


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

In the matter of trademark application Serial No. 78110344
For the mark "Superfreaks Funky Disco Revue"
Published in the Official Gazette on December 17, 2002
Application filing date: February 22, 2002
Applicant: Guy A. Hoffmann


11-12-2003
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Opposition No. 91155188


**MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT OF**
(including affidavits and exhibits)
filed by Joe J. Alfaro, Jr., Opposer

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as "Express Mail Post Office to Addressee" in an envelope addressed to:

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

on 11-12-03
Date


Signature

Joe J. Alfaro, Jr., Opposer

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Joe J. Alfaro, Jr.
v.
Guy A. Hoffmann

Opposition No. 91155188

MOTION TO REQUEST SUMMARY JUDGMENT
and accompanying Brief

Joe J. Alfaro, Jr., Owner of the band "The Superfreaks"
481 W. Blaine Street, Riverside, CA 92507

I. Introduction

Opposer, Joe J. Alfaro, Jr., has moved for Summary Judgment of this case. Opposer will demonstrate in his motion for Summary Judgment brief that there are no genuine issues as to any material facts, and that he is indeed entitled to judgment as a matter of law.

II. Background

In August of 1999, Opposer Joe J. Alfaro, Jr., founded and named his band "The Superfreaks" for the purpose of providing live musical performances. Opposer has been using the Service Mark "The Superfreaks" to identify his services exclusively and continuously since August of 1999 to present. The Superfreaks first paid gig was on October 15, 1999. Opposer used the name in Interstate Commerce for the first time on December 31, 1999 in Laughlin, Nevada. Opposer has always had sole discretion and control over both the nature and quality of the band's performances, as well as, the use of the service mark "The Superfreaks" (please see sworn, notarized affidavits from Opposer and band members). Opposer is the owner of a Certificate of Registration from the State of California for the Service Mark "The Superfreaks" (please see

copy of certificate for State Reg. No. 056707 for Class: Int'l. 41).

In late 2001, Applicant, who used to perform with The Superfreaks, was dismissed and became very disgruntled vowing to get "PAYBACK" from Opposer (please see copy of Applicant's actual e-mail sent to David Hickam Gulley and sworn, notarized affidavit from David Hickam Gulley, authenticating Applicant's e-mail).

Applicant's filing of an unauthorized "Intent to Use" application with the USPTO is just one in a series of malevolent actions taken by Applicant in his quest to get "PAYBACK" from Opposer. Only four days after filing his unauthorized application with the USPTO, Applicant filed a Small Claims suit against the Opposer in Superior Court of California, in the County of Riverside, City of MorenoValley, for an alleged "breach of contract" concerning Applicant's participation in Opposer's band "The Superfreaks" the same Service Mark that is the subject of this Opposition proceeding (please see attached copies of official small claims case documents). In addition, Applicant began to interfere with the Opposer's livelihood by harassing some of the Opposer's clients which prompted the Opposer to file a counterclaim on March 15, 2002 in Superior Court of California, in the County of Riverside for "Intentional Interference" against the Applicant (please see copy Opposer's counterclaim case). Applicant lost his Small Claims case in court on April 10, 2002 (please see copy of official court judgment) and then began to harrass members of the band, and Opposer's new clients. Applicant also falsely represented himself as the owner of a Federal Registration of the Service Mark "Superfreaks" to Opposer's clients and warned them not to hire the band because it would be illegal for them to do so (please see sworn, notarized affidavit from The Superfreaks' client Timmy Daniels).

After learning that Applicant had filed an unauthorized application with the USPTO to register Service Mark "Superfreaks Funky Disco Revue", a mark virtually identical to Opposer's Service Mark "The Superfreaks" , Opposer's attorney, Christopher Connolly, mailed a "cease

and desist” letter to the Applicant on September 12, 2002 warning Applicant that he was infringing on Opposer’s trademark (please see copy of “cease and desist” letter). Applicant ignored Opposer’s “cease and desist” letter and continued to pursue a Federal Registration of the Opposer’s Service Mark with the USPTO. Applicant has been persistent in his attempts to disrupt, defame, and cause injury to the Opposer’s band because in Applicant’s own words, he wants “PAYBACK” from Opposer for being dismissed from the band.

