, within a few weeks after Mr. Gilles and Mr. Fletcher had formed a partnership to establish their Jackson 5 cover band, they had discussed and decided upon the performers they would need for the band, had secured rehearsal space in Mr. Gilles’s home, and were prepared to move forward with the concept.

B. The Selection of the Name Wonderbread 5

At the first meeting for Mr. Fletcher, Mr. Gilles, and the other musicians occurred in Mr. Gilles’s home located at 900 Simons Lane in Novato, California. Gilles Depo. at p. 26. Early on, the name White Bread 5 was discussed, however, there was concern that the name would not appeal to a broad base. Id. at p. 25. As such, Mr. Gilles suggested the name CINCO DE BLANCO, or five whites. Id. Mr. McDill chimed in and suggested the term WONDERBREAD. Id. at p. 26. The name was then established.

C. The Early Years

For the first three to four years Mr. Gilles, Mr. Fletcher, and the other musicians would rehearse at Mr. Gilles’s home. Gilles Depo. at p. 26. Mr. Gilles built a studio in his garage for the band and Mr. Gilles or Mr. Fletcher would arrange for the time when rehearsals would take place. Id. at p. 27.

Mr. Gilles’s home served as the official address of record for he and Mr. Fletcher’s band during this time. Gilles Depo. at p. 29. Not only was it where all rehearsals occurred, it also served as a place of contact to book the band by and through Mr. Gilles and his home. Id.

After a period of time Mr. Gilles no longer wanted the official address of record for he and Mr. Fletcher's band to be his home address. As such, Mr. Gilles registered a P.O. Box at a local San Rafael, California post office to serve as the official address of record for his band. Gilles Depo. at p. 28. Ultimately, however, Mr. Gilles did not like the inconvenience of using the post office box as the official address of record and, after roughly six months, allowed the official address to remit back to his home address. Id. at pp. 28-29. Thereafter, Mr. Gilles's home address remained as the official address for the band until the it moved to Jay Siegan Presents when Mr. Siegan became the booking agent for the band. See Gilles Depo. at p. 29.

The first performance of the band occurred in November of 1996. Gilles Depo. at p. 30. Mr. Gilles booked the band to perform at the Faultline in San Rafael, California, the same location he had met and later formed the underlying partnership with Mr. Fletcher for the Wonderbread 5. Id. Thereafter, for the first two years performances for the band were limited. Aside from the initial Faultline performance, the band played another venue known as the Tongue and Groove earning roughly \$500 for the performance. Id. at p. 31. Later, the band performed at Mr. Gilles's wedding. Id. In sum, Mr. Gilles estimated that the band performed 1 to 2 times per month, on average, from 1996 through 1998. Id.

During this time, the day-to-day management and accounting for the band remained with the partnership of Mr. Gilles and Mr. Fletcher. See Gilles Depo. at p. 31. Specifically, Mr. Gilles and Mr. Fletcher would alternate control of the finances for their band. Id. If they received cash from the venue, Mr. Gilles or Mr. Fletcher were charged with the receipt of the same and then paying the other band members for their performances. Id. Later, as the revenues increased venues began insisting upon paying Mr. Gilles and Mr. Fletcher via check. Id. at pp. 31-32.

When this occurred, Mr. Fletcher or Mr. Gilles would pay the other musicians via their own personal checks. Id. at p. 32.

In regard to soliciting work from 1996 through 1998, only Mr. Gilles and Mr. Fletcher secured performances for the band. Gilles Depo. at p. 32. At that point there was not a significant amount of promotion that occurred. However, Mr. Gilles made stickers to promote the band, Mr. Fletcher the posters, and Mr. Brooks created a specific, stylized logo to be used in connection therewith. Id. at pp. 32-33.

Of note, Mr. Gilles and Mr. Fletcher suffered their first loss from the original line up in 1997 when Mr. Brooks decided to leave the band. Gilles Depo. at p. 33. When he left, he did not claim any rights to ownership of assets or the good will of the band. See Id. at p. 34-35. Mr. Brooks was replaced by Mr. Adams in 1998. See id. at p. 35.

D. Jay Siegan Presents Becomes the Band's Booking Agent

In 1998 Jay Siegan ("Mr. Siegan") was an independent booking agent operating under the name Solo Music Group and doing business on Mission Street in San Francisco, California. See Gilles Depo. at p. 35. See also Deposition of Tommy Rickard (hereinafter "Rickard Depo.") at pp. 27-30. Mr. Siegan contacted the band after a 1998 show at the Tongue and Groove to speak with them about booking the band. Gilles Depo. at p. 35; Rickard Depo. at pp. 27-30.

In 1998 Mr. Siegan became the booking agent for the band. Gilles Depo. at p. 43. Rickard Depo. at pp. 27-30. Mr. Siegan has never been the manager of the band. Gilles Depo. at p. 35. See also Gilles Depo. at pp. 36, 40-42; Id. at Exhibits 2, 3, 4, 5. Mr. Siegan repeatedly confirmed this with Mr. Gilles after he became the booking agent for the band as, by Mr. Siegan's admission, under the laws of the State of California he could not be both the manager and the booking agent for the band. Id. at p. 43.

E. Bookings and Growth under Jay Siegan

Once Mr. Siegan became the booking agent for the band the bookings increased significantly. Gilles Depo. at p. 43. The band began performing four to six times per month. Id. at p. 44. Correspondingly, as the number of shows grew so too did the finances associated therewith. Id. Mr. Siegan was given unilateral power to book the band. Id. at p. 53.

F. Pat Gilles's Management of the Band

During this time Mr. Gilles and Mr. Fletcher continued to manage the band. If there was an issue with booking the band Mr. Siegan would call Mr. Gilles. Gilles Depo. at pp. 53-56. See also Gilles Depo., Exhibits 11-13. Mr. Gilles and Mr. Fletcher were Mr. Siegan's contacts as they controlled the band. Id. at p. 56.

Between 2000 and 2005 the increased popularity of the band and the demands placed upon it by the performance schedule began exacting a toll on Mr. Fletcher. See generally Gilles Depo. at pp. 44-46. Mr. Fletcher would complain that he had the hardest role in the band and that the work load placed upon him was too much. Id. At this same time Mr. Fletcher's personal life was becoming increasingly demanding. During this period Mr. Fletcher got married and began having children. Id. at p. 46. As a result, he wanted to spend more quality time with his wife and children and began to scale back his role in the operation of the band. Id. See also Gilles, Exhibit 7. As such, Mr. Fletcher began actively stepping down his role in the management of the band as can be seen in Exhibits 11 through 13 to Mr. Gilles's deposition. Gilles Depo. at pp. 56-57. See also Gilles Depo., Exhibits 11-13.

During this time Mr. Gilles continued to manage the band, do the merchandising for the band as well as ran the radio advertisement buys. Gilles Depo. at pp. 47, 53. See also id. at pp. 48-52; Gilles Depo., Exhibits 8 – 10c. His duties managing the band also extended to soothing

interpersonal conflicts among the other musicians. Id. at pp. 69-70. See also Gilles Depo., Exhibit 19.

In June of 2001 Mr. Gilles also opened a bank account for the band to deal with the increasingly complex finances for the same. Gilles Depo. at pp. 57-60. Specifically, Mr. Gilles and Mr. Siegan, as the band's booking agent, opened a bank account at Mission Bank making both Mr. Siegan and Mr. Gilles signatories on the account for the band. Id. Only Mr. Siegan or Mr. Gilles could make deposits or withdrawals in the account for the band. Id. No other musician had access to the account. Id. at p. 58. The opening of this bank account was even memorialized in an agreement between Mr. Gilles and Mr. Siegan. Id. at 58-59. See also Gilles Depo., Exhibit 14. Bank records provided by Mr. Gilles establish contemporaneous knowledge of the opening of this account by he and Mr. Siegan as well as use of the same in the form of payments to Mr. Rickard and other activity by Mr. Fletcher.² See also Gilles Depo. at pp. 60-62, Exhibits 15-16.

