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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: December 7, 2004

Opposition No. **91152243**

CENTRAL MFG. CO.

v.

HEPA CORPORATION

Before Bottorff, Holtzman and Drost, Administrative
Trademark Judges.

By the Board:

Now ready for consideration are the following motions:

1. Opposer's motion for summary judgment, filed April 25, 2004;
2. Opposer's motion to amend its notice of opposition, filed April 25, 2004;
3. Applicant's motion, filed April 29, 2004, to compel opposer to provide better answers to applicant's discovery requests; and
4. Applicant's cross-motion, filed May 21, 2004, for summary judgment or, in the alternative, for partial summary judgment on certain claims in the notice of opposition.

OPPOSER'S MOTION FOR SUMMARY JUDGMENT; APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Opposer argues that the Board should grant its motion for summary judgment because there is a likelihood of

confusion between the marks at issue as a matter of law. Applicant takes the position that there is no likelihood of confusion as a matter of law. Each party has filed the declaration of its president and supporting documentation. Both motions have been fully briefed.¹

After reviewing the arguments and supporting papers of the parties, we find that neither opposer nor applicant has met its burden of establishing that no genuine issue of material fact exists as to opposer's claim of likelihood of confusion. At a minimum, genuine issues of material fact exist as to the similarity or dissimilarity of connotations and commercial impressions of the marks at issue and the relationship of the goods identified in the involved application and the pleaded registrations.²

In view thereof, opposer's motion for summary judgment and applicant's cross-motion for summary judgment are hereby denied.³

¹ We have considered the parties' reply briefs because they clarify the issues before us. See Trademark Rule 2.127(a).

² The fact that we have identified only a few genuine issues of material fact as sufficient bases for denying the motions for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

³ The parties should note that the evidence submitted in connection with their motions for summary judgment is of record only for consideration of those motions. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1993); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

APPLICANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Applicant seeks partial summary judgment on the following claims made in the notice of opposition: that the mark was not applied for "according to its correct type, as shown in its said application"; that applicant committed fraud because it filed an application based on its intent to use the mark despite the fact that it allegedly had used the mark before filing; and that the goods in the application are indefinite. Applicant seeks partial summary judgment on these claims.

No genuine issues of material fact exist with respect to these allegations.

As to the allegation that applicant's mark was applied for in the "wrong" type, there are no genuine issues of material fact that opposer's claim is groundless. There is no evidence that a typed drawing was inappropriate for this intent to use application. Therefore, the application was applied for "in its correct type."

As for the dates of use stated in the application, it is well established that an applicant filing under Section 1(b) of the Trademark Act may assert dates of use that are earlier than the filing date of the application in an amendment to allege use or statement of use. See TMEP § 903. Thus, there are no genuine issues of material fact

that applicant did not commit fraud in the filing of its application.

There also exist no genuine issues of material fact that the goods, as listed in applicant's application ("high efficiency particulate air filters and integrated fan units for industrial clean room use"), are not indefinite, as was determined during the prosecution stage of applicant's application. See TMEP § 1402.01.

Applicant further seeks partial summary judgment on opposer's claim that applicant's mark STEALTH 100 is merely descriptive or deceptively misdescriptive. In its brief, opposer contends that applicant's mark is merely descriptive because it is alleged to be a model designation. While there appear to be no genuine issues of material fact that applicant's mark is not merely a model designation, the notice of opposition is not so limited, and further alleges that applicant's mark is deceptively misdescriptive. Applicant has failed to show the absence of genuine issues of material fact on these claims.

Applicant further seeks partial summary judgment on opposer's claim that its STEALTH mark is famous and has been diluted. Opposer's amended complaint includes the date on which opposer alleges its mark STEALTH became famous. However, opposer's complaint fails to allege the goods in connection with which the mark has allegedly become famous.

In view thereof, opposer is allowed until twenty days from the mailing date of this order to further amend the notice of opposition to state, with particularity and using their common commercial names, the goods in connection with which opposer alleges the mark STEALTH has become famous, failing which partial summary judgment for applicant shall be entered on opposer's dilution claim. See *Polaris Indus., Inc. v. DC Comics*, 59 USPQ2d 1798 (TTAB 2000); see also *Boral Ltd. v. FMC Corp.*, 59 USPQ2d 1701 (TTAB 2000); and *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d (TTAB 2001).

