

TTAB

Attorney Docket No. 17207-005900US

CERTIFICATE OF DEPOSIT

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, Box TTAB 2900 Crystal Drive, Arlington, VA 22202-3513 on April 7, 2003.

TOWNSEND AND TOWNSEND AND CREW LLP

By: *Rebecca L. Gilbert*

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

In re application of:  
Amvescap PLC

TM Attorney: Rebecca L. Gilbert

Serial No.: 76/214,007

Law Office: 113

Filed: February 21, 2001

For: **INVESCO FIELD AT MILE HIGH**

APPEAL BRIEF

**BOX TTAB, NO FEE**

Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

Pursuant to the Trademark Trial and Appeal Board ("Board") Order dated February 4, 2003, and Trademark Rule 2.142(b), Appellant-Applicant Amvescap PLC ("Appellant") submits the following brief in support of its appeal of the Examining Attorney's final refusal of registration of the above-referenced mark.

**INTRODUCTION**

Appellant respectfully requests that the Board reverse the Examining Attorney's refusal to register Appellant's mark INVESCO FIELD AT MILE HIGH due to alleged likelihood of

*W*

confusion with the registered mark MILE HIGH STADIUM.<sup>1</sup> The two marks differ significantly in sight, sound, and commercial impression: Appellant's mark contains the highly distinctive element INVESCO FIELD AT, and also does not contain the element STADIUM, thus differentiating it substantially from the cited registered mark visually, aurally, and in connotation. The Examining Attorney failed to recognize this, apparently because she dissected the two marks and focused exclusively on the common element MILE HIGH. Such dissection contravenes well-settled law and should be reversed for this reason alone. Moreover, the Examining Attorney failed to recognize that the element MILE HIGH is geographically descriptive of Denver, Colorado, and consistently has been treated as weak by the Patent and Trademark Office ("P.T.O."). Evidence of this consistent treatment is found in the fact that there exist sixteen registrations incorporating the element MILE HIGH, including several – including MILE HIGH MARATHON, MILE HIGH NATIONALS, and MILE HIGH ADVENTURES AND ENTERTAINMENT – in the same International Class in which Appellant seeks to register its mark. In addition, MILE HIGH SALUTE recently was published for opposition and nobody opposed registration, proving that even the owner of MILE HIGH STADIUM does not believe confusion is likely due to common usage of the element MILE HIGH. Finally, several other factors, including the history and context surrounding the actual and future use of the two marks, weigh strongly in favor of registration of Appellant's mark. Consequently, Appellant respectfully requests that the Board reverse the final refusal and allow Appellant's application to proceed to publication.

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Registration No. 2,291,174, issued November 9, 1999.

## PROCEDURAL BACKGROUND

Appellant filed the subject trademark application on February 21, 2001, seeking registration of the mark INVESCO FIELD AT MILE HIGH in International Class 41. On June 6, 2001, the Examining Attorney issued an Office Action raising a number of issues, only one of which is relevant for purposes of this appeal: the Examining Attorney refused registration of Appellant's mark under Section 2(d)<sup>2</sup> on the grounds that there exists a likelihood of confusion between Appellant's mark and the registered mark MILE HIGH STADIUM.<sup>3</sup> On December 2, 2001, Appellant filed an Amendment and Response arguing on a number of grounds that there exists no likelihood of confusion between the two marks. On January 16, 2002, the Examining Attorney issued a second office action, maintaining and making final the Section 2(d) refusal. On April 16, 2002, Appellant filed an Amendment and Request for Consideration, again arguing that there exists no likelihood of confusion between the two marks. On May 3, 2002, the Examining Attorney denied the request for reconsideration. On July 15, 2002, Appellant instituted the present appeal.

The sole issue presented is whether there exists a likelihood of confusion between the following two marks:

- INVESCO FIELD AT MILE HIGH for use in connection with "providing facilities for sporting events, namely football games and soccer matches; providing facilities for entertainment events, namely music concerts" in International Class 41; and
- MILE HIGH STADIUM for use in connection with "providing stadium facilities for sports and recreational activities" in International Class 41.

