

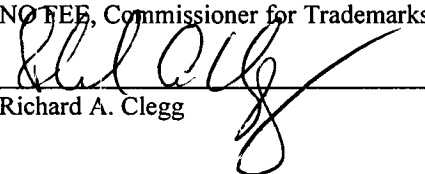
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

JOE J. ALFARO, JR.	)	
	)	
Opposer,	)	Opposition No.: 91155188
	)	
vs.	)	IN RE:
	)	Serial No.: 78/110,344
	)	
GUY A. HOFFMAN,	)	Mark: SUPERFREAKS FUNKY
	)	DISCO REVUE
Applicant.	)	
_____	)	

**OPPOSER'S MAIN BRIEF**

**CERTIFICATION UNDER 37 CFR § 1.8**

I hereby certify that the document referred to as enclosed herein is being deposited with the United States Postal Service as first-class mail on this date, December 14, 2005, in an envelope addressed to: Box TTAB, NO FEE, Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.

  
 \_\_\_\_\_  
 Richard A. Clegg



12-21-2005

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## I. INTRODUCTION

Opposer, Joe J. Alfaro, Jr., submits this brief in support of his opposition to Application Serial No 78/110,344 filed by Guy Hoffmann (“Applicant”).

As shown below, Opposer is the founder and leader of a 1970’s disco-theme band called THE SUPERFREAKS. Since 1999, Opposer has continuously been using the SUPERFREAKS mark in connection with live disco musical performances. THE SUPERFREAKS band has become well-known for providing musical entertainment throughout Southern California and in neighboring states.

Applicant, Guy Hoffman, is a disgruntled former band member. After being fired from the band, Mr. Hoffman vowed to “payback” the Opposer and set out intentionally to cause trouble. On February 22, 2002, Mr. Hoffman filed an ITU application seeking to register the same SUPERFREAKS mark in his own name, in connection with the same services as Opposer. Opposer sent a “Cease and Desist” letter to Applicant (see Exhibit #6), but Applicant refused to drop his registration application. When Applicant’s proposed registration was published for opposition on December 17, 2002, Opposer timely opposed the registration.

Applicant’s proposed registration should be denied on several grounds.

First, registration should be denied because Applicant is trying to register a mark that is confusingly similar to (and, indeed, essentially identical to) Opposer’s mark.

Second, Applicant filed his ITU application without having any actual, *bona fide* intent to use the mark. He filed the application solely as “payback” for being fired from band and has never actually used the mark. Indeed, he has used a different name (“Afroknots”) for his own post-SUPERFREAKS band. (J. Alfaro Dep. at 31: 2-8, Elva Handler Dep. at 11:23-25, 12:1-16.)

Third, Applicant claimed in his registration application that he was the sole owner of the SUPERFREAKS mark. In his pleadings in this opposition, however, Applicant has asserted that he was a “joint venturer” or “partner” in THE SUPERFREAKS. Applicant's statement of belief that a joint venture or partnership existed is sufficient to invalidate his claim of sole ownership in his application. His misrepresentation of “sole” ownership in the application is sufficient grounds for holding the application void, and for sustaining the opposition.

## **II. DESCRIPTION OF THE RECORD**

The record of this opposition proceeding consists of the file for the opposed application, Serial No. 78/110,344, and the pleadings of both parties.

The record also includes the following evidence submitted by Opposer:

A. Testimony of Opposer, Joe J. Alfaro, Jr., taken on February 24, 2005 and filed on March 26, 2005, with the following exhibits:

Exhibit 7: 1099 Statements, sent to Joe Alfaro, dba SUPERFREAKS;

Exhibit 8: Performance contracts for SUPERFREAKS, signed by Joe Alfaro (Opposer);

Exhibit 9: Judgment in small claims court case;

Exhibit 10: Letter from Applicant to Opposer, dated 2/25/2002;

Exhibit 11: E-mail from Applicant;

Exhibit 12: Excerpts from SoCalRocks website;

Exhibit 13: Newspaper excerpt with advertisement for Opposer's SUPERFREAKS band;

Exhibit 14: Print advertisement for Opposer's SUPERFREAKS band.

