

ESTTA Tracking number: **ESTTA320107**

Filing date: **12/03/2009**

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

Proceeding	91177234
Party	Plaintiff Cardinal Health 303, Inc.
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Date	12/03/2009
Attachments	Opposer's Trial Brief.pdf (37 pages)(133234 bytes)

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OPPOSER/PETITIONER'S TRIAL BRIEF

TO THE HONORABLE UNITED STATES TRADEMARK TRIAL AND APPEAL BOARD:

Opposer/Petitioner, Cardinal Health 303, Inc. (“Cardinal” or “Opposer/ Petitioner”), in support of its Combined Opposition Nos. 91-177,234, 91-177,365, 91-177,366, 91-177,367 to Application Nos. 78/744,914 (ALARIS SELECT); 78/945,025 (ALARIS ADVANTAGE); 78/937,067 (ALARISWARE); 78/945,352 (ALARIS) of The Alaris Group, Inc., (“Alaris Group”) and its Cancellation No. 92-048,172 to Registration No. 2,930,177 (ALARIS) of The Alaris Group, Inc., (“Alaris Group” or “Applicant/Registrant”), would respectfully show the Board as follows:

I. RECORD EVIDENCE

The evidence of record consists of:

1. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 8, 2009, which includes U.S. Registration No. 2,371,410 ALARIS and U.S. Registration No. 2,279,724 ALARIS (“Cardinal June 8 Notice of Reliance”)
2. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 8, 2009, which includes the Stipulated Testimony of Eric Gilmore (“Gilmore Testimony”)
3. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Patricia West and attachments (“West Testimony”)
4. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Gary Jollon and attachments (“Jollon Testimony”)
5. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Jason Woodbury and attachments (“Woodbury Testimony”)
6. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of B. Michael Betz (“Betz Testimony”)
7. Cardinal’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Declaration of Larry E. Boggs (“Boggs Declaration”)

8. Cardinal's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Erin N. Waltz and attachments ("Waltz Testimony")
9. Cardinal's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Richard Giometti and attachments ("Giometti Testimony")
10. Cardinal's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Cindy J. Burns and attachments ("Burns Testimony")
11. Cardinal's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Stipulated Testimony of Timothy Vanderveen and attachments ("Vanderveen Testimony")
12. Cardinal's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated June 9, 2009, which includes the Deposition and Exhibits of Nancy Caven ("Caven Deposition")
13. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes the Declaration of Kelly Flanagan ("Flanagan Declaration")
14. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes the Declaration of Shelley K. Hawthorne ("Hawthorne Declaration")
15. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes the Declaration of Nancy Caven ("Caven Declaration")
16. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes U.S. Application Nos. 78/945,352; 78/945,025; 78/937,067; 78/754,166; 78/744,914 and U.S. Registration Nos. 2,510,667 and 2,930,177 and their related file wrappers
17. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes the Second Supplemental Declaration of Nancy Caven ("Supplemental Caven Declaration")
18. Alaris Group's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated August 10, 2009, which includes documents produced by Alaris Group 001; 0081 to 0158; and 0700 to 0716

II. PROCEDURAL HISTORY

On May 10, 2007, Cardinal filed its Notice of Opposition to Alaris Group's application Serial No. 78/744914 (ALARIS SELECT), and on May 17, 2007, Cardinal filed Notices of Opposition to Alaris Group's applications Serial Nos. 78/945532 (ALARIS), 78/937067 (ALARISWARE) and 78/945025 (ALARIS ADVANTAGE). On September 25, 2007, Cardinal filed its Petition to Cancel Alaris Group's Registration No. 2,930,177 (ALARIS). The actions were consolidated by Order of the Board on October 4, 2007. On November 7, 2007, Cardinal amended its Notices of Opposition and Petition to Cancel to delete the claims that had comprised Count Two of the original Notices of Opposition, and to cite an additional registration as basis for its oppositions and cancellation. On February 19, 2008, Alaris Group filed a Motion for Summary Judgement, which included (in the alternative) a Motion for Leave to File a Counterclaim for Cancellation. Both Motions were denied by the Board on September 3, 2008. Accordingly, Cardinal opposes the above-referenced applications, and seeks to cancel the above-referenced registration, based on the priority of its Registration Nos. 2,279,724 and 2,371,410 for ALARIS, and the likelihood for confusion between Cardinal's prior common law use of and ALARIS registrations and Alaris Group's ALARIS registration and applications.

III. STATEMENT OF THE CASE

The ALARIS mark is one of the most well-known marks in the healthcare industry. Cardinal and its predecessors have made extensive use of the mark since 1997 on a wide variety of medical products and services relating to intravenous ("IV") medication delivery and infusion therapy, patient monitoring and related products and services. ALARIS-branded products are used by technicians, nurses and doctors on patients in every conceivable healthcare setting throughout the United States, including hospitals, nursing homes, ambulatory care facilities and patient's homes. From 1998 through mid 2009, domestic sales of ALARIS-branded products

have totaled more than \$4 billion, and Cardinal and its predecessors have spent millions of dollars promoting ALARIS products and services to professionals in the healthcare community.

The Alaris Group, Inc. began in 1999 as a five-person consulting group focused on the worker's compensation industry. Although Alaris Group was aware of Cardinal's ALARIS marks at least as early as 2003, Alaris Group chose to shorten its name to ALARIS and obtained a new federal registration for the new mark on March 8, 2005. Along with changing the mark, Alaris Group revised its identification of services from "consulting services . . ." to "medical consulting services. . .". Later that same year, Alaris Group filed another trademark application for yet another new name, ALARIS SELECT, which also adopted the new wording "medical consulting services. . .". In 2006, Alaris Group undertook a strategic initiative to expand geographically via franchising. In anticipation of and/or coinciding with its impending franchise business, Alaris Group filed additional trademark applications for ALARIS and ALARIS ADVANTAGE and also filed an application for a software product known as ALARISWARE, all for goods and services in or related to the medical field.

