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

Proceeding	85325500
Applicant	MASQUERADE OF TAMPA BAY, INC.
Applied for Mark	MASQUERADE ONE STEP CLOSER TO UNMASKING A CURE FOR
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Date	12/23/2012

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

In re Service Mark Application of :

Applicant: MASQUERADE OF TAMPA BAY, INC. non-profit corporation FLORIDA 4701
DUNNIE DRIVE TAMPA FLORIDA 33614

Serial No.: 85325500

Filed: May 19, 2011

Trademark Attorney: Maria-Victoria Suarez

Applicant's Mark:



APPLICANT'S APPEAL BRIEF

I hereby certify that on December 23, 2012, this Appeal Brief was filed with the Trademark Trial and Appeal Board via ESTTA. Please charge deposit account 23-3060 for any and all fees in regard to this appeal and this appeal brief.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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BRIEF FOR APPLICANT

A. INTRODUCTION.

On May 19, 2011 ("Applicant") applied to register the design mark shown here. Quoted information is single spaced. All other information is double spaced.



"Word Mark: MASQUERADE ONE STEP CLOSER TO UNMASKING A CURE FOR
MULTIPLE SCLEROSIS

Goods and Services IC 036. US 100 101 102. G & S: charitable fund raising services for
the benefit of multiple sclerosis research. FIRST USE: 20110226. FIRST USE IN
COMMERCE: 20110226

Serial Number 85325500

Filing Date May 19, 2011

Current Basis 1A

Original Filing Basis 1A

Owner (APPLICANT) MASQUERADE OF TAMPA BAY, INC. non-profit corporation
FLORIDA 4701 DUNNIE DRIVE TAMPA FLORIDA 33614

Description of Mark The color(s) hot pink, purple, blue, brown, yellow, green, black and
gray is/are claimed as a feature of the mark. The mark consists of the word
"MASQUERADE" with a large "MS" in hot pink overlapping the black letters

"AQUERADE" with a black mask and a swooping gray line leading from the mask underneath the word "MASQUERADE" with spots of purple, blue, brown, yellow and green and gray lines in the form of party tassels emanating from the mask, and the words "ONE STEP CLOSER TO UNMASKING A CURE FOR MULTIPLE SCLEROSIS" in black.

SIGNIFICANCE OF MARK: MS appearing in the mark means or signifies or is a term of art for multiple sclerosis in the relevant trade or industry or as applied to the goods/services listed in the application.”

The Trademark Attorney finally refused to register Applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d) on April 30, 2012. In the final refusal the Trademark Attorney stated:

“SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION

“Registration of the applied-for mark was refused because of a likelihood of confusion with the mark in U.S. Registration No. 3574143 and 3247585. Trademark Act Section 2(d), 15 U.S.C. §1052(d); see TMEP §§1207.01 et seq.

Applicant applied to register the mark MASQUERADE ONE STEP CLOSER TO UNMASKING A CURE FOR MULTIPLE SCLEROSIS (and design) for use in connection with charitable fund raising services for the benefit of multiple sclerosis research. The registered marks are MASQUERADE EXPERIENCE THE FRENZY! (and design) [U.S. Registration No. 3574143] and MASQUERADE [U.S. Registration No. 3247585] for use in connection with charitable fundraising services.

Taking into account the relevant du Pont factors, a likelihood of confusion determination in this case involves a two-part analysis. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361-62, 177 USPQ 563, 567 (C.C.P.A. 1973); *In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007); see also *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01, 1207.01(b). The services are compared to determine whether they are similar or commercially related or travel in the same trade channels. See *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

Applicant's mark and the mark in U.S. Registration No. 3574143 are very similar in that they share the salient term “MASQUERADE.” Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both

applicant's and registrant's mark. See *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01 (b)(ii)-(iii).

