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

Proceeding	86248063
Applicant	Fourstar Group Inc.
Applied for Mark	FUNOVATIONS
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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IN RE	:	Fourstar Group Inc.
SERIAL NO	:	86248063
FILING DATE	:	APRIL 10, 2014
MARK	:	FUNOVATIONS
LAW OFFICE	:	113

APPLICANT'S BRIEF ON APPEAL

Applicant respectfully submits this appeal brief.

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III. Statement of the Issues

The Examining Attorney has refused registration pursuant to Trademark Act §2(d) , 15 U.S.C. §1052(d) for likelihood of confusion with another registered mark FUNOVATION (with designs and colors claimed) Registration No. 3698713. Applicant respectfully submits this appeal.

As described below, Applicant's mark is not likely to cause confusion with the cited mark because (1) Applicant's mark and the cited mark are sufficiently dissimilar in appearance, their entireties, and commercial impressions; (2) the goods of Applicant and the registrant are significantly different; (3) a registration in federal register for substantially similar mark to the cited mark on goods in International Class 28 indicates that Applicant's mark may coexist with the cited mark.

IV. Prosecution History

Applicant filed its Application for the mark FUNOVATIONS on April 10, 2014 in connection with "mechanical toys, wind-up toys" in International Class 28. On July 23, 2014, the Examining Attorney issued an initial Office Action on the basis of §2(d) likelihood of confusion with the mark FUNOVATION (with designs and colors claimed) Registration No. 3698713, in connection with "action skill games" in International Class 28.

On August 4, 2014, Applicant filed its response requesting its application be suspended

until the required §8 Affidavit for the cited mark was timely filed by the registrant. On August 20, 2014, the Examining Attorney issued a Second and Final Office Action maintaining the refusal to register Applicant's mark on the basis of §2(d) with FUNOVATION Registration No. 3698713.

On December 16, 2014, Applicant filed its Request to Reconsideration in response to the Final Office Action. Applicant argued that Applicant's mark would not cause confusion among consumers with the cited mark because the marks when viewed in their entireties were sufficiently dissimilar and the channels of trade of the goods were different. Applicant also argued that Applicant's novelty toys would not be confused with Registrant's action skill games when considering the sophistication of purchasers for either Applicant's or Registrant's goods. On December 31, 2014, the Examining Attorney denied Applicant's Request for Reconsideration and maintained the §2(d) refusal.

On February 5, 2015, Applicant filed a second Request to Reconsideration. Applicant argued that the goods and services listed in the cited mark and the goods of Applicant's mark were not related. Applicant also argued that Applicant's mark should co-exist with the cited mark because the cited mark has been co-existed with Registration No. 4170950 for mark FUNNOVATION in connection with "playground equipment, namely, play structures comprised of at least one or more of the following: climbing towers, monkey bars, platforms, jungle gyms, playhouses, gymnastic apparatus, slides, swings, ladders, climbing walls, climbing nets, fire poles, tubes and picnic tables sold as a component of the aforementioned playground equipment" in International Class 28. On February 10, 2015, the Examining Attorney denied Applicant's Request for Reconsideration and maintained the §2(d) refusal.

On February 5, 2015, Applicant timely filed a Notice of Appeal.

V. Legal Argument

In determining likelihood of confusion, the thirteen *DuPont* factors should be analyzed. *In re DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). In this case, the relevant factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; (2) the similarity or dissimilarity of the goods; (3) the similarity or dissimilarity of the trade channels; (4) the number and nature of similar marks in use on similar goods. *Id*. Among the relevant *DuPont* factors, our analysis on likelihood of confusion should focus on the dissimilarity of the marks and the goods because if the marks are readily distinguishable when the marks are considered in their entireties and if the goods sold by Applicant under Applicant's mark differ from the goods and/or services by the registrant under the registrant's mark, prospective purchasers would not be confused. *Steve's Ice Cream, Inc. v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478 (TTAB 1987).

