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

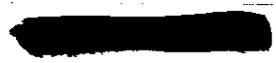
FRED WISNIEWSKI, a/k/a CAPTAIN RAT,)	
)	
Petitioner,)	Cancellation No. 20,442
)	
v.)	
)	
CAPTAIN RAT AND THE BLIND RIVETS,)	
)	
Respondent.)	

RESPONDENT'S RESPONSE TO BOARD'S ORDER OF
JANUARY 9, 2004 INFORMING BOARD OF
CIVIL ACTION STATUS

NOW COMES the Respondent, CAPTAIN RAT AND THE BLIND RIVETS, and in response to the Board's Order of January 9, 2004, requesting information regarding the status of the "civil action" between the parties, states that the civil action filed by CAPTAIN RAT AND THE BLIND RIVETS against FRED WISNIEWSKI, in the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, as cause number 92-C-1569, was voluntarily dismissed on November 8, 1999. The Court's written Order Granting Voluntary Dismissal was entered November 9, 1999.

In accordance with this Board's Order of January 9, 2004, the Respondent submits the following Exhibits to aid this Board in its understanding of the State Court's "civil action" between the same parties, from Cause No. 92-C-1569:

1. Exhibit A - Order Granting Voluntary Dismissal Without Prejudice, November 9, 1999;
2. Exhibit B - Motion for Voluntary Dismissal, filed October 26, 1999;



02-11-2004

3. Exhibit C - Docket Sheet from Champaign County Civil Action No. 92-C-1569, indicating history of civil action;

4. Exhibit D - Amended Petition for Declaratory Judgment to Cancel Service Mark Registrations and for Issuance of Injunction, filed April 20, 1999;

5. Exhibit E - Answer to Amended Petition, filed May 25, 1995;

6. Exhibit F - Memorandum Opinion and Order, entered October 21, 1993.

7. Exhibit G - (omitted)

No other "civil action" has been commenced between the parties following the dismissal of 92-C-1569 in November of 1999.

The original "civil action" between the parties was initially commenced on April 28, 1987, with FRED WISNIEWSKI bringing suit against the principals of CAPTAIN RAT AND THE BLIND RIVETS in, Fred Wisniewski a/k/a Captain Rat vs. Tim Vear, Mark Rubel and Roger Prillaman, case number 87-C-485, in the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois. That suit was dismissed by the Court on its own motion, on August 28, 1991, for want of prosecution, and thereafter reinstatement was refused by the Court on November 19, 1991. In order to further aid this Board in its understanding of the full litigation between the parties, Respondent attaches the following Exhibits, from Cause No. 87-C-485:

8. Exhibit H - Petition for Preliminary Injunction, filed April 28, 1987;

9. Exhibit I - Motion to Dismiss and Petition to Cancel Service Mark Registration, filed May 1, 1987 by Tim Vear, Mark Rubel and Roger Prillaman, d/b/a Captain Rat and The Blind Rivets;

10. Exhibit J - Exerpts from transcript of hearing held May 1, 1987, detailing the Court's ruling in denying Fred Wisniewski's Request for Preliminary Injunction;
11. Exhibit K - Answer to Petition for Preliminary Injunction, filed June 10, 1987;
12. Exhibit L - Amended Counter-Petition to Cancel Service Mark Registration, filed November 23, 1987;
13. Exhibit M - Response to Amended Counter-Petition to Cancel Service Mark Registration, filed on or about January 11, 1988;
14. Exhibit N - Dismissal for want of proecution of 87-C-485 dated August 28, 1991;
15. Exhibit O - Fred Wisniewski's Petition to Reinstate and for Leave to File Amended Pleadings, dated or about December 27, 1991;
16. Exhibit P - Captain Rat and The Blind Rivet's Response to Plaintiff/Counter-Defendant's Petition to Reinstate/Response to Plaintiff's Leave to File Amended Pleadings, filed November 14, 1991;
17. Exhibit Q - Excerpts from Docket Sheet, 87-C-485, indicating entry of November 19, 1991, denying Fred Wisniewski's Petition to Reinstate, etc.

In summary, based upon the foregoing and enclosed Exhibits, even though there has been prior litigation between the parties, with FRED WISNIWESKI originally suing CAPTAIN RAT AND THE BLIND RIVETS in 1987 (case dismissed in 1991), and thereafter, CAPTAIN RAT AND THE BLIND RIVETS suing FRED WISNIEWSKI in

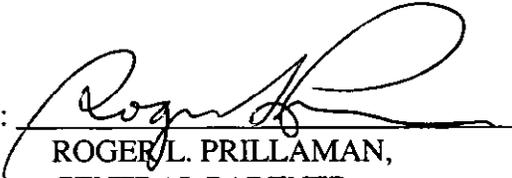
1992 (case voluntary dismissed in 1999), there has been no other civil litigation between the parties.

Respondent respectfully requests that entry number 80, dated September 4, 2003, titled "D'S MOTION FOR AN EXTENSION OF TIME", contained on the TTABVUE Trademark Trial and Appeal Board Inquiry System be corrected.

Respondent suggests said entry is inadvertent and a scrivener's error. The actual document filed by Respondent was titled, "Request Concerning Resetting of Testimony Period", mailed September 2, 2003. Since Respondent elected to voluntarily dismiss its civil action in Champaign County against Petitioner in 1999, all Motions for Suspension filed herein have been unilaterally filed by Petitioner.

CAPTAIN RAT AND THE BLIND RIVETS

DATED: 2/9/04

BY: 
ROGER L. PRILLAMAN,
GENERAL PARTNER

CAPTAIN RAT AND THE BLIND RIVETS
220 W. Main Street
Urbana, Illinois 61801
(217)384-1310

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

FRED WISNIEWSKI, a/k/a CAPTAIN RAT,)	
)	
Petitioner,)	Cancellation No. 20,442
)	
v.)	
)	
CAPTAIN RAT AND THE BLIND RIVETS,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I, ROGER L. PRILLAMAN hereby certify that a copy of the forgoing RESPONDENT'S RESPONSE TO BOARD'S ORDER OF JANUARY 9, 2004 INFORMING BOARD OF CIVIL ACTION STATUS was served upon Smart and Bostjancich, 19 South LaSalle Street, Suite 1300, Chicago, Illinois 60603, by first class mail, postage pre-paid, this 9th day of February 2004.



CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first-class mail, in an envelope addressed to:

Commissioner For Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

on the 9th day of February, 2004.



ROGER L. PRILLAMAN

CAPTAIN RAT AND THE BLIND RIVETS
220 W. Main Street
Urbana, Illinois 61801
217/384-1310

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

HILLIARD
SIXTH JUDICIAL CIRCUIT

OCT 26 1999

Linda S. Frazier
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

TIM VEAR, MARK RUBEL,)
ROGER PRILLAMAN, and)
JEFF EVANS, d/b/a)
"CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT", a general)
partnership,)
Plaintiffs,)
vs.)
FRED WISNIEWSKI,)
Defendant.)

No. 92-C-1569

MOTION FOR VOLUNTARY DISMISSAL

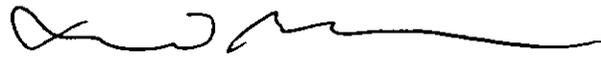
NOW COME the Plaintiffs, individually and doing business as CAPTAIN RAT AND THE BLIND RIVETS, and pursuant to 735 ILCS 5/2-1009, move for a voluntary dismissal of this cause without prejudice; this Motion is being made prior to trial, upon notice to Defendant's attorney of record, and upon tender of payment of Defendant's costs (see attachment A).

WHEREFORE, Plaintiffs request voluntary dismissal of this action without prejudice.

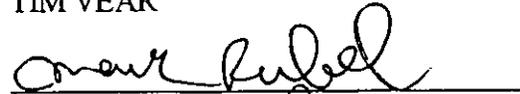
Respectfully submitted,

PLAINTIFF(s):

DATED: 10/26/99



TIM VEAR



MARK RUBEL



JEFF EVANS



ROGER L. PRILLAMAN

INDIVIDUALLY AND DOING BUSINESS
AS CAPTAIN RAT AND THE BLIND
RIVETS

Linda S. Frank

Clerk of the Circuit Court

Case: Lookup

Name: [REDACTED]

LOGOFF

CIVIL CASE LOOKUP FOR CASE #92C 01569**Respondant**WISNIEWSKI FRED
00000**Petitioner**

VEAR TIM

VS 00000

Information:File Date: 11/19/92
Court Room: E
Next Appearance: 11/08/99 09:00
Jury Trial: NOPLAINTIFF: VEAR TIM
DEFENDANT: WISNIEWSKI FRED
PL. ATTORNEY: PRILLAMAN & PRILLAMAN, LTD.
PLAINTIFF: RUBEL MARK
PLAINTIFF: PRILLAMAN ROGER
PLAINTIFF: EVANS JEFF
PLAINTIFF: CAPTAIN RAT AND BLIND RIVETS
PLAINTIFF: CAPTAIN RAT
PLAINTIFF: VEAR TIM
PLAINTIFF: RUBEL MARK
PLAINTIFF: PRILLAMAN ROGER
PLAINTIFF: EVANS JEFF
DEFENDANT: WISNIEWSKI FRED**FEES & FINES INFORMATION**

as of 02/05/2004 10:00:52 PM

ORDERED	DESCRIPTION	PAID	BALANCE
40.00	CLERK	40.00	.00
5.00	LIBRARY	5.00	.00
3.00	AUTOMATION FEE	3.00	.00
10.00	COURT SECURITY FEE	10.00	.00

RECEIPT HISTORY INFORMATION

as of 02/05/2004 10:00:52 PM

RECEIPT #	DESCRIPTION	AMOUNT	DATE PAID
116687	CLERK	40.00	11/19/92
116687	LIBRARY	5.00	11/19/92
116687	AUTOMATION FEE	3.00	11/19/92
116687	COURT SECURITY FEE	10.00	11/19/92

CHARGES INFORMATION

as of 02/05/2004 10:00:54 PM

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03-30-95 HLJ/DT/BT with the case. Cause taken under advisement.
 HLJ/BT
 HLJ/BT Ruling on matters taken under advisement on
 HLJ/BT March 27, 1995. See written order filed herewith.

04-20-95 CIVIL / CD Amended Petition for Declaratory Judgment to
 CIVIL / CD Cancel Service Mark Registrations and for
 CIVIL / CD Issuance of Injunction on file by Plaintiffs
 CIVIL / CD pro-se.