Applicant maintains that its "design mark includes a prominent 'MS' and these letters are to denote 'multiple sclerosis' [...] It is respectfully suggested that the presentation of MS in combination with and overlapping the letters 'aquerade' creates a completely different commercial [sic] impression than either registration." The examining attorney respectfully disagrees. The designs are given less weight when determining the overall commercial impression of the marks. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the services; therefore, the word portion is normally accorded greater weight in determining whether marks are confusingly similar. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); TMEP §1207.01(c)(ii); see *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011). Notwithstanding, the marks create the same commercial impression of a masquerade party as reinforced by the word portions of the marks and the design of a mask in applicant's mark. The term "masquerade" refers to a "costume party at which masks are worn." See attached dictionary definition.

Likewise, the stylization of applicant's mark is irrelevant when comparing it to the standard character mark in U.S. Registration No. 3247585. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display. TMEP §1207.01(c)(iii); see 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters or otherwise in special form generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. See, e.g., *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"); *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

Turning to the services, in a likelihood of confusion analysis, the comparison of the parties' services is based on the services as they are identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); see *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d

1261, 1267-68, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638-39 (TTAB 2009); TMEP §1207.01(a)(iii).

In this case, the identification set forth in the cited registration uses broad wording to describe registrant's services and does not contain any limitations as to nature, type, channels of trade or classes of purchasers. Therefore, it is presumed that the registration encompasses all charitable fundraising services, including those in applicant's more specific identification, that the services move in all normal channels of trade, and that they are available to all potential customers. See *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); TMEP §1207.01(a)(iii).

The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); see TMEP §1207.01(a)(iii).

In total, the marks create the same commercial impression and the registrant's services encompass applicant's services. Consumers are likely to be confused and mistakenly believe that the services originate from a common source. Therefore, registration must be refused under Section 2(d) of the Lanham Act.”

For the convenience of the Board and Trademark Attorney, the reference marks are set forth below:

Reference 1. United States Trademark Registration No. 3574143:



“Word Mark MASQUERADE EXPERIENCE THE FRENZY!

Goods and Services IC 036. US 100 101 102. G & S: CHARITABLE FUNDRAISING SERVICES. FIRST USE: 20060921. FIRST USE IN COMMERCE: 20060921

Owner (REGISTRANT) Kreyling, Douglas INDIVIDUAL UNITED STATES 547 DeSoto Drive DeSoto TEXAS 75115

Serial Number 78943258

Filing Date August 2, 2006

Registration Date February 10, 2009

Color is not claimed as a feature of the mark.”

Reference 2. United States Trademark Registration No. 3247585:

MASQUERADE

“Goods and Services IC 036. US 100 101 102. G & S: CHARITABLE FUNDRAISING SERVICES. FIRST USE: 20060322. FIRST USE IN COMMERCE: 20060322

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Owner (REGISTRANT) Kreyling, Douglas INDIVIDUAL UNITED STATES 547 DeSoto Drive DeSoto TEXAS 75115

Serial Number 78944283

Filing Date August 3, 2006

Registration Date May 29, 2007”

Applicant respectfully requests and asks that the Trademark Trial and Appeal Board ("TTAB") please review this matter, and reverse the Trademark Attorney's decision refusing registration.

The issue on appeal is:

whether the mark of the Applicant is confusingly similar to either United States Trademark Registration **3574143** or **3247585**?

B. THE MARKS ARE NOT LIKELY TO BE CONFUSED WHEN PROPERLY CONSIDERED IN THEIR ENTIRETIES

Applicant respectfully asserts that the Trademark Attorney did not properly consider the marks in their entirety. When the cited marks and Applicant's mark are properly considered in their entireties as they would be encountered in the marketplace, they are quite different in appearance and commercial impression. Essentially, the Trademark Attorney has essentially ignored most of the Applicant's mark. See, *In re Electrolyte Laboratories, Inc.*, 913 F.2d 930, 16 USPQ2d 1239 (Fed. Cir. 1990), corrected 929 F.2d 645 (Fed. Cir. 1990), stating:

"Determination of likelihood of confusion is reviewed as a question of law. *Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir.1985). It is necessarily a subjective determination, *In re Burndy Corp.*, 300 F.2d 938, 940, 133 USPQ 196, 197 (CCPA 1962), and the effect of a design or style of letters, as any determination of likelihood of confusion, depends on the particular facts.....

There is no general rule as to whether letters or design will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue. No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone. See *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974) (improper to ignore portion of composite mark).....

