



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

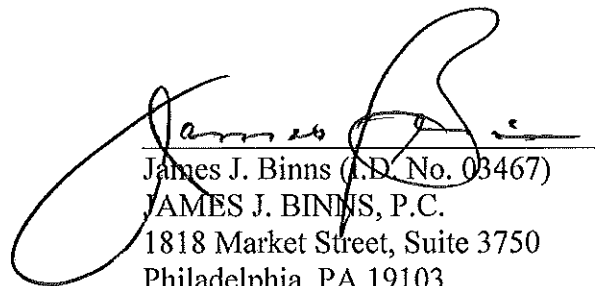
HERO SCHOLARSHIP FUND	:	
OF PHILADELPHIA	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 08-CV-4330
v.	:	
	:	
HERO THRILL SHOW, INC.	:	
	:	
Defendant	:	

**MOTION FOR SUMMARY JUDGMENT OF DEFENDANT HERO THRILL SHOW, INC.**

Pursuant to Federal Rule of Civil Procedure 56, Defendant in the above-captioned case, Hero Thrill Show, Inc., by and through its undersigned counsel, hereby moves for summary judgment on all Counts of the Complaint filed by Plaintiff, Hero Scholarship Fund of Philadelphia.

The arguments and authorities in support of this Motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

  
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Dated: March 8, 2011

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HERO SCHOLARSHIP FUND	:	
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Plaintiff	:	
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v.	:	
	:	
HERO THRILL SHOW, INC.	:	
	:	
Defendant	:	

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT  
OF ITS MOTION IN SUMMARY JUDGMENT**

**INTRODUCTION**

Plaintiff has filed a 3 Count Complaint alleging unfair competition, in violation of 15 U.S.C. §1125(a) in Count I; trademark dilution, in violation of 15 U.S.C. § 1125(c) (1) in Count II; and a state law claim of unfair competition, in violation 10 P.S. §162.15 in Count III, seeking compensatory damages and injunctive relief. The Complaint alleges that the defendant is liable to the plaintiff for unfair competition and dilution of an unregistered trademark, viz., Hero Thrill Show, which the plaintiff never owned (Compl. ¶ 7; Ex. C, March 3, 2006 letter from plaintiff’s President, Ruth A. Sliwinski) (“Ex. C”), voluntarily discontinued in 2006, (Ex. B, January 20, 2006 letter from plaintiff’s President, Ruth A. Sliwinski) (“Ex. B”) and hasn’t been involved with during the last five years. (Ex. D, Affidavit of Lloyd Ayers (“Ayers Aff.”) ¶ 21; Ex. E, Affidavit of Sylvester Johnson (“Johnson Aff.”) ¶ 13; Ex. F, Affidavit of Robert Eddis (“Eddis Aff.”) ¶ 13; Ex. G, Affidavit of Brian McBride (“McBride Aff.”) ¶ 13).

## BACKGROUND

The Hero Thrill Show began in and around 1954 "... as a city function and operation." (Ex. C). According to the plaintiff, By the 1980's the Hero Thrill Show nearly ceased to exist (Compl. ¶ 6) and by the 1990's the plaintiff, was forced to become its *de facto* producer. (Compl. ¶ 7; Ex. C). Attendance at the *city function* declined dramatically over the period of plaintiff's stewardship (1990-2005) (Ayers Aff. ¶ 5; Johnson Aff. ¶ 5; Eddis Aff. ¶ 5; McBride Aff. ¶ 5) resulting in a decline of morale among the police and fire performers. (Ayers Aff. ¶ 6; Johnson Aff. ¶ 6; Eddis Aff. ¶ 6; McBride Aff. ¶ 6). Attendance bottomed out at the 2005 show. (Ayers Aff. ¶ 7; Johnson Aff. ¶ 7; Eddis Aff. ¶ 7; McBride Aff. ¶ 7). Plaintiff then decided to "discontinue" the Hero Thrill Show (Ex. B) "...because it could not produce..." it, (Compl. ¶ 8) and delineated its reasons. (Ex. C). The period of plaintiff's "*de facto*" production corresponds precisely with the dramatic decline in attendance. (Ayers Aff. ¶ 5; Johnson Aff. ¶ 5; Eddis Aff. ¶ 5; McBride Aff. ¶ 5). Evidentially, plaintiff's Board of Directors suffered from a lack of leadership and direction. (Ex. I, Affidavit of Norbert McGettigan Affidavit of Ex. J, Affidavit of Richard McCaffery).

The January 20, 2006 letter from plaintiff's President, Ruth A. Sliwinski, (Ex. B) which she directed to the Police and Fire Commissioners of Philadelphia, declared:

"After carefully comparing revenues of the past several years, including decreases as well as the expense and difficulty in putting on the show, it has been decided to *discontinue* the show..." (emphasis added).

She clarified plaintiff's reason for discontinuing the show in her letter of March 3, 2006 (Ex. C):

"The reason for our discontinuance of the show is that it was originally established in 1954 as a *city function and operation*. Since 1994 we have been forced to operate the show simply because there was no city backing ... we cannot continue to lay out money necessary to fund the show each year..." (emphasis added).



When Ms. Sliwinski's letters are juxtaposed with Paragraphs 6-8 of the Complaint, the contradictions as to plaintiff's alleged reasons for discontinuing the Hero Thrill Show become apparent. (Compare Exs. B and C with Compl. ¶¶ 6-8).

Faced with the declaration of discontinuance, the City of Philadelphia, through its Fire Commissioner, Lloyd Ayers and its Police Commissioner, Sylvester Johnson, authorized a new and distinct entity, viz., the defendant, Hero Thrill Show, Inc., to produce the Hero Thrill Show for the purpose of raising money to pay for the college education of children of Police Officers and Firefighters killed in the line of duty. (Ayers Aff. ¶ 11; Johnson Aff. ¶ 11).

After 2005, the plaintiff never produced the Hero Thrill Show. (Ayers Aff. ¶ 21; Johnson Aff. ¶ 16; Eddis Aff. ¶ 16; McBride Aff. ¶ 18; Ex. H, Affidavit of John McNesby, ("McNesby Aff.") ¶¶ 5, 6). Commencing with 2006, the Hero Thrill Show has been produced every year by the defendant, the Hero Thrill Show, Inc., and it is the only Hero Thrill Show that has been produced in Philadelphia for the last five years. (Ayers Aff. ¶ 21; Johnson Aff. ¶ 16; Eddis Aff. ¶ 16; McBride Aff. ¶ 16; McNesby Aff. ¶¶ 5, 6).

