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

Proceeding	91187188
Party	Plaintiff North Atlantic Operating Company, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In The Matter of Application Serial No. 77/316,130
Filed: October 29, 2007
For Trademark: THE PAPER
Published in the Official Gazette of May 27, 2008

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NORTH ATLANTIC OPERATING COMPANY, INC.,	:
	:
Opposer,	:
	: Opposition No. 91187188
v.	:
NEW IMAGE GLOBAL, INC.,	:
	:
Applicant.	:
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OPPOSER’S MOTION FOR SUMMARY JUDGMENT

Upon the annexed Declaration of Eric J. Shimanoff, dated September 9, 2009 (“Shimanoff Decl.”), and the exhibits thereto, and the following memorandum of law, Opposer North Atlantic Operating Company, Inc. (“Opposer” or “NAOC”), by and through its undersigned attorneys, hereby moves for an order, pursuant to 37 C.F.R. § 2.127(e) and Fed. R. Civ. P. 56, granting Opposer summary judgment in this proceeding. Opposer moves for summary judgment because there are no genuine issues of material fact as to Opposer’s contention that Applicant’s application is merely descriptive, and therefore Opposer is entitled to judgment as a matter of law.

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

This request for summary judgment concerns Opposer's opposition to Applicant's application Serial No. 77/316,130 for the mark "THE PAPER" in International Class 34 for "SMOKING ARTICLES, NAMELY, TOBACCO, TOBACCO LEAVES, FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET, CHEWING TOBACCO, AND TOBACCO PIPES" (the "THE PAPER mark"). Applicant's THE PAPER mark is opposed on the basis that it is merely descriptive of the goods identified in the above-cited application, and Opposer requests summary judgment on that basis. Specifically, as set forth more fully below, Opposer is entitled to summary judgment because there is no dispute regarding the mere descriptiveness of Applicant's THE PAPER mark. The record before the Board shows that Applicant's THE PAPER mark merely describes a feature, characteristic, or purpose of at least one of goods identified in Applicant's application, namely "FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET." Applicant will not be able to introduce any evidence to rebut Opposer's arguments, especially in light of the extensive evidence proving that the relevant purchasing public readily understands the term "paper" to describe a characteristic or purpose of Applicant's goods. Not only are Applicant's goods a type of paper used for wrapping tobacco, and are commonly referenced as such in the industry, but, when used as a verb, Applicant's goods "paper" (meaning, to wrap or envelope) tobacco to hold it in place for smoking and control the rate of burn. Indeed, the record shows that Applicant itself has used the term "paper" to describe the intended goods in the instant application. The material facts of this case not being in dispute, summary judgment in Opposer's favor is proper.

STATEMENT OF FACTS

I. Procedural History

The material facts involved in this opposition are undisputed and indisputable. On October 29, 2007, Applicant filed an Intent-to-Use application for the mark THE PAPER, Serial No. 77/316,130, in International Class 34 for “SMOKING ARTICLES, NAMELY, CIGARS, CIGARETTES, TOBACCO, TOBACCO LEAVES, FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET, NON-METALIC CIGARETTE HOLDERS, TOBACCO PIPES, CIGAR CUTTERS AND CHEWING TOBACCO.” On January 7, 2008, the Examining Attorney issued an office action, refusing to register the THE PAPER mark pursuant to Section 2(e)(1) of the Trademark Act on the ground that the “proposed mark is merely descriptive of applicant’s goods because cigars and cigarettes are wrapped in paper and paper is an ingredient in cigars and cigarettes. A term is merely descriptive if it conveys an immediate idea of the ingredients, qualities, or characteristics of the identified goods or services.” (Shimanoff Decl. Exh. A). Among the evidence supporting the Examining Attorney’s refusal were Internet articles describing the paper in which cigarettes and cigars are wrapped and websites offering such tobacco wrapping paper and related products for sale. (Id.).

