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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas :
non-profit corporation; **R. ANDREWS,** :
S. CLARK and **M. RIVERS,** :
 :
Plaintiffs, :
 :

Case No. 02:05-CV-00994 DS

vs. :

MOTION FOR
JUDGMENT ON PLEADINGS
RE: AFFIRMATIVE
DEFENSES OF
INTERVENER :: UHPA

COLONEL SCOTT T. DUNCAN, :
Superintendent, Utah Highway Patrol; :
JOHN NJORD, Executive Director, :
Utah Department of Transportation; :
D'ARCY PIGNANELLI, Executive Director, :
Department of Administrative Services; and, :
F. KEITH STEPAN, Director :
Division of Facilities Construction & Management :
Department of Administrative Services, :
 :
Defendants. :

(Judge David Sam)

UTAH HIGHWAY PATROL ASSOCIATION, :
 :
Defendant/Intervener :

PLAINTIFFS, by and through counsel, move this Court, pursuant to Rule 12(c), Fed. R. Civ. Pro., to consider and grant a judgment on the pleadings as to certain affirmative defenses asserted by the defendant intervener, the Utah Highway Patrol Association (“UHPA”). Plaintiffs also request a preliminary hearing on certain affirmative defenses pursuant to Rule 12 (d), Fed. R. Civ. Pro.

The defendant intervener, UHPA has asserted the following Affirmative Defenses (Doc. # 26, pp. 6 - 7) :

FIRST AFFIRMATIVE DEFENSE

37. Plaintiffs’ complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

38. Plaintiffs lack standing and their claims are non-justiciable and do not present a proper case and controversy as required by Article III of the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

40. The memorials have a secular purpose, do not advance religion, and do not involve excessive entanglement with religion.

FIFTH AFFIRMATIVE DEFENSE

41. Removal or modification of the memorials is barred by the First Amendment to the United States Constitution and Article I, § 15 of the Utah Constitution.

SIXTH AFFIRMATIVE DEFENSE

42. Removal of the memorials is barred by due process of law.

SEVENTH AFFIRMATIVE DEFENSE

43. Plaintiffs' attempt to suppress protected First Amendment expression based on audience reaction is unconstitutional.

This motion is based upon the pleadings, facts and record in this case and is supported by a memorandum of points and authorities previously submitted in this action regarding the religious nature of Christian Crosses. Doc. # 28. Plaintiffs also submit a memorandum of even date with regard to UHPA affirmative defenses not addressed in plaintiffs' prior memo.

STANDARD FOR REVIEW

The burden of coming forward with evidence and the burden of proof with regard to evidence to support each affirmative defense of UHPA is and remains upon UHPA. UHPA alleges no facts in their answer in support of its affirmative defenses. *See* Doc. # 26.

A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6). Atlantic Richfield Co. v. Farm Credit Bank, 226 F.3d 1138, 1160 (10th Cir. 2000). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the non-moving party. Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir. 2001); Realmonte v. Reeves, 169 F.3d 1280, 1283 (10th Cir. 1999). The defendant can succeed only "when it appears that the plaintiff can prove no set of facts in support of the claims that would entitled the plaintiff to

relief." Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992). The determination of a Rule 12(c) motion is confined to the pleadings and to any documents attached as exhibits to the pleadings, including the defendant's answer. Oxendine v. Kaplan, 241 F.3d 1272, 1275 (10th Cir. 2001).

The standard to be applied by this Court in preliminary consideration of defenses under Rule 12 (d) Fed. R. Civ. Pro. is a review of the well plead facts both in the Complaint (Doc. # 1) and in the Answer of the defendant intervener. Doc. # 29. If plaintiffs' complaint fails to state a cause of action, *now* is the time for the Court to so determine. Because such defenses asserted by defendant and because the burden is and remains on defendants to establish these defenses, the court accepts as true all well-pleaded facts in the Complaint, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiffs. Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir. 2001); Realmonte v. Reeves, 169 F.3d 1280, 1283 (10th Cir. 1999). The defendant can succeed as to such affirmative defenses only "when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992). A reading of the Complaint (Doc. # 1) establishes, *inter alia*, that a cause of action is stated, that plaintiffs have standing, that justiciable claim is stated, and that this Court has jurisdiction.