The plaintiff gratuitously alleges that the Hero Thrill Show nearly ceased to exist because it took place outdoors making the venue susceptible to the weather and that performances by the Philadelphia Police and Firefighters had lost their appeal. (Compl. ¶ 6). However, an outdoor venue, i.e., the parking lot of the Wells Fargo Center, with traditional performances by the Philadelphia Police and Firefighters, is exactly where and how the Hero Thrill Show has been produced by the defendant for the last five years. (Ayers Aff. ¶ 16; Johnson Aff. ¶ 15; Eddis Aff. ¶ 15; McBride Aff. ¶ 15; Ex. H, McNesby Aff. ¶ 16).

The funds raised by the Hero Thrill Show, Inc. are used to pay for the college education of the children of Police Officers and Firefighters who have been killed in the line of duty. (Ayers Aff. ¶¶ 18, 19, 20; Johnson Aff. ¶¶ 7, 8; Eddis Aff. ¶¶ 7, 8; McBride Aff. ¶¶ 7, 8; McNesby Aff. ¶¶ 7, 8).

Because of admissions contained in the plaintiff's Complaint, the binding correspondence of its President, and the uncontested facts set forth in the Affidavits attached to this Motion, it is clear that there are no genuine issues of material fact that remain in dispute and therefore summary judgment should be granted in favor of the defendant under Rule 56 of the Federal Rules of Civil Procedure.

#### **STATEMENT OF MATERIAL FACTS NOT REASONABLY IN DISPUTE**

1. The plaintiff does not own and never owned the Hero Thrill Show. (Compl. ¶ 7; Ex. C).
2. The Hero Thrill Show existed for 35 years prior to the plaintiff's involvement as its "*de facto*" producer. (Compl. ¶¶ 5-7; Ex. C).
3. Prior to 1990, the Hero Thrill Show was always an outdoor event. (Ayers Aff. ¶ 4; Johnson Aff. ¶ 4; Eddis Aff. ¶ 4; McBride Aff. ¶ 3).
4. The main attractions at the Hero Thrill Show have always been performances by active duty Police Officers and Firefighters. (Ayers Aff. ¶ 4; Johnson Aff. ¶ 4; Eddis Aff. ¶ 4; McBride Aff. ¶ 3).
5. Beginning in 1990, the plaintiff became the *de facto* producer of the Hero Thrill Show and remained in that role until 2005. (Compl. ¶¶ 6, 7; Ex. C).

6. During the 15 years of the plaintiff's *de facto* production (1990-2005), attendance at the Hero Thrill Show declined sharply. (Ayers Aff. ¶ 5; Johnson Aff. ¶ 5; Eddis Aff. ¶ 5; McBride Aff. ¶ 5).
7. Only 300 people attended the Hero Thrill Show in 2005. (Ayers Aff. ¶ 7; Johnson Aff. ¶ 7; Eddis Aff. ¶ 7; McBride Aff. ¶ 7).
8. On January 20, 2006, plaintiff's President, Ruth A. Sliwinski, wrote to the Police and Fire Commissioners of Philadelphia announcing that "After carefully comparing revenues over the past several years, including decreases as well as the expense and difficulty in putting on the show, it has been decided to discontinue the show..." (Ex. B).
9. On March 3, 2006, plaintiff's President, Ruth A. Sliwinski, wrote that "the reason for our discontinuance of the show is that it was originally established in 1954 as a city function and operation. Since 1994, we have been forced to operate the show simply because there was no city backing... we cannot continue to lay out money necessary to fund the show each year..." (Ex. C).
10. Philadelphia Fire Commissioner, Lloyd Ayers and Philadelphia Police Commissioner Sylvester Johnson, discussed plaintiff's letters and authorized the defendant, the Hero Thrill Show, Inc., to produce the Hero Thrill Show in order to raise money to pay for the college education of children of Police Officers and Firefighters killed in the line of duty. (Ayers Aff. ¶¶ 10, 11; Johnson Aff. ¶¶ 10, 11; Eddis Aff. ¶¶ 10, 11; McBride Aff. ¶¶ 10, 11).
11. The Hero Thrill Show, Inc. is the only entity authorized to produce the Hero Thrill Show. (Ayers Aff. ¶ 14; Johnson Aff. ¶ 13; Eddis Aff. ¶ 13; McBride Aff. ¶ 13).

12. The Hero Thrill Show is the only entity authorized to use the emblems of the Philadelphia Police Department and Philadelphia Fire Department. (Ayers Aff. ¶ 12; Johnson Aff. ¶ 12).

13. The Hero Thrill Show, Inc. is the only entity that has produced the Hero Thrill Show during the last five years. (Ayers Aff. ¶ 21; Johnson Aff. ¶ 16; Eddis Aff. ¶ 16; McBride Aff. ¶ 16).

14. The mission of the Hero Thrill Show, Inc. is to pay for the college education of all children of Police Officers and Firefighters who have been or may be killed in the line of duty. (Ayers Aff. ¶¶ 11, 18, 19, 20; Johnson Aff. ¶ 11; Eddis Aff. ¶ 11, McBride Aff. ¶ 11; McNesby Aff. ¶¶ 4, 7, 8).

15. The Hero Thrill Show, Inc. pays for the education of college age children of Police Officers and Firefighters who have been killed in the line of duty. (Ayers Aff. ¶¶ 11, 18, 19, 20; Johnson Aff. ¶ 11; Eddis Aff. ¶ 11, McBride Aff. ¶¶ 11, 17; McNesby Aff. ¶¶ 4, 7, 8).

16. The Hero Thrill Show, Inc. is prepared to pay for the college education of every child of every Police Officer and/or Firefighter who has been or may be killed in the line of duty. (Ayers Aff. ¶¶ 11, 20; Johnson Aff. ¶ 11; Eddis Aff. ¶ 11, McBride Aff. ¶ 11; McNesby Aff. ¶ 8).