05-25-95 CIVIL / CD Answer to Amended Petition for Declaratory
 CIVIL / CD Judgment to Cancel Service Mark Registrations and
 CIVIL / CD for Issuance of Injunction on file by Defendant
 CIVIL / CD by attorney Croegaert, Clark & Hough, LTD.

09-25-96 CIVIL / MM Motion for Approval of Settlement on file by
 CIVIL / MM Plaintiff, Captain Rat and the Blind Rivets Pro
 CIVIL / MM Se.

06-23-99 GSM/JS/PW
 GSM/JS/PW Roger Prillaman appears pro se and on behalf of
 GSM/JS/PW "Captain Rat & The Blind Rivets". Defendant
 GSM/JS/PW appears personally with attorney Stephen Hough.
 GSM/JS/PW Cause called for hearing on Motion to Enforce
 GSM/JS/PW Settlement. Motion for enforcement of settlement
 GSM/JS/PW is withdrawn by the moving defendant party. Cause
 GSM/JS/PW referred to Judge DeLaMar for trial setting.

09-20-99 JRD/JS
 JRD/JS Cause allotted for Bench Trial for 1 day
 JRD/JS commencing 9:30 A.M. on November 30, 1999 in
 JRD/JS Courtroom E. Notice sent by the Court this
 JRD/JS date.

10-26-99 CIVIL / NM Motion for Voluntary Dismissal on file by
 CIVIL / NM Plaintiffs by Pro Se.

11-02-99 JRD/OP
 JRD/OP Plaintiffs' Motion for Voluntary Dismissal
 JRD/OP is set to be heard 11/8/99 at 9:00 a.m. in
 JRD/OP Courtroom E. Plaintiff to give notice.

* 11-08-99 JRD/OP
 JRD/OP Appearance of the Plaintiff by R. PRILLAMAN.
 JRD/OP No appearance by the Defendant nor anyone on
 JRD/OP Defendant's behalf. Notice of Hearing this date
 JRD/OP and proof of service thereof on file and
 JRD/OP approved. Cause called for hearing on
 JRD/OP Plaintiff's Motion for Voluntary Dismissal.
 JRD/OP Motion is allowed. Cause is dismissed without
 JRD/OP prejudice.

* 11-09-99 JRD/OP
 JRD/OP Written Order Granting Voluntary Dismissal
 JRD/OP Without Prejudice entered. See ORDER.

11-21-02 CASE HAS BEEN MICRO FILMED-ROLL #0523 INDEX #0091
 CASE HAS BEEN MICRO FILMED-ROLL #0523 INDEX #0091

Case LookUp

Name List

LOGOFF

FILED
SIXTH JUDICIAL CIRCUIT

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

APR 20 1995

TIM VEAR, MARK RUBEL,)
ROGER PRILLAMAN, and)
JEFF EVANS, d/b/a)
"CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT", a general)
partnership,)
)
Plaintiffs,)
)
vs.)
)
FRED WISNIEWSKI,)
)
Defendant.)

Linda S. Freed
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

No. 92-C-1569

AMENDED PETITION FOR DECLARATORY JUDGMENT TO CANCEL
SERVICE MARK REGISTRATIONS AND FOR ISSUANCE OF INJUNCTION

NOW COME the pro se Plaintiffs, TIM VEAR, MARK RUBEL, ROGER PRILLAMAN, and JEFF EVANS, a general partnership, d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" and "CAPTAIN RAT" and pursuant to Illinois Revised Statutes, Chapter 140, Paragraph 8 et seq, and believing that they are or will further be damaged, pray for an order canceling certain service mark registrations now existing in the Office of the Secretary of State, and in support thereof state as follows:

1. That on or about April 12, 1985 one FRED WISNIEWSKI, Defendant herein, did individually apply for four separate service marks with regard to the mark "Captain Rat". On the 13th day of May, 1985, the Office of the Secretary of State did issue official registrations to FRED WISNIEWSKI, individually in said four marks as registration numbers 56575, 56576, 56577, and 56578, on said

D 1

mark "Captain Rat". Said registrations are attached hereto as Exhibits A, B, C, & D and are incorporated by reference herein. Each said registration describes the mark "Captain Rat" as follows: "Stage name: The name is used to orally indicate the stage name of one individual in the musical group professionally known as 'Captain Rat and The Blind Rivets'"; "The stage name is used in conjunction with the performances of the group professionally known as 'Captain Rat and The Blind Rivets'."

2. On the date of said applications, Defendant, FRED WISNIEWSKI was the drummer for the Champaign-Urbana, Illinois musical group known professionally as "Captain Rat and the Blind Rivets", or in short-hand language, "Captain Rat" and the Plaintiffs hereto, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, were the other members of said musical group, and at all times herein relevant said musical group was and is an oral general partnership by virtue of the parties having joined together to carry on business for their common benefit, with each member having contributed services and having community of interest in all profits.

2.5. Facts supporting Plaintiffs' allegation of the existence of a partnership include, but are not limited to the following: during Defendant's membership in the band, the group purchased liability insurance in the form of a "partnership", maintained a joint business checking account with equal check writing privileges of all members, split all profits and losses from performances on

an equal basis, purchased an equipment truck from group revenues in equal shares, maintained a partnership advertising account with the Daily Illini, recorded and sold several records under the name Captain Rat and the Blind Rivets, splitting the expenses and profits equally, and made major band decisions by majority vote, all of which established "an association of two or more persons to carry on as co-owners of a business for profit" within the meaning of the Uniform Partnership Act, 805 ILCS 205/1 et seq.

3. By majority vote of the partnership, Defendant, FRED WISNIEWSKI, was dismissed from the organization on or about April 20, 1987. JEFF EVANS was hired as replacement drummer by the group and was made a full partner on or about January 1, 1988. The group continues to perform in this present format through present, enjoying continuing popularity, averaging in excess of 75 performances each year throughout the state and elsewhere.

4. That Illinois Revised Statutes, Chapter 140, Paragraph 16 provides in pertinent part: The Secretary of State shall cancel from the register:

- (4) Any registration concerning which the circuit court shall find:
 - (a) that the registered mark has been abandoned,
 - (b) that the registrant is not the owner of the mark,
 - (c) that the registration was granted contrary to this Act,
 - (d) that the registration was obtained fraudulently,
 - (e) that the registered mark is so similar, as to be likely to cause confusion or mistake or to deceive, to a mark currently registered by another person in

the United States Patent Office on an application filed prior to the date of the first use in this State by the registrant hereunder, and not abandoned,

(f) that the registered mark has become incapable of serving as a mark.

(5) Any registration which the circuit court shall order canceled on any ground.

5. That the application for registration of the mark "Captain Rat" by the Defendant was secretly made without discussion with the other aforementioned group members and was made without their knowledge or approval.

6. That on numerous occasions throughout the musical history of Captain Rat and the Blind Rivets, and specifically on or about March 20, 1985, the parties hereto had discussed and decided that the group name was an asset of the partnership, and, that the group would be the proper party to apply for federal trademark registration.

7. That notwithstanding the fiduciary duty owed by FRED WISNIEWSKI to his other partners and in direct contravention of the aforementioned group discussions and decisions regarding the group designation "Captain Rat and The Blind Rivets" being a partnership asset, the Defendant FRED WISNIEWSKI did violate his fiduciary obligations and agreements with his partners by so individually registering "Captain Rat" as service marks aforementioned with the Secretary of State.

8. That the intent of FRED WISNIEWSKI in so registering the

various service marks was to gain an undue advantage over his partners in ownership rights to the group name, all in an effort to exclude the other partners from use of the name at a later date.

9. That the applications for registration contained an oath which states in pertinent part:

"That said applicant is the owner of the mark sought to be registered and that no other person has the right in the State of Illinois to use such mark either in the identical form thereof, or in such near resemblance thereto, as to be likely, when applied to the goods or services of such person, to cause confusion or to cause mistake or to deceive."

10. That the designation "Captain Rat" and full group name, "Captain Rat and The Blind Rivets" were originally conceived by one George Dion, an earlier group member in or about 1973 or 1974, when the members of the then existing rock group "Ratsback" collectively decided to create a 50's/60's sub-group, naming it "Captain Rat and The Blind Rivets", and thereafter assigning roles, and stage names to individual members. At all times subsequent thereto the marks in question were and are partnership assets of the named musical group and at all such times, the group/partnership has controlled and determined the nature and quality of the musical services which have been marketed under the name(s) in question. Over time, the short-hand designation "Captain Rat" has acquired secondary meaning and been primarily used (both internally and by the general public) to refer to the group as a whole, rather than any particular individual.

11. After Defendant, FRED WISNIEWSKI's dismissal from the

partnership, he unsuccessfully sought an injunction from this Court in cause no. 87-C-485, seeking to enjoin the partnership from performing under the group name(s); the Court being fully aware of FRED WISNIEWSKI's registered service marks, found on May 1, 1987, that FRED WISNIEWSKI possessed no superior rights to the name(s) and that FRED WISNIEWSKI's use of the name, "Captain Rat" had not become "to separate a persona..." and "...the use of that particular appellation ("Captain Rat") had been so permitted to be used to describe the group in a short-hand fashion." (page 70-73 of transcript containing the Honorable Harold Jensen's ruling, appended hereto and marked as Exhibit E).

12. That FRED WISNIEWSKI'S registered trademarks should be canceled for the following reasons:

A. Defendant has not actively and continuously performed under the stage name "Captain Rat" since April 20, 1987, thereby abandoning any claim to said mark;

B. That the registrant was and is not the owner of the mark in that FRED WISNIEWSKI individually had never adopted and/or used the mark in a business of his own, with regard to identifying the services of a musical group; rather, the mark was created and adopted by the musical group/partnership and made popular by the joint efforts and distinctive personalities and style of the group members;

C. That the registration was granted contrary to this act as the oath cited therein was false and made in derogation of

FRED WISNIEWSKI'S fiduciary obligations to his other partners, knowing then and there that he did not have the exclusive rights in said name, "Captain Rat"; similarly, that his use of the mark would be likely to cause confusion or mistake or to deceive the public. (Ill.Rev.Stat., Ch.140, Sect. 9(f)).

D. That due to the facts surrounding the secret nature of FRED WISNIEWSKI'S applications for registration as well as MR. WISNIEWSKI'S knowledge that said service mark "Captain Rat" was a mark belonging to the partnership, said registrations were obtained fraudulently.

