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Jennifer M. Murray

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

GOLDEN GATE FIREWORKS, INC.)

Opposer,)

vs.)

AMERICAN PROMOTIONAL)
EVENTS, INC.)

Applicant.)

Opposition No. 91158743

Serial No. 78/206944

Mark: IF IT'S NOT TNT, IT'S
NOT FIREWORKS

APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR IN THE ALTERNATIVE A MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE A MOTION FOR MORE DEFINITE STATEMENT

COMES NOW Applicant, American Promotional Events, Inc. ("Applicant"), by and through its attorneys, and moves that the Notice of Opposition of Opposer, Golden Gate Fireworks, Inc. ("Opposer") be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, Applicant moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) or for more definite statement pursuant to Fed. R. Civ. P. 12(e). In support of this motion, Applicant states as follows:



02-18-2004

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #39

BACKGROUND

Applicant seeks to register the mark IF IT'S NOT TNT, IT'S NOT FIREWORKS (the "Mark" or "Applicant's Mark") for fireworks in International Class 13, paper products namely posters in International Class 16, clothing namely t-shirts, jackets, caps and sweatshirts in International Class 25, and wholesale and retail store services in the field of fireworks in International Class 35, Serial No. 78/206,944 ascribed thereto. The application was published for opposition in the *Official Gazette of the U.S. Patent and Trademark Office* on September 30, 2003. See Notice of Opposition, Exhibit A. The Office did not issue an Office Action relating to the application. It merely issued an Examiner's Amendment with respect to the application entering a claim of ownership of U.S. Trademark Registration No. 1,486,863.

Opposer filed its Notice of Opposition requesting that the Trademark Trial and Appeal Board (the "Board") refuse Applicant's registration of said Mark on a variety of vague and ambiguous grounds. Applicant now files its Motion to Dismiss Opposer's Notice of Opposition pursuant to Fed. R. Civ. P. 12(b)(6) on the basis that Opposer has failed to establish any statutory ground upon which said Mark could be refused.

LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) is applicable to Board proceedings in accordance with Trademark Rule 2.116(a). *Galleon S.A. v. Havana Club Holding, S.A.*, Cancellation No. 92024108, p. 52, n.25 (T.T.A.B. 2004) (decision not citable as precedent of the T.T.A.B.). A motion to dismiss for failure to state a claim will only be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988

F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Under this standard, disputed issues are viewed in the light most favorable to the complainant, and all reasonable inferences are construed in favor of the complainant. *Id.* at 1161; *see also Galleon*, Cancellation No. 92024108, p. 52 (citing T.B.M.P. § 503.02 (2d ed. 2003)).

In order to survive a motion to dismiss, Opposer must have (1) standing and (2) a valid ground upon which to oppose the involved registration. *Young v. AGB Corp.*, 152 F.3d 1377, 1380 (Fed. Cir. 1998). Here, Opposer has neither.

1. Opposer Does Not Have Standing to Assert Its Claims.

Section 13 of the Lanham Act, 15 U.S.C. § 1063, provides that “[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register may . . . file an opposition in the Patent and Trademark Office, stating the grounds therefor” In addition, the Federal Circuit has set forth two other judicially created requirements for standing: (1) the opposer must have a “real interest” in the proceedings and (2) the opposer must have a “reasonable” basis for his belief of damage. *Ritchie v. Orenthal James Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999).

The “real interest” requirement necessitates a direct and personal stake in the outcome of the opposition, a direct injury to the opposer. *Ritchie*, 170 F.3d at 1095-96. With regard to the “reasonable” basis standard, the opposer must allege some trait or characteristic that is clearly and directly implicated in the applicant’s mark or allege some other facts showing that the opposer’s belief is something other than subjective. *Id.* at 1098.

