

ESTTA Tracking number: **ESTTA986443**

Filing date: **07/10/2019**

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

Proceeding	91246567
Party	Defendant Phantom I.P., LLC
Correspondence Address	ROBYN R GALLITTO LEGAL DEPARTMENT 2445 BELMONT AVENUE YOUNGSTOWN, OH 44505-2405 UNITED STATES RGallitto@fireworks.com, waweimer@fireworks.com 330-746-1046
Submission	Answer
Filer's Name	Robyn R. Gallitto
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Signature	/Robyn R. Gallitto/
Date	07/10/2019
Attachments	2019 07-10 Answer to Notice of Opposition.pdf(848907 bytes)

B. Statement of Facts

Initially, it should be noted that Plaintiff Dynamite Wholesale, LLC has not registered the mark "Air Assault" with the U.S. Patent and Trademark Office. (USPTO). Plaintiff's words do not bear any "TM" marking after them. Also, as of the filing of this Answer, no application of the words "Air Assault" have been filed by Dynamite with the U.S. Patent and Trademark Office.

Dynamite is located in Seymour, Missouri. A check with the Missouri Office of Secretary of State on July 10, 2019 at 9:58 am reports the designation "Air Assault" is "conditionally available" meaning that no one has filed it in the Missouri Secretary of State's office as of that time. Opposer is relying on its Common Law rights in the designation. Defendant Phantom Fireworks has approximately 80 brick and mortar retail locations in 15 states including Missouri. However, the closest Phantom location in Missouri is about 200 miles from Dynamite Wholesale's location in Seymour. It should also be noted that the goods at issue here are fireworks, which are highly regulated and cannot simply be sold just anywhere. State laws and transportation laws dictate which fireworks can be sold in which jurisdictions. Therefore, it is possible that Opposer's good with the designation Air Assault cannot be sold everywhere.

II. ARGUMENT

As was noted, Plaintiff, Dynamite Wholesale, LLC, has not filed for registration of the Mark "Air Assault" with the USPTO (nor with the state of Missouri). Instead, Plaintiff is claiming and solely relying on a common law right in the Mark. As such, Plaintiff must first establish that it has used and is continuing to use the Mark prior to the Application filed by Defendant. Plaintiff cannot meet this burden.

In Plaintiff's Notice of Opposition, Plaintiff claims "Opposer adopted and used the *designation* [not "mark" as it is not registered] AIR ASSAULT for fireworks goods long prior to the July 24, 2018 filing date of the Opposed Application, and *is still using to this date* the designation AIR ASSAULT for fireworks goods." (See Notice of Opposition, ¶13, *emphasis*

added.) In paragraph 4 of its Notice of Opposition, Opposer again alleges current usage in stating: "By virtue of the prior *and continuous advertising and sales* of Opposer's goods..."

Plaintiff operates a website called Dynamite Fireworks at www.dynamitefireworks.com. See a copy of the homepage attached hereto and marked as Exhibit A. A search of that website shows no results when "Air," "Assault," and "Air Assault" are searched. All three of those search results are attached and marked as Exhibit B. Defendant proposes that, contrary to what was alleged in Plaintiff's Notice of Opposition, the designation is not being used.

Additionally, a search using search engine google also shows not one listing of "air assault" attributed to Opposer's website. See the first three pages of the google search attached hereto and collectively marked as Exhibit C. The remaining pages showed the same; no results attributed to the Plaintiff. Defendant submits that this again shows Plaintiff is not using the designation, the words "Air Assault."

Therefore, Plaintiff should not be given credit for any rights in a name that it is not actively using, all to the exclusion of another who is attempting to properly register it. Plaintiff has not taken steps to protect its designation.

Assuming *arguendo* that Plaintiff has used and has continued to use this Mark prior to the Application filed by Defendant, an assumption which Defendant has and continues to deny, Plaintiff cannot demonstrate other elements alleged.