G. A Split Develops between Patrick Gilles and Jeff Fletcher

In the mid-2000s friction began to develop between Mr. Gilles and Mr. Fletcher as well as Mr. Rickard. Gilles Depo. at p. 67. Mr. Gilles had a vision that the business should grow, become bigger, and make more money. Id. This would require a greater time commitment from the other musicians as well as his partner Mr. Fletcher. Id. at pp. 67-68. However, at that same time, as referenced before, Mr. Fletcher wanted to reduce his time commitment to the band given his expanding personal role and family commitments. Id. at p. 68. See also id. at pp. 44-46.

During this same time, Mr. McDill's time commitment to his performances also were becoming strained as he was dedicated to building a home for his ex-wife and new son. Gilles

² Of note, both Mr. Siegan and Mr. Rickard denied knowledge of the existence of this account during this time frame in their depositions. Mr. Fletcher, as the Board is aware, was not called to testify in this matter by the Petitioner.

Depo. at p. 71. Mr. Adams was also going through his second divorce in two years and also had tax problems. Id. at p. 72.

Despite other's instability, however, Mr. Gilles was stable and wanted to continue to grow the band. Gilles Depo, at p. 72. Mr. Gilles's desire to grow the band with Mr. Fletcher's desire to reduce his role as well as the other musicians' personal instability led to significant friction among the performers. Id. at pp. 72-73.

H. Patrick Gilles is Forced Not to Perform with the Band

To this day Mr. Gilles is not fully aware as to why he was forced not to perform with his band. It is believed that something in regard to the friction referenced above caused a split. However, Mr. Gilles never became disengaged in his performances as has been contended by the Petitioner. Gilles Depo. at p. 74. Mr. Gilles attended shows as expected and performed as expected. Id.

It is important to note, the band's performances were all about fun. Their performances were an alcohol-infused, over 21, nightly high energy party. Gilles Depo. at p. 75. It was an adult environment with adult themes, language, and references. Id. at pp. 76-84. See also Gilles Depo., Exhibits 21-22. Drinking was promoted on and off the stage. Id. at pp. 79-80. Women would expose themselves to the band members and band members would even simulate sex acts on stage with the clientele. Id. at 78, 81. Gilles Depo., Exhibits 21, 23-24.

A week before Mr. Gilles last performed with Mr. Fletcher and the other musicians he admittedly wore the wrong outfit to a performance. Gilles Depo. at p. 88. Specifically, for a performance at The Last Day Saloon, Mr. Gilles was supposed to wear a specific multi-colored tuxedo. Id. However, he inadvertently wore a white suit with a red shirt. Id. Other performers in the band had forgotten their outfits in the past. Specifically Mr. Fletcher and Mr. Rickard. Id. at

pp. 88-89. But no ramifications had materialized out of the same. See also Gilles Depo., Exhibit 25.

Other performers had even forgotten shows. Specifically, Mr. Adams had missed an entire show in the past, but did not suffer any ramifications therefrom. Id. at p. 89. But somehow this acted as a final catalyst in forcing Mr. Gilles to no longer perform with his band.

On or about March 8, 2009 Mr. Gilles, Mr. Fletcher, and the other musicians performed as Wonderbread 5 at a wedding in Utah or Idaho. Gilles Depo. at p. 91. Mr. Gilles thought it was a great show and that the performance went very well. Id. Mr. Gilles returned from the show never suspecting what was about to transpire. Id. at 92. See also Gilles Depo., Exhibit 26.

On or about March 10, 2009 Mr. Gilles received a call from Mr. Adams who told Mr. Gilles he was “out of the band.” Gilles Depo. at p. 93. As the conversation progressed, Mr. Gilles stated that he intended to show up for the next show scheduled for a Wednesday night in Sacramento, California. Id. at p. 94. Mr. Adams then threatened Mr. Gilles stating “If you show up, we will stop you. You will never make it to the stage.” Id.

Mr. Gilles also talked with Mr. Rickard about this issue. But Mr. Rickard reiterated the threat of violence against Mr. Gilles made by Mr. Adams. Gilles Depo. at p. 97. Mr. Rickard further added something to the effect of “Don’t show up or it will get physical.” Id. Mr. Gilles took this threat of violence seriously as he had previously been assaulted and choked by Mr. Rickard at another show at the Red Devil Lounge. Id. at pp. 97-100. See also Gilles Depo., Exhibit 27; Rickard Depo. at 90-91. Due to the threat of physical violence, Mr. Gilles did not attend the next or any subsequent shows performed by the band he co-founded with Mr. Fletcher. Gilles Depo. at pp. 101-102.

Later, Mr. Gilles learned that a musician named Mike Taylor (“Mr. Taylor”) had been brought in to replace his performances on lead guitar for the band. Gilles Depo. at p. 95. Based upon his 35-years of experience as a musician, Mr. Gilles testified that there is no way Mr. Taylor was brought in on short notice. Id. at pp. 95-96. He must have been practicing for days or weeks to get ready for the Wednesday show Mr. Gilles had also been preparing to play. Id.

Mr. Gilles spoke with Mr. Siegan regarding this matter. But he stated that there was nothing he could do as he was only the booking agent. Gilles Depo. at p. 96.

I. Patrick Gilles Registers His Service Mark

Mr. Gilles applied for and registered the instant trademark. At the time he applied for registration he believed, and still believes, that he is the rightful owner of the registration and associated good will. Gilles Depo. at p. 106.

J. The San Francisco Lawsuit

As a result of his being forced not to play with his band, Mr. Gilles sustained an immediate loss in his wages. As a result, he brought suit in San Francisco Superior Court to recover his wages from his former band mates. Gilles Depo. at pp. 102-103. See also Petitioner’s Notice of Reliance at Exhibit 2 (Complaint for Damages) to Exhibit G (Discovery Deposition of Patrick Gilles). As a result of this lawsuit, the defendants, those individuals who comprise the Petitioner in the instant matter, agreed to pay Mr. Gilles \$30,000 to settle the claims set forth in the lawsuit. Id. at p. 103. See also Gilles Depo., Exhibit 28. Specifically, there was no mention as to any intellectual property or other ownership rights Mr. Gilles retained in the band or the name of the band in that lawsuit or the settlement thereof. Id. at pp. 103-104.³ See also Petitioner’s Notice of Reliance at Exhibit 2 (Complaint for Damages) to Exhibit G

³ The record is substantially developed on this point by and through Petitioner’s Motion for Summary Judgment filed on or about July 30, 2010, the Board’s order denying the same on March 13, 2012, and related pleadings.

(Discovery Deposition of Patrick Gilles). Moreover, Mr. Gilles has never signed any document transferring his ownership interests in the partnership. *Id.* at p. 105.

