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

Ex Parte Appeal - Serial No.	90232782
Appellant	Southern Audio Services, Inc.
Applied for mark	PARTY BAR
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Submission	Appeal brief
Attachments	Appeal Brief final.pdf(357817 bytes)
Appealed class	Class 009. First Use: Jan 28, 2016 First Use In Commerce: Jan 28, 2016 All goods and services in the class are appealed, namely: Loudspeakers; Audio speakers; Bass speakers; Loudspeaker systems
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Signature	/R. BENNETT FORD/
Date	11/01/2023

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF:	Southern Audio Services, Inc.		
MARK:	PARTY BAR	**LAW OFFICE:** 104	
APPLICATION NO.:	90/232,782		
FILING DATE:	October 2, 2020	**EXAMINING ATTORNEY:**	MacFarlane, James
ATTORNEY DOCKET NO.:	7721.175		

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Applicant's Appellate Brief

Dear Sir:

This is in response to the Final Office Action, dated January 18, 2023. Applicant filed a timely Request for Reconsideration on July 18, 2023. The examiner refused the request for reconsideration. Accordingly, the appeal was resumed on September 11, 2023, and the deadline for filing this Brief was set for sixty days after the resumption. This Brief is believed to be timely filed. However, if any extension is required, please consider this a petition for the same. The fee for filing an ex parte appeal brief is submitted herewith. No additional fee is believed to be required with this response; however, if any is due, the Commissioner is hereby authorized and requested to charge the same to deposit account number 18-2210.

I. Issue on Appeal

Whether Applicant must disclaim BAR from its mark, PARTY BAR.

II. Overview of Question Presented

The examiner has required that Applicant disclaim BAR because BAR is descriptive of Applicant's goods, namely "loudspeakers; audio speakers; bass speakers; loudspeaker systems" in class 009. Applicant agrees that BAR is descriptive of loudspeakers. However, Applicant contends that a disclaimer is inappropriate because PARTY BAR is unitary.

III. Legal Standard

Unitary marks are not subject to disclaimer. TMEP § 1213.05. Thus, the only issue in this case is whether PARTY BAR is unitary or, in the alternative, whether the examiner has carried his burden that a disclaimer is required.

A. Burden of Proof

Where a mark falls on the distinctiveness continuum is a question of fact. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001). It is well established that the examiner has the burden of proving that a mark lacks inherent distinctiveness. *In re Pacer Tech.*, 338 F.3d 1348, 1350 (Fed. Cir. 2003); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 964 (Fed. Cir. 2007).

The burden of proof encompasses two concepts: burden of production and burden of persuasion. *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1078 (Fed. Cir. 2012). "The burden of persuasion specifies 'which party loses if the evidence is balanced,' while the burden of production specifies 'which party must come forward with evidence at various stages.'" *Id.*, at 1078; *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1375 (Fed. Cir.

2016)(addressing burden of proof, burden of production, and burden of persuasion); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009), *on reh'g in part,* 638 F.3d 781 (Fed. Cir. 2011)(distinguishing burden of persuasion from burden of production).

In practice, the examiner has the initial burden to make a *prima facie* showing that a mark is descriptive. *In Re Box Sols. Corp.*, 79 U.S.P.Q.2d 1953 (T.T.A.B. 2006). A *prima facie* showing merely creates a rebuttable presumption of the issue in question. *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 1391 (Fed. Cir. 2010)(abandonment); *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358 (Fed. Cir. 2009)(acquired distinctiveness). When the predicate evidence necessary to trigger the presumption is introduced, the presumption is established. *Id*. That places the burden on the opposing party to offer evidence to the contrary. *Id*. This switches the burden of production; it does not change the burden of persuasion.

However, presumptions are not evidence. *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998). When the party against whom a *prima facie* presumption applies introduces evidence sufficient to raise a genuine question as to the issue, the presumption vanishes entirely. *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992)(en banc), *abrogated by SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954, 197 L. Ed. 2d 292 (2017)[1]; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981); Fed. R. Evid. 301.

A presumption does not alter the burden of persuasion. That remains on the party who had it originally. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747, 125 L. Ed.

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[1] *SCA Hygiene* overruled the holding of *AC Aukerman* regarding the effect of laches on patent infringement claims. It did not address or refute *Auckerman's* approach to *prima facie* presumptions and their rebuttal.

2d 407 (1993)(Title VII presumption "operates like *all* presumptions")(emphasis added); *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1305 (Fed. Cir. 2017)("if the underlying burden of persuasion rests with the other party, that underlying burden never shifts"); Fed. R. Evid. 301.

The burden of persuasion with respect to descriptiveness lies with the examiner. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 964 (Fed. Cir. 2007)("The examining attorney has the burden to *establish* that a mark is merely descriptive")(emphasis added); *In Re Transcorp, Inc.*, No. 85537171, 2014 WL 4896400, at *7 (TTAB Sept. 18, 2014)(non-precedential)("the examining attorney bears the burden of coming forward with evidence to support his refusal, and bears the ultimate burden of persuasion on the issue of descriptiveness").

Here, the examiner made a *prima facie* showing that BAR is descriptive. This switched the burden *of production* to the Applicant to rebut the *prima facie* showing of the examiner. *In re Pacer Tech.*, 338 F.3d 1348, 1350 (Fed. Cir. 2003). Applicant has done so by submitting evidence that PARTY BAR is unitary.[2] Applicant contends that the phrase PARTY BAR has a commonly understood meaning that is not descriptive of Applicant's services and, therefore, PARTY BAR is not *merely* descriptive of Applicant's services.[3]

Faced with a *prima facie* showing that BAR is descriptive of Applicant's services, the Applicant's burden was to present evidence sufficient to raise a genuine question regarding the

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[2] See, discussion starting on page 6, below.

[3] Applicant is making an argument under §2(e) of the Lanham Act, not an argument under §2(f). The difference is important. Under §2(f) the Applicant has the burden of proof (production and persuasion). *In re Louisiana Fish Fry Prod., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015). In a rejection under § 2(e), the examiner has the burden of proof. *In re Bayer Aktiengesellschaft,* supra.

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