B. Testimony of Elva Handler, taken on February 24, 2005 and filed on March 26, 2005), with the following exhibits:

Exhibit 1: Advertisements and promotional announcements for Opposer's SUPERFREAKS band;

Exhibit 2: Excerpts from SoCalRocks website, showing Applicant's use of the mark "Afroknots" for his band;

Exhibit 5: California State Registration for mark "THE SUPERFREAKS," granted to Joe Alfaro, filed 9/07/02;

Exhibit 6: Letter sent to Applicant (Guy Hoffman) by prior counsel for Applicant, dated 9/12/02.

C. Testimony of Danny Alfaro, taken on February 24, 2005 and filed on March 26, 2005.

D. Testimony of Eric Handler, taken on February 24, 2005 and filed on March 26, 2005.

F. The following documentary exhibits, filed with Opposer's Notice of Reliance dated February 26, 2005:

1. Applicant's Answer to Notice of Opposition dated 3/26/03;

2. Applicant's Opposition to Motion for Summary Judgment dated 1/05/04;

3. Applicant's Answer to Amended Notice of Opposition dated 9/21/04;

4. Printouts of website found at [www.socalrocks.com](http://www.socalrocks.com).

The record is devoid of any evidence from Applicant. On March 28, 2005 Applicant attempted to file improper and untimely written "testimony." On July 6, 2005, the Board granted Opposer's motion to exclude the "testimony." Accordingly, Applicant's improperly filed "testimony" should be given no consideration in the opposition proceeding.

### **III. STATEMENT OF ISSUES**

There are three issues for consideration by the Board:

1. Whether the opposition to Applicant's proposed registration of the mark "SUPERFREAKS FUNKY DISCO REVUE" should be sustained under Section 2(d) of the Lanham Act, based on a likelihood of confusion with Opposer's mark "SUPERFREAKS," in connection with the same types of services;

2. Whether the opposition to Applicant's proposed registration of the mark "SUPERFREAKS FUNKY DISCO REVUE" should be sustained on the basis that, when Applicant filed his application, he did not have a *bona fide* intent to use the mark for which registration is sought; and;

3. Whether the opposition to Applicant's proposed registration of the mark "SUPERFREAKS FUNKY DISCO REVUE" should be sustained on the basis that Applicant misrepresented "sole" ownership of the SUPERFREAKS mark in his application, in view of his subsequent (albeit false) assertion of a "joint venture" or "partnership" with Opposer.

### **IV. STATEMENT OF FACTS**

Opposer, Joe Alfaro, founded the SUPERFREAKS band in August of 1999. (J. Alfaro Tr. at 4:15 –5:3.)<sup>1</sup> Opposer performs in the SUPERFREAKS band, playing guitar. (J. Alfaro Tr. at 5:4-8.) Opposer decided that the band would play disco music, funk music and cover tunes. (J. Alfaro Tr. at 6:24 – 7:6.) Opposer also chose the name "SUPERFREAKS" for the band. (J. Alfaro Tr. at 12:1-12.)

Opposer chose Danny Arroyo and Danny Alfaro (Opposer's brother) to be the next members of the band. (J. Alfaro Tr. at 5:18 –6:7.) After Opposer had

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<sup>1</sup> Testimony is cited using a page:line – page:line format. E.g., the citation to "4:15 – 5:3" refers to page 4, line 15 through page 5, line 3.



already formed the band and after he had already named the band THE SUPERFREAKS, Opposer invited Applicant, Guy Hoffman, to join the band. (J. Alfaro Tr. at 6:11-20.) Applicant was the last member of the band to be chosen. (J. Alfaro Tr. at 6:8-10.) He was the bass player.

The SUPERFREAKS band's first performance was at the Olympic Club in San Francisco, California. It performed at the Golden Nugget Casino in Laughlin Nevada on New Years of 1999. The band has been playing continuously under the SUPERFREAKS name since then. (J. Alfaro Tr. at 12:13 - 13:10.)

Since its formation by Opposer in August of 1999, the SUPERFREAKS band has continuously played a wide variety of public events, including festivals, casinos, parties and receptions. The band continues to perform under the SUPERFREAKS name to this day. (J. Alfaro Tr. at 7:7 -8:9.) It has played in excess of 400 shows over the past five years, all under the SUPERFREAKS name. (J. Alfaro Tr. at 13:11-19; see also Exhibit 1 and Elva Handler Tr. at p. 8:5 - 10:15.)