As the evidence and controlling legal authorities set forth herein make clear, there exists a likelihood of confusion between the parties marks; thus, Alaris Group's Registration No. 2,930,177 of ALARIS should be cancelled and its applications to register Serial No. 78/744914 (ALARIS SELECT), Serial Nos. 78/945532 (ALARIS), 78/937067 (ALARISWARE) and 78/945025 (ALARIS ADVANTAGE) should be refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

IV. STATEMENT OF THE ISSUES

Cardinal's ownership of valid trademarks in the term ALARIS and its priority in use of those marks is well-established, including by its incontestable U.S. trademark registrations. Thus, the only issue before the Board in these consolidated proceedings is whether Alaris

Group's marks, when applied to the goods and services in the challenged registration and applications, are likely to cause confusion with Cardinal's use of its marks as used in connection with the goods and services in Cardinal's registrations, and hence should be canceled and refused registration pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

V. FACTS

A. **Cardinal's Rights in the ALARIS Mark**

1. Adoption and Use of the ALARIS Mark

Opposer/Petitioner had its beginnings in 1967 as IVAC Corporation, a medical device company that focused on producing various products and services relating to intravenous technology, including infusion pumps, infusion delivery systems and patient vital sign measuring products. In 1996, IVAC Corporation was acquired by a company called Advanced Medical, Inc., which had a subsidiary called IMED Corporation, a leader in the field of producing infusion pumps for the medical and healthcare market. The merger of IVAC and IMED created a world leader in medical infusion products and services. (Vanderveen Testimony at ¶¶ 4-5)

The merged company decided that neither IVAC nor IMED would be an appropriate name for a growing company and that a new name should be chosen. In 1996, the company hired Interbrand Corporation, a global branding company, to develop a new name for the company and a trademark for all of the goods and services sold by the company. Interbrand came up with the name Alaris as both the proposed new company name and house trademark. Interbrand suggested the name Alaris because it was derived from the Latin word for wing ("alar") and conveyed the company's commitment to soar to new heights in the healthcare industry. (Jollon Testimony at ¶¶ 8-10, 13-14).

On April 29, 1997, the company changed its corporate name from IVAC Holdings, Inc. to Alaris Medical Systems, Inc. (Jollon Testimony at ¶ 20). The name Alaris was announced

with great fanfare and was well received. In the 17th Annual Interbrand Corporate Name Change Survey, held in 1997, the Alaris name for the company and its products and services was chosen as one of the year's best names for a renamed company. (Jollon Testimony at ¶ 15 and Ex. A to Jollon Testimony). In all, Opposer/Petitioner's predecessor spent more than one million dollars on the name selection process and introduction of Alaris as the new company name and trademark for its products and services. (Jollon Testimony at ¶ 17).

On January 10, 1997, the company filed its first intent to use trademark application, Serial No. 75/223900, to register the name Alaris, and first use of the mark ALARIS on the goods and services listed in that application occurred on or before July 24, 1997. By the middle of July 1997, the company had re-branded all of the medical products and services it was then selling under the ALARIS trademark and was using Alaris Medical Systems as its trade name and corporate name. (Vanderveen Testimony at ¶¶ 6-8).

On June 16, 2003, Alaris Medical Systems, Inc. was merged into Alaris Medical, Inc., and on October 13, 2004, Alaris Medical, Inc. (and all its trademarks and other intellectual property associated with the Alaris medical products and services business) was acquired by Opposer/Petitioner and changed its corporate name to Cardinal Health 303, Inc. (Jollon Testimony at ¶¶ 21-22; Vanderveen Testimony at ¶ 26). While the company ceased use of Alaris as a corporate name, Cardinal continues to use the ALARIS mark on a wide variety of medical products and service relating to IV medication delivery and infusion therapy, patient monitoring, and related products and services. (Vanderveen Testimony at ¶ 9),

Opposer/Petitioner is a world leader in the design, manufacture and marketing of IV fluid delivery and infusion therapy devices, needle-free disposables and related monitoring equipment in the United States and internationally. ALARIS-branded infusion products are used

to introduce fluids into a patient intravenously, including saline solution to re-hydrate a person, nutritional fluids, drug and pharmaceutical products, antibiotics and chemotherapy drugs. In addition to infusion products, Opposer/Petitioner also manufactures and sells a range of devices for monitoring patient vital signs, including sophisticated, proprietary thermometers, blood pressure cuffs and devices that monitor patient oxygen levels. Opposer/Petitioner also manufactures and sells computer system software support solutions for regulating and monitoring ALARIS infusion systems and for wirelessly connecting infusion and patient monitoring products; it provides maintenance and repair services for its products and also has rental/leasing programs for its ALARIS branded products. (Vanderveen Testimony at ¶¶ 10-13 see also Giometti Testimony at ¶ 12).¹

2. Sales, Promotion and Distribution of Goods and Services Under the ALARIS Mark

ALARIS-branded products are sold in all 50 states (as well as in dozens of foreign countries). They are sold in more than 600 hospitals and to direct customers, all over the United States, including hospitals, nursing homes, long and short term care facilities, rehabilitation facilities, and to medical products distributors for further distribution, generally in the non-acute care setting. (Vanderveen Testimony at ¶¶ 28-30, 36). Since 1998, Opposer/Petitioner has sold more than \$4 billion of ALARIS-branded goods and services. (Gilmore Testimony at ¶ 7). Among the company and its competitors in the infusion market, Alaris is the market share leader. (Giometti Testimony at ¶ 13).