The marks at hand share the common term "funovation," but the overall commercial impression is not confusingly similar because the cited mark is distinctly different in appearance and entireties from Applicant's mark due to additional colors and designs. Moreover, the goods, trade channels, and consumers of the goods of Applicant and the registrant are different because Applicant's goods are wind-up mechanical toys being sold in dollar stores while the registrant's goods are the software and hardware sold to the amusement parks for installation and set-up of laser mazes. Furthermore, Applicant's mark should be allowed to co-exist with the cited mark because the cited mark has been co-existed with Registration No. 4170950 for mark FUNNOVATION in connection with "playground equipment, namely, play structures comprised

of at least one or more of the following: climbing towers, monkey bars, platforms, jungle gyms, playhouses, gymnastic apparatus, slides, swings, ladders, climbing walls, climbing nets, fire poles, tubes and picnic tables sold as a component of the aforementioned playground equipment" in International Class 28 since 2012 without any known instances of actual confusion.

For the reasons stated above, Applicant's mark does not create likelihood of confusion among consumers with the cited mark and, therefore, the Application should pass to publication for registration.

A. Dissimilarity of the Marks

Likelihood of confusion can be avoided if the marks in their entireties create overall different commercial impressions. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1396, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *In re: National Data Corp.*, 224 USPQ 749 (Fed. Cir. 1985); TMEP § 1207.01(b).

Applicant's mark apparently differs from the cited mark in their entireties because the marks are sufficiently dissimilar in appearance. While Applicant's mark is a standard character mark, the cited registration consists of letters "FUN" in blue, the letters "OVATION" in red, a left swirl in red with a background of gray and white, a right swirl in blue with a background of gray and white, and a shading of gray underneath the words "FUNOVATION." Although the marks share a word "funovation," the marks are apparently and visually different due to additional designs and colors in the cited mark and these apparent differences in appearance differentiate them in their entireties and create overall different commercial impressions.

Although the Examining Attorney asserts that confusion among consumers of Applicant and the registrant is likely because Applicant's mark and the cited mark share a word 'funovation,' even if marks are almost identical in a literal sense, there is no per se likelihood of confusion if overall images of the marks are different. *Steve's Ice Cream, Inc.*, 3 USPQ2d at 1478; *Jacobs v. International Multifoods Corp.*, 212 USPQ 641 (CCPA 1982); *In re Best Products*, 231 USPQ 988 (TTAB 1986) (holding no likelihood of confusion between marks JEWELERS' BEST for retail jewelry store services and BEST JEWERLRY for men's and ladies' bracelets and watch bracelets, sold separately from the watches*); In re Akzona, Inc.*, 219 USPQ 94 (TTAB 1983) (holding no likelihood of confusion between SILKY TOUCH for synthetic yarns and TOUCH O'SILK for items of men's clothing); *Industrial Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199, 177 USPQ 386, 387 (CCPA 1973) (holding that "each case must be decided on its own facts and the differences are often subtle ones").

In *Steve's Ice Cream*, applicant filed an application for mark 'STEVE'S & DESIGN' for restaurant services and the application was opposed on the ground of likelihood of confusion with a registration of mark 'STEVE'S' for ice cream for consumption on or off the premises and applications for "STEVE'S' and 'STEVE'S & DESIGN' for selling ice cream at retail. 3 USPQ2d at 1477. The Board held there was no likelihood of confusion found because (1) the marks were different as there were obvious differences in the marks caused by design portion in the applicant's mark and (2) it did not necessarily follow that consumer expected a single source to be responsible for both restaurant services and ice cream. *Id*. at 1478.

Like the Board in *Steve's Ice Cream*, the Court in *Jacobs* held that there was no likelihood of confusion between BOSTON SEA PARTY for restaurant services and BOSTON

TEA PARTY for teas because a party must show something more than that similar or even identical marks were used for food products and for restaurant services to establish likelihood of confusion. *Jacobs*, 212 USPQ at 642.

Like the mark in *Steve's Ice Cream*, Applicant's mark is apparently different from the cited mark in appearance because the cited mark includes designs and claimed colors. 3 USPQ2d at 1478. Additionally, in order to assert likelihood of confusion between Applicant's mark and the cited mark, it must be supported more than that those marks which only share a word 'funovation' are used for goods that are categorized in International Class 28 as the court in *Jacobs* held. 212 USPQ at 642. The visual differences make Applicant's mark different from the cited mark in their entireties and the difference in their entireties results in creating overall different commercial impressions between the marks. As likelihood of confusion can be avoided when the marks in their entireties create overall different commercial impressions, there is no likelihood of confusion between Applicant's mark and the cited mark. *Palm Bay Imports, Inc.,* 73 USPQ2d at 1692; *Recot, Inc.*, 54 USPQ2d at 1899; TMEP § 1207.01(b).

