

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Hearing:
August 6, 2002

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Paper No. 115
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

S Industries, Inc., and Central Mfg. Co., joined as party
plaintiff

v.

Casablanca Industries, Inc., and Hunter Fan Company,
joined as party defendant

Cancellation No. 24,330

S Industries, Inc. and Central Mfg. Co., appeared without
counsel.¹

Valerie Walsh Johnson of Baker, Donelson, Bearman &
Caldwell, P.C. for Casablanca Industries, Inc. and Hunter
Fan Company.

Before Hanak, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

¹ Papers filed on behalf of petitioners have been signed by Leo Stoller, as an officer of each corporation. Corporations (and other business entities) appear without counsel as a privilege extended by Patent and Trademark Office Rule 10.14(e). Although petitioner corporations appeared without counsel, they have been party to numerous cases before this Board (as well as Courts), and petitioners are currently involved in numerous cases now pending before the Board. Petitioners are (or should be) fully aware of proper Board practice and procedure, and petitioners are well aware that all parties to Board proceedings must comply with the Trademark Rules of Practice, whether or not they are represented by counsel.

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S Industries, Inc. (a Delaware corporation) filed a petition to cancel a registration on the Principal Register issued to Casablanca Industries, Inc. (an Oregon corporation), for the mark STEALTH for "ceiling fans" in International Class 11.²

Petitioner, S Industries, Inc., ultimately assigned relevant trademark rights to Central Mfg. Co. (a Delaware corporation); and registrant, Casablanca Industries, Inc., ultimately assigned the subject registration to Hunter Fan Company (a Delaware corporation). Accordingly, the assignee entities have previously been joined as parties to this proceeding.

Petitioners assert as grounds for cancellation³ that they have continuously used the trademark and trade name STEALTH since at least as early as 1981 on a broad range of goods and services, and on fans since 1985; that "petitioner holds rights to" nine pleaded registrations and fifteen pleaded applications; that petitioners have an "aggressive licensing program" (paragraph 6); that

² Registration No. 1,638,283, issued March 19, 1991, Section 8 affidavit accepted. The claimed date of first use and first use in commerce is January 15, 1990.

³ The original petition to cancel was filed on September 18, 1995. In a June 10, 1999 Board order, petitioners were ordered to file an amended petition to cancel providing a more definite statement of their claims. Petitioners' filed an amended petition to cancel and respondents filed an answer thereto.

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respondent's mark, when used on its goods, so resembles petitioners' previously used and registered mark and trade name, as to be likely to cause confusion, mistake, or deception;⁴ that respondent obtained the registration by fraud in that respondent knowingly asserted a false first use date of January 15, 1990; that respondent also committed fraud by signing the declaration in the application when respondent had knowledge that another party had a right to use the mark in commerce; that respondent had no bona fide intent to use the mark in commerce prior to the filing of the application⁵; and that respondents' mark is merely descriptive or deceptively misdescriptive of the goods.⁶

Petitioners' amended petition to cancel and respondents' answer thereto are the operative pleadings in this case.

⁴ Petitioners' amended pleading includes a claim that respondents' mark "is likely to blur the distinctiveness of the Petitioner's well known STEALTH trademark(s)" (paragraph 5). To whatever extent, if any, petitioners were asserting a claim of dilution under Sections 14 and 43(c), it cannot be entertained by the Board. Dilution became available as a ground for cancellation with the enactment of The Trademark Amendments Act of 1999 (with an effective date of August 5, 1999). The 1999 amendments apply only to applications filed on or after January 16, 1996. Because respondent's involved Registration No. 1,638,283 matured from an application filed on April 27, 1990, there is a statutory bar to any assertion of dilution as a ground for cancellation.

⁵ The application which matured into respondents' registration was based on a claim of actual use, and, in any event, there is no evidence of record showing that respondents' lacked a bona fide intention to use this mark.

⁶ Petitioners also asserted claims that respondents' mark is a functional configuration and does not function as a trademark;

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In the answer respondents denied the salient allegations of the amended petition to cancel, and raised certain affirmative defenses including that petitioners have abandoned any use of the STEALTH mark on fans and any goods related thereto; that petitioners failed to plead any fraud claims with particularity as required by Fed. R. Civ. P. 9; and that "petitioners' claims are barred pursuant to the doctrines of waiver, estoppel and laches."⁷

The Board notes that this case is unusual in that there are numerous motions which remain pending at this final stage of the proceeding. We shall now determine the pending motions. Discovery closed in this case on March 20, 2001, and plaintiffs' testimony period closed on June 18, 2001 pursuant to the Board order dated February 26, 2001. In an October 25, 2001 Board order the remaining testimony dates were reset with shortened

and that the mark is a mere design which does not function as a mark separate and apart from its display. (Paragraphs 15 and 18.) These two claims were stricken by Board order dated August 31, 2000 (p. 7).

⁷ With one exception, specifically, petitioners' abandonment of the mark, respondents offered no evidence on any other affirmative defenses and did not raise any of their other affirmative defenses in their brief on the case. Therefore, we consider all of respondents' pleaded affirmative defenses, except for abandonment, to have been waived by respondents.

Respondents did raise in their brief (p. 28) a claim that petitioners should lose this case based on "equity." The

times for both remaining dates, and respondents' testimony period closed on December 3, 2001,⁸ and rebuttal closed on December 20, 2001.

Pending Motions Filed By Petitioners

It is noted that in a Board order dated February 26, 2001, the Board sanctioned petitioners based on their "conduct in the case" and the "inordinate number of motions

abandonment and equity issues will be determined later in this decision.

⁸ The closing date set for December 1, 2001 was a Saturday. Hence, pursuant to Patent and Trademark Office Rule 1.7, the time for taking action became December 3, 2001.