## ARGUMENT

### A. Summary Judgment Standard

Under Fed. R. Civ. P. 56 “[a] motion for summary judgment shall be granted where all of the evidence demonstrates ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Vazquez v. Rosnagle*, 163 F. Supp. 2d 494, 497

(E.D. Pa. 2001) (McLaughlin, J.). A fact is “material” when proof of its existence or non-existence would affect the outcome of the lawsuit under the substantive law applicable to the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. 225 Cartons*, 871 F.2d 409, 419 (3d Cir. 1989). An issue of material fact is “genuine” when the evidence is such that a reasonable jury might return a verdict for the non-moving party. *Anderson*, 477 U.S. at 257; *United States Fidelity & Guaranty Company v. Barron Industries, Inc.*, 809 F. Supp. 355, 358 (M.D. Pa. 1992).

The moving party has the initial burden of demonstrating that no genuine issue of material fact exists and can discharge that burden by showing that there is an absence of evidence to support the non moving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has made this showing, the burden shifts to the non moving party to present evidence that there is a genuine issue of material fact. In attempting to meet this burden, the nonmoving party cannot rely upon the pleadings, but must go beyond the pleadings to present evidence of a material factual dispute. *Id.* at 323-24; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995). *See also Robinson v. National Medical Care, Inc.*, 897 F. Supp. 184, 187 (E.D. Pa. 1995), *aff’d*, 77 F.3d 463 3d Cir. 1996 (“Merely saying ‘not so’ does not create a material issue of fact”). The nonmoving party “must do more than simply show that there is a metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

## **B. Plaintiff’s Inability to Prevail**

### **1. No Unfair Competition Under 15 U.S.C. §1125(a)**

To prevail on its claim of unfair competition under Section §1125(a) of the Lanham Act, the plaintiff must establish that (1) the mark in question is valid and protectable, (2) the plaintiff is the owner of that mark, and (3) the defendant’s use of that mark to identify goods or services is likely to cause confusion. *Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d

270, 279 (3d Cir. 2001) Although the unregistered mark “HERO THRILL SHOW” may be valid and protectable, the plaintiff cannot establish ownership of the mark.

**(a) Lack of Ownership**

Plaintiff asserts claims under the Lanham Act because its name is allegedly “synonymous” with the Hero Thrill Show. (Compl. ¶ 5). That allegation, even if true, (which it isn’t) is meaningless. “With respect to ownership of an unregistered mark [such as “HERO THRILL SHOW”], the first party to adopt a mark can assert ownership to it as long as it continuously uses the mark it in commerce.” *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 292 (3d Cir. 1991). Therefore, the only entity who could legally assert a claim of ownership to the mark “Hero Thrill Show” would be the city of Philadelphia through its Police and Fire Departments.

The March 3, 2006 letter from the plaintiff’s President acknowledged that the Hero Thrill Show “...was originally established in 1954 as a city function and operation” which the plaintiff was “...forced to operate...simply because there was no city backing.” (Ex. C). When the plaintiff elected to discontinue its role 2006, (Ex. B) the defendant was authorized by the Police and Fire Departments to produce the show. (Ayers Aff ¶ 11; Johnson Aff. ¶ 11; Eddis Aff. ¶ 11; McBride Aff. ¶ 11). Because the City is the only possible owner of the mark “HERO THRILL SHOW”, the plaintiff cannot establish the second and most crucial element necessary to its claim of unfair competition under Section §1125(a) of the Lanham Act, i.e., ownership of the mark. Moreover, it is clear that the plaintiff voluntarily abandoned any role it played and that the defendant has been authorized by the City of Philadelphia Police and Fire Departments to use the mark in connection with the production of the Hero Thrill Show. (Ayers Aff. ¶¶ 11, 12, 14; Johnson Aff. ¶¶ 11, 12, 13; Eddis Aff. ¶¶ 11, 12, 13; McBride Aff. ¶¶ 11, 12, 13).

**(b) Abandonment**

Even if the plaintiff owned the mark “HERO THRILL SHOW” (which it never did) or was a licensee, it unambiguously abandoned its rights in 2006.

“A party asserting abandonment of trademark must prove (1) discontinuance of use of the mark and (2) an intent not to resume use within a reasonably foreseeable time in the future. Abandonment being in the nature of a forfeiture, both of these criteria must be strictly proved. This ‘strictly proved’ standard has been held by a majority of courts to mean that abandonment must be proved by clear and convincing evidence.” *EH Yacht, LLC v. Egg Harbor, LLC*, 84 F. Supp. 2d 556 (D. N.J. 2000) (citations omitted). *Accord Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 31 (1900) (“To establish the defence [*sic*] of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon”); *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134 (3d Cir. 1981) (the “twin requirement of non-use and intent to abandon is embodied in section (a) of the statutory definition of abandonment [and] remains valid today”); *Ritz Hotel, Ltd. v. Shen Manufacturing Co., Inc.*, 2009 WL 1578059 (E.D. Pa. 2009) (“A party asserting a trademark’s abandonment must prove: 1) discontinuance of the mark’s use; and 2) an intent not to resume use within a reasonably foreseeable time”).

The plaintiff’s voluntary declaration of discontinuance contained in the January 20, 2006 letter, coupled with its non-involvement with the “HERO THRILL SHOW” during the last five years, amply demonstrate that the plaintiff has long since abandoned whatever rights it might have had in the mark.

**2. No Dilution Under 15 U.S.C. §1125(c)**

Claims of dilution under the Lanham Act may be brought only by “the *owner* of a famous mark.” 15 U.S.C. § 1125(c) (emphasis added). *See also Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 163 (3d Cir. 2000) (“To establish a prima facie claim for relief

under the federal dilution act, the plaintiff must plead and prove: 1. The plaintiff is the *owner of a mark* that qualifies as a “famous” mark in light of the totality of the eight factors listed in § 1125(c)(i), 2. The defendant is making commercial use in interstate commerce of a mark or trade name, 3. Defendant’s use began after the plaintiff’s mark became famous, and 4. Defendant’s use causes dilution by lessening the capacity of the plaintiff’s mark to identify and distinguish goods or services.”) (emphasis added).

Because the plaintiff cannot establish ownership of the mark in question, “HERO THRILL SHOW”, it will be unable to prevail on its dilution claim, as a matter of law.

### 3. No Unfair Competition Under 10 P.S. §162.15

Plaintiff’s claim for unfair competition in violation 10 P.S. §162.15 fares no better than its claim for unfair competition under Section 1125(a) of the Lanham Act. The elements of a cause of action for unfair competition under Pennsylvania common law are identical to those for a claim under [Section 1125(a)] of the Lanham Act, with the exception that the goods [or services] need not have traveled in interstate commerce. *World Wrestling Federation Entertainment, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 446 (W.D. Pa. 2003) (citations omitted) (“The Third Circuit test for common law infringement and unfair competition is identical to the test for federal infringement and unfair competition”; decided under Pennsylvania law). *See also Haymond v. Lundy*, 2000 WL 804432, at \*12 (E.D. Pa. 2000) (“Since the motion to dismiss the [Section 1125(a)] claim will be denied, the motion to dismiss [the Pennsylvania state unfair competition claim] will also be denied.”).