Partial summary judgment on opposer's claims that the application was not applied for in its correct type, that applicant committed fraud, and that the goods are indefinite is hereby granted in favor of applicant. Partial summary judgment on opposer's claim that applicant's mark is merely descriptive or deceptively misdescriptive is denied. Decision on applicant's motion for partial summary judgment on opposer's claim of dilution is deferred.

OPPOSER'S MOTION TO AMEND THE NOTICE OF OPPOSITION

Opposer seeks to amend the notice of opposition as follows:

1. Amend paragraph 2 of the notice of opposition by changing the goods, in connection with which opposer claims to have used the mark STEALTH, **from** "air filters and fans" **to** "household air cleaners,

household air cleaners with ionizer, domestic and commercial air purifiers, air conditioners;"

2. Amend the list of registrations and applications included in paragraph 8, and attach status and title copies to the notice of opposition;
3. Amend paragraph 9 by changing "1997" to "1995;" and
4. Amend paragraph 23 by adding the following at the end of the paragraph: "The Opposer's STEALTH mark became famous on January 14, 1997."

It has been held that amendment of a pleading generally should be allowed with great liberality, at any stage of the proceeding, where necessary to bring about a furtherance of justice, unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of the non-moving party. See *American Optical Corporation v. American Olean Tile Company, Inc.*, 168 USPQ 471, 473 (TTAB 1971); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216 (TTAB 1990); and *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985).

Discovery was set to close six days before opposer filed its motion to amend, and the parties have already engaged in extensive discovery based on opposer's current allegations regarding the goods in connection with which it asserts it has used its mark. To allow opposer to change its goods at this stage would unduly prejudice applicant,

who has relied on opposer's assertion of rights in specific goods from the commencement of this proceeding.

Accordingly, opposer's motion to amend paragraph 2 is denied. Opposer's motion to amend paragraphs 8, 9, and 23 is granted.⁴

APPLICANT'S MOTION TO COMPEL

The Board ordered opposer to respond without objection to applicant's discovery requests on June 11, 2003. Applicant contends that the responses produced by opposer in response thereto are incomplete. Applicant seeks better answers to Interrogatory Nos. 7, 8, 10-14, 16, 21-30, and 37.

We have reviewed the discovery requests and opposer's responses thereto. To facilitate the discovery of any confidential or business proprietary information, it is adjudged appropriate for the standard Board protective order to be imposed herein, and accordingly, an executed order is attached. The parties are free to hereinafter modify or amend the terms of the order, by mutual agreement.⁵

⁴ Opposer should note, however, that it cannot rely at trial upon the copies of the alleged registrations attached to its amended notice of opposition, because the "status and title" certifications of these registrations are stale. See Trademark Rule 2.122(d)(2) and TBMP § 704.03(b).

⁵ See *Glaxo Group, Ltd. v. Genetics Institute, Inc.*, 72 USPQ2d 1607 (Dir USPTO 2002) (Director's duty to promulgate regulations to facilitate the conduct of proceedings at the Office pursuant to 15 U.S.C. §1123 includes authorizing Board to issue protective orders under Trademark Rule 2.120(f)).

We turn now to applicant's interrogatories.

- Interrogatory No. 7 seeks to discover opposer's advertising expenses for goods sold under the "word STEALTH." The interrogatory is proper and must be answered. Answers may be provided under the terms of the imposed protective order.⁶
- Interrogatory No. 8 asks opposer to describe its channels of trade. This inquiry is proper. Opposer must describe its channels of trade for each product that is sold under a STEALTH mark.⁷
- Interrogatory No. 10 seeks opposer's yearly dollar and unit volume of sales for goods sold under the mark STEALTH. Opposer must unambiguously answer the interrogatory, and break down these figures by product and trademark. Responses may be provided under the terms of the imposed protective order.
- Interrogatory No. 11 asks opposer to identify all assignments, licenses or other transfers of rights in the word STEALTH granted by or to Opposer. Opposer must answer the interrogatory fully and completely and produce the documents that opposer revealed exist by its previous answer to the interrogatory.
- Interrogatory No. 12 asks about opposer's knowledge, if any, of any third party uses of certain marks. Opposer must answer the interrogatory and produce the documents that opposer revealed exist by its previous answer to the interrogatory.
- Interrogatory No. 13 seeks information about any instances of actual confusion of which opposer may be aware. Opposer states that it has received misdirected telephone calls. Opposer must provide the details of

⁶ Opposer pleads ownership of numerous applications and registrations for STEALTH and STEALTH-derivative marks. When answering applicant's discovery requests, opposer must be unambiguous as to any specific mark or product involved. In answering Interrogatory No. 7, for example, opposer must state what dollar amounts, if any, were spent for which product(s) under which mark(s).