Opposer, Mr. Alfaro, markets the SUPERFREAKS band in a wide variety of different ways, including a band web site, promotional videos, mass mailings, business cards, flyers, newspaper advertisements and the like. (J. Alfaro Tr. at 8:10 -10:13; see also Exhibits 1 and 3 and Elva Handler Tr. at p. 8:5 - 10: 15; 12:17-13:17.) These materials are all prepared and paid for by Opposer, who also built the band's stage props. (Id.) The website alone gets 4,000 - 5,000 hits per month, showing the popularity of Opposer's SUPERFREAKS band. (J. Alfaro Tr. at 11:16-25.)

Opposer (Mr. Alfaro), as the leader of the SUPERFREAKS, receives IRS W-2 forms from clients, with his name and the name of the SUPERFREAKS band on the W-2 forms. (J. Alfaro Tr. at 14:7 -15:12; see also Exhibit 7.) Mr. Alfaro

signs all the contracts for performances, and handles all the business affairs of the band. (J. Alfaro Tr. at 15:15 –18:18; see also Exhibit 8.)

Mr. Alfaro (Opposer) fired Mr. Hoffman (Applicant) from the SUPERFREAKS band after Mr. Hoffman threw an emotional fit on stage, and following a series of other unprofessional acts on Mr. Hoffman's part. (J. Alfaro Tr. at 18:20 –20:21.)

After he was fired from the band, Applicant sued Opposer for breach of contract. Applicant lost the case against Opposer. (J. Alfaro Tr. at 18:20 –20:21; Exhibit 9.) Applicant's vengeful conduct continued. He sent a letter to Opposer demanding unsupported, continuing monthly damages. (See Exhibit 10 and J. Alfaro Tr. at 27:11-18.)

On September 10, 2002, Mr. Hoffman (Applicant) sent an e-mail to a Mr. Hickum (a part time member of the band), stating (in all caps):

But don't think I'm done with Joe [Opposer] by a long shot. F[\*\*\*] No!!! Losing the Crazyhorse is only the beginning of his payback from me. Yes, I booked Boogie-Knights up in Irvine. Thought I didn't!!! When I'm done, he won't have time to worry about disco at all 'cause he'll be worrying about where to live and how to eat.

(Exhibit 11 and J. Alfaro Tr. at 28: 2 –30:23 [emphasis and bracketed materials (including deletion of obscenity)] added.)

Applicant continued in his rant, noting, "I've moved on to new disco bands / rock bands / top-40 bands." (Exhibit 11 and J. Alfaro Tr. at p. 28, l. 2 – p. 30, l. 23.) This was a clear indication that (1) Applicant did not consider the SUPERFREAKS band (or name) to be his, and (2) he did not actually intend to use the SUPERFREAKS name in the future. He had "moved on" to a new band.

In Exhibit 12, Mr. Hoffman (Applicant) placed an ad looking for band members for new bands that he was forming. Mr. Hoffman is listed as the contact for the "Vocalist/Front Man Avail" ad, bridging the first and second pages of

Exhibit 12. (Exhibit 12 and J. Alfaro Tr. at 31:2 –36:6; see also Elva Handler Tr. at 10:18 –11:15 and Exhibit 2.) Exhibit 12 also includes (on the fourth page) a listing for Mr. Hoffman’s new band, the “Afroknots.” Again, this shows that he had no intent to use the SUPERFREAKS name that is the subject of his application. He had “moved on” to other things. Since he was fired by Opposer, Mr. Hoffman (Applicant) has never used the name SUPERFREAKS or SUPERFREAKS FUNKY DISCO REVIEW in any band. (J. Alfaro Tr. at 31:2-8; Elva Handler Tr. at 11:23 –12:16.)

Nonetheless, on February 22, 2002, in a further effort to “payback” Opposer, Applicant filed an “ITU” application to register the mark SUPERFREAKS FUNKY DISCO REVUE. This opposition proceeding resulted.

## V. ARGUMENT

### 1. Opposer’s Standing and Priority Are Clearly Established

Opposer clearly has standing to oppose the subject registration. Section 2(d) of the Lanham Act provides protection against registration of a mark that “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Lanham Act § 2(d), 15 U.S.C. § 1052(d).

