

ESTTA Tracking number: **ESTTA57021**

Filing date: **12/09/2005**

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

Proceeding	91158743
Party	Plaintiff Golden Gate Fireworks, Inc.
Correspondence Address	Richard P. Stitt SHUGHART THOMSON & KILROY, PC 32 Corporate Woods; Ste 1100' 9225 Indian Creek Parkway Overland Park, KS 66210  rstitt@stklaw.com
Submission	Other Motions/Papers
Filer's Name	Richard P. Stitt
Filer's e-mail	officeactions@stklaw.com
Signature	/Richard P. Stitt/
Date	12/09/2005
Attachments	Opposer's Motion .pdf ( 4 pages ) Exhibits A, B, C and D.pdf ( 18 pages )

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

In re Application Serial No. 78/206,944  
For the mark: IF IT'S NOT TNT, IT'S NOT FIREWORKS  
Published in the Official Gazette: September 30, 2003, at TM 174

Golden Gate Fireworks, Inc. )  
 )  
 Opposer, )  
 )  
 vs. ) Opposition No. 91158743  
 )  
 American Promotional Events, Inc. )  
 )  
 Applicant. )

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**OPPOSER'S MOTION FOR ORDER PROTECTING CONFIDENTIALITY OF  
INFORMATION REVEALED DURING BOARD PROCEEDING**

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Opposer, Golden Gate Fireworks, Inc., moves the Board for order protecting the confidentiality of information revealed during board proceeding under 37 CFR § 2.120(f).

Specifically, Opposer requests the Board impose the attached Provisions For Protecting Confidentiality Of Information Revealed During Board Proceeding on the parties to this proceeding to protect the financial information of the Opposer which has been ordered produced by the Board's decision of November 1, 2005. (Exhibit A). The Provisions For Protecting Confidentiality Of Information Revealed During Board Proceeding attached as Exhibit A are believed to be identical to the Form suggested by the Board.

**I. Statement of Good Faith Effort by Movant to Resolve Issues**

Opposer requested by letter dated December 2, 2005, that Applicant stipulate to the Provisions For Protecting Confidentiality of Information Revealed During Board Proceeding. (See, Exhibit B). An executed copy of the Provisions was provided to the Applicant at that time.

No response had been made to Opposer's letter of December 2, 2005.

Opposer telephoned Applicant's counsel on December 9, 2005 at 4:00 pm, but was unable to speak to Mr. R. Prescott Sifton. As it appears Opposer will not receive a response to its many requests, Opposer has filed this Motion without receiving a response from Applicant's counsel.

**II. Argument of Opposer in Favor of Provisions For Protecting Confidentiality of Information Revealed During Board Proceeding.**

By Agreement of the parties, the deadline to produce the discovery requested by Applicant and ordered produced by the Board was extended from December 1 to December 12 to allow Opposer additional time to confirm that all materials requested had been obtained.

(Exhibit C)

The agreed deadline is now Monday, December 12, 2005, one business day in the future. Opposer has been ordered to provide confidential information regarding company revenues and advertising costs. (Exhibit D; page 3; Response to Interrogatories Nos. 2 and 3 and Document Requests Nos. 20 and 21). Opposer requests that it be allowed to designate such information as Trade Secret/ Commercially Sensitive information under the proffered Provisions For Protecting Confidentiality of Information Revealed During Board Proceeding.

The proffered Provisions For Protecting Confidentiality of Information Revealed During Board Proceeding is believed to be identical in substance to the Board's form of Provisions For

Protecting Confidentiality of Information Revealed During Board Proceeding shown on the Trademark Trial and Appeal Board web pages.

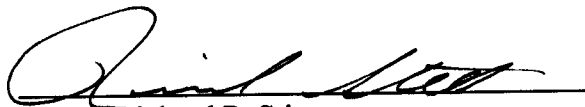
**WHEREFORE**, Opposer requests the Board enter the attached Provisions For Protecting Confidentiality of Information Revealed During Board Proceeding in the above-captioned matter to permit production of confidential and commercially sensitive information.

Respectfully submitted,

GOLDEN GATE FIREWORKS, INC.  
Opposer

By: Shughart, Thomson & Kilroy, P.C.

Dated: 12/09/2005



Richard P. Stitt  
Lawrence A. Swain  
Jason Parks  
32 Corporate Woods, Suite 1100  
9225 Indian Creek Parkway  
Overland Park, Kansas 66210  
Telephone:(913) 451-3355  
Facsimile: (913) 451-3361

ATTORNEYS FOR OPPOSER

**CERTIFICATE OF ESTTA FILING**

I hereby certify that a copy of the foregoing paper was filed electronically with the Trademark Trial and Appeal Board via the ESTTA on the 9th day of December 2005.