A design is viewed, not spoken, and a stylized letter design can not be treated simply as a word mark. *Burndy*, 300 F.2d at 940, 133 USPQ at 197."

The refusal to register by the Trademark Attorney can be fairly characterized as a simple comparison between:

the word mark **MASQUERADE** of United States Trademark Registration No. **3247585** and the applicant's mark; and,

the word portion **MASQUERADE** of United States Trademark Registration No. **3574143** and the applicant's mark. The Applicant's mark is:



A single Registrant, an individual, owns United States Trademark Registration nos. 3574143 (MASQUERADE EXPERIENCE THE FRENZY!) and 3247585 (MASQUERADE).

The mark of Applicant and the marks of Registrant when compared in their entireties are different and are not likely to be confused. Applicant's mark focuses on the disease Multiple Sclerosis. Applicant's design mark includes a prominent "MS" and these letters are used to denote "Multiple Sclerosis", the disease for which money is sought to help find a cure through research. The application has been amended to recite that the letters "MS" mean "Multiple Sclerosis." It is respectfully suggested that the presentation of "MS" in combination with and

overlapping the letters "aquerade" and all of the additional words and design elements in Applicant's mark creates a completely different commercial impression than either cited registration.

Applicant's mark is not just a word mark, rather, it is much more and presents a different commercial impression. Clearly, Applicant's mark includes the words "ONE STEP CLOSER TO UNMASKING A CURE FOR MULTIPLE SCLEROSIS" and these words are not at all similar to the words EXPERIENCE THE FRENZY! as set forth in the '143 registration and they obviously don't appear with the word MASQUERADE in the '585 registration.

Additionally, the '143 and '585 registrations are relatively plain and do not contain any of the design elements of applicant's mark, namely, the '143 registration is in black and white and the '585 is in black and white. This is in stark contrast to the colorful design mark of the instant application for which registration is sought.

The color(s) hot pink, purple, blue, brown, yellow, green, black and gray is/are claimed as a feature of the mark. The mark consists of the word "MASQUERADE" with a large "MS" in hot pink overlapping the black letters "AQUERADE" with a black mask and a swooping gray line leading from the mask underneath the word "MASQUERADE" with spots of purple, blue, brown, yellow and green and gray lines in the form of party tassels emanating from the mask, and the words "ONE STEP CLOSER TO UNMASKING A CURE FOR MULTIPLE SCLEROSIS" in black. The spots of purple, blue, brown, yellow and green and gray lines in the form of party tassels emanating from the mask denote are included in the mark.

The large MS in hot pink means or signifies or is a term of art for Multiple Sclerosis in the relevant trade or industry or as applied to the goods/services listed in the application. The "mask" illustrated in the mark refers to the fact that the etiology of the disease of Multiple Sclerosis has not yet been identified nor has the cure of the disease been identified. The letters MS, the words Multiple Sclerosis, and the words UNMASKING A CURE FOR MULTIPLE SCLEROSIS, the mask, and the party tassels synergistically work together as a mark whose theme is Multiple Sclerosis and its cure.

The identified services used in connection with Applicant's mark are also different, to wit, charitable fund raising services for the benefit of multiple sclerosis research. Registrant's services are charitable fund raising services which are delivered in the form of \$5 jewelry sales and those services and their mode and method of delivery are of record in the file history of the instant application to register. Applicant's mode and method of delivering its services are by way of a dinner fundraiser as indicated by the specimen originally filed with the application.

The Trademark Attorney's analysis focuses on the sole proposition that the word portion of a design mark should be accorded more weight than the design portions. It appears that the Trademark Attorney has not considered the words "ONE STEP CLOSER TO UNMASKING A CURE FOR MULTIPLE SCLEROSIS". Further, it appears that the Trademark Attorney has not considered the words "Multiple Sclerosis" or letters "MS". Further, the party tassels, the colors and the other features of Applicant's mark were not considered by the Trademark Attorney.