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filed by [petitioners]" and the "serious delay occasioned by [petitioners'] aggressive motion practice"; ordering petitioners not to "file further pretrial motions without first obtaining leave from the Board." (Board order, p. 8.) In a subsequent Board order dated October 4, 2001, involving, inter alia, petitioners' request for reconsideration of a portion of the February 26, 2001 order and petitioners' motion to amend the petition to cancel, the Board explained that the previous order had "required petitioners to first seek Board permission before filing any further motions..." (p. 2), and it was repeated that "in the previous order, petitioners were "advised that they must first seek leave to file any motion" (p. 5). Thus, the Board made clear that the prohibition on petitioners filing motions related to all motions, and that prior leave of the Board was required before petitioners could file a motion on any topic.⁹

⁹ In the Board orders dated February 26, 2001 (p. 8) and October 4, 2001 (pp. 2 and 3) petitioners were also specifically ordered to follow Trademark Rule 2.127(a) regarding submitting papers double spaced, and failure to do so would result in the paper not being considered. We note that petitioners' motions filed after April 2, 2002, while possibly double spaced appear to be in type smaller than that allowed by Trademark Rule 2.127(a).

Also, in the October 4, 2001 Board order (p. 3, footnote 1), the timeliness of a motion filed by petitioners was discussed and the Board noted that petitioners have been sanctioned in other Board proceedings for falsification of certificates of mailing.

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Petitioners thereafter captioned their motions as "motion for leave to file a motion..." or "request for leave to file a motion...." Petitioners have filed the following motions:

(1) request for leave to file a motion to strike exhibit 1 to the Pearson deposition (filed September 19, 2001—via certificate of mailing);

(2) motion for leave to suspend and re-open trial dates (filed September 19, 2001—via certificate of mailing);

(3) request for leave to file a motion for reconsideration of a portion of the October 4, 2001 Board order (filed October 16, 2001—via certificate of mailing);

(4) request for leave to file a motion to amend the record to be corrected to conform to the evidence including all of their federal STEALTH registrations under Fed. R. Civ. P. 15(b) (filed October 16, 2001—via certificate of mailing);

(5) request for leave to file a request that the Board take judicial notice of all of petitioners' federal registrations of the word STEALTH under Fed. R. Evid. 201

Moreover, in a Board order dated March 5, 2001, petitioners were ordered to produce requested documents, warning them that

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(filed November 20, 2001—via certificate of mailing);

(6) request for leave to file a motion to strike respondents' conditional notice of reliance (filed December 5, 2001—via certificate of mailing);

(7) request for leave to file a motion to amend the pleading to conform to the evidence and to accept petitioners' rebuttal notice of reliance (filed December 14, 2001—via certificate of mailing);

(8) request for leave to file a motion for summary judgment and/or judgment on the pleadings (filed January 17, 2002—via certificate of mailing)¹⁰;

(9) request for leave to file a motion to strike respondents' conditional notice of reliance (filed January 23, 2002—via certificate of mailing);

(10) request for leave to file a motion for Fed. R. Civ. P. 11 sanctions (filed February 14, 2002—via certificate of mailing);

(11) request for leave to file a motion to strike respondents' trial brief as over the page limit and to

non-compliance with the Board order could result in entry of judgment against petitioners under Trademark Rule 2.120(g).
¹⁰ Petitioners' trial brief was filed on the same date and was titled "trial brief and/or request for leave to file a motion for summary judgment and/or judgment on the pleadings and request for leave to amend the complaint to conform to the evidence."

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extend petitioners' time to file a reply brief (filed March 28, 2002—via certificate of mailing);¹¹ and

(12) petitioner's motion for leave to file a cross-motion for Rule 11 sanctions (filed July 16, 2002—via certificate of mailing).

¹¹ Petitioners filed their reply brief on April 9, 2002—via certificate of mailing.

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The previous Board orders prohibiting petitioners from filing any motion without first obtaining permission from the Board were clear that the permission of the Board was a preliminary requirement. That is, it was not simply a question of petitioners receiving permission from the Board to file a motion, rather, petitioners were required to obtain that permission prior to filing the motion. In order to obtain permission from the Board to file a motion, it was clear that petitioners first needed to establish or show why any particular motion (e.g., to reopen, to strike, to amend) was necessary and why the Board should grant petitioners permission to file it. However, here petitioners have filed twelve motions simply changing the caption thereof to read "motion/request for leave to file..." but including no statement of good cause regarding any possible circumstances that would support why the Board should grant petitioners permission to file each involved motion.

Inasmuch as petitioners provided no statement in any of their twelve motions for leave to file motions on various topics justifying why the Board should allow the filing of any of said substantive motions, all twelve motions for leave to file motions are denied.

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Informationally, the Board notes that in any event petitioners' motions are generally not well taken, substantively and/or procedurally. (For example, petitioners did not show "excusable neglect" to justify a re-opening of this case, petitioners did not show any error in the October 4, 2001 Board order requiring reconsideration thereof, the Board does not take judicial notice of registrations in the USPTO,¹² and respondent's trial brief consists of 5 preliminary pages and 49 numbered pages for a total of 54 pages which does not violate Trademark Rule 2.128(b) on the length of briefs.¹³)

In addition, we note that petitioners filed on January 17, 2002 (via certificate of mailing) their trial brief as "Trial brief and/or request for leave to file a motion for summary judgment and/or judgment on the pleadings and request for leave to amend the complaint to conform to the evidence." To the extent the motions for

¹² See *Wright Line Inc. v. Data Safe Services Corporation*, 229 USPQ 769, footnote 5 (TTAB 1985); *In re Lar Mor International, Inc.*, 221 USPQ 180, 183 (TTAB 1983); and *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974).