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<sup>2</sup> 15 U.S.C. § 1052(d).

<sup>3</sup> The Examining Attorney also found Appellant's recitation and classification of goods and services unacceptable and cited various prior pending applications as potential grounds for refusal under Section 2(d). All of these issues have been resolved and are not before the Board in this appeal.

For the reasons set forth below, Appellant respectfully contends that the Examining Attorney incorrectly analyzed this issue and improperly refused registration of Appellant's mark.

### **ARGUMENT**

There exists no likelihood of confusion between Appellant's mark, INVESCO FIELD AT MILE HIGH, and the cited registered mark, MILE HIGH STADIUM. The marks differ significantly in sight, sound, and commercial impression, rendering the possibility of confusion as to the source of services extremely small. The Examining Attorney reached the opposite conclusion, but her analysis contains two fundamental errors. First, the Examining Attorney improperly dissected the two marks. When viewed in their entireties, the marks differ substantially. Second, the Examining Attorney failed to recognize that the common element, MILE HIGH, is weak both generally and on the federal register, and that P.T.O. consistently has recognized this weakness. Due to this weakness, consumers are likely to focus on the elements of the marks that are not shared. Finally, the Examining Attorney's conclusion that certain articles in the press suggest a likelihood of confusion between the two marks is incorrect. When read in the correct context, these articles actually demonstrate that the relevant consumers are fully aware that the sources of the services offered under the two marks differ.

#### **A. The Two Marks Differ Significantly In Sight, Sound, And Commercial Impression.**

There exists no likelihood of confusion between INVESCO FIELD AT MILE HIGH and MILE HIGH STADIUM because the two marks differ sufficiently in sight, sound and commercial impression. Appellant's Mark contains the element INVESCO FIELD AT, which does not appear in the cited registered mark. Therefore, Appellant's mark contains five additional, non-shared syllables. Moreover, the element INVESCO – a fanciful word that

Appellant has incorporated into many of its registered marks<sup>4</sup> – is highly distinctive in itself, thus strongly distinguishing Appellant's mark from the cited registered mark. Furthermore, the cited registered mark contains the word STADIUM, which Appellant's mark does not contain, further distinguishing the two marks. Appellant's mark contains different words, and more words, than the cited registered mark, and therefore the two marks are spoken differently, heard differently, and appear differently to the eye. When such differences exist, likelihood of confusion rarely if ever should be found.<sup>5</sup> In this case, confusion is extremely unlikely due to these dissimilarities.

**B. The Examining Attorney Should Not Have Dissected The Marks.**

It appears that the Examining Attorney failed to appreciate the differences in sight, sound, and meaning for two reasons. First, the Examining Attorney improperly dissected the two marks. The validity and distinctiveness of a composite trademark is determined by viewing it as a whole, as it appears in the marketplace.<sup>6</sup> "A mark should not be dissected or split up into its component parts and each part then compared with corresponding parts of the conflicting mark to determine the likelihood of confusion."<sup>7</sup> As the Supreme Court has stated, "[t]he commercial impression of a trademark is derived from it as a whole, not from its elements separated and compared in detail. For this reason it should be considered in its entirety."<sup>8</sup>

<sup>4</sup> See, e.g., Registration Nos. 1,825,441; 7,4505,461; 7,6256,076.

<sup>5</sup> *Champagne Louis Roederer, S.A., v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998) ("[O]ne DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.")

<sup>6</sup> Lanham Act, § 43(a)(1), 15 U.S.C. § 1125(a)(1); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 203, 22 U.S.P.Q.2d 1542, 1545 (Fed. Cir. 1992); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985); 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:41 (4th ed. 1996) ("Conflicting composite marks are to be compared by looking at them as a whole, rather than breaking the marks up into their component parts for comparison.").

<sup>7</sup> 3 McCarthy § 23:41.

