

ESTTA Tracking number: **ESTTA22871**

Filing date: **01/07/2005**

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

<b>Proceeding</b>	91159950
<b>Party</b>	Defendant PREMIUM PRODUCTS, INC. PREMIUM PRODUCTS, INC. P.O. Box 444 Mount Vernon, VA 22121
<b>Correspondence Address</b>	H. JAY SPIEGEL H. JAY SPIEGEL & ASSOCIATES P.O. BOX 444 MOUNT VERNON, VA 22121
<b>Submission</b>	Applicant's Response to Opposer's Motion For Summary Judgment
<b>Filer's Name</b>	H. Jay Spiegel
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<b>Signature</b>	/H. Jay Spiegel/
<b>Date</b>	01/07/2005
<b>Attachments</b>	Central.v.Premium.Response.010705.pdf ( 30 pages )

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**H. JAY SPIEGEL & ASSOCIATES**

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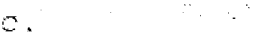
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January 7, 2005

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Re: Opposition No. 91159950  
Central Mfg. Co. v.   
Premium Products, Inc. 

Dear Clerk:

Kindly accept for filing, in the above-referenced Opposition proceeding, Applicant's Response in Opposition to Opposer's Motion for Summary Judgment, along with Exhibits 1-16 and the Declaration of H. Jay Spiegel. Pursuant to Opposer's claim of confidentiality, Exhibits 8, 10, 11, 15 and 16 are filed under Seal pursuant to the procedure set forth in the Protective Order entered in this Proceeding. The remaining Exhibits, namely, Exhibits 1-7, 9 and 12-14 are publicly available.

Today, a copy of the Response, without Exhibits, but including the Declaration of H. Jay Spiegel, will be posted on the ESTTA System for public viewing.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES



H. Jay Spiegel  
Counsel to Premium Products, Inc.

HJS:tg  
Enclosures

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

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CENTRAL MFG. CO.  
P.O. Box 35189  
Chicago, IL 60707-0189

Trademark: GROUND ZERO STEALTH

Opposer,

Application SN: 76/505,385

v.

Int. Class No.: 28

PREMIUM PRODUCTS, INC.  
(a Virginia Corporation)  
P.O. Box 11  
Mount Vernon, VA 22121

Filed: April 1, 2003

Published: November 25, 2003

Applicant.

Opposition No.: 91159950

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**APPLICANT'S RESPONSE IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

Numerous issues of fact exist that preclude entry of summary judgment in favor of Opposer. In Section IV below, these issues are discussed in detail. Among the issues of fact in dispute are the following:

1. Whether the mark "GROUND ZERO STEALTH" is dissimilar in sound, sight or meaning with respect to the mark "STEALTH."
2. Whether there is any similarity between the goods recited in Opposer's asserted registrations and applications and Applicant's proposed goods, namely, green football kicking tees.
3. That none of the registrations and applications asserted by Opposer claims use of a mark for any type of football equipment.

4. Whether Opposer has shown any commonality between the trade channels for the goods recited in Opposer's asserted registrations and applications, on the one hand, and the goods claimed in Applicant's application, namely, green football kicking tees.

5. Whether Opposer has shown any commonality or significant overlap between potential customers for the goods recited in Opposer's asserted registrations and applications, on the one hand, and potential customers for green football kicking tees.

6. Whether Opposer's alleged mark "STEALTH" is famous.

7. Whether Opposer's alleged mark "STEALTH" as embodied in numerous registrations and applications can be considered to be a "family" of marks.

8. Whether Opposer's licenses covering the asserted marks are "naked."

## I. INTRODUCTION

On or about July 6, 2004, Central Mfg. Co. (Opposer) filed a Motion for Summary Judgment (Opposer's Motion) against Premium Products, Inc. (Applicant) in the above-captioned Opposition proceeding seeking to have the Trademark Trial and Appeal Board (the Board) sustain Opposer's Notice of Opposition and deny Applicant the right to register the mark "GROUND ZERO STEALTH" (Applicant's mark) as Applicant has requested in Trademark application Serial No. 76/505,385. At first blush, the listing of registrations and applications asserted against Applicant in Opposer's Motion is quite impressive, a total of 34 Federal Registrations for marks consisting of solely the word "STEALTH" or the word "STEALTH" with one or more additional words, and additionally, 15 applications for registration of marks either solely including the word "STEALTH" or "STEALTH" in combination with one other word or expression. Of the registered marks, 10 of them are classified in International Class 28, the same Class where Applicant's proposed goods, namely, football kicking tees in a green color,

are classified. However, none of the registered marks or pending applications claims use of a mark for any type of football equipment.

When one more closely examines Opposer's portfolio of marks as described above, one finds that this seemingly impressive portfolio is better described as a mile wide and a millimeter deep. While 34 of the marks are, in fact, registered, proof of their use in interstate commerce is either scarce or non-existent. Virtually the only evidence presented by Opposer other than copies of Certificates of Registration are dozens upon dozens of purported license agreements between Opposer, its owner or related companies as Licensor, and any number of licensees. However, again, proof that the licensees are actually using the licensed marks in interstate commerce in association with goods covered by the registrations is somewhere between "slim and none," and most assuredly closer to "none."