The Plaintiff claims "the fireworks goods sold by Opposer [Plaintiff Dynamite Wholesale, LLC] and the goods described in the Opposed Application are identical." (See Notice of Opposition, ¶5.) However, there is no description of any of the fireworks goods- not of the Plaintiff's goods nor of Defendant's goods. Plaintiff cannot show what its fireworks goods are because they do not exist. Plaintiff is not currently using the Mark. There is no statement or representation that the Plaintiff intends to use the Mark. Similarly, Plaintiff could not know what fireworks item the Mark will be on as Defendant filed its Application under section 1(b), an intent to use. Obviously, at this early time, there is no specimen filed concurrent with the Application

so there is no description of the goods other than the class of 013. This broad category is not a basis to claim items are “identical” especially when there is no description of what Plaintiff’s item is (or even was).

The Plaintiff also claims “purchasers, prospective purchasers and others are likely to be confused, mistaken or deceived into the belief, contrary to fact, the Applicant’s described goods under the mark “Air Assault” emanate from and/or are in some way sponsored, or approved by Opposer and/or that Applicant is somehow affiliated with Opposer, thereby damaging Opposer.” See Notice of Opposition, ¶16. There is no description on how a purchaser might be confused or mistaken. There is a possibility, due to geographic distance of the retail locations, that the parties may not even have the same purchasers. Plaintiff also alleges “likelihood of confusion” (see ¶16) but does not state where or how the confusion may occur. There are just conclusory statements. The record is devoid of that argument or any evidence of the confusion. (In fact, on August 22, 2018, Defendant Phantom I.P., LLC filed for the mark “Assault Squad” under the classification of 013 fireworks and Plaintiff did not oppose it as being likely to confuse.)

Opposer is claiming that purchasers are likely to be confused that the goods come from the same source which will damage the Opposer. See Notice of Opposition, ¶16. There is no demonstration of *how* the goods are related. Additionally, Opposer cannot prevail because it cannot show that its goods are inherently distinctive and have developed a trade identity. In fact, there are other fireworks that have the words “assault” or “air” in them that have been registered and are being used. This shows that Opposer’s common law claim that its mark is unique is very weak.

Additionally, Plaintiff states that if Defendant’s Mark is registered, such registration would “seriously damage and injure Opposer.” See Notice of Opposition, ¶7 and ¶16. Plaintiff cites no evidence nor any description of how it would be damaged or injured. It is merely a conclusory statement and an assumption. There is no support for the claim of damage or injury other than self-serving statements that it will be damaged. There is no explanation of how this potential

damage will occur nor is there any description of what the potential damage will be if Defendant's mark "Air Assault" is registered.

Opposer has not continuously used its designation. Under applicable case law, a common law mark that is not used for three consecutive years constitutes a *prima facie* showing of abandonment. If Plaintiff had used the designation in the past, it has, in effect, abandoned the designation. Plaintiff should not be given more time than a registrant would be given with the USPTO. The time for filing any extensions and for filing a statement of continued use have long since passed. Plaintiff should not be given additional protection that would not otherwise be given if it had registered its designation.

III. CONCLUSION

Even if Plaintiff had ever used the Mark "Air Assault," it has abandoned it. Plaintiff is not using the Mark "Air Assault" now. Opposer should not be given any rights in a name that it is not actively using, all to the nationwide exclusion of another who is attempting to properly register it. Plaintiff has not taken steps to protect its designation.

WHEREFORE, the Defendant, Phantom I.P., LLC respectfully requests that Plaintiff's Opposition be overruled and denied and that Defendant's Mark "Air Assault" be allowed.

Respectfully submitted,

Phantom I.P., LLC

Date: July 10, 2019

By: _____



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Proof of Service

I hereby certify that a true and complete copy of the foregoing Answer to Notice of Opposition has been served on Glenn K. Robbins, II, Esq., of Spence Fane, LLP, 1 North Brentwood Blvd., Suite 1000, St. Louis, MO 63105, by forwarding said copy on July 10, 2019, via email to sfaction@spencerfane.com and to grobbins@spencerfane.com.