On January 15, 2003, Opposer, Joe J. Alfaro, Jr., filed a Notice of Opposition with the Trademark Trial and Appeal Board against Applicant, Guy A. Hoffmann, for his unauthorized “Intent to Use” application to Federally Register the Mark “Superfreaks Funky Disco Revue” opposing on the basis of a number of pleadings including Prior Use and Ownership of the Mark “The Superfreaks”, Likelihood of Confusion, and Fraud perpetrated by the Applicant in his application filing to Federally Register Opposer’s Service Mark (please see Notice of Opposition for all pleadings filed).

III. Statement of Facts:

- A) Opposer is the owner of a Certificate of Registration from the State of California for the Service Mark “The Superfreaks”, Reg.#.056707 for Class No. Int. 041. (please copy of certificate).
- B) Opposer has been using the Service Mark “The Superfreaks” to identify musical performances since August of 1999 exclusively and continuously to present (please see Opposer’s sworn affidavit).
- C) On February 22, 2002, Applicant filed an unauthorized “Intent to Use” application with the USPTO to Federally Register the Service Mark “Superfreaks Funky Disco Revue.” (application in which Applicant makes sworn declaration in his filing that “ , , , to the best of his knowledge and belief no other person, firm, corporation, or association has the right

to use the mark in commerce, . . . etc.”) (please see Trademark Application serial #78110344 dated 2/22/02).

- D) On February 26, 2002 (only four days after submitting his application with the USPTO which included a sworn declaration that Applicant knew of “no other person who is using the mark”), Applicant filed a Small Claims court case against the Owner of the band “The Superfreaks”, Joe J. Alfaro, Jr. - the Opposer, for an alleged “breach of contract” concerning musical performances with Opposer’s band “The Superfreaks”.
- E) On September 12, 2002, Opposer’s attorney, Christopher Connolly, mailed a “cease and desist” letter warning the Applicant that he was infringing on Opposer’s Trademark (please see copy of “cease and desist” letter).
- F) On March 15, 2002, Opposer filed a counterclaim against the Applicant for his “intentional interference” of Opposer’s livelihood due to Applicant’s persistent attempts to disrupt Opposer’s livelihood by harassing Opposer’s clients.
- G) On April 10, 2002, Applicant lost the Small Claims case he had filed against the Opposer.
- H) After losing his Small Claims case, Applicant made several phone calls to client’s of the Opposer’s band “The Superfreaks” claiming that it was illegal for them to continue to hire the band because he was the owner of a Federal Registration for the Service Mark “Superfreaks” (please see client Timmy Daniels’ sworn, notarized affidavit).
- I) Opposer is and has always been solely responsible for all of the band’s expenses. Opposer has always had sole discretion and control over both the nature and quality of the band’s performances, as well as, the use of the Service Mark “The Superfreaks”. In his answer to Opposer’s Notice of Opposition, Applicant himself describes Opposer as being “overly controlling” (please see last paragraph of Applicant’s answer dated 3/26/03). In addition, Applicant during his Small Claims case against Opposer, subpoenaed all records pertaining

to Opposer's band "The Superfreaks" which were all in possession of the Opposer (please see copy of Applicant's subpoena). This fact is consistent with Opposer's assertion that Opposer is in complete control of all aspects regarding Opposer's band "The Superfreaks."

J) On September 10, 2002, Applicant sent an e-mail to David H. Gulley telling Mr. Gulley of his plan to get "Payback" from Plaintiff for dismissing him from the band. This e-mail helps establish motive for all of Applicant's malicious actions since his dismissal.