ALARIS products and services are sold in several ways, including via a direct sales force of ninety (90) people located throughout the United States. The direct sales force promotes and sells ALARIS products and services through in-person sales presentations, product

¹ See Vanderveen Testimony at ¶¶ 14-17 for a list of products and services Opposer/Petitioner has sold and is currently selling under the ALARIS name.

demonstrations and webcasts. Specific members of the direct sales force are assigned to work with hospital Group Purchasing Organizations (“GPO”). Every hospital belongs to a GPO, and each GPO has more than 2000 member hospitals. (Giometti Testimony at ¶¶ 5, 7). Petitioner/Opposer also promotes its ALARIS products via promotional mailers to potential customers, and new product launches are supported with numerous sales support materials that go to thousands of potential customers, such as product brochures, videos, price lists, catalogs, wall posters, product folders, product samples and informational white papers. (Giometti Testimony at ¶¶ 9-10 and Exhibits C and D).

Trade shows are an important way in which Opposer/Petitioner promotes and sells its ALARIS products and services, and have been since at least 1997. Trade shows are widely attended by members of the various organizations, including nurses, clinicians and pharmacists, all of whom work in many different healthcare settings, including acute care hospitals, nursing homes, ambulatory care centers, surgical centers, infusion centers, cancer centers, pharmacies, laboratories, research clinics, schools and in patient’s homes. (Jollon Testimony at ¶ 24). Significantly, many of these conferences are attended by thousands of home care nurses, care managers, pharmacists and other healthcare professionals involved in the home infusion and home health industries. (Woodbury Testimony at ¶ 10). Cardinal spends between one and two million dollars each year to exhibit and attend trade shows and promote ALARIS products and services to the attendees. (Jollon Testimony at ¶ 26).

Alaris products and services are not promoted and marketed via the same channels as consumer products, i.e., through mass-market print advertising and media buys. Rather, products and services sold under the Alaris trademark, like most healthcare products and services, are widely promoted to professionals within the healthcare community in ways which are designed

to educate these professionals on the benefits of the products or services, the proper use and safety advantages of the products, and the wide variety of applications in which they can be used.

(Burns Testimony at ¶ 6).

Alaris products and services are widely promoted, advertised and marketed through various means, including:

- The cardinal.com website
- Brochures, brochures w/samples
- Sales catalogs
- Promotional mailers
- Press releases
- Sales presentations
- Sales personnel and agents
- Training opportunities for healthcare personnel and accompanying materials.
- Field visits to customer operations, national product and sales tours
- Annual marketing and sales campaigns
- Alaris service centers

(Burns Testimony at ¶ 7).

The www.carefusion.com website (until September 1, 2009, www.cardinal.com) is an important marketing tool for ALARIS-branded products, and has been since the Company's inception. It provides information on the various product lines, downloadable product brochures, and information on how to contact the appropriate sales representatives for a particular product. The cardinal.com website gets 1.2 million hits per month. (Burns Testimony at ¶ 8).

Since 2002, Cardinal's expenses for promotional materials for all products bearing the ALARIS name, such as the items listed above are as follows:

2002 -- \$259,431

2003 -- \$1,106,808

2004 -- \$1,163, 568

The following amounts were spent for promotional materials solely for Alaris infusion systems and IV sets:

FY 2006 -- \$197,816

FY 2007 -- \$221,978

FY 2008 -- \$96,695

(Burns Testimony at ¶ 15).²

3. Cardinal's Federal Registrations of the ALARIS Mark

Cardinal owns two valid, subsisting and incontestable federal registrations for the mark ALARIS for various products and services in the healthcare industry:

(a) ALARIS – Registration No. 2,279,724, registered on the Principal

Register on September 21, 1999 for use in connection with:

medical instruments and equipment, namely, infusion pumps and controllers, including volumetric infusion pumps, syringe pumps, programmable infusion pumps, programmable syringe pumps and the resident control programs; clinical vital signs measurement instruments, namely, thermometers for medical use, disposable thermometer covers, blood pressure measurement instruments, pulse rate measurement instruments, blood pressure cuffs, pulse oximetry instruments, namely, sensors and monitors, respiration measurement instruments, and ECG instruments; medical fluid administration sets for the delivery of medical fluids, namely, drug delivery tubing, clamps, flow control devices, drug infusion connectors, adapters, injection sites, needleless connectors, needleless ports, needleless injection sites, and medical valves; medical devices for the delivery of medical fluids, namely, drug delivery tubing, clamps, flow control devices, drug infusion connectors, adapters, injection sites, needleless connectors, needleless ports, needleless injection sites, and medical valves; intravenous fluid containers, monitors, alarms, rate meters; sphygmomanometers; enteric infusion pumps and bags therefor; medical instrument and intravenous fluid container stands and hanger devices; gastrointestinal feeding tubes; needle catheter jejunostomy kits, namely, tubing and needles; multiple specimen holders for medical use; cold and hot packs for chemically producing and absorbing heat for use in medical treatment and therapy in Class 010;

² See Burns Testimony at ¶9-14 and Exhibits A, B, C, D and F to Burns Testimony and Exhibits A and B to Geometti Testimony for examples of Cardinal's advertising and marketing materials

service and repair of medical instruments, equipment and accessories in Class 037;

leasing and rental of medical instruments, equipment, and accessories in Class 042.