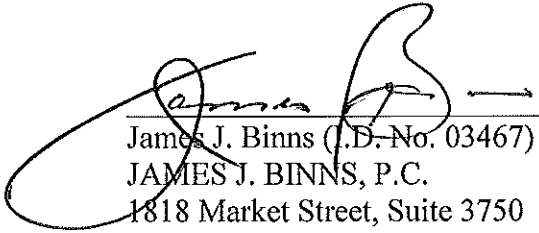
As a matter of law, since plaintiff cannot establish a claim of unfair competition under Section 1125(a) of the Lanham Act, it cannot establish a claim for unfair competition in violation 10 P.S. §162.15.



**CONCLUSION**

For all the foregoing reasons, this Court should grant Moving Defendant's Motion for Summary Judgment and enter summary judgment in its favor.

Respectfully submitted,



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Counsel for Defendant,  
Hero Thrill Show, Inc.

Dated: March 8, 2011



# EXHIBIT A

PBT

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED  
SEP 10 2008

HERO SCHOLARSHIP FUND  
OF PHILADELPHIA

vs.

HERO THRILL SHOW, INC.

CIVIL ACTION NO. 08-4330

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, Hero Scholarship Fund of Philadelphia, by and through its attorneys, states as follows:

PARTIES

1. Plaintiff, Hero Scholarship Fund of Philadelphia (hereafter "Hero"), is a 501(c)(3) corporation organized under the laws of the Commonwealth of Pennsylvania for the sole purpose of providing funding for the post-high school education of the children of police and firefighters killed in the line of duty, with its principle place of business in Philadelphia, Pennsylvania.
2. Defendant, Hero Thrill Show, Inc. (hereafter "HTSI") is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principle place of business at 1336 Spring Garden Street, Philadelphia, PA 19123.
3. This court has jurisdiction over this matter pursuant to 28 USC § 1331 as well as 15 USC §1125. Further, this court has jurisdiction over the Pennsylvania state law claims pursuant to 28 USC § 1338.
4. Hero was created by a group of civic and political leaders in 1955, following a disastrous fire at Berg Laboratories in which 11 uniformed personnel lost their lives, leaving 23 children without a parent. Hero was formed to fund the post-high school education of those children.
5. Beginning in or around 1955 Hero was the recipient of the proceeds of the "Hero Thrill Show" and used those funds, totaling more than \$4,000,000.00, to educate more than 700 qualified children from deserving, disaster stricken families. Because of its history, the Hero Thrill Show name became synonymous with Hero.

6. By the early 1980's the Hero Thrill Show nearly ceased to exist. The outdoor venue was susceptible to weather and that type of entertainment had lost its appeal. Hero began to assume some direct responsibility for producing the Hero Thrill Show in or around 1990. The Hero Thrill Show was re-located to the Civic Arena and the format was broadened to include carnival-type attractions.
7. By the 1990's Hero was the *de facto* producer of the show with great assistance from the uniformed service unions and the City of Philadelphia. The show was re-located to the Pennsylvania Convention Center.
8. In 2006 convention center space was unavailable to Hero and health problems suffered by its then-executive director caused Hero to announce it could not produce the Hero Thrill Show for 2006.
9. Without seeking or obtaining permission from Hero, HTSI assumed control over the production of a substantially similar show, misappropriating the name ("Hero Thrill Show"), appearance, content, and statement of purpose that Hero has used for over 50 years. HTSI conducted its show in a substantially similar fashion to confuse and mislead the public, all the while keeping the proceeds of the shows for uses other than Hero.
10. HTSI has stated and advertised that it will produce a 2008 "Thrill Show" on September 6, 2008.
11. HTSI has intentionally advertised, made statements, and/or omitted information to intentionally lead the City of Philadelphia and the public to believe that the 2006, 2007 and 2008 shows are related to the preceding fifty-plus Hero Thrill Shows and for the purpose of supporting the Hero Scholarship Fund of Philadelphia.
12. The statements and advertising by HTSI were likely to and did in fact confuse and mislead the public into believing that the Hero Thrill Show was as it had been for over 50 years and that the proceeds were to finance the education of children whose parents were killed in the line of duty for the City of Philadelphia.
13. The representations of HTSI were confusing and misleading as the names, phrases, terms, symbols, and combinations thereof, misled the public as to the identity of the entity operating and/or benefitting from the 2006, 2007 and 2008 Thrill Shows.
14. HTSI encouraged and/or by its silence permitted others to represent to the public that the 2006 and 2007 Thrill Show proceeds would be used to benefit Hero.
15. As a result of the acts and omissions of HTSI, the public, inclusive of those being solicited to purchase tickets to attend the HTSI Thrill Shows, were misled and confused as to intended disposition of the proceeds and profits of the event.

**COUNT I**  
**UNFAIR COMPETITION UNDER 15 USC § 1125(a)**

16. Plaintiff incorporates the allegations of paragraphs 1 through 15 as though set forth at length.
17. HTSI, in connection with production of a "Hero Thrill Show" in 2006 and 2007 and promotion of such a show in 2008, has used and/or allowed the use of words, terms, names and symbols that were and are likely to cause confusion or mistake as to the origin, sponsorship and beneficiary of the HTSI Thrill Show.
18. The conduct of HTSI caused the public to be misled and confused as to the sponsorship of the Thrill Show, the connection of the Hero Thrill Show being produced in 2006, 2007 and 2008 to the shows that had been produced previously, and the affiliation of the HTSI Thrill Show to Hero.
19. At all times, HTSI has acted without authority or license from Hero to use its name, words, terms, symbols or goodwill in connection with the solicitation of funds for the HTSI Thrill Show.
20. As a result of defendants' representations, members of the public are and have been induced to purchase tickets to the HTSI Thrill Show and otherwise to make financial donations to HTSI in the mistaken belief that such ticket proceeds and donations are endorsed by and/or associated or affiliated with Hero, or being donated to Hero to support its mission of helping the children of deceased police and fire personnel.
21. Hero has been and will continue to be damaged by HTSI's false and misleading solicitations in that HTSI attempts to benefit from the goodwill associated with Hero.
22. HTSI has failed and refused to tender any of the proceeds from the 2006 or 2007 Thrill Shows to Hero.
23. Despite Hero's request that HTSI cease and desist from promoting itself through the use of Hero's slogans, history and goodwill, defendant has persisted in its unlawful conduct.
24. Hero believes that defendant will continue in the above described course of conduct resulting in irreparable harm unless enjoined by this court.
25. The conduct of HTSI as set forth above constitutes unfair competition in violation of 15 USC § 1125(a).

