

CORRECTED

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-1525

(Opposition No. 91/122,948)

SPORTS MACHINE, INC. (doing business as BikeSource),

Appellant,

v.

MIDWEST MERCHANDISING, INC.

Appellee.

Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board.

Brief of Appellee, Midwest Merchandising, Inc.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SPORTS MACHINE V. MIDWEST MERCHANDISING

No. 04-1525

Certificate of Interest

Counsel for the Appellee, Midwest Merchandising, Inc. certifies the following:

1. The full name of every party or amicus represented by me is:

Midwest Merchandising, Inc.

2. The name of the real party in interest (if any) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Roger A. Gilcrest, Schottenstein, Zox & Dunn Co., L.P.A.

December 3, 2004
Date

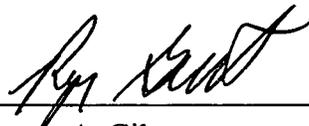

Roger A. Gilcrest

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STATEMENT OF RELATED CASES

Although no other appeal in or from the same proceeding in the U.S. Patent & Trademark Office has been before this Court or any other appellate court, Cancellation No. 30,578, wherein Sports Machine was Petitioner and Midwest Merchandising was Respondent, was decided in favor of Midwest Merchandising (A08)¹. This proceeding involved U.S. Trademark Registration No. 1,887,592 of its BIKESOURCE (Stylized) mark in stylized form:

BIKESOURCE

and the only issue was whether the mark was merely descriptive of the services for which it had been registered. No timely appeal has been taken, and that decision has now been finally determined.

APPELLATE JURISDICTIONAL STATEMENT

Applicant-Appellee Midwest Merchandising disagrees with the jurisdictional statement only in that Sports Machine misstates that the TTAB denied its motion for reconsideration. Rather, the record reflects that on November 20, 2003, the TTAB determined that Midwest Merchandising's Motion for Entry

of Judgment was a motion for summary judgment, but then treated it as an affirmative defense of *res judicata*. On May 13, 2004 the TTAB actually granted Sport's Machine's motion in order to reconsider Midwest Merchandising's Motion for Entry of Judgment (A52) not as an affirmative defense based upon *res judicata*, but simply as a motion for entry of judgment pursuant TBMP 510.02(b). See (A41). After that reconsideration, the TTAB once again entered judgment in favor of Midwest Merchandising, dismissing the Opposition as being barred by application of the doctrine of *res judicata* (A44).

STATEMENT OF THE ISSUES

Appellee disagrees with Appellant's Statement of the Issues.

Appellee respectfully submits that the only issue presented is:

1. Whether the TTAB erred in entering judgment in favor of Midwest Merchandising by applying the doctrine of *res judicata* in the Opposition against the application for registration of the mark BIKESOURCE (Block Letter) for "retail store outlets featuring bicycles, bicycle accessories and replacement parts, and apparel relating to bicycling" when the TTAB had already found in the Cancellation as a purely factual matter that (1) the term BIKESOURCE (Stylized) was not merely descriptive of those services

¹ Midwest Merchandising notes that this decision does not appear in chronological

based upon the non-descriptiveness of the word BIKESOURCE itself, *and* that (2) the term BIKESOURCE itself was not merely descriptive of those services, declining to require requested disclaimer of that term from the registration of BIKESOURCE (Stylized); *or in the alternative,*

2. Whether the TTAB entering judgment in favor of Midwest Merchandising by applying the doctrine of *res judicata* in the Opposition as stated above was harmless error as the same result could have been reached by applying the issue preclusion doctrine of collateral estoppel as the factual issue of mere descriptiveness of the mark BIKESOURCE (Block Letter) for “retail store outlets featuring bicycles, bicycle accessories and replacement parts, and apparel relating to bicycling” was already determined when the TTAB in the Cancellation found as a purely factual matter that (1) the term BIKESOURCE (Stylized) was not merely descriptive of those services based upon the non-descriptiveness of the wording BIKESOURCE itself, *and* that (2) the term BIKESOURCE itself was not merely descriptive of those services, declining to require requested disclaimer of the term from the registration of BIKESOURCE (Stylized).

order in the Joint Appendix.

