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

Proceeding	91214578
Party	Plaintiff LeMans Corporation
Correspondence Address	TARA M VOLD VOLD & WILLIAMSON PLLC 8251 GREENSBORO DRIVE, SUITE 340 MCLEAN, VA 22102 UNITED STATES trademark@vwiplaw.com
Submission	Reply in Support of Motion
Filer's Name	TARA M. VOLD
Filer's e-mail	trademark@vwiplaw.com
Signature	/tmv/
Date	09/13/2016
Attachments	Reply in Support of Petitioners Motion for Summary Judgment.pdf(894429 bytes)

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

LeMans Corporation,)	Parent Opposition No. 91214578
)	Mark: THORO
Opposer/Petitioner,)	Serial No. 85/956,925
)	
v.)	Opposition No. 91226723
)	Mark: THÖRÖ
LeMar Xavier Lewis,)	Serial No. 86/367,828
)	
Applicant/Respondent.)	Cancellation No. 92063552
)	Mark: THORO (Stylized)
)	Reg. No. 3,206,498

**REPLY IN SUPPORT OF
PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

LeMans Corporation (“Petitioner”) submits the following reply in support of its motion for summary judgment (the “Motion”) in the Oppositions to Serial No. 85/956,925 for THORO and Serial No. 86/367,828 for THÖRÖ and the Cancellation of Registration No. 3,206,498 for ~~thoro~~, all in the name of LeMar Xavier Lewis (“Respondent”).

I. The Response Misrepresents the Grounds for the Motion and the Required Showing for Abandonment

The basis of the Motion is that Serial No. 85/956,925 for THORO and Serial No. 86/367,828 for THÖRÖ are *void ab initio* and that Registration No. 3,206,498 has been *prima facie* abandoned as a result of at least three years of non-use of the ~~thoro~~ mark by the Respondent prior to November 4, 2015. Respondent’s assertions as to Petitioner’s alleged failure to establish its pleaded claims of fraud or likelihood of confusion are simply misplaced. Likewise, Respondent mistakenly suggests that Petitioner’s Motion depends on establishing Respondent “was not using any of the Thoro marks at any time during the 10 year period [he has] owned them.” *See* 71 TTABVUE 1.

II. The Response Contests Summary Judgment Only in the Cancellation Action

As Petitioner understands the Response, Respondent has not argued, nor presented any evidence against summary judgment in the two Opposition proceedings. Therefore, Respondent has arguably

conceded the entry of summary judgment in those cases.

III. The Response Introduces No Authenticated Evidence Supporting Respondent's Position

For Respondent, as a non-movant, to prevail on a motion for summary judgment, Rule 56(e) requires Respondent to present "concrete evidence" it could produce at trial supporting its position. *Celotex*, 477 U.S. at 324. The Response offers no admissible evidence to counter the specific non-use assertions contained in the Motion -- that is that there was no use of the marks on the dates that the use-applications were filed or of the THORO (stylized mark) for the three year period prior to November 4, 2015.¹ Respondent's general and unauthenticated assertions that he has been "actively using his Thoro brand non-stop since inception to the best of his ability" simply do not suffice under *Celotex*. Of course, any argument of current use is irrelevant as it is outside the three year non-use period identified in the Motion.

IV. Petitioner's Reliance on the Existing Record in Support of the Motion is Appropriate

These matters have been properly consolidated by the Board because they involve common questions of law and fact and consolidation will avoid duplication of effort and unnecessary costs. Accordingly, and as the Board has previously recognized, the proceedings may be presented on the same record and briefing as a matter of law. See Board's Order Granting Consolidation at 63 TTABVUE 2 citing *Hilson Research Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1424, n.1 (TTAB 1993); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d1618, 1619, n.1 (TTAB 1989).