¹³ If the 12 pages of exhibits with respondents' brief (e.g., a comprehensive chart of respondents' objections to petitioners' asserted registrations and applications, photocopies of motions filed by petitioners) are counted, then it exceeds the 55-page limit, but we will not count such pages. Moreover, if the Board did count all exhibit pages, then petitioners' brief (which

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leave to file motions contained within petitioners' trial brief are intended as separate requests for leave to file various motions, these are denied for the same reasons set forth above—petitioners' failure to provide any reasons to justify granting them leave to file the motions, and lack of merit in the motions. (For example, under Trademark Rule 2.127(e)(1) a summary judgment motion is untimely if it is filed after the opening of the plaintiff's testimony period, and in order to conform the pleadings to the evidence under Fed. R. Civ. P. 15(b), the evidence must have been properly introduced into the record, with the implied or express consent of the adverse party.¹⁴)

Pending Motions Filed By Respondents

Respondents have filed the following motions:

(1) combined motion (filed November 5, 2001-via certificate of mailing) to strike petitioners' notice of reliance and to strike petitioners' request for leave to file a request that the record be corrected to conform to the evidence (both filed October 16, 2001);

includes their request to move for summary judgment, etc.) would also violate the rule as it includes over 100 pages of exhibits.¹⁴ In this case, there is little evidence submitted by petitioners (as fully discussed later herein), and such evidence was clearly not submitted with the express or implied consent of respondents, in view of their motions to strike what respondents assert is inappropriate introduction of evidence by petitioners.

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(2) combined motion (filed April 17, 2002-via certificate of mailing) to strike petitioners' reply brief and to strike the evidence attached thereto;

(3) motion (filed June 27, 2002-via certificate of mailing) to strike petitioners' request for leave to file a motion to strike respondents' trial brief;

(4) motion (filed June 27, 2002-via certificate of mailing) to strike petitioners' request for leave to file a motion for Rule 11 sanctions;

(5) motion (filed July 29, 2002-via certificate of mailing) to strike petitioners' request for leave to file a cross-motion for Rule 11 sanctions; and

(6) motion (filed July 29, 2002-via certificate of mailing) for Rule 11 sanctions.

In view of our decision on petitioners' motions/requests for leave to file motions, all of respondents' motions to strike certain of petitioners' motions/requests for leave to file motions are denied as moot.

Respondents' motion to strike petitioners' reply brief and an exhibit attached thereto is granted because (i) the reply brief was due on April 5, 2002¹⁵ and

¹⁵ The due date of petitioners' opening trial brief fell on February 18, 2002, which was a holiday, making all briefing due

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petitioners filed it several days late on April 9, 2002 (via certificate of mailing)¹⁶; (ii) the reply brief is single spaced in violation of Trademark Rule 2.128(b) and the specific Board orders of February 26, 2001 and October 4, 2001; and (iii) the evidence attached thereto was not properly made of record during trial.

Petitioners' reply brief has not been considered.

Respondents' motion (filed November 5, 2001—via certificate of mailing) to strike petitioners notice of reliance (filed October 16, 2001—via certificate of mailing) is granted because the notice of reliance was not filed in accordance with the October 4, 2001 Board order which, inter alia, allowed petitioners time to file proper status and title copies of pleaded registrations. Also, the notice of reliance includes a photocopy of an asserted assignment document, and a photocopy of a letter from petitioners to respondent's attorney regarding discovery, which are not subject to submission into the record by way of notice of reliance.

dates one day later than that set forth by respondents in their motion to strike.

¹⁶ We note that petitioners had filed a motion for leave to file a motion to strike respondents' brief and to extend petitioners' time to file a reply brief. For the reasons explained above petitioners' motion for leave to file said motion was denied. For the record, a full consideration of the reply brief would not alter the Board's decision herein.

Respondents' motion for Fed. R. Civ. P. 11 sanctions is denied as moot in view of our decision on the merits of petitioners' case.

The Record and Evidentiary Objections

The Board must clarify what is properly of record herein. Trademark Rule 2.123(1) reads as follows: Evidence not obtained and filed in compliance with these sections will not be considered.

The record includes petitioners' amended petition to cancel, respondents' answer thereto, and the file of respondent's registration. Petitioners took no testimony, but they submitted four notices of reliance, all of which involve motions to strike and/or objections by respondents.

Respondents submitted the testimony, with exhibits, of John C. Pearson, vice president of marketing of respondents' division Casablanca Fan Company¹⁷; a notice of reliance, and a "conditional" notice of reliance.¹⁸

¹⁷ Petitioners objected numerous times during the testimony deposition, but there is no recognizable, coherent reiteration of objections to respondents' evidence in petitioners' brief, with the exception of a clear objection (brief, p. 14, footnote 1) to respondents' Exhibit 1 (five-page laser copy of respondents' packaging). This matter will be determined later herein.

¹⁸ Respondents "conditional" notice of reliance was timely filed during respondents' testimony period, specifically, on December 3, 2001—via certificate of mailing, the closing day of their testimony period.

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The Board will first address respondents' objections to petitioners' four notices of reliance. The first notice of reliance, filed by Central Mfg. Inc. on June 7, 2001 (during petitioners' testimony period), consisting of Exhibits A-I, cannot be considered in determining this case. This notice was filed by a non-party to this case. Moreover, the evidence is not admissible in the form presented. Exhibit A consists of a typed list of petitioners' asserted registrations and applications for marks involving the word STEALTH, a typed list of petitioners' asserted policing efforts and licensing material related thereto, photocopies of assignment documents and registrations, and printouts of applications and registrations from the USPTO's Trademark Electronic Search System (TESS). The typed lists, the licensing materials, and the photocopies of assignment documents which do not indicate that the assignments have been recorded with the Assignment Branch of this Office, are not printed publications which are appropriate for submission into the record by way of a notice of reliance. See Trademark Rule 2.122(e). The TESS printouts of applications and registrations are official publications, but applications are of extremely limited probative value, and the TESS records do not establish

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the status and title of said claimed registrations to properly make them of record. See Trademark Rule 2.122(d). We specifically note that respondents had filed a motion to strike Exhibit A¹⁹ and said motion was granted by the Board on October 4, 2001, with the Board allowing petitioners time to submit proper status and title copies of their pleaded registrations.