/Richard P. Stitt/  
Richard P. Stitt



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

In re Application Serial No. 78/206,944  
For the mark: IF IT'S NOT TNT, IT'S NOT FIREWORKS  
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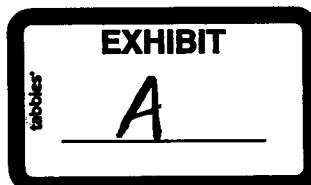
Golden Gate Fireworks, Inc. )  
 )  
Opposer, )  
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vs. ) Opposition No. 91158743  
 )  
American Promotional Events, Inc. )  
 )  
Applicant. )

**PROVISIONS FOR PROTECTING  
CONFIDENTIALITY OF INFORMATION  
REVEALED DURING BOARD PROCEEDING**

Information disclosed by any party or non-party witness during this proceeding may be considered confidential, a trade secret, or commercially sensitive by a party or witness. To preserve the confidentiality of the information so disclosed, **either** the parties have agreed to be bound by the terms of this order, in its standard form or as modified by agreement, and by any additional provisions to which they may have agreed and attached to this order, or the Board has ordered that the parties be bound by the provisions within. As used in this order, the term "information" covers both oral testimony and documentary material.

Parties may use this standard form order as the entirety of their agreement or may use it as a template from which they may fashion a modified agreement. If the Board orders that the parties abide by the terms of this order, they may subsequently agree to modifications or additions, subject to Board approval.

Agreement of the parties is indicated by the signatures of the parties' attorneys and/or the parties themselves at the conclusion of the order. Imposition of the terms by the Board is indicated by signature of a Board attorney or Administrative Trademark Judge at the conclusion of the order. If the parties have signed the order, they may have created a contract. The terms are binding from the date the parties or their attorneys sign the order, in standard form or as modified or supplemented, or from the date of imposition by a Board attorney or judge.



## TERMS OF ORDER

### 1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all inter partes proceeding files, as well as the involved registration and application files, are open to public inspection. The terms of this order are not to be used to undermine public access to files. When appropriate, however, a party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

**Confidential**—Material to be shielded by the Board from public access.

**Highly Confidential**—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the parties and/or their attorneys.

**Trade Secret/Commercially Sensitive**—Material to be shielded by the Board from public access, restricted from any access by the parties, and available for review by outside counsel for the parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the parties.

### 2) Information Not to Be Designated as Protected.

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating party with the approval of the designating party.

### 3) Access to Protected Information.

The provisions of this order regarding access to protected information are subject to modification by written agreement of the parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the parties or their attorneys to perform services incidental to this proceeding will be bound

only to the extent that the parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.
- **Attorneys** for parties are defined as including **in-house counsel** and **outside counsel**, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.
- **Independent experts or consultants** include individuals retained by a party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the party or its attorneys.
- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

**Parties** and their attorneys shall have access to information designated as **confidential** or **highly confidential**, subject to any agreed exceptions.

**Outside counsel, but not in-house counsel**, shall have access to information designated as **trade secret/commercially sensitive**.

**Independent experts or consultants, non-party witnesses, and any other individual** not otherwise specifically covered by the terms of this order may be afforded access to **confidential** or **highly confidential** information in accordance with the terms that follow in paragraph 4. Further, **independent experts or consultants** may have access to **trade secret/commercially sensitive** information if such access is agreed to by the parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

#### **4) Disclosure to Any Individual.**

Prior to disclosure of protected information by any party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the party or attorney proposing to disclose the information has received the signed certification from the individual. A form for such certification is attached to this order. The party or attorney receiving the completed form shall retain the original.



## **5) Disclosure to Independent Experts or Consultants.**

In addition to meeting the requirements of paragraph 4, any party or attorney proposing to share disclosed information with an independent expert or consultant must also notify the party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice of the name, address, occupation and professional background of the expert or independent consultant.

The party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the parties must negotiate the issue before raising the issue before the Board. If the parties are unable to settle their dispute, then it shall be the obligation of the party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the parties have made to settle their dispute. The party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

## **6) Responses to Written Discovery.**

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

## **7) Production of Documents.**

If a party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding party makes documents available for inspection and copying by the inquiring party, all documents shall be considered protected during the course of inspection. After the inquiring party informs the responding party what documents are to be copied, the responding party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

## **8) Depositions.**

Protected documents produced during a discovery deposition, or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the appropriate designation.

