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

Proceeding	91182064
Party	Plaintiff AS Holdings, Inc.
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AS HOLDINGS, INC. )  
 )  
Opposer, )  
 )  
v. ) Opposition No. 91182064  
 )  
H&C MILCOR, INC. f/k/a )  
AQUATICO OF TEXAS, INC. ) Serial Number: 76/461,157  
 ) Mark: Miscellaneous Design:  
Applicant. ) Pipe Boot Product Design)

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OPPOSER'S TRIAL REPLY BRIEF

Opposer files this reply brief to address new issues raised by Applicant. Opposer continues to rely upon its main trial brief and does not here repeat arguments and issues previously addressed in Opposer's main trial brief.

Applicant makes repeated statements having the appearance of fact but without citation to evidence of record to support the statement. It is a party's job to address the Board to the record, not leave the Board and the opposing party to pour through the record to determine what evidence may exist and determine where facts cease and speculation and misinterpretation begins.

Applicant repeatedly engages in rank speculation on diverse matters, such as the poor quality of the raised rib as a knife guide due to the durometer hardness of the material (page 6), that since GenFlex was purchased by Firestone in all probability the pipe boots that GenFlex had been making were actually a pipe boot made by Portals Plus (pages 6, 22), about various changes in dimensions that could be applied to the pipe boot, all without reference to the metal clamping band that is directed to be placed on the boot or the pipes the parts target (page 8), purportedly hundreds of thousands of documents relating to sales of pipe boots notwithstanding the fact that

Applicant did not produce such documents (pages 9, 46), the effectiveness of the rib as a reinforcement (page 20), the efficacy of a hypothetical design hand-sketched by Applicant's counsel (Fig. 7, page 25), the dimensions and ratios of various products (pages 27-29), the size, financial appraisal and sales volume of Opposer (page 36), and what a draftsman used as a guide in making application drawings (page 45). Not only are these various allegations irrelevant to the issues in this proceeding, but they are unsupported by testimony and other evidence.

Applicant introduced limited fact testimony. Applicant elected to not introduce any expert testimony, even though Applicant requested and obtained significant delay in these proceedings so that it could conduct expert testimony. Applicant's idle speculation and hypothetical reformulation of factual what-ifs is unsupported by any expert testimony.

The issue of lack of distinctiveness and absence of proof of secondary meaning or acquired distinctiveness was asserted in Count I of the Notice of Opposition. That issue has been in this proceeding since the very beginning. Applicant's failure to introduce evidence in support of acquired distinctiveness is its own failing.

Applicant mischaracterizes an exchange between counsel at the original Steimle deposition (Applicant's brief pages 3, 13-14, 30). In response to repeated requests by Opposer's counsel for all sales documents and information relating to the pipe boot in question, Applicant's counsel asked why **Applicant** would want to use that information. Opposer's counsel responded that he did not know why Applicant would want to use the information, and subsequently stated that Opposer would only want to review that information if Applicant made use of it (Steimle I deposition pages 72-74).

Applicant also mischaracterizes the assertions made by Opposer regarding the Applicant's expired Patent No. 4,211, 423. (See Applicant's brief page 5, 38.) Opposer

established and argued that the expired Patent No. 4,211, 423 of Applicant discloses and claims a severable, stepped configuration that functions to accommodate different pipe sizes (Opposer's brief pages 20, 29).

The mark sought to be registered is functional, lacking in distinctiveness and secondary meaning has not been proven. Applicant improperly amended the drawing to add subject matter. The opposition should be sustained and judgment entered in favor of Opposer, registration being denied to Application Serial No. 76/461,157.

Respectfully submitted,

January 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, a true and correct copy of Opposer's Trial Reply Brief was sent via First Class Mail, postage prepaid to Attorney for Applicant as follows:

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