Exhibit B, petitioners' own answers to respondents' "narrowed first set of interrogatories," is not appropriate for entry into the record by way of notice of reliance. See Trademark Rule 2.120(j)(5).

Exhibit C (one invoice and a typed list of petitioners' asserted dollar sales of fans), Exhibit D (a photocopy of a letter from petitioners to respondents' attorney regarding settlement, typed lists of petitioners' asserted dollar sales of air conditioners and air cleaners, and one invoice), Exhibit E (a photocopy of a letter from petitioners to respondents' attorney regarding discovery and one invoice), Exhibit F (photocopies of several asserted invoices), Exhibit G (photocopies of several asserted letters from petitioners to potential customers), and Exhibit I (a photocopy of

¹⁹ Respondents noted in their motion (footnote 1) that they would submit substantive objections to the notice of reliance in their brief on the case.

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one page asserted to be petitioners' brochure on fans)²⁰, are all inappropriate for entry into the record by way of notice of reliance as they are not printed publications available to the general public in libraries or in general circulation among the relevant members of the public. See Trademark Rule 2.122(e).

Exhibit H, the affidavit of Ray Webber, an asserted customer of petitioners, is inadmissible pursuant to Trademark Rule 2.123(b).

Petitioners' first notice of reliance was not considered.

The second notice of reliance, filed by Central Mfg. Inc. on August 21, 2001 (four days after the close of respondents' testimony period as then set) is titled "Request for leave to file a request to amend notice of reliance," and consists of photocopies of several status and title copies of registrations assertedly owned by petitioners. This notice was filed by a non-party, and it was untimely as it was not filed during petitioners'

²⁰ Respondents argued that this one-page brochure appears to have been "fabricated by cutting and pasting the letter 'S' onto photographs of fans." (Brief, p. 40.) We agree that this document appears to have involved cutting and pasting of the letter "S," making the credibility of the document questionable at best. However, we do note that there is no obvious indication that the involved mark STEALTH has been cut and pasted; and there is otherwise no evidence of record regarding this issue.

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testimony period. In addition, petitioners' request for leave to file this amended notice of reliance was held moot in the Board order dated October 4, 2001 (p. 7) because in that same board order, petitioners had been allowed time to submit proper status and title copies of their pleaded registrations.²¹

Petitioners' second notice of reliance was not considered.

Turning to petitioners' third notice of reliance, filed by Central Mfg. Co. on October 16, 2001 (about two weeks after the close of petitioners' rebuttal testimony period as set in the February 26, 2001 Board order and about two months prior to the opening of the rebuttal testimony period as rescheduled in the October 4, 2001 Board order) is titled "Notice of reliance and request for leave to file it'r [sic] request to amend to conform to the evidence FRCP 15(b)," and consists of photocopies of status and title copies of registrations, a photocopy of an asserted assignment document, and a photocopy of a letter from petitioners to respondent's attorney regarding discovery. Petitioners' request for leave to file this request to amend to

²¹ We note that some of these registrations included in this notice of reliance show title to be in the name of non-parties,

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conform to the evidence was denied earlier herein.

Respondents' motion to strike this notice of reliance notice of reliance was granted earlier herein.

Petitioners' third notice of reliance was not considered.

Thus, petitioners did not submit any testimony or evidence into the record in compliance with the Trademark Rules of Practice which could be considered their testimony-in-chief.²²

However, during petitioners' rebuttal testimony period (as reset) Central Mfg. Co. filed petitioners' fourth notice of reliance, titled "motion for leave to file a motion to amend to conform to evidence and notice of reliance," and consisting of Exhibits A-I. To the extent that this notice of reliance was filed during

e.g., Central Mfg. Inc., Cobra Electronics Corporation, and Cheyenne Advanced Technology Limited.

²² During the cross-examination of respondents' witness, Mr. Pearson, petitioners introduced five exhibits, all relating to petitioners' business (e.g., petitioners' document titled "STEALTH BRAND FAN SALES"; a photocopy of an invoice (carrying a typed date of "2/04/86" and a facsimile date at the top of the page of "Jul 25.01"; two affidavits signed by Mr. Ray Webber, and a photocopy of a page assertedly from petitioners' brochure for fans. Petitioners laid no foundation for these documents, and the documents were not previously made of record. Inasmuch as respondents' witness knew nothing about the documents themselves, they are hearsay. Thus, these documents have not been considered in our decision. Petitioners cannot attempt to put into the record on cross examination of respondents' witness, what they failed to properly submit and prove during their case-in-chief.

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petitioners' rebuttal testimony period, petitioners did not need to seek permission from the Board to file same because timely notices of reliance need not be filed by way of motion. To the extent petitioners sought leave to file a motion to amend under Fed. R. Civ. P. 15(b), that motion for leave was specifically denied earlier in this decision.

Respondents object to the fourth notice of reliance on several bases, including essentially that all of the material is improper rebuttal; that much is irrelevant; and that the notice of reliance includes status and title copies of registrations not pleaded by petitioners. Respondents set forth (in chart form) their objections to each of the 24 registrations referenced in this fourth notice of reliance. (Petitioners had pleaded that they "hold rights to" nine registrations and fifteen applications.)

Exhibit A consists of (i) photocopies of status and title copies of 17 registrations, all for marks consisting of or including the word STEALTH, (ii) photocopies of one registration and an assignment document relating thereto, (iii) photocopies of TESS printouts of three registrations, along with assignment documents relating thereto, and (v) photocopies of the

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cover page and the registration page of three registrations issued in 2001, as well as an assignment document relating to two of said registrations. The latter three types of photocopied registrations are not proof of the existence, validity or ownership of said registrations, and are of virtually no probative value. See Trademark Rule 2.122(d). And as explained earlier herein, the photocopies of assignment documents which have not been recorded with the Assignment Branch of this Office, are not printed publications or official records which are appropriate for submission into the record by way of a notice of reliance. See Trademark Rule 2.122(e).

