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

Proceeding	92052197
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration
No. 2049857, registered April 1, 1997.

Terri Yenko Gould, Executor,)	
)	
Petitioner)	
)	
v.)	Cancellation 92052197
)	
SuperCar Collectibles, Limited)	
)	
Registrant)	
)	

PETITIONER'S REPLY BRIEF IN SUPPORT OF CANCELLATION

Petitioner Terri Yenko Gould, Executor of the Estate of Donald Frank Yenke, submits this Reply Brief In Support of Cancellation in response to the Main Brief of Respondent-Registrant General Marketing Capital, Inc. (GMCI), filed and served March 30, 2011.

Dated: April 12, 2012

Respectfully submitted,

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 3

II. ARGUMENT 4

A. ISSUES CONCEDED BY RESPONDENT'S FAILURE TO ADDRESS THEM..... 4

(1) PETITIONER'S STANDING AS REPRESENTATIVE OF DON YENKO'S ESTATE 4

(2) THE VALUE OF THE YENKO NAME TODAY 4

(3) THE RELEVANCE OF THIS BOARDS' *MARC CHAGALL* DECISION TO THE PRESENT CASE 5

B. RESPONDENT'S STATEMENT OF FACTS IS IN CONFLICT WITH THE UNDISPUTED TESTIMONY 6

(1) THAT THE PRIMARY SIGNIFICANCE OF THE YENKO NAME NOW ATTACHES TO RESPONDENT, AND NOT DON YENKO (GMCI BRIEF, P. 6) 6

(2) THAT AFTER DON YENKO'S DEATH IN 1987 IT WAS "GENERALLY RECOGNIZED" THAT ALL RIGHTS TO HIS NAME HAD BECOME ABANDONED (GMCI BRIEF P. 6)..... 6

(3) THAT ANY VALUE IN THE YENKO NAME TODAY OWES TO RESPONDENT'S ACTIVITIES, AND NOT DON YENKO'S CONTINUING FAME AND REPUTATION..... 7

(4) THAT PETITIONER KNEW OR SHOULD HAVE KNOWN THAT GMCI AND OTHERS WERE SCRAMBLING TO SEIZE HER FATHER'S NAME..... 9

(5) THAT ALL RIGHTS TO THE YENKO NAME EVAPORATED UPON CLOSING OF THE ESTATE, BECAUSE THEY WERE NOT MENTIONED IN ESTATE INVENTORIES..... 10

C. RESPONDENT'S PRECEDENTS HAVE NO APPLICATION IN THIS CASE 11

III. CONCLUSION 14

I. TABLE OF AUTHORITIES

PRECEDENTIAL COURT CASES

Aquion Partners Limited Partnership v. Envirogard Products Limited, 43 USPQ2d 1371, 1373 (TTAB 1997)..... 14

Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France, 245 F.3d 1359, 58 USPQ2d 1460 (Fed.Cir. 2001) 12

Morehouse Manufacturing Corp. v. J. Strickland & Co., 407 F.2d 881, 160 USPQ 715 (Fed. Cir. 1969) 13

University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 703 F.2d 1372, 1377, 217 USPQ 505, 509 (Fed. Cir. 1983) 12

PRECEDENTS OF THE TRADEMARK TRIAL AND APPEAL BOARD

Association Pour La Defense Et La Promotion De L'oeuvre DeMarc Chagall Dite Comité Marc Chagall v. Bondarchuk, No. 92042323 (TTAB 2007) 5

Land O' Lakes, Inc. v. Hugunin, 88 USPQ2d 1957 (TTAB 2008)..... 13

Mag Instrument, Inc. v. Brinkmann Corp., Opp. No. 91163534 (TTAB 2010) 13

Otto International, Inc. v. Otto Kern GmbH, 83 USPQ2d 1861 (TTAB 2007) 12

Teledyne Technologies, Inc. v. Western Skyways, Inc., 78 USPQ2d 1203, Cancellation No. 92041265 (TTAB 2006) 11

The Christian Broadcasting Network, Inc. v. ABS-CBN International, 84 USPQ2d 1560, Cancellation No. 92046167 (TTAB 2007) 13

STATUTES

Trademark Act Section 2(a), 15 U.S.C. §1052(a) 11, 13

Trademark Act Section 14, 15 U.S.C. §1064 11

OTHER

Rule 701, Fed. R. Evidence 5

II. ARGUMENT

A. ISSUES CONCEDED BY RESPONDENT'S FAILURE TO ADDRESS THEM

(1) PETITIONER'S STANDING AS REPRESENTATIVE OF DON YENKO'S ESTATE

Terri Yenko Gould was and is the executor of Don Yenko's Estate. While Respondent GMCI argues that the Estate long ago abandoned any rights to defend Don Yenko's name and reputation (Resp. Brief pp.19-2), GMCI does not dispute that Ms. Yenko Gould is in fact the proper person to represent the Estate as the aggrieved party in this cancellation proceeding. Her standing is therefore conceded.