STATEMENT OF THE CASE

1. Nature of the Case

Midwest Merchandising, Inc. sought registration of its long-established mark BIKESOURCE in block letter form under the provisions of 15 U.S.C. §1051(a) after having already obtained U.S. Trademark Registration No. 1,887,592 of its BIKESOURCE (Stylized) mark in stylized form:

BIKESOURCE

5 years earlier under that same section.

Midwest Merchandising sought to have Sports Machine cease from using its infringing mark BIKESOURCE which it had used in several forms, including its principal stylized one-word form (A11).

Sports Machine filed the Cancellation on March 29, 2000. Sports Machine attended neither of Midwest Merchandising's depositions, nor cross-examined its witnesses (A10).

Recognizing that both proceedings involved nearly identical factual issues, the TTAB suspended the Opposition pending the outcome of the Cancellation (A57).

The Cancellation and the Opposition involved the same singular issue –

whether the mark BIKESOURCE was merely descriptive of the services recited in the respective registration and application.

2. Course of the Proceedings

While it claimed itself to have common law rights in the mark BIKESOURCE mark, Sports Machine petitioned to cancel Midwest Merchandising's registration for the mark BIKESOURCE (stylized). See Petition for Cancellation in Cancellation No. 30,578. The only grounds for cancellation alleged was mere descriptiveness under 15 U.S.C. §1052(e).

With the Cancellation advanced nearly to the completion of testimony, Sports Machine filed the subject Opposition (A82) and immediately moved for consolidation with the Cancellation in its Notice of Opposition and later by formal motion (A84, A80).

In filing the Opposition, Sports Machine then alleged itself to have common law rights in BIKE SOURCE (now presenting its mark in two-word form), and moved to consolidate the proceedings with the proceedings in Cancellation No. 30,578, which involved Registration No. 1,887,592, for BIKESOURCE (stylized) (A80). As in the Cancellation, the only grounds for opposition alleged was mere descriptiveness under 15 U.S.C. §1052(e).

In contrast to Sports Machine's expressed desire to have this Court order

additional factual findings through remand, after filing its formal motion to consolidate, Sports Machine even went so far as to file a subsequent motion to suspend the Opposition pending the TTAB's decision on its motion to consolidate (to prevent it having to answer Midwest Merchandising's outstanding discovery requests in the Opposition directed to its inconsistent pleadings; see A66)).

Sports Machine also took no steps during the pendency of the Opposition to place evidence from the Cancellation into the Opposition, although it had ample opportunity to do so.

The TTAB denied Sports Machine's motion to consolidate the proceedings, but granted Sports Machine's motion to suspend the Opposition pending disposition of the Cancellation No. 30,578 (A57).² The TTAB found that both proceedings involved "nearly identical legal and factual issues." (A59).

After the TTAB entered judgment in Cancellation No. 30,578 (A08), Midwest Merchandising properly filed a Motion to Resume the Opposition Proceedings and Enter Judgment under TBMP §510.02(b) (A52 - A56). Sports Machine agreed with the motion to dissolve the suspension of the Opposition proceeding, but opposed the motion to have judgment entered in favor of Midwest Merchandising (A46).

² Midwest Merchandising notes that reference to opposer and applicant have been inadvertently confused on the first two pages of this decision.

3. Disposition by the TTAB

On November 20, 2003, the TTAB mailed its decision granting Midwest Merchandising's Motion for Entry of Judgment as based an affirmative defense of *res judicata* (A01). The decision was based on the TTAB's decision in Cancellation No. 30,578 (A08), finding that the mark BIKESOURCE in block letter and stylized form gave the same commercial impression (A06 – A07).

On December 19, 2003, Sports Machine filed a request for reconsideration of the decision (A23). In contrast to Sport's Machine's characterization, on May 13, 2004, the TTAB did not deny its motion for reconsideration, but actually granted Sports Machine's motion to the extent it reconsidered Midwest's motion for entry of judgment based upon the application as *res judicata* (rather than one based upon an affirmative defense) (A41), and allowed the entry of the judgment to stand (A37).

Sports Machine then filed a Notice of Appeal seeking still further review by this Court of the TTAB's decisions in the Opposition proceeding.