Regarding the photocopies of petitioners' asserted 17 status and title copies of registrations, all including the word STEALTH, there can be no question but that petitioners' pleaded registrations constitute part of petitioners' case-in-chief and should have been properly made of record during petitioners' opening testimony period. Thus, petitioners' finally properly submitting the registrations at the rebuttal stage constitutes improper rebuttal, as argued by respondents. Although petitioners did submit a notice of reliance during their opening testimony period, their copies of

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registrations were stricken and the Board specifically gave petitioners time to submit proper current status and title copies thereof. Petitioners did not finally succeed in doing so until rebuttal, an inappropriate time to prove their case-in-chief. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, footnote 4 (TTAB 2000). We reiterate that although petitioner corporations are appearing before this Board without counsel, as explained previously, petitioners are (or should be) fully familiar with Board practice and procedure.

Without setting forth here the particulars of each of the 17 registrations individually, suffice it to say that some are pleaded registrations, some are pleaded applications which matured into registrations, and some were not pleaded at all. Some show title to be in the name of parties who are not either petitioner in this case. Finally, all but two of the seventeen status and title copies involve applications which were filed after the filing date of respondents' application which matured into the registration petitioners seek to cancel.

(Petitioners presented no case-in-chief, and there is no testimony or evidence of any common law use by

petitioners of the registered marks on any goods, including fans.²³)

Because respondents treated two of the plaintiffs' registrations as of record, petitioners' Registration Nos. 1,332,378²⁴ and 1,434,642²⁵, both for the mark STEALTH, are of record herein. (See e.g., respondents' brief, pp. 12, 19, 47 and 48.)

Exhibit B (a "special customs invoice"), Exhibit D (a photocopy of a letter from petitioners to respondents' attorney regarding discovery), and Exhibit I (a typed list of petitioner's asserted federal applications and registrations) are each inappropriate for entry into the record by way of notice of reliance as explained above.

²³ We note that none of the status and title copies of pleaded registrations are for "fans" or "ceiling fans." Rather, they are for completely unrelated goods such as, "fishing tackle floats," "comic book," "metal alloys for use in sporting goods and transportation and window locks," and "lawn sprinklers."

²⁴ Registration No. 1,332,378, filed August 29, 1984, and issued April 23, 1985 to Leo D. Stoller, Section 8 affidavit accepted, Section 15 affidavit acknowledged. Title is currently shown to be in Central Mfg. Co. The registration is for goods identified as "sporting goods, specifically, tennis rackets, golf clubs, tennis balls, basketballs, baseballs, soccer balls, golf balls, cross bows, tennis racket strings, and shuttlecocks" in International Class 28. The claimed date of first use is January 15, 1981.

²⁵ Registration No. 1,434,642, filed September 8, 1986, issued March 31, 1987 to S Industries, Inc., Section 8 affidavit accepted. Title is currently shown to be in Central Mfg. Co. The registration is for goods identified as "bicycles, motorcycles and boats" in International Class 12. The claimed date of first use is January 1982.

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Exhibit C, petitioners' own answers to respondents' "narrowed first set of interrogatories," are not appropriate for entry into the record by way of notice of reliance under Trademark Rule 2.120(j)(5) as explained above, and also because these answers are unsigned.

Exhibits E and F, respondents' responses to petitioners' first set of interrogatories and to petitioners' request for documents, respectively, are generally appropriate for entry into the record by way of notice of reliance as provided in Trademark Rule 2.120(j)(5). Thus, these discovery responses have been considered by the Board, but only to the extent that any of respondents' responses to the involved discovery are proper rebuttal to the testimony and evidence submitted by respondents during their testimony period.

Exhibit G (a printout of two pages retrieved from an Internet website) is inadmissible as it does not qualify as a printed publication under Trademark Rule 2.122(e). See *Michael S. Sachs v. Cordon Art, B.V.*, 56 USPQ2d 1132, 1134 (TTAB 2000).

Exhibit H (a photocopy of one page from a U.S. District Court decision in a proceeding involving S Industries, Inc. as plaintiff) is not admissible as there is no indication that this was a published, precedential

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decision of the Court; and respondents herein were not parties to that case. (If it were a precedential decision of the Court, it need not be put into the record by way of notice of reliance as the Board may take note of any precedential Court and Board cases.)

Petitioners' fourth notice of reliance was not considered, with the exception of the photocopies of status and title copies of petitioners' pleaded Registration Nos. 1,332,378 and 1,434,642 (part of Exhibit A), and respondents' responses to petitioners' first set of interrogatories and document requests (Exhibits E and F).

Finally, with regard to petitioners' four notices of reliance, each one includes a "declaration" signed by Leo Stoller. All four declarations are stricken as they are improper under Trademark Rule 2.123(b). The four declarations of Leo Stoller have not been considered by the Board.

Turning now to petitioners' objection (reiterated in their brief) to respondents' Exhibit 1, petitioners argue that this document was not produced during discovery in response to petitioners' document request No. 1 for all documents showing use of respondents' mark; and that

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therefore, it must be excluded from consideration in determining this case.

Respondents contend that they answered the involved document request with an objection as to being overbroad and unduly burdensome, but that respondents would make available for inspection and copying examples of "all" documents requested by petitioners; that examples were produced (not including this particular item); and that petitioners never moved to compel respondents to produce "all" documents.

Although this particular document was not produced, representative samples are generally acceptable, and petitioners have not shown that the documents they did receive were not representative, and they did not move to compel any further response of "all" documents. See TBMP §419(2), and cases cited therein. Accordingly, petitioners' objection to respondents' Exhibit 1 is overruled.

In sum, the record before the Board consists of petitioners' amended petition to cancel; respondents' answer thereto; the file of respondent's registration; status and title copies of petitioners' pleaded

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Registration Nos. 1,332,378 and 1,434,642;²⁶ respondents' responses to petitioners' first set of interrogatories and document requests; respondents' testimony, with exhibits, of John C. Pearson, vice president of marketing of respondents' division Casablanca Fan Company; respondents' notice of reliance; and respondents' conditional notice of reliance.