(2) THE VALUE OF THE YENKO NAME TODAY

Whether the subject rights – not just trademark rights against false association and misrepresentation under 14 U.S.C. Section 2(a) and Section 14, but rights of publicity under both Pennsylvania and California statutes (Petitioner's Exhibits 33, 34) – were abandoned by the Estate, the fact remains that original YENKO sports cars are very, very valuable today. Several happen to be owned by the witnesses in this case, including GMCI's witness James Sullivan and its own president Jeffrey Leonard. Here is a box score:

<u>Owner</u>	<u>Cars Owned</u>	<u>Estimated (Insured) Value</u>
James Sullivan	One	\$150,000 (Sullivan, T. 13)
Jeffrey Leonard	One	\$350,000 (Leonard, T. 51)
Tom Clary	Five	(not stated) (Clary T. 18-19)
Lester Quam	Two	(not stated) (Quam T. 22)

GMCI urges in its motion to strike (filed separately) that neither Tom Clary (President of the Yenko SportsCar Club) and Lester Quam (long-time auto enthusiast and owner of two

original YENKO automobiles) is competent to offer opinions based on their personal knowledge and experience of the value of original YENKO cars today, ignoring the Rule 701, Fed. R. Evidence which clearly allows it into evidence here. (See Petitioner's Motion Response, also filed separately.)

At the heart of each of the issues presented in this case is one unavoidable fact. Neither GMCI nor either of its predecessors in ownership of the registration in question would have had any interest in the YENKO name were it not for the continuing fame and reputation of Donald Frank Yenke. The name YENKO name became famous and therefore valuable while Don Yenke was alive, and long before Jeffrey Leonard and GMCI ever entered the picture. It is famous and valuable today, possibly even more so. That Mr. Leonard's auto parts business may be less profitable in the absence of exclusive rights to the Yenke name (Respondent's Brief, pp 24-25) is beside the point – his intentions speak louder than his counsel's words. He even thinks he should be able to prevent the Estate itself – Don Yenke's rightful heirs – of the right to use his name for commercial purposes (Leonard T. 63-65).

The stakes in this proceeding are therefore considerable, not just for this registration, but for the eleven others that GMCI has managed to accumulate (see Exhibit P-31) since James Sullivan originally applied to register it for his unauthorized YENKO replica model cars.

(3) THE RELEVANCE OF THIS BOARD'S *MARC CHAGALL* DECISION TO THE PRESENT CASE

It is rare that a precedent is as much “on all fours” with the facts of a contested case as is this Board's decision in Association Pour La Defense Et La Promotion De L'oeuvre De Marc Chagall Dite Comité Marc Chagall v. Bondarchuk, No. 92042323 (TTAB 2007)

(Petitioner's main brief, pp. 16, 18-19). The ingredients are almost entirely the same: a famous man, since deceased; some opportunistic individuals; and a family determined to protect their predecessor's name and reputation from unauthorized commercial exploitation. Yet it isn't even mentioned in Respondent's brief.

The result in this case ought to be the same. The registration in question, and ultimately all of GMCI's subsequent registrations of the YENKO name, should be canceled.

B. RESPONDENT'S STATEMENT OF FACTS IS IN CONFLICT WITH THE UNDISPUTED TESTIMONY

In its recitation of Facts, GMCI asks this Board to accept, without testimony or evidence of any kind, four illogical – and indeed impossible – conclusions.

- (1) THAT THE PRIMARY SIGNIFICANCE OF THE YENKO NAME NOW ATTACHES TO RESPONDENT, AND NOT DON YENKO (GMCI BRIEF, P. 6)

That the primary significance of the YENKO was attributable to Don Yenke's now defunct auto dealership, Yenke Sportscars Inc., and not Don Yenke himself.

- (2) THAT AFTER DON YENKO'S DEATH IN 1987 IT WAS “GENERALLY RECOGNIZED” THAT ALL RIGHTS TO HIS NAME HAD BECOME ABANDONED (GMCI BRIEF P. 6)

What actually happened, of course, was that a few enterprising individuals, including (and probably limited to) Jeffery Leonard, Donald Heth, and James Sullivan – the original registrant of the registration in question - applied for and received federal registrations of the name YENKO for themselves, registrations which eventually were all gathered up under their present owner, GMCI.