In response to the January 7, 2008 Office Action, Applicant voluntarily deleted “CIGARS, CIGARETTES, CIGAR CUTTERS and NON-METALIC CIGARETTE HOLDERS” from the application’s description of goods. (Shimanoff Decl. Exh. B). Applicant, however, did not delete “FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET” from its application. (Id.). On May 27, 2008, Applicant’s application, as amended, was published for opposition. On October 27, 2008, Opposer filed the instant opposition. Pursuant

to the Board's last order, Opposer's testimony period opens on September 10, 2009 and thus this summary judgment motion is timely. See T.M.B.P. § 528.02; 37 C.F.R. § 2.127(e)(1).

II. Use of the Term "Paper" as Descriptive of Applicant's Goods

Applicant seeks to register the THE PAPER mark for, inter alia, "FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET." Such goods are sold for the purpose of wrapping roll-your-own tobacco products such as cigars and cigarettes. (Shimanoff Decl. Exh. C). In other words, Applicant's goods are tobacco wrappers. Applicant itself, or through its affiliated or predecessor companies and brands SMK, Inc. (a/k/a SMK Tobacco, Inc. a/k/a/ True Blunt) and Royal Blunt, Inc., has filed approximately 28 federal trademark applications (and obtained 6 registrations) for marks covering identical goods. (Shimanoff Decl. Exhs. D & E). In all but the instant application, the description of goods "TOBACCO LEAVES IN THE FORM OF A SHEET" was followed by a qualifying phrase such as "FOR USE IN ROLLING CIGARS AND CIGARETTES" or "FOR USE IN ROLLING CIGARS, CIGARILLOS, AND CIGARETTES," further affirming the intended use of the goods as tobacco wrappers. (Shimanoff Decl. Exh. E (emphasis added)). While, on this motion, Opposer must refrain from speculation as to why Applicant omitted the phrase "FOR USE IN ROLLING CIGARS AND CIGARETTES" only in its THE PAPER mark application, Applicant's motivation is irrelevant since, as noted above, consumers of such products understand generally that the purpose of Applicant's good are for wrapping tobacco products.

As evidenced by numerous Internet articles and web-pages, consumers, including Applicant's own consumers, and persons in the tobacco industry regularly refer to tobacco wrappers as: "wrapping papers," "blunt papers," "cigar papers," "leaf papers," "rolling papers" and, simply, "paper" or "papers." (Shimanoff Decl. Exhs. C & F). Even Applicant's

competitors sell and promote such tobacco wrappers as “paper” or “papers.” (Shimanoff Decl. Exh. G). And, in three of Applicant’s own applications, namely, Ser. No. 77/765505 for BALLERS CHOICE, Ser. No. 77/765522 for PREMO CHOICE, Ser. No. 78/252386 for HIPNOTIQ, Applicant itself even described the applied-for goods here as “TOBACCO LEAVES IN THE FORM OF A SHEET FOR USE AS ROLLING PAPERS.” (Shimanoff Decl. Exh. E (emphasis added)).

While Applicant’s goods set forth in the opposed application allegedly will be made from tobacco leaves, these wrappers serve the same purpose as typical rolling paper, namely, to keep the tobacco in place, shape it into a smokable form and control the burning of the tobacco. (Shimanoff Decl. Exhs. A, H & I). Indeed, like all tobacco wrappers, Applicant’s tobacco wrappers are actually a form of paper, but Applicant’s wrappers are made from tobacco leaves or pulp instead of more traditional cellulose. (Shimanoff Decl. Exhs. A, C, E, F, H, I & J). Moreover, the word “paper” can also be used as a verb, meaning “to cover [or] wrap” (Shimanoff Decl. Exh. J), which is the primary function of Applicant’s goods.

These references clearly indicate that the word “paper” is used by numerous manufactures and consumers, and Applicant itself, to describe products such as the tobacco wrappers applied for here. In line with this fact, several applicants have been required by the United States Patent and Trademark Office to disclaim in their registrations words such as “paper,” “rolling paper” and “cigarette paper” from marks used in connection with tobacco wrappers and related products because they would otherwise be refused registration as descriptive or generic. (Shimanoff Decl. Exh. K).