⁷ Again, opposer must be specific regarding its trade channels, and make it clear what goods travel in what trade channels, and under what mark(s).

the alleged calls as requested by the interrogatory: a description of each alleged incident, information about the nature of the incident, a complete list of person(s) involved, the date and place of the incident (e.g., where the alleged person was calling from, where the call was taken), and the identity of person(s) at opposer most knowledgeable about the incident.

- Interrogatory No. 14: opposer must provide applicant with the opposition proceeding number for the opposition proceeding identified in response to this interrogatory, and state the outcome or current status (if pending) of the proceeding.
- Interrogatory No. 16: opposer must provide applicant with its expert witness' correct address, telephone number, facsimile number and email address, if any.
- Interrogatory No. 21 asks opposer to identify which of its marks, if any, are used in connection with "high efficiency particulate air filters and integrated fan units for industrial use." Opposer must identify any such mark(s). If none, opposer must state "none."
- Interrogatory Nos. 22 and 24 ask opposer to identify the one product and the mark appearing thereon that opposer claims is closest to applicant's use of its mark, and indicate the application serial no. or registration no. of such mark, if applicable. Opposer must answer the interrogatories.
- Interrogatory Nos. 23, 25, and 26: Each of these interrogatories seeks to learn information about the goods upon which opposer actually uses its mark. Opposer may not merely point to the list it created of its alleged marks (which opposer has made a part of the notice of opposition) as responsive to these questions. Opposer must state, using common commercial terms, the goods that applicant requests be identified, and the trademarks used in connection therewith.
- Interrogatory Nos. 27 and 28 ask opposer to state the legal and factual basis for its claims. The Board has already ruled that opposer must answer applicant's discovery requests without objection. Opposer must

respond, but opposer need not include privileged information, if any.⁸

- Interrogatory No. 29 seeks an identification of all mark(s) that opposer claims have a "distinctiveness that will be blurred." Opposer must do more than repeat the listing of applications and registrations contained in the notice of opposition. Opposer must identify any relevant mark by specifying the mark and its application or registration number, if applicable.
- Interrogatory No. 30 seeks information on any "purchasers referred to in paragraph 31 of the notice of opposition." Opposer answered: "Raymond Webber." Opposer must provide Mr. Webber's address, telephone number, facsimile number, and email address, if any.
- Interrogatory No. 37 seeks information relating to applicant's requests for admissions. Opposer must answer the interrogatory by providing opposer's legal and factual basis for "not unqualifiedly" admitting any specific request for admission. Opposer must answer the interrogatory fully and completely, but opposer need not provide any privileged information.

Turning to applicant's document production requests, opposer responds to every question but four (out of 44) with the same response: "the opposer will produce any documents in its possession that it can locate that are responsive to this request." Opposer has had ample opportunity to locate responsive documents (these responses were produced November 4, 2003), but has failed to do so. Accordingly, opposer shall be estopped from introducing, as part of opposer's

⁸ Even where, as here, a party is otherwise held to have waived its right to make objections to the merits of discovery requests, the Board generally is not inclined to hold the party to have waived its right to claim that information sought by a discovery request is a trade secret, is business-sensitive or otherwise confidential, is subject to attorney-client or a like privilege, or comprises attorney work product.

evidence on the case, any information sought in the requests that opposer does not produce within twenty days from the mailing date of this order (providing that applicant raises the matter by objecting to the evidence in question on that ground, and preserves the objection in its brief on the case). See TBMP § 527.01(e).

Four of the document production requests prompted different responses:

1. Document Production Request No. 1. Applicant asks for documents evidencing the first use of the mark STEALTH for each product in connection with which opposer claims use. Opposer answers that it cannot currently locate any documents. Opposer must produce all relevant documents or affirmatively state that none exist.
2. Document Production Request No. 23. Opposer states that it has no documents proving or tending to prove that it does not own a family of marks. This answer is sufficient.
3. Document Production Request No. 29. Applicant asks for a copy of opposer's 1999 Licensing Resource Directory, which is cited in paragraph 21 of the notice of opposition. Opposer must produce the directory or paragraph 21 shall be considered stricken from the notice of opposition.
4. Document Production Request No. 39. Applicant seeks all documents that support opposer's failure to unquestionably admit any of the admissions contained in applicant's requests for admissions. Applicant further seeks all documents that support opposer's denial of any of the requests for admissions. Opposer must produce all relevant documents or affirmatively state that none exist.