This was no accidental confluence of great minds independently inventing the same thing at the same time¹. These few individuals, who must have been well aware of what they

¹ See: http://en.wikipedia.org/wiki/Elisha_Gray_and_Alexander_Bell_telephone_controversy

were doing, intended to exploit Don Yenke's name and reputation for themselves with automotive-related goods. But was Jeffrey Leonard, through his companies Classic Camaro, Inc. and its successor GMCI, who took his opportunism to the extreme by applying for no fewer than twelve YENKO registrations, and then buying up the registration in question here, thereby to lock up for himself every last crumb of Don Yenke's substantial and continuing fame and reputation.

(3) THAT ANY VALUE IN THE YENKO NAME TODAY OWES TO RESPONDENT'S ACTIVITIES, AND NOT DON YENKO'S CONTINUING FAME AND REPUTATION

GMCI asserts at page 13 of its brief that:

It is also axiomatic that the value of Yenke Chevrolets today is due, at least in part, to the prior availability of Yenke promotional items and memorabilia, such as models, clothing, glasses and mugs etc. It was GMCI, SCL [SuperCar Collectibles] and others (e.g. David Heth in the early 1990s) who serviced the unmet market demand for these Yenke promotional items and memorabilia over many years while Petitioner chose to sit it out. [GMCI Brief, pgs 13-14]

This amazing assertion has no basis in fact, let alone in this Record. GMCI had ample opportunity to prove, either by expert testimony or that of lay witnesses, that automotive enthusiasts now buy YENKO branded goods not because of anything to do with Don Yenke, but because they associate the YENKO name with GMCI.

It offered no such testimony, and the reason should be obvious. No car enthusiast (at least one wasn't born yesterday) would ever confuse Jeff Leonard's name and reputation with that of Don Yenke. Is there a "Jeff Leonard SportsCar Club"? What was a recent auction price for an "Original Jeff Leonard/GMCI Camaro"? The proposition is of course absurd. It is the YENKO name that has the association and thus the value, and this Respondent has no lawful claim to it.

What did SuperCar Collectibles do to merit an association with the real Don Yenke? Absolutely nothing, other than to pick up James Sullivan's registration of the name for its replicas of the original YENKO sports cars, for which there would obviously be no market were it not for the continuing fame and reputation of Don Yenke.² What did GMCI pay for the Sullivan registration, then owned by Supercar Collectibles? Nothing. (Dahlberg T. 38) What is the present value of SuperCar's inventory of YENKO replicas? A little over \$50,000, which is a mere fraction of the \$350,000 value placed by Mr. Leonard on his own original YENKO automobile. (Dahlberg T. 23, 39)

As for David Heth, how did he come to claim a right of ownership in Don Yenke's name, such that it took litigation to make him give it up? From all that appears in this record, just about nothing, except contribute – albeit indirectly and certainly unwillingly - his original YENKO Camaro to Mr. Leonard's current private collection. (Leonard T. 11-13)

Did Petitioner Terri Yenke Gould choose to “sit it out”, as GMCI now argues? GMCI had a superb opportunity to ask her this very question at her deposition (attended in person by not just GMCI's counsel but Mr. Leonard himself), but did not. Ms. Gould knew nothing about what had gone on in the USPTO, and certainly nothing about the legal squabbles between SuperCar, GMCI and Heth – and even if she had, the terms of the settlement were suppressed from public view. To impute a legal abandonment of the Estate's rights from these mostly-imagined facts by a suburban California mother of two school-age children is plainly absurd.

In the light of these facts, this assertion by GMCI, apparently meant to be a show-stopper, turns out to be based on no facts or evidence at all. Instead, it perfectly demonstrates

² SuperCar's president Dahlberg pretended to be baffled when asked why he didn't label his replicas models SCHWARTZ instead of YENKO. (Dahlberg T. 36-37)

the emptiness of GMCI's legal position in trying to defend this registration, and with it all of the other undeserved registrations in its portfolio.

