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

Proceeding	91125588
Party	Defendant GRACO, INC. ,
Correspondence Address	STEPHEN R. BAIRD WINTHROP & WEINSTINE, P.A. 225 South Sixth Street; Suite 3500 MINNEAPOLIS, MN 55402
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Samuel T. Lockner
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Signature	/Samuel T. Lockner/
Date	03/10/2005
Attachments	20050310LtrMtnDismiss.pdf (1 page) 20050310MtnDismiss.pdf (7 pages) 20050310DeclMtnDismiss.pdf (11 pages) 20050310CertMtnDismiss.pdf (1 page)


WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

March 10, 2005

Samuel T. Lockner
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Commissioner of Trademarks
BOX TTAB – NO FEE
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Campbell Hausfeld/Scott Fetzer Co. v. Graco, Inc.
Opposition No. 91,125,588

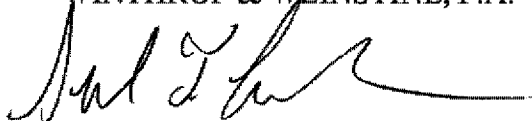
Dear Commissioner:

Enclosed for filing in connection with the above-identified matter please find:

1. Applicant's Motion to Dismiss and Embodied Memorandum in Support of Its Motion
2. Declaration of Samuel T. Lockner; and
3. Certificate of Service.

Very truly yours,

WINTHROP & WEINSTINE, P.A.



Samuel T. Lockner
STL/mmr
Enclosures
2231103v1

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

CAMPBELL HAUSFELD/SCOTT FETZER CO.)	Opposition No.: 91/125,588
)	
)	Mark: The Color Blue
)	
vs.)	Serial No.: 75/621,248
)	
GRACO, INC.)	Filed: January 13, 1999
)	
)	Published: March 26, 2002
)	
)	
)	

**APPLICANT'S MOTION TO DISMISS AND EMBODIED
MEMORANDUM IN SUPPORT OF ITS MOTION**

Pursuant to Fed. R. Civ. P. 12(b)(6) and Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 503, Applicant Graco, Inc. ("Applicant") respectfully moves the Trademark Trial and Appeal Board (the "Board") for an order dismissing Opposer Campbell Hausfeld/Scott Fetzer Co.'s ("Opposer") opposition based on Section 2(d) of the Lanham Act. Opposer failed to plead a claim under Section 2(d) upon which relief can be granted. Specifically, Opposer never pled facts that, if proven, demonstrate that it has superior proprietary rights in the color blue on and in connection with its Products – a requisite element under Section 2(d). Accordingly, Opposer's Second Amended Notice of Opposition based on Section 2(d) of the Lanham Act should be dismissed.

STATEMENT OF THE FACTS

Applicant is owner of Application Serial No. 75/621,248 (the "Application"), which covers the color blue on portable electric and gasoline powered airless paint sprayers for use by professional painters and professional contractors, in International Class 7.

On June 20, 2002, Opposer filed a Notice of Opposition against the Application. A true and correct copy is attached as Exhibit A. In its Notice of Opposition, Opposer made the following vague, ambiguous and seemingly contradictory allegations:

- Opposer since at least as early as 1947 has been, and is using now, the color blue on and in connection with the promotion and sale of a wide variety of products, including, without limitation, products relating to the paint industry (“the Products”). (Not. of Opp. ¶ 1.)
- Opposer’s use of blue on and in connection with the Products has been continuous since 1947 and such use has been throughout the United States and throughout the world. (*Id.* at ¶ 2.)
- Opposer uses the color blue on the Products which compete with the goods identified in the Application. (*Id.* at ¶ 4.)
- Opposer’s use of blue on the Products predates Applicant’s use of blue as shown in the Application. (*Id.* at ¶ 5.)
- In view of the similarity of the Applicant’s and Opposer’s use of the color blue and the related nature of the goods offered for sale by the respective parties, Applicant’s use of blue so resembles Opposer’s use of blue previously used in the United States as to be likely to cause confusion, to cause mistake, or to deceive as to source. (*Id.* at ¶ 6.)
- Use of the color blue is so widespread in the relevant industry and has been since at least as early as 1947 that the color blue cannot be identified exclusively with Applicant for the goods listed in the Application. (*Id.* at ¶ 10.)
- The mark shown in the Application is incapable of achieving trademark significance. Applicant’s alleged mark is common for all goods and related goods produced by competitors engaged in similar businesses. (*Id.* at ¶ 11.)