<sup>8</sup> *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538 (1920); *Packard Press Inc.*, 56 U.S.P.Q.2d 1351, 1356 (overturning TTAB decision that "completely failed to consider the appearance and sound of the mark as

The Examining Attorney dissected Appellant's Mark and the cited registered mark, focusing exclusively on the common element of the two marks, but in no way assessed the impact of the uncommon elements on sight, sound, and meaning. The January 16, 2001, Office Action states that "Appellant has merely added the name of the field to the cited registered mark." Office Action at 4. This is not correct. As noted above, the cited registered mark contains the word "STADIUM," which Appellant's mark does not contain. As a result, all of the cases cited by the Examining Attorney are inapposite.

More importantly, Appellant's mark contains highly distinctive words which the cited registered mark does not contain. These words, "INVESCO FIELD AT," constitute the dominant portion of Appellant's Mark for at least three reasons: (1) the INVESCO element is highly distinctive; (2) the INVESCO FIELD AT element is the first part of the mark and this primacy increases its impact on consumers; and (3) the INVESCO FIELD AT element comprises three words, five syllables, and sixteen characters and thus overshadows the element MILE HIGH, which comprises only two words, two syllables, and nine characters. The Office Action makes no effort to assess the effect of these differences, instead focusing solely on the common element MILE HIGH. Under applicable law, the two marks must be compared in their entireties.

In addition, assuming *arguendo* that Appellant had simply added words to the cited registered mark, this would not by itself create a likelihood of confusion. The Board and the courts consistently have held that the fact that one mark incorporates another previously-registered mark does not by itself preclude registration of the later mark.<sup>9</sup> When the marks are

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a whole"); *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 42 U.S.P.Q.2d 1173 (6th Cir. 1997) (overall impression of shopper of mark as a whole will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison of the two marks).

<sup>9</sup>See *Murray Corp. of Amer. v. Red Spot Paint & Varnish*, 126 U.S.P.Q. 390, 392-93 (C.C.P.A. 1960) (finding no likelihood of confusion between EASY for spray-on enamel and EASYTINT for paint); *Bell Labs., Inc. v. Colonial Prods., Inc.*, 231 U.S.P.Q. 569, 573 (S.D. Fla. 1986) (finding no likelihood of confusion between FINAL and

considered in their entireties, there exists no likelihood of confusion.

**C. The Common Element Of The Two Marks Is Weak And Thus Not Entitled To A Wide Scope Of Protection.**

The marks' common element – MILE HIGH – is weak both in general and on the federal register. For this reason, consumers are highly unlikely to focus on this element and mistakenly conclude that there exists a connection or affiliation between Appellant's services and those offered under the cited registered mark.<sup>10</sup> Just the opposite, consumers will focus on the uncommon element of the two marks and conclude that the services offered under each are provided by different sources. The Examining Attorney failed to appreciate this weakness and thus has provided MILE HIGH STADIUM with a scope and breadth of protection wider than that to which it is entitled under the law.

The record contains extensive evidence demonstrating the weakness of MILE HIGH. Specifically, Appellant has submitted evidence showing that Denver, Colorado is known as the "Mile High City" and the surrounding area is known as the "Mile High Area." For instance, the web page of the Red Cross lists its "Mile High Area Branches."<sup>11</sup> The Denver-area telephone directory lists well in excess of 200 business that begin their name with "Mile High."<sup>12</sup> In

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FINAL FLIP, both for rodent poison); *In re Hamilton Bank*, 222 U.S.P.Q. 174, 178 (TTAB 1984) (finding no likelihood of confusion between KEY, for banking services, and KEYCHECK, for banking services); *Industrial Adhesive Co. v. Borden, Inc.*, 218 U.S.P.Q. 945, 951 (TTAB 1983) (finding no likelihood of confusion between BOND-PLUS for adhesive and WONDER BOND PLUS for adhesive).

<sup>10</sup> *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 1390 (Fed. Cir. 1989) (holding that PECAN is merely descriptive and that no likelihood of confusion existed between PECAN SANDIES and PECAN SHORTIES); *Hamilton Bank*, 222 U.S.P.Q. at 178 (finding the element KEY weak and that no likelihood of confusion existed between KEY and KEYCHECK); *In re Texas Trading & Milling Co.*, 178 U.S.P.Q. 319, 320 (T.T.A.B. 1973) (holding that the element TEXAS is descriptive and allowing registration of both TEXAS BEST and TEXAS PRIDE).