K. Petitioner's Continued Infringement upon Patrick Gilles' Rights

Of note, since forcing Mr. Gilles to cease performing with the band the Petitioner's in the instant matter have continued to wrongfully use the intellectual property rights of Mr. Gilles. Gilles Depo. at p. 108. For instance, the Petitioner's continue to advertise for the band's services using Mr. Gilles's likeness in their advertisements. *Id.* at pp. 108-117. Gilles Depo., Exhibit 31-44. Mr. Gilles's performances are even still included in audio and visual recordings the band uses to promote its services without Mr. Gilles's consent. *Id.* at p. 117-128. Gilles Depo., Exhibit 42. Mr. Gilles has never given the Petitioner's the rights to use his likeness or other intellectual property since being forced not to perform with the band. *Id.* at p. 199. Moreover, Petitioner has conceded that it does not have the right to use Mr. Gilles's likeness in the advertisement of its services. Rickard Depo. at pp. 77, 84.

ARGUMENT

Petitioner, as the plaintiff herein, bears the burden of proof with respect to its claims of priority of use, likelihood of confusion, ownership stemming from partnership allegations, and fraud. See, e.g., *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ("[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion"); *Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982) ("[a]s the opposer in this proceeding, appellant bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the Notice of Opposition, which, if not

countered, negates appellee's right to a registration"); and *Clinton Detergent Co. v. Procter & Gamble Co.*, 302 F.2d 745, 49 C.C.P.A. 1146, 1962 Dec. Comm'r Pat. 368, 133 USPQ 520, 522 (CCPA 1962) ("[o]pposer ... has the burden of proof to establish that applicant does not have the right to register its mark").

Petitioner must establish its pleaded case by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

The standard of proof for a fraud claim is the rigorous clear-and-convincing-evidence standard, and it is strictly applied. *Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 186 Fed. Appx. 1005, 77 USPQ2d 1917, 1926 (TTAB 2006); *Smith International Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981). See also *Torres v. Cantine Torresella S.r.L.*, 808 F.2d 46, 1 USPQ2d 1483, 1484-85 (Fed. Cir. 1986); *Medinol Ltd. v. Neuro Vasx Inc.*, 67 USPQ2d 1205, 1209 (TTAB 2003); *Mister Leonard Inc. v. Jacques Leonard Couture Inc.*, 23 USPQ2d 1064 (TTAB 1992); *First International Services Corp. v. Chuckles Inc.*, 5 USPQ2d 1628, 1636 (TTAB 1988).

In the instant case, Petitioner has failed to establish that it, and Mr. Gilles, is the owner of the service mark at issue. Moreover, Petitioner has also failed in its obligation to establish fraud under the applicable standard. As such, Petitioner's petition must be denied.

A. Petitioner Has Failed to Identify Itself Sufficiently to Establish Standing in this Matter

A threshold question in every inter partes case is whether the plaintiff has established its standing. See TBMP § 309.03(b) (2d ed. rev. 2004). In a Board proceeding, the plaintiff is required to show that it has a "real interest," that is, a "direct and personal stake," in the outcome of the proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir.

1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In this regard, petitioner has made the following allegation:

Petitioner Wonderbread 5 is a California general partnership which was created in late 1996. (citation omitted) Currently, the partnership's members are musicians Jeffrey Fletcher, John McDill, Thomas Rickard, Christopher Adams, and Michael Taylor, and the Band's manager and booking agent Jay Siegan (citations omitted). The band has engaged in live music performances under the name Wonderbread 5 for over 17 years throughout California, the United States, and beyond, and it continues to do so today ... Petitioner has developed a substantial client and fan base, and the Wonderbread 5 name has become well-known as referring to Petitioner. (citations omitted).

Petitioner's Main Brief on the Case at pp. 2-3.

This allegation, and the allegations alone in the Petition, do not conclusively establish Petitioner's standing because standing is an element of petitioner's case which must be affirmatively proved. *Ritchie*, 50 USPQ2d at 1029; and *Lipton Industries, Inc.*, 213 USPQ at 189. In the instant case, the Petitioner, as set forth in Petitioner's pleadings, has failed to satisfy this burden.

Petitioner contends that it is a California general partnership which was created in 1996. It next lists its "current" partners as musicians Mr. Fletcher, Mr. McDill, Mr. Rickard, Mr. Adams and Mr. Taylor as well as "manager" and "booking agent" Mr. Siegan. However, Petitioner never sets forth for the Board how or when these current "partners" became vested in the Petitioner or how they derive rights in an alleged partnership that, on its face, pre-dates many of their memberships in the alleged organization.

The uncontroverted testimony in this case sets forth that Mr. Gilles and Mr. Fletcher first formed a partnership in 1996 to create a band that would become known as the Wonderbread 5. Gilles Depo. at pp. 14-19.⁴ Thereafter, Mr. Gilles and Mr. Fletcher invited Mr. Rickard, Mr.

⁴ Petitioner did not call Mr. Fletcher as a witness in this matter despite the ability to do so. As such, Mr. Gilles's testimony is the only testimony on this point.

Brooks, and Mr. McDill to play in Mr. Fletcher and Mr. Gilles's band. Id. at p. 21. Mr. Adams, Mr. Taylor, and Mr. Siegan were not part of the band in 1996. As such, how do their rights originate back to 1996? This is one of the mysteries left unanswered by the Petitioner.

Petitioner provides no evidence of a partnership agreement in this matter. Petitioner only provides vague assumptions that as one performer cycled in and another cycled out they became, or left, the partnership as a result thereof and somehow acquired rights in the disputed mark retroactively to 1996. But there is no written agreement to this effect. In short, Petitioner has provided no evidence that would substantiate a basis for the Board to understand who the exact Petitioner is and when the Petitioner contends it acquired rights in the name Wonderbread 5.

Under the first statement, "Petitioner is a California general partnership created in late 1996" one would assume Petitioner is taking the position that it is comprised of Mr. Gilles, Mr. Fletcher, Mr. Brooks, Mr. Rickard, and Mr. McDill. Under another statement, "Petitioner has developed a substantial client and fan base", how does this include current alleged partner Mr. Siegan who has never performed with the band? Finally, under the statement "[c]urrently, the partnership consists of" Mr. Fletcher, Mr. McDill, Mr. Rickard, Mr. Adams, Mr. Taylor, and Mr. Siegan we are provided with the named alleged "partners" purportedly comprising the Petitioner but never truly provided with an explanation of how this combination of original performers, replacement musicians, and their booking agent derive rights in a partnership under California Law entitling them to claim ownership of the assets of a name that originated in 1996, a time when half of the alleged members of the Petitioner admittedly had nothing to do with the band.

Perhaps most troubling of all is the absence of any testimony or an appearance by Mr. Fletcher. As Mr. Gilles repeatedly provided, he and Mr. Fletcher created the original partnership

to form the band. Mr. Fletcher is allegedly part of the Petitioner. However, the Petitioner never called Mr. Fletcher as a witness. Never offered any testimony from Mr. Fletcher. In fact, looking at the evidence as a whole, one is left to wonder whether or not Mr. Fletcher is even part of this Petitioner.

Returning to the law on point, standing is an element of a petitioner's case which must be affirmatively proved. *Ritchie*, 50 USPQ2d at 1029; and *Lipton Industries, Inc.* 213 USPQ at 189. It is submitted for the Board that this Petitioner has failed in its burden to establish standing. Petitioner, on one hand, states that it is a California general partnership transacting business since 1996. But the facts establish that this cannot be the case. Mr. Adams did not begin performing with the band until 1997. Mr. Siegan never performed with the band and only became their booking agent in 1998. Mr. Taylor became associated with the band in 2009. When one examines the competing claims of the Petitioner and its alleged underlying partners we are left with more questions than answers.

In the end, it is submitted that there are just too many questions involving the organization of the Petitioner, its alleged "current" members, and their purported rights that have not been answered by the Petitioner for a determination that the Petitioner, in whatever of the multiple forms it may exist, has standing in this matter in the absence of a more definitive outline of the Petitioner's rights and how the same were acquired vis-à-vis its current alleged members.