These allegations, in addition to the remainder of Opposer’s Notice of Opposition, failed to clearly establish the grounds for Opposer’s opposition. (*See id.*) Opposer neither explicitly asserted trademark rights in the color blue nor did it identify products with which it claims exclusive rights in the color blue; yet, Opposer alleged Applicant’s use of blue was likely to cause confusion. (*See id.*) This incongruity made it impossible for Applicant to determine whether Opposer was opposing its Application based on Section 2(d). Accordingly, Applicant

submitted its Motion for a More Definite Statement, Conditional Motion to Strike on August 26, 2002.

The Board granted Applicant's Motion for a More Definite Statement because it found Opposer's pleading unclear as to whether Opposer was opposing Applicant's Application based on Section 2(d) of the Lanham Act. (Board's Order dated January 10, 2003 at p. 5.) Specifically, the Board found that Opposer had neither pled superior proprietary rights in its color blue nor that its color blue was distinctive or had acquired secondary meaning. (*Id.* at 6.) The Board also ruled that Opposer had failed to specify both the exact nature of any alleged trademark rights in the color blue and the particular goods with which it purportedly used the color blue. (*Id.* at pp. 6-7.) In its Order, the Board expressly set forth several requirements that, if satisfied, would enable Opposer to sufficiently plead an opposition based on Section 2(d). (*Id.* at pp. 6-7.)

Opposer filed its Amended Notice of Opposition on January 28, 2003. (Am. Not. of Opp.) A true and correct copy is attached as Exhibit B. Again, Opposer failed to provide the requisite specificity necessary to adequately apprise Applicant as to its claims for opposition and the facts relied upon to support the same. (*See id.*) Rather than submitting an answer based on speculation and serving misguided or overboard discovery, Applicant filed its Motion to Strike dated March 11, 2003. While the Board declined to strike portions of Opposer's Amended Notice of Opposition, it ruled that Applicant was entitled to more specificity as to the goods upon which Opposer relies for its allegations. (Board's Order dated January 27, 2005 at p. 4.) Accordingly, the Board provided Opposer thirty (30) days from the mailing date of the Board's Order, January 27, 2005, to once again amend its notice of opposition to cure its ambiguities. (*Id.* at 5.) The Board allowed Applicant until March 28, 2005, to answer. (*Id.*)

On February 22, 2005, Opposer submitted its Second Amended Notice of Opposition. A true and correct copy is attached as Exhibit C. Despite being provided a roadmap for how to plead the necessary elements of a Section 2(d) claim (provided in the Board's Order dated January 10, 2003) and even though its most recent pleading purports to assert Section 2(d) as a ground of opposition, Opposer utterly fails to plead the necessary elements to succeed under such a claim.

Specifically, Opposer has failed to make any allegation or provide any facts that, if proven, demonstrate that it owns a superior proprietary right in the color blue on and in connection with its Products as set forth in paragraph 1 of the Second Amended Notice of Opposition. (*See* Second Am. Not. of Opp.) Opposer alleges that “the relevant consuming public has come to associate the color blue with the Products and Opposer,” (*Id.* at ¶ 2), and that “Opposer’s use of blue on the Products predates Applicant’s use of blue as shown in the Application.” (*Id.* at ¶ 5.) (emphasis added) Opposer fails, however, to allege or provide any facts that demonstrate or from which it can be implied that Opposer acquired distinctiveness or secondary meaning for the color blue in connection with its Products prior to Applicant’s first use of the color blue in 1967, which is necessary to establish superior proprietary rights.

Opposer’s glaringly deficient 2(d) claim is curious at best given that the Board expressly instructed Opposer what to plead if Opposer elected to pursue a claim under Section 2(d). (Board’s Order dated January 10, 2003 at pp. 6-7.) (“opposer must plead and prove that it has superior proprietary rights in the term or mark) (“opposer is required to specify . . . when . . . the color acquired distinctiveness as a mark”) (emphasis added). Clearly, Opposer cannot in good faith make an allegation. For that reason, Applicant respectfully moves the Board to dismiss Opposer’s opposition based on Section 2(d) of the Lanham Act.

LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a complaint. *Space Base Inc. v. Stadis Corp.*, 17 U.S.P.Q. 1216 (T.T.A.B. 1990); TBMP § 503.02. In ruling on a motion to dismiss, the court may not decide disputed fact issues. Rather, the court must assume all material facts contained in the complaint are true. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633, 119 S. Ct. 1661, 1666 (1999). A motion to dismiss will be granted when the pleadings do not allege facts that entitle the plaintiff to relief sought. TBMP § 503.02. Conclusory allegations of law and unwarranted inferences in the complaint, however, will not defeat a Rule 12(b)(6) motion. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

ARGUMENT

To oppose an application based on Section 2(d) of the Lanham Act, an opposer “must plead and prove that it has superior proprietary rights in the term or mark it relies upon to prove likelihood of confusion.” (Board’s Order dated January 10, 2003 at p. 6) (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317 (CCPA 1981), *on remand* 215 U.S.P.Q. 1140 (T.T.A.B. 1982)); *see Herbko Intern. Inc., v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002). “As to a Section 2(d) claim based on a color mark, opposer would also have to plead and prove acquired distinctiveness and priority of acquisition of secondary meaning.” (*Id.*) (emphasis added) (citing *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163-64 (1995); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211-12 (2000)); *see also Herbko Intern., Inc.*, 308 F.3d at 1162 . Therefore, to maintain a Section 2(d) claim Opposer must plead that it maintains superior proprietary rights in the color blue to sustain its Section 2(d) claim. Because the mark in question is a color, Opposer must plead that the color blue on and in

connection with its Products has acquired distinctiveness and that it acquired distinctiveness prior to Applicant's first use of the color, i.e., 1967. *See PaperCutter, Inc. v. Fay's Drug Co., Inc.*, 900 F.2d 558, 564 (2d Cir. 1990) (the owner of a descriptive mark must show acquisition of secondary meaning prior to first use of the mark by its competitor.)

Despite the explicit direction from the Board and having three attempts to properly plead its opposition, Opposer's Second Amended Notice of Opposition fails to plead the necessary elements for a Section 2(d) claim. Opposer does not plead either expressly or by implication that it has "superior proprietary rights" or that it "acquired distinctiveness" in the color blue at the requisite time period. (*See* Second. Am. Not. of Opp.) Opposer does not plead that the color blue, when used on and in connection with its Products, acquired distinctiveness or secondary meaning prior to Applicant's first use in 1967. (*See id.*) In other words, Opposer's only attempt to establish proprietary rights in the color blue is comprised by the statement "the relevant consuming public has come to associate the color blue with the Products and Opposer." (*Id.* at ¶ 1.) This statement is insufficient on its face because it makes no assertion as to when the public started to associate the color blue with Opposer's Products.

Opposer knew the timing of acquired distinctiveness was critical to its Section 2(d) claim, but omitted it anyway. (*See* Board's Order dated January 10, 2003 at p. 7) ("opposer is required to specify . . . when . . . the color acquired distinctiveness as a mark"). Because Opposer has not and cannot plead it acquired distinctiveness prior to 1967, Applicant is entitled to judgment as a matter of law and dismissal of the purported 2(d) claim. Indeed, Opposer only asserts that its use of the color blue predates Applicant's use of blue, not that it acquired distinctiveness or secondary meaning before Applicant used the same, which it must to prevail on a Section 2(d) claim. (*Id.* at ¶ 5) ("Opposer's use of blue on the Products predates Applicant's use of blue as

shown in the Application”) (emphasis added). This is clearly insufficient to set forth a viable opposition based on Section 2(d). Therefore, Opposer has failed to plead a claim under Section 2(d) of Lanham Act upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board dismiss Opposer’s Second Amended Notice of Opposition as to its claim under Section 2(d) of the Lanham Act.

Date: March 10, 2005



/s/ Samuel T. Lockner

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Attorneys for Graco, Inc.

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

CAMPBELL HAUSFELD/SCOTT FETZER)	Opposition No.: 91/125,588
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)	Mark: The Color Blue
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vs.)	Serial No.: 75/621,248
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GRACO, INC.)	Filed: January 13, 1999
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Applicant.)	Published: March 26, 2002
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Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

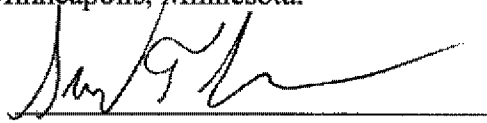
DECLARATION OF SAMUEL T. LOCKNER

COMES NOW, Samuel T. Lockner, to state and declare as follows:

1. I am an attorney with the law firm of Winthrop & Weinstine, P.A. representing the Applicant in the above-referenced matter and I am competent to testify to the matters stated herein. I possess personal knowledge as to the information set forth below.
2. A true and correct copy of Opposer's Notice of Opposition to Application Serial No. 75/621,248 is attached as Exhibit A.
3. A true and correct copy of Opposer's Amended Notice of Opposition to Application Serial No. 75/621,248 is attached as Exhibit B.
4. A true and correct copy of Opposer's Second Amended Notice of Opposition to Application Serial No. 75/621,248 is attached as Exhibit C.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 10th day of March, 2005, at Minneapolis, Minnesota.