K) Opposer's band "The Superfreaks" continues to thrive with a very busy schedule of performances scheduled throughout Southern California and into the year 2004. Attached is a copy of the band's most recent ad that appeared in the "Reader's Choice" Supplemental included in the Riverside Press-Enterprise Newspaper on November 9, 2003 and was delivered in the Sunday's edition of the newspaper to more than 200,000 households throughout the entire County of Riverside. This ad is just one of the ways in which Opposer continuously markets his band "The Superfreaks" in commerce.

L) Applicant has provided no credible evidence to support any of his claims.

IV. Argument:

Applicant's answer to Opposer's Notice of Opposition consists of unsubstantiated allegations that are irrelevant to the merits of this case. All of the Opposer's pleadings in Opposition have been granted in favor of Opposer by virtue of Applicant's inability to answer the issue at hand and the fact that all of Opposer's official documents and affidavits in support of Opposer's case remain uncontested. None of Opposer's evidence has been challenged because all of the evidence submitted by Opposer is indisputable. Applicant makes libelous comments about Opposer's reputation, again without any factual evidence to support his claims, in an attempt to cast dispersion and distract from the true issues. Suspiciously the only document that Applicant offers in support of his answer is what appears to be a flyer listing the exact date

of Plaintiff's date of first paid gig. Opposer asserts that Applicant fabricated this document in a desperate attempt to discredit the Plaintiff's date for first paid gig (please see Opposer's sworn affidavit). On October 15, 1999 Opposer was performing with his band "The Superfreaks" at an event held at the Olympic Club in San Francisco, California. Applicant's purported claims and mere assertions do not reasonably challenge the credibility of Opposer or of any of Opposer's supporting evidence. The copies of Applicant's Small Claims case are indisputable official court records and clear and convincing evidence of the fact that Applicant was well aware of the Opposer's Superior Rights in the Mark at the time that Applicant filed his unauthorized "Intent to Use" application with the USPTO thus Applicant knowingly submitted a false declaration with intent to deceive because he knew that his registration would be disallowed if he had acknowledged the existence of Opposer's Superior Rights. This brings us to the issue of fraud.

Applicant knowingly submitted a false declaration with an intent to deceive. "Fraud in procuring a . . . mark occurs when an applicant knowingly makes false, material representations of fact in connection with an application." Metro Traffic Control, Inc. v. Shadow Network, Inc., 104 F.3d 336, 340, 41 USPQ2d 1369, 1373 (Fed. Cir. 1997); see also 15 U.S.C.A. § 1064(3) (West Supp. 1999). This constitutes fraud because Applicant knew he was making a false oath but showed reckless disregard for the truth by submitting his false oath with his registration filing anyway.

Applicant fails to address the specific allegations of fraud raised by the Opposer. Specifically, Applicant does not deny Opposer's allegation that Applicant filed an application to register a mark which he knew infringed on the Opposer's Superior Rights in the Mark. In fact, Applicant admits to knowing of Opposer's prior use of the mark in his answer to Opposer's Notice of Opposition (please see first paragraph under bona fide offering of Applicant's answer).

Applicant committed fraud upon the office of the USPTO and upon Opposer's clients by falsely claiming to be the Owner of a Federal Registration of the Service Mark "The

Superfreaks” for the purpose of disrupting the Plaintiff’s business (please see sworn affidavit by client Timmy Daniels) at a time when his application had merely been assigned to an examining attorney.

Applicant’s claims are not credible. Even though Opposer has official undisputable proof that Applicant lost his Small Claims case alleging “breach of contract” from Opposer, Applicant in his answer, still claims that financial restitution has never been made (please see copy of judgment of small claims case in favor of Opposer). Applicant has demonstrated through his false oath and submission of a phony flier that he is not worthy of credibility and that his application has been filed in bad faith.