(b) ALARIS – Registration No. 2,371,410, registered on the Principal

Register on July 25, 2000 for use in connection with:

electronic equipment and accessories, namely, fluid monitors; fluid flow rate meters; metered infusion pumps; ammeters; computer programs for controlling and monitoring fluid flows and detecting obstructions to fluid flows; and computer programs for capturing, storing, integrating, and presenting data in patient care management systems in Class 009.

B. Alaris Group’s Use of the ALARIS Mark

1. Adoption of the ALARIS Mark

Alaris Group was founded in December 1999 as a five-person consulting company focused on the worker’s compensation industry. (Caven Declaration at ¶ 3-4, noting that Alaris Group’s various marks have consistently been used with “consulting services in the fields of medical and vocational rehabilitation primarily responding to the needs of the worker’s compensation industry”). Over time, Alaris Group has grown and changed its business — including expansion geographically, the addition of new goods and services, and changes in the names used to brand its goods and services. (Caven Declaration at ¶ 5-8). Alaris Group employees and franchisees provide medical case management services. Approximately 80% of its medical case managers are nurses. (Caven Depo. at pp. 47-48). Among the services Alaris Group provides is Catastrophic Case Management, in which Alaris Group case managers “assess the injury, clarify the diagnosis, define the treatment plan and coordinate all necessary services to stabilize the patient.” (Alaris Group 0097). Part of this process includes communicating with the patient’s medical team, coordinating “with facilities/home care for suitable ongoing

treatment”, negotiating durable medical equipment and “treatment and services to meet client needs.” *Id.*

Alaris Group did not conduct a trademark search prior to selecting the name ALARIS. (Caven Deposition at p. 16). Alaris Group became aware of Cardinal’s trademarks, including its registration of the mark ALARIS for a wide variety of goods and services in the medical field in 2003. (Caven Deposition at p. 20.) Despite this knowledge, Alaris Group chose to shorten its name from THE ALARIS GROUP, INC. to ALARIS and obtained a new federal registration for the new mark on March 8, 2005. (Caven Decl. ¶ 5(c)). Along with changing the mark, Alaris Group revised its identification of services; whereas they formally read “consulting services...” they were revised in the new registration to be “medical consulting services....”(Caven Decl. ¶5(c), acknowledging that the new mark for the single word ALARIS was registered for “medical consulting services....”(emphasis added)). Later that same year, Alaris Group filed another trademark application for yet another new name, ALARIS SELECT, which also adopted the new wording “medical consulting services....” (Caven Decl. ¶ 6).

2. Expansion of Use

In 2006, the owners of the Alaris Group undertook a strategic initiative to expand geographically via the franchise model. (Caven Decl. ¶ 8). Also in 2006, and in anticipation of and/or coinciding with its impending franchise business, Alaris Group filed additional trademark applications for ALARIS and ALARIS ADVANTAGE, and for the software support program ALARISWARE, all for goods and services in or related to the medical field. (Caven Decl. ¶ 8). The company has indicated its desire to continue to expand geographically (Caven Depo. at 84; Caven Decl. at ¶ 7; Supplemental Caven Decl. at ¶¶ 2-4), and would consider further expansion and use of ALARIS – formative marks. (Caven Depo. at pp. 71-72).

3. *Alaris Group's Federal Registration and Applications*

The application that matured into Registrant's Registration No. 2,930,177 for the word mark ALARIS was filed on July 3, 2003, and is based on Registrant's contended use of the mark in commerce as early as January 1, 2001, for use in connection with:

Medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry in Class 044.

Application Serial No. 78/945,352, for the mark ALARIS, was filed on August 4, 2006, and is based on Applicant's contended intent to use the mark in commerce in connection with:

Franchise services, namely, offering technical and business management assistance in the establishment and operation of medical consulting primarily for the workers compensation industry in Class 35.

Application Serial No. 78/744,914, for the mark ALARIS SELECT, was filed on November 1, 2005, and is based on Applicant's contended use of the mark in commerce in connection with:

medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry in Class 044.

Application Serial No. 78/945,025, for the mark ALARIS ADVANTAGE, was filed on August 4, 2006, and is based on Applicant's contended intent to use the mark in commerce in connection with:

franchise services, namely, offering technical and business management assistance in the establishment and operation of medical consulting primarily for the workers compensation industry in Class 035; and

medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry in Class 044.

Application Serial No. 78/937,067, for the mark ALARISWARE, was filed on July 25, 2006, and is based on Applicant's contended intent to use the mark in commerce in connection with:

computer software for the collection, editing, organizing, modifying, book marking, transmission, storage, reporting and sharing of data and information namely in the field of medical consulting in Class 009.

C. Potential For Overlap

1. Cardinal has a Significant Market in ALARIS Products Designed for Home Healthcare Use

The non-hospital market for the Cardinal's ALARIS medical products and services has been and will continue to be an important market. (West Testimony at ¶ 6). When Cardinal first began producing its medical products, the market for them was more directed to hospitals and acute-care facilities. However, over the years Cardinal has expanded its line of products sold under the ALARIS trademark from infusion therapy devices and accessories to computerized systems that monitor a patient's vital signs, insure that exact dosages of drugs and other fluids are administered to the patient and monitored, and make those monitoring results available to various healthcare professionals on computer networks also sold under the ALARIS trademark by Cardinal. (Chiero Testimony at ¶ 4).

As the Alaris medical product and services line has expanded since 1997, so too has the potential market for Alaris products. With the aging population requiring healthcare services, there are more and more patients in retirement homes, assisted living facilities, long and short term care facilities, and more patients receiving in-home healthcare, all of whom have need for the Cardinal's ALARIS medical products and services. These types of healthcare settings are referred to by Cardinal as Alternate Sites. (Chiero Testimony at ¶¶ 6-7).