During discussion of any non-documentary protected information, the interested party shall make oral note of the protected nature of the information.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

## **9) Filing Notices of Reliance.**

When a party or its attorney files a notice of reliance during the party's testimony period, the party or attorney is bound to honor designations made by the adverse party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

## **10) Briefs.**

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing party, or any adverse party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this order.

## **11) Handling of Protected Information.**

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

## **12) Redaction; Filing Material With the Board.**

When a party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. **Occasions when a whole document or brief must be submitted under seal should be very rare.**

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

### **CONFIDENTIAL**

***This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.***

#### **13) Acceptance of Information; Inadvertent Disclosure.**

Acceptance by a party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

#### **14) Challenges to Designations of Information as Protected.**

If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties are unable to resolve their

differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time.

The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

#### **15) Board's Jurisdiction; Handling of Materials After Termination.**

The Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the parties and their attorneys shall return to each disclosing party the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information. In the alternative, the disclosing party or its attorney may make a written request that such materials be destroyed rather than returned.

#### **16) Other Rights of the Parties and Attorneys.**

This order shall not preclude the parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

**By Agreement of the Following, effective** \_\_\_\_\_

By \_\_\_\_\_  
Ralph Apel  
President  
Golden Gate Fireworks, Inc.

By \_\_\_\_\_  
American Promotional Events, Inc.

\_\_\_\_\_  
Richard P. Stitt  
Lawrence A. Swain  
32 Corporate Woods, Suite 1100  
9225 Indian Creek Parkway  
Overland Park, Kansas 66210  
Telephone: (913) 451-3355  
Facsimile: (913) 451-3361

ATTORNEYS FOR OPPOSER

\_\_\_\_\_  
Ralph W. Kalish, Jr., Esq  
Michael R. Annis, Esq.  
R. Prescott Sifton, Jr., Esq.  
720 Olive Street, Suite 2400  
St. Louis, Missouri 63101  
Telephone: (314) 345-6000  
Facsimile: (314) 345-6060

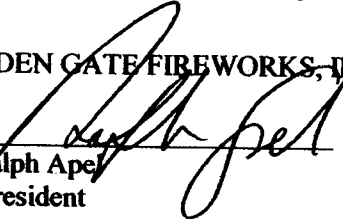
ATTORNEYS FOR APPLICANT

**By Order of the Board, effective** \_\_\_\_\_

\_\_\_\_\_  
[print or type name and title of Board attorney  
or judge imposing order]

By Agreement of the Following, effective November 10, 2005

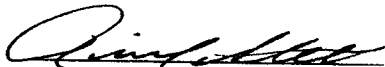
GOLDEN GATE FIREWORKS, INC.

By   
Ralph Apel  
President

AMERICAN PROMOTIONAL EVENTS

By \_\_\_\_\_

SHUGHART THOMSON KILROY, P.C.



Richard P. Stitt  
Lawrence A. Swain  
32 Corporate Woods, Suite 1100  
9225 Indian Creek Parkway  
Overland Park, Kansas 66210  
Telephone: (913) 451-3355  
Facsimile: (913) 451-3361

ATTORNEYS FOR PETITIONER

BLACKWELL SANDERS PEPER MARTIN, LLP

\_\_\_\_\_  
Ralph W. Kalish, Jr., Esq.  
Michael R. Annis, Esq.  
R. Prescott Sifton, Jr., Esq.  
720 Olive Street, Suite 2400  
St. Louis, Missouri 63101  
Telephone: (314) 345-6000  
Facsimile: (314) 345-6060

ATTORNEYS FOR APPLICANT

RECEIVED

NOV 12 2005

Shughart, Thomson & Kilroy

The Law Firm Of



A Professional Corporation

**Richard P. Stitt**  
rstitt@stklaw.com  
Direct Dial (816) 374-0554  
Direct Fax (816) 817-0291  
Fax (816) 374-0509

File No. GOL045/106731

December 2, 2005

**FIRST CLASS MAIL**

Mr. R. Prescott Sifton, Jr.  
Blackwell Sanders Peper Martin LLP  
720 Olive Street, Suite 2400  
St. Louis, MO 63101

**RE: *Golden Gate Fireworks v. American Promotional Events***

Dear Mr. Sifton:

Enclosed is an executed copy of a standard Trademark Trial and Appeal Board Protective Order to protect the confidentiality of information during a Board proceeding.

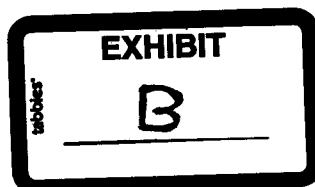
Golden Gate Fireworks, Inc. requires such a Confidentiality Agreement be in place prior to its providing the requested financial information which was the subject of the previous discovery requests.