Both parties filed trial briefs on the case. (Petitioners' reply brief has been stricken as explained above.) An oral hearing was held before the Board on August 6, 2002, with petitioners' president and CEO, Leo Stoller, appearing for petitioners, and Valerie Walsh Johnson, counsel for respondents, appearing on behalf of respondents.

The Parties

The record as to petitioners consists only of the status and title copies of two pleaded registrations, both currently owned by Central Mfg. Co. through assignment, both for the mark STEALTH, and one covering bicycles, motorcycles, and boats, and the other for

²⁶ Trademark Rule 2.122(d)(1) clearly and plainly sets forth the manner in which pleaded registrations (or pleaded applications that mature into registrations) may be made of record. A plaintiff cannot simply continually during the course of an inter partes proceeding add non-pleaded registrations and or marks to its case because that would involve a lack of notice and prejudice to the defendant.

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various sporting goods. Throughout their motions, responses to motions, and in their brief after trial, petitioners make statements about themselves and the nature of their business (e.g., their licensing program) and numerous products, including fans. However, petitioners submitted no evidence during trial that is probative of, or establishes, any of these statements or any of the allegations made in the amended petition to cancel.²⁷ Petitioners did not submit testimony or any other evidence regarding their alleged pending application for the mark STEALTH for, inter alia, "fans."

Respondent, Hunter Fan Company, became the owner of the involved registration in 1995 through assignment. Respondents' mark was developed and first used by Hunter Fan Company's predecessor in interest. The development of the mark started in late 1988, and is related to the "swept wing design" of the ceiling fan, meant to look like the STEALTH bomber. In fact, respondents obtained a

²⁷ Statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. See *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991); and *Times Mirror Magazines, Inc. v. Sutcliff*, 205 USPQ 656 (TTAB 1979).

Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. See *BL Cars Ltd. v. Puma*

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design patent, No. 323,028, issued on January 7, 1992 to Richard Holbrook inventor, and assigned to Casablanca Industries, Inc. (Exhibit 5, Pearson dep.)

Respondents' first sale of ceiling fans under the STEALTH mark occurred on January 15, 1990. This consisted of a "pilot run" of ceiling fans sold "through dealers and certain representatives throughout the United States." (Pearson, dep., p. 15.) Mr. Pearson explained that "pilot runs" are typical when developing a new ceiling fan, and respondent runs a limited number of fans to get the kinks out before the fan is mass marketed. Thereafter, respondents commenced mass marketing of their STEALTH brand ceiling fan in February 1991 (and, in fact, royalties have been paid to Mr. Holbrook, the inventor, continuously since February 1991²⁸).

Respondents advertise their fans sold under the involved mark in national magazines such as "Architectural Digest," "Sunset," "Midwest Living," and "Better Homes and Gardens." Their STEALTH mark is also advertised through billboards and appearing on various

Industria de Veiculos S/A, 221 USPQ 1018 (TTAB 1983); and Abbott Laboratories v. TAC Industries, Inc., 217 USPQ 819 (TTAB 1981).

²⁸ Respondents pay royalties not based on the pilot runs, but rather based on when the fan is introduced and sold to the entire dealer base. Mr. Pearson made clear that respondents' use of the mark STEALTH on ceiling fans has been continuous since January 15, 1990.

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point-of-purchase items such as T-shirts. In addition, the mark appears prominently on respondents' website, and is advertised by one of respondents' largest dealers (in Los Angeles) on local television. It is also used in respondents' co-op advertising with dealers, and the STEALTH brand fan is respondents' number one fan used in such ads. Since 1991, the STEALTH brand ceiling fan has not only been offered for sale in the product catalog, but has frequently been on the cover of respondents' product catalog (Exhibits 7-9, Pearson dep.); as well as appearing within and as the cover of respondents' 1996 "Sales Training Presenter Guide."

Respondents' total advertising costs for their products (including the STEALTH fan) was over \$2.8 million in 1990, to a high of over \$3 million in 1994, and in 1999 was over \$1.6 million. Mr. Pearson testified that he could not give an exact number, but "a large portion" of the advertising dollars are spent on the STEALTH trademark. The STEALTH fan is respondents' "number one margin producer" and is "one of the most advertised fans" within respondents' product lines. (Dep., pp. 29-30.)

Respondents sell their fans throughout the United States through premium lighting showrooms, such as Lamps

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Plus, Expo Design Center stores (the high-end design division of Home Depot) and ceiling fan specialty stores. Respondents' fans are sold through a distribution which requires a knowledgeable sales force. The price of respondents' STEALTH brand ceiling fans range from around \$500 to over \$800. (And their general fans range from \$200 to over \$1000.) According to Mr. Pearson, the average industry wide retail price of a ceiling fan is around \$60.

In addition to ceiling fans, respondents also sell ceiling fan accessories, a limited number of lighting fixtures and one type of portable oscillating fan selling for around \$300-\$400. There is no indication that respondents offer any of these products under the STEALTH mark. (Cross-examination, pp. 50-51, 53.)

Respondents are not aware of any instance of actual confusion. (See respondents' answer to petitioners' interrogatory No. 20.)

The Burden of Proof

Preliminarily, the Board notes that petitioners appear to believe that respondents were free to "cross-examine" both Leo Stoller and Ray Webber by calling them as witnesses during respondents' testimony period. Petitioners did not notice and take any testimony (e.g.,

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of Leo Stoller or Ray Webber), and therefore respondents could not cross-examine witnesses called by petitioners. Petitioners also appear to believe that they are allowed to rely on any marks or registrations that petitioners decide to include at any time during the proceeding without giving proper notice to respondents (for example, through clearly pleading rights in common law marks, and/or applications and/or registrations in the original petition to cancel, or moving to so amend the pleadings in a timely and proper manner). Petitioners are wrong on both matters.