WHEREFORE, plaintiff respectfully requests:

- (1) An Order enjoining defendant from the conduct set forth above;
- (2) An accounting by HTSI to Hero for revenues and receipts obtained by it for the years 2006, 2007 and 2008;
- (3) Compensatory damages in an amount equal to all funds received by defendant through the conduct set forth above, with interest; and
- (4) Such other relief as the Court sees fit and proper.

**COUNT II**  
**DILUTION**

26. Plaintiff incorporates by reference the allegations of paragraphs 1 through 25 as though set forth at length.
27. By reason of continuous, extensive and exclusive use for many years, plaintiffs' trademarks are famous within the definition of the Federal Dilution Act, as set forth at 15 USC § 1125(c)(1).
28. HTSI, in connection with the production of the HTSI Thrill Show in 2006 and 2007, and going forward, used and continues to use plaintiff's marks or marks confusingly similar thereto.
29. Defendant's conduct, as complained of herein, constitutes a violation of 15 USC § 1125(c)(1).

WHEREFORE, plaintiff respectfully requests:

- (1) An Order enjoining defendant from the conduct set forth above;
- (2) An accounting by HTSI to Hero for revenues and receipts obtained by it for the years 2006, 2007 and 2008;
- (3) Compensatory damages in an amount equal to all funds received by defendant through the conduct set forth above, with interest; and
- (4) Such other relief as the Court sees fit and proper.

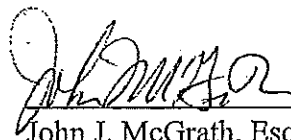
COUNT III  
UNFAIR COMPETITION – STATE CLAIMS

30. Plaintiff incorporates by reference the allegations of paragraphs 1 through 24 as though set forth at length.
31. Upon information and belief, the actions of HTSI, as set forth above, were undertaken in whole or in part for solicitation of funds for charitable purposes.
32. In so doing, HTSI utilized names, symbols and statements so closely related to Hero that it would tend to confuse or mislead those who were solicited.
33. Upon information and belief, members of the public have been and may continue to be confused regarding the lack of any affiliation between the HTSI and Hero.
34. The conduct of defendant, as set forth herein, constitutes unfair practices under Pennsylvania law including, but not limited to, 10 P.S. § 162.15.

WHEREFORE, plaintiff respectfully requests:

- (1) An Order enjoining defendant from the conduct set forth above;
- (2) An accounting by HTSI for revenues and receipts obtained by it for the years 2006, 2007 and 2008;
- (3) Compensatory damages in an amount equal to all funds received by defendant through the conduct set forth above, with interest; and
- (4) Such other relief as the Court sees fit and proper.

Dickie, McCamey & Chilcote, P.C.



John J. McGrath, Esquire  
Gregory R. Webber, Esquire

150 South Independence Mall, West  
Public Ledger Building, Suite 901  
Philadelphia, PA 19106  
215-925-2289  
215-925-0307 (fax)  
[jmcgrath@dmclaw.com](mailto:jmcgrath@dmclaw.com)  
[gwebber@dmclaw.com](mailto:gwebber@dmclaw.com)



# EXHIBIT B



January 20, 2006

Dear Board Member:

The 2005 Hero Scholarship Fund Show, the 51st, was held September 10 and 11, 2005. After carefully comparing revenues over the past several years, including decreases as well as the expense and difficulty in putting on the show, it has been decided to discontinue the show as its main fundraiser.

The Fund will continue to be managed by the Haverford Trust Company, financial advisors and Heffler, Radetich & Saitta, auditors. Scholarships will continue to be awarded to eligible recipients by the executive and scholarship committees of the Hero Scholarship Fund.

These funds extend well into the future to insure continuance of the mission statement; that of helping provide scholarships to the children of police officers and firefighters killed or permanently disabled in the line of duty.

Because of this change there is no need for a full board as it now exists. However, we would welcome your continued support as you see fit.

Mere words pale in light of our gratitude for your past efforts and valued input over the years for this most worthy cause. You have indeed made the mission statement a reality!

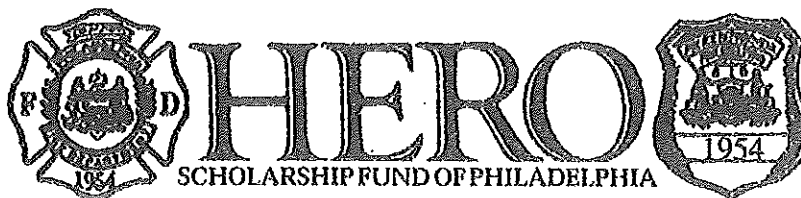
Again, thank you and kindest personal regards.

Sincerely,

A handwritten signature in cursive script that reads "Ruth A. Sliwinski".

Ruth A. Sliwinski  
President

# EXHIBIT C



March 3, 2006

James J. Binns, Esquire  
925 Harvest Drive  
Blue Bell, PA 19422

Dear Mr. Binns:

I am in receipt of your letter of February 15 regarding the Hero Scholarship Fund.

The reason for our discontinuance of the show is that it was originally established in 1954 as a city function and operation. Since 1994 we have been forced to operate the show simply because there was no city backing. Hence, we have been operating as a "one man Director of Operations."

Further, we cannot continue to lay out the money necessary to fund the show each year by becoming the producers as well. Therefore, it was decided to continue fund raising through other sources in order to continue our mission; that of providing college scholarships for the children of police officers and firefighters killed or permanently disabled in the line of duty.

The Fund continues to be operated by a Board consisting of the executive and scholarship committees as described in my letter to the directors as of January 22, 2006.

In accordance with your request, we will have a copy of our financial statement prepared by Heffler, Radetich & Saitta sent to you.

On a personal note, I have been associated with the Fund since 1962 and president since 1994.