B. Dissimilarity of the Goods and Trade Channels

In analyzing the *DuPont* factors to determine likelihood of confusion, the question should be whether the purchasing public would mistakenly assume that the Applicant's goods come from the same source as the registrant of the cited mark. *In re Majestic Distilling Co.*, 65 USPQ2d 1311, 1315 (Fed. Cir. 2003). Moreover, when goods are marketed or promoted in different ways from each other, consumers are not likely to be confused with the source of the products even if the marks are identical and, therefore, there is no likelihood of confusion. *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR

for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties' respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by); TMEP §1207.01(a).

Although the Examining Attorney asserts that the goods of Applicant are related to the goods of the registrant of the cited mark, the goods are sufficiently dissimilar and unrelated because those are marketed differently, sold through different channels and to different groups of purchasers, and priced disparately based on the facts described below.

Applicant's goods are "mechanical toys and wind-up toys" sold at dollar stores. Exhibit A. Differently, the registrant's goods are "action skill games" and the registrant is selling software and/or hardware to amusement parks for the purpose to install and set-up laser mazes and the installation and set-up services are also provided by the registrant. Exhibit B. Accordingly, the groups of purchasers of the goods of Applicant and the registrant are different as Applicant's goods are sold to individuals who visit dollar stores while the registrant's goods are sold to mostly sizable amusement parks which utilize set-up laser mazes and provide entertainment to paid customers. When 'funovation' is searched on Google the search results show extensive use of the cited mark by the registrant for its business of laser mazes. Exhibit C. Based on the differences in the characteristics of the goods, it seems reasonable to assume that Applicant's goods are much less expensive than the registrant's goods.

In conclusion, the goods of Applicant and the cited mark are mutually exclusive as they are sold for mutually exclusive purposes, targeted different groups of purchasers, sold through different channels of trade, and sold under different conditions under which sales are made. For

the reasons, the goods are not even competitive to each other. As the goods of Applicant and the registrant of the cited mark are different in all aspects except that those are categorized in International Class 28, the goods are sufficiently different to negate likelihood of confusion. *In Reynolds v. I.E. Systems, Inc.,* 5 USPQ2d 1749 (TTAB 1987) (holding that when function or fields of use of goods at issue are different, the difference is sufficient to negate likelihood of confusion).

C. Similar Mark by Third Party in Use on Similar Goods

In addition to the cited mark, evidence of third-party of FUN-OVATION-formative mark is found in the federal register for the goods in International Class 28 and the evidence supports that Applicant's mark can co-exist with the cited mark without causing confusion.

The mark in the third party registration is as follows:

1. FUNNOVATION

   Registration No.: 4170950

   Registration Date: April 24, 2012

   International Class 28: Playground equipment, namely, play structures comprised of at least one or more of the following: climbing towers, monkey bars, platforms, jungle gyms, playhouses, gymnastic apparatus, slides, swings, ladders, climbing walls, climbing nets, fire poles, tubes and picnic tables sold as a component of the aforementioned playground equipment.

If Applicant's goods are considered similar and related to the goods of the cited mark, we

find that the goods of the cited mark and the '950 registrant also should be considered similar and related to each other because the cited mark and the mark in '950 registration share the same word portion 'FUN' and 'OVATION' and the goods of '950 registration are playthings like Applicant's. In that sense, because the cited mark and the mark in '950 registration have co-existed without any known instances of actual confusion we find that Applicant's mark also should and may coexist with the cited mark without causing confusion.

VI. Conclusion

In determining likelihood of confusion, "the fundamental inquiry mandated by the Lanham Act, 15 USC §1052(d), should go to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Further, likelihood of confusion should be a legal determination based upon factual underpinnings. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1084 (Fed. Cir. 2000). Based on the factual underpinnings regarding Applicant's mark and the cited mark, we find that Applicant's mark is sufficiently different from the cited mark because the marks are visually dissimilar as the cited mark consists of a distinctive design and claimed colors which are missing from Applicant's mark. We also find that the goods for Applicant's mark are sufficiently different and unrelated to the goods of the registrant of the cited mark because the goods are marketed differently, sold through different channels of trade and targeted different groups of purchasers, and priced disparately. Based on the cumulative effects of differences in the essential characteristics of the goods and differences

in the marks, confusion among the purchasing public does not seem possible. Therefore, we may not simply assume that purchasers would expect a common source to both the goods because there is no likelihood of confusion when "the potential for confusion appears a mere possibility not a probability." *Electronic Data & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2D 713, 21 USPQ2d 1388, 1393 (Fed. Cir. 1992).