STATEMENT OF THE FACTS

The only facts necessary for this Court to decide the subject appeal are those regarding the nature of the decisions of the TTAB in the Cancellation and the Opposition. The entire factual record of the Cancellation was never properly

placed into the record of the Opposition, and thus that record cannot be relied upon by Sports Machine in this appeal. Rather, this Court can and should reach a decision based upon the holdings of the TTAB and the factual findings underlying its decisions apparent from the record.

After a full trial on the merits of a complete factual record, the TTAB decided the issue of mere descriptiveness of the mark:

BIKESOURCE

in the Cancellation, finding that the mark was not merely descriptive (A22).

In making its decision, the TTAB also specifically declined Sports Machine's specific alternative request that the TTAB require disclaimer of the term "bikesource" from the subject registration (A18).

SUMMARY OF THE ARGUMENT

The issue of mere descriptiveness is an issue of fact. In Re Northland Aluminum Products, Inc. 777 F.2d 1556; 1985 U.S. App. LEXIS 15326; 227 U.S.P.Q. (BNA) 961 (Fed. Cir. 1985).

The issue of mere descriptiveness of the mark BIKESOURCE has already been finally decided in the Cancellation.

The TTAB found that the mark BIKESOURCE (stylized) was not merely descriptive, and also declined Sports Machine's request to require disclaimer of the term "bikesource."

The decision of the TTAB in the Opposition was based upon the factual findings underlying its decision in the Cancellation.

As to the procedural aspects of the TTAB's action in the Opposition, TBMP 510.02(b) provides:

When a proceeding before the Board has been suspended pending the outcome of another proceeding, and that other proceeding has been finally determined, the interested party should notify the Board in writing of the disposition of the other proceeding, and requesting that further appropriate action be taken in the Board proceeding. *Usually, the interested party requests, as a result of the decision in the other proceeding, that judgment be entered in its behalf on one or more issues in the Board proceeding.* A copy of the decision in the other proceeding should accompany the notification. Absent any such notification as to the final determination of the civil action, cases which have been suspended pending civil action will remain in a suspended status for two years before the Board will issue an order requiring the parties to provide the status of the civil action.

A proceeding is considered to have been finally determined when a decision on the merits of the case (i.e., a dispositive ruling that ends litigation on the merits) has been rendered, and no appeal has been filed therefrom, or all appeals filed have been decided. (Emphasis added).

This section does not prescribe the procedural means by which judgment is to be considered and entered. Accordingly, the TTAB acted as any tribunal would to properly consider and enter judgments bearing on cases before it, as is within its inherent authority.

Midwest Merchandising properly moved for entry of judgment in its favor (A52 – A56).

The TTAB first applied the doctrine of *res judicata* by considering Midwest Merchandising's motion as an affirmative defense (A05 – A07) and ruled in favor of Midwest Merchandising, dismissing the Opposition (A07).

Upon Sports Machine's motion for reconsideration of Midwest Merchandising's motion for entry of judgment, the TTAB even reconsidered Midwest Merchandising's motion for entry of judgment simply as a motion under TBMP Section 510.02(b) as based upon *res judicata*. The TTAB once again properly applied the standards of *res judicata* based upon its earlier decision on the factual issue of mere descriptiveness of BIKESOURCE in the Cancellation and allowed its earlier judgment to stand (A42 – A45). The TTAB again properly

entered judgment in favor of Midwest Merchandising, and again dismissed the Opposition (A07).

Sports Machine now uses only defluctive arguments in an attempt to relitigate precisely the same factual issue already clearly decided in the Cancellation. Many of these same arguments were already made to the TTAB in the Cancellation.

There are no relevant issues to decide, and further proceedings would accomplish nothing but further delay and the risk of inconsistent results.

The TTAB's judgment and order of dismissal of the Opposition were entirely proper and should be affirmed.

ARGUMENT

1. Standard of Review

Contrary to Sports Machine's assertion, the TTAB twice properly applied the doctrine of *res judicata*, and found in Midwest Merchandising's favor.

While the standard applied is a *de novo* standard, the issue is whether the Board acted properly in applying the doctrine of *res judicata* as a basis for entering judgment, as a matter of law based upon the earlier decision, not whether, as Sports Machine suggests, whether no genuine issue of material fact existed.

That is, this Court need look only to the *factual determinations* made by the TTAB, and *need not reweigh those facts* as Sports Machine suggests.