Indeed, in 2002, Applicant, through its a affiliate, SMK, Inc., filed an application for the mark TRUE BLUNT (App. Ser. No. 78/128513) for “TOBACCO LEAVES IN THE FORM OF

A SHEET FOR USE IN ROLLING YOUR OWN CIGARS,” in International Class 34. (Shimanoff Decl. Exh. E). In response to an office action, Applicant was required to disclaim the word “blunt” from its TRUE BLUNT mark application because the word “blunt” was merely descriptive of the goods therein. (Shimanoff Decl. Exh. L). In the tobacco industry, the word “blunt” is another term for a type of “paper” used for the rolling of tobacco products and many consumers refers to “blunts” simply as “papers.” (Shimanoff Decl. Exhs. C & F). Thus, Applicant was required to disclaim a word that was synonymous with the word “paper” in a prior application that covered goods identical to those applied for here.

Moreover, even without such evidence of consumer perception, Applicant’s THE PAPER mark would still be merely descriptive of the goods “FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET.” Indeed, one of the definition of “leaves” is “sheets of paper.” (Shimanoff Decl. Exh. M). Similarly, one of the definitions of the word “sheet” is a “piece of paper.” (Shimanoff Decl. Exh. N). And the word “sheet” also can be used a verb, meaning “to cover [or] wrap,” which, as discussed above, also is a definition of the word “paper.”

ARGUMENT

I. Standard for Summary Judgment

Whether an applicant’s mark is merely descriptive as applied to the goods in its application is an issue properly considered on an opposer’s motion for summary judgment. See Interpayment Servs. Ltd v. Docters & Thiede, 66 U.S.P.Q.2d 1463, 1468 (T.T.A.B. 2003) (holding applicant's mark merely descriptive as a matter of law and entering judgment in opposer's favor on summary judgment). As the moving party, an opposer is entitled to summary judgment where there are no genuine issues of material fact, and judgment in its favor is proper as a matter of law. See Fed. R. Civ. P. 56(c); Copelands’ Enter. Inc. v. CNV, Inc., 20

U.S.P.Q.2d 1295, 1297 (Fed. Cir. 1991). A material fact is one that would affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is in “genuine” dispute where a reasonable finder of fact could find for the non-movant. See id.; Opryland USA, Inc. v. The Great Am. Music Show, Inc., 23 U.S.P.Q.2d 1471, 1472 (Fed. Cir. 1992).

When, as here, the moving party has adequately supported its motion for summary judgment, the burden shifts to the nonmoving party to demonstrate that a genuine issue of material fact does exist, necessitating a trial. See Venture Out Properties LLC v. Wynn Resorts Holdings LLC, 81 U.S.P.Q.2d 1887, 1890 (T.T.A.B. 2007). In a case concerning the descriptiveness of a proposed mark, once the opposer has established its prima facie case by presenting evidence to show descriptive use of the term comprising the mark in question, the burden shifts to the applicant to show that the average consumer does not understand the mark to have a descriptive significance. See Mars Money Sys. v. Coin Acceptors, Inc., 217 U.S.P.Q. 285, 287 (T.T.A.B. 1983).

Proper summary judgment evidence includes “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” See Fed. R. Civ. P. 56(c); T.B.M.P. § 528.05. The evidentiary record may also include documents produced in response to a request for production and printed publications available to the segment of the public relevant to the issue. T.B.M.P. § 528.05. These materials may be submitted as attachments or exhibits to a party’s summary judgment brief. Id.