For the reasons set forth below, Opposer's Motion fails to demonstrate an absence of material facts in dispute nor that Opposer is entitled to judgment as a matter of law. For those reasons, the Motion for Summary Judgment should be denied.

Pursuant to the Protective Order entered in this matter, Exhibit Nos. 8, 10, 11 and 16 are filed under seal. This Memorandum is presented without mention of any subject matter claimed by Opposer to be confidential and, as such, is publicly viewable in its entirety.<sup>1</sup>

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<sup>1</sup>Exhibit 16 consists of the entirety of the deposition transcript from the December 15, 2004 deposition of Leo Stoller. Although only portions of the transcript are marked confidential, the entirety of the transcript has been filed under seal to avoid confusion that would likely occur should the transcript be filed in two portions separately, confidential and non-confidential. Those portions of the transcript quoted in this Memorandum are either non-confidential, or confidential portions thereof are redacted.

## II. FACTUAL BACKGROUND

Applicant arranges for the manufacture of, distributes and sells football kicking tees. Spiegel Dec. at 2. On January 19, 1989, Applicant began using the mark "GROUND ZERO" (Applicant's "GROUND ZERO" mark) as a trademark in interstate commerce in association with football kicking tees. Spiegel Dec. at 3, and Exhibit 1.

Since the date of first use of "GROUND ZERO" by Applicant, "GROUND ZERO" has been continuously used in interstate commerce throughout the United States in association with Applicant's football kicking tees. Spiegel Dec. at 4. On January 5, 1996, an Affidavit under Sections 8 and 15 of the Lanham Act was filed with the U.S. Patent and Trademark Office and on June 25, 1996, the Section 8 portion was accepted and the Section 15 portion was acknowledged. See Exhibit 2. On February 14, 2000, a combined Affidavit under Sections 8 and 9 of the Lanham Act was filed in the U.S. Patent and Trademark Office and on September 22, 2000, the Section 8 aspect was accepted and the Section 9 aspect was granted, resulting in renewal of registration of Applicant's "GROUND ZERO" mark for an additional ten (10) years through February 13, 2010.

Applicant's "GROUND ZERO" mark for football kicking tees is the most prominent trademark in the field of football kicking tees. Spiegel Dec. at 6. The "GROUND ZERO" tee has been used by every NFL kicker in virtually every NFL football game including regular season games, play-off games and the Superbowl for the past 6 NFL seasons. Spiegel Dec. at 6. Exhibit 3 shows a compilation of advertisements from various sources concerning the "GROUND ZERO" line of football tees. Exhibit 4 shows copies of invoices, bills of lading, check stubs and

payment checks from every NFL team. Exhibit 5 shows copies of invoices and evidence of payment from sales of Applicant's "GROUND ZERO" tees to its distributor.<sup>2</sup>

To date, all of the football kicking tees sold by Applicant under the registered trademark "GROUND ZERO" have been manufactured in the color black. Spiegel Dec. at 7. In early 2003, Applicant began considering marketing a line of "GROUND ZERO" tees in the color green so that they would blend into the grass on a football field to reduce distraction to a kicker. Spiegel Dec. at 8. Applicant decided that combining their well recognized trademark "GROUND ZERO" with the word "STEALTH" to signify the "stealthy" nature of a green football tee placed within green grass, would be an appropriate way to associate those football tees with their source, Applicant. Spiegel Dec. at 9. Accordingly, on April 1, 2003, Applicant filed their application to register the mark "GROUND ZERO STEALTH" and it was assigned Serial No. 76/505,385. See Exhibit 6.

A Notice of Publication was mailed on November 5, 2003, indicating that the mark would be published for opposition on November 25, 2003. See Exhibit 7. The mark was published for opposition and this Opposition proceeding resulted.

During the course of discovery to date, a large volume of documents has been produced by Opposer in an effort to support Opposer's position as set forth in Opposer's Motion. These documents include four sets of Sales Quote Sheets collectively identified herein as Exhibit 8, Certificates of Registration collectively identified herein as Exhibit 9, license agreements collectively identified herein as Exhibit 10, invoices collectively identified herein as Exhibit 11, sample shipping labels collectively identified as Exhibit 12, a number of sheets alleged to show

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<sup>2</sup>Concerning the Exhibits 4 and 5 evidence, confidential information such as bank names, account numbers and contact persons has been redacted.

hang tags collectively identified as Exhibit 13, a plurality of documents purporting to comprise advertising materials from Opposer's alleged licensee Easton collectively identified as Exhibit 14, and documents from the sub-licensee of one of Opposer's alleged licensees collectively identified as Exhibit 15. As will become apparent in the arguments set forth below, none of this so-called evidence, taken alone or in combination, may be found to eliminate all possible questions of fact concerning whether there is a likelihood of confusion between Opposer's mark "STEALTH" and Applicant's mark "GROUND ZERO STEALTH" nor can Opposer, based upon this so-called evidence, demonstrate to the Board that Opposer is entitled to judgment as a matter of law.<sup>3</sup>

### **III. LEGAL STANDARD FOR ENTRY OF SUMMARY JUDGMENT**

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In considering such a motion, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

In Opposer's Motion, Opposer has alleged that there is a likelihood of confusion between its use of "STEALTH" as evidenced by the pleaded registrations (Exhibit 9) and Applicant's