In this case, Opposer appears to be asserting its claims on behalf of itself and the entire fireworks industry, including fireworks manufacturers and fireworks trademark owners. In paragraph 13 (b) of the Notice of Opposition, Opposer asserts in relevant part, “[r]egistration of

Applicant's Mark will tend to dilute and disparage . . . the goods and trademarks of the members of the group of fireworks manufacturers and fireworks trademark owners" Opposer fails to identify any fireworks manufacturers or trademark owners; it discloses no marks other than its own. Further, Opposer presents no basis for its presumed authority to act on behalf of an entire industry, who is not even a nominal party to this proceeding. Rather, it must assume that the Board will take judicial notice of its self-anointing or self-coronation. Simply stated, Opposer has set forth no basis upon which it can show that it is uniquely situated to represent the fireworks industry, or that the entire fireworks industry will be directly injured by registration of Applicant's Mark. Moreover, Opposer has failed to allege any objective basis for the purported injury that will be sustained as a result of Applicant's Mark. Therefore, Opposer does not have standing to assert its claims on behalf of the entire fireworks industry.

2. Opposer Has Failed to Establish Statutory Grounds for Refusal of Applicant's Mark.

There are only a limited number of grounds upon which a registration may be refused. Title 15 U.S.C. § 1052 (hereinafter referred to as "Section 2" of the Lanham Act) sets forth several grounds upon which registration shall be refused. In addition, the Trademark Amendments of 1999 provide that dilution may be a ground for refusing registration. *Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1443 (Fed. Cir. 2003).¹

Opposer's grounds for opposition are set forth in paragraph 13 of its Notice of Opposition. Because the Notice generally fails to state the section or sections of the Lanham Act which Opposer is relying upon, Applicant is forced to blindly interpret the Opposer's allegations. In fact, only one subsection of paragraph 13 purports to identify which statutory ground Opposer relies upon to preclude the registration of Applicant's Mark. As such, Applicant attempts to

¹ The basis for opposition on the grounds of dilution stems from Section 2(f) of the Lanham Act.

squeeze Opposer's allegations to fit into the statutory grounds for refusing registration.

Applicant will address each allegation of paragraph 13 separately.

ARGUMENT

A. Registration of Applicant's Mark Will Not Deceive the Relevant Public as to the Nature and Quality of Opposer's Fireworks Marks.

The Notice of Opposition at paragraph 13, subpart (a) alleges:

- a. Registration of Applicant's mark will deceive the relevant public as to the nature and quality of Opposer's BLACK CAT, ZEBRA and BIG CHIEF fireworks and damage the BLACK CAT and Fireworks Marks.

Without any help from Opposer, Applicant construes this subpart as an alleged violation of section 2(a) of the Lanham Act. Section 2(a) provides that a trademark may not be registered if it "[c]onsists of or comprises . . . deceptive . . . matter." To state a claim for deceptiveness, an opposer must establish that it would be damaged by use of the applicant's mark and that purchasers would be deceived in a way that would materially affect their decision to purchase applicant's goods. *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 U.S.P.Q.2d 1711, 1712 (T.T.A.B. 1993). The Federal Circuit has stated that in opposition proceedings, the opposer bears the burden of showing that the applicant is not entitled to register its mark. *The Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1360 (Fed. Cir. 2001). Further, the Federal Circuit established a three-part test to determine whether a mark is deceptive under section 2(a):

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the *applicant's* goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the *applicant's* goods?
- (3) If so, is the misdescription likely to affect the decision to purchase?

Hoover, 238 F.3d at 1361 (emphasis added).

Applicant's Mark, IF IT'S NOT TNT, IT'S NOT FIREWORKS, is merely an exaggerated slogan, or puffing, that does not misdescribe or misrepresent Applicant's fireworks

and fireworks-related goods and services. Moreover, Opposer has offered no support for the contention that Applicant's Mark is misdescriptive of its goods and/or services. Regardless, prospective purchasers would not be likely to believe that the slogan actually means that any other brand of fireworks are not fireworks such that it would materially affect their decision to purchase Applicant's goods and/or services.

Opposer cannot establish under any set of facts that Applicant's Mark is deceptive under section 2(a). As a result, Opposer's allegation that Applicant's Mark will deceive the relevant public as to the nature and quality of Opposer's fireworks fails to state a claim pursuant to Fed. R. Civ. P. 12 (b)(6). Applicant's registration should not be refused on this ground.