Opposer’s priority with respect to the SUPERFREAKS mark is also established. Applicant has not denied Opposer’s prior use of the mark or offered any controverting evidence. Further, Applicant has not presented (and cannot present) any evidence of actual use on his part. Applicant, therefore, is limited to his application filing date of February 22, 2002, for the purpose of determining priority. See, e.g., Lone Star Manufacturing Co., Inc v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368 (CCPA 1974); Levi Strauss & Co v. R. Josephs

Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993); Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 17115 (TTAB 1991). Because Opposer's date of first use of the SUPERFREAKS mark is well before the filing date of Applicant's intent-to-use application, there is no issue as to priority.

**2. The Opposition Should Be Denied Based On A Likelihood of Confusion**

The determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. Du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203-04 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the [services] and differences in the marks.").

**A. Applicant's Proposed Mark is Virtually Identical to Opposer's Mark**

The first word in Applicant's proposed mark is SUPERFREAKS, the exact name of the Opposer's band and service mark THE SUPERFREAKS. The first part of the mark is the most dominant and therefore most likely to be remembered by the consumer. The term SUPERFREAKS is the only arbitrary element common to both marks. Applicant was required to disclaim the remaining descriptive terms FUNKY DISCO REVUE. The mere addition of a descriptive term to Applicant's proposed mark is not enough to overcome the likelihood of confusion with Opposer's previously used mark. Giant Food, Inc. v. Nations Foodservice, Inc., 710 F.2d 1565, 218 USPQ 198 (Fed. Cir 1983), 218 USPQ 380

(Fed Cir. 1983). Applicant's mark is confusingly similar to Opposer's mark in appearance, sound, and commercial impression.

**B. The Parties' Services are Identical.**

When determining whether there is likelihood of confusion between Applicant and Opposer's marks, the Board must limit its review to the Applicant's description as set forth in its application. In re Dixie Restaurants, Inc., *supra*; in re Continental Graphics Corp., 52 USPQ 2d 1374 (TTAB 1999). According to the services as listed in the application, Applicant's services are identical to Opposer's. The degree of similarity between the two marks necessary to support a finding of likelihood of confusion declines when the services of both Applicant and Opposer are identical. In re Dixie Restaurants, Inc., 52 USPQ 2d at 1374. Any minor differences between Opposer's mark and the mark for which Applicant seeks registration are insubstantial. "When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

**C. The Parties' Services are Sold to the Same Consumers/Purchasers**

Because the services of both Opposer and Applicant are identical, "they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers." In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994). In fact, both parties are selling services to the same customers in the same geographic region. According to information listed on Applicant's application, the Applicant operates out of the city of Menifee located within Riverside County, California. The Opposer operates out of the city of Riverside, which is also located within Riverside County, California. The fact that both parties are operating out of the same geographic region increases the likelihood of confusion.

**D. Applicant's "Intent" Supports a Likelihood of Confusion.**

It is clear that Applicant chose a name virtually identical to the Opposer's mark, in an intentional effort to "payback" Opposer and cause confusion. Applicant's blatant effort to appropriate and mimic Opposer's existing trademark supports a finding of likelihood of confusion.

**E. Any Doubts Should Be Resolved In Favor of the Prior User**

If the Board has any doubts in this opposition, all such doubts must be resolved in favor of the Opposer, the senior user. McCarthy §§ 23:64, 23:65, 23:82; Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). "Preference is accorded the prior user of a mark . . . as against a newcomer." The newcomer has the clear opportunity, if not the obligation, to avoid confusion with well-known marks of others. J&J Snack Foods Corp v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991).

**3. The Opposition Should Be Sustained Because Applicant Did Not Have A Bone Fide Intent To Use The Mark**

The evidence shows that Applicant's sole motive for filing his registration application was to harass and vex the Opposer, the founder and leader of the actual SUPERFREAKS band. Applicant's intent is clear from the e-mail that he sent to another person, stating, "When I'm done, he [Opposer] won't have time to worry about disco at all cause he'll be worrying about where to live and how to eat . . ."

There is no reason to believe that Applicant ever had any actual, *bona fide* intent to use the mark. He never actually used the mark after he was dismissed from THE SUPERFREAKS and after he filed his registration application. Indeed, everything that Applicant did and said after he was fired from the SUPERFREAKS proves that he had "moved on" and was going to start a new band under a different name. (See e.g., Exhibit #12, Page 4.) Applicant even announced the formation of a new band "the Afroknots" that came "out of the ashes of the original Superfreaks." In short, Applicant never had any intent

actually to use the term SUPERFREAKS (or SUPERFREAKS FUNKY DISCO REVIEW) as the name of his band. He filed his registration application solely to cause problems for Opposer, who fired him from the SUPERFREAKS band.