2. The TTAB Properly Entered Judgment Either on Midwest Merchandising's Affirmative Defense Based on *Res Judicata* or as a Basis for Entry of Judgment on its Behalf Because Sports Machine's Claim is Precluded Under the Restatement's Concept of a Claim.

Application of *res judicata* requires a prior final judgment on the merits by a court or other tribunal of competent jurisdiction; identity of the parties or those in privity with the parties; and a subsequent action based on the same claims that were raised, or could have been raised, in the prior action. See Amgen, Inc. v. Genetics Inst., 98 F.3d 1328, 1331, 40 USPQ2d 1524, 1526 (Fed. Cir. 1996); McCandless v. Merit Sys. Protection Bd., 996 F.2d 1193, 1197-98 (Fed. Cir. 1993).

Recently, the Federal Circuit in Ammex, Inc. v. United States, Case No. 02-1498 (Fed Cir. 2003) recognized that the Restatement notes that a common set of transactional facts is to be identified "pragmatically." Restatement (Second) of Judgments § 24. Seeking to bring additional clarity to this standard, courts have defined "transaction" in terms of a "core of operative facts," the "same operative facts," or the "same nucleus of operative facts," and "based on the same, or nearly the same factual allegations." Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226 (7th Cir. 1993) (*citing* Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 521 (1986)).

One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other. Ammex, Inc., supra, citing United States v. Haytian Republic, 154 U.S. 118, 125 (1894).

It is clear from the TTAB's ruling that, but for the advanced state of the Cancellation, it would have consolidated the Opposition with it (A59). Accordingly, the two claims or causes of action should have been joined.

Also, it is clear that the evidence necessary to prove one claim would establish the other. Indeed, as pointed out above, the issue of mere descriptiveness (in support of its plea for disclaimer of BIKESOURCE) in the Cancellation and the issue of mere descriptiveness (in support of its grounds for opposition to registration of BIKESOURCE under Section 2(e) of the Lanham Act) in the Opposition are *identical* and would have required the *precisely the same evidence*. Indeed, in its decision upon reconsideration of its original decision in the Opposition, the TTAB even pointed out that all of Sports Machine's evidence bore solely on the wording BIKESOURCE alone (rather than on the stylized version), and that the TTAB's decision in the Cancellation was based on the non-descriptiveness of the wording itself, not on its stylization (A44).

In the present case, the judgment based on *res judicata* was granted under

the doctrine of claim preclusion. The Court of Appeals for the Federal Circuit has stated that it is guided by the analysis set forth in the Restatement (Second) of Judgment §24 (1982) in determining whether an opposer's claim is barred under the doctrine of claim preclusion. Chromalloy American Corp. v. Kenneth Gordon, Ltd., 736 F .2d 694, 222 USPQ 187 (Fed. Cir. 1984). Under §24 of the Restatement:

"(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a 'transaction', and what grouping constitutes a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."

A Valid and Final Judgment has been Rendered Between the Parties

In this case, the TTAB found, and Sports Machine has not disputed, that a valid and final judgment has already been rendered in the Cancellation (A41).

That judgment became final when Sports Machine failed timely to appeal the TTAB's judgment in the Cancellation, and the TTAB so found (A06).

The "Factual Grouping" in the Opposition is Identical to that in the Cancellation

Using the recommended pragmatic approach, it is clear that the issue of mere descriptiveness of the BIKESOURCE mark has already been decided.

The TTAB correctly reasoned that the stylized version of BIKESOURCE and BIKESOURCE in block letter form were legally equivalent due to the limited and simple stylization of the stylized version of BIKESOURCE (A43).

In this regard, the cases cited by Sports Machine bearing on specific stylized and block letter forms of marks are of no relevance to the finding of descriptiveness in the Cancellation and the Opposition, which is purely a factual, case-specific matter. The TTAB even pointed out as much in its original ruling as it noted that other marks or terms are not relevant to its determination regarding the mere descriptiveness of the BIKESOURCE mark (A22).