In the final refusal, the Trademark Attorney cited *In re Dakin's Miniatures, Inc.* 59 USPQ2d 1593, 1596 (TTAB), *CBS v. Morrow*, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200

(Fed. Cir. 1983), and *In re Kysela Pere et Fils. Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011) in support of the proposition that the word portion of a design mark is normally accorded greater weight in a likelihood of confusion analysis. *In re Dakin's Miniatures, Inc., Id.*, indicates that the additional wording used therein is descriptive or informational, namely, the wording "QUALITY CRAFTED MINIATURES." Applicant's mark uses "MS", the words "Multiple Sclerosis" (initials are capitalized), and the words "one step closer to unmasking a cure for Multiple Sclerosis" along with a mask and party tassels, all of which are colored and form part of the mark. While the Trademark Attorney has focused on the word MASQUERADE, the focus on the letters "MS" and the words "Multiple Sclerosis" should have been part of the analysis. In fact, it is respectfully suggested that the words and design of Applicant's mark are differentiating features of the mark and are not just descriptive or informational in character. Therefore, the analysis of *In re Dakin's Miniatures, Inc., Id.*, does not apply to the instant mark.

CBS v. Morrow, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983), states that the verbal position of a mark is the one most likely to indicate the origin of the goods. It is possible that the word "position" is a typo and that the word is supposed to be "portion." *In re Kysela Pere et Fils. Ltd., Id.*, cites the dominance of the letters HB with a crown design and that the focus should be on the HB instead of the design. As stated previously, it appears that the Trademark Attorney ignored the letters "MS" in applicant's mark and probably for good reason as those letters do not appear in either cited registration.

The Trademark Attorney has cited TMEP 1207.01(c)(ii), entitled: Composite Marks Consisting of Both Words and Designs, which states, in pertinent part, that "[h]owever, the fundamental rule in this situation is that the marks must be considered in their entirety. See *In*

re Shell Oil Co., 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993); *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402, 181 USPQ 272, 273-74 (C.C.P.A. 1974)."

The Trademark Attorney states that "stylization of applicant's mark is irrelevant when comparing it to the standard character mark" in U.S. Registration No. 3247585 citing TMEP §1207(c)(iii) and citing *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"); *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); and, *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

First, *Squirtco v. Tomy Corp. Id.* is not on point and was decided based on a conclusion that an alliteration, to wit, SQUIRT SQUAD, did not and could not create a different commercial impression as compared with SQUIRT. Second, *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988), dealt with an attempt to register the word LITE in script form in view of registrations for the word LITE. Third, *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991), dealt with the attempt to register a mark in script in view of a registration for the identical mark in mark in block letters. None of these citations is applicable to the factual or legal issues before the Board, as the issue here is the evaluation of the Applicant's mark in its entirety. The Trademark Attorney's statement that "stylization of Applicant's mark is irrelevant when comparing it to the standard character mark" is believed to a misstatement of law.

The Trademark Attorney has not considered: the letters "MS", the words "Multiple

Sclerosis", the "mask design", the "party tassel design", the lines and other distinctive markings, all of which are colored, and the words "one step closer to a cure for Multiple Sclerosis" in evaluation of the Applicant's mark to determine whether or not Applicant's mark is likely to be confused with either or both cited Registrations. As such, the Trademark Attorney's analysis is flawed. It is believed that Applicant's mark is distinct and different with respect to the cited Registrations and is allowable and registrable.

C. CONCLUSION

The mark of Applicant and the marks of Registrant when compared in their entireties are different and are not likely to be confused. Applicant's mark focuses on the disease Multiple Sclerosis. Applicant's design mark includes a prominent "MS" and these letters are used to denote "Multiple Sclerosis", the disease for which money is sought to help find a cure through research. The application has been amended to recite that the letters "MS" mean "Multiple Sclerosis." It is respectfully suggested that the presentation of MS in combination with and overlapping the letters "aquerade" and all of the additional words and design elements in Applicant's mark creates a completely different commercial impression than either registration.

Applicant respectfully requests and asks that the Trademark Trial and Appeal Board reverse the Trademark Attorney's decision refusing registration and direct that a Notice of Publication be issued.

Respectfully Submitted,
MASQUERADE OF TAMPA BAY, INC.

/Kenneth L. Mitchell/
December 23, 2012

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