Applicant has not demonstrated proof of a *bona fide* offering for use of his proposed mark "SUPERFREAKS FUNKY DISCO REVUE". When an Applicant files an Intent To Use application but has not used the mark, the "well established rule" of resolving doubts against the newcomer applies and the opposition should be sustained. TBC Corp. v. Holsa, Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997).

**4. The Opposition Should Be Sustained Based On Applicant's False Assertion of "Sole" Ownership In His Registration Application.**

Pursuant to Section 1(a) of the Lanham Act, only the owner of a trademark may file an application to register the mark. Otherwise, the application is void for failure to comply with the statutory requirement that an applicant be the owner of the mark sought to be registered. Huang v. Tzu Chen Food Co. Ltd., 849 F.2d 1458, 7 USPQ2d 1335 (Fed. Cir. 1988). Opposer has demonstrated that he (and not Applicant) is the sole owner of the mark. Applicant does not have, and never had, any rights to the mark.

But if Applicant ever had any ownership rights to the SUPERFREAKS mark, they were not sole rights, as he claimed in his registration application. On the contrary, Applicant has consistently contradicted his own application, by asserting in this opposition that his rights to the mark were joint. Throughout his Answer to the first Notice of Opposition, and in his Opposition to Opposer's Motion for Summary Judgment, Applicant repeatedly describes his relationship with the SUPERFREAKS band as a "partnership." He describes "co-operating the band," "as a partner with Opposer," and states that "a partnership was formed", "I was a partner and coprincipal with Joe Alfaro." In essence, he admits that he was

not a sole owner of the SUPERFREAKS mark and asserts (albeit, falsely) that he was somehow a “partner” or “joint” owner of the band and the mark.

Whether or not a “joint venture” or “partnership” ever actually existed is immaterial. Applicant’s statement in this opposition that a “joint venture” or “partnership” existed with respect to the SUPERFREAKS band is adequate to invalidate his prior claim of sole ownership of the mark, as set forth in his application. On the basis of the positions that he has taken in this opposition, Applicant is not entitled to registration of the SUPERFREAKS mark that he seeks to register, and his application is void *ab initio*.<sup>2</sup>

The evidence clearly establishes that Applicant filed his ITU application fraudulently, without any actual, *bona fide* intent to use the mark for which registration is sought. This fraudulent conduct warrants sustaining the opposition and denying registration.

## VI. CONCLUSION

Applicant has used the Patent & Trademark Office, and this proceeding, as a tool for harassing his former band. He has wasted the time and resources of Opposer and this Board. His efforts to register the name of his former band as his own property are baseless and wrong. If the Board has any inherent power to sanction an applicant, it should do so here. At the very least, the Board should

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<sup>2</sup> The Board reached this same conclusion in a 1999 case with remarkably similar facts, Zarr Men L.S., Inc., v. Henry Duarte, Opposition No. 105,510. The disposition was designated as non-citable, and is not expressly relied upon herein.

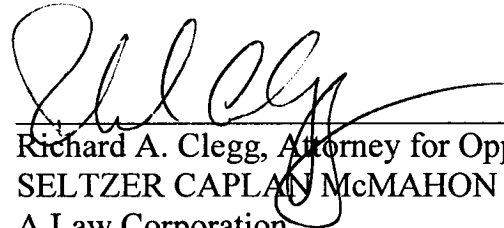


deny Applicant's wrongful efforts to register the SUPERFREAKS mark that he seeks to register.

Respectfully submitted:

Dated: December 14, 2005

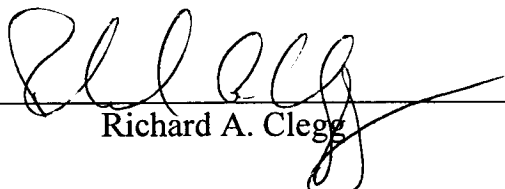
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**CERTIFICATE OF SERVICE**

I hereby certify that, on December 14, 2005, a true and correct copy of the foregoing OPPOSER'S MAIN BRIEF was served on Applicant's counsel, via First Class Mail, postage prepaid, at the following address:

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Richard A. Clegg