WHEREFORE, this court should grant a judgment on the pleadings resolving the forgoing Affirmative Defenses of UHPA and determining that the stand alone Christian Crosses that are the subject matter of this action are, as a matter of law, religious symbols. The Court

should determine than any secular purpose for the crosses is overwhelmed by the religious nature of the symbol, the crosses can not but advance religion, and they involve excessive entanglement with religion because of the use of the Utah Highway Patrol logo on the Christian Crosses.

The Court should determine removal or modification of the memorials is not barred by the First Amendment to the United States Constitution nor Article I, § 15 of the Utah Constitution nor by the due process protections of the Fifth and Fourteenth Amendments nor Article I, § 7 of the Utah Constitution. Finally, the Court should find and determine that plaintiffs' claims and their action herein do not implicate any protected First Amendment expression. Plaintiffs are not governed by the First Amendment.

The Court should find and determine that the Complaint states a cause of action, that this Court has jurisdiction, that plaintiffs have standing, and that a justiciable controversy is presented.

Dated this 10th day of APRIL 2006.

UTAH LEGAL CLINIC
Attorneys for PLAINTIFFS

by


BRIAN M. BARNARD

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS RE: AFFIRMATIVE DEFENSES OF UHPA to:

Mark Shurtleff
Utah Attorney General
Thom Roberts, AAG
160 East 300 South Street 5TH Floor
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FRANK D MYLAR JR
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on the 10th day of APRIL 2006, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Plaintiffs

By 
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AMERICAN ATHEISTS, INC., a Texas :
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Superintendent, Utah Highway Patrol; :
JOHN NJORD, Executive Director, :
Utah Department of Transportation; :
D'ARCY PIGNANELLI, Executive Director, :
Department of Administrative Services; and, :
F. KEITH STEPAN, Director :
Division of Facilities Construction & Management :
Department of Administrative Services, :

Defendants. :

UTAH HIGHWAY PATROL ASSOCIATION, :

Defendant/Intervener :

Case No. 02:05-CV-00994 DS

MEMO RE: MOTION FOR
JUDGMENT ON PLEADINGS
RE: AFFIRMATIVE
DEFENSES OF
INTERVENER :: UHPA

(Judge David Sam)

PLAINTIFFS, by and through counsel, moved this Court to consider and grant a judgment on the pleadings as to certain affirmative defenses asserted by the defendant intervener, the Utah Highway Patrol Association (“UHPA”) pursuant to Rule 12(c), Fed. R. Civ. Pro. Plaintiffs requested a preliminary hearing on certain affirmative defenses pursuant to Rule 12 (d), Fed. R. Civ. Pro.

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The motion is based upon the pleadings, facts and record in this case and is supported by a memorandum of points and authorities previously submitted in this action regarding the religious nature of Christian Crosses (Doc. # 28) and this memorandum with regard to UHPA's affirmative defenses not addressed in plaintiffs' prior memo.

STANDARD FOR REVIEW

The burden of coming forward with evidence and the burden of proof with regard to evidence to support each affirmative defense is and remains upon UHPA. UHPA alleges no facts in their answer in support of its affirmative defenses. *See* Doc. # 26.

A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6). Atlantic Richfield Co. v. Farm Credit Bank, 226 F.3d 1138, 1160 (10th Cir. 2000). The court will dismiss a defense or cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff [or defendant] can prove no set of facts in support of his claims [or defenses] which would entitle him to relief," Poole v. County of Otero, 271 F.3d 955, 957 (10th Cir. 2001) (*quoting* Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)), or when an issue of law is dispositive, Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are

viewed in favor of the non-moving party. Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir. 2001); Realmonte v. Reeves, 169 F.3d 1280, 1283 (10th Cir. 1999). The issue in resolving a motion such as this is "not whether [the party] . . . will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quotation omitted). The defendant can succeed only "when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992). The determination of a Rule 12(c) motion is confined to the pleadings and to any documents attached as exhibits to the pleadings, including the defendant's answer. Oxendine v. Kaplan, 241 F.3d 1272, 1275 (10th Cir. 2001).

