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

Proceeding	91208858
Party	Defendant Holy Spirits, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

STF ENTERPRISES, LLC, Opposer, v. HOLY SPIRITS, LLC, Applicant	Opposition No.: 91208858 Marks: FATHER DOM'S; FATHER DOM'S PREMIUM PRODUCTS Serial Nos.: 85/554963; 85/554993
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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S MOTION
FOR SUMMARY JUDGMENT**

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Pursuant to Fed. R. Civ. Proc. 56, 37 C.F.R. §2.127, and TBMP 528, Applicant Holy Spirits, LLC ("Holy Spirits") hereby states the following in opposition to the Motion for Summary Judgment of Opposer STF Enterprises, LLC ("STF") filed July 10, 2014. Reviewing each paragraph of STF's motion in turn:

A. Paragraph 1 of STF's Motion for Summary Judgment

STF alleges that it owns the copyright to the applied-for mark with serial number 85/554993:

Plaintiff, STF Enterprises, LLC, (hereinafter "STF") owns the copyright to Father Dom's Premium Products, United States Copyright Office Registration Number VA001911536, which is the applied for mark with the serial number 85/554993.

The undersigned certifies that a copy of this paper is being served upon Opposer STF Enterprises, LLC via email (to wklar@yahoo.com and milwaukeeimports@wi.rr.com) and by first-class mail to the address of record (3144 S. 47th Street, Milwaukee, WI 53219) on the date set out below.

08/06/2014

/craigfieschko/

Date of Deposit

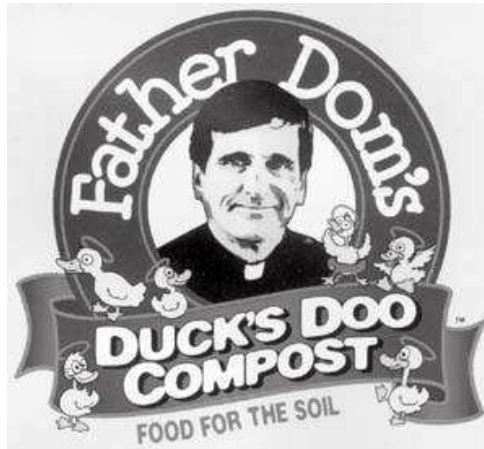
Craig A. Fieschko

- (1) STF is apparently alleging that Holy Spirits has committed copyright infringement by using STF's copyrighted design without STF's consent. However, "the Board does not have jurisdiction to determine copyright infringement claims." *Carano v. Vina Concha Y Toro S.A.*, 67 USPQ2d 1149, 1152 (TTAB 2003). "An allegation of copyright infringement alone does not constitute the necessary statutory ground which negates the [applicant's] right to the subject registration." *Id.* at 1151. The allegation of copyright ownership is consequently irrelevant here.
- (2) As stated in TBMP §528.05(a)(1), any evidence which is not already part of the record, but "which a party wishes to have considered upon summary judgment, must be submitted in connection with the summary judgment motion." Here, STF wishes the Board to consider a copyright registration, yet STF has not provided a copy of the copyright registration setting forth the details of the alleged copyright. Without this evidence, the alleged copyright registration could not be considered by the Board even if *arguendo* the registration were relevant.
- (3) Even if it was proper to consider any copyright registration held by STF, the applied-for mark with serial number 85/554993 is for the following design:



It includes the likeness of Father Domenic J. Roscioli (who is commonly known as "Father Dom"), a principal of Holy Spirits. This design is a modified version of a prior design which was not authored or copyrighted by STF (and to which STF otherwise holds no rights), and which has been used by Father Dom on another product, FATHER

DOM'S Duck's Doo Compost, since at least as early as 2004 (see Exhibit 1¹), many years before STF existed and many years before Holy Spirits met STF:



Since the applied-for design depicted in serial number 85/554993 is a modified version of the prior design, the applied-for design is a “derivative work” within the meaning of 17 USC §101, and any alleged copyright held by STF therein “extends only to the material contributed by the author of such work” (17 USC §103(b)). Since such contribution appears to merely be the addition of the words “PREMIUM PRODUCTS” – words which have been disclaimed from serial number 85/554993 – and since copyright protection does not extend to words and short phrases such as PREMIUM PRODUCTS,² the validity of any alleged copyright held in the design by STF is doubtful.

¹ The article in Exhibit 1 can be accessed at http://chippewa.com/dunnconnect/variety/st-joe-s-hosts-fowl-fundraiser-school-sells-duck-s/article_902b88e5-aa50-5a29-bcc1-31f25e924113.html (last accessed July 29, 2014).

² 37 CFR §202.1 provides that “examples of works not subject to copyright [include] Words and short phrases such as names, titles, and slogans.” See also *ATC Distribution Group Inc. v. Whatever It Takes Transmissions & Parts Inc.*, 74 USPQ2d 1161, 1167 (6th Cir. 2005) (“Indeed, the Copyright Office will not register a short name, phrase, or expression, such as the name of a product or service, even if it is novel or distinctive.”); Copyright Office Circular 34 (“Copyright law does not protect names, titles, or short phrases or expressions. Even if a name, title, or short phrase is novel or distinctive or lends itself to a play on words, it cannot be protected by copyright.”) at <http://www.copyright.gov/circs/circ34.pdf> (last accessed August 5, 2014).

B. Paragraph 2 of STF's Motion for Summary Judgment

STF apparently alleges that it owns the copyright to a part of a specimen filed as part of Holy Spirits' application for registration of the FATHER DOM'S mark (serial number 85/554963):

STF owns the copyright to Father Dom's Papal Pancake Mix, United States Copyright Office Registration Number VA001908991, which is part of the alleged proof of sale under the applied for mark with the serial number 85/554963.

The logo for the "Papal Pancake Mix" is shown in Exhibit C of STF's Motion. This allegation is irrelevant to these proceedings for the reasons discussed in the foregoing part A of this brief.

C. Paragraph 3 of STF's Motion for Summary Judgment

STF apparently alleges that it was granted a license to the Father Dom's image, and in support provides an email chain in which Father Dom's image was allegedly emailed by Holy Spirits to STF, then by STF to STF's graphic designer:

STF was given license on April 5, 2011 on Father Dom's image. (Attached as Exhibit A)

Assuming that the email chain is authentic,³ STF's Exhibit A does not show that STF was given a license but rather only that it was emailed an image. Even if *arguendo* this email chain suggests STF was effectively granted a license, STF's admission that it was "licensed" inherently recognizes that Holy Spirits is the proper owner of what is being licensed, with the right to control use thereof. Holy Spirits would not be able to license the "Father Dom's image" to STF if it was not the owner thereof.

³ The documents submitted by STF as part of its Exhibits have not been authenticated, and Applicant does not waive this objection. Nonetheless, Applicant will assume they are authentic for the purpose of responding.

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