<sup>11</sup> December 2, 2001, Amendment and Response, Exh. A.

<sup>12</sup> *Id.* Exh. B. This type of information, primarily because of its recent nature, constitutes acceptable evidence of third party usage of marks containing MILE HIGH and MILE HI. See *In re Broadway Chicken Inc.*, 38 U.S.P.Q. 2d

addition, there are numerous other listings that include "Mile High" or "Mile Hi" as a part of a business name or trademark, but which do not start with those words (and hence are not shown on the alphabetical directory listing in the record). Further, an Internet search engine yields scores of hits for sites containing "Mile High" both as references to Denver and as part of business names and trademarks.<sup>13</sup> These sites include numerous examples of the use of "Mile High" in connection with sports and sporting events, none of which are associated with or take place at MILE HIGH STADIUM (including Mile High Figure Skating Association, Mile High Tournament of Champions, Mile High City Marathon, Mile High Gaelic Tournament, and Mopar Mile High Nationals).<sup>14</sup>

Evidence in the record also demonstrates that MILE HIGH is weak on the federal register in connection with the class of services for which Appellant seeks registration. There exist sixteen current registrations incorporating MILE HIGH, plus an additional seven pending applications.<sup>15</sup> Of the sixteen existing registrations incorporating MILE HIGH, four are in International Class 41, the same class in which Appellant seeks to register its mark. These existing registrations in International Class 41 are:

- MILE HIGH STADIUM for stadium facilities;
- MILE HIGH MARATHON for conducting sporting events;
- MILE HIGH ADVENTURES AND ENTERTAINMENT for organizing social events and activities; and

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1559 (TTAB 1996). Telephone directories are, of course, not prepared for applicant, but "are maintained on an ongoing basis for general business use." *Id.* at 1565.

<sup>13</sup> December 2, 2001, Amendment and Response, Exh. C.

<sup>14</sup> *Id.* Exh. D. Like telephone listings, this type of information is relevant evidence of the descriptive nature of "Mile High," as well as third party usage of the terms.

<sup>15</sup> *Id.* Exhibit E.



- MILE HIGH NATIONALS for automobile races.<sup>16</sup>

These four registrations demonstrate that the P.T.O. has appreciated the high density of MILE HIGH marks in International Class 41 and has allowed registration to even more MILE HIGH marks, provided the proposed mark is not identical to an existing mark. The weakness of MILE HIGH for services in International Class 41 weighs in favor of allowing registration of Appellant's Mark.<sup>17</sup>

The P.T.O. has taken the same approach with respect to MILE HIGH marks in other classes. Of the twelve other MILE HIGH registrations, many are for very similar goods and services, including:

- MILE HIGH CLUB for clothing, 5280' DENVER THE MILE HIGH CITY for clothing, and MILE HIGH for shoes;
- MILE HIGH PUBLISHING for publishing fitness books and periodicals, MILE HIGH COMICS for selling comic books, and MILE HIGHTECH for providing financial news; and
- MILE HIGH PIE for ice cream, MILE HIGH for sandwiches, and NEW ENGLAND COUNTRY HOMES HOME OF THE "MILE HIGH APPLE PIE" for pies.<sup>18</sup>

These records make clear that: (1) "Mile High" is a commonly used phrase with understood meanings; (2) the P.T.O. has recognized this fact by registering marks containing this common element for the same or closely related goods, and; (3) that a common element in two marks is an insufficient basis to find likelihood of confusion where that common element is widely used.<sup>19</sup>

Further evidence of the weakness of MILE HIGH is found in the prosecution histories for

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<sup>16</sup> See April 16, 2002, Amendment and Request for Reconsideration Exh. 1.

<sup>17</sup> *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) (stating that the number of similar marks on similar goods should be considered in assessing likelihood of confusion).

<sup>18</sup> See *id.* Exh. 2.

<sup>19</sup> See *American Hospital Supply Corp. v. Air Prods. and Chemicals, Inc.*, 194 U.S.P.Q. 340, 343 (TTAB 1977).