Execution of this Confidentiality Agreement, it will facilitate our providing the discovery responses on December 12 2005.

Very truly yours,

RICHARD P. STITT

RPS:df  
Enclosure



**Richard Stitt**

**From:** Sifton, Scott [rsifton@Blackwellsanders.com]  
**Sent:** Monday, November 28, 2005 4:30 PM  
**To:** Richard Stitt  
**Cc:** Kalish, Ralph W., Jr.  
**Subject:** RE: Golden Gate v. APE

Richard, this shall confirm that it will be acceptable for Golden Gate to supplement its production in accordance with the TTAB's November 1 order by December 12, rather than the December 1 date established by the order.

Thank you for your cooperation in extending the discovery cut-off and testimonial period dates.

Scott Sifton

\*\*\* PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION \*\*\*

This e-mail message and all attachments, if any, are intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. If you are the intended recipient but do not wish to receive communications through this medium, please so advise the sender immediately, either by return e-mail or by calling the sender at (314) 345-6000.

-----Original Message-----

**From:** Richard Stitt [mailto:rstitt@stklaw.com]  
**Sent:** Monday, November 28, 2005 10:23 AM  
**To:** Sifton, Scott  
**Subject:** RE: Golden Gate v. APE



Scott:

Sorry to be slow in responding to your draft of the Joint Motion.

Your draft looks fine to me.

This email will serve to confirm our agreement to the Joint Motion.

Thanks,

Richard

Richard P. Stitt  
SHUGHART THOMSON & KILROY, P.C.  
120 West 12th Street, Suite 1500  
Kansas City, MO 64105  
Switchboard: 816-421-3355  
Direct Dial: 816-374-0554  
Facsimile: 816-374-0509  
email: [rstitt@stklaw.com](mailto:rstitt@stklaw.com)



12/9/2005



-----Original Message-----

**From:** Sifton, Scott [mailto:rsifton@Blackwellsanders.com]

**Sent:** Wednesday, November 23, 2005 3:23 PM

**To:** Richard Stitt

**Subject:** Golden Gate v. APE

Richard, I have not heard from you in response to my e-mail yesterday. If I do not hear from you by 3:00 on Monday, November 26 I will assume that my proposed joint motion is acceptable and proceed with filing it.

Scott Sifton

\*\*\* PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION \*\*\*

This e-mail message and all attachments, if any, are intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. If you are the intended recipient but do not wish to receive communications through this medium, please so advise the sender immediately, either by return e-mail or by calling the sender at (314) 345-6000.

\*\*\*\*\*PRIVATE AND CONFIDENTIAL\*\*\*\*\*

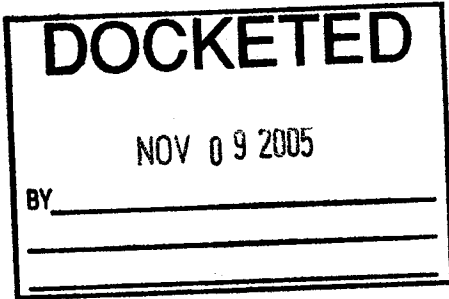
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RECEIVED

NOV 09 2005

Shughart, Thomson & Kilroy

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451



Mailed: November 1, 2005

Opposition No. 91158743

Golden Gate Fireworks, Inc.

v.

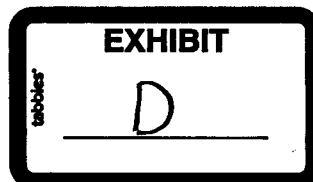
American Promotional Events,  
Inc.

Cheryl S. Goodman, Interlocutory Attorney:

This case now comes up on applicant's motion to compel, filed July 29, 2005 and opposer's cross-motion for a protective order, filed August 18, 2005.

In support of its motion to compel, applicant argues that it has attempted in good faith to resolve the dispute; that opposer's answers to interrogatories and document requests require supplementation; that applicant's discovery requests are relevant in that they seek substantiation for allegations in the second amended notice of opposition; and that the Board should issue an order compelling opposer to respond to the interrogatories and to produce documents.

In response, opposer advises that it has provided supplemental answers to Interrogatories 9 and 10 and Request for Production Nos. 8, 9, 10 and 16 and the motion to compel is moot with regard to these requests; that opposer seeks a protective order limiting discovery with regard to the



remaining interrogatories (nos. 2, 3, 4, 5, 6) and document requests (nos. 13, 20 and 21) applicant has complained of; that opposer's answer to interrogatory no. 7 was complete; and that the Board should deny applicant's request for further discovery with regard to the interrogatories and discovery requests that are the subject of the motion to compel.