E. That the registered marks have become incapable of serving as a mark, in that due to the very terms of FRED WISNIEWSKI'S own service mark registrations, his service mark has expired naturally in that he is no longer a member of the musical group, "Captain Rat and the Blind Rivets".

F. That Defendant's attempted use of his state service mark registrations is well beyond the scope of the registrations' description as a mere "stage name".

13. That notwithstanding this Court's rulings against the Defendant, FRED WISNIEWSKI, in cause no. 87-L-485, (Exhibit E), the Defendant either directly or through his agents and/or representatives, has attempted to interfere with the business affairs of CAPTAIN RAT and THE BLIND RIVETS by threatening the group's purchasers of its talent, including but not limited to group performance for the Champaign Park District (6/92), Radio

Station WLRW (10/92), Radio Station WKIO/The Champaign County 4th of July Freedom Celebration (7/4/92), Scotty's Night Club (10/92). (For examples see Exhibits F and G attached hereto and incorporated by reference herein.)

14. Further, relying upon his wrongfully obtained state service marks, Defendant, FRED WISNIEWSKI, has also filed a petition seeking cancellation of the group's federal trademark, "Captain Rat and The Blind Rivets", asserting, in essence, that said federal trademark was obtained because the group did not reveal the existence of FRED WISNIEWSKI's wrongfully obtained state service marks in the application process; (See Exhibit H attached hereto and incorporated by reference herein.) The U.S. Patent and Trademark Office potentially lacks jurisdiction to cancel Defendant's state service mark registrations, thereby necessitating this instant action in part.

15. Plaintiffs' Exhibits attached to the original Petition herein are hereby incorporated by reference and made a part of this Amended Petition.

WHEREFORE, the Plaintiffs, TIM VEAR, MARK RUBEL, ROGER PRILLAMAN, and JEFF EVANS, d/b/a "Captain Rat and The Blind Rivets" and "Captain Rat" hereby pray for the following:

A. Cancellation of Defendant's service marks and for an award of reasonable attorneys fees; and/or

B. A declaration that Plaintiffs are the proper owners of the marks, "Captain Rat and The Blind Rivets" and/or "Captain Rat",

and/or

C. Issuance of any injunction enjoining Defendant from attempting to prevent Plaintiffs from performing under the name(s) "Captain Rat and The Blind Rivets" and/or "Captain Rat", and from interfering in Plaintiff's business affairs; and/or

D. A declaration as to the relative rights of the parties in and to the mark(s) "Captain Rat and The Blind Rivets" and/or "Captain Rat"; and

E. For such further relief as the Court may deem just and equitable.

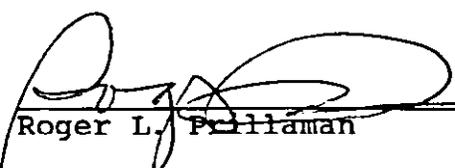
CAPTAIN RAT AND THE BLIND RIVETS

BY: 

ROGER L. PRILLAMAN, General Partner

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



Roger L. Prillaman

Captain Rat & The Blind Rivets
117 N. Broadway
Urbana, IL 61801
(217)384-1310

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

TIM VEAR, MARK RUBEL,)
ROGER PRILLAMAN, and)
JEFF EVANS, d/b/a)
"CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT", a general)
partnership,)
Plaintiffs,)
vs.)
FRED WISNIEWSKI,)
Defendant.)

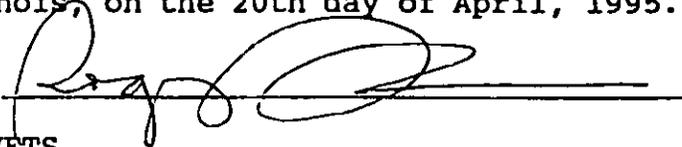
No. 92-C-1569

CERTIFICATE OF SERVICE

I, the Undersigned, certify that a copy of the foregoing
AMENDED PETITION FOR DECLARATORY JUDGMENT TO CANCEL SERVICE MARK
REGISTRATIONS AND FOR ISSUANCE OF INJUNCTION was served upon the
parties named therein by enclosing said document in an envelope
addressed to:

Stephen J. Hough
Croegaert, Clark & Hough
305 E. Main St.
Olney, IL 62450

with postage fully pre-paid, and by depositing said envelope in
the U.S. Mail in Urbana, Illinois, on the 20th day of April, 1995.



CAPTAIN RAT AND THE BLIND RIVETS
117 North Broadway Avenue
Urbana, Illinois 61801
217/384-1310

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

TIM VEAR, MARK RUBEL,)
ROGER PRILLAMAN, and)
JEFF EVANS, d/b/a)
"CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT", a general)
partnership,)
)
Plaintiffs,)
)
vs.) No. 92-C-1569
)
FRED WISNIEWSKI,)
)
Defendant.)

ANSWER TO AMENDED PETITION FOR DECLARATORY JUDGMENT TO CANCEL
SERVICE MARK REGISTRATIONS AND FOR ISSUANCE OF INJUNCTION

COMES NOW the Defendant, FRED WISNIEWSKI, also known as Captain RatSM, by and through his attorneys, CROEGAERT, CLARK & HOUGH, Ltd., and for their answer to the Amended Petition filed herein states as follows:

1. The Defendant admits the allegations of paragraph 1.
2. The Defendant denies the allegations of paragraph 2, but admits that he was a drummer for a Champaign/Urbana, Illinois musical group known as "Captain Rat and the Blind Rivets". Defendant denies that there was an oral general partnership.
- 2.5 Defendant denies the allegations of paragraph 2.5.
3. Defendant denies the allegations of paragraph 3.
4. Defendant admits the allegations in paragraph 4, but denies that the cited statute applied in this instance.
5. Defendant denies the allegations of paragraph 5.
6. Defendant denies the allegations of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. Defendant denies the allegations of paragraph 8.
9. Defendant admits that the application for registration contains such an oath, but denies that it applies in the case at

bar.

10. Defendant denies the allegations of paragraph 10.

11. Defendant denies the allegations of paragraph 11 and denies that the application of cause no. 87-C-485 has any bearing on the outcome of this case.

12. Defendant denies the allegations of paragraph 12 and each and every subpart thereof.

13. Defendant denies the allegations of paragraph 13.

14. Defendant denies that the state service marks were wrongfully obtained but admits that he has filed a Petition seeking cancellation. The Defendant denies that the U.S. Patent and Trademark Office potentially lacks jurisdiction to cancel the state service mark registration, and further denies that this action is necessary as set forth in paragraph 14.

15. Defendant admits that Plaintiffs have attached Exhibits and denies that they have any meaning in the case in stance here.

WHEREFORE, the Defendant, Fred Wisniewski, also known as Captain RatSM prays that this Court:

A. Enter its Order denying the Amended Petition for Declaratory Judgment;

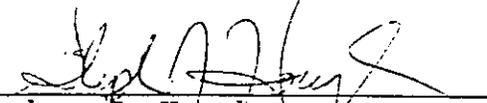
B. Enter its Order that the Defendant is the proper owner of the four marks of registration Nos. 56575, 56576, 56577, and 56578;

C. Denies issuance of any injunction enjoining Defendant, Fred Wisniewski, also known as Captain RatSM;

D. Declaration as to relative rights of the Defendant to use the marks Captain RatSM;

E. For further relief as the Court may deem just and equitable.

FRED WISNIEWSKI, Defendant

BY 
Stephen J. Hough
CROEGAERT, CLARK & HOUGH, Ltd.
305 East Main Street
Olney, IL 62450
(618) 395-7363

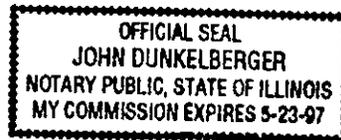
VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that FRED WISNIEWSKI verily believes same to be true.

Fred Wisniewski
Fred Wisniewski

Subscribed and sworn to before me this 24 day of May, 1995.

John Dunkelberger
Notary Public



RECEIVED OCT 21 1993

HAROLD L. JENSEN
CIRCUIT JUDGE
COURTHOUSE
101 EAST MAIN STREET
URBANA, ILLINOIS 61801-2772

SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY

TELEPHONE 384-3707
AREA CODE 217

October 21, 1993

Mr. Roger Prillaman
Attorney at Law
115 West Main St.
Urbana, IL 61801

Mr. Robert Dodd
Attorney at Law
303 S. Mattis Suite 201
Champaign, IL 61821

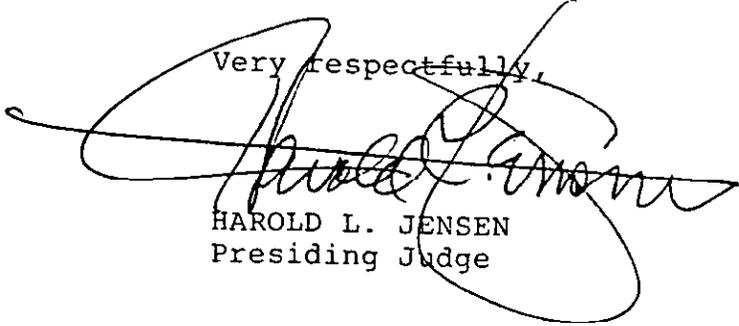
RE: Tim Vear, et al vs Fred Wisniewski
NO: 92-C-1569

Dear Counsel,

I have this date made the following docket entry in the above entitled cause:

"Ruling on all matters heretofore taken under advisement. See written Memorandum Opinion and Order filed herewith".

Very respectfully,



HAROLD L. JENSEN
Presiding Judge

HLJ/bt

F1

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FILED

OCT 2 1 1993

TIM VEAR, MARK RUBEL,)
ROGER PRILLAMAN, AND)
JEFF EVANS, d/b/a "CAPTAIN)
RAT AND THE BLIND RIVETS")
AND "CAPTAIN RAT", a)
general partnership,)
Plaintiffs,)
vs)
FRED WISNIEWSKI,)
Defendant.)

Linda S. French
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

No. 92-C-1569

MEMORANDUM OPINION AND ORDER

On September 8, 1993, arguments were heard on the defendant's "Motion for Stay, Sanctions, Injunction, and Other Relief," and the plaintiffs' response thereto and defendant's reply to the response, after which the Court took those matters under advisement. The Court has examined the records and files herein and considered the arguments of counsel and the applicable law, and now rules as follows.