Our Board would be happy to work with responsible agencies dedicated to the welfare of police officers and firefighters, as we continue to be and in accordance with our by-laws.

I trust this gives you background on the Fund and our Board.

Very truly yours,

A handwritten signature in cursive script that reads "Ruth A. Silwinski".

Ruth A. Silwinski  
President

RAS/aps

# EXHIBIT D

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERO SCHOLARSHIP FUND OF  
PHILADELPHIA

Plaintiff

vs.

HERO THRILL SHOW, INC.

Defendant

NO. 08-CV-4330

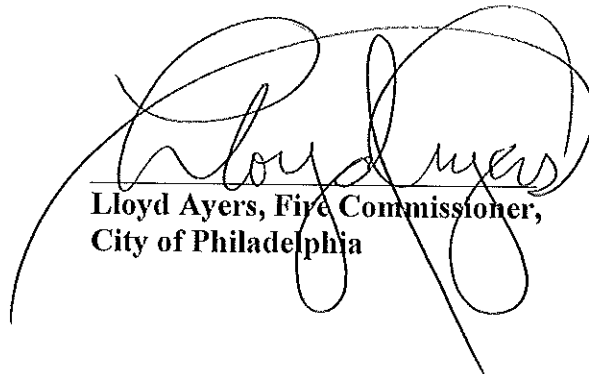
AFFIDAVIT

Lloyd Ayers, being of full age, on his oath, deposes and says:

1. I have served as the Fire Commissioner of Philadelphia from 2004 to the present.
2. For 30 years prior to my appointment as Commissioner, I was employed as a full time Fire Fighter in the Philadelphia Fire Department.
3. I am intimately familiar with the history of and attendance at the annual Hero Thrill Show.
4. The Hero Thrill Show always featured performances by active duty Police Officers and Fire Fighters as its main attractions and until 1990 it was performed outdoors.
5. From in 1990 through 2005, attendance at the Hero Thrill Show declined rapidly.
6. The decrease in attendance resulted in a significant decline in morale of the Fire Fighters who participated in the event.

7. In 2005, the year prior to the decision by the Hero Scholarship Fund of Philadelphia to discontinue the Hero Thrill Show, attendance at the Hero Thrill Show diminished to approximately 300 people over a two-day period.
8. In January 2006, I received a letter dated January 20, 2006 signed by Ruth Sliwinski, President of the Hero Scholarship Fund of Philadelphia, in which she stated that that the Hero Scholarship Fund had decided to discontinue the Hero Thrill Show and stated the reason for the decision.
9. I also saw a letter dated March 3, 2006, signed by Ruth Sliwinski, wherein she detailed additional reasons why the Hero Scholarship Fund of Philadelphia decided to discontinue the Hero Thrill Show.
10. I discussed the letters with Police Commissioner Sylvester Johnson, Fraternal Order of Police President Robert Eddis and International Association of Fire Fighters President Brian McBride.
11. Because the Hero Scholarship Fund decided to discontinue producing the Hero Thrill Show we unanimously authorized the incorporation of the Hero Thrill Show, Inc. and authorized it to produce the Hero Thrill Show in order to raise funds to pay for the college education of children of Police Officers and Firefighters killed in the line of duty.
12. The Hero Thrill Show, Inc. was given the exclusive right to use the emblems of the Philadelphia Police Department and Philadelphia Fire Department, for use in producing the Hero Thrill Show.
13. The Firefighters of the Philadelphia Fire Department are authorized to perform only at the Hero Thrill Show which is produced by the Hero Thrill Show, Inc.

14. The Hero Thrill Show, Inc. is the only entity authorized to produce the Hero Thrill Show.
15. I am a Board Member of the Hero Thrill Show, Inc.
16. The Hero Thrill Show, Inc has successfully produced the Hero Thrill Show from 2006 to the present. It is an outdoor event featuring performances by active duty Police Officers and Firefighters.
17. During these years, attendance has risen sharply in each year.
18. The Hero Thrill Show, Inc. reimbursed the widow of John Redmond for the college tuition of her children. John Redmond was a Philadelphia Firefighter who was killed in the line of duty.
19. The Hero Thrill Show, Inc. is paying for college tuition of the daughter of Vincent Acey who was a Philadelphia Firefighter killed in the line of duty.
20. The Hero Thrill Show, Inc. is prepared to pay for the college education of the children of every Police Officer and/or Firefighter who has been or may be killed in the line of duty.
21. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.



**Lloyd Ayers, Fire Commissioner,  
City of Philadelphia**

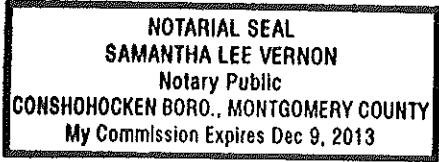
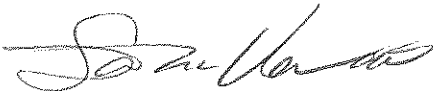


Sworn to and subscribed Lloyd Ayers

before me this 9<sup>th</sup>

day of February,

2011.



# EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

---

**HERO SCHOLARSHIP FUND OF  
PHILADELPHIA**

**Plaintiff**

**vs.**

**HERO THRILL SHOW, INC.**

**Defendant**

**NO. 08-CV-4330**

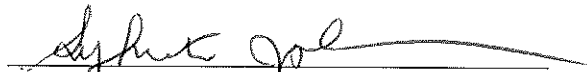
**AFFIDAVIT**

**Sylvester Johnson**, being of full age, on his oath, deposes and says:

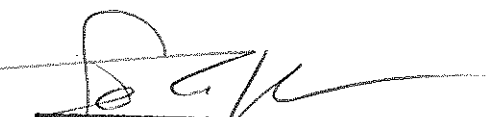
1. From 2002 to 2008, I served as the Police Commissioner of Philadelphia, Pennsylvania.
2. For 38 years prior to my appointment as Commissioner, I was a full time Philadelphia Police Officer.
3. I am intimately familiar with the history of and attendance at the annual Hero Thrill Show.
4. Except for the period from 1990- 2005 the Hero Thrill Show has always been an outdoor event featuring performances by active duty Police Officers and Firefighters.
5. From 1990 through 2005, attendance at the Hero Thrill Show declined rapidly.
6. The decrease in attendance resulted in a significant decline in morale of the Police Officers who participated in the event.
7. In 2005, attendance at the Hero Thrill Show diminished to approximately 300 people over a two-day period.