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<sup>3</sup>Applicant has presented Exhibits 8 and 10-15 in anticipation of their presentation by Opposer in Opposer's forthcoming Reply Brief. In so presenting these Exhibits herewith, Applicant makes no concession as to their admissibility or probative value regarding the issues raised in Opposer's Motion.



proposed use of “GROUND ZERO STEALTH” for football kicking tees in a green color. The Board determines the issue of likelihood of confusion by focusing on the question whether the purchasing public would mistakenly assume that the applicant’s goods originate from the same source as, or are associated with, the goods in the cited registrations. *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973). The Board makes that determination on a case-by-case basis. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1084, 56 USPQ 2d 1471, 1474 (Fed. Cir. 2000). In making that determination, the Board is aided by application of the factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Those factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods ... described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark ... .
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used ... .
- (10) The market interface between the applicant and the owner of a prior mark ... .

- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion ... .
- (13) Any other established fact probative of the effect of use.

*Id.* at 1361, 177 USPQ at 567. Not all of the *DuPont* factors may be relevant or of equal weight in a given case, and “any one of the factors may control a particular case,” *In re Dixie Rests*, 105 F.3d 1405, 1406-07, 41 USPQ 2d 1531, 1533 (Fed. Cir. 1997).

#### IV. ARGUMENT

The 13 *DuPont* factors are analyzed below as pertains to this Opposition using the same numbering system set forth above as follows:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.**

When considering the respective entireties of the marks at issue, they are more dissimilar than similar as to appearance, sound, connotation and commercial impression. The vast majority of the marks asserted by Opposer are solely directed to the single word mark “STEALTH.” As understood from Exhibit 9, those marks relied upon by Opposer that are not solely directed to the word “STEALTH” make the marks more dissimilar with respect to Applicant’s mark “GROUNDED ZERO STEALTH.”<sup>4</sup> Thus, concentrating on Opposer’s registrations solely directed to the

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<sup>4</sup>Those registrations are for the alleged marks “CDSTEALTH,” “STEALTH TECHNOLOGY,” “STEALTH SQUAD,” “THE STEALTH,” “STEALTH ASSAULT,” “STEALTH 9MM,” “STEALTH 99MM SHADOW,” “STEALTH SPRAY,” “STEALTH SOAP,” “STEALTH DUST,” and “STEALTH POD.”

alleged mark "STEALTH," clearly that word is the sole and necessarily dominant feature of the mark. By comparison, in Applicant's mark, the dominant element is clearly "GROUND ZERO."

The Board has found that although two marks had similarities in common, it is often the first part of the mark that is most likely to be impressed upon the mind of a purchaser and remembered. *Presto Products, Inc. v. Nice-PAK Products, Inc.*, 9 USPQ 2d 1895, 1897 (TTAB 1988). In this case, Applicant's mark is "GROUND ZERO STEALTH" and the first portion of that mark is "GROUND ZERO," the most well recognized trademark in the narrow field of football placekicking tees.

When assessing the likelihood of confusion between compound word marks, one must determine whether there is a portion of the word mark that is dominant in terms of creating a commercial impression. TMEP § 1207.01(b)(viii). Although there is no mechanical test to select a "dominant" element of a compound word mark, consumers would be more likely to perceive a fanciful or arbitrary term rather than a descriptive or generic term as the source-indicating feature of the mark. *Id.* If the common element of two marks is "weak," in that it is generic, descriptive or highly suggestive of the named goods or services, consumers typically will be able to avoid confusion unless the overall combinations have other commonality. *Id.* See also *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *The U.S. Shoe Corp. v. Chapman*, 229 USPQ 74 (TTAB 1985); and *In re Istituto Sieroterapico E Vaccinogeno, Toscano "SCLAVO" S.p.A.*, 226 USPQ 1035 (TTAB 1985).

"GROUND ZERO" is clearly a fanciful or arbitrary term when related to football kicking tees. As explained above, Applicant chose to add the word "STEALTH" to "GROUND ZERO" to create a new mark because "STEALTH" is suggestive of the hiding of a green football tee

when placed in green grass. See Spiegel Dec. at 9. Thus, it is submitted that consumers would be more likely to perceive "GROUND ZERO" as the source-indicating feature of the mark "GROUND ZERO STEALTH." By contrast, the "STEALTH" marks asserted by Opposer can only rely upon "STEALTH" as the source-indicating feature. For these reasons, this factor clearly favors Applicant. In any event, there is a factual dispute as to whether the mark "GROUND ZERO STEALTH" is similar, in sound, sight and meaning, to "STEALTH."

**(2) The similarity or dissimilarity and nature of the goods ... described in an application or registration or in connection with which a prior mark is in use.**

"GROUND ZERO STEALTH" is intended to be used in interstate commerce as the source-indicator for football kicking tees in a green color. The table set forth below displays all of the registrations asserted by Opposer for marks including the word "STEALTH" and for goods in International Class 28.