MILE HIGH MARATHON, MILE HIGH NATIONALS, and MILE HIGH SALUTE.<sup>20</sup> Each of these histories demonstrate the P.T.O.'s consistent treatment of MILE HIGH as geographically descriptive. For instance, registration of MILE HIGH MARATHON was expressly conditioned on the registrant's agreement to disclaim any exclusive right to the element MILE HIGH. Similarly, during prosecution of MILE HIGH NATIONALS, the Examining Attorney found that "[t]he words 'Mile High' would clearly be regarded by the applicant's consumers as referring to the Mile High City, or Denver, Colorado, the place where applicant's automobile races take place." The only exception to consistent treatment of MILE HIGH as geographically descriptive is MILE HIGH STADIUM, where the P.T.O. (presumably inadvertently) failed to require a disclaimer or require the registrant to prove substantial continuous and exclusive use under Section 2(f).<sup>21</sup> If INVESCO FIELD AT MILE HIGH is reviewed in light of the P.T.O.'s otherwise consistent policy with respect to MILE HIGH, registration of Appellant's mark should be permitted.

**D. The Owner of MILE HIGH STADIUM has acknowledged that MILE HIGH is descriptive.**

The owner of MILE HIGH STADIUM, the City and County of Denver, has acknowledged that the element MILE HIGH is descriptive by not objecting to the registration of additional MILE HIGH marks. The mark MILE HIGH SALUTE, owned and used by the Denver Broncos, the football club that played for years at MILE HIGH STADIUM, was published for opposition in December 2001, and nobody – including the City and County of Denver – opposed registration of that mark.<sup>22</sup> This indicates that even the owner of MILE HIGH

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<sup>20</sup> See attachments to Request for Remand filed July 15, 2002.

<sup>21</sup> 15 U.S.C. § 1052(f).

<sup>22</sup> See Amendment and Request for Reconsideration, Exh. 3.

STADIUM does not believe confusion is likely based simply on usage of the common element MILE HIGH.

Moreover, the City and County of Denver has used MILE HIGH STADIUM descriptively even after the stadium bearing that name was demolished.<sup>23</sup> Attached hereto at Tab 1 is a photo of a street sign in Denver, Colorado, showing a street named "Mile High Stadium Circle." This use is geographically descriptive and constitutes a dedication to the public of the element MILE HIGH. Consequently, even the owner of MILE HIGH STADIUM has acknowledged that it does not have exclusive rights to the element MILE HIGH, and thus the Board should conclude that MILE HIGH is descriptive.<sup>24</sup>

**E. The Preposition "At" Reinforces the Conclusion that MILE HIGH is Geographically Descriptive.**

The Examining Attorney concluded that if MILE HIGH is geographically descriptive, proper English would require the stadium to be named INVESCO FIELD IN MILE HIGH rather than INVESCO FIELD AT MILE HIGH.<sup>25</sup> This conclusion is incorrect. When referring to altitude, the correct preposition is "at," not "in." For instance, one would say that Washington, D.C., is at sea level and that Denver sits at 5,280 feet above sea level. Similarly, INVESCO FIELD is at 5,280 feet, or one mile high. The fact that Denver is one mile above sea level is perceived to be an advantage for the home team because visiting athletes must cope with the reduced oxygen at 5,280 feet.<sup>26</sup> As a result, the mark INVESCO FIELD AT MILE HIGH is

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<sup>23</sup> See *infra* note 38 and accompanying text.

<sup>24</sup> Although the photo at Tab A is not currently of record, Applicant requests that the Examining Attorney respond to this evidence in her Reply Brief and that the Board consider this evidence. To the extent either the Examining Attorney or the Board objects to this approach, Applicant respectfully requests that the Board suspend this appeal and remand the instant application for further examination pursuant to Trademark Rule 2.142(d).

<sup>25</sup> January 16, 2002, Office Action at 5.