8. In January 2006, I received a letter dated January 20, 2006 signed by Ruth Sliwinski, President of the Hero Scholarship Fund of Philadelphia, Inc., in which she stated that the Hero Scholarship Fund had decided to discontinue the Hero Thrill Show and stated the reason for the decision.
9. I also saw a letter dated March 3, 2006, signed by Ruth Sliwinski, wherein she detailed additional reasons why the Hero Scholarship Fund of Philadelphia decided to discontinue the Hero Thrill Show.
10. I discussed the letters with Fire Commissioner Lloyd Ayers, FOP President Robert Eddis and Brian McBride, President of Local 22, International Association of Fire Fighters.
11. Because the Hero Scholarship Fund decided to discontinue the Hero Thrill Show we unanimously authorized the incorporation of the Hero Thrill Show, Inc. and authorized it to produce the Hero Thrill Show in order to raise funds to pay for the college education of children of Police Officers and Firefighters killed in the line of duty.
12. The Hero Thrill Show, Inc. was given the exclusive right to use the seals/emblems of the Philadelphia Police Department and Philadelphia Fire Department for use in producing the Hero Thrill Show.
13. The Hero Thrill Show, Inc. is the only entity authorized to produce the Hero Thrill Show.
14. The Hero Thrill Show, Inc., has successfully produced the Hero Thrill Show from 2006 to the present.
15. During these years, attendance has risen sharply in each year.

16. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.

  
Sylvester Johnson, Police Commissioner  
City of Philadelphia, (ret.)

Sworn to and subscribed Sylvester Johnson  
before me this 17<sup>th</sup>  
day of February,  
2011.

  
**NOTARIAL SEAL**  
**SAMANTHA LEE VERNON**  
Notary Public  
CONSHOHOCKEN BORO., MONTGOMERY COUNTY  
My Commission Expires Dec 9, 2013

# EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

---

**HERO SCHOLARSHIP FUND OF  
PHILADELPHIA**

**Plaintiff**

**vs.**

**HERO THRILL SHOW, INC.**

**Defendant**

**NO. 08-CV-4330**

**AFFIDAVIT**

**Robert Eddis**, being of full age, on his oath, deposes and says:

1. I was the President of the Fraternal Order of Police, Lodge 5 Philadelphia, Pennsylvania from 2002 to 2007.
2. Prior thereto, I was an active member of the Philadelphia Police Department for 25 years.
3. I am intimately familiar with the history of and attendance at the annual Hero Thrill Show.
4. The Hero Thrill Show always featured performances by active duty Police Officers and Fire Fighters as its main attractions and until 1990 it was performed outdoors.
5. From 1990 through 2005, attendance at the Hero Thrill Show declined rapidly.
6. The decrease in attendance resulted in a significant decline in morale of the Police Officers who participated in the show.

7. In 2005, attendance at the Hero Thrill Show diminished to approximately 300 people over a two-day period.
8. In 2006, I saw a letter dated January 20, 2006 signed by Ruth Sliwinski, President of the Hero Scholarship Fund of Philadelphia, in which she stated that that the Hero Scholarship Fund had decided to discontinue the Hero Thrill Show and stated the reason for the decision.
9. I also saw a letter dated March 3, 2006, signed by Ruth Sliwinski, wherein she detailed additional reasons why the Hero Scholarship Fund of Philadelphia decided to discontinue the Hero Thrill Show.
10. I discussed the letters with Police Commissioner Sylvester Johnson, Fire Commissioner Lloyd Ayers and International Association of Fire Fighters President, Brian McBride.
11. Because the Hero Scholarship Fund decided to discontinue the Hero Thrill Show we unanimously authorized the incorporation of the Hero Thrill Show, Inc. and authorized it to produce the Hero Thrill Show in order to raise funds to pay for the college education of children of Police Officers and Firefighters killed in the line of duty.
12. The Hero Thrill Show, Inc. was given the exclusive right to use the emblems of the Philadelphia Police Department and Philadelphia Fire Department for use in producing the Hero Thrill Show.
13. The Hero Thrill Show, Inc. is the only entity authorized to produce the Hero Thrill Show.



14. The Hero Thrill Show, Inc. has successfully produced the Hero Thrill Show from 2006 to the present.
15. During these years, attendance has risen sharply.
16. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.

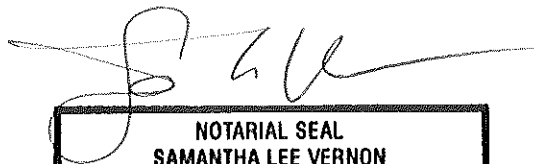
  
\_\_\_\_\_  
**Robert Eddis**

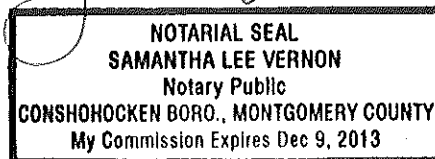
Sworn to and subscribed Robert Eddis

before me this 17<sup>th</sup>

day of February,

20 11.





# EXHIBIT G

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

---

**HERO SCHOLARSHIP FUND OF  
PHILADELPHIA**

**Plaintiff**

vs.

**HERO THRILL SHOW, INC.**

**Defendant**

**NO. 08-CV-4330**

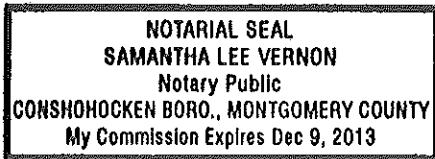
**AFFIDAVIT**

**Brian McBride**, being of full age, on his oath, deposes and says:

1. I was the President of the International Association of Fire Fighters, Local 22, from July, 2005 to June, 2009.
2. Prior thereto I was an active member of the Philadelphia Fire Department for over 30 years.
3. The Hero Thrill Show always featured performances by active duty Police Officers and Fire Fighters as its main attractions and until 1990 it was performed outdoors.
4. I am intimately familiar with the history of and attendance at the annual Hero Thrill Show.
5. From in 1990 through 2005, attendance at the annual Hero Thrill Show declined rapidly.
6. The decrease in attendance resulted in a significant decline in morale of the Fire Fighters who participated in the show.