By way of background it is noted that in 1987 the plaintiffs filed for and were granted federal registration for the mark "Captain Rat and the Blind Rivets." Subsequently, the defendant filed a petition with the federal Trademark Trial and Appeal Board (hereafter TTAB) requesting cancellation of the plaintiffs' federal trademark on the grounds that the plaintiffs failed to reveal the existence of the defendant's prior state (Illinois) service mark. While the defendant's petition for cancellation is currently pending before the TTAB, the plaintiffs

have filed a petition in this court seeking the cancellation of the defendant's state service mark, a declaration as to the proper ownership of the marks "Captain Rat" and "Captain Rat and the Blind Rivets", and the issuance of an injunction to prevent the defendant from using either mark and from interfering in the plaintiffs' business affairs. In response to this complaint, the defendant has not filed an answer, but instead has filed a petition to stay the proceedings of this court, and has also requested that this court enter sanctions and an injunction against the plaintiffs.

The issues are as follows:

I. Whether the defendant's Motion to stay the plaintiffs' complaint should be granted.

II. Whether the defendant's Motion to Impose Sanctions upon the plaintiffs should be granted.

III. Whether the defendant should be awarded injunctive relief against the plaintiffs which would bar them from any further use of the names "Captain Rat and the Blind Rivets", or "Captain Rat", and which would prevent the plaintiffs from operating under either name as a penalty for failing to register such names under the Illinois Assumed Business Name Act.

I. The issue of a stay under 735 ILCS 5/2-619.

This issue is whether the proceedings before the Court should be stayed in deference to the cancellation proceeding currently pending before the TTAB. This relief is sought on the ground that there is another action pending, the rationale being to

relieve the courts and litigants of the unnecessary burden of duplicative litigation. Plaintiffs argue, and the Court could probably conclude, that the proceedings before the TTAB do not constitute an "action" within the meaning of 735 ILCS 5/12-619(a)(3). See Ransom v. Marrese, (1988) 122 Ill. 2d 518. But there are other more substantive reasons why the Court need not stay these proceedings pending the outcome of the matter before the TTAB.

The defendant argues that the proceedings before this court should be stayed under 735 ILCS 619(a)(3), because the federal trademark cancellation proceeding involves the same parties as the proceeding before this court, as well as questions identical to those presented by the plaintiffs' state court petition. (Defendant's Motion, pars. 8 and 9). However, even assuming that both actions involve the same parties and questions, this does not mean that a stay must be automatically granted. Rather, the decision whether to grant or deny a section 2-619 (a)(3) motion is discretionary with the trial court. (Kellerman v. MCI Telecommunications Corp. (1986), 112 Ill.2d 428, 493 N.E. 2d 1045, 98 Ill. Dec. 24, 32).

The factors which a court should consider in deciding whether a stay is warranted under 735 ILCS 2-619(a)(3), include: comity; the prevention of multiplicity, vexation and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment in the local forum. (Kellerman, supra). Defendant's request

for a stay should be denied because the issues presented by the plaintiffs' complaint are not identical to those before the TTAB and consequently the plaintiffs will be unable to obtain complete relief from the federal proceedings, and because any decision handed down by the TTAB will have no binding effect upon this court, essentially necessitating a trial de novo in this state forum regardless of the outcome of the TTAB proceeding. Contrary to the defendant's assertions, the proceedings before this court and the federal Trademark Trial and Appeal Board do not involve totally identical issues. The defendant specifically argues that the same question is at issue in both the TTAB petition and the plaintiffs' state-court complaint: ownership of the mark "Captain Rat and the Blind Rivets". (Defendant's Reply to Plaintiffs' Response to Defendant's Motion for Stay, Sanctions, Injunction, and other Relief, pars. 1 and 2). However, this statement is simply an inaccurate representation of the function and powers of the TTAB in a registration cancellation proceeding.

15 USC sec. 1068, "Action of Commissioner in interference, opposition, and proceedings for concurrent use registration or for cancellation", provides that in cancellation or opposition proceedings, the TTAB "... may refuse to register the opposed mark, may cancel the registration, in whole or in part, may modify the application or registration by limiting the goods or services specified therein, may otherwise restrict or rectify with respect to the registration of a registered

mark, may refuse to register any or all of several interfering marks, or may register the mark or marks for the person..entitled thereto, as the rights of the parties under this chapter may be established in the proceedings..". Thus, the power of the TTAB in a cancellation proceeding is limited solely to a determination of the parties' relative rights to federal trademark registration.

Although Congress, through 15 USC sec. 1068, has granted the Board the authority to cancel a trademark registration, the Board has not been given the power to cancel the trademark itself. (Hammermill Paper Co. v. Gulf States Paper Corp., 337 F.2d 662, 663 (1964). Consequently, even though the TTAB may need to consider each party's respective use of the registered trademark in reaching its decision as to cancellation of a registration, it cannot issue a binding decision as to the ownership or common-law use of the trademark. (Skil-Craft Corp. V. M. Lober & Assoc., 138 F. Supp. 313, 314 (S.D.NY. 1956). In contrast, this Court does possess the authority not only to cancel a federal registered trademark (15 USC sec. 1119), but also to make a final and binding determination as to the ownership of that trademark, and to award damages or injunctive relief for trademark infringement or unfair competition.

Clearly then, the issues confronting the TTAB through the defendant's cancellation proceeding and those presented to this court by the plaintiffs' complaint are hardly identical. The only issue facing the TTAB is whether the plaintiffs' federal

registration of "Captain Rat and the Blind Rivets" should be cancelled due to the plaintiffs' failure to disclose the alleged interest of the defendant in that mark. In making its decision as to whether the plaintiffs committed fraud by failing to disclose the existence of the defendant's state-registered service mark, the TTAB will necessarily make a limited inquiry into whether the defendant's use of the federally registered mark was prior to any use by the plaintiffs, but will be unable to issue any binding decision as to use or ownership of that mark.

This Court, however, has the authority to determine whether the plaintiffs are, or the defendant is, the proper owner of the mark. Further, this Court is faced with the additional question of whether the defendant's Illinois registered service mark should be cancelled under 765 ILCS 1035/9. Although a defendant-registrant in a federal registration cancellation proceeding may counterclaim for the cancellation of the plaintiffs' federal trademark registration (37 C.F.R. sec. 2.114(b)(1)), the TTAB obviously lacks the authority to cancel this defendant's state-registered service mark.

X
Because the issues confronting the TTAB and this court are not identical, and because the TTAB cannot cancel the defendant's state service mark nor issue any injunctive relief for trademark infringement or unfair competition, the plaintiffs' clearly cannot obtain complete relief in the TTAB cancellation proceeding, and consequently there is no reason for this court

to stay the plaintiffs' suit pending the outcome of the defendant's cancellation proceeding.

The defendant's motion for a stay should be denied on the additional grounds that any decision rendered by the TTAB concerning the cancellation of the plaintiffs' trademark registration has no binding or res judicata effect upon this court. Actions for violations of the Lanham Act can be properly brought in state courts, which possess powers under the Act identical to those of the federal courts. (Dell Pub. Co. v. Stanley Publications, Inc. (Court of Appeals of New York 1961), 172 N.E.2d 656, 660). Under 15 USC sec. 1071(b), a party to a cancellation proceeding who is disappointed with the decision of the TTAB may bring a subsequent civil action which raises precisely the same issues which were addressed by the TTAB. (Goya Foods v. Tropicana Products (CA 2nd 1988), 6 USPQ 2d 1950, 1953; Sam S. Goldstein Industries v. Botany Industries (S.D.NY 1969). 163 USPQ 442, 443).

This civil action is intended to essentially constitute a trial de novo, since although the record made in the Patent and Trademark Office is admitted into evidence, the factfinding of the office is not conclusive, nor is the court's consideration limited to that record. (Goya, supra). Rather, the Court is allowed to permit and consider additional evidence, testimony and cross-examination. (Goya Foods v. Tropicana Products (CA 2nd 1988) USPQ 2d 1950, 1953). Because courts are allowed to consider such additional evidence, they

generally do not consider the decision rendered by the TTAB to be res judicata, although some deference must be afforded to it. (Goya, supra; Gilson, Trademark Protection and Practice, Vol. 1A, sec. 8.03(7)).

Since such decisions are not res judicata, and because courts may be forced to eventually independently determine those issues which faced the TTAB, courts generally are reluctant to stay trademark suits filed in their own forums in deference to pending TTAB proceedings. (Gilson, supra). Accordingly, the defendant's request for a stay of these proceedings is denied.

II. The issue of sanctions.

In his Motion for Stay, Sanctions, Injunction, and Other Relief, the defendant has requested that sanctions be imposed against the plaintiffs for filing their complaint. The defendant specifically alleges that the sole purpose of the plaintiffs in filing their complaint was to "...subvert the federal proceedings..to harass the defendant and cause him to incur unnecessary legal expenses.." in violation of Illinois Supreme Court Rule 137. (Defendant's Motion, para. 15).

There is simply no factual basis for this contention. As explained above, the defendant's TTAB cancellation proceeding is an extremely limited proceeding and only involves the cancellation of the plaintiffs' federal trademark registration. Issues of use and ownership of the marks "Captain Rat and the Blind Rivets", and "Captain Rat", will simply

not be resolved in that proceeding. Further, the TTAB lacks any authority to cancel the defendant's Illinois service mark. Thus, the plaintiffs' complaint merely seeks resolution of these crucial issues which will go unaddressed by the federal Trademark Trial and Appeal Board. The plaintiffs simply chose to file this cancellation and infringement suit while the defendant's TTAB proceeding was still pending; there is no rule forbidding the plaintiffs' from doing so, and such suits are frequently filed in district and state courts before the TTAB matter has been resolved.

Because there is no evidence that the plaintiffs' brought this suit purely to harass the defendant in violation of Supreme Court Rule 317, the defendant's motion for sanctions is denied.

III. The issue of defendant's request for injunctive relief.

The defendant in paragraph 21 of his Motion for Stay, Sanctions, Injunction and Other Relief has requested that this Court preliminarily enjoin the plaintiffs from using either the name "Captain Rat," or "Captain Rat and the Blind Rivets" pending the determination of ownership of these marks. Given the number of years the parties have "co-existed" in their dispute mode without court intervention and given the fact that there is not sufficient evidence to make any determination as to which side is likely to prevail on the merits and given the fact that there has been no demonstration of likely irreparable harm and because in balancing the interests of the plaintiffs, the defendant and the public there is nothing

that persuades the Court that the scales should tip toward the defendant, the request in paragraph 21 of defendant's motion is denied.