As such, it is respectfully submitted that the Petitioner has failed to establish its standing in this matter by and through failing to establish requisite elements of the alleged partnership it now contends existed underlying Petitioner's rights and how those partnership claims rights revert back to 1996.

B. Mr. Gilles and Mr. Fletcher Formed a Partnership to Perform Under the Service Mark WONDERBREAD 5

Under the California's Uniform Partnership Act of 1994, "partnership" is defined as an association of two or more persons to carry on as co-owners a business for profit. See § 16101 Ca. Corp. Code. See also § 16102 Ca. Corp. Code.

In 1996 Mr. Gilles and Mr. Fletcher formed a two-man partnership to create a band to perform Jackson 5 cover songs. Gilles Depo. at p. 17. Under California Law the partnership was founded, maintained, and run as a 50-50 general partnership between Mr. Fletcher and Mr. Gilles. The other musicians as well as the booking agent, Mr. Siegan, were not partners.

Specifically, prior to any other musician or booking agent's involvement, Mr. Fletcher and Mr. Gilles devised the format for the band, discussed potential musicians for the same and, after bi-lateral consultation, decided on who would be asked to join the band. Gilles Depo. at pp. 14-21. See also Siegan Depo. at p. 59.

At all times relevant hereto, Mr. Gilles and Mr. Fletcher managed and ran the band. During the early years Mr. Fletcher and Mr. Gilles booked all of the performances for the band. Gilles Depo. at pp. 30-33. Mr. Gilles built out a studio in his home with his home operating as the official address of record for the band. Id. at pp. 26-29. Mr. Gilles was in charge of the radio advertising for the band. Id. at pp. 47, 53. Mr. Gilles and Mr. Fletcher took care of all of the financial matters for the band including paying the other musicians for their performances. Id. at pp. 31-32. Mr. Gilles opened a PO Box for the band and maintained the correspondence therefor. Id. at 30-33. In short, Mr. Fletcher and Mr. Gilles operated the band as a general partnership between the two of them.

In 1998, when Mr. Siegan became the booking agent for the band, some roles changed slightly. But Mr. Siegan did not become the manager of the band. Gilles Depo. at p. 35. See also Gilles Depo. at pp. 36, 40-43; Id. at Exhibits 2, 3, 4, 5. He did not become a partner. He merely became the booking agent for the band. Id.

Of note, when Mr. Siegan became the booking agent for the band further evidence of the dual partnership between Mr. Gilles and Mr. Fletcher manifested. For instance, when there was a

problem with bookings or other personnel matters Mr. Siegan would contact only Mr. Gilles or Mr. Fletcher. Gilles Depo. at pp. 53-56. See also Gilles Depo., Exhibits 11-13. Mr. Gilles and Mr. Fletcher were Mr. Siegan's contacts as they controlled the band. Id. at p. 56.

In short, the evidence of record establishes that Mr. Fletcher and Mr. Gilles formed the partnership for the band WONDERBREAD 5 and, as a result, own the related intellectual property rights associated with the same on a 50-50 basis. Mr. Fletcher was never called to testify. Moreover, the only witnesses called to testify on behalf of the Petitioner conceded that Mr. Fletcher and Mr. Gilles had conducted meetings prior to their involvement with the band thus corroborating Mr. Gilles's account of how the partnership with Mr. Fletcher was formed. In the absence of testimony by Mr. Fletcher contradicting Mr. Gilles's account or other evidence to the contrary Mr. Gilles's version of the events that led to the 50-50 partnership stands unchallenged.

It is the Petitioner's burden of proof to establish that it, and not Mr. Gilles, owns the name WONDERBREAD 5. Under the original partnership, however, Mr. Gilles is no less than a 50-50 owner of the name with Mr. Fletcher. Of note, Petitioner contends that it terminated Mr. Gilles, to the extent that that could occur, in 2009. Petitioner's Main Brief on the Case at p. 10. Assuming, *en arguendo*, this to be the case, when a partner leaves a partnership all partners retain equal rights in the trademarks in the absence of an agreement to the contrary. *Menendez v. Holt*, 128 U.S. 514 (U.S. 1888). See *Weston v. Ketcham*, 39 N.Y. Superior Ct. (7 Jones & Spencer) 54; *Young v. Jones*, 3 Hughes, 274, *Taylor v. Bothin*, 5 Sawyer, 584; *Huer v. Dannenhoffer*, 82 N.Y. 499; *Wright v. Simpson*, 15 Off. Gaz. 968.

As such, it is submitted that when Mr. Gilles was forced to no longer to perform with the band he retained no less than a 50% ownership of all assets in the partnership he formed with

Mr. Fletcher which included, but was not limited to, ownership of the trademark WONDERBREAD 5.

In this matter, it is the Petitioner's burden of proof to establish that it, and not Mr. Gilles, is the rightful owner of the trademark at issue. Petitioner has failed to call Mr. Fletcher as a witness and, as such, has offered no credible evidence to dispute Mr. Gilles's account that he and Mr. Fletcher formed the partnership and ran the same during Mr. Gilles's tenure therewith. It is suggested that Mr. Fletcher was not called as a witness because, on cross examination, he would have had to have admitted to these facts thus fully conceding Mr. Gilles's position. Moreover, in contrast to Mr. Gilles's very direct and clear position as to his rights in the name, we are left only with the quagmire of assumptions of rights the "current" band members would like the Board to find to provide that they both have standing and, more critically, superior rights to one of the original 50-50 partners to the name WONDERBREAD 5.

Thus, the Petitioner cannot and has not established its burden of proof that it, and not Mr. Gilles, is the owner of the trademark at issue. Mr. Gilles was a 50-50 partner with Mr. Fletcher for the band. As a result, when he was forced not to perform he left with no less than 50% ownership of the trademarks and associated intellectual property.⁵ In that regard, Petitioners cannot carry their burden, in the absence of some written agreement setting forth an alternative to the ownership of the intellectual property by the partners, that Mr. Gilles was not an original owner of the same thus entitling him to the continued registration of this service mark.

⁵ Of note, while resolving the civil case Petitioner represented, through counsel, that it had no assets or otherwise which would include no rights in intellectual property assets. See Gilles Depo., Exhibit 28.

C. Robi v. Reed is Not Applicable to the Instant Matter

The Petitioner relies heavily upon *Robi v. Reed*, 173 F.3d 736 (9th Cir. 1999) in its analysis of this case. However, it is respectfully submitted to the Board that reliance on *Robi* in the instant matter, as well as the other cases cited by Petitioner, is misplaced and inapplicable to the circumstances at hand.

The facts of *Robi* are not in dispute. As the Board is probably familiar, in 1957 Paul Robi joined the now famous singing group The Platters as a replacement member following the departure of several of the original members of the group. After eight years of performing with the group Mr. Robi was convicted of felony narcotics possession and was incarcerated. Following his release from prison, Mr. Robi never attempted or sought to rejoin The Platters.

In 1988, Mr. Robi executed a written “assignment of trademark” assigning whatever rights he may have to the trademark The Platters to his wife Martha Robi. Subsequent to that “assignment”, Mrs. Robi booked singing acts under The Platters name that did not include any original members of the then famous group. A dispute arose between Mrs. Robi and Mr. Herb Reed, who co-founded The Platters in 1953. Mrs. Robi brought suit against Mr. Reed seeking to secure her rights in the exclusive use of the name. Mr. Reed countersued Ms. Robi for trademark infringement.