<sup>26</sup> On-line at [http://www.sportswatherpage.com/about\\_altitude.htm](http://www.sportswatherpage.com/about_altitude.htm) (last accessed Apr. 1, 2002).

correct English usage, and the preposition “at” reinforces the conclusion that MILE HIGH is geographically descriptive of Denver

**F. The History Surrounding MILE HIGH STADIUM and INVESCO FIELD AT MILE HIGH Demonstrates That There Is No Likelihood Of Confusion.**

There exists no actual consumer confusion nor other indicia of likely future confusion.<sup>27</sup>

The Examining Attorney has suggested that various articles from computerized databases demonstrate that the public likely will be confused about the source of stadium services offered under INVESCO FIELD AT MILE HIGH.<sup>28</sup> The cited articles do not stand for this proposition; just the opposite, consumers of Appellant’s services recognize that the sources of services under the two marks differ. In order to appreciate this point and correctly construe the articles cited by the Examining Attorney, one must understand the history and context surrounding construction of the new stadium in Denver.

The facility bearing the mark MILE HIGH STADIUM was built in 1948. It began as the home of Denver’s minor league baseball team, the Bears, and was known at the time as Bears Stadium. In 1960, the American Football League’s Denver Broncos began playing their home games at Bears stadium.<sup>29</sup> In 1968, a Denver-area civic group purchased Bears Stadium, changed the name to MILE HIGH STADIUM, and gave the stadium to the City of Denver.<sup>30</sup> At the time, one longtime fan stated, “they can call it Mile High Stadium if they want to, but it will always be Bears Stadium to me.”<sup>31</sup>

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<sup>27</sup> *DuPont*, 476 F.2d at 1361 (stating that actual confusion and other factors should be considered in evaluating likelihood of confusion).

<sup>28</sup> January 16, 2002, Office Action at 4-5.

<sup>29</sup> On line at <http://denver.rockymountainnews.com/milehigh/1223mile0.shtml> (last accessed on Mar. 26, 2002).

<sup>30</sup> *Id.*

<sup>31</sup> On line at <http://denver.rockymountainnews.com/milehigh/1223amole.shtml> (last accessed on Mar. 26, 2002).

In the late 1990s, the Colorado legislature set out to determine whether the stadium should be renovated or whether a new facility should be built.<sup>32</sup> In 1998, Denver-area voters approved a referendum in favor of constructing a new stadium.<sup>33</sup> As construction began, considerable media attention and public debate focused on the new stadium's name.<sup>34</sup> The Denver Metropolitan Football Stadium District,<sup>35</sup> the entity responsible for building and naming the new stadium, weighed the public's sense of history and tradition against the financial realities of paying for the \$400 million dollar project.<sup>36</sup> Ultimately, the Stadium District announced that it had reached a deal to sell the naming rights to Appellant, who had chosen to name the new stadium and provide services under the mark INVESCO FIELD AT MILE HIGH.<sup>37</sup> Construction of the new stadium finished and first use of Appellant's mark began in 2001, and in 2002 (since issuance of the final rejection in this proceeding) the old stadium was demolished.<sup>38</sup>

This background demonstrates that the consuming public will not be confused between the two stadiums or the origin of the source of services being provided at each. MILE HIGH STADIUM had a long and unique history with which the consuming public is well aware. In light of the media attention and public interest surrounding the naming of the new stadium by the Stadium District, consumers are also well aware that the owner of the mark INVESCO FIELD

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<sup>32</sup> On line at <http://mfsd.com/history.htm> (last accessed on Mar. 29, 2002).

<sup>33</sup> *Id.*

<sup>34</sup> Cindy Brovsky, *History circles new stadium Webb takes Mile High to the streets*, Denver Post, March 14, 2002, Pg. B-02.

<sup>35</sup> Importantly, this entity is distinct from the City and County of Denver, the owner of MILE HIGH STADIUM.

<sup>36</sup> On line at [http://mfsd.com/naming\\_rts/name\\_rts1\\_22\\_01b.htm](http://mfsd.com/naming_rts/name_rts1_22_01b.htm), [http://mfsd.com/naming\\_rts/namings\\_rts11\\_2000.htm](http://mfsd.com/naming_rts/namings_rts11_2000.htm) (last accessed on Mar. 26, 2002).