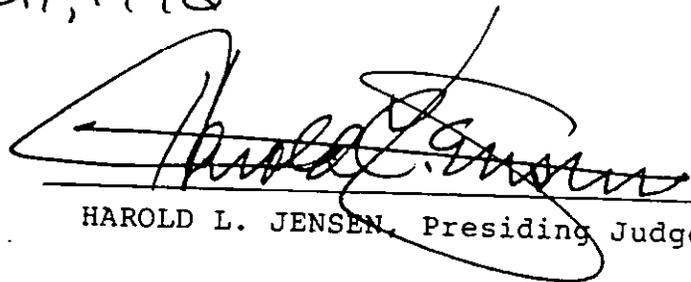
The defendant has additionally requested that the plaintiffs be enjoined from representing that they are "doing business as" either "Captain Rat and the Blind Rivets", or "Captain Rat", because the plaintiffs have failed to previously register either assumed name under the Illinois Assumed Business Name Act (805 ILCS 401/1). (Defendant's Motion, para. 22). The defendant also asks that this Court cancel any such certificate which may have been recently filed by the plaintiffs with the County Clerk, and that this Court not allow this certificate to relate back to the filing of the plaintiffs' complaint. (Defendant's Motion, para. 26). The defendant has cited absolutely no authority for the proposition that a failure to register an assumed business name warrants the enjoining of the further use of that name. The sole remedy available for a violation of the Illinois Assumed Business Name Act is for the State's Attorney to bring a Class C. Misdemeanor complaint against the violators, and that remedy is exclusive. (Thompson v. Cadillac (2nd Dist. 1989), 187 Ill. App.3d 104, 543 N.E.2d 308, 135 Ill. Dec. 73, 75): 805 ILCS 405/5). The Act makes no provision for either an injunction barring the use of an unregistered assumed name, or for the cancellation of any certificate which was not "timely filed". Further, courts have held that a party failing to register under the Act may sue and be sued (People v.

Arnold (1st Dist. (3rd Div.) 1972), 3 Ill. App.3d 678, 279 N.E.2d 436, 438); thus, contrary to the defendant's assertions, the Act does not bar these plaintiffs from bringing a civil suit against the defendant. The defendant's request for an injunction on this ground is denied.

For all of the above reasons, defendant's requests for a stay, sanctions and injunctive relief are denied.

SO ORDERED.

Dated: October 21, 1993


HAROLD L. JENSEN, Presiding Judge

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FILED

FRED WISNIEWSKI, :
a/k/a CAPTAIN RAT, :
 :
Plaintiff, :
 :
-vs- :
 :
TIM VEAR, MARK RUBEL and :
ROGER PRILLAMAN, :
 :
Defendants. :

APR 28 1987

87-C- 485

Ray Smith
CLERK OF THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PETITION FOR PRELIMINARY INJUNCTION

Now comes the Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, by his attorney, Michael B. McClellan, and in support of his Petition, he states:

1. A musical group, known as Captain Rat and the Blind Rivets, was formed in 1975, in Champaign, Champaign County, Illinois; Plaintiff was an original member of said group, and he was then, and has hereafter been, identified as CAPTAIN RAT, an appellation he registered as a service mark in the State of Illinois in August, 1985.

2. Plaintiff is the only member of said musical group to have performed with the group, consistently, since its formation; on April 20, 1987, the other current members of the group were the Defendants, TIM VEAR, MARK RUBEL, and ROGER PRILLAMAN.

3. On April 20, 1987, Plaintiff was informed by the Defendants, that they did not wish him to continue participating in the group, and further, that they intended to continue to perform as Captain Rat and the Blind Rivets.

4. Plaintiff has not granted Defendants permission to use his service marked name, CAPTAIN RAT.

5. Plaintiff would suffer irreparable harm, should Defendants perform as Captain Rat and the Blind Rivets, for the reason that his stage

H/

identity and his property rights, therein, would be diminished by the existence of this ersatz alter ego.

6. Plaintiff has no adequate remedy at law, due, in part, to the personal nature of his identification with the name, CAPTAIN RAT.

7. Defendants have announced their intention to perform, as Captain Rat and the Blind Rivets on the evening of May 1, and the morning of May 2, 1987, at Huff Gym, University of Illinois, Champaign, IL.

WHEREFORE, Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, prays that:

1. Defendants be temporarily and permanently enjoined from performing as Captain Rat and the Blind Rivets;
2. That Plaintiff have judgment in his favor and against the Defendants;
3. That Plaintiff be granted such other and further relief as to this Court seems just and equitable.

Fred Wisniewski a/k/a Captain Rat
Fred Wisniewski, a/k/a Captain Rat

STATE OF ILLINOIS)
) SS
COUNTY OF CHAMPAIGN)

FRED WISNIEWSKI, a/k/a CAPTAIN RAT, being first duly sworn on oath, states and deposes that he has read the Petition for Preliminary Injunction, by him subscribed; that the facts and matters therein contained are true and correct.

Fred Wisniewski

Subscribed and sworn to before me this 28th day of April, 1987.

Dorcas L. Flory
Notary Public

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FILED

MAY 1 1987

FRED WISNIEWSKI a/k/a)
CAPTAIN RAT,)
)
Plaintiff/Counter-)
Defendant,)
)
vs.)
)
TIM VEAR, MARK RUBEL AND)
ROGER PRILLAMAN, individually)
and as a general partnership,)
d/b/a "CAPTAIN RAT AND THE)
BLIND RIVETS" and "CAPTAIN)
RAT".)
)
Defendant/Counter-)
Plaintiff.)

No. 87-C-485

Boyd Smith
CLERK OF THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

MOTION TO DISMISS

NOW COMES the Defendant/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership, d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" and "CAPTAIN RAT" and move to dismiss the Petition For Preliminary Injunction filed by Plaintiff/Counter-Defendant FRED WISNIEWSKI, and in support thereof state as follows:

1. Said Petition is contrary to Section 2-611 of the Illinois Code of Civil Procedure as Plaintiff/Counter-Defendant's attorney, Michael McClellan fails to sign said pleading or set forth any address thereon.

2. Said Petition is defective on its face as it sets forth conclusions unsubstantiated by facts, to wit:

A. Paragraph 5 of the Petition fails to allege facts to support the allegation of "irreparable harm";

B. Paragraph 6 of the Petition fails to allege sufficient facts to support the allegation of "no adequate remedy

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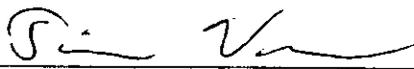
at law."

3. The Petitioner fails to allege to show that the acts of Defendants/Counter-Plaintiffs are unlawful or tortious and that same is not alleged and the Plaintiff/Counter-Defendant's service mark registration does not confer exclusive rights to the mark "Captain Rat".

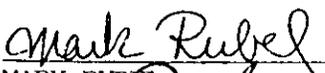
4. The Petitioner fails to show that FRED WISNIEWSKI is the lawful possessor of those rights which he seeks to protect, to the exclusive rights of the Defendant/Counter-Plaintiffs as shown on the fact of the service mark registration.

WHEREFORE, the Defendant/Counter-Plaintiffs pray that Plaintiff/Counter-Defendant be dismissed and for costs of suit.

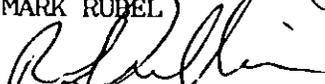
TIM VEAR, MARK RUBEL, AND
ROGER PRILLAMAN, individually
and as a general partnership,
d/b/a "CAPTAIN RAT AND THE
BLIND RIVETS" and "CAPTAIN RAT"



TIM VEAR



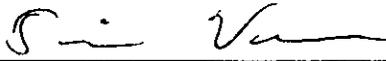
MARK RUBEL



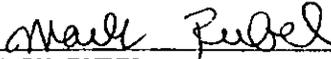
ROGER PRILLAMAN

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certify as aforesaid that they verily believe the same to be true.



TIM VEAR



MARK RUBEL



ROGER PRILLAMAN

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
 CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI a/k/a)
 CAPTAIN RAT,)
)
 Plaintiff/Counter-)
 Defendant,)
)
 vs.)
)
 TIM VEAR, MARK RUBEL AND)
 ROGER PRILLAMAN, individually)
 and as a general partnership,)
 d/b/a "CAPTAIN RAT AND THE)
 BLIND RIVETS" and "CAPTAIN)
 RAT".)
)
 Defendant/Counter-)
 Plaintiff.)

No. 87-C-485

FILED

MAY 1 1987

R. Smith
 CLERK OF THE CIRCUIT COURT
 SIXTH JUDICIAL CIRCUIT
 CHAMPAIGN COUNTY, ILLINOIS

PETITION TO CANCEL SERVICE MARK REGISTRATION

NOW COME the Defendants/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" and "CAPTAIN RAT" and pursuant to Illinois revised Statutes, chapter 140, paragraph 16, pray for an order canceling certain service mark registrations now existing in the Office of the Secretary of State, Index Department, and in support thereof state as follows:

1. That on or about April 12, 1985 one FRED WISNIEWSKI, Plaintiff, Counter-Defendant herein, did apply for four separate service marks with regard to the mark "Captain Rat". On the 13th day of May, 1985, the Office of the Secretary State did issue official registrations on said four marks as registration numbers 56575, 56576, 56577, and 56578, on said mark "Captain Rat".

2. That at all times herein relevant, FRED WISNIEWSKI was the drummer for the Champaign-Urbana, Illinois musical group known professionally as "Captain Rat and the Blind Rivets", or in

short-hand language, "Captain Rat" and the Defendants/Counter-Plaintiffs hereto, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, were the other members of said musical group, and at all times herein relevant said musical group was and is a general partnership.

3. That the Illinois Revised Statutes, chapter 140, paragraph 16 provides in pertinent part:

- A. The Secretary of State shall cancel from the register: (4) Any registration concerning which the Circuit Court shall find:
 - b. That the registrant is not the owner of the mark;
 - c. That the registration was granted contrary to this act; and
 - d. That the registration was obtained fraudulently.

4. That the applications for registration of the mark "Captain Rat" by the Plaintiff/Counter-Defendant was made without discussion with the other aforementioned group members and was made without their knowledge or approval.

5. That on numerous occasions throughout the musical history of Captain Rat and the Blind Rivets, and specifically on or about March 20, 1985, the parties hereto had discussed and decided that the group name was an asset of the partnership, and, that the group would be the proper party to apply for federal trademark registration.