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(screenshot)

Exhibit A



DYNAMITE FIREWORKS

WISHES YOU AND YOUR FAMILY A
HAPPY 4TH!

Choose your shopping experience

RETAIL

Buy fireworks for personal use
by the case, shipped to your door.

No minimum order.

SHOP NOW

WHOLESALE

Buy fireworks by the case
at special bulk pricing.

\$1,500 minimum order.
EIN required.

SHOP NOW

Air

Relevance

ALL PRODUCTS

COMING SOON



Airborne Paratrooper

Case Quantity: 36 ea.

\$199.60



Air Craft Carrier

Case Quantity: 144 ea.

\$139.20



Air Blaster

Case Quantity: 18 pk.

\$160.20



Croc Cruiser

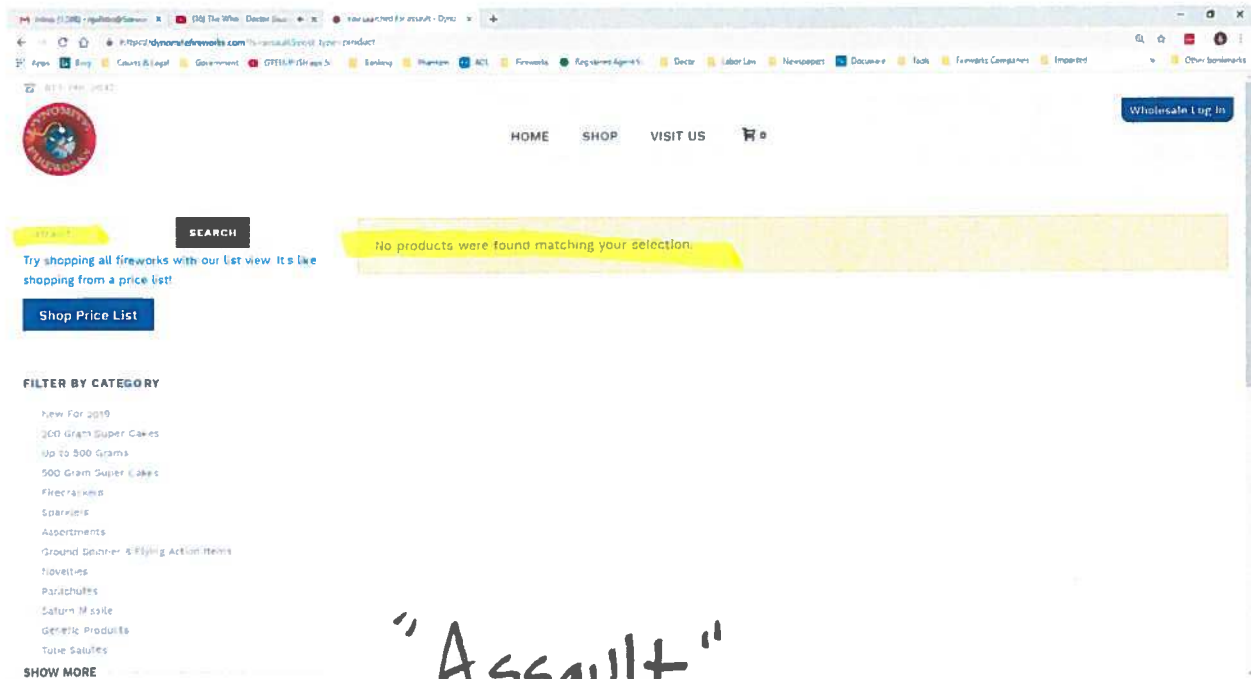
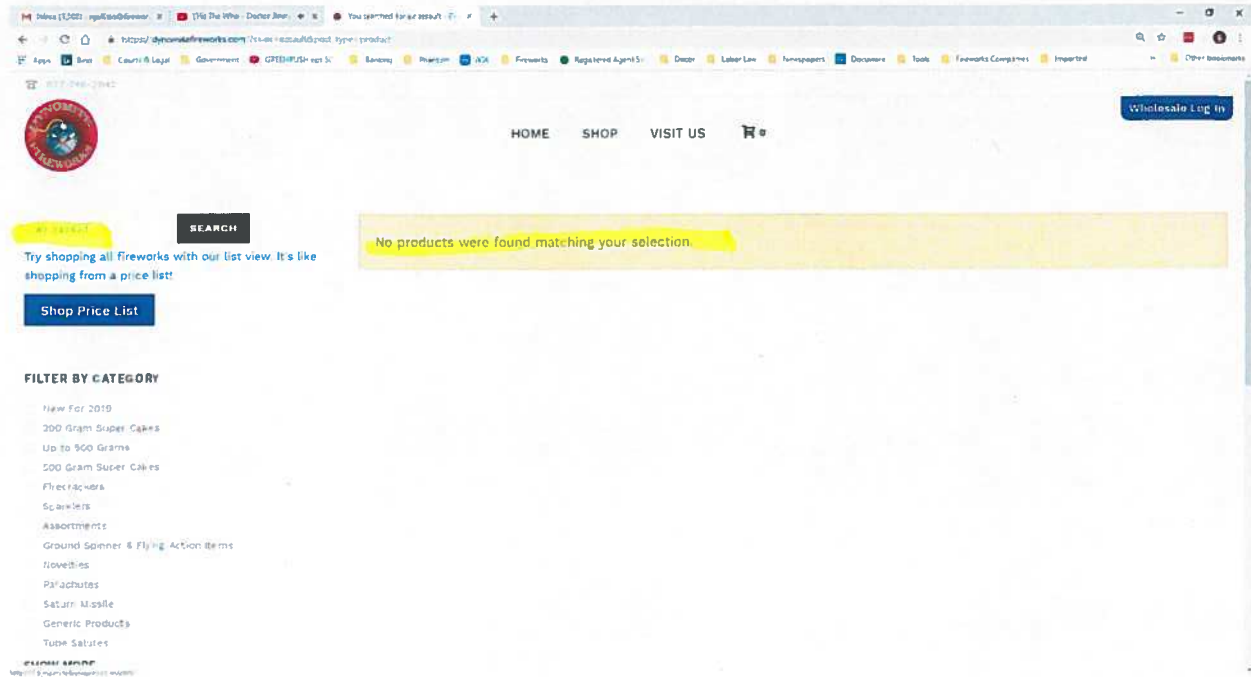
Case Quantity: 24 ea.