Many patients begin receiving care in hospitals that use Alaris medical products and services administered by doctors, nurses and technicians. Over time, many of these patients improve enough to be discharged from the hospital, but still require care in rehabilitation facilities or at home. These patients may still need the types of infusion therapies provided by the Company's Alaris products, and the Company's ALARIS ReadyMed device, in particular, is appropriate and marketed for in-home care. (West Testimony at ¶ 6; Chiero Testimony at ¶ 8).

The ALARIS ReadyMed device was designed exclusively for home care and is used to deliver anti-infectives such as antibiotics into the patient. Originally known as the IMED ReadyMED pump, this product was launched in 1992 and has been sold as the ALARIS ReadyMed by Cardinal since the Company's inception. (Woodbury Testimony at ¶ 6). The ALARIS ReadyMed pump has been a popular item, well suited for use in home infusion therapy. In the past five years, the Company has sold more than 6 million ReadyMed pumps. (Woodbury Testimony at ¶ 7).

ALARIS-branded disposable accessories that are used with the Company's infusion and monitoring products are also widely used in Alternate Site locations. (Chiero Testimony at ¶ 8). The Company sells about 450 different ALARIS-branded products for use in Alternate Site settings, including home healthcare. (Woodbury Testimony at ¶ 8 and Exhibit A to Woodbury Testimony). For example, the ALARIS SmartSite needle free valve is also sold on OEM (Original Equipment Manufacturer) basis for use with other companies' infusion therapy devices and is widely used and recognized by healthcare practitioners across all platforms. The Company manufactures approximately 800,000 valves per day (over 300 million per year) bearing the ALARIS trademark for inclusion on its various infusion devices and for sale as OEM products. (Woodbury Testimony at ¶ 11).

Cardinal has studied this expanding Alternate Site market for ALARIS products and services, and from 1996 through early 2000 Cardinal made a strong effort to focus and expand the sales of ALARIS products and services into these markets. During this time frame, Cardinal's sales of these products grew from \$500,000 per year to over \$25 million in annual sales. (Chiero Testimony at ¶ 9 and Exhibit A thereto). From FY 2006 to the present, the company has sold on average \$8.2 million yearly just to the Alternate Site market. (Woodbury Testimony at ¶ 8).

2. *Cardinal's Sale of ALARIS Products for Home Healthcare Creates Potential for Confusion With the Services Provided by Alaris Group Under its ALARIS Marks*

There is a potential for confusion with the services provided by The Alaris Group in several areas: a) a patient who has been assigned to The Alaris Group for case management could be using an ALARIS product in the home and may think there is a connection between the case manager and Cardinal; b) hospital personnel who may have had a bad experience with a case manager from The Alaris Group may not want to use Cardinal's ALARIS-branded products; c) patients working with The Alaris Group may try to reach their case manager and contact Cardinal by mistake; d) a patient who is using an ALARIS product in the home and who is working with The Alaris Group may have a question or problem with their ALARIS product and contact The Alaris Group by mistake. This last issue could have life-threatening consequences. (Vanderveen Testimony at ¶ 41).

The potential for confusion is demonstrated by doing a simple search on Google for "Alaris + nursing homes". As the printout attached as Exhibit F to the Vanderveen Testimony shows, the first five entries relate to Alaris products, followed by several entries referencing The Alaris Group, Inc., which include links that take the viewer directly to the home page of The Alaris Group, Inc. This type of listing could be confusing for a home healthcare patient, and

could cause them to think there was a connection between Cardinal's ALARIS products and the services provided by The Alaris Group, Inc. (Vanderveen Testimony at ¶ 42).

Nancy Caven, the president of The Alaris Group, acknowledged that the case managers who work for The Alaris Group have occasion to work with patients who have been discharged from the hospital and need to have care established in a non-hospital setting; that it is possible that some of her medical case managers would be working with patients who would still be receiving medical fluids following their discharge from the hospital, and that Alaris Group medical case managers sometimes need to arrange for the rental of medical equipment, as ordered by the treating physicians, including infusion pumps. (Caven Deposition at pp. 51-55).

Patricia West, R.N. B.S.N, Cardinal's Director of Clinical Marketing, Clinical Technologies and Services has spent much of her career associated with the home healthcare industry, and is familiar with the many of the types of case management services provided by Alaris Group. (West Testimony at ¶¶ 4-5 and Exhibit A to West Testimony). Upon review of the website for The Alaris Group, available at <http://www.alarisgroup.com/>, she noted the following:

I note that one of the services The Alaris Group provides is "Catastrophic Case Management", attached hereto as Exhibit C, which is described on their website as follows:

Extreme injuries require meticulous handling right from the start. ALARIS Catastrophic Case Managers are exceptionally qualified to assess the injury, clarify the diagnosis, define the treatment plan and coordinate all necessary services to stabilize the patient. Their timely involvement can expedite the transition from acute care to optimal functioning – and lessen the cost of the loss.

<http://www.alarisgroup.com/catastrophic/index.html>

The type of care described above – particularly the idea of transitioning a patient from acute care to an out-of-hospital setting – is precisely the type of care that would require a nurse case manager who is familiar with and conversant in (among other things) infusion therapies.

I also reviewed the qualifications of several of the case managers listed on The Alaris Group's website at <http://www.alairsgroup.com/minnall.asp>, attached hereto as Exhibit D. In my opinion, based on their qualifications, the medical case managers listed who have RN and/or BSN degrees should be likely to be familiar with and conversant in infusion therapies, and should be likely to be familiar with my Company's infusion therapy products.