<u>Registration Number</u>	<u>Mark</u>	<u>Goods</u>
1,332,378	STEALTH	Sporting goods, specifically, tennis rackets, golf clubs, tennis balls, basketballs, baseballs, soccer balls, golf balls, cross bows, tennis racket strings and shuttlecocks
1,766,806	STEALTH	Fishing tackle floats (bobbers)
1,867,087	STEALTH & DESIGN	Pool cue, pool tables, darts, billiard balls, cue cases, cue rack; billiard gloves
2,269,113	STEALTH ASSAULT	Hand-held units for playing electronic games
2,497,857	STEALTH SPRAY	Hunters' scent camouflage
2,497,858	STEALTH SOAP	Hunters' scent camouflage

2,657,452	STEALTH	Toys and sporting goods, namely, model airplane kits, toy boats, toy guns, toy robots, and toy soldiers
2,737,991	STEALTH	Fishing back support belts and harnesses; fishing belts, namely, back support belts as part of a fishing pole support harness; fishing belts, namely, back support belts for support of fishing poles with gimbal or uni-butt receiver; fishing belts, namely, back support belts for use on deep sea fishing vessels; fishing belts, namely, back support belts with quick release hook and loop shoulder straps; fishing belts, namely, adjustable shape back support belts
2,744,536	STEALTH DUST	Hunters' scent camouflage and neutralizer
2,892,249	STEALTH	Baseball, softball, t-ball bats

A Certificate of Registration of a mark upon the Principal Register ... shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the Certificate of Registration. Section 7(b), Lanham Act, 15 U.S.C. § 1057(b). Review of the registrations asserted by Opposer with goods in International Class 28 reveals that Opposer has never obtained registration for "STEALTH" for any type of football equipment whatsoever. As such, Opposer may not assert the presumption in 15 U.S.C. § 1057(b) of exclusive right to use the mark "STEALTH" against Applicant in this Opposition proceeding since the goods differ. Furthermore, a question of fact is raised (that is unresolved) as to whether use of the mark "STEALTH" on a diverse list of non-football related goods in International Class 28 raises a

likelihood of confusion concerning Applicant's proposed use of "GROUND ZERO STEALTH" in association with green football kicking tees.

It is noted that Opposer's Motion lists 15 applications and asserts them against Applicant. Of those applications, two list goods in International Class 28, namely, Serial Nos. 76/215,703 and 76/236,749. Concerning these applications, the former one corresponds to Registration No. 2,892,249 and the latter one corresponds to Registration No. 2,737,991. Both of these registrations are included in the table set forth above. As such, none of the remaining 13 applications lists goods in International Class 28. Thus, an unresolved question of fact is raised as to whether there is a likelihood of confusion between the "STEALTH" marks for which the 13 remaining applications are pending and Applicant's proposed mark "GROUND ZERO STEALTH," particularly where none of the cited applications includes a listing of any goods in International Class 28.

Opposer has failed to cite so much as a single registration or application against Applicant that claims use of any mark whatsoever for any type of football equipment whatsoever. Despite this deficiency, Opposer has presented evidence purporting to show hang tags alleged to have been used in association with footballs and football linemen gloves (see Exhibit 13). However, Opposer has presented no evidence that these so-called hang tags have actually been used in a consistent basis in association with any football products as they travel in interstate commerce as a source-indicator identifying Opposer. Opposer's representative, Leo Stoller, testified at his deposition on December 15, 2004, that Opposer has sold footballs under the mark "STEALTH" to a number of high schools and colleges, see Exhibit 16, Stoller Dep. at 18 and 30, however, Opposer has provided absolutely no evidence that such sales ever occurred.

The only evidence Opposer has produced in an attempt to demonstrate sales of sporting goods under the mark "STEALTH" consists of the documents collectively referred to above as Exhibit 14, the catalog pages from the Easton catalog purporting to show sales of baseball bats. The Easton documents are insufficient as a matter of law to prove that Opposer or their licensee, Easton, has actually used the mark "STEALTH" in interstate commerce in association with the claimed baseball bats. First, Opposer has not established that they have personal knowledge that the Easton advertising materials were produced by Easton or that those advertisements were actually disseminated to the public. Fed.R.Evid. 901 provides that the authentication requirement for purposes of admissibility is satisfied only when there is "evidence sufficient to support a finding that the matter in question is what it purports to be." Without a declaration of an agent or a representative of Easton, Opposer is unable to authenticate the Easton advertising materials and they should not be considered by the Board in support of Opposer's Motion.

Furthermore, Opposer has offered the Easton advertising materials to prove the alleged truth of what is asserted therein, namely, Opposer offers the advertising materials to prove that Easton is actually selling the goods listed in the advertising materials. As such, the advertising materials constitute inadmissible hearsay and should not be considered by the Board in determining the issue of likelihood of confusion. Fed.R.Evid. 801(c). Hearsay is unusable in summary judgment proceedings. See, for example, *Minor v. Ivy Tech State College*, 174 F.3d 855, 856 (7<sup>th</sup> Cir. 1999).

Furthermore, even if the evidence of sales of baseball bats were credible and admissible, baseball bats are far afield from football placekicking tees. Thus, Opposer has presented absolutely no credible evidence that the mark "STEALTH" is being used in interstate commerce in connection with similar goods. For these reasons, this factor clearly favors Applicant.

**(3) The similarity or dissimilarity of established, likely-to-continue trade channels.**

As a matter of law, since neither the registrations asserted by Opposer nor Applicant's application specify the channels of commerce, the Board must assume that the goods identified in the application for which registration is opposed move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers for such goods. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Of course, Opposer has provided absolutely no proof of any use of its "STEALTH" marks in any trade channels. Additionally, as explained above, none of the registrations or applications asserted by Opposer claims use of a mark for any type of football equipment. As such, an unresolved question of fact arises as to whether the goods specified in the asserted registrations and applications move in the same channels of trade that would be normal for football equipment. Further, an unresolved question of fact arises as to whether the customers for football equipment would be the same or have significant overlap with potential customers for the goods recited in Opposer's asserted registrations and applications. These questions of fact have not been resolved by Opposer.