\$118.99

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Exhibit B

"Air Assault"



"Assault"



air assault firework



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Air Assault 2016 - YouTube

<https://www.youtube.com/watch?v=8nuWTEzFRVA>

Apr 4, 2016 - This **air assault** operation has 25 shots of "free falling" parachutes! Each shot has 5 parachutes that ... **Air Assault 2016**. **Fireworks Supermarket**.

Fireworks #1 (air assault) - YouTube

<https://www.youtube.com/watch?v=eLYyS3LnatQ>

Nov 6, 2017 - I shoot some rockets.

Ground and Air Assault Archives - Keystone Fireworks

<https://keystonefireworks.com/product-tag/ground-and-air-assault/>

Ground and **Air Assault**. Sort by price: low to high, Sort by price: high to low. Keystone Fireworks Ground and Air Assault Assortment ...

Assortments Archives - Keystone Fireworks

<https://keystonefireworks.com/product-category/assortments/>

... to high, Sort by price: high to low. Keystone Fireworks Assortment ... Fiesta Family Pack. Click Here - Keystone Fireworks Ground and **Air Assault** Assortment ...

Parachutes | Fireworks Over America Wholesale

<https://fireworksoveramerica.com/product-category/parachutes/>

This **air assault** operation has 25 shots of. Sign In For Price. This **air assault** operation has 25 shots of "free falling" parachutes! Each shot has 5 parachutes that ...