Given that some of my Company's Alaris infusion pumps can be used in a home care setting for patients, there is a likelihood that my Company's products and services could be used on the same patients who are being treated by employees of Applicant/Registrant.

Based on my understanding of the types of services Applicant/Registrant provides under the name The Alaris Group, Inc., it is very possible that its employees could use my Company's Alaris infusion pumps and other Alaris products.

(West Testimony at ¶¶ 7-8, 11-13).

VI. ARGUMENT

A. **Applicable Legal Standards**

The party seeking cancellation or the party opposing registration of a mark must prove that it has standing and that there are valid grounds for canceling a registration or refusing registration in an opposition proceeding. *Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Herbko Intern. v. Koppa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002). To prevail on its likelihood of confusion claim, Cardinal must show priority of use, which may be established by proving prior use or ownership of valid and subsisting registrations, and a likelihood of confusion between its ALARIS Marks and Alaris Group's Alaris Marks. *See* 15 U.S.C. §1052(d); TBMP §309.03(c)(A)-(B). In determining likelihood of confusion, the Board applies the factors in *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). Different factors may play dominant roles in determining likelihood of confusion in different cases. *Nina Ricci S.A.R.L. v. E.T.F. Enters., Inc.*, 12 USPQ

2d 1901, 1903 (Fed. Cir. 1989). In assessing whether a likelihood of confusion exists, all doubts must be resolved in favor of the prior user. *Id.*, 12 USPQ2d at 1904; *Hancock v. Am. Steel & Wire Co.*, 97 USPQ 330, 333 (CCPA 1953).

B. Opposer/Petitioner Has Established Standing

Cardinal has standing to oppose and cancel Alaris Group's Alaris Marks because Cardinal has (1) a "real interest" in the proceedings; and (2) a reasonable basis for the belief that Cardinal will suffer damage if registration of the Alaris Group's Alaris marks is allowed or permitted to continue. *Ritchie v. Simpson*, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed Cir. 2000). Cardinal has made the registrations of its ALARIS Marks of record in these proceedings and has also presented substantial evidence of its prior use in connection with goods and services that are confusingly similar to those listed in Alaris Group's applications and registration. The identity of the marks and the potential for overlap in the services support a reasonable basis for Cardinal's claims of likelihood of confusion and Cardinal's real interest in opposing the applications and canceling the registration of the Alaris Group's Alaris Marks to prevent damage to Cardinal's ALARIS Marks, goodwill and reputation.

C. Opposer/Petitioner Has Established Ownership of Valid Marks and its Prior Use and Registration of its ALARIS Marks

To establish priority, Cardinal must show proprietary rights in its ALARIS Marks arising from "a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights." *Herbko Int'l, Inc.*, *supra*, 64 USPQ2d at 1378; *see also Otto Roth & Co. v. Universal Foods Corp.*, 209 USPQ 40, 43 (CCPA 1981)(must prove "proprietary rights in the term [opposer] relies upon . . . whether by ownership of a registration, prior use of a technical

‘trademark’, prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity”).

Cardinal is the owner of two incontestable registrations for the mark ALARIS which are of record in this case. (Cardinal June 8 Notice of Reliance). Under Section 33(b) of the Lanham Act, 15 U.S.C. §1115, an incontestable registration is ‘conclusive 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.’” Cardinal’s ALARIS Registrations issued long before Alaris Group’s July 3, 2003 application filing date and claimed first use date of January 1, 2001 for its ALARIS registration, long before Alaris Group’s application filing date of November 1, 2005 and claimed first use date of April 1, 2003 for ALARIS SELECT; and long before its August 4, 2006 ITU application filing dates for ALARIS and ALARIS ADVANTAGE; and its July 25, 2006 ITU application filing date for ALARISWARE. This in itself is sufficient to show Cardinal’s priority. *Herbko, supra*, 64 USPQ2d at 1378; *Otto Roth, supra*, 209 USPQ at 43; *see also King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Moreover, Cardinal has offered undisputed evidence of its prior common law rights in and continuous use of its ALARIS Marks in the U.S. since 1997 (*see, e.g.*, Gilmore Testimony, Vanderveen Testimony, Jollon Testimony), well before Alaris Group’s filing dates and claimed first use dates. This evidence of earlier use also establishes Cardinal’s priority. *Herbko, supra*, 64 USPQ2d at 1378; *Otto Roth, supra*, 209 USPQ at 43.

Based on these undisputed facts, Cardinal has priority over Alaris Group for each of the marks at issue in these consolidated proceedings.

D. The Alaris Group's Marks are Confusingly Similar to Cardinal's ALARIS Marks

1. Cardinal's ALARIS Marks are Strong

When assessing the strength of a mark, both the conceptual and commercial aspects of the mark's strength must be considered. *Acxiom Corp. v. Axiom, Inc.*, 27 F. Supp. 2d 478, 495-96 (D. Del. 1998). A mark's conceptual strength is measured along a spectrum of distinctiveness by placing a mark in one of the following categories: (1) arbitrary or fanciful; (2) suggestive; or (3) descriptive. *See Morningside Group Ltd. v. Morningside Capital Group LLC*, 182 F.3d 133, 139 (2d Cir. 1999); *see also Multi-Local Media Corp. v. 800 Yellow Book Inc.*, 813 F. Supp. 199, 203 (E.D.N.Y. 1993).