For the reasons state above, Applicant respectfully requests that the Board withdraw the cited Registration No. 3698713 and that the instant Application be passed to publication and such action is courteously solicited.


funovation
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GALAXY
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FOR ENDLESS HOURS OF FUN!


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Receiver 6
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Laser 2
Laser 3
Laser 4
Laser 5
Laser 6
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FUNOVATION
Laser Control Module
TriNet
TriNet
Receiver 9
Receiver 10
Receiver 11
Receiver 12
Receiver 13
Receiver 14
Receiver 15
Receiver 16
Laser 9
Laser 10
Laser 11
Laser 12
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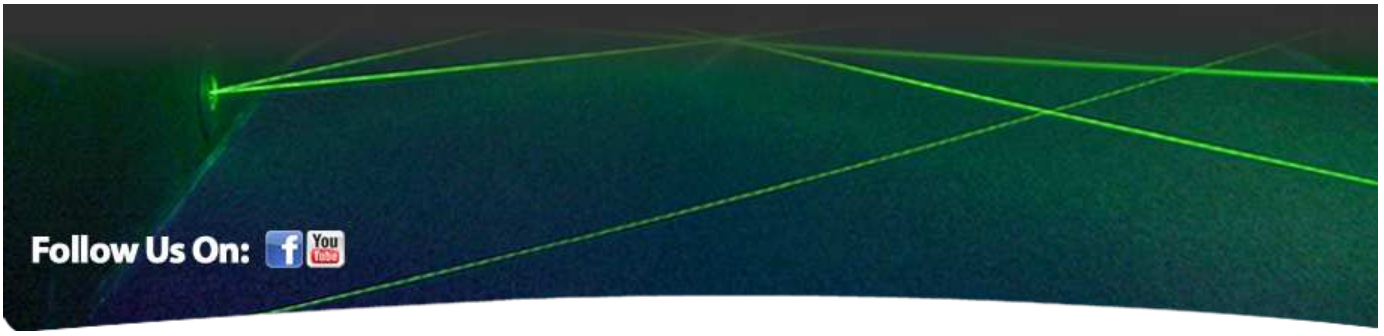
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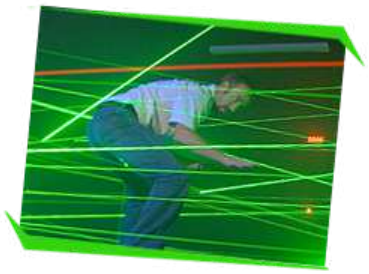

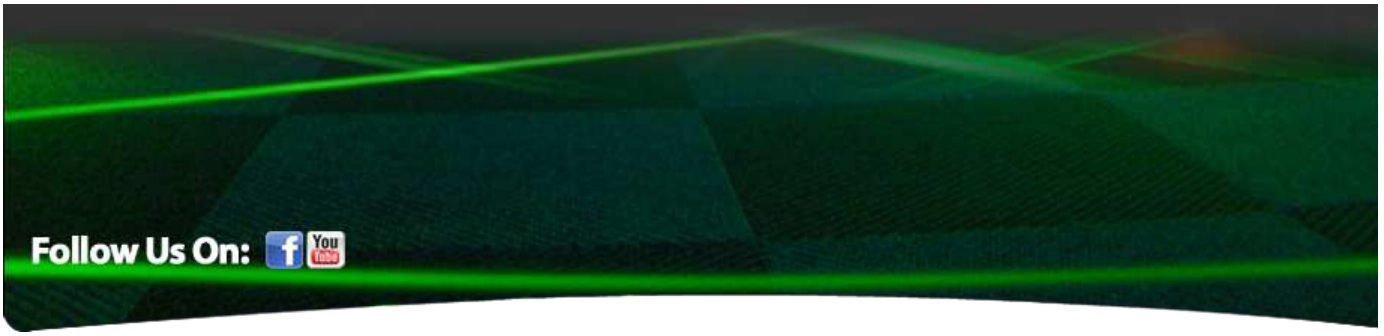
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