6. That notwithstanding the fiduciary duty owed by FRED WISNIEWSKI to his other partners and in direct controvention of the aforementioned group discussions and decisions regarding the group designation "Captain Rat and The Blind Rivets" being a

partnership asset, the Plaintiff/Counter-Defendant FRED WISNIEWSKI did violate his fiduciary obligations and agreements with his partners by so registering "Captain Rat" as a service mark aforementioned with the Secretary of State, Index Department.

7. That the intent of FRED WISNIEWSKI in so registering the various service marks was to gain an undue advantage over his partners in ownership rights to the group name, all in an effort to exclude the other partners from use of the name at a later date.

8. That the applications for registration contained an oath which states in pertinent part:

"That said applicant is the owner of the mark sought to be registered and that no other person has the right in the State of Illinois to use such mark either in the identical form thereof, or in such near resemblance thereto, as to be likely, when applied to the goods or services of such person, to cause confusion or to cause mistake or to deceive."

9. That the designation "Captain Rat" and full group name, "Captain Rat and The Blind Rivets" were originally conceived by one George Dion, and a member of the original Captain Rat and The Blind Rivets, in or about the year 1974. At all times subsequent thereto the marks in question were and are partnership assets of the named musical group.

10. That FRED WISNIEWSKI'S registered trademarks should be canceled for the aforementioned reasons:

A. That the registrant was and is not the owner of the mark;

B. That the registration was granted contrary to this

act as the oath cited therein was made in derogation of FRED WISNIEWSKI'S fiduciary obligations to his other partners, knowing then and there that he did not have the exclusive rights in said name, "Captain Rat";

C. That due to the facts surrounding the secret nature of FRED WISNIEWSKI'S applications for registration as well as MR. WISNIEWSKI'S knowledge that said service mark "Captain Rat" was a mark belonging to the partnership, there exists reason to believe that said registrations were obtained fraudulently.

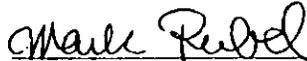
WHEREFORE, the Defendant/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership, d/b/a "Captain Rat and The Blind Rivets" and "Captain Rat" hereby pray for order canceling the four aforementioned registrations involving the service mark "Captain Rat".

Respectfully Submitted,

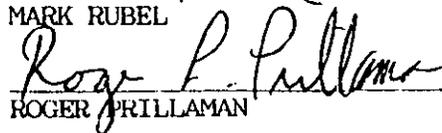
TIM VEAR, MARK RUBEL, ROGER
PRILLAMAN, DEFENDANTS/COUNTER-
PLAINTIFFS



TIM VEAR



MARK RUBEL



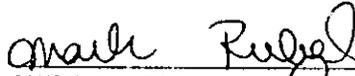
ROGER PRILLAMAN

VERIFICATION

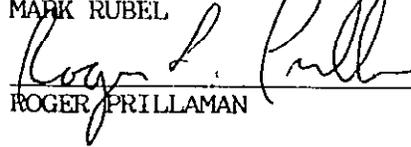
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certify as aforesaid that they verily believe the same to be true.



TIM VEAR



MARK RUBEL



ROGER PRILLAMAN

1 IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
2 CHAMPAIGN COUNTY, ILLINOIS
3

4 FRED WISNIEWSKI,)
a/k/a Captain Rat)
5 Plaintiff)
vs.) No. 87-C-485
6)
7 TIM VEAR, MARK RUBEL and)
ROGER PRILLAMAN)
Defendants.)
8

9 REPORT OF PROCEEDINGS of the HEARING FOR
10 PRELIMINARY INJUNCTION, had before the Honorable Harold
11 L. Jensen, judge presiding, on the 1st day of May, 1987.
12

13 APPEARANCES: MR. MICHAEL McCLELLAN,
14 Appearing for the Plaintiff
15 DEFENDANTS APPEAR PRO SE.
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20
21

22 Deann K. Parkinson, CSR
23 Official Court Reporter
24

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1 allowed even where there may be serious doubt as to the
2 ultimate success of the complaint. I don't think such
3 serious doubt exists here, but that is the sort of
4 standard that is to be applied.

5 I think the court has properly identified the
6 issues here earlier, and I think that Mr. Wisniewski
7 has made a sufficient showing for this point, and for
8 that matter for all time that regardless of whatever
9 shorthand may have been adopted, that he is, and prior
10 to ever meeting Roger Prillaman or Mark Rubel, was Captain
11 Rat. Thank you, your honor.

12 THE COURT: Mr. Prillaman, anything else?

13 MR. PRILLAMAN: No, your honor.

14 * THE COURT: Well, we have a very narrow issue
15 here, and you have to keep this in mind. We are not
16 here to determine the fairness or unfairness or the details
17 or the results necessarily financially of the manner in
18 which the group split up.

19 I think at this stage it's not crucial to determine
20 the legal relationship that this group might be
21 designated, such as a partnership or otherwise.

22 We are here on the issues that I think have been
23 delineated, and that is the showing required that there
24 would be irreparable harm. That's interestingly, I think,

1 intertwined with the other issue in the case that we spoke
2 of at the beginning, and that is the separate persona
3 of Captain Rat, or whether that name is so identified
4 with the rest of the group and the title of the group
5 that it can not necessarily be separated out and said
6 to belong exclusively and solely to one individual.

7 I don't think there is any doubt that if the
8 name of this group was Fred Wisniewski, Tim Vear, Mark
9 Rubel and Roger Prillaman, that if Mr. Wisniewski was
10 no longer associated with the group, that the group
11 wouldn't be performing with his name.

12 Then the question becomes, is Mr. Wisniewski
13 so associated with the designation Captain Rat so as
14 to become one indivisible persona.

15 I think the evidence has been established that
16 certainly for a time he was singled out by his early
17 associates, and later by the Defendants who are here as
18 the person to whom the appellation Captain Rat referred.
19 But, it also becomes apparent from the evidence that
20 call it what you will, shorthand lingo or otherwise,
21 that the use of that particular appellation has been
22 permitted to be used to describe the group in a shorthand
23 fashion.

24 It seems that from the logos that were designed

1 here, that the rodent became inextricably involved
2 with the blindness, at least that's the way I view
3 some of these logos.

4 I can not say that it has become so separate
5 a persona, and I can not find on the evidence that
6 the Petitioner would be so irreparably harmed that this
7 rather extraordinary relief ought to be granted.

8 So, for those reasons, I'm denying the petition
9 for preliminary injunction.

10 MR. McCLELLAN: Your honor, at this stage until
11 just moments ago I thought you were still addressing
12 his motion for a directed finding at the close of our
13 evidence.

14 THE COURT: I am.

15 MR. McCLELLAN: I would beg the indulgence
16 of the court to make brief further argument on that point
17 then.

18 THE COURT: Well, I thought we had concluded.
19 I have concluded from the evidence at this point that
20 the Petitioner, who has concluded his case, has
21 concluded his case, has not made the sufficient showing
22 that that name, that appellation, is so distinctly his
23 own persona, has not sufficiently shown that it has not
24 become a designation that is identified with the group

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as a whole, whether you call it shorthand lingo or not.
And I think there has also been a failure to demonstrate
the kind of irreparable harm that the rather
extraordinary relief that you ask for be granted.

And on that basis, the Petitioner, having
concluded his evidence, I am making a finding in favor
of the Defendants and against the Petitioner. And
in essence, that means that the petition is denied.

(Proceedings adjourned.)

J5

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI a/k/a)
CAPTAIN RAT, (sic))
)
Plaintiff/Counter-)
Defendant,)
)
vs.)
)
TIM VEAR, MARK RUBEL, AND)
ROGER PRILLAMAN, individ-)
ually and as a general)
partnership, d/b/a "CAPTAIN)
RAT AND THE BLIND RIVETS" and)
"CAPTAIN RAT".)
)
Defendants/Counter-)
Plaintiff,)

No. 87-C-485

FILED

JUN 10 1987

Paul M. Smith
CLERK OF THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

ANSWER TO PETITION FOR PRELIMINARY INJUNCTION

NOW COME the Defendants/Counter-Plaintiffs and in answer to the Petition filed by the Plaintiff/Counter-Defendant, FRED WISNIEWSKI, answer as follows:

1. Defendants/Counter-Plaintiffs admit that the musical group "Captain Rat and The Blind Rivets" was formed in or about 1975 in Champaign, Champaign County, Illinois but deny that FRED WISNIEWSKI is or has been solely identified as "Captain Rat". Further, Defendants/Counter-Plaintiffs admit that FRED WISNIEWSKI registered "Captain Rat" as a service mark in the State of Illinois in August of 1985 but affirmatively state that his so doing was in contravention of his fiduciary duties owed to the partnership, "Captain Rat and The Blind Rivets".

2. Defendants/Counter-Plaintiffs admit that Plaintiff/Counter-Defendant has performed substantially consistently with Captain Rat and The Blind Rivets since its formation but affirmatively state that there was a several year period of time during which the musical group was inactive; further, TIM VEAR has also substantially consistently performed with same group. Defendants/Counter-Plaintiffs admit that the other current members of the group as of April 20, 1987 were TIM

K 1

VEAR, MARK RUBEL and ROGER PRILLAMAN.

3. Defendants/Counter-Plaintiffs admit the allegations of paragraph 3.

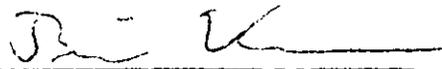
4. Defendants/Counter-Plaintiffs admit that Plaintiff/Counter-Defendant has not granted Defendants/Counter-Plaintiffs permission to use the service mark "Captain Rat" but deny that same was or is necessary and affirmatively state that the Defendants/Counter-Plaintiffs has superior rights in said mark.

5. Defendants/Counter-Plaintiffs deny the allegations of paragraph 5.

6. Defendants/Counter-Plaintiffs deny the allegations of paragraph 6.

7. The allegations of paragraph 7 of the Petition are now rendered moot as the performance date, being May 1, 1987, has come and passed.

WHEREFORE, Defendants/Counter-Plaintiffs pray that the Plaintiff/Counter-Defendant's Petition for Preliminary Injunction be dismissed with prejudice and for costs of suit and for such other and further relief as this Court deems just and equitable.