Applicant's motion to compel is hereby granted, and opposer is allowed until **twenty days** from the mailing date of this order to provide full and complete responses to

applicant's interrogatories and to produce all responsive documents in response to applicant's requests for production of documents. Opposer is further reminded of its obligation to conduct a thorough search of its records for responsive evidence and to supplement any answers with responsive evidence throughout this proceeding. See Fed. R. Civ. P. 26(e)(2).

Inasmuch as opposer has now twice been ordered to respond to applicant's document production requests, opposer is hereby sanctioned to send applicant any and all copies of responsive documents by the "Express Mail Post Office to Addressee" service of the United States Postal Service, unless applicant selects an alternate method of production.

Should opposer fail to comply with this order granting applicant's motion to compel, applicant may move for entry of an appropriate sanction, including entry of judgment against opposer. See Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2); see also, *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000); *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984); and TBMP § 527.01.

SUMMARY

Opposer's motion for summary judgment is denied.

Applicant's cross-motion for summary judgment is denied. Applicant's cross-motion for partial summary judgment is granted in part and denied in part.

Opposer's motion to amend the notice of opposition is granted in part and denied in part. Opposer has twenty days from the mailing date of this order to further amend the complaint, failing which paragraphs 16, 17 and 23 of the notice of opposition (asserting opposer's dilution claim) shall be stricken.

Applicant's motion to compel is granted. Opposer has the same twenty days from the mailing date of this order to respond fully and completely to applicant's first set of interrogatories and requests for production of documents and things.

Trial dates, including the close of discovery, are reset as indicated below.⁹

⁹ When opposer filed its motion for summary judgment, there were six days remaining in the discovery period. Applicant has been allowed additional time to review opposer's forthcoming answers to its discovery requests, and to conduct any follow-up discovery that it may deem necessary. On the other hand, opposer has shown no reason for extending its discovery period. Accordingly, opposer's discovery period has not been extended.

DISCOVERY PERIOD TO CLOSE : **December 15, 2004**
(for party in position of plaintiff)
DISCOVERY PERIOD TO CLOSE : **February 1, 2005**
(for party in position of defendant)

30-day testimony period for party in the position of **May 2, 2005**
plaintiff to close:

30-day testimony period for party in the position of **July 1, 2005**
defendant to close:

15-day rebuttal period for party in the position of the **August 15, 2005**
plaintiff to close:

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **thirty days** after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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

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HEPA CORPORATION

**PROVISIONS FOR PROTECTING
CONFIDENTIALITY OF INFORMATION
REVEALED DURING BOARD PROCEEDING**

Information disclosed by any party or non-party witness during this proceeding may be considered confidential, a trade secret, or commercially sensitive by a party or witness. To preserve the confidentiality of the information so disclosed, **either** the parties have agreed to be bound by the terms of this order, in its standard form or as modified by agreement, and by any additional provisions to which they may have agreed and attached to this order, **or** the Board has ordered that the parties be bound by the provisions within. As used in this order, the term "information" covers both oral testimony and documentary material.

Parties may use this standard form order as the entirety of their agreement or may use it as a template from which they may fashion a modified agreement. If the Board orders that the parties abide by the terms of this order, they may subsequently agree to modifications or additions, subject to Board approval.

Agreement of the parties is indicated by the signatures of the parties' attorneys and/or the parties themselves at the conclusion of the order. Imposition of the terms by the Board is indicated by electronic signature of a Board attorney or Administrative Trademark Judge at the conclusion of the order. If the parties have signed the order, they may have created a contract.¹⁰ The terms are binding from the date the parties or their attorneys sign the order, in standard form or as modified or supplemented, or from the date of imposition by a Board attorney or judge.

¹⁰ There may be a remedy at court for any breach of contract that occurs after the conclusion of this Board proceeding. See *Fort Howard Paper Co. v. C.V. Gambina Inc.*, 4 USPQ2d 1552, 1555 (TTAB 1987). See *also*, *Alltrade Inc. v. Uniweld Products Inc.*, 946 F.2d 622, 20 USPQ2d 1698 (9th Cir. 1991).