Ultimately the court concluded that Mr. Robi, and by extension Mrs. Robi, took no rights in the name when he left the band in large part because (1) he was not an original member of the band and (2) he effectively departed the band voluntarily as after his incarceration ended he never attempted to reunite with the same or otherwise. In short, his removal from the band was deemed voluntary. In the instant case, Mr. Gilles’s departure from the band was anything but voluntary.

To the contrary, as has been set forth by the witnesses in this matter, Mr. Gilles's departure from the band he founded under the partnership with Mr. Fletcher was forced under a threat of violence. As such, it is suggested that Robi and the other cases cited by Petitioner are factually distinguishable from the instant matter and are not binding upon the Board insofar as they deal with cases wherein a non-original member voluntarily leaves a band, not a founding partner involuntarily forced not to play with the group.

To the extent that there has been a dissolution of the partnership as between Mr. Gilles and Mr. Fletcher, as Mr. Gilles contends, or Mr. Gilles from a larger partnership as it would appear Petitioner contends, it is suggested that the holding in *Menendez v. Holt*, 128 U.S. 514 (U.S. 1888) still controls wherein it states on the dissolution of a partnership, in the absence of any agreement to the contrary, all partners retain equal rights in the trade-marks, of the firm, See *Weston v. Ketcham*, 39 N.Y. Superior Ct. (7 Jones & Spencer) 54; *Young v. Jones*, 3 Hughes, 274, *Taylor v. Bothin*, 5 Sawyer, 584; *Huer v. Dannenhoffer*, 82 N.Y. 499; *Wright v. Simpson*, 15 Off. Gaz. 968.

As such, under *Holt*, upon the dissolution or forced exit of Mr. Gilles of the partnership with Mr. Fletcher it is suggested Mr. Gilles retained his rights to the service mark at issue. Accordingly, it is submitted to the Board that *Holt*, and not *Robi*, controls the instant matter and, under *Holt*, Mr. Gilles remains the rightful owner of the service mark at issue.

D. Credibility and Relevance of the Witnesses

The instant case largely revolves around factual disputes as to the original and continued ownership of the service mark at issue. As such, credibility and relevancy of the witnesses, always a factor in the Board's determination, in this case takes on heightened importance.

1. Fraser Lunney & Clay Bell

Initially, Petitioner called Frasier Lunney and Clay Bell as witnesses in the instant matter. Their respective testimony was of little to no probative value.

Mr. Bell was an occasional substitute in the band who did not play with the band until 2006. See Clay Bell Deposition of September 25, 2013 (hereinafter “Bell Deposition”) at p. 6. Mr. Bell conceded he was never a member of the band. *Id.* at 9. See also Gilles Depo. at p. 66.

In regard to Mr. Lunney, he also was a substitute performer in the band first performing therewith in 1999 or 2000. See Fraser Lunney Deposition of September 25, 2013 (hereinafter “Lunney Deposition”) at pp. 5-6. Again, Mr. Lunney conceded he was never a member of the band. *Id.* at 6. See also Gilles Depo. at p. 66.

In that regard, neither Mr. Lunney nor Mr. Bell were regular performers with the band nor were they connected with the band in 1996 when the partnership between Mr. Fletcher and Mr. Gilles was formed. They merely had brief, transitory and occasional roles with the regular performers years after the band had been formed. Moreover, they deny having ever been members in the Wonderbread 5.

As such, it is submitted that both witness’s testimony is of limited probative value in the instant matter to the issues raised herein and should be largely, if not entirely, disregarded.

2. Jay Siegan

Mr. Siegan unambiguously testified that he was and continues to be the manager and booking agent for the band. See Deposition of Jay Siegan (hereinafter “Siegan Depo.”) at p. 9. Specifically, on direct Mr. Siegan testified:

Q. So what -- what was -- what was your relationship with the band?

A. In a management to booking capacity, helping them secure work, and providing guidance for their career.

Q. So you were their manager?

A. I was and am.

Q: When did you actually become their manager?

A. Approximately 15 years ago.

Q. So approximately in 1998 or so?

A. Correct.

Id. (emphasis added)

The California Legislature regulates agents and managers through the Talent Agencies Act (“TAA”).⁶ The California Legislature and the various entertainment-industry unions (guilds) have promulgated role-specific rules with respect to what third-party artist representatives can and cannot do. For instance, California law allows only agents to procure employment. See CAL. LAB. CODE § 1700.4 (West 1989). By allowing only agents to procure employment—that is, by preserving the traditional distinction between agents and managers—and by regulating agents’ activities, the TAA ensures that agents do not take advantage of their clients. Also, it ensures that managers do not take advantage of their clients—for example, by procuring unsafe employment for them—because it completely prohibits them from procuring employment in the first place. In short, the TAA prohibits booking agents from being managers and managers from being booking agents based upon the inherent conflict of interest involved in those two roles.

⁶ The TAA is an outgrowth of the more general Private Employment Agencies Law that the California Legislature had passed in 1913 to regulate all types of employment agencies. Chip Robertson, Note, *Don’t Bite the Hand That Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. & ENT. L.J. 223, 228 (1997). That general law gave way to the more entertainment-industry-specific Artist Manager Law (“AML”) and Artist Managers Act (“AMA”) in 1937 and 1943, respectively. Id. Those laws, however, failed to consider adequately the different roles of agents and managers. See id. at 229–30. Basically, neither the AML nor the AMA distinguished between the two types of representatives. See id. In an attempt to clarify those representatives’ roles, the Legislature amended the AMA in 1978 to create the TAA. See id. at 232–33

On cross-examination, more likely than not having an understanding of the TAA, Mr. Siegan quickly backed away from his earlier testimony that he served as both a manager and a booking agent perhaps realizing the peril he had placed himself in creating a record wherein he would breach California state law concerning the regulation of his talent agency. Specifically, Mr. Siegan testified:

Q. Before we really get started, I just want to 22 clarify your position again. I believe you testified that you were both the booking agent and the manager for the band; is that correct?

A. No.

Q. How is it incorrect?

A. I function in the capacity of a manager, and I think it's semantics, which title you choose to use.

Q. Well, let's say legal semantics, so indulge me.

A. Manager.

Q. Okay. So you're a manager. Do you – thank you. So you would act as the actual manager of the band, yes?

A. Yes.

Siegan Depo. at pp. 47-48.

Once he had affirmatively testified to being the manager of the band, and most likely familiar with the state law regulating his industry, Mr. Siegan was quickly presented with a legal dilemma: he had testified that he was now the band's manager, he could no longer be its booking agent or such would constitute a breach of the TAA.

As such, despite his unambiguous testimony on the point early in the deposition, Mr. Siegan, on cross examination, now actively denied being the booking agent for the band. See generally Siegan Depo. at p. 9. Specifically, Mr. Siegan testified:

Q. Now, during this time, also, you were the booking agent; is that correct?

A. No.

Id. at 49.

Curiously, however, on all literature wherein Mr. Siegan or Mr. Siegan's company Jay Siegan Presents is listed in connection with the Wonderbread 5, Mr. Siegan or his business Jay Siegan Presents is always listed as the booking agent for the band. See Gilles Depo. at Gilles Depo. at pp. 36, 40-42; Id. at Exhibits 2, 3, 4, 5. Moreover, the Petitioner's other main witness, Mr. Rickard, testified in his deposition:

Q. You've mentioned Jay Siegan a couple of times, and I don't think we've really gone into that yet.

A. Yes.

...