<sup>37</sup> Cindy Brovsky, *'Invesco Field' Wins Name Game*, Denver Post, January 30, 2001, at A-1.

<sup>38</sup> *Out with the Old*, Denver Post, March 28, 2002, at B-2.

AT MILE HIGH is not the same as the owner of the facility known as MILE HIGH STADIUM. The public also knows that MILE HIGH STADIUM has been torn down. Thus, public confusion is extremely unlikely.

Each of the articles cited by the Examining Attorney must be viewed in light of this background. For instance, the Examining Attorney calls attention to an article containing a poll suggesting that 81% of people will call the new stadium "Mile High Stadium."<sup>39</sup> The results of this poll do not demonstrate a likelihood of confusion between the two marks. Rather, the results of this poll demonstrate Denver fans' sense of tradition and their ambivalence about the Stadium District's decision to sell the naming rights for the new stadium. That is why the cited article begins with the qualifier, "Regardless of how you feel about the Stadium Board selling the new stadium's name..."<sup>40</sup> This article actually demonstrates a *lack* of confusion between the two marks. Far from being confused, most fans fully understand the distinction between the sources of services under the two marks and feel strongly about the situation. Whether the new stadium's name incorporated the element MILE HIGH or not, a certain segment of the public would refer to the new stadium as MILE HIGH STADIUM out of tradition. (Note that certain fans continued to call the old stadium "Bears Stadium" even after the name changed to MILE HIGH STADIUM. This was not due to consumer confusion, but due to the fans' sense of tradition. Similarly, consumers continued to refer to a well-known beverage as "Coke" despite the trademark owner's rebranding to "Classic Coke.") The same is true for many of the other articles cited by the Examining Attorney. They do not reflect confusion as to the source of the services, but instead reflect some parties' disappointment that the old stadium had been replaced

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<sup>39</sup> January 16, 2002, Office Action at 4.

<sup>40</sup> See attachments to January 16, 2002, Office Action.

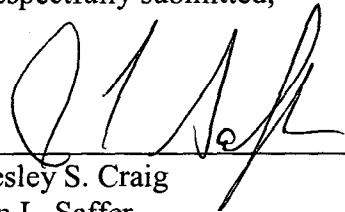
at all.<sup>41</sup>

### CONCLUSION

For the reasons set forth above, there is no likelihood of confusion between the marks INVESCO FIELD AT MILE HIGH and MILE HIGH STADIUM. The substantial differences in sight, sound, and meaning are apparent when the marks are viewed in their entireties. In addition, the great number of marks incorporating MILE HIGH proves that this element is weak and that consumers will look to the uncommon elements of the two marks in order to determine source. Appellant respectfully requests that the Board reverse the Examining Attorney's decision and allow the application to proceed to registration.

Appellant believes that no fees are due at this time; however, the Commissioner is hereby authorized to deduct any fees or credit any overpayments regarding this application to Deposit Account Number 20-1430.