The standard to be applied by this Court in preliminary consideration of defenses under Rule 12 (d) Fed. R. Civ. Pro. is a review of the well plead facts both in the Complaint (Doc. # 1) and in the Answer of the defendant intervener. Doc. # 29. If plaintiffs' complaint fail to state a cause of action, *now* is the time for the Court to so determine. If plaintiffs lack standing, *now* is the time for the Court to so find. Because these are defenses asserted by defendant intervener and because the burden is and remains on defendant intervener to established these defenses, the court accepts as true all well-pleaded facts in the Complaint, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiffs. Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir. 2001); Realmonte v. Reeves, 169 F.3d 1280, 1283 (10th Cir. 1999). The defendant intervener can succeed as to such affirmative defenses only "when it appears that the plaintiff can prove no set of facts in support of the claims that would

entitled the plaintiff to relief." Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992). A reading of the Complaint (Doc. # 1) establishes, *inter alia*, that a cause of action is stated, that plaintiffs have standing, that justiciable claim is stated, and that this Court has jurisdiction.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' complaint states a cause of action upon which relief can be granted. UHPA fails to set forth any defect in the complaint. The complaint recites all of the necessary elements to state a cause of action under 42 U.S.C. § 1983.

In order to survive a Rule 12(b)(6) motion to dismiss a § 1983 claim, a plaintiff must allege "(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom[,] or usage, of any State or Territory or the District of Columbia." Sumnum v. City of Ogden, 297 F.3d 995, 1000 (10th Cir.2002) (quotation omitted). Plaintiffs herein state a claim under 42 U.S.C. § 1983.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have standing. Plaintiffs' claims are justiciable, *e.g.*, actual, concrete, adverse, ripe, not moot, etc. Plaintiffs' complaint presents a proper case and controversy as required by Article III of the United States Constitution.

To have standing, a party invoking the court's authority "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Raines v. Byrd, 521 U.S. 811, 818-19, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)

(quotation omitted). To demonstrate an adequate personal injury, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (quotations omitted).

In the context of alleged violations of the Establishment Clause, the 10th Circuit has held that "standing is clearly conferred by non-economic religious values." Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir.1973). The Supreme Court requires that plaintiffs alleging non-economic injury must be "directly affected by the laws and practices against which their complaints are directed." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486 n. 22, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quotation omitted). Allegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury. Foremaster v. City of St. George, 882 F.2d 1485, 1490-91 (10th Cir.1989). Plaintiffs at bar have alleged sufficient personal contact and injury to establish standing.

Plaintiffs' claims are real and substantial; they are appropriate at this time for judicial determination; this is not a dispute of contingent, hypothetical or abstract character. Doc. # 1.

Plaintiffs' claims are ripe for judicial consideration. "Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 807, 123 S.Ct. 2026, 2029, 155 L.Ed.2d 1017 (2003) (internal quotation marks omitted); see New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir.1995). Like

standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized at the time of trial. The ripeness issue, however, focuses not on whether the plaintiff was in fact harmed, but rather "whether the harm asserted has matured sufficiently to warrant judicial intervention." Warth v. Seldin, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Though rooted in the "cases and controversies" requirement of Article III, the ripeness doctrine also reflects important prudential limitations on a court's exercise of jurisdiction. *See Coalition for Sustainable Res., Inc. v. United States Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir.2001) ("Application of the ripeness doctrine . . . remains a confused mix of principle and pragmatic judgment reflecting its mixture of article III case and controversy requirements with prudential restraints on the exercise of jurisdiction.") (internal quotation marks omitted).

Plaintiffs' claims are viable and ripe for decision. Their manifest harm is clearly alleged.