(4) THAT PETITIONER KNEW OR SHOULD HAVE KNOWN THAT GMCI AND OTHERS WERE SCRAMBLING TO SEIZE HER FATHER'S NAME

There is nothing in this Record to support the supposition that Terri Yenke Gould, a suburban mother, was aware, or even should have been aware, of all the activities (including litigation) between and among SuperCar Collectibles, Mr. Leonard, GMCI, and/or Donald Heth, all prior to GMCI's late 2011 announcement of a “new” Yenke Camaro, which was the trigger event for this cancellation proceeding. Her testimony is exactly contrary – that she wasn't aware even of SuperCar's replica models until GMCI's “new” YENKO Camaro was brought to her attention by Lester Quam in late 2011. (Gould, T. 22) She wasn't at the inaugural meeting of the Yenke SportsCar Club because she was busy raising her small children. (Gould, T. 39) Contrary to GMCI's mischaracterizations, this is how she actually testified:

As far as I know, people wanted to use it [the YENKO name], but I did not know that people were actually doing that. I didn't have any inkling about that. Wanting to do something and actually doing something are two different things, and I was not aware of anything. (Gould, T. 40)

If GMCI is seeking sympathy for itself, and for SuperCar Collectibles (from whom it purchased the registration at issue long after this proceeding was under way) by reciting the various intra-mural squabbles between and among the several parties competing to be exclusive (though totally unauthorized) sources of YENKO branded merchandise, the story told in its brief isn't going to draw many tears. It is not about a few naive businessmen who innocently adopted the same name for their sports-car related products. Both James Sullivan (the original registrant) and GMCI (who recently added this registration to its already fat

portfolio of YENKO registrations) knew exactly what they were doing – they were trying to exploit exploit and capitalized on Don Yenke's famous name, knowing that he was no longer around to do anything about it.

In particular, James Sullivan well knew that Don Yenke was dead when he filed his application to register the name for YENKO replica model cars, thought his application cleverly omitted reference to that fact. Jeffrey Leonard, being well acquainted with the YENKO name and fame, thereafter filed multiple applications of his own to register it. He, like Sullivan, actually owned a genuine YENKO automobile, and was personally aware of the name's value. (Sullivan T. 15 , Leonard T. 51) Their motives were anything but innocent – they knew the name was a valuable business asset and they had no legitimate claim to it, but because they assumed that after Don Yenke's death it was unguarded and they could take it and get away with it. And so they did.

SuperCar Collectibles' alleged investment, and thus its financial stake, in the YENKO name is so trivial as to be negligible (Dahlberg T. 12 [confidential]), especially when compared with the current market value of just one original YENKO Camaro, and in particular the one owned by Mr. Leonard himself (Leonard T. 51).

(5) THAT ALL RIGHTS TO THE YENKO NAME EVAPORATED UPON CLOSING OF THE ESTATE, BECAUSE THEY WERE NOT MENTIONED IN ESTATE INVENTORIES

Finally, GMCI points to the testimony of John Latella, the attorney who took Don Yenke's will through probate, not for the reason it was offered (to prove that Ms. Yenke Gould indisputably has standing to bring and maintain this action) but as evidence that the YENKO name became commercially worthless upon his death because his trademark registrations went unmentioned in the Estate's property inventories. (GMCI Brief, pp 16-17)

This argument is of course beside the point, because this cancellation proceeding is based on Sections 2(a) and 14 of the Act, and also by implication the right-of-publicity statutes of Pennsylvania and California (Petitioner's exhibits P-33, 34) which Mr. Latella could not have known about, because they had not yet been enacted.

C. RESPONDENT'S PRECEDENTS HAVE NO APPLICATION IN THIS CASE.

GMCI cites Teledyne Technologies, Inc. v. Western Skyways, Inc., 78 USPQ2d 1203, Cancellation No. 92041265 (TTAB 2006)³ because a delay of some years between registration of the mark and filing of the cancellation petitions was found to be excessive, and because the respondent had reasonably invested in and promoted the mark in its own name during that time. However, in allowing the defense, the Board specifically determined that the evidence did not establish “inevitable confusion” (as opposed to a mere likelihood of confusion) which would have foreclosed laches as a defense. “*This is so because any injury to respondent caused by petitioner’s delay is outweighed by the public’s interest in preventing confusion in the marketplace.*” Cancellation No. 92041265 at 29, Citations omitted.

By contrast, in this case customer confusion is not just inevitable; it had to have been intended – otherwise there would have been no reason for Sullivan to decide on YENKO (as opposed to SCHWARTZ, or some other arbitrary name) for his replica automobiles. Likewise, the only plausible reason for Mr. Leonard to seek to register YENKO was also to capitalize on the inevitable association that their customers would make, and most likely continuing to make, with the fame and reputation of Don Yenke.

³ Involving the mark GOLD SEAL for rebuilt aircraft engines; and rejecting the *Morehouse* defense.