II. Standard for Refusal of Merely Descriptive Mark

Under Section 2(e)(I) of the Lanham Act, 15 U.S.C. § 1052(e)(I), a mark that merely describes the goods to which it relates is not registrable on the Principal Register. A mark is

merely descriptive if it immediately conveys information to the relevant consumers concerning a quality, characteristic, use or function of the product. See In re MBNA Am. Bank, 67 U.S.P.Q. 1778, 1780 (Fed. Cir. 2003); In re Quik-Print Copy Shop, Inc., 205 U.S.P.Q. 505, 507 (C.C.P.A. 1980). The mark does not have to describe all of the properties of the associated goods to be held merely descriptive. Instead, “it is sufficient if the term describes a significant attribute or feature about [the goods].” In re Styleclick.com Inc., 57 U.S.P.Q.2d 1445, 1447 (T.T.A.B. 2000). Similarly, “[t]he mark need not describe all the goods and services identified, as long as it merely describes one of them.” T.B.M.P. 1209.01(b) (citing In re Stereotaxis Inc., 77 U.S.P.Q.2d 1087, 1089 (Fed. Cir. 2005)). It is well-settled that the determination of descriptiveness must be made in the context of the goods or services identified in the application. See In re Ethnic Home Lifestyles Corp., 70 U.S.P.Q.2d 1156, 1159 (T.T.A.B. 2003).

The major reasons for not protecting merely descriptive marks that have not acquired distinctiveness are: “(1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved” In re Abcor Dev. Corp., 200 U.S.P.Q. 215, 217 (C.C.P.A. 1978). A company cannot, therefore, preclude its competitors from marketing their own brands of similar or related products simply by seeking federal registration of a merely descriptive term. See Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 228 U.S.P.Q. 519, 521 (7th Cir. 1986). Evidence of competitor need for a particular term, therefore, is relevant to determining whether a mark comprised of that term is merely descriptive. See Sperry Rand Corp. v. Sunbeam Corp., 170 U.S.P.Q. 37, 38 (C.C.P.A. 1971).

Moreover, mere descriptiveness is determined from the viewpoint of the relevant purchasing public. See In re Nett Designs Inc., 57 U.S.P.Q.2d 1564, 1566 (Fed. Cir. 2001). “[A] mark is merely descriptive if the ultimate consumers immediately associate it with a quality or

characteristic of the product or service.” MBNA Am. Bank, 67 U.S.P.Q.2d at 1780. Evidence that a mark is merely descriptive in the minds of consumers and purchasers “may be obtained from any competent source, such as dictionaries, newspapers, or surveys.” In re Bayer Aktiengesellschaft, 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007) (citations omitted). “Internet evidence is generally admissible . . . for purposes of evaluating a trademark,” id., especially in summary judgment situations. See Retail Servs. Inc. v. Freebies Publ’g, 70 U.S.P.Q.2d 1603, 1610 (4th Cir. 2004) (considering Internet evidence offered on summary judgment as proof of the public's understanding of the generic nature of defendant's mark).

Moreover, evidence of the applicant’s own descriptive use of the term comprising its mark is particularly strong evidence of descriptiveness. See Freebies Publ’g, 70 U.S.P.Q.2d at 1611 (“[E]vidence of the [mark] owner’s generic use, in particular, ‘is strong evidence of genericness’”) (citation omitted); Sunbeam Corp. v. Battle Creek Equip. Co., 216 U.S.P.Q. 1101, 1103 (T.T.A.B. 1982) (finding that applicant’s own descriptive use of a mark establishes that the mark has not become distinctive of applicant's goods). Evidence of the applicant’s descriptive use of a term is especially relevant where, as here, such use is consistent with “scores of other websites on the Internet.” Freebies Publ’g, 70 U.S.P.Q. at 1611.

III. Applicant’s THE PAPER Mark Is Merely Descriptive

The record facts of this case demonstrate that the THE PAPER mark is merely descriptive of the goods identified in Applicant’s application as a matter of law and thus should be refused registration under Section 2(e)(1). It is well-settled that a mark only needs to describe one item listed in the applicant's identification of goods to make refusal of registration proper. T.M.E.P. 1209.01. Here, Applicant's THE PAPER mark is descriptive of at least one of the

goods identified in Applicant's application, namely, "FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET."