Aerial Assault — Diamond Fireworks

www.diamondfireworks.co.uk/aerial-assault

This fun little colourful selection box is designed with the younger family members in mind. As the name suggests it contains lots of colourful fountains, candles ...

Air Assault - KC Fireworks

www.kcfireworks.com/shop/parachutes/air-assault/

Description. This **air assault** operation has 25 shots of "free falling" parachutes! Each shot has 5 parachutes that crackle and strobe as they "chute" to the ground.

TNT Air Assault Rocket Fireworks - ASDA Groceries

<https://groceries.asda.com/product/in...2...air-assault...fireworks/1000102260819>

Buy TNT Air Assault Rocket Fireworks at ASDA.com

Best fireworks for sale at Asda, Tesco, Aldi, Lidl and more | Metro News

<https://metro.co.uk/Lifestyle>

Nov 2, 2017 - Aldi, Lidl, Tesco, Asda and Morrisons are selling fireworks at ... two for £20 or the 13 shot Massive Attack Box or Air Assault rockets for £15 ...

Fireworks | TNT Fireworks UK | Buy Fireworks

<https://tntfireworks.co.uk/>

TNT Fireworks UK provides safe, high quality consumer fireworks across the United Kingdom. Shop online, in our Rocket Box stores or in retailers everywhere.

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Exhibit C



air assault firework

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Family of 4, including 2 toddlers, burned by fireworks ignited by road ...<https://abc13.com/18-year-old-arrested-after-road-rage-shooting...car.../5379484/>

3 days ago - 2 children and dad injured by fireworks ignited by road rage ... says Bayron Rivera has been charged with four counts of aggravated assault.

aerial assortments - Big Fireworkswww.bigfireworks.com/Products/AERIAL-ASSORTMENTS/

Results 1 - 16 of 37 - Products > AERIAL ASSORTMENTS > ... 148 - LAND AND AIR. +Show ... 1632 - AERIAL ASSAULT - BOTTLE ROCKET ASSORTMENT.

Fort Campbell MWR - Home | Facebook<https://www.facebook.com> > Places > Fort Campbell, Kentucky > Military Base

Join us on Thursday, July 4 for our Independence Day Concert & Fireworks! ... to the public and will feature live music from the 101st Airborne Division Band, ...

Aerial Assault 36 shells - North Central Industries, Inc.<https://www.greatgrizzly.com/aerial-assault-36-shells>

North Central Industries, produces Great Grizzly Fireworks, and carries a large variety of consumer fireworks An importer and ... Image of Aerial Assault 36 shells.

Where you can and can't use fireworks in the DC area | WTOP<https://wtop.com> > Living News > Holiday News > Fourth of July

Jun 28, 2019 - Any firework that explodes or launches a projectile in the air or moves on the ground is illegal in Maryland, including firecrackers, cherry bombs, ...

Teen charged after attack on family celebrating Fourth of July on ...<https://wreg.com/.../juvenile-charged-after-attacking-family-celebrating-the-fourth-of-...>

4 days ago - The firework hit a man in the group and he went to confront the teen. That's when the suspect reportedly began to assault the victim.

TNT Fireworks - Air assault rockets | Seasonal Forum<https://seasonaltraditions.co.uk> > Fireworks > Fireworks Review > Rockets

Oct 17, 2018 - 6 posts - 2 authors

Your browser does not currently recognize any of the video formats available. Click here to visit our frequently asked questions about HTML5 ...

Air Assault | Big Daddy K's Fireworks Outlet<https://bigdaddyksfireworksoutlet.com> > Parachutes

0 - \$0.00 - Big Daddy K's Fireworks Outlet. Always Save Big At Big Daddy Ks! menu. Home · Contact · Brands · Directions · My Account · Shop · Pick Up Info ...