Plaintiffs' complaint sets out all necessary elements to establish a case or controversy. Article III, Section 2 of the United States Constitution extends the judicial power only to "Cases" or "Controversies." A dispute is an Article III "Case" or "Controversy" only if the plaintiff can establish "constitutional standing." Constitutional standing is present if the plaintiff:

show[s] [that] (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env. Services (TOC), Inc., 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *see D.L. v. Unified School Dist. No. 497*, 392 F.3d 1223, 1232 (10th Cir.2004); Cetacean Comm. v. Bush, 386 F.3d 1169, 1174 (9th Cir.2004) (distinguishing constitutional from statutory standing).

Plaintiffs' complaint sets out a case and controversy as required by Article III.

FOURTH AFFIRMATIVE DEFENSE

Any secular purpose that the Christian crosses may have is overwhelmed by their poignant and exclusive religious symbolism. Courts across the nation have consistently held that a Christian Cross is a religious symbol beyond any peradventure. Doc. # 28. No rhetoric and no legislative declarations can alter that truth. *See id.*

The Christian Crosses can not but advance religion and support only those professing the Christian faith. *See Doc. # 28.*

The challenged Christian Crosses involve excessive entanglement with religion because of the prominent placement thereon of the official Utah State Highway Patrol logo. Of the record in this action are photographs of some of the Christian Crosses that are the subject matter of this action. Exhibits "A" - "C" attached to Doc. # 1; *see Doc. # 28.* The photos show the official Utah Highway Patrol brown and yellow logo standing out on the white crosses. *Id.*

That official Highway Patrol logo is utilized, *inter alia*, to identify Utah Highway Patrol troopers with patches on their uniforms, to identify documents and papers used by troopers, to identify vehicles used by troopers and to identify buildings, offices and facilities of the Utah Highway Patrol. That logo unquestionably represents the most prominent law enforcement agency of the State of Utah.

The Utah Highway Patrol logo, a beehive with the words "UTAH HIGHWAY PATROL" across the beehive is a registered trademark owned by the State of Utah and the Utah Highway

Patrol. Exhibit “A” attached is a copy of the registration with the United States Patent & Trademark Office. The placement of the Utah Highway Patrol logo on the Christian Crosses is with the approval, knowledge and/or acquiescence of the State and/or defendant Colonel Scott T. Duncan, Superintendent, Utah Highway Patrol. Use of that logo gives the State’s imprimatur to the Christian Crosses.

The prominent placement of an official logo of the State of Utah on a religious symbol exclusive to Christianity is excessive entanglement forbidden by the establishment clause.

FIFTH AFFIRMATIVE DEFENSE

Removal or modification of the memorials is not barred by the First Amendment to the United States Constitution nor Article I, § 15 of the Utah Constitution. Removal will occur because of a violation of the establishment clause of the First Amendment and Article I, § 4 of the Utah Constitution.

Removal or modification of the Christian Crosses will occur because the defendant state officials in allowing the crosses exclusively to stand on government property bearing the official Utah Highway Patrol logo impermissibly support religion and support one religion exclusively to the exclusion of others. The free expression provisions of the First Amendment do not allow state actors to violate the establishment clause of that amendment.

SIXTH AFFIRMATIVE DEFENSE

Removal of the memorials will not violate due process of law. UHPA intervened to protect its interests and is having “its day in court” with notice and an opportunity to be heard.

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs are not attempting to suppress protected First Amendment expression based on audience reaction.¹ Plaintiffs, non-government actors, can not violate the First Amendment. The free expression provisions of the First Amendment do not supercede the establishment clause of that amendment.

This action was commenced because state officials have violated and are violating the establishment clause of the United States and Utah State constitutions. Those officials are unconstitutionally endorsing religion. They are endorsing one religion, Christianity to the exclusion of all others. This action is not based upon “audience reaction.” This action is based upon the unquestioned message sent by Utah State government officials.