However, the issue of "legal equivalence," although not incorrectly determined, does not change the fact that the TTAB's decision in the Cancellation was based on the non-descriptiveness of the wording itself, not on its stylization (A44). Accordingly, the propriety of the TTAB's determination on the "legal equivalence" issue need not be considered central to the analysis of *res judicata*. Rather, the non-descriptiveness of BIKESOURCE as a word alone has already

been determined directly even without resort to application of the “legal equivalence” standard.

Furthermore, and more directly on point, is that the TTAB also determined in the Cancellation as a factual matter *that the mark “BIKESOURCE” was not merely descriptive of the services recited in U.S. Trademark Registration No. 1,887,592 because it refused to require disclaimer of this term in that registration* (A18). This is precisely the same claim that was made in the Opposition.

3. Any Finding Other than a Finding that BIKESOURCE is not Merely Descriptive would Clearly be Inconsistent with the Result in the Cancellation

As is apparent from the discussion above, any finding of mere descriptiveness would be directly contrary to those in the Cancellation.

After considering all evidence Sports Machine presented, the TTAB held that the mark BIKESOURCE (stylized) was not merely descriptive basing its holding expressly upon the non-descriptiveness of the word BIKESOURCE alone (A44), and further holding that disclaimer was not required on those same grounds (A18).

Any decision to the contrary in the Opposition would be in direct opposition to the factual finding already made in the Cancellation, and could lead to inconsistent results. The TTAB properly noted as much (A41).

Sports Machine is simply attempting to relitigate an already decided factual

issue.

Sports Machine claims that it is merely “attempting to assert its claim against registration of the typed word mark, which confers much broader rights to a registrant.” However, Sports Machine attempted to assert that same claim in the Cancellation: that BIKESOURCE was merely descriptive of the recited services. That same claim failed factually and need not be relitigated.

Sports Machine argues that its “claim” is not being relitigated because it is merely contesting that ownership of a registration for BIKESOURCE (stylized) should not “confer on a registrant the right to register the mark with a typed drawing.” This mischaracterizes the Cancellation and its holding. Nothing in the Cancellation or the TTAB’s decision therein directly involved the registration of the mark in block letter form. It is the application subject of the Opposition that seeks such a typed drawing registration.

The Cancellation is however directly relevant to the claim of mere descriptiveness alleged against the mark BIKESOURCE (as a word alone), and this issue has been decided in favor of Midwest Merchandising. The TTAB based its holding of non-descriptiveness of the stylized form of the mark BIKESOURCE on the strength of the non-descriptiveness of the BIKESOURCE as a word alone, and also, for that same reason, refused to require its disclaimer.

The cases cited by Sports Machine in support of this argument are therefore

irrelevant. All of the cases cited by Sports Machine involved the stylization of an otherwise descriptive mark. Those marks are different than BIKESOURCE (stylized) *because BIKESOURCE (stylized) is a stylized form of a mark that has itself now been held not to be merely descriptive* (both as a factual finding in support of the TTAB's holding the mark itself not merely descriptive and likewise in support of its refusal to require disclaimer of BIKESOURCE as a word).

Sports Machine also takes a particularly myopic view of the benefits of consolidation. It fails to mention the possibility that should the TTAB find that the mark BIKESOURCE is not merely descriptive on the strength of the word alone, and also refuse to require disclaimer of the term BIKESOURCE from the registration – as it did - that the Opposition would be moot and could be dismissed summarily as involving precisely the same factual issue.

Indeed, the TTAB was “puzzled” when Sports Machine's claimed that it thought it would be entitled to continue to proceed in the Opposition following disposition of the Cancellation because the TTAB's suspension was expressly to avoid duplication of effort and inconsistent results. (A40).

Section 4 of Sports Machine's brief is little more than a repeat of all of the arguments advanced in the Cancellation. Properly applying the standard on mere descriptiveness, the TTAB properly found, after considering the entire factual record before it, that BIKESOURCE was not merely descriptive. (A10 – A22).

4. As an Alternative This Court may Properly find that the Opposition is Now Barred based upon the Issue Preclusion Doctrine of Collateral Estoppel as the Required Factual Finding has been Made by the TTAB that Directly Defeats Sports Machine's Claim in the Opposition.