**(5) The fame of the prior mark ... .**

In Opposer's Motion, Opposer has alleged that Opposer's mark is famous. Opposer's Motion at 7. In this regard, Opposer has made reference to a decision dated January 14, 1997, in the Northern District of Illinois, Case No. 96 C 2037, in which the District Court Judge allegedly stated the following:

"the mark STEALTH has also created a distinctive designation of the origin on which it has place and is widely recognized by the public."



In fact, the very same Court later ruled that Opposer's alleged "STEALTH" trademark is not famous. In *S Industries, Inc. v. Diamond Multimedia Systems, Inc.*, 45 USPQ 2d 1705 (ND IL. 1998), the Court stated that "[I]n any event, Plaintiff's STEALTH mark is not famous." 45 USPQ 2d at 1712. The Court went on to state that: "Plaintiff's STEALTH mark does not remotely meet the criteria of a famous mark." 45 USPQ 2d at 1713. Going on, the Court stated the following:

"S Industries' own use of the STEALTH mark has been adjudged by a federal court to infringe the STEALTH trademark owned by the Timex Corporation. *Timex Corp. v. Stoller*, 961 F. Supp. 374, 379-380 (D. Conn. 1997) (Timex awarded treble damages and reasonable attorney's fees from defendant Stealth Industries, but case settled during the appeal). Moreover, S Industries has not used the STEALTH mark for an extended time period like PANAVISION or TOYS 'R' US. Plaintiff has presented no evidence of any substantial publicity or advertising, other than two catalogs, a few advertising contracts with retailers, and three solicitation letters, to establish the extent to which plaintiff's STEALTH mark is recognized or promoted in the marketplace. Thus, as a matter of law, we find that plaintiff's evidence is insufficient to establish that its STEALTH mark is famous. Summary judgment on Count IV is granted in defendants' favor." *Id.*<sup>5</sup>

The Board is in the unique position of being the entity that decides whether a junior mark in an Intent to Use application under Section 1(b) of the Lanham Act dilutes a senior mark for purposes of registration. In this circumstance, the Board determines whether there is a likelihood of dilution rather than actual dilution. *Toro Co. v. ToroHead, Inc.*, 61 USPQ 2d 1164 (TTAB 2001), *NASDAQ Stockmarket, Inc. v. Antarctica, s.r.l.*, 69 USPQ 2d 1718 (TTAB 2003). Here, the question is not one of fame to prove dilution, but fame as a component of the likelihood of

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<sup>5</sup>Leo Stoller, as the principal of both S Industries, Inc. and Opposer herein, had an ethical obligation to bring to the attention of the Board the decision in *S Industries, Inc. v. Diamond Multimedia Systems, Inc.* during his discussion of whether or not the mark STEALTH is famous. Mr. Stoller failed to discharge this ethical obligation.

confusion analysis. Where the question is whether a mark is famous pursuant to a likelihood of confusion analysis, the Board has held that the question of fame must meet a lesser test than the test for fame in a dilution analysis. See *Toro*, 61 USPQ 2d at 1170. Also, *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Fame of an Opposer's mark or marks, if it exists, plays a dominant role in the process of balancing the *DuPont* factors. *Recot, Inc. v. Benton*, 214 F.3d 1322, 1327, 54 USPQ 2d 1894 (Fed. Cir. 2000). Thus, famous marks enjoy a wide latitude of legal protection. *Id.* This is true because famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* A strong mark casts a long shadow which competitors must avoid. *Kenner Parker Toys v. Rose Art Industries, Inc.*, 963 F.2d 350, 353, 22 USPQ 2d 1453, 1456 (Fed. Cir. 1992). A famous mark is one with extensive public recognition and renown. *Id.*

In a likelihood of confusion context, fame of a mark may be measured indirectly through, among other things, the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident. See *Nina Ricci, S.A.R.L. v. E.T.F. Enterprises, Inc.*, 889 F.2d 1070, 1072, 12 USPQ 2d 1901, 1902 (Fed. Cir. 1989); *Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1146-47, 227 USPQ 541, 542 (Fed. Cir. 1985); *Specialty Brands Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 674-75, 223 USPQ 1281, 1284 (Fed. Cir. 1984). Of course, direct evidence of fame such as widespread consumer polls may be compelling, however, such evidence is not presented by Opposer herein.

In this case, Opposer has failed to produce even a scintilla of evidence concerning sales, revenues, or advertising revenues. The only mention of sales revenues came on pages 100-101 of the Deposition Transcript of Leo Stoller dated December 15, 2004, in which he stated the following:

“We have generated over \$ (amount confidential) in Stealth-branded goods sales, ...” Stoller Dep. at 100:11-12.

“Q. Would you repeat the dollar figure you just said?