CONCLUSION & RELIEF

WHEREFORE, this court should grant a judgment on the pleadings resolving the forgoing Affirmative Defenses of UHPA and determining that the stand alone Christian Crosses

¹ Defendant intervener is disingenuous to claim that today in our society a publically and prominently displayed twelve foot (12') tall stark white steel cross does not immediately and primarily invoke the theology and the image of Christianity.

that are the subject matter of this action are, as a matter of law, religious symbols. The Court should determine than any secular purpose for the crosses is overwhelmed by the unquestionable and strong religious nature of the symbol, the crosses can not but advance religion, and they involve excessive entanglement with religion because of the Utah Highway Patrol logo prominently placed on the Christian Crosses.

The Court should determine the sufficiency and validity of the UHPA's affirmative defenses as set forth above. The Court should find and determine, *inter alia*, that the Complaint states a cause of action, that this Court has jurisdiction, that plaintiffs have standing, and that a justiciable controversy is presented.


The Court should determine removal or modification of the memorials is not barred by the First Amendment to the United States Constitution and Article I, § 15 of the Utah Constitution nor by the due process protections of the Fifth and Fourteenth Amendments nor Article I, § 7 of the Utah Constitution. Finally, the Court should find and determine that plaintiffs' claims and their action herein do not implicate any protected First Amendment expression. Plaintiffs are not governed by the First Amendment.

The affirmative defenses above should be resolved against defendant intervener.

Dated this 10th day of APRIL 2006.

UTAH LEGAL CLINIC
Attorneys for PLAINTIFFS

by


BRIAN M. BARNARD

CERTIFICATE OF MAILING

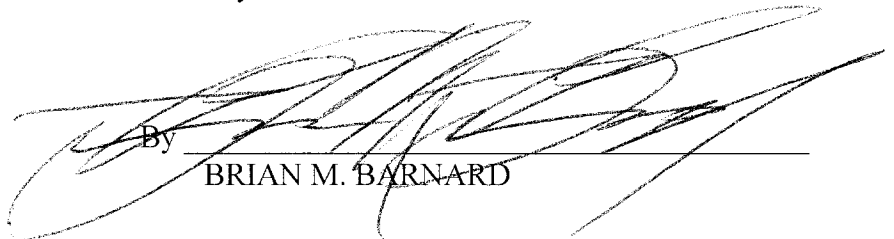
I hereby certify that I caused to be mailed a true and correct copy of the foregoing MEMORANDUM SUPPORTING MOTION FOR JUDGMENT ON THE PLEADINGS RE: AFFIRMATIVE DEFENSES OF UHPA to:

Mark Shurtleff
Utah Attorney General
Thom Roberts, AAG
160 East 300 South Street 5TH Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857

FRANK D MYLAR JR
MYLAR LAW PC
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on the 10th day of APRIL 2006, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Plaintiffs

By 
BRIAN M. BARNARD

EXHIBIT

UNITED STATES TRADEMARK REGISTRATION

UTAH HIGHWAY PATROL LOGO



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Word Mark	UTAH HIGHWAY PATROL
Goods and Services	IC 026. US 037 039 040 042 050. G & S: Cloth patches for clothing. FIRST USE: 19470700. FIRST USE IN COMMERCE: 19470700
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	03.23.07 - Beehives; Honeycombs 09.05.25 - Batting helmets; Caps, nurses; Caps, swimming; Dunce caps; Football helmets; Hats, graduation (mortarboards); Helmets, athletic; Helmets, construction; Helmets, military; Helmets, protective; Mortarboards; Mortarboards (hats); Safety helmets
Serial Number	75394195
Filing Date	November 21, 1997
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 20, 1999
Registration Number	2284604
Registration Date	October 12, 1999
Owner	(REGISTRANT) Utah Highway Patrol STATE AGENCY UTAH 4501 South 2700 West Salt Lake City UTAH 84119
Attorney of Record	K. S. CORNABY

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "UTAH" APART FROM THE MARK AS SHOWN

Description of Mark The mark consists of a beehive with the words "**UTAH HIGHWAY PATROL**" across the beehive.

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

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