TERMS OF ORDER

1) **Classes of Protected Information.**

The Rules of Practice in Trademark Cases provide that all inter partes proceeding files, as well as the involved registration and application files, are open to public inspection. The terms of this order are not to be used to undermine public access to files. When appropriate, however, a party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

Confidential—Material to be shielded by the Board from public access.

Highly Confidential—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the parties and/or their attorneys.

Trade Secret/Commercially Sensitive—Material to be shielded by the Board from public access, restricted from any access by the parties, and available for review by outside counsel for the parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the parties.

2) **Information Not to Be Designated as Protected.**

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating party with the approval of the designating party.

3) **Access to Protected Information.**

The provisions of this order regarding access to protected information are subject to modification by written agreement of the parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the

parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.
- **Attorneys** for parties are defined as including **in-house counsel** and **outside counsel**, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.
- **Independent experts or consultants** include individuals retained by a party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the party or its attorneys.
- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their **attorneys** shall have access to information designated as **confidential** or **highly confidential**, subject to any agreed exceptions.

Outside counsel, but not in-house counsel, shall have access to information designated as **trade secret/commercially sensitive**.

Independent experts or consultants, non-party witnesses, and any other individual not otherwise specifically covered by the terms of this order may be afforded access to **confidential** or **highly confidential** information in accordance with the terms that follow in paragraph 4. Further, **independent experts or consultants** may have access to **trade secret/commercially sensitive** information if such access is agreed to by the parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

4) **Disclosure to Any Individual.**

Prior to disclosure of protected confidential or highly confidential information by any party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the party or attorney proposing to disclose the information has received the signed certification

from the individual. A form for such certification is attached to this order. The party or attorney receiving the completed form shall retain the original.

5) Disclosure to Independent Experts or Consultants.

In addition to meeting the requirements of paragraph 4, any party or attorney proposing to share disclosed trade secret/commercially sensitive information with an independent expert or consultant must also notify the party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice of the name, address, occupation and professional background of the expert or independent consultant.

The party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the parties must negotiate the issue before raising the issue before the Board. If the parties are unable to settle their dispute, then it shall be the obligation of the party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the parties have made to settle their dispute. The party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

6) Responses to Written Discovery.

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

7) Production of Documents.

If a party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding party makes documents available for inspection and copying by the inquiring party, all documents shall be considered protected during the course of inspection. After the inquiring party informs the responding party what documents are to be copied, the responding party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if

necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

8) Depositions.

Protected documents produced during a discovery deposition, or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the appropriate designation.

During discussion of any non-documentary protected information, the interested party shall make oral note of the protected nature of the information.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

9) Filing Notices of Reliance.

When a party or its attorney files a notice of reliance during the party's testimony period, the party or attorney is bound to honor designations made by the adverse party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

10) Briefs.

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing party, or any adverse party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this order.

11) Handling of Protected Information.

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

12) Redaction; Filing Material With the Board.

When a party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of

the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. **Occasions when a whole document or brief must be submitted under seal should be very rare.**

Protected information, and relevant portions of pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

CONFIDENTIAL

This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.

13) Acceptance of Information; Inadvertent Disclosure.

Acceptance by a party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

14) Challenges to Designations of Information as Protected.

If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties are unable to resolve

their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time.

The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

15) Board's Jurisdiction; Handling of Materials After Judgment.

The Board's jurisdiction over the parties and their attorneys ends with the entry of a final judgment, unless jurisdiction is restored by grant of a post-judgment motion or as the result of an appellate proceeding. After entry of judgment, the parties' handling of protected information and materials is governed only by any agreements to which the parties may agree.

16) Other Rights of the Parties and Attorneys.

This order shall not preclude the parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

By Order of the Board

Frances S. Wolfson
Interlocutory Attorney

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

CENTRAL MFG. CO.

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**ACKNOWLEDGMENT OF
AGREEMENT OR ORDER PROTECTING
CONFIDENTIALITY OF INFORMATION
REVEALED DURING BOARD PROCEEDING**

I, _____ [print name], declare that I have been provided with a copy of the Agreement or Order regarding the disclosure of, and protection of, certain types of information and documents during and after the above-captioned opposition or cancellation proceeding before the Trademark Trial and Appeal Board.

I have read the Agreement or Order and understand its terms and provisions, by which I agree to be bound. Specifically, I agree to hold in confidence any information or documents disclosed to me in conjunction with any part I take in this proceeding.

I declare under the penalty of perjury that these statements are true and correct.

[signature]

[print title, if applicable]

[date]