A: He approached us as wanting to be our booking agent. And we sat down and had a meeting with him. And his partner Daniel Swan, who -- they had a partnership, Jay Siegan and Daniel, to possibly work with us **booking corporate gigs and so forth.**

...

Q. And were all the band members in agreement to use Jay Siegan?

A. As I recall, absolutely. Yes.

Q. Pat was in agreement with that?

A. Yes.

Q. All right. And so once those preexisting gigs had been played, **what was the deal with Jay Siegan?**

A. For every gig booked, it was -- we split it six ways. That was the deal.

Q. And does that continue to the present day?

A. Absolutely does. Yes.

Rickard Depo.at pp. 27-30. In short, Mr. Rickard, another alleged member of the Petitioner and Petitioner's own witness, directly contradicted Mr. Siegan's denial of being the band's booking agent.

One other issue of note in regard to Mr. Siegan being the band's alleged "manager", on direct Mr. Siegan unambiguously testified that he had been the band's manager since 1998 or thereabouts. Siegan Depo. at p. 9. Once again on cross examination, however, Mr. Siegan's memory as to when he actually became the band's "manager" began to fade. Specifically, he testified:

Q. Okay. So you're a manager. Do you – thank you. **So you would act as the actual manager of the band, yes?**

A. Yes.

Q. And you have acted -- it's your testimony that **you have acted in that capacity since being – or becoming associated with the band in roughly 1998**, correct?

A. I would say **it evolved into that.**

Q. **Well, earlier you said it was that. So when did it evolve into that?**

A. Sometime shortly thereafter me being involved with the band.

Q. Define "shortly thereafter," please.

A. **I don't recall.**

Q. **Okay. Was it 1999?**

A. **I don't recall.**

Q. **2000?**

A. **I don't recall.**

Q. **2001?**

A. Some -- somewhere around there. I don't recall.

Q. Okay. Sometime between 1998 and 2001, in that three-year period?

A. Somewhere in there.

Q. You became the manager of the band?

A. Correct.

Id. at pp. 48-49.

Based upon the testimony above, Mr. Siegan's role with the band, and his credibility, are severely drawn into question. First, he had previously unambiguously testified he became the band's manager in 1998 or thereabout. On cross examination, he conceded that, in his words, it "evolved" over a period of years. But in stepping back from his earlier unambiguous position, Mr. Siegan creates two separate and fascinating questions.

First, when did he allegedly become the "manager" of the band?

Second, and more curiously, he testifies "it evolved into that." What was it before? All of the documentary evidence supports the fact that Mr. Siegan was the booking agent. Mr. Gilles and Petitioner's own alleged member and witness Mr. Rickard corroborated this as well. Mr. Siegan even testified to this initially and then stepped back upon cross examination most likely realizing such an admission would be a breach of the TAA. But when asked specific cross-examination questions concerning his role as a manager in light of all of the evidence he is a booking agent his memory starts to fade as to specific details surrounding all of his alleged roles for the band.

So who is Jay Siegan and what role does he serve for the band?

Based upon the testimony of Petitioner's other main witness Mr. Rickard as well as Mr. Gilles it is apparent that he is the booking agent for the band. However, in an effort to

undermine and present an alternative, albeit deceitful, view of his role as the “manager” Mr. Siegan initially attempted to testify that he served as both the manager and the booking agent of the band. When cross-examined under the pressure of a violation of the TAA Mr. Siegan both testified he was not the booking agent for the band contradicting Mr. Rickard’s testimony and also stepped back on his own testimony as to when he became the purported manager of the band with that date never truly being identified.

It is submitted to the Board that Mr. Siegan’s testimony is completely incredible. What has most likely occurred is that in order to strengthen their perceived case the Petitioner needed someone in their “group” other than Mr. Gilles to claim a managerial role for the band. For whatever reason Mr. Fletcher was not called to testify. As such, that someone became Mr. Siegan.

The only issue with this charade, however, is that he was not the manager of the band. He was the booking agent as Mr. Siegan initially admitted, Petitioner’s own Tommy Rickard testified, and the exhibits clearly demonstrate. But he could not testify he served in both roles as that would be a clear violation of the TAA. So upon cross-examination his testimony crumbled and he ultimately denied being what he truly is, just the booking agent, so as to avoid breaking the law under the TAA in support of Petitioner’s claim that there was another manager of the band aside from Pat Gilles.

Of note, Mr. Siegan’s lies were not simply relegated to his role for the band. They extended to other facts involved in the case as well.

For instance, Mr. Siegan attempted to impugn Mr. Gilles during his direct exam concerning a bank account opened allegedly by Mr. Gilles which the band or Mr. Siegan allegedly never consented to or knew about until after Mr. Gilles had opened the same. *Id.* at pp.

15-16. In this regard, Mr. Siegan stated they felt “bamboozled” by Mr. Gilles having opened the bank account. Id.

Upon cross-examination, however, once again Mr. Siegan’s original testimony crumpled into a heap of lies. Specifically, Mr. Siegan conceded on cross examination:

Q: You testified also in reference to the bank account that Mr. Gilles had opened. Are you aware that that was opened at Mission Bank (verbatim)?

A. I don't recall.

Q. Have you ever had an account at Mission Bank, Mr. Siegan?

A. Can you repeat the question.

Q. Have you ever had a bank account at Mission Bank –

A. I have. Yes.

Q. -- Mr. Siegan? Do you recall going and opening the account you testified to earlier today actually with Mr. Gilles?

A. I recall opening accounts with Mr. Gilles, but I believe I could be confusing Wonderbar, LLC accounts with what you're discussing today. And that might be the point of the confusion here.

Q. Fair enough. And we can speak about that a little more fully.

A: Do you recall opening a bank account for Wonderbread 5 with Mr. Gilles at Mission Bank?

A. I recall opening a bank account, and I honestly can't remember if that was on behalf of the band, when we were talking about saving money together, or whether that was in direct conjunction with Wonderbar, LLC. [sic Wonderbread]

Q. Do you recall signing a signature card to that effect for that account?

...

Q. Mr. Siegan, in reference to a -- an account opened by Mr. Gilles on behalf of Wonderbread 5, a bank account opened at Mission Bank, do you recall actually going to Mission Bank with Mr. Gilles and signing a signature card opening that bank account? Again, for the band?

A. I don't have a recollection of specifically what it was for, but I do recall going to Mission National Bank with Patrick.

Q. And if you don't have a recollection of what it was for, you don't know one way or the other, correct?

A. Correct.

Siegan Depo. at pp. 66-68. The testimony continues on wherein Mr. Siegan ultimately concedes that he in fact opened the Wonderbread 5 account with Mr. Gilles, the very bank account he testified to on direct as having been “bamboozled” over.

In short, a major part of Petitioner’s case is the credibility of Mr. Siegan as well as the allegation that Mr. Siegan served as the manager of the band. However, upon inspection, Mr. Siegan presented false testimony on no less than two occasions during his testimony in an effort to support Petitioner’s fraudulent claims against Mr. Gilles.

First, in regard to a bank account opened by Mr. Gilles and Mr. Siegan, Mr. Siegan denied all knowledge thereof on direct. Then, however, on cross examination, he conceded that he had in fact opened bank accounts with Mr. Gilles for Wonderbread 5 or, at a minimum, could not recall whether he had or not, a far cry from his earlier “bamboozled” testimony.

Of greater significance are the lies concerning his role with the band. As Mr. Rickard and Mr. Gilles testified, Mr. Siegan approached the band to become its booking agent in 1998. Under the TAA, California state law prohibits a booking agent from also serving as a band’s manager. However, to undermine the facts supporting Mr. Gilles’s managerial position in this matter, Mr. Siegan initially lies stating he is both the manager and booking agent for the band. On cross examination, realizing his legal peril, but also needing to preserve the appearance as a manager for this case, Mr. Siegan states he is and was the manager of the band.