B. Opposer's Claim that Applicant's Mark Will Dilute and Disparage Opposer's Fireworks Mark Is Without Merit.

This claim, found at paragraph 13(b) of the Notice of Opposition, appears to combine a claim under section 2(a) of the Lanham Act with a dilution claim under section 2(f) by alleging a violation of section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).² Subsection (b) of Opposer's paragraph 13 states as follows:

- b. Registration of Applicant's mark will tend to dilute and disparage the Opposer's BLACK CAT and Fireworks [M]arks and the goods represented thereby and the goods and trademarks of the members of the group of fireworks manufacturers and fireworks trademark owners before the relevant public by disparaging the quality and character of the Opposer's BLACK CAT, ZEBRA and BIG CHIEF goods by the false claim and representation that Opposer's BLACK CAT, ZEBRA and BIG CHIEF fireworks are not actually fireworks.

² It appears that Opposer may also be asserting a claim under section 43(a) of the Lanham Act for false advertisement. Section 43(a), however, does not provide a statutory basis for refusal of registration in an opposition proceeding. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:21. Even if section 43(a) provided a ground upon which to refuse a registration, puffing is not actionable claim for false advertisement. *Lipton v. The Nature Company*, 71 F.3d 464, 474 (2d Cir. 1995).

1. Applicant's Mark Does Not Disparage Opposer's Marks.

In addition to deceptive matter discussed above, section 2(a) provides that a trademark may not be registered if it disparages an institution. The relevant portion of section 2(a) provides that a "matter which may disparage . . . institutions . . . or bring them into contempt or disrepute" shall not be registered.

As discussed previously, Applicant's Mark, IF IT'S NOT TNT, IT'S NOT FIREWORKS, is nothing more than an exaggerated slogan or puffing. Puffing has been described as "outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service, Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (quoting *Metro Mobil Cts, Inc. v. Newvector Communications, Inc.*, 643 F. Supp. 1289 (D. Ariz. 1986)).

Puffing does not amount to actionable disparagement. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Chandris America Lines, Inc.*, 321 F. Supp. 707, 712-13 (D.C.N.Y. 1971); *Autoinfo, Inc. v. Hollander Publishing Co.*, 1991 WL 64190, *4 (S.D.N.Y. 1991) ("A claim in general terms of superiority of one's product over that of a competitor is mere 'puffing' and is not actionable"). Applicant's Mark is merely a general assertion of superiority, not a factual misrepresentation. See *Cook*, 911 F.2d at 246. Without detailed or specific factual assertions, Applicant's Mark cannot be considered disparagement. See *id.*

Moreover, Opposer's argument that Applicant's Mark should be refused registration loses its credence when Opposer itself uses the slogans, "Black Cat is the Best you can get" and "The Closest Thing You'll Get to Professional Display Fireworks."³ As Opposer may likely

³[http:// www.blackcatfireworks.com](http://www.blackcatfireworks.com)

agree, these exaggerated slogans do not amount to disparagement of other fireworks, but merely puffing which is not a basis for refusal of federal registration.

In addition, slogans similar to Applicant's Mark have previously been granted federal registration. For example, "If It Doesn't Suck Ink From a Bottle, It's Not a Real Pen"⁴ and "If It Doesn't Say 'A La Henri' They're Not Chicken Fingers."⁵ Therefore, Opposer cannot show that exaggerated slogans or puffing result in disparagement amounting to refusal of registration. Hence, Opposer has failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

2. Opposer's Dilution Claim Is Without Merit.

This subsection of Opposer's Notice of Opposition also alleges dilution, a violation of section 43(c) of the Lanham Act. Section 2(f) provides the basis for opposition on the grounds of dilution. Section 43(c)(1) provides that if another's commercial use in commerce of a famous mark or trade name, if such use begins after the senior mark has become famous, causes dilution of the distinctive quality of the senior mark, the owner of the famous mark may obtain relief.