Applicant has withdrawn the motion to compel with respect to Interrogatory No. 10 and Document Request Nos. 8, 9, 10 and 16. In reply to its motion to compel and in response to the motion for protective order, applicant argues that opposer has made "extensive allegations" regarding its interest in this proceeding that it should be required to substantiate through discovery or alternatively these allegations should be stricken as surplusage; that opposer claims to manufacture fireworks in the United States but then fails to back that claim up; that opposer must supplement its answer to Interrogatory No. 7; and that the Board should either grant its motion to compel or strike opposer's pleadings in part or in their entirety.

Although applicant references the discovery requests as attached exhibits in the body of its electronically filed motion to compel, these exhibits were not included with the electronically filed motion. Under Trademark Rule 2.120(e) copies of discovery requests must be included with a motion

to compel for the Board to consider the motion to compel. Therefore, applicant's motion to compel is denied due to applicant's failure to comply with Trademark Rule 2.120(e).

However, the Board will consider the discovery requests in the context of opposer's motion for protective order.

Interrogatory Nos. 2, 3 and Document Request nos. 20 and 21

Upon consideration of the parties' arguments, the Board finds applicant's discovery requests for sixteen years worth of sales, advertising and promotional information to be overbroad and not relevant to standing.

Standing requires minimal proof in Board proceedings. Where the pleaded ground of opposition is that applicant's mark is deceptive under Section 2(a), opposer may establish standing by pleading and proving that it is presently engaged in the sale of goods which may be competitive in character with those of the applicant for registration (and/or that the product in question is one which could be produced in the normal expansion of the opposer's business) and that the use and registration of the mark in question would clearly adversely affect the business of said party. *Steinberg Brothers, Inc. v. J.P. Stevens & Co., Inc.*, 156 USPQ 579 (TTAB 1967).

Therefore, with regard to these discovery requests it is sufficient for opposer to provide some summary

information of its current use with regard to licensing, sales, advertising and promotional information.

Accordingly, opposer's motion for protective order is granted to the extent that opposer need only supplement its discovery responses to these interrogatories and document requests to provide in summary fashion its current annual sales for goods, its annual expenditures for promotion and advertising, and the current media outlets through which opposer has advertised its Black Cat trademark.

Interrogatory No. 4

With regard to this request, applicant seeks names and addresses of all manufacturing facilities since 1989.

As previously discussed above, the Board finds that sixteen years worth of manufacturing facility information is overbroad and not relevant to opposer's standing.

Accordingly, opposer motion for protective order is granted to the extent that opposer need only supplement its response to these discovery requests to provide the names and addresses of current manufacturing facilities.

Interrogatory No. 6

With regard to this request, applicant seeks the names and addresses of opposer's customers. The names and addresses of customers are confidential and do not constitute discoverable information. Accordingly, opposer's motion for protective order is granted to the

extent that opposer need only supplement its discovery response to this request to provide in summary fashion its channels of trade through which products bearing opposer's BLACK CAT mark have been or will be distributed. Opposer need not provide any customer names and addresses.

Interrogatory No. 7

With regard to this request, the Board agrees with applicant that opposer's response is insufficient in that it does not adequately explain how applicant's mark misdescribes applicant's goods so as to deceive the consumer.<sup>1</sup>

In view thereof, opposer's motion for protective order is denied with respect to this request. Accordingly, opposer should further supplement its response to this request.

Document request no. 13.

Opposer's motion for protective order is denied with respect to this request. Accordingly, opposer should supplement its response to this document request to provide some representative samples of promotions, advertising or other communications of current use of its BLACK CAT mark.

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<sup>1</sup> Opposer is reminded that the three part test for deceptiveness under 2(a) is 1) whether the term is misdescriptive of a character, quality, function, composition or use of applicant's goods; 2) if so, are the prospective purchasers likely to believe the misdescription actually describes applicant's goods; and 3) if so, is the misdescription likely to affect the purchase.

Opposer is allowed until THIRTY DAYS from the mailing date of this order to supplement its responses as indicated above.

Applicant's alternative motion to strike portions of opposer's pleading is denied.

Proceedings are resumed. Discovery and trial dates are reset as follows:

<b>DISCOVERY PERIOD TO CLOSE:</b>	<b>December 3, 2005</b>
<b>30-day testimony period for party in position of plaintiff to close:</b>	<b>March 3, 2006</b>
<b>30-day testimony period for party in position of defendant to close:</b>	<b>May 2, 2006</b>
<b>15-day rebuttal testimony period for party in position of plaintiff to close:</b>	<b>June 16, 2006</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.