But this testimony flies in the face of all of the documentary evidence in the case as well as the testimony of Petitioner's other main witness, Mr. Rickard. In the end, Mr. Siegan sets forth he is not the booking agent, although all web sites identify him as such, but he is the manager, although the other witnesses in the case, including Petitioner's own Mr. Rickard, dispute this role. Finally, Mr. Siegan even concedes he cannot recall when he became the manager.

It is suggested that the lapse in that recall is for one reason alone: he never has been the manager of the band.

3. Tommy Rickard

In regard to Mr. Rickard's testimony, Mr. Rickard was an abusive musician who, at one time, admittedly assaulted and battered Mr. Gilles at a show in 2006. Specifically, despite opposing counsel's best efforts to interrupt Mr. Rickard's testimony, he admitted to the battery as follows:

Q: Do you recall playing a show June 2006 in the Red Devil Lounge?

A. I don't recall it. Unless there are specifics that are going to draw attention to it, I don't recall offhand.

Q. Now -- well, and I'll tell you some specifics. Now, at this time I believe there may have been an issue with batteries and a wireless microphone. Does this ring a bell?

A. Yeah. And I picked up Pat by this throat and I –

MR. CARLIN: I'm sorry. There is no question pending.

THE WITNESS: Okay. Yes.

MR. SWYERS: Q. That's okay. Go ahead and tell me what you did to Pat.

A. Pat and I got into an argument,..

Rickard Depo. at pp. 90-91. Although the witness, in large part after conferring with counsel, attempts to minimize the assault, Mr. Gilles corroborated the same offering his explanation as to what happened that evening and that it was, in fact, a battery by Mr. Rickard. See Gilles Depo at pp. 98-101.

Of note, Mr. Rickard also conceded that he nor the band have a continuing right to use Mr. Gilles's likeness in the ongoing promotion for the band, this despite the fact they are, in fact, continuing to do so. Rickard Depo. at pp. 77, 84. See also Gilles Depo. at 108-117. Gilles Depo., Exhibit 31-44.

4. Jeff Fletcher

Finally, there is the conspicuous absence of Mr. Fletcher as a witness in the instant case. Throughout this proceeding Petitioners have claimed to be the general partners in a band Mr. Fletcher started with Mr. Gilles in 1996. No partnership agreement has ever been produced to establish how they allegedly acquired such rights in Mr. Fletcher and Mr. Gilles's partnership. No evidence has been offered to refute Mr. Gilles's version that he and Mr. Fletcher formed the partnership prior to any other musicians' involvement in the same. All of these issues could easily have been addressed by one simple act by the Petitioner: call Mr. Fletcher to dispute Mr. Gilles's account of the formation and management of the band.

Rather, Petitioner elected, even after listening to Mr. Gilles's testimony setting forth his partnership agreement with Mr. Fletcher, not to call Mr. Fletcher during its rebuttal period. From the outside one must ask, is Mr. Fletcher even a part of the Petitioner or the instant matter?

Instead, Petitioner has largely rested its case on the testimony of two witnesses, Mr. Siegan and Mr. Rickard. Both witnesses concede that they were not present when Mr. Gilles and

Mr. Fletcher initially discussed and formulated the band, the partnership between Mr. Fletcher and Mr. Gilles. Rickard Depo. at p. 7; Siegan Depo. at p. 9.

Mr. Rickard, who was one of the musicians that Mr. Gilles and Mr. Fletcher agreed should be asked to be a performer, has further admitted, and grotesquely joked about, feloniously battering Mr. Gilles backstage during a performance in 2006. Rickard Depo. at pp. 90-91.

Mr. Siegan, effectively lied about being the “manager” of the band to make it seem like he, and not Mr. Gilles, exercised control over the band during Mr. Gilles’s tenure. Of note, however, this lie runs him afoul of California’s TAA prohibiting booking agents from also being managers of bands at the same time. As such, Mr. Siegan had to scramble and state that he was not the booking agent for the band when all evidence, including the other alleged member of the Petitioner Mr. Rickard, provided otherwise. As such, Mr. Siegan either lied about being the manager to strengthen the case for the Petitioner, lied about not being the booking agent as is set for by the testimony of Mr. Gilles and Mr. Rickard as well as the exhibits in this case, or lied about not being both to avoid violating the TAA. However, one way or another, he lied, under oath, in official testimony, to this Board.

In sum, rather than call Mr. Fletcher to dispute Mr. Gilles’s account of the events that formed the partnership between he and Mr. Fletcher Petitioner has relied upon two witnesses, one of whom has likely committed perjury before this Board and the other his has committed criminal battery against Mr. Gilles while perpetuating ongoing intellectual property violations of Mr. Gilles’s likeness in the continued promotion of the band.

To this end, it is difficult to discern how Petitioner can maintain the credibility of its principle witnesses in this matter given their admitted breaches of civil and criminal codes which are clearly of record in the instant matter. As such, it is respectfully submitted to the Board that

the witnesses for the Petitioner be given little, if any, credibility on the subjects upon which they testified and, as a result, Petitioner cannot satisfy its burden on the backs of these two highly incredible witnesses.

E. Mr. Gilles's Rights Were Not Purchased by the Petitioner⁷

Petitioner contends that as a part of a settlement of a lawsuit brought by Mr. Gilles against members of the Petitioner in the Superior Court for the State of California, County of San Francisco that Mr. Gilles relinquished all rights to the subject trademark upon settlement of the claims at issue. Again, Petitioner's claim in this regard is factually misplaced.

Upon his wrongful termination from the group Wonderbread 5 Registrant brought suit against several of the members of what is alleged to be the Petitioner for wrongful termination, breach of contract, and other allegations concerning his termination from the band. Petitioner's Notice of Reliance at Exhibit 2 (Complaint for Damages) to Exhibit G (Discovery Deposition of Patrick Gilles). Upon examination of the lawsuit, however, none of the claims involved intellectual property rights. Id.

To the contrary, the allegations involved allegations of fraud, breach of contract, breaches of the covenants of good faith and loyalty, as well as interference with economic opportunity and the like. Petitioner's Notice of Reliance at Exhibit 2 (Complaint for Damages) to Exhibit G (Discovery Deposition of Patrick Gilles). Moreover, the only relief requested by Registrant was for monetary relief. Id.

Prior to this civil matter proceeding to trial the parties reached an agreement whereby the defendants in the lawsuit compensated Petitioner in the nature of \$30,000.00 to settle the claims in the Superior Court case. However, the terms of the settlement were never reduced to writing.

⁷ This issue was previously dealt with in Petitioner's Motion for Summary Judgment filed July 30, 2010 and the Board's Order denying Petitioner's requested relief on March 13, 2012.

In short, the Petitioner would like the Board to now find that the settlement of the civil lawsuit which, again, never made mention of ownership of the subject trademark and was limited to requests for monetary damages for economic loss somehow transferred rights in the subject trademark even in the absence of any writing supporting this claim.

Again, the lawsuit did not involve any claim to intellectual property rights. Petitioner's Notice of Reliance at Exhibit 2 (Complaint for Damages) to Exhibit G (Discovery Deposition of Patrick Gilles). Moreover, the \$30,000 paid to Mr. Gilles did not act to transfer his rights in the name WONDERBREAD 5. Moreover, the Petitioner has no writings, agreements, documents, or otherwise that would establish a transfer of Mr. Gilles's rights in the instant service mark to Petitioner. Siegan Depo. at pp. 59-60. See also Gilles Depo. at pp. 102-105.