A. Over \$ (amount confidential).

Q. And do you have any documentary proof of those -- of those sales on goods bearing the mark Stealth?

A. My testimony. I'm the sole owner, my testimony.”  
Stoller Dep. at 100:21 to 101:4.

Applicant submits that Mr. Stoller's testimony as the sole basis to demonstrate fame of his “STEALTH” trademarks is woefully inadequate.

In *S Industries, Inc. v. Diamond Multimedia Systems, Inc.*, 45 USPQ 2d 1705, 1711 (ND IL. 1998), the Court took a dim view of the very same Leo Stoller's self-serving affidavit submitted in an attempt to defeat a Motion for Summary Judgment. Similarly, in *S Industries, Inc. v. Stone Age Equipment, Inc.*, 49 USPQ 2d 1071 (ND IL. 1998), the same Court took a dim view of Leo Stoller's attempt to rely solely on testimony without the support of documentary evidence.

“Stoller's testimony is no better. His declaration contains several conclusory statements that his companies ‘advertised, marketed, and sold’ athletic shoes ‘[f]rom at least as early as 1985 to the present date.’ Absolutely nothing in the record supports this.” 49 USPQ 2d at 1081.

In *Shen Manufacturing Co., Inc. v. The Ritz Hotel Limited* (Case No. 04-1063, - 1076 (Fed. Cir. Decided December 17, 2004)), the Federal Circuit concluded that despite the facts that

Shen's RITZ trademark has been in use for more than a century, is the subject of more than 5 million dollars worth of annual sales, and is the subject of hundreds of thousands of dollars of annual advertising expenditures, that mark RITZ was not famous. In the face of this Federal Circuit Decision, it is inconceivable that the Board could find Opposer's mark "STEALTH" famous, where Opposer has produced absolutely no evidence of sales and advertising revenues. For these reasons, this factor clearly favors Applicant.

**(6) The number and nature of similar marks in use on similar goods.**

Opposer has presented no evidence of the use of similar marks on similar goods. The closest Opposer has come is in its presentation of inadmissible advertising materials purporting to show the sales of baseball bats and non-probative samples of alleged hang tags used to sell footballs and football gloves. None of this evidence should be seriously considered by the Board. For these reasons, this factor clearly favors Applicant.

**(7) The nature and extent of any actual confusion.**

Opposer has presented absolutely no evidence of actual confusion.

**(9) The variety of goods on which a mark is or is not used ... .**

In asserting 34 trademark registrations, Opposer has alleged that the mark "STEALTH" in its various variations is used on a variety of goods. However, the only alleged proof produced by Opposer consists of inadmissible advertising materials concerning its use on baseball bats and other advertising materials concerning its use on bicycle racks. This so-called evidence, most, if not all, of which is inadmissible, is not believed to favor Opposer.

**(10) The market interface between the applicant and the owner of a prior mark ... .**

There is no market interface between Applicant and the owner of a prior mark.

**(11) The extent to which applicant has a right to exclude others from use of its mark on its goods.**

Should Applicant begin to use the mark "GROUND ZERO STEALTH" in interstate commerce, Applicant believes it has the right to stop any third party from using any mark including the wording "GROUND ZERO" plus any other wording or logo for the sale of football kicking tees. "GROUND ZERO" has been registered since 1990, is now incontestable, and has been renewed. As such, this factor favors Applicant.

**(12) The extent of potential confusion ... .**

Opposer has provided absolutely no probative documentary evidence of potential confusion.

**(13) Any other established fact probative of the effect of use.**

Based upon the evidence produced by Opposer, it is submitted that, when considering the strength of Opposer's marks, those marks should be considered to be extremely weak. Opposer has alleged that the 34 registrations it asserts against Applicant in this Opposition proceeding are "famous." Opposer's Motion at 4. However, merely registering marks in the U.S. Patent and Trademark Office only provides a presumption of the ownership of those marks and that presumption may very well be rebutted.

A trademark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article. *Hanover Star Milling Co. v. Metcalf*, 240 US 403, 416 (1916). A trademark is treated as merely a protection for the goodwill, and not the subject of

property except in connection with an existing business. 240 US at 414. The evidence presented by Opposer to demonstrate use of the marks it asserts against Applicant is virtually non-existent if not, in fact, non-existent.

In Opposer's Motion, Opposer alleges that it "has built its STEALTH brand over 20 years into a major national brand." This is in the nature of an argument that the Board should treat the "STEALTH" marks plead by Opposer as a so-called family of marks. However, merely registering marks is manifestly incompetent to establish the extent of use of the registered marks, whether one or more of the registered marks have been promoted, advertised, used or displayed in any manner likely to cause an association or "family" of marks, or that at the least, a good number of the registrations have become known or familiar to purchasers of the product claimed by Opposer. *Consolidated Foods Corporation v. Sherwood Medical Industries, Inc.*, 177 USPQ 279, 282 (TTAB 1973). The Board cannot assume any knowledge on the part of the purchasing public of mere registrations in the U.S. Patent and Trademark Office. *Id.*

A family of marks is a group of marks having a recognizable common characteristic wherein the marks are composed and used in such a way that the public associates not only the individual marks but the common characteristic of the family with the trademark owner. *J & J Snack Foods, Corp. v. McDonald's Corp.*, 18 USPQ 2d 1889, 1891 (Fed. Cir. 1991). Simply using a series of similar marks does not of itself establish the existence of a family. *Id.* There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods. *Id.* Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family. *Id.* It is thus necessary to consider the use, advertisement and distinctiveness of the marks including

assessment of the contribution of the common feature to the recognition of the marks as of common origin. 18 USPQ 2d at 1891-92. Here, Opposer has provided absolutely zero evidence that would support establishment of any of these factors.