As discussed in great detail above, Applicant's "FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET" goods are sold for the purpose of wrapping roll-your-own tobacco products such as cigars and cigarettes. Indeed, Applicant has filed numerous applications for identical goods with the express qualifier "FOR USE IN ROLLING CIGARS AND CIGARETTES." Such tobacco wrappers are commonly known and sold in the industry as "wrapping papers," "blunt papers," "cigar papers," "leaf papers," "rolling papers" and, simply, "paper" or "papers." Indeed, Applicant itself has referred to such tobacco wrappers as "rolling papers" in three of its own trademark applications. Moreover, these wrappers are just a form of paper, made from tobacco leaves as opposed to more common cellulose, and serve the same function as ordinary rolling paper, namely to keep loose tobacco in place and control the burn of the cigar or cigarette. And consistent with the definition of "paper," which, when used as a verb, means to "cover" or "wrap," Applicant's goods literally cover or wrap loose tobacco.

Because the word "paper" is used by numerous competitors and consumers to describe products such as Applicant's tobacco wrappers, several applicants have been required to disclaim the words "paper," "rolling paper" and "cigarette paper" from registered marks used in connection with tobacco wraps because they would otherwise be descriptive or generic. Applicant itself was required to disclaim the word "blunt," which is synonymous with "paper," from a prior application for goods identical to those here, because the term "blunt" was merely descriptive. Similarly, Applicant's use of the word "paper" here is, at best, merely descriptive.

Moreover, even putting aside all the evidence of consumer perception and intended uses of Applicant's goods, Applicant's THE PAPER mark would still be merely descriptive of the

goods “FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET” since (1) one of the definitions of “leaves” is “sheets of paper,” (2) one of the definitions of “sheet” is a “piece of paper” and (3) another definition of “sheet,” when used a verb, means “to cover [or] wrap,” which also is a definition of the word “paper.”

This case is strikingly similar to Ex parte Continental Paper & Bag Corporation, 43 U.S.P.Q. 514, 514 (Comm’r Pat. 1939), where the Examiner of Trademarks refused, based on mere descriptiveness, to register the mark MEATPACK for “a grease and moisture resistant paper of a type widely used in butcher shops and delicatessens for wrapping many commodities of a greasy or semi-liquid nature.” Citing to one of the definitions of the word “pack” as meaning “to cover, envelop, or protect tightly with something,” the Commissioner affirmed the Examiner’s finding that the mark was merely descriptive because that definition was “the precise function of applicant’s paper” with respect to meat. Id. Similarly here, the definition of paper, namely to envelope or wrap, is precisely the function of Applicant’s goods with respect to their intended use as wrappers for tobacco. Applicant’s THE PAPER mark “directly conveys information about [Applicant’s] product . . . , other than information about its source or association with a particular entity,” and thus is merely descriptive. PaperCutter Inc. v. Fay’s Drug Co. Inc., 14 U.S.P.Q.2d 1450, 1454 (2d Cir. 1990).

Applicant may attempt to argue that the addition of the word “the,” used in its adjectival sense, to the descriptive term “paper” gives the mark a different meaning, namely, that Applicant’s tobacco wrap is of superior quality to others. However, the Board specifically rejected this argument In re The Computer Store, Inc., 211 U.S.P.Q. 72, 75-75 (T.T.A.B. 1981) (rejecting Applicant’s contention that “use of the definite article, ‘The’, converts the merely descriptive term [“computer store”] into a registrable service mark This kind of uniqueness

has nothing to do with source of origin in the trademark sense”). Indeed, on several occasions the Board has determined that the definite article “the” is generic does not create any unique commercial impression in a mark. See In re Thor Tech Inc., 90 U.S.P.Q.2d 1634, 1635 (T.T.A.B. 2009) (“The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance”); In re The Place Inc., 76 U.S.P.Q.2d 1467, 1468 (T.T.A.B. 2005) (“definite article THE and the generic term BAR are not distinctive terms, and they add no source-indicating significance to the mark as a whole”). Nonetheless, even if the Board considered such an interpretation, such a laudatory meaning would still render the mark descriptive. See In re Nett Designs Inc., 57 U.S.P.Q.2d 1564, 1566 (Fed. Cir. 2001) (THE ULTIMATE BIKE RACK is “a laudatory descriptive phrase that touts the superiority of Nett Designs’ bike racks”); In re The Place Inc., 76 U.S.P.Q.2d 1467, 1468 (T.T.A.B. 2005) (“Laudatory terms, those that attribute quality or excellence to goods or services, generally are deemed to be merely descriptive under Trademark Act Section 2(e)(1)”).