Respectfully submitted,



Lesley S. Craig  
Ian L. Saffer

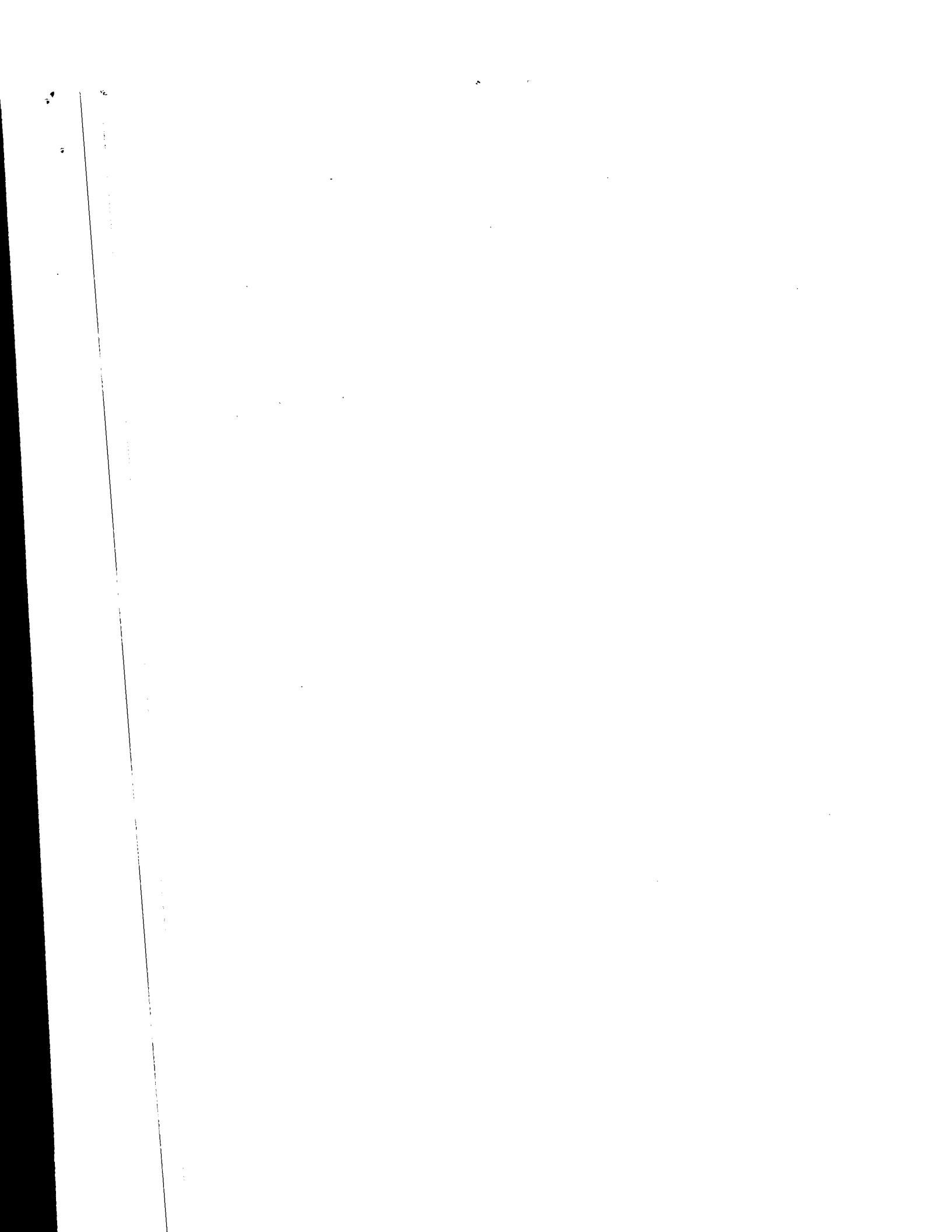
Date: April 7, 2003

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<sup>41</sup> Cindy Brovsky, *Post: Out with the New Stadium Name, In with the Old*, Denver Post, August 8, 2001, at B-1 (reporting the decision of the Denver Post editorial board to refer to the new stadium as "Mile High" rather than "Invesco Field at Mile High" due to community sentiment) (the Post editorial board has subsequently reversed this decision).







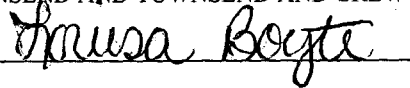
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TOWNSEND AND TOWNSEND AND CREW LLP

By:



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Filed: February 21, 2001

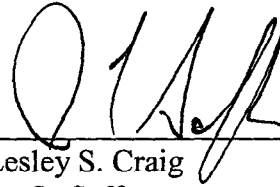
For: **INVESCO FIELD AT MILE HIGH**

REQUEST FOR AN ORAL HEARING  
37 C.F.R. 2.129(a)

Applicant, Amvescap PLC, a corporation duly organized and existing under the laws of the United Kingdom, having its headquarters at 11 Devonshire Square, London, ENG EC2M 4YR, United Kingdom, hereby requests an oral hearing of the Appeal in this application.

Dated: April 7, 2003

Respectfully submitted,



Lesley S. Craig  
Ian L. Saffer

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