Dilution is the lessening of the capacity of a famous mark to identify and distinguish goods or services regardless of competition or likelihood of confusion, mistake or deception. *World Gym Licensing, Ltd. v. Fitness World, Inc.*, 47 F. Supp.2d 614, 624-25 (D. Md. 1999); *see also Moseley v. V Secret Catalogue, Inc.*, 123 S.Ct. 1115, 1118 (2003). The elements of a dilution claim are (1) applicant has made use of a junior mark sufficiently similar to the senior famous mark that (2) has caused (3) actual economic harm by lessening the famous mark's selling power. *Id.*

Dilution is separated into two categories: blurring and tarnishment. Dilution by blurring occurs when consumers "see the [opposer's] mark used on a plethora of different goods and

⁴ U.S. Federal Registration No. 2346927

services . . . raising the possibility that the mark will lose its ability to serve as a unique identifier of the [opposer's] product.” *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 466 (7th Cir. 2000). Dilution by tarnishment occurs when a “junior mark’s similarity to a famous mark causes consumers mistakenly to associate the famous mark with the defendant’s inferior or offensive product.” *Id.*

Opposer’s vague and ambiguous allegations make it difficult to determine which category of dilution is at issue in this subsection. However, given that this claim appears to be coupled with a disparagement claim, it is probably more likely that this dilution claim as one of dilution by tarnishment. Regardless of what type of dilution Opposer is attempting to put at issue, the Applicant’s Mark, IF IT’S NOT TNT, IT’S NOT FIREWORKS, is not similar in any degree with Opposer’s cited marks: BLACK CAT, ZEBRA or BIG CHIEF. There is simply no basis to assert that the target market would see Opposer’s marks as essentially the same as Applicant’s Mark. *See Luigino’s v. Stouffer Corp.*, 170 F.3d 827 (8th Cir. 1999).

Moreover, dilution by tarnishment is not a valid ground for refusal of registration of Applicant’s Mark where Opposer has asserted no facts to support its allegation that Applicant’s Mark would damage the positive association attached to Opposer’s marks. *See Moseley*, 123 S.Ct. at 1120. Thus, Opposer has failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

C. Registration of Applicant’s Mark Will Not Dilute or Damage the Alleged Distinctive Quality of Opposer’s Firework Marks.

Subsection (c) of paragraph 13 of Opposer’s Notice of Opposition states:

- c. Registration of Applicant’s mark will dilute and damage the distinctive quality of the BLACK CAT and the Fireworks Marks for fireworks and upon which Opposer’s business is based.

⁵ U.S. Federal Registration No. 1863288

Opposer seems to be asserting a second claim of dilution. As explained in the previous section, dilution is separated into two categories. Applicant can only assume that this dilution claim to be one of dilution by blurring. Again, regardless of the type of dilution at issue, Opposer has failed to establish the first element of a dilution claim – similarity of the marks. Opposer has set forth no set of facts that IF IT'S NOT TNT, IT'S NOT FIREWORKS would cause BLACK CAT, ZEBRA or BIG CHIEF to lose their “ability to serve as unique identifier” of Opposer’s goods. See *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 805 (9th Cir. 2002). As such, Applicant’s Mark should not be refused registration on this ground.

D. Registration of Applicant’s Mark Is Not Deceptive, Nor Does It Falsely Suggest a Connection with Opposer in Violation of Section 2(a) of the Lanham Act.

Subsection (d) of Opposer’s paragraph 13 states:

- d. Applicant’s use and registration of the mark in the manner suggested is deceptive under Section 2(a) of the Trademark Act as it misrepresents to the relevant public the nature of [A]pplicant’s goods and the nature of the BLACK CAT, ZEBRA and BIG CHIEF fireworks sold by Opposer and the BLACK CAT and Fireworks Marks used to sell fireworks to the relevant public.

It appears that Opposer is again claiming deceptiveness under Section 2(a), as well as that Applicant’s Mark falsely suggests it is connected to Opposer’s goods. Applicant has previously addressed the fact that Opposer cannot establish a claim for deceptiveness. Applicant now addresses Opposer’s claim that Applicant’s Mark falsely suggests it is connected to Opposer’s goods.

In addition to deceptiveness and disparagement, Section 2(a) states that a trademark may not be registered if it falsely suggests a connection with an institution or brings it into contempt or disrepute. Opposer must plead and prove that applicant’s mark points “uniquely and unmistakably to the identity or persona of the person or institution asserting claim” in order to

establish a violation of 2(a) for falsely suggesting a connection with another's goods or services.