7. In 2005, attendance at the Hero Thrill Show diminished to approximately 300 people over a two-day period.
8. In 2006, I saw a letter dated January 20, 2006 signed by Ruth Sliwinski, President of the Hero Scholarship Fund of Philadelphia, in which she stated that that the Hero Scholarship Fund had decided to discontinue the Hero Thrill Show and stated the reason for the decision.
9. I also saw a letter dated March 3, 2006, signed by Ruth Sliwinski, wherein she detailed additional reasons why the Hero Scholarship Fund of Philadelphia decided to discontinue the Hero Thrill Show.
10. I discussed the letters with Police Commissioner Sylvester Johnson, Fire Commissioner Lloyd Ayers and Fraternal Order of Police President, Robert Eddis.
11. Because the Hero Scholarship Fund decided to discontinue the Hero Thrill Show we unanimously authorized the incorporation of the Hero Thrill Show, Inc. and authorized it to produce the Hero Thrill Show in order to raise funds to pay for the college education of children of Police Officers and Firefighters killed in the line of duty.
12. The Hero Thrill Show, Inc. was given the exclusive right to use the emblems of the Philadelphia Police Department and Philadelphia Fire Department for use in producing the Hero Thrill Show.
13. The Hero Thrill Show, Inc. is the only entity authorized to produce the Hero Thrill Show.
14. The Hero Thrill Show, Inc. has successfully produced the Hero Thrill Show since 2006.

15. During these years the Hero Thrill Show has been performed outdoors and has featured performances by active duty Police Officers and Firefighters.
16. During these years, attendance has risen sharply.
17. The Hero Thrill Show, Inc. reimbursed the widow of John Redmond for the college tuition of her children. John Redmond was a Philadelphia Firefighter who was killed in the line of duty.
18. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.



A handwritten signature in cursive script, appearing to read "Brian McBride".

**Brian McBride**

A handwritten signature in cursive script, appearing to read "Samantha Vernon".

Sworn to and subscribed Brian McBride

before me this 9<sup>th</sup>

day of February,

2011.

# EXHIBIT H

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**HERO SCHOLARSHIP FUND OF  
PHILADELPHIA**

**Plaintiff**

**vs.**

**HERO THRILL SHOW, INC.**

**Defendant**

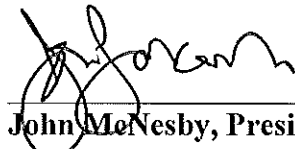
**NO. 08-CV-4330**

**AFFIDAVIT**

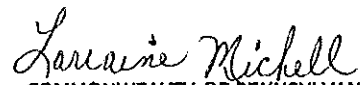
**John McNesby**, being of full age, on his oath, deposes and says:

1. Since June 2007, I have been the President of the Fraternal Order of Police, Lodge 5 Philadelphia, PA.
2. Prior thereto, I was an active member of the Philadelphia Police Department for over 20 years.
3. I am a Board Member of the Hero Thrill Show, Inc.
4. The mission of the Hero Thrill Show, Inc. is to raise funds to pay for the college education of the children of Police Officers and Firefighters who are killed in the line of duty.
5. The Hero Thrill Show, Inc. has produced the Hero Thrill Show each year since 2006.
6. It is the only Hero Thrill Show in Philadelphia.

7. The Hero Thrill Show, Inc. is paying for the college tuitions of Robert Skerski, Joseph Marynowitz, Joseph Friel, Jennifer Stackwitez, Katelyn Stackwitez and Kimberly Acey.
8. The Hero Thrill Show, Inc. is prepared to pay for the college tuition of the children of every Police Officer and/or Firefighter who has been, or may be, killed in the line of duty.

  
\_\_\_\_\_  
**John McNesby, President of the  
Fraternal Order of Police,  
Lodge 5 Philadelphia**

Sworn to and subscribed John M<sup>c</sup> Nesby  
before me this 14<sup>th</sup>  
day of March,  
2011.

  
COMMONWEALTH OF PENNSYLVANIA  
Notarial Seal  
Lorraine Michell, Notary Public  
City of Philadelphia, Philadelphia County  
My Commission Expires Jan. 31, 2015  
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES



# EXHIBIT I

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERO SCHOLARSHIP FUND OF  
PHILADELPHIA

Plaintiff

vs.

HERO THRILL SHOW, INC.

Defendant

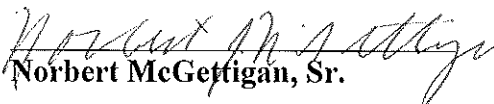
CIVIL ACTION NO. 08-CV-4330

JURY TRIAL

AFFIDAVIT

Norbert McGettigan, being of full age, on his oath, deposes and says:

1. I am a former Board Member of The Hero Scholarship Fund of Philadelphia, Inc.
2. I resigned from that Board because of a lack of direction and leadership among its members.
3. I am a Board Member of the Hero Thrill Show, Inc.
4. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.

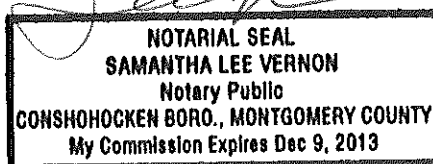
  
Norbert McGettigan, Sr.

Sworn to and subscribed Norbert McGettigan Sr

before me this 15

day of February,

2011.



# EXHIBIT J

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERO SCHOLARSHIP FUND OF  
PHILADELPHIA

Plaintiff

vs.

HERO THRILL SHOW, INC.

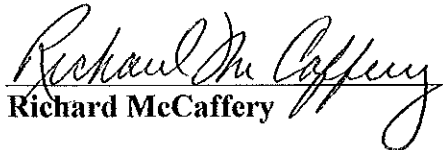
Defendant

NO. 08-CV-4330

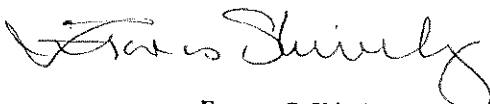
AFFIDAVIT

**Richard McCaffery**, being of full age, on his oath, deposes and says:

1. I am a former Board Member of The Hero Scholarship Fund of Philadelphia, Inc.
2. I resigned from that Board because of a lack of direction and leadership among its members.
3. I am a Board Member of the Hero Thrill Show, Inc.
4. The Hero Thrill Show, Inc is the only entity that has produced the Hero Thrill Show for the last 5 years.

  
Richard McCaffery

Sworn to and subscribed Richard McCaffery  
before me this 11  
day of February,  
2011.



Frances C. Shively  
Notary Public of New Jersey  
My Commission Expires 10/11/2012