A handwritten signature in black ink, appearing to read 'Sam T. Lockner', written over a solid horizontal line.

Samuel T. Lockner

EL 821236216US

"Express Mail" Mailing Label No. _____

Date of Deposit 6/20/02

I hereby certify that this paper or fees is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513

By *Amel J. J. J.*

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

CAMPBELL HAUSFELD/
SCOTT FETZER COMPANY,

Opposer,

vs.

GRACO, INC.

Applicant.

Opposition No



06-20-2002

U.S. Patent & TMO/TH Mail Rcpt Dt. #34

Application Serial No. 75/621,248

Published in the Official Gazette on March 26, 2002

NOTICE OF OPPOSITION

Opposer, Campbell Hausfeld/Scott Fetzer Company, a corporation located and doing business at 100 Production Drive, Harrison, Ohio, 45030, ("Opposer") believes that it will be damaged by registration of the mark shown in Serial No. 76/621,248, and hereby opposes the same. As grounds for opposition, it is alleged that:

1. Opposer, since at least as early as 1947 has been, and is using now, the color blue on and in connection with the promotion and sale of a wide variety of products, including, without limitation, products relating to the paint industry ("the Products").

Exhibit A

2. Opposer's use of blue on and in connection with the Products has been continuous since 1947 and such use has been throughout the United States and throughout the world.

3. Applicant seeks to register the color blue as shown in Serial No. 75/621,248 to identify airless paint sprayers ("the Application").

4. Opposer uses the color blue on the Products which compete with the goods identified in the Application.

5. Opposer's use of blue on the Products predates Applicant's use of blue as shown in the Application.

6. In view of the similarity of the Applicant's and Opposer's use of the color blue and the related nature of the goods offered for sale by the respective parties, Applicant's use of blue so resembles Opposer's use of blue previously used in the United States as to be likely to cause confusion, to cause mistake, or to deceive as to source.

7. Applicant has claimed that it is entitled to registration of the mark shown in the Application on the basis of 15 U.S.C. § 1052(f).

8. Applicant has failed to properly demonstrate that its use of the color blue has acquired distinctiveness pursuant to 15 U.S.C. § 1052(f).

9. Applicant has failed to demonstrate that its use of the color blue has acquired secondary meaning.

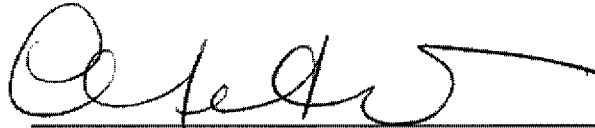
10. Use of the color blue is so widespread in the relevant industry and has been since at least as early as 1947 that the color blue cannot be identified exclusively with Applicant for the goods listed in the Application.

11. The mark shown in the Application is incapable of achieving trademark significance. Applicant's alleged mark is common for all such goods and related goods produced by competitors engaged in similar businesses. Applicant's alleged mark cannot identify Applicant's goods and distinguish them from goods offered by others.

WHEREFORE, Opposer prays that Application Serial No. 75/621,248 be rejected, that no registration be issued thereon to Applicant and that this Opposition be sustained in favor of Opposer.

Dated this 20th day of June, 2002

By:



ROBERT P. DUCATMAN
MEREDITH M. WILKES
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Date of Deposit January 28, 2003

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By [Signature]

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

CAMPBELL HAUSFELD/ SCOTT FETZER COMPANY,)	Opposition No. 125,588
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Opposer,)	
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vs.)	Application Serial No. 75/621,248
)	
GRACO, INC.)	
)	
Applicant.)	Published in the Official Gazette on March 26, 2002

AMENDED NOTICE OF OPPOSITION

Opposer, Campbell Hausfeld/Scott Fetzer Company, a corporation located and doing business at 100 Production Drive, Harrison, Ohio, 45030, ("Opposer") believes that it will be damaged by registration of the mark shown in Serial No. 76/621,248, and hereby opposes the same. As grounds for opposition, it is alleged that:

1. Opposer, since at least as early as 1947 has been, and is using now, the color blue on and in connection with the promotion and sale of a wide variety of products, including, without limitation, products relating to the paint industry and spraying devices which can be used in connection with paint ("the Products").

Exhibit B

2. Opposer has used blue on and in connection with the Products as an indicator of a source. Such use has been continuous since 1947 and such use has been throughout the United States and throughout the world. As a result of decades of use of the color blue on and in connection with the Products and hundreds of thousands of dollars spent to advertise and promote the color blue on and in connection with the Products, the relevant consuming public has come to associate the color blue with the Products and Opposer.

3. Applicant seeks to register the color blue as shown in Serial No. 75/621,248 to identify airless paint sprayers ("the Application").