Likelihood of Confusion is inevitable under Section 2(d) of the Lanham Trademark Act. The similarities between Opposer’s mark and Applicant’s proposed mark are identical; same classification of service Int’l. 41, same geographic area (both parties are based in Riverside County) for the purpose of performing Disco and Funk from the ‘70s and ‘80s wearing costumes from the Disco era, and both would appeal to the same class of consumers; casino, nightclubs, private events, birthday parties, etc. This pleading is conceded because Defendant does not even attempt to deny this pleading in his answer which is sufficient cause to grant the Opposition..

Applicant is not the Owner of the Mark. Per 15 U.S.C. §; TMEP 1201, application must be declared void. Only the owner of the mark, or the person entitled to use the mark in commerce as of the application filing date, may file an application for it’s registration. An application filed by a person who is not the owner of the mark, or not entitled to use the mark in commerce, will be declared void. Applicant’s application of the mark “Superfreaks Funky Disco Revue” should be declared void because Applicant was not the owner of the mark at the time he applied for registration.

V. Summary Judgment is Warranted

Summary Judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,” Fed. R. Civ. P. 56(c).

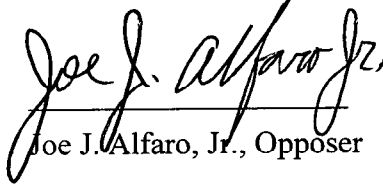
VI. Conclusion

Opposer has established his priority use and ownership of the Service Mark “The Superfreaks” in connection with a band that has been providing live musical performances since its inception in August 1999 exclusively and continuously through present by submitting 6 affidavits, copies of official Small Claims Case Court documents, and other additional evidence. In addition, Opposer has also proven that Applicant was well aware of Opposer’s Superior Rights in the service mark “The Superfreaks” shown by copies of official court documents and several other supporting documents. Applicant, through his deliberate withholding of information regarding Opposer’s prior and continuous use of the mark has proven himself to be unworthy of credibility. Applicant’s actions throughout the past year and a half have established a pattern of malevolent actions against the Opposer designed to disrupt the Opposer’s livelihood culminating in Applicant’s fraudulent filing of an “Intent to Use” application for registration of Opposer’s Service Mark “The Superfreaks”. Opposer, through all of his supporting documents, has shown the lack of merit in Applicant’s claims, as well as, a lack of evidence and failure of Applicant to support any of his claims. All of Opposer’s supporting documents and affidavits remain uncontested and indisputable. Applicant is nothing more than a disgruntled person who has no basis for filing an “Intent to Use” application because he is not the owner of the mark. For all of the reasons listed in this motion and brief, the Opposer’s motion for Summary Judgment should be granted.

VII. Relief Sought

Opposer therefore respectfully requests that the Trademark Trial and Appeal Board grant his motion for Summary Judgment and sustain the Opposition against the registration of Applicant's proposed mark "Superfreaks Funky Disco Revue" based on all of the aforementioned reasons contained in this brief.

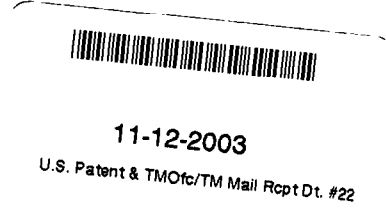
Respectfully submitted,

 11-12-03
Joe J. Alfaro, Jr., Opposer Date

November 12, 2003
ELI009936045 US (40)

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Applicant: **Guy A. Hoffmann**



Opposition No. **91155188**

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Motion for Summary Judgment, accompanying brief, and all supporting documents has been served on Guy A. Hoffmann by mailing said copy on November 12, 2003, via Express Mail Post Office to Addressee to:

Guy A. Hoffmann
25563 Pelion Road
Menifee, CA 92584

Joe J. Alfaro, Jr.
Joe J. Alfaro, Jr., Opposer

11-12-03
Date

481 W. Blaine Street
Riverside, CA 92507