TIM VEAR



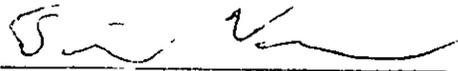
MARK RUBEL



ROGER PRILLAMAN

STATE OF ILLINOIS)
) SS
COUNTY OF CHAMPAIGN)

TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN being first duly sworn on oath, state and depose that they have read their Answer to Petition for Preliminary Injunction, by them subscribed; that the facts and matters therein contained are true and correct.



TIM VEAR

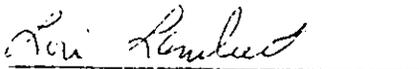


MARK RUBEL



ROGER PRILLAMAN

Subscribed and Sworn to
before me this 8th day of
June, 1987.



Notary Public

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI a/k/a CAPTAIN)
RAT, (sic),)
Plaintiff/Counter-Defendant,)
vs.) No. 87-C-485
TIM VEAR, MARK RUBEL, AND ROGER)
PRILLAMAN, individually and as a)
general partnership, d/b/a "CAPTAIN)
RAT AND THE BLIND RIVETS" and)
"CAPTAIN RAT",)
Defendant/Counter-Plaintiff,)

CERTIFICATE OF SERVICE

I, the Undersigned, certify that a copy of the foregoing Answer to Petition for Preliminary Injunction was served upon the parties named therein by enclosing said document in an envelope addressed to:

Mike McClellan, Esq.
206 N. Randolph
Rooms 412-414
Champaign, IL 61820

with postage fully pre-paid, and by depositing said envelope in the U.S. Mail in Urbana, Illinois, on the 8th day of June, 1987.



PRILLAMAN, PRILLAMAN & SAVAGE
115 W. Main, Suite 300
Urbana, Illinois 61801
(217) 384-1300

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a)
CAPTAIN RAT,)
)
Plaintiff/Counter-)
Defendant,)
)
vs.)
)
TIM VEAR, MARK RUBEL,)
AND ROGER PRILLAMAN,)
individually and as a)
general partnership,)
d/b/a "CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT",)
)
Defendant/Counter-)
Plaintiffs,)

No. 87-C-485

FILED

NOV 23 1987

Ray Smith
CLERK OF THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

MOTION FOR LEAVE OF COURT TO FILE AMENDED COUNTER-CLAIM
PETITION TO CANCEL SERVICE MARK REGISTRATION

NOW COME the Defendant/Counter-Plaintiffs, TIM VEAR, MARK RUBEL and ROGER PRILLAMAN, individually and as a general partnership, d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" and "CAPTAIN RAT", respectfully move for leave of Court to file their Amended Counter-Claim - Petition to Cancel Service Mark Registration. Attached hereto and incorporated by reference herein is the amended Counter-Claim - Petition to Cancel Service Mark Registration.

Respectfully submitted,

TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership, d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" AND "CAPTAIN RAT", Defendants/Counter-Plaintiffs,

BY: *Roger L. Prillaman*
ROGER L. PRILLAMAN,
individually and on behalf of
said general partnership

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a)
CAPTAIN RAT,)
)
Plaintiff/Counter-)
Defendant,)
)
vs.)
)
TIM VEAR, MARK RUBEL,) No. 87-C-485
AND ROGER PRILLAMAN,)
individually and as a)
general partnership,)
d/b/a "CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT",)
)
Defendant/Counter-)
Plaintiffs,)

AMENDED COUNTER-PETITION
PETITION TO CANCEL SERVICE MARK REGISTRATION

NOW COME the Defendant/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership, d/b/a "CAPTAIN RAT AND THE BLIND RIVETS" and "CAPTAIN RAT" and pursuant to Illinois revised Statutes, chapter 140, paragraph 16, pray for an order canceling certain service mark registrations now existing in the Office of the Secretary of State, Index Department, and in support thereof state as follows:

1. That on or about April 12, 1985 one FRED WISNIEWSKI, Plaintiff/Counter-Defendant herein, did apply for four separate service marks with regard to the mark "Captain Rat". On the 13th day of May, 1985, the Office of the Secretary of State did issue official registrations on said four marks as registration numbers 56575, 56576, 56578, on said mark "Captain Rat". Said registration have been previously filed with this Court; are a

part of the official court record and are incorporated by reference herein.

2. That at all times herein relevant, FRED WISNIEWSKI was the drummer for the Champaign-Urbana, Illinois musical group known professionally as "Captain Rat and the Blind Rivets", or in short-hand language, "Captain Rat" and the Defendant/Counter-Plaintiffs hereto, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, were the other members of said musical group, and at all times herein relevant said musical group was and is a general partnership.

3. That the Illinois Revised Statutes, chapter 140, paragraph 16 provides impertinent part:

The Secretary of State shall cancel from the register (4) Any registration concerning which the Circuit Court shall find:

- a. That the registrant is not the owner of the mark;
- b. That the registration was granted contrary to this act; and
- c. That the registration was obtained fraudulently.

4. That the application for registration of the mark "Captain Rat" by the Plaintiff/Counter-Defendant was made without discussion with the other aforementioned group members and was made without their knowledge or approval.

5. That on numerous occasions throughout the musical history of Captain Rat and the Blind Rivets, and specifically on or about March 20, 1985, the parties hereto had discussed and decided that the group name was an asset of the partnership, and, that the group would be the proper party to apply for federal trademark registration.

6. That notwithstanding the fiduciary duty owed by FRED WISNIEWSKI to his other partners and in direct controvention of the aforementioned group discussions and decisions regarding the group designation "Captain Rat and The Blind Rivets" being a partnership asset, the Plaintiff/Counter-Defendant FRED WISNIEWSKI did violate his fiduciary obligations and agreements with his partners by so registering "Captain Rat" as a service mark aforementioned with the Secretary of State, Index Department.

7. That the intent of FRED WISNIEWSKI in so registering the various service marks was to gain an undue advantage over his partners in ownership rights to the group name, all in an effort to exclude the other partners from use of the name at a later date.

8. That the applications for registration contained an oath which states in pertinent part:

"That said applicant is the owner of the mark sought to be registered and that no other person has the right in the State of Illinois to use such mark either in the identical form thereof, or in such near resemblance thereto, as to be likely, when applied to the goods or services of such person, to cause confusion or to cause mistake or to deceive."

9. That the designation "Captain Rat" and full group name, "Captain Rat and The Blind Rivets" were originally conceived by one George Dion, and a member of the original Captain Rat and The Blind Rivets, in or about the year 1974. At all times subsequent thereto the marks in question were and are partnership assets of the named musical group.

10. That FRED WISNIEWSKI'S registered trademarks should be

anceled for the aforementioned reasons:

A. That the registrant was and is not the owner of the mark;

B. That the registration was granted contrary to this act as the oath cited therein was made in derogation of FRED WISNIEWSKI'S fiduciary obligations to his other partners, knowing then and there that he did not have the exclusive rights in said name, "Captain Rat";

C. That due to the facts surrounding the secret nature of FRED WISNIEWSKI'S applications for registration as well as MR. WISNIEWSKI'S knowledge that said service mark "Captain Rat" was a mark belonging to the partnership, there exists reason to believe that said registrations were obtained fraudulently.

11. That due to the very terms of Plaintiff/Counter-Petitioner's FRED WISNIEWSKI'S own service mark registration, his service mark has expired naturally in that he is no longer a member of the musical group, "Captain Rat and the Blind Rivets" or as they are otherwise know, "Captain Rat". Defendants/Counter-Plaintiffs proffer this in the alternative to the aforementioned grounds of fraudulent registration.

WHEREFORE, the Defendant/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, individually and as a general partnership, d/b/a "Captain Rat and The Blind Rivets" and "Captain Rat" hereby pray for order canceling the four

aforementioned registrations involving the service mark "Captain Rat".

Respectfully Submitted,

TIM VEAR, MARK RUBEL, ROGER
PRILLAMAN, DEFENDANTS/COUNTER-
PLAINTIFFS

BY: Roger L. Prillaman
Roger L. Prillaman,
individually and on
behalf of the partner-
ship

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Roger L. Prillaman
Roger L. Prillaman,
and on behalf of the partnership

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a)
CAPTAIN RAT,)
)
Plaintiff/Counter-)
Defendant,)
)
vs.)
)
TIM VEAR, MARK RUBEL,)
AND ROGER PRILLAMAN,)
individually and as a)
general partnership,)
d/b/a "CAPTAIN RAT AND)
THE BLIND RIVETS" AND)
"CAPTAIN RAT",)
)
Defendant/Counter-)
Plaintiffs,)

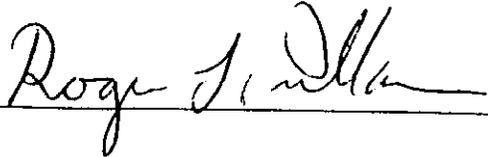
No. 87-C-485

CERTIFICATE OF SERVICE

I, the Undersigned, certify that a copy of the foregoing Motion for Leave of Court to File Amended Counter-Claim Petition to Cancel Service Mark Registration was served upon the parties named therein by enclosing said document in an envelope addressed to:

Mike McClellan, Esq.
Rooms 412-414
206 N. Randolph
Champaign, IL 61820

with postage fully pre-paid, and by depositing said envelope in the U.S. Mail in Urbana, Illinois, on the 19th day of November, 1987.



IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

RECEIVED JAN 13 1988

FRED WISNIEWSKI, a/k/a :
CAPTAIN RAT, :
 :
Plaintiff/Counter-Defendant, :
 :
-vs- :
 :
TIM VEAR, MARK RUBEL, and ROGER :
PRILLAMAN, individually and as a :
general partnership, d/b/a "CAPTAIN :
RAT AND THE BLIND RIVETS" and :
"CAPTAIN RAT", :
 :
Defendant/Counter-Plaintiffs, :

NP: 87-C-485

RESPONSE TO AMENDED COUNTER-PETITION/
PETITION TO CANCEL SERVICE MARK REGISTRATION

Now comes, FRED WLSNIEWSKI, a/k/a CAPTAIN RAT, Plaintiff/Counter-Defendant, by his attorney, Michael B. McClellan, and in Response to Defendant's/Counter-Plaintiff's Amended Counter-Petition/Petition to Cancel Service Mark Registration, he states:

1. He admits the allegations contained in paragraph 1.
2. He denies the allegations contained in paragraph 2.
3. He has insufficient personal knowledge to either confirm or deny the allegations of paragraph 3, and he demands strict proof of same.
4. He admits the allegations contained in paragraph 4.
5. He denies the allegations contained in paragraph 5.
6. He denies the allegations contained in paragraph 6.
7. He denies the allegations contained in paragraph 7.
8. He has insufficient personal knowledge to either confirm or deny the allegations of paragraph 8, and he demands strict proof of same.
9. He denies the allegations contained in paragraph 9.
- 10 He denies the allegations contained in paragraph 10, and each and every sub-paragraph contained therein.