In the absence of a writing evidencing the intent of the parties at the time the settlement was reached and where the parties dispute the intent behind the settlement it must be said that genuine issues of material fact truly exist as the reason for this settlement and, as such, based upon the Petitioner's own lack of evidence on this point as evidenced by the lack of any supporting documentation the Board must deny the motion for summary judgment on this ground.

F. Mr. Gilles Did Not Commit Fraud on the U.S. Patent and Trademark Office

Petitioner also contends that the Mr. Gilles committed fraud upon the U.S. Patent and Trademark Office by filing an application for the subject registration when he knew, or should have known, that the Petitioner had superior rights to the trademark at issue. Once again Petitioner has focused upon part of the facts but has neglected to address the relevant facts as they apply to the instant matter.

Fraud is a fact-intensive determination based often upon the subjective intent of the person against whom fraud is alleged. Petitioner is quick to point out that as of the time Registrant filed to register the instant trademark he was aware that (1) he had been forced out of the band and (2) the band intended to continue use of the subject trademark. Both statements are true.

Petitioner then makes the improper logical leap in stating that by retaining knowledge of (1) and (2) above Mr. Gilles committed fraud upon the U.S. Patent and Trademark Office by knowingly filing for protection of the mark when he knew his former band mates would continue to use the same. The critical flawed assumption on the part of the Petitioner is that Registrant must have been wrong in his belief that he owned the mark simply because others were going to continue and use the same. Unfortunately for Petitioner's claim there is no evidence of record to support their position.

To the contrary, Mr. Gilles remains steadfast that he is the rightful owner of the trademark. Petitioner has brought forth no evidence of Registrant's fraudulent intent whatsoever. All that they have done is established that he was not permitted to continue to perform with a band he founded with Mr. Fletcher and then filed for the mark. The assumption that one must draw from this to find in Petitioner's favor is that he did so with a fraudulent intent. However, there is no evidence to that effect. Rather, the evidence in the case establishes that, at the time of filing for the service mark at issue, Mr. Gilles believed, and still believes today, that he is the rightful owner of the service mark.

In the absence of concrete facts that establish the subjective intent of the Petitioner at the time of filing to defraud the U.S. Patent and Trademark Office and, specifically, on the evidence of record before the Board, Petitioner cannot and has not carried its burden in regard to its claim of fraud.

G. Mr. Gilles Has Not Abandoned his Trademark

Lastly, although not specifically addressed in Petitioner's Main Brief on the Case, there has been allegations of abandonment or otherwise during the instant proceeding by Mr. Gilles of his rights in the service mark at issue. Specifically, Mr. Gilles has not performed under the WONDERBREAD 5 service mark since as early as 2009 when he was forced not to perform with the current line-up of the band. Gilles Depo at pp. 132-133. However, as Mr. Gilles has explained, he has not used the service mark as a competing mark during the pendency of this litigation. Id. at p. 133 In short, he did not want to destroy the good will associated with the

WONDERBREAD 5 by offering competing bands under the same. *Id.* Rather, he availed himself of the protection afforded by the law and, upon the completion of this matter, intends to resume use of his trademark. *Id.*

As such, to the extent Petitioners raise the issue of abandonment for the first time in their rebuttal brief although there may have been a period of non-use by Mr. Gilles of the service mark for a period of time, such was excusable given the intellectual property battles that have surrounded this issue and, given his professed intent to resume use thereof upon the conclusion of this matter, pending the results thereof, he has not statutorily abandoned the service mark at issue.

CONCLUSION

It is the Petitioner's burden of proof to establish that it, and not the Registrant, is the rightful owner of the service mark at issue. As a threshold issue, it is submitted that the Petitioner has failed to establish standing in this matter or that it's rights could possibly be superior to those of Registrant. Petitioner has loosely identified itself as a California general partnership but has provided no details or agreement as to how that partnership secured their rights in the disputed name in 1996.

At its core, this case is not about priority of use. It is about ownership of the service mark as between Mr. Gilles and Mr. Fletcher and whether Petitioner has carried its burden to establish that it has succeeded to the rights Mr. Gilles and Mr. Fletcher secured when they founded the band. To this end, Petitioner's case hinges on the testimony of two witnesses, Mr. Siegan and Mr. Rickard. In regard to Mr. Siegan, it is relatively clear he has committed perjury in an effort to alter his role from booking agent to manager of the band in an effort to buttress Petitioner's claim in the instant case. During his testimony he either lied, violated California

law, or both. Whatever the case, the Board must disregard his testimony in sum given the totality of his transgressions in truthfulness.

Likewise, Mr. Rickard, who admitted to assault and battery of Mr. Gilles, is equally incredible and cannot be relied upon. His testimony even contradicted the story of Petitioner's other main witness by clearly identifying Mr. Siegan as the booking agent in the band. As such, to establish its case Petitioner has relied upon two witnesses, a batterer and a liar, to establish its case. The Board can simply not hold that the testimony of these two incredible witnesses has established the Petitioner's burden of proof.

Perhaps the most curious issue that draws into question the entire claims of the Petitioner is the conspicuous absence of Mr. Fletcher, co-founder of the band and original partner with Mr. Gilles. Why was he not called as a witness? Is he even apart of the Petitioner as Petitioner claims?

In the end, the record in this case has established that Mr. Gilles founded the band with Mr. Fletcher as 50-50 partners. No evidence was brought to light to contradict this fact in this proceeding. Mr. Gilles managed the band for years until a split between he and Mr. Fletcher developed most likely causing other musicians to threaten him with physical violence if he ever showed up to perform with the band again.

He did not leave the band. It was stolen from him. And the witnesses who testified for the Petitioner, as the record has demonstrated, were wholly incredible. Moreover, despite having forcibly taken his band from him, they continue to wrongfully use his likeness in the promotion of their future performances of the band under Mr. Gilles's service mark.

Rather than to offer competing services that would diminish the value of his brand, Mr. Gilles has at every turn, availed himself to the proper channels for these disputes, courts, rather than to fight it out onstage.

WHEREFORE it is respectfully submitted that the Petitioner has attempted to steal that which rightfully belongs to Mr. Gilles. In some respects, they have been successful barring him from performing under the threat of violence. But in this forum, it is respectfully requested that the Petitioner not be permitted to take away what is rightfully Mr. Gilles's: the service mark for Wonderbread 5.

Accordingly, Registrant respectfully submits that given the facts and circumstances of this case, and in particular the nature of the evidence both submitted and not by the Petitioner, Petitioner has failed in its burden of proof and, as such, the instant petition should be denied.

DATED this 30th day of April, 2014.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

Matthew H. Swyers, Esquire

344 Maple Avenue West, Suite 151

Vienna, VA 22180

Telephone (800) 906-8626 x100

Facsimile (270) 477-4574

mswyers@TheTheTrademarkCompany.com

Attorney for Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Trademark Registration No. 3,691,948.
For the mark WONDERBREAD 5,

Wonderbread 5,	:	
	:	
Petitioner,	:	
	:	
	:	Cancellation No. 92052150
vs.	:	
	:	
Gilles, Patrick,	:	
	:	
Registrant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 30th day of April, 2014,
to be served, via first class mail, postage prepaid, upon:

Cari A. Cohorn, Esq.
PHILLIPS ERLEWINE & GIVEN LLP
50 California St., 32nd Floor
San Francisco, CA 94111

/Matthew H. Swyers/
Matthew H. Swyers