In sum, the undisputed facts of this case demonstrate that Applicant's proposed THE PAPER mark is merely descriptive of Applicant’s “FLAVORED TOBACCO LEAVES IN THE FORM OF A SHEET.”

IV. The Minimally Stylized Presentation of THE PAPER Does Not Overcome the Descriptive Significance of the Mark

Finally, the minimally stylized presentation of Applicant’s THE PAPER mark does not present a separate and distinctive commercial impression that would save the mark from refusal under Section 2(e)(1). The stylized display of descriptive or otherwise unregistrable components of a mark does not bestow registrability upon the mark unless such stylization creates a “distinctive commercial impression separate and apart from and above the descriptive significance” of the term comprising applicant’s mark. In re Behre Indus., 203 U.S.P.Q. 1030,

1032 (T.T.A.B. 1979). “In order for a term otherwise unregistrable to be capable of distinguishing an applicant's goods, the presentation of the term must be sufficiently striking, unique or distinctive so as to overcome its inherent incapacity and render the mark capable of serving as a source indicator.” In re Cosmetic Factory, Inc., 220 U.S.P.Q. 1103, 1103 (T.T.A.B. 1983).

The letters in Applicant's mark are displayed in a standard serif font, similar, if not identical, to ordinary Times New Roman font. The only other design element in Applicant's mark is that the word “THE” is underlined. The appearance of Applicant's mark in a standard serif font – one that is identical or strikingly similar to one of the world's most ubiquitous fonts – is not unique. See Interpayment Services Ltd. v. Docters & Thiede, 66 U.S.P.Q.2d 1463, 1468 (T.T.A.B. 2003) (fact that mark was in “plain typography, or a common font such as what would be used in a newspaper article” was insufficient to raise an issue of fact that mark was merely descriptive); In re Bonni Keller Collections Ltd., 6 U.S.P.Q.2d 1224, 1227 (T.T.A.B. 1987) (holding the generic term LA LINGERIE unregistrable on the Supplemental Register because “ordinary and nondistinctive” stylized presentation did not overcome generic significance of the mark); In re Cosmetic Factory, Inc., 220 U.S.P.Q. at 1104 (“even had the words ‘BODY SOAP’ per se been disclaimed, the subject matter for registration would not be registrable on the Supplemental Register since the style of lettering clearly is not unique or fanciful but rather is ordinary and non distinctive in appearance”).

Similarly, the use of underscoring beneath under the article “the” in Applicant's THE PAPER mark does not create any unique commercial impression. See In re American Academy of Facial Plastic and Reconstructive Surgery, 64 U.S.P.Q.2d 1748, 1755 (T.T.A.B. 2002) (“Here, the display of the generic words FACIAL PLASTIC SURGERY is clearly nondistinctive with

the words shown one above the other in ordinary capital letters with an insignificant underscoring. The display is nothing but ordinary in nature and does not create a commercial impression separate and apart from the unregistrable components”).

Because Applicant's mark is ordinary and non-distinctive, it does not create a commercial impression apart from the descriptive significance of the term “paper” and, as such, must be refused registration for the reasons already discussed.

CONCLUSION

Based on the foregoing, Opposer respectfully requests the Board issue an order granting summary judgment to Opposer, and refusing registration of Applicant’s application.

Dated: New York, New York
September 9, 2009

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of September, 2009, the foregoing Motion for Summary Judgment was served on Applicant by mailing a true and correct copy thereof to Applicant at:

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/Arlana S. Cohen/
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