In Board proceedings, our primary reviewing Court has held that the plaintiff must establish its pleaded case (e.g., likelihood of confusion, descriptiveness, misdescriptiveness), as well as its standing, and must generally do so by a preponderance of the evidence. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *Martahus v. Video Duplication Services Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991); and *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

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The ground of fraud must also be established by the plaintiff, but it must be in accordance with the higher standard of clear and convincing proof. See *Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon)*, 43 USPQ2d 1440, 1443-1444 (TTAB 1997), aff'd unpub'd, Appeal No. 97-1580, Fed. Cir., March 5, 1998.

Thus, it is petitioners (plaintiffs) who bear the burden of proving by a preponderance of the evidence their standing, and their claims that respondent's registered mark is merely descriptive, is misdescriptive, and that petitioners have priority and the use of the marks on the respective goods would be likely to cause confusion; and petitioners bear the burden of proving by clear and convincing evidence their claim that respondents committed fraud on the USPTO.

Respondents (defendants) bear the burden of proving by a preponderance of the evidence their asserted affirmative defense of abandonment and their assertion of "equity."²⁹ See *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Quest de la France*, 254 F.3d 1359, 58 USPQ2d 1460, 1462 (Fed. Cir. 2001); and *A.C. Aukerman*

²⁹ See footnote 7, supra.

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Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 22 USPQ2d 1321, 1338 (Fed. Cir. 1992)(en banc).

Standing

As explained in 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §20:7 (4th ed. 2001):

The Federal Circuit has emphasized that there are two judicially-created requirements for standing in inter partes cases. The opposer or petitioner must have: (1) a "real interest" in the proceedings; and (2) a reasonable basis for the belief in damage.

The issue is not whether the opposer [or petitioner] owns the mark or is entitled to register it, but merely whether it is likely that he would be somehow damaged if a registration were granted [or maintained] to the applicant [by the registrant].

(Footnotes and citations omitted.)

See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339 (CCPA 1957).

In this case, status and title copies of two of petitioners' pleaded registrations for the mark STEALTH are of record. The Board finds based on the status and title copies of these two registrations that petitioners have established their standing. Respondents did not contest petitioner's standing. Nonetheless, we want to make clear that the evidence is hardly overwhelming proof of petitioners' standing, and, in fact, is very shaky

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evidence thereof. Inasmuch as the two registrations or record are for the mark STEALTH, it may be said that petitioners have a "real interest" in this proceeding. However, due to the differences in the involved goods (i.e., petitioners' sporting goods, motorcycles, bicycles and boats versus respondents' ceiling fans), it is questionable whether petitioners have a reasonable basis for a belief in damage. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d supra at 1844; and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority

Although petitioners own two registrations, priority must be proven in a cancellation proceeding. See *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, at 1283-1284 (TTAB 1998). However, a petitioner relying on a registration of its pleaded mark is entitled to rely on the filing date of the application which matured into its registration as evidence of use of its mark. See *Henry Siegel Co. v. M & R International Mfg. Co.*, 4 USPQ2d 1154, footnote 9 (TTAB 1987). In this case petitioners are entitled to the filing date of the applications which matured into their two registrations, or August 29, 1984 and September 8, 1986, respectively. Respondents have

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proven their first use as of January 15, 1990. (If respondents had not proven a date of first use, they also would have been entitled only to the filing date of the application which matured into their involved registration, or April 27, 1990.) Thus, petitioners have established first use of the mark STEALTH with respect to the goods set forth in their two registrations of record.³⁰

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). However, as

³⁰ Respondents' argument that petitioners have not demonstrated priority on fans is unavailing.

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indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood-of-confusion analysis, two key considerations are the similarity of the marks and the similarity of the goods and/or services.

There is no question that respondents' registered mark and petitioners' registered mark are the identical term, STEALTH. Although argued in petitioners' brief, the record is devoid of evidence that petitioners own a family of STEALTH marks, or that petitioners' mark STEALTH is famous.

Turning now to the similarity or dissimilarity and nature of the goods as described in the parties' respective registrations, respondents have registered their mark for "ceiling fans"; and petitioners own two registrations, one registered for "sporting goods, specifically, tennis rackets, golf clubs, tennis balls, basketballs, baseballs, soccer balls, golf balls, cross bows, tennis racket strings, and shuttlecocks, and one for "bicycles, motorcycles and boats."

These goods are clearly not related as identified in the respective registrations. Petitioners have not submitted any evidence (e.g., testimony or other properly

submitted evidence) to establish that the involved goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods. See *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). There is no basis for the Board to conclude that consumers would assume that respondents' goods are in any way associated with petitioners as the source thereof.

Petitioners have utterly failed to prove any similarity in or relationship between the involved goods.

Likewise, petitioners, having submitted essentially no other evidence of record, have not proven how their identified goods -- e.g., "boats," "bicycles," "tennis balls," "cross bows," "golf clubs" -- and respondents' identified goods, "ceiling fans," would travel in the same channels of trade to similar purchasers. It is true that there is no restriction in any of the registrations as to channels of trade and/or purchasers, and thus, the Board must presume that the involved identified goods would travel in all the normal channels of trade to all

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the usual purchasers. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). However, we do not presume that, for example, "motorcycles" and "ceiling fans" normally travel in the same channels of trade to the same purchasers. What the record here completely lacks is any evidence that the normal channels of trade and purchasers for these disparate goods could be the same or overlapping in any way.

We must comment at this juncture that traditionally, identical marks owned by different parties have been able to coexist when they are used on unrelated products (or services). Recognizing a right in gross is contrary to the principles of trademark law and to the concepts embodied in Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). That is, the owner of a trademark (or service mark) is not entitled to preclude the same or similar mark in connection with any and all goods and services, including those completely unrelated to the trademark owner's goods. See *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 415 (1916); *The University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983); *Viacom International Inc. v. Komm*, 46 USPQ2d 1233, 1239 (TTAB 1998); and *CCI*

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Corporation v. Continental Communications, Inc., 184 USPQ 445, 447 (TTAB 1974). The Board has taken the position that even the Federal Trademark Dilution Act of 1995 (a ground not available to petitioners in this case as explained in our footnote 4, supra) did not create property rights in gross. See Toro Co. v. ToroHead Inc., 61 USPQ2d 1164, 1173-1174 (TTAB 2001).