In support of its position, Opposer has produced dozens upon dozens of agreements purporting to demonstrate licensing of the trademarks registered by Opposer to various third parties. However, again, as explained above, the evidence produced by Opposer in an attempt to demonstrate that the marks in question are actually in use in interstate commerce is either woefully inadequate or completely non-existent. Opposer produced 4 sales quote sheets directed to Opposer's supposed customers as shown in Exhibit 8. Each of the 4 sets of sales quote sheets is allegedly directed to a different entity identified in this Response as parties A, B, C and D. In the Board's Order of September 10, 2004, Opposer was ordered to produce evidence that the sales quote sheets actually resulted in actual sales of products bearing the trademark "STEALTH." In response to this Order, Opposer failed to produce a single piece of paper that would demonstrate such sales. Rather, Opposer produced at the Deposition of Leo Stoller on December 15, 2004, a thick stack of invoices supposedly sent to another one of Opposer's alleged customers, identified herein as another entity, party E. When questioned about this at his Deposition, Mr. Stoller admitted that he did not produce any evidence of actual sales resulting from the sales quote sheets. Stoller Dep. at 98:6 - 100:20.

Furthermore, the invoices produced by Mr. Stoller purportedly showing sales of items to party E made no mention of the mark "STEALTH" in association with any of the goods allegedly sold to party E.

"Q. So to summarize your answer in a one-word answer, yes or no, is the trademark Stealth shown anywhere on any of those invoices in association with a description of a product sold?

- A. The only place the mark Stealth is shown is on the invoice on the company selling the goods.  
Q. And, again, what is that company?  
A. Stealth Industries, Inc.”

Stoller Dep. at 102. Thus, the invoices produced by Opposer are not even invoices originating from Opposer, but from another entity, Stealth Industries, Inc.

For the reasons set forth above, the documents produced purporting to demonstrate promotion of “STEALTH” baseball bats by alleged licensee J.S. Easton and Company are inadmissible and may not be considered by the Board in this determination.

Further concerning any alleged strength of the marks asserted by Opposer in this Opposition proceeding, each of them appears to be the subject of at least one third party license. It is well established that a trademark owner may grant a license and remain protected as the registrant provided quality control of the goods and services sold under the trademark by the license is maintained. *Barcamerica International USA Trust v. Tyfield Importers, Inc.*, 62 USPQ 2d 1673, 1677 (9<sup>th</sup> Cir. 2002). But uncontrolled or naked licensing may result in the trademark ceasing to function as a symbol of quality and controlled source. *Id.* citing *McCarthy on Trademarks and Unfair Competition* § 18:48, at 1879 (4<sup>th</sup> Ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, “a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.” *Id.* citing *Moore Business Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5<sup>th</sup> Cir. 1992).<sup>6</sup>

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<sup>6</sup>Applicant does not allege, in Applicant’s Opposition to the Motion for Summary Judgment that Opposer has abandoned any of its registrations. Applicant merely asserts that evidence of naked licensing goes to the lack of strength of the marks asserted by Opposer. Applicant does, however, reserve the right to amend its Answer to the Notice of Opposition to allege abandonment of one or more of the registrations asserted by Opposer in this Opposition proceeding, and to file separate Petitions to cancel them.



Opposer has provided absolutely zero credible evidence that it controls the nature and quality of the goods sold under the marks it has licensed to third parties as evidenced by the dozens upon dozens of license agreements produced by Opposer and collectively referred to herein as Exhibit 10. During the Deposition of Leo Stoller, this issue was addressed. In the Board's Order of December 10, 2004, the Board ordered Opposer to produce documents attesting to the current status of the license agreements, i.e., whether the agreements remain in force. In response to this Order, Opposer's representative, Leo Stoller, was asked whether Opposer had produced any documents attesting to the current status of the agreements. In response, Opposer replied "Just my testimony." Stoller Dep. at 64:18.

During the course of Mr. Stoller's Deposition, Mr. Stoller was closely questioned concerning the steps taken to control the nature and quality of the goods sold under the marks allegedly licensed by Opposer and its related companies. This discussion may be found on pages 75-90 of the Stoller Deposition Transcript. In summarizing the testimony, the following exchange occurred as documented on page 90 of the Stoller Deposition Transcript:

"Q. So in order to substantiate that Opposer is controlling the nature and quality of the goods sold under all of these license agreements, plus any other ones that may not have been produced concerning the licensing of the mark Stealth, the proof that you provide is solely your testimony?