4. Opposer uses the color blue on the Products which compete with the goods identified in the Application.

5. Opposer's use of blue on the Products predates Applicant's use of blue as shown in the Application.

6. In view of the similarity of the Applicant's and Opposer's use of the color blue and the related nature of the goods offered for sale by the respective parties, Applicant's use of blue so resembles Opposer's use of blue on the Products previously used in the United States as to be likely to cause confusion, to cause mistake, or to deceive as to source.

7. Applicant has claimed that it is entitled to registration of the mark shown in the Application on the basis of 15 U.S.C. § 1052(f).

8. Applicant has failed to properly demonstrate that its use of the color blue has acquired distinctiveness pursuant to 15 U.S.C. § 1052(f).

9. Applicant has failed to demonstrate that its use of the color blue has acquired secondary meaning.

10. Use of the color blue is so widespread in the relevant industry and has been since at least as early as 1947 that the color blue cannot be identified exclusively with Applicant for the goods listed in the Application.

11. The mark shown in the Application is incapable of achieving trademark significance. Applicant's alleged mark is common for all such goods and related goods produced by competitors engaged in similar businesses. Applicant's alleged mark cannot identify Applicant's goods and distinguish them from goods offered by others.

WHEREFORE, Opposer prays that Application Serial No. 75/621,248 be rejected, that no registration be issued thereon to Applicant and that this Opposition be sustained in favor of Opposer.

Dated this 28th day of January, 2003

By:



ROBERT P. DUCATMAN
MEREDITH M. WILKES

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North Point
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ATTORNEYS FOR OPPOSER

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Date of Deposit January 22, 2005

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451

By [Signature]

**IN THE UNITED STATES PATENT AND
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SECOND AMENDED NOTICE OF OPPOSITION

Opposer, Campbell Hausfeld/Scott Fetzer Company, a corporation located and doing business at 100 Production Drive, Harrison, Ohio, 45030, ("Opposer") believes that it will be damaged by registration of the mark shown in Serial No. 76/621,248, and hereby opposes the same. As grounds for opposition, it is alleged that:

1. Opposer, since at least as early as 1947 has been, and is using now, the color blue on and in connection with the promotion and sale of a wide variety of products, products relating to the paint industry and spraying devices which can be used in connection with paint, including, spray stainers, spray painters, powered rollers, power sprayer accessories, paint sprayers, house

painters, airless paint sprayers, HVLP paint sprayers, HVLP spray guns, sprayer wheel caddies, sprayer oil, paint sprayer guns and painter sprayer filters as well as compressors and accessories for compressors ("the Products").

2. Opposer has used blue on and in connection with the Products as an indicator of a source. Such use has been continuous since 1947 and such use has been throughout the United States and throughout the world. As a result of decades of use of the color blue on and in connection with the Products and hundreds of thousands of dollars spent to advertise and promote the color blue on and in connection with the Products, the relevant consuming public has come to associate the color blue with the Products and Opposer.

3. Applicant seeks to register the color blue as shown in Serial No. 75/621,248 to identify airless paint sprayers ("the Application").

4. Opposer uses the color blue on the Products which compete with the goods identified in the Application.

5. Opposer's use of blue on the Products predates Applicant's use of blue as shown in the Application.

6. In view of the similarity of the Applicant's and Opposer's use of the color blue and the related nature of the goods offered for sale by the respective parties, Applicant's use of blue so resembles Opposer's use of blue on the Products previously used in the United States as to be likely to cause confusion, to cause mistake, or to deceive as to source.

7. Applicant has claimed that it is entitled to registration of the mark shown in the Application on the basis of 15 U.S.C. § 1052(f).

8. Applicant has failed to properly demonstrate that its use of the color blue has acquired distinctiveness pursuant to 15 U.S.C. § 1052(f).

9. Applicant has failed to demonstrate that its use of the color blue has acquired secondary meaning.

10. Use of the color blue is so widespread in the relevant industry and has been since at least as early as 1947 that the color blue cannot be identified exclusively with Applicant for the goods listed in the Application.

11. The mark shown in the Application is incapable of achieving trademark significance. Applicant's alleged mark is common for all such goods and related goods produced by competitors engaged in similar businesses. Applicant's alleged mark cannot identify Applicant's goods and distinguish them from goods offered by others.

WHEREFORE, Opposer prays that Application Serial No. 75/621,248 be rejected, that no registration be issued thereon to Applicant and that this Opposition be sustained in favor of Opposer.

Dated this 22nd day of February, 2005

By:



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ATTORNEYS FOR OPPOSER