As noted in Footnote 5 of the Motion, Opposer's First Set of Interrogatories contained the following definition of THORO:

All references in these discovery requests to the term, mark or designation "THORO" refer to the stand-alone, block letter term THORO as well as any variations thereof used by Applicant, such as plural forms, abbreviations or design presentations, or composites including THORO, or which Applicant intends to use, or on which Applicant may rely in any way in this proceeding,

¹ Respondent's attempt to introduce further information and documentation in his "Submission of Discovery" filing on September 2, 2016 (72 TTABVUE 1, Parent) and his "Response to Initial Disclosures" filing on September 10, 2016 (22 TTABVUE 1, Cancellation) should be ignored as procedurally inappropriate, unauthenticated and impermissible under the Board's March 2, 2016 Order, 57 TTABVUE 8, Parent (see argument *supra*).

including, but not limited to, Applicant's mark which is the subject of Application Serial No. 85/956,925.

This definition was incorporated into Opposer's First Request for Production of Documents and First Request for Admissions. See Exhibits 1, 2 and 10 to Motion. Respondent did not object to this definition or to the scope of the discovery responses and, in any event, was later ordered by the Board to respond to Petitioner's Discovery Requests without objection.² Further, since any use of the THORO (stylized) mark would have supported the THORO (word) filing, it makes no sense why Respondent would not have produced responsive evidence of use of the ~~THORO~~ mark.

V. **Introduction Now Of Any Further Information or Documents Requested By Petitioner During Discovery But Not Produced Should be Prohibited**

Respondent had multiple opportunities to update his discovery though April 2016 (which postdates the three year period of claimed non-use). Despite Orders compelling him to do so, Respondent either chose not to respond at all (in the case of the Admission Requests and Second Set of Discovery) or to reserve essentially the same responses (in the case of the multiple Responses to the First Set of Discovery). Respondent now argues that Petitioner should be prevented from relying on Respondent's responses to establish Petitioner's claims because the responses are "unverified and incomplete and outdated." To allow Respondent yet another opportunity to provide responses would render meaningless the time obligations required of parties under the Federal Rules of Civil Procedure and Trademark Rules of Practice.

Respondent has been prohibited from introducing any further information or documents that would have been responsive to Petitioner's earlier discovery requests as a result of the sanctions imposed by the Board. 57 TTABVUE 8 (item 3). Specifically, the Board ordered:

Applicant is prohibited at trial from introducing or relying at trial on any documents or information requested by Opposer during discovery but not produced by Applicant in accordance with the

² Respondent's asserted confusion as to which THORO Marks were covered by the Discovery Requests is directly contradicted by the simultaneous assertion that he had knowledge that all three forms of the marks were at issue. See 71 TTABVUE 3, Parent ("I respectfully ask the board to take note that **three 'THORO' marks have been on trial in the 1 ½ duration.**") (bold in original).

Board's orders;

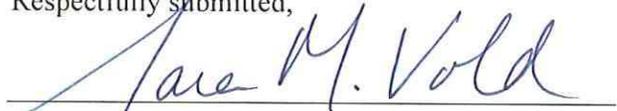
Since the earlier discovery requests sought information with respect to use of all three forms of the THORO Marks at issue in these consolidated proceedings, the sanctions imposed by the Board preclude additional discovery responses from Respondent now.

CONCLUSION

For over two years now, Respondent has delayed substantive consideration of the issues through repeated failures to adhere to Board orders and by the provision of non-compliant, incomplete and inconsistent responses to Petitioner's discovery requests. This Motion provided Respondent with one last opportunity to produce permissible evidence of the use of the THORO Marks during the relevant time period. Respondent has failed to do so. As Petitioner has established its case on the merits, Petitioner respectfully requests the Board to grant the Motion for Summary Judgment, sustaining Opp. Nos. 91214578 and 91226723 and granting Cancellation No. 92063552 because the opposed applications for THORO Marks were void *ab initio*, and the mark which is the subject of the THORO Registration has been abandoned.

Dated: September 13, 2016

Respectfully submitted,

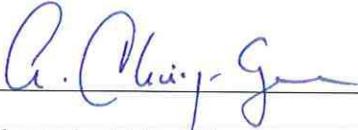


Tara M. Vold
J. Paul Williamson
VOLD & WILLIAMSON PLLC
8251 Greensboro Drive, Suite 340
McLean, VA 22102
571-395-4630
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT was served via email on this 13th day of September, 2016 to Respondent at the following address:

lemarlewis@hotmail.com



Alexandra Thierry-Gore