Internet Inc. v. Corporation for Nat'l Research Initiatives, 38 U.S.P.Q.2d 1435, 1437

(T.T.A.B. 1996) ("internet" is widely known and used as the network itself, not as opposer's name or identity). To succeed on a false suggestion of connection ground, the opposer must demonstrate that: (1) the applicant's mark is the same or a close approximation of the opposer's previously used name or identity; (2) the applicant's mark would be recognized as such; (3) the opposer is not connected with the activities of applicant under the mark; and (4) the opposer's name or identity is of sufficient fame or reputation that applicant's use of the mark presumes a connection with opposer. *Buffett v. Chi-Chi's, Inc.*, 226 U.S.P.Q. 428 (T.T.A.B. 1985) (cited by *In re Urbano*, 51 U.S.P.Q.2d 1776 (T.T.A.B. 1999); *In re Sloppy Joe's Int'l, Inc.*, 43 U.S.P.Q.2d 1350 (T.T.A.B. 1997)).

Under no circumstances does the Applicant's Mark IF IT'S NOT TNT, IT'S NOT FIREWORKS *uniquely and unmistakably* point to Opposer's BLACK CAT, ZEBRA and BIG CHIEF marks. Moreover, Opposer cannot establish the first prong of the *Buffett* test requiring that Applicant's Mark be the "same or a close approximation" of Opposer's name or identity. The marks at issue do not even contain any of the same words.

Opposer's Notice of Opposition fails to state a claim upon which Applicant's Mark should be refused registration. As such, Opposer's Notice of Opposition should be dismissed.

E. Opposer Has No Basis Upon Which to Allege That Applicant's Mark Is Likely to Cause Confusion, Mistake or Deceive Consumers.

Likelihood of confusion depends upon whether the purchasing public would mistakenly assume applicant's goods or services originate with, are sponsored by, or associated with goods sold under the applicant's registration. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:78. Section 2(d) requires that someone have proprietary rights

in the previously used term. *Internet*, 38 U.S.P.Q.2d at 1437-38. If not, the applicant's use of the term cannot cause source confusion as a matter of law. *Id.* (for example, space shuttle).

Importantly, if the common portion of the two conflicting marks is a generic name, the inquiry should be confined to the confusing similarity of the non-generic portion, with the final determination based upon the total impression of both marks. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:49 (citing *Beech-Nut, Inc. v. Warner-Lambert Co.*, 346 F. Supp. 547 (S.D.N.Y. 1972)).

The word "fireworks" is clearly a generic term as disclaimed on federal registrations using the word.⁶ Even after taking out the generic portion of the mark, Opposer cannot contend that TNT is confusingly similar to BLACK CAT, ZEBRA or BIG CHIEF. None of the words in any of the marks are similar in sight, sound or connotation.

Moreover, the Board recently dismissed an opposition holding that there was no likelihood of confusion between applicant's mark, ONE IS GOOD, BUT UNA MAS IS BETTER, and the opposer's mark, POQUITO MAS. *McCarney v. Una Mas, Inc.*, Opposition Nos. 91107026 and 91107748 (T.T.A.B. 2004) (not citable as precedent of the TTAB). In *McCarney*, the Board analyzed the opposition based upon likelihood of confusion in accordance with the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). *Id.* The Board found that the goods and/or services, as well as the channels of trade or prospective purchasers were identical. *Id.* The Board held, however, that the two marks were not substantially similar in appearance, sound, meaning and overall commercial impression when compared in their entireties. *Id.* The Board noted that the applicant's mark contained additional wording which made the mark even less similar to the opposer's mark. *Id.* Finally,

⁶ See U.S. Federal Registration Nos. 1710506, 1696601, 2715649, 2378788, 2231972 and 2531042.

the Board discussed the fame of the opposer's mark and any actual confusion that may result from the applicant's mark. *Id.* The Board found that the opposer's mark may be well known in a limited geographical area, but there was little other evidence demonstrating fame of the opposer's mark. *Id.* The Board also held that due to lack of any reliable survey, opposer failed to show actual confusion. *Id.*

Similarly, Applicant in this case recognizes that the goods and/or services, as well as the channels of trade or prospective purchasers are similar. Both the Opposer and the Applicant are in the market of selling fireworks and fireworks-related goods and services. However, as in the *McCarney* matter, the marks at issue here are not substantially similar in appearance, sound, meaning and overall commercial impression when compared in their entireties. In fact, again, the marks at issue here contain none of the same words.