Turning now to the remaining duPont factors relevant in this case, we recognize that the test is likelihood of confusion not actual confusion, but respondents' experience that there has been no actual confusion is not surprising in view of the disparate nature of the involved goods of the respective parties.

Finally, we consider the du Pont factor on the extent of potential confusion, i.e., whether *de minimis* or substantial. On this record, there is at most a *de minimis* chance that consumers would confuse the source of petitioners' goods and respondents' goods. There must be shown more than a mere possibility of confusion; instead, there must be demonstrated a probability or likelihood of confusion. See Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting from Witco Chemical Company, Inc. v. Whitfield Chemical Company, Inc., 418

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F.2d 1403, 164 USPQ 43 (CCPA 1969) as follows: "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimis* situations but with the practicalities of the commercial world, with which the trademark laws deal." See also, Triumph Machinery Company v. Kentmaster Manufacturing Company Inc., 1 USPQ2d 1826 (TTAB 1987). The Trademark Act does not speak in terms of remote possibilities of confusion, but rather, the likelihood of such confusion occurring in the marketplace. In this case, it is our belief that the possibility or likelihood of confusion is remote.

Upon balancing all of the relevant du Pont factors in this case, and giving each relevant factor the appropriate weight, we firmly believe that confusion is unlikely. See *In re Mars, Inc.*, 741 F.2d 395, 222 USPQ 928 (Fed. Cir. 1984).

Remaining Pleaded Claims

This record does not establish by a preponderance of the evidence that the word STEALTH is either merely descriptive or deceptively misdescriptive of "ceiling fans."

The record submitted by petitioners falls far short of establishing by "clear and convincing" evidence that

respondents committed fraud in filing the application which matured into Registration No, 1,638,283—either with regard to the asserted date of first use or the declaration regarding no other entity having a right to use the mark for these goods.

Respondents' Affirmative Defense

Respondents' asserted the affirmative defense that petitioners have abandoned their mark, contending in their brief that this abandonment occurred "sometime prior to February 17, 1994." (Brief, p. 33.) While raising interesting questions regarding the various business entities of Leo Stoller, there is simply not a preponderance of the evidence which establishes that petitioners have abandoned their mark.

Respondents' Assertion of Equity

In light of our decision on the merits that there is a failure of proof by petitioners of any of their asserted claims, we have previously denied as moot respondents' motion (filed July 29, 2002) for Fed. R. Civ. P. 11 sanctions.

We now consider respondents' request contained in their brief (pp. 28-33) that petitioners be estopped from prevailing in this case based on equitable grounds of "frivolous filings, delaying tactics and dishonesty."

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Respondents point to numerous and continued examples of such inequitable behavior by petitioners herein-- including petitioners' several references in their brief to a quote from a previous court case, when petitioners have been sanctioned for the misuse of that quote, filing numerous baseless motions in this case, and having a non-party file papers herein.

Having carefully reviewed the entire record and procedural history of this cancellation proceeding, we are inclined to agree with respondents, but find that there is insufficient proof of "dishonesty" (such as fabricating evidence) by petitioners to enter judgment on equitable grounds.

Although we are not entering judgment against petitioners on equitable grounds in this case, we would be remiss if we did not comment on this proceeding which was commenced by petitioners in September 1995. Despite the constant filing of papers filed in this case (amounting to three volumes required for the Board inter partes file), petitioners consistently failed to follow proper Board practice and procedure at any stage this proceeding; and they have engaged in numerous dilatory tactics to delay this proceeding (e.g., filing numerous interlocutory motions, two separate motions to disqualify

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respondents' attorneys--both denied, and a petition to the Director--denied.) Moreover, petitioners' litigation strategy of delay, harassment and falsifying documents in other cases is well documented. See *S Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293 (TTAB 1997), (petitioner's certificate of mailing on a motion to extend found to be fraudulent). Mr. Leo Stoller, petitioners' officer, has also recently been sanctioned, individually, for making material misrepresentations to the Board regarding an applicant's alleged consent to extensions of time. See *Central Mfg. Inc. v. Third Millennium Technology, Inc.*, 61 USPQ2d 1210 (TTAB 2001). See also the following Court cases:

S Industries Inc. v. Centra 2000 Inc., 249 F.3d 625, 58 USPQ2d 1635 (7th Cir. 2001) (affirming award of attorney's fees against S Industries Inc. noting a pattern of abusive and improper litigation, specifically citing S Industries Inc.'s officer, Leo Stoller);

S Industries Inc. v. Stone Age Equipment Inc., 12 F. Supp.2d 796, 49 USPQ2d 1071 (N.D. Ill. 1998) (awarding attorneys fees and costs for oppressive suit where plaintiff offered "highly questionable (and perhaps fabricated) documents" and testimony from its principal

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that was "inconsistent, uncorroborated, and in some cases, demonstrably false");

S Industries Inc. v. Diamond Multimedia Systems, Inc., 991 F. Supp. 1012, 45 USPQ2d 1705 (N.D. Ill. 1998) (awarding attorneys fees and costs based on plaintiff's frivolous claims); and

S Industries, Inc. v. Hobbico, Inc., 940 F. Supp. 210 (N.D. Ill. 1996) (directing plaintiff's counsel "to address some plainly questionable aspects of [S Industries, Inc.'s] lawsuit," and noting that "S Industries, Inc. ('S') appears to have entered into a new industry - that of instituting federal litigation. ...[A]nd this court has had occasion to note a proliferation of other actions brought by S...").

Decision: The petition to cancel is denied with prejudice.