The doctrine of issue preclusion (i.e., collateral estoppel) serves to preclude the relitigation, by the same parties or their privies, of issues actually litigated, and necessarily determined (by a court of competent jurisdiction), in a prior proceeding, whether or not the prior proceeding involved the same claim as the subsequent proceeding. See: Lawlor v. National Screen Service Corp., 349 U.S. 322; 75 S. Ct. 865; 99 L. Ed. 1122; 1955 U.S. LEXIS 1547 (1955); Chromalloy American Corp. v. Kenneth Gordon, Ltd., supra; Mother's Restaurant Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 221 U.S.P.Q. 394 (Fed. Cir. 1983); and International Order of Job's Daughters v. Lindeburg & Co., 727 F.2d 1087, 220 U.S.P.Q. 1017 (Fed. Cir. 1984).

The issue of the descriptiveness of Midwest Merchandising's BIKESOURCE mark was actually directly litigated when Sports Machine requested disclaimer of the term, and necessarily determined by the TTAB in declining to require that disclaimer in the Cancellation, with that determination being adverse to Sports Machine. This issue was also decided as a supportive finding underlying its determination that BIKESOURCE in stylized form was not

merely descriptive.

This factual finding is antithetical to the required factual underpinnings of Sports Machine's claim in the Opposition, and its claim therefore must fail.

It should be noted that the doctrines of both *res judicata* and collateral estoppel have been applied by the TTAB not, in and of themselves, as grounds for opposition. Rather, they are legal rules which serve to preclude, in appropriate cases, the relitigation of matters previously litigated. See Flowers Industries, Inc. v. Interstate Brands Corporation, 1987 TTAB LEXIS 2; 5 U.S.P.Q.2D (BNA) 1580 (TTAB 1987) (holding that it is wrong to fail to consider such a motion for summary judgment on the grounds that it is an unplead issue). Accordingly, there is no procedural formality that should prevent Midwest Merchandising from having judgment entered in its favor.

Because the TTAB has already determined, after a complete trial on a full factual record, that BIKESOURCE is not merely descriptive of the services recited in the registration, Sports Machine is collaterally estopped to relitigate this issue in the Opposition.

The dismissal the Opposition to application of Serial No. 76/035,008 was entirely proper, and should be affirmed.

5. This Court cannot Fairly Reconsider and Reweigh the Facts upon which the TTAB made its Finding in the Cancellation as that Record is not Properly before this Court.

In its brief, Sports Machine points to a very small portion of the entire factual record considered by the TTAB in the Cancellation.

Sports Machine did not properly place that record in the Opposition before it was suspended and, accordingly cannot require this Court to reconsider and reweigh that evidence. Rather this Court need only look to the express factual findings made by the TTAB in applying the standards of *res judicata* or collateral estoppel.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all of the reasons stated herein, this Court should affirm the TTAB's ruling that Sports Machine's claim of mere descriptiveness is barred by application of the doctrine of *res judicata*, as this claim has already been litigated and decided in the Cancellation.

As an alternative this Court may similarly find that Sports Machine's claim of mere descriptiveness likewise fails because the factual issue of mere descriptiveness is barred by issue preclusion under the doctrine of collateral estoppel.

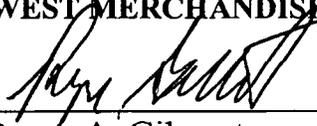
The dismissal the Opposition to registration of Serial No. 76/035,008 should

be affirmed.

Respectfully submitted,

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December 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Corrected Brief was served on the United States Court of Appeals for the Federal Circuit, this 3rd day of December, 2004, by mailing an original and eleven (11) true copies thereof via First Class U.S. Express Mail, No. ER481249162 US US postage prepaid, addressed to Clerk of Court, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC 20439.

By: 

CERTIFICATE UNDER 37 CFR 1.8

I hereby certify that the foregoing Corrected Brief was served on the United States Patent & Trademark Office, Solicitor's Office, this 3rd day of December, 2004, by mailing two (2) true copies thereof via First Class U.S. Mail, postage prepaid, addressed to John M. Whealan, P.O. Box 15667, Arlington, VA 22215.

By: 

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Corrected Brief were served on counsel for Appellant, this 3rd day of December, 2004, via First Class U.S. Mail, postage prepaid, addressed to Mary J. Gaskin , Annelin & Gaskin, 2170 Buckthorne Pl., Suite 220, The Woodlands, TX 77380

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