The mark ALARIS is a coined term which has no dictionary meaning (Waltz Declaration at ¶ 3) and was selected for the sole purpose of functioning as a trademark. (Jollon Testimony at ¶ 10). As such, the mark is inherently distinctive and strong. *Exxon Corp. v. Texas Motor Exch., Inc.*, 628 F.2d 500, 504 (5th Cir. 1980) ("the more distinctive a [mark or trade dress], the greater its 'strength'"); *Stork Restaurant v. Sahati*, 166 F.2d 348, 76 USPQ 374 (9th Cir. 1948); *Blisscraft of Hollywood v. United Plastics Co.*, 295 F.2d 694, 131 USPQ 55 (2d Cir. 1961).

2. The Parties' Marks are Identical in Sound, Sight and Overall Commercial Impression

In evaluating the similarity of the parties' marks, the Board must determine whether the marks, "when compared in their entireties in terms of appearance, sound, and connotation, are similar or dissimilar in their overall commercial impressions. *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1659-60 (TTAB 2002). As the Board has explained:

It is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the

recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.

Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975) (citations omitted.)

If the marks of the respective parties are identical, the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as would be required in a case where there are differences between the marks. *Amtcor, Inc. v. Amtcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). In appropriate cases, a finding of similarity as to only one factor (sight, sound or meaning) "may be sufficient to support a holding that the marks are confusingly similar." *Trak, Inc. v. Traq Inc.*, 212 USPQ 846, 850 (TTAB 1981); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *General Foods Corp. v. Wisconsin Bottling, Inc.*, 190 USPQ 43, 45 (TTAB 1976); *In re Mack*, 197 USPQ 755, 757 (TTAB 1977); *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968).

If the dominant portion of both marks is the same, then confusion may be likely notwithstanding small differences, such as the addition of descriptive terms. *See, e.g., In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366 (TTAB 2009) (CAPRI COLLECTION for flooring tiles likely to be confused with CAPRI for roofing tiles, noting "the presence of the additional term "Collection" would not be likely to distinguish the marks since it would merely indicate that applicant offers a group of products under its mark."); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266 (TTAB 2009) (VANTAGE TITAN for MRI diagnostic equipment held likely to be confused with TITAN for medical ultrasound device, noting that the marks are more similar than they are different and that the addition of applicant's "product mark" to the registered mark would not avoid confusion); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005) (VEUVE ROYALE for sparkling wine found likely to be confused with VEUVE CLICQUOT and VEUVE CLICQUOT

PONSARDIN for champagne, noting that the presence of the “strong distinctive term [VEUVE] as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entirety with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) (even though applicant’s mark PACKARD TECHNOLOGIES (with “TECHNOLOGIES” disclaimed) does not incorporate every feature of opposer’s HEWLETT PACKARD marks, similar overall commercial impression is created).

In this case, the parties’ respective ALARIS marks are identical visually and aurally. They are coined terms without any dictionary meaning. The dominant portion of the Alaris Group’s ALARIS, ALARIS SELECT, ALARIS ADVANTAGE and ALARISWARE marks is the word ALARIS. The marks are identical in sight, sound and commercial impression; accordingly, this factor favors Cardinal. *In re Cabot Safety Intermediate Corp.*, 2009 TTAB LEXIS 21 (TTAB 2009).

3. *The Goods and Services are Related and are Distributed in the Same or Overlapping Channels of Trade*

In light of the broad scope of protection that is appropriately given to Cardinal’s strong and well-known ALARIS Marks within the healthcare community, and the fact that the parties’ respective ALARIS marks are identical, the relatedness of the goods is of less significance in assessing likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (“the more similar the marks at issue, the less similar the goods need to be for the Board to find a likelihood of confusion.”) “[I]t is enough that goods or services are related in some manner or

that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.” *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). In other words, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Cardinal has presented ample evidence of the possibility for source confusion between Cardinal’s ALARIS-branded products and Alaris Group’s medical consulting services and software. Cardinal markets several of its ALARIS-branded products directly to the home healthcare market, and has significant sales in that market. (Cheiro Testimony; Woodbury Testimony; Vanderveen Testimony). Alaris Group’s medical consulting services are provided to patients in a home healthcare setting. It is well settled that the question of likelihood of confusion must be determined based upon an analysis of the marks as applied to the goods/services recited in the subject application vis-a-vis the goods/services recited in the cited registration, regardless of what the evidence may show as to the actual nature of the goods/services, their channels of trade, and/or the classes of purchasers. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re William Hodges & Co.*, 190 USPQ 47 (TTAB 1976); *J&J Snack Foods Corp. v. McDonald’s Corp.*, 18 USPQ2d 1889 (Fed. Cir. 1991). In the absence of any express limitations in the involved application(s) or registration(s), the Board assumes that the channels of trade for the goods or services are those normal for such goods or services, and that the purchasers are the same. *In re*

Melville Corp., 18 USPQ2d 1387 (TTAB 1991); *CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 16 USPQ2d 1783 (Fed. Cir. 1990). In this case, it is clear that Alaris Group’s medical consulting services and software, as set forth in its applications and registration might likely be associated by purchaser with Cardinal’s ALARIS medical equipment and computer software and be assumed to originate from a common source.

4. Cardinal’s ALARIS Marks are Well-Known Within the Healthcare Industry

Moreover, Cardinal’s ALARIS Marks are famous within the healthcare industry. The fame of an opposer’s mark, if it exists, plays a “dominant role in the process of balancing the *DuPont* factors.” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894 (Fed. Cir. 2000); *see also Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). There is a distinction between fame in the likelihood of confusion analysis and fame for analyzing dilution:

Fame for likelihood of confusion purposes and fame for dilution purposes are not necessarily the same. A mark may have acquired sufficient public recognition and renown to demonstrate that it is a strong mark for likelihood of confusion purposes without meeting the stringent requirements to establish that it is a famous mark for dilution purposes. *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 47, 49 USPQ2d 1225, 1239 (1st Cir. 1998) (“The standard for fame and distinctiveness required to obtain anti-dilution protection is more rigorous than that required to seek infringement protection”). Therefore, we will refer to “public recognition and renown” when we are discussing fame in the context of likelihood of confusion.