Further, the additional wording, beyond the mere brand name of Applicant's fireworks and fireworks-related goods and services, in Applicant's Mark decreases any similarity in the marks at issue. Finally, Opposer has set forth no facts in support of its mark's fame or actual confusion. As such, there is no likelihood of confusion in this case.

Therefore, Opposer has stated no cause of action upon which the relief sought, refusal of Applicant's registration, can be granted. Opposer's Notice of Opposition should be denied.

F. In the Alternative, Applicant Seeks a Motion for Judgment on the Pleadings.

A motion for judgment on the pleadings is only granted if the moving party "clearly establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 U.S.P.Q.2d 1048, 1049 (T.T.A.B. 1992). As with a motion to dismiss, all factual allegations are assumed to be true and all inferences are drawn in favor of the nonmoving party. *Id.*

As a matter of law, puffing, or exaggerated statements, do not constitute disparagement. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 321 F. Supp. at 712-13. Moreover, Opposer is unable to satisfy the elements of its deceptive claims because Applicant's puffery does not misdescribe its goods and services. See *Hoover*, 238 F.3d at 1361 (elements of deceptive claim).

Further, Applicant's Mark does not falsely suggest a connection with Opposer's goods where Opposer fails to allege the first element required for a false suggestion of connection claim. See *Buffett*, 226 U.S.P.Q. 428 (elements of false suggestion claim). In addition, where the marks are dissimilar, there can be no dilution. See *Luigino's*, 170 F.3d 827. Finally, a generic term and marks that are not substantially similar cannot be the basis for likelihood of confusion. See *Beech-Nut, Inc.*, 346 F. Supp. 547; *McCarney*, Opposition Nos. 91107026 and 91107748.

As a result, even assuming all facts alleged in Opposer's Notice of Opposition are true, Applicant's mark should not be refused registration as a matter of law.

G. In the Alternative, Applicant Moves for a More Definite Statement.

Only in one of Opposer's subsections does the Opposer identify the statutory grounds upon which it claims that Applicant's Mark should be refused registration. With regard to all the other allegations, Applicant has been left to assume the grounds on which Opposer believes Applicant's Mark should be refused registration. Such a tactic only serves to confuse the Applicant and the Board and should not be permitted.

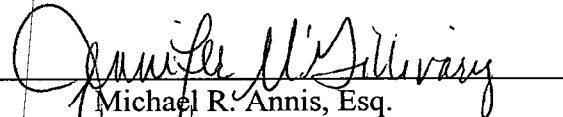
As such, in the event the Board does not grant Applicant's Motion to Dismiss or alternative Motion for Judgment on the Pleadings, Applicant states that the Notice of Opposition

is not averred with sufficient definiteness or particularity to enable Applicant properly to prepare responsive pleadings.

WHEREFORE, Applicant, American Promotional Events, Inc., respectfully requests an Order of the Board dismissing Opposer's Opposition of Applicant's Mark for failure to state a claim upon which relief may be granted, or in the alternative a motion for judgment on the pleadings, or in the alternative a motion for more definite statement.

Respectfully Submitted,

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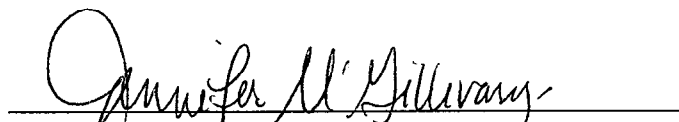
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a true and correct copy of the foregoing upon counsel for Opposer, by United States First Class Mail, in a properly addressed envelope, with adequate postage affixed thereon, this 18th day of February, 2004, addressed as follows:

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