A. My oral testimony under oath as the controlling entity, right."

Thus, the only proof produced by Opposer to demonstrate that the license agreements used to support Opposer's position in this Opposition proceeding, are not naked licenses, is the oral testimony of Opposer's representative, Leo Stoller, under oath. It is respectfully submitted that Mr. Stoller's testimony under oath is woefully inadequate to demonstrate anything, much

less the strength of the marks asserted in this Opposition proceeding. Mr. Stoller's lengthy history in proceedings before the Board is replete with numerous instances of dishonest actions on the part of Mr. Stoller that have been sanctioned. In fact, in this very Opposition proceeding, Mr. Stoller was found to be violating U.S. Postal Regulations and was sanctioned with an Order requiring him to obtain a hand canceled postmark for any correspondence he might serve on Applicant during the remainder of this Opposition proceeding. The Board recounted some of the history of Mr. Stoller's sanctions in a Decision dated February 19, 2004, in Opposition Nos. 91154585 and 91154617 at pages 20-21, footnote 15. In the Board's Decision dated December 12, 2001, in Opposition No. 115931, *Central Mfg. Inc. v. Third Millenium Technology Inc.*, the Board found that Leo Stoller "has, in this case, twice filed papers based on false statements and material misrepresentations and, moreover, that he has engaged in a pattern of submitting such filings to this Board." Decision at 13-14. Accordingly, in that case, the Board issued a sanction against Mr. Stoller. In *S Industries, Inc. v. S&W Sign Company, Inc.*, Opposition No. 102907, Mr. Stoller was ordered to copy by hand several sections of the Trademark Rules and the Federal Rules of Civil Procedure "to demonstrate that he has read them and, hopefully, to help him appreciate their applicability to this case." Decision at 10.

Since the Board is well acquainted with the sanctions it has imposed on Mr. Stoller throughout his history of dealings before the Board, there is no need to provide more examples from the numerous ones available. Suffice to say, arguments made by Mr. Stoller solely relying upon his own sworn testimony and without support from any documentary evidence whatsoever are not credible in any respect. For these reasons, this factor clearly favors Applicant.

V. CONCLUSION

For the reasons set forth above, Opposer cannot possibly demonstrate an absence of an issue of fact so as to permit the Board to enter Summary Judgment in favor of Opposer, nor can Opposer demonstrate to the Board that it is entitled to a judgment as a matter of law.

As such, it is respectfully requested that the Motion for Summary Judgment be denied.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES



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

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CENTRAL MFG. CO.  
P.O. Box 35189  
Chicago, IL 60707-0189

Opposer,

v.

PREMIUM PRODUCTS, INC.  
(a Virginia Corporation)  
P.O. Box 11  
Mount Vernon, VA 22121

Applicant.

Trademark: GROUND ZERO STEALTH

Application SN: 76/505,385

Int. Class No.: 28

Filed: April 1, 2003

Published: November 25, 2003

Opposition No.: 91159950

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Box TTAB/NO FEE

**DECLARATION OF H. JAY SPIEGEL**

The undersigned, H. JAY SPIEGEL, makes the following declaration:

- (1) That I am the owner of Premium Products, Inc. (Premium), Applicant in the above-captioned Opposition proceeding.
- (2) That Premium arranges for the manufacture of, distributes and sells football kicking tees.
- (3) That on January 19, 1989, Premium began using the mark "GROUND ZERO" as a trademark in interstate commerce in association with football kicking tees.
- (4) That since the date of first use of "GROUND ZERO" by Premium as set forth in paragraph (3) above, Premium has been continuously using the mark "GROUND ZERO" in

interstate commerce throughout the United States in association with Premium's football kicking tees.

(5) That Premium is the owner of record of U.S. Trademark Registration No. 1,582,737 for "GROUND ZERO" for football kicking tees.

(6) That Premium's "GROUND ZERO" mark for football kicking tees is the most prominent trademark in the field of football kicking tees since Premium's one-inch "GROUND ZERO" tee has been used by every NFL kicker in virtually every NFL football game played for the past 6 NFL seasons including regular season games, playoff games, and the Superbowl.

(7) That to date, all of the football kicking tees sold by Premium have been manufactured in the color black.

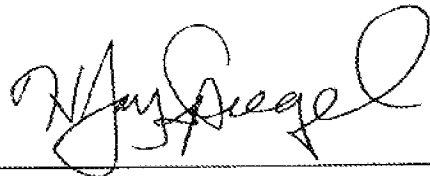
(8) That in early 2003, Premium began considering marketing a line of "GROUND ZERO" tees in the color green so that they would blend into the grass on a football field to reduce distraction to a kicker.

(9) That in early 2003, Premium decided to combine their trademark "GROUND ZERO" with the word "STEALTH" to signify the "stealthy" nature of a green football tee placed within green grass and that this would be an appropriate way to associate those football tees with Premium, their source.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting

therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "H. Jay Spiegel". The signature is written in black ink and is positioned above a horizontal line.

H. Jay Spiegel

1/7/05

Date

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

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CENTRAL MFG. CO.

P.O. Box 35189

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Opposer,

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PREMIUM PRODUCTS, INC.

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**CERTIFICATE OF SERVICE**

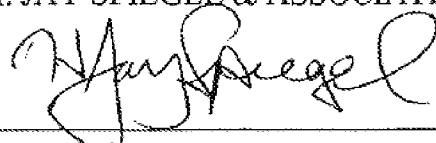
I hereby certify that true copies of the foregoing APPLICANT'S RESPONSE IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT along with Exhibits 1-16 and the Declaration of H. Jay Spiegel were served by First Class Certified Mail, postcard receipt requested, postage prepaid, this 7th day of January, 2005, on the following Opposer:

Mr. Leo Stoller  
CENTRAL MFG. CO.  
P.O. Box 35189  
Chicago, IL 60707-0189.

DATED: January 7, 2005

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES



---

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