In Otto International, Inc. v. Otto Kern GmbH, 83 USPQ2d 1861 (TTAB 2007)⁴, the petitioner had failed to do more than “make a bald allegation in the language of the statute”, which did not give the respondent fair notice of the basis for petitioner’s claim. It pleaded no facts by which the Board could conclude the sort of “blatant misuse” (*dicta*) which it was looking for, so the Board never got into the facts at all.

In the present case, the uncontroverted evidence goes even further than that – it shows that this respondent, like its predecessor in interest, must have intended the public to assume that it held exclusive rights to the name YENKO, which was – and is – blatantly false. As such, it falls within the circumstances referred to in University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 703 F.2d 1372, 1377, 217 USPQ 505, 509 (Fed. Cir. 1983) (false association intended by the registrant) .

In Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France, 245 F.3d 1359, 58 USPQ2d 1460 (Fed.Cir. 2001)⁵, the principal issue was laches, and the respondent's burden of proof was therefore to show (1) an unreasonable delay in filing, and (2) the suffering of material prejudice because of it. The respondent was allowed to raise this defense only because “*There was no evidence that Bridgestone's use of the LEMANS mark for tires entailed misrepresentation ... Thus Bridgestone may avail itself of the defense of laches.*” 245 F.3d 1359, 1363. The

4 Involving the mark OTTO KERN for luggage, clothing, etc.

5 Involving the mark LEMANS for pneumatic rubber tires.

issue of intentionally seeking customer confusion – which is the case here – was therefore not present.

The Christian Broadcasting Network, Inc. v. ABS-CBN International, 84 USPQ2d 1560, Cancellation No. 92046167 (TTAB 2007)⁶, is cited in support of the argument that the Estate's laches ran all the way from Mr. Sullivan's alleged first use of his supposedly new-found mark, which would draw the period of inaction out to an alleged twelve years. But as in each of Respondent's other precedents, the issue in that case was a Section 2(d) likelihood of confusion, and not a Section 2(a) intentional creation of a false association – such as is the case here. The decision is therefore irrelevant.

Finally, GMCI seeks to rely on Morehouse Manufacturing Corp. v. J. Strickland & Co., 407 F.2d 881, 160 USPQ 715 (Fed. Cir. 1969) as a defense. The Morehouse rationale (if it can be called that) is essentially this:

We think the board took the proper approach in first determining the cancellation and then dismissing the opposition, on the basis of the cases relied on, for the reason that opposer cannot suffer legal damage from the additional registration, over and above any damage it may suffer from the existing registration. 407 F.2d 881, 884

Of this supposed defense, one commentator has called it a “toothless tiger”⁷, because since its origination in 1966 it has apparently been more often rejected than followed. See, e.g., Land O' Lakes, Inc. v. Hugunin, 88 USPQ2d 1957 (TTAB 2008); Mag Instrument, Inc. v. Brinkmann Corp., Opp. No. 91163534 (TTAB 2010) (“*The Morehouse defense requires the*

6 Involving the mark ABS-CBN for television broadcasting services, etc.

7 Welch, John L., “Keeping Tabs on the TTAB”, <http://thettablog.blogspot.fr/2008/02/vitamilk.html>, (March 3, 2008).

goods to be “*identical, substantially the same, or so related so as to represent in law a distinction without a difference*”, citing Aquion Partners Limited Partnership v. Envirogard Products Limited, 43 USPQ2d 1371, 1373 (TTAB 1997))

In other words, GMCI is arguing that because the Estate elected to petition to cancel this particular registration first – it being the first to be applied for (July 26, 1995) and the first issued (April 1, 1997) – that it has thereby acquiesced in each of GMCI's subsequent applications and registrations. When the present petition was filed, GMCI wasn't yet the respondent. Since it hadn't yet acquired the registration, it wasn't even in the picture.

Thus GMCI's subsequent avalanche of registration applications (the first having been filed February 8, 1999 for “*mail order catalog services ...*”) doesn't fit even the most favorable interpretation of this often-discredited precedent.

III. CONCLUSION

Upon the points and authorities set forth above, and in her Main Brief, Petitioner Terri Yenko Gould, Executor of the Estate of Donald Frank Yenko, prays that this petition for cancellation be sustained, and that U.S. Trademark Registration No. 2049857 be canceled.

Dated: April 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

George E. Bullwinkel, an attorney of record, hereby certifies that one copy of the foregoing PETITIONER'S REPLY BRIEF IN SUPPORT OF CANCELLATION was served by mailing, first class, postage prepaid, on April 12, 2012, and also by electronic mail, to the following:

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