The Toro Co. v. ToroHead, Inc., 61 USPQ2d 1164, 1170 (TTAB 2001). Thus, fame for confusion purposes arises when “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Palm Bay Imports, supra*.

Cardinal has presented extensive evidence of the “public recognition and renown” of its ALARIS Marks among the “relevant consuming public”, *i.e.*, the healthcare industry, including evidence of \$4 billion in sales of ALARIS-branded products (Gilmore Testimony); widespread marketing and promotion to medical professionals (Jollon Testimony at ¶¶ 23-24, 26; Giometti Testimony at ¶¶ 9-10; Vanderveen Testimony at ¶¶ 24-25); significant advertising and marketing expenditures (Burns Testimony at ¶ 15); dominant market share (Giometti Testimony at ¶ 13); evidence of high ratings given ALARIS branded products by independent testing groups within the healthcare industry (Giometti Testimony at ¶ 14 and Exhibit F) and bibliographies of articles written by third parties about ALARIS medical products (Vanderveen Testimony at Exhibit E). *See also* Vanderveen Testimony at ¶ 39 (“In my opinion, based upon my 26 years of experience, it would be difficult to find a nurse, doctor, clinician, pharmacist or medical technician in the United States who has not been exposed to, trained on, or currently uses our Alaris medical products and/or services.”); *Bose Corp. supra*, 293 F.3d at 1376, 63 USPQ2d at 1309 (“Large market shares of product sales or large percentages of advertising expenditures in a product line would buttress claims to fame.”).

The fame of Cardinal’s ALARIS Marks within the healthcare industry should be given full weight in the Board’s consideration and balancing of the other relevant *DuPont* factors. *Bose Corp, supra*, 63 USPQ2d at 1305.

5. *There is an Increased Risk of Likelihood of Confusion Because the Parties' Respective ALARIS marks are Both Being Used in the Healthcare Industry*

It is well settled that where the marks are used on medical products, and confusion as to source can lead to serious consequences, it is extremely important to avoid confusion *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301 (TTAB 2004) (avoiding confusion extremely important when dealing with marks used in connection with medicines); *Schering Corporation v.*

Alza Corporation, 207 USPQ 504 (TTAB 1980) (great care exercised to prevent any possibility of confusion in use of pharmaceutical trademarks); *Glenwood Laboratories Inc. v. American Home Products Corp.*, 173 USPQ 19 (CCPA 1972) (view that higher standard be applied to medicinal products is supported by case law); *Blansett Pharmacal Co. Inc. v. Carmrick Laboratories Inc.*, 25 USPQ2d 1473 (TTAB 1992) (avoiding confusion even more important when marks used on pharmaceuticals); *Morgenstern Chemical Co., Inc. v. G. D. Searle & Co.*, 116 USPQ 480 (3d Cir. 1958) (“In the field of medical products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trademarks.”).

Here, Cardinal has submitted substantial evidence that confusion as to the source of Cardinal’s ALARIS products and the services offered by Alaris Group under its ALARIS marks is possible, and could be life-threatening. (West Testimony at ¶¶ 7-8, 11-13; Caven Deposition at pp. 51-55; Vanderveen Testimony at ¶ 41). Under such circumstances, public policy dictates that any possibility of confusion is sufficient to establish likelihood of confusion.

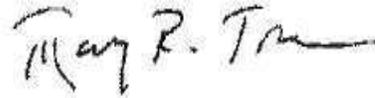
6. *There are No Other Registrations of the Term ALARIS for Goods or Services in the Medical or Healthcare Industry*

The sixth *duPont* factor considers the number and nature of similar marks in use on similar goods. *duPont, supra*, 177 USPQ at 567. In this case, the potential for likelihood of confusion between the parties’ respective ALARIS marks is further enhanced because there are no other federal registrations of the term ALARIS for goods or services in the medical or healthcare industries, nor is there any evidence in the record of the scope or extent of any third-party use of the term ALARIS in the non-medical context. *In re Cabot Safety Intermediate Corp., supra*; *Palm Bay Imports, supra*, 73 USPQ2d at 1693 (“[t]he probative value of third-party trademarks depends entirely upon their usage.”). This factor also favors Cardinal.

VII. CONCLUSION

On balance, considering all of the evidence on all of the above-listed relevant factors, and giving each such factor its appropriate weight in the circumstances of this case, the Alaris Group's ALARIS marks so closely resemble Cardinal's prior used and registered ALARIS marks as to be likely, when used on or in connection with Alaris Group's goods and services, to cause confusion, or to cause mistake, or to deceive, and hence, Alaris Group's ALARIS registration should be canceled and registration of its ALARIS, ALARIS ADVANTAGE, ALARIS SELECT and ALARISWARE applications should be refused under Section 2(d) of the Lanham Act; 15 U.S.C. §1052(d).

Respectfully submitted,



Date: December 3, 2009

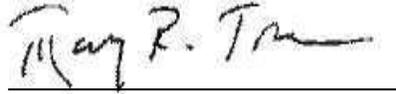
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following attorney of record for Applicant by First Class Mail, this 4th day of December 2009:

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Minneapolis, Minnesota 55402

A handwritten signature in black ink, appearing to read "Mary R. True", is written above a horizontal line.

Mary R. True