No Fourth of July fireworks at Fort Jackson in Columbia SC | The State<https://www.thestate.com/news/local/article232035952.html>

Jun 27, 2019 - Fort Jackson will not have a fireworks display on the fourth of July ... fireworks show, an air assault demonstration and the unveiling of a half-size ...

Aldi launches firework range with prices as low as £1.29 - but is it a ...<https://www.thesun.co.uk/money/.../aldi-firework-range-bonfire-night-cheap-deals/>

Oct 12, 2017 - Bonfire Night also known as Fireworks' Night or Guy Fawkes Night is ... For example, shoppers can opt for Aldi's Air Strike rockets which ...

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Steamboat fireworks fanatic sets sights on world record ...<https://www.craigdaily.com/.../steamboat-fireworks-fanatic-sets-sights-on-world-r...>

Feb 8, 2019 - If launched successfully, the 2500-pound firework would set a world record ... The current world record for the largest aerial fireworks shell belongs to ... with calls for fireworks, assault, vehicle theft: On the Record — July 4 to 7

500 Gram Repeaters | Phantom Fireworks<https://fireworks.com/products/aerial/500-gram-repeaters>

500 Gram Fireworks Repeater Mineshell Mayhem. 500 Gram Repeaters. G-016 ... 500 Gram Firework Repeater Red White and Boom. 500 Gram Repeaters.

Photos: Gadsden's July 4 fireworks show - Gadsden Times - Gadsden ...<https://www.gadsdentimes.com/photogallery/DA/20190705/NEWS/705009999/.../1>

5 days ago - Fireworks explode during the Gadsden-Etowah Patriots Association's show in ... 1,000 Marines at Camp Lejeune conduct air assault exercise.

Department of Defense Videos - Special Report - Videos - Defense.gov<https://dod.defense.gov/News/SpecialReports>

Feb 15, 2019 - Conducting the Air Assault course in theater maximizes resources while ... Air Assault Student (3) Pfc. ... 4K 60fps - Firework B-roll - 06/29/19.

3rd of July Fireworks - 96.9 KAYOwww.kayofm.com/contestsevents/kayo-events/event/3rd-of-july-fireworks/

4:30 p.m. Aerial Assault - Extreme Trampoline Show! 5:00 p.m. The Olson ... 10:00 p.m. Fireworks Spectacular presented by TwinStar Credit Union. PLUS, FIND ...

North Carolina K-9 found days after running away during Fourth of ...<https://myfox8.com/.../north-carolina-k-9-found-days-after-running-away-during-fou...>

1 day ago - Suddenly, fireworks cracked in the air. Igor, who was off ... Wake County deputy pleads guilty in assault trial for siccing K-9 on suspect - News ...

Fireworks Assortments-Buy Fireworks Online<https://www.usfireworks.biz/category/assortments.htm>

Fireworks Assortments US Fireworks has fireworks at discount prices. ... AIR RAID Fireworks Assortment Fireworks For Sale - Fireworks Assortments - AIR RAID Fireworks Assortment Price: \$37.47 ... Assault Candle Assortment Price: \$11.7

The Show will go on: Fort Campbell Carnival, fireworks will happen ...https://www.army.mil/.../the_show_will_go_on_fort_campbell_carnival_fireworks_wi...

By Master Sgt. Pete Mayes (101st Airborne) July 1, 2013 ... (Air Assault) U.S. Army homepage - 101st Airborne Division (Air Assault) official Twitter news page ...

Police post photos of 2 suspects in Elk Grove firework robbery | The ...<https://www.sacbee.com/news/local/crime/article232258677.html>

6 days ago - ... sought in connection with robbery and assault at an Elk Grove fireworks booth over the weekend. ... Gun waved in air was BB gun, police say

China 21s Ground Air Assault Cakes Fireworks (CA2103) - China ...<https://colorcloudfireworks.en.made-in-china.com/Products/Cakes>

Item No: CA2103 Item Name: 21S Ground Air Assault Cakes Fireworks Packing: 4/1. Effect: Can enter our website directly watch the video effects, can also be ...

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