M/

11. He denies the allegations contained in paragraph 11.

WHEREFORE, the Plaintiff/Counter-Defendant, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, prays this Honorable Court strike and dismiss the Amended Counter-Petition/Petition to Cancel Service Mark Registration, filed December 21, 1987, and for costs.

Fred Wisniewski a/k/a Captain Rat
Fred Wisniewski, a/k/a Captain Rat

STATE OF ILLINOIS)
) SS
COUNTY OF CHAMPAIGN)

FRED WISNIEWSKI, a/k/a CAPTAIN RAT, being first duly sworn on oath states and deposes that he has read the foregoing Response to Amended Counter-Petition/Petition to Cancel Service Mark Registration, by him subscribed; that the facts and matters therein contained are true and correct.

Fred Wisniewski a/k/a Captain Rat
Fred Wisniewski, a/k/a Captain Rat

Subscribed and sworn to before me this 11th day of January, 1988.

Jimmy L. Dalton
Notary Public

PREPARED BY:

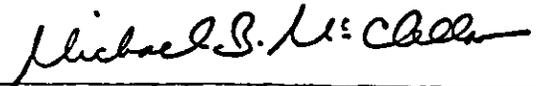
McCLELLAN & GORDON
412-414 Robeson Building
206 N. Randolph St.
Champaign, IL 61820
(217) 352-0528

PROOF OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Response to Amended Counter-Petition/Petition to Cancel Service Mark Registration was served on:

Roger Prillaman
PRILLAMAN, PRILLAMAN & SAVAGE
115 W. Main, Suite 300
Urbana, IL 61801

by depositing same in the United States Mail, with proper postage affixed, this 11th day of January, 1988, in Champaign, IL.



McCLELLAN & GORDON
412-414 Robeson Building
206 N. Randolph St.
Champaign, IL 61820
(217) 352-0528

RECEIVED AUG 29 1991

CIRCUIT COURT OF ILLINOIS
SIXTH JUDICIAL CIRCUIT

CHAMBERS OF
GEORGE S. MILLER
CIRCUIT JUDGE

101 E. MAIN STREET
URBANA, ILLINOIS 61801-4635
TELEPHONE 384-3701
AREA CODE 217

August 28, 1991

Michael McClellan
Dodd & McClellan
303 S. Mattis Ave.
Champaign, Il. 61820

Roger Prillaman
Prillaman & Prillaman
115 W. Main St., Suite 300
Urbana, Il. 61801

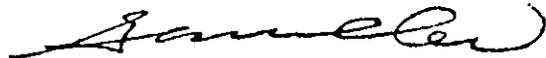
RE: Wisniewski, etc. v. Tim Vear, et al.
No. 87-C-485 in Champaign County

The above-entitled case was dismissed on the above date for want of prosecution. It may not be reinstated automatically by appearing on a motion to reinstate.

There must be some affirmative action in the nature of settings, motions or other relief sought at the same time the motion to reinstate is made. This action must be taken within 30 days of this date and hearing must be scheduled with Judge George S. Miller, Courtroom "B".

Thank you for your cooperation in this matter.

Yours very truly,



George S. Miller
Circuit Judge

GSM/lsm

I, Linda Montgomery, this date, 8/28/91
served this notice by mailing a copy to each person
to whom it is directed.

N1

Linda Montgomery

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI,
a/k/a CAPTAIN RAT,

Plaintiff,

-vs-

TIM VEAR, MARK RUBEL and
ROGER PRILLAMAN,

Defendants.

RECEIVED SEP 30 1991

87-C-485

PETITION TO REINSTATE
AND FOR LEAVE TO FILE AMENDED PLEADINGS

NOW COMES the Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, and in support of his Petition to Reinstate and for leave to file amended pleadings, he states:

1. On August 28, 1991, this cause was dismissed by the Honorable George Miller, for want of prosecution; this petition is placed on file within thirty (30) days of that date.
2. Judge Miller, who entered the Order of dismissal, had recused himself from these proceedings, when they were first placed on file.
3. Plaintiff has continued to pursue his case, through discovery, and he has actively sought advice from legal counsel, with the intention of filing additional pleadings; he has actively consulted with three separate attorneys, in Chicago, since December, 1990.
4. Plaintiff seeks leave to file his Amended Petition, a copy of which is attached, hereto, instanter.

WHEREFORE, Plaintiff prays this Honorable Court vacate the order entered August 28, 1991, and reinstate his cause of action, and further, that the Court grant his leave to file his Amended Petition instanter.

Respectfully Submitted,

Fred Wisniewski
Fred Wisniewski, Plaintiff

Michael B. McClellan
Michael B. McClellan, One of his attorneys

DODD & McCLELLAN, P.C.
ATTORNEYS AT LAW
201 MARINE BANK BUILDING
303 SOUTH MATTIS AVENUE
CHAMPAIGN, IL 61821-3051
TELEPHONE: (217) 356-6363

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI,)
a/k/a CAPTAIN RAT,)
)
Plaintiff,)
)
-vs-) 87-C-485
)
TIM VEAR, MARK RUBEL and)
ROGER PRILLAMAN,)
)
Defendants.)

AMENDED PETITION FOR PRELIMINARY INJUNCTION

NOW COMES the Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, by his attorneys, Dodd & McClellan, P.C., and in support of his Amended Petition for Preliminary Injunction, he states:

COUNT I (1. Counting)

1. In 1975, plaintiff entered into an agreement for the formation of a partnership, a musical group known as Captain Rat and the Blind Rivets, between the plaintiff and other parties, all of the City of Champaign, County of Champaign, and State of Illinois.

2. Thereupon the plaintiff and other partners entered into the performance of their duties in pursuance of the partnership agreement. The plaintiff has faithfully performed all the duties devolving upon him under the agreement.

3. Plaintiff is the only member of said partnership, a musical group known as Captain Rat and the Blind Rivets, to have performed with the group consistently since its formation.

4. On April 20, 1987, the current members of the partnership were the Defendants, TIM VEAR, MARK RUBEL, and ROGER PRILLAMAN. On that date, Plaintiff was informed by the defendants that they did not wish him to continue participating in the group; and further, that they intended to continue to perform as Captain Rat and the Blind Rivets.

5. Since the date of April 20, 1987, the defendants have continued to perform as Captain Rat and the Blind Rivets, and the defendants have used the plaintiff's picture in connection with the advertisement of the partnership.

6. Plaintiff has not granted defendants permission to use his service marked name, CAPTAIN RAT, or his picture.

7. The partnership expired on April 20, 1987.

8. All debts and liabilities of the partnership to third

persons have been fully paid, satisfied and discharged, and a large surplus remains in the hands of defendants, both of original capital and accrued gains and profits.

9. Though often requested so to do, defendants have failed, neglected and refused, and still fail neglect and refuse, to render to plaintiff an account and statement of the business and transactions of the partnership, its gains and assets and creditors, or the amount of money drawn out, or the kinds, quantities or values of personal property taken, by them from the assets of the partnership; or to exhibit the accounts, books and papers of the partnership, or any of them, to plaintiff.

10. The name, "Captain Rat and the Blind Rivets," represents an asset of the partnership.

11. A large sum is due to the plaintiff as his capital and accrued profits in the partnership; which will be shown to be his just share of the partnership assets.

WHEREFORE, plaintiff prays as follows:

I. That defendants may be adjudged and compelled to account with plaintiff, under the direction of this court, as to all dealings and transactions of and with the partnership and the investments thereof, all moneys due or to become due the partnership, all receipts and expenditures of the partnership business, and all sums drawn, and property taken and misapplied, by defendants:

II. That, upon such accounting, defendants may be adjudged to pay to plaintiff, as his share of the assets of the partnership, such sum of money, or deliver up to him such property, as may be found to be due, or justly to belong, to him.

III. That he may have such other and further, or different, relief herein as the court shall deem just; and

IV. For his costs herein.

COUNT II (*serv mark infringed*)

1. Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, on May 13, 1985, registered with the Illinois Secretary of State the name, "CAPTAIN RAT" as a service mark, and has used that name without change from that time up to and including the present time in connection with his performance as a musician.

2. The above service mark was used orally to indicate the stage name of plaintiff in the musical group professionally known as "Captain Rat and the Blind Rivets."

3. The members of Captain Rat and the Blind Rivets comprised a partnership under the laws of the State of Illinois up to the date of April 20, 1987, at which time the plaintiff was told he was no longer desired as a member of the said partnership.

4. Plaintiff, through its authorized agents and attorneys, has made demand on defendants and its authorized representatives to cease and desist from using plaintiff's service mark or any picture of the plaintiff in conjunction with defendants' business of performing as a musical group.

5. Despite demands by plaintiff, and in flagrant disregard of plaintiff's rights and those of the public to be free of confusion, defendant has continued to use and will continue to use plaintiff's service mark and his picture in conjunction with defendants' business of performing as a musical group.

6. Defendant's use of the name "CAPTAIN RAT" and the picture of the plaintiff in conjunction with the identification and advertisement of their musical group is presently confusing to the public, and is likely to continue to confuse the public, because this use represents and has a likelihood to deceive the public that defendants' musical group is plaintiff's musical group, and that defendants, its agents, and representative and its business, are part of, or condoned or approved by, and are in some manner related to, the plaintiff. Further, the defendants' use of "CAPTAIN RAT" limits the ability of plaintiff to conduct business as Captain Rat, a name which he lawfully registered with the State of Illinois.

7. Defendant refuses to cease and desist from the use of plaintiff's name and picture and infringement of plaintiff's rights.

8. Unless defendant is immediately enjoined by this court against any and all further use of the term "CAPTAIN RAT" and/or the use of the plaintiff's picture in any manner in conjunction and connection with the identification or advertisement of the defendants' musical group, the public will continue to be confused, plaintiff's reputation and goodwill will be irreparably injured, the distinctive quality of the plaintiff's name will be diluted, and the market value of plaintiff's services will be diminished and reduced.

WHEREFORE, plaintiff prays as follows:

I. The defendant, its agents, employees, representatives, and all those claiming by or through it or in any manner in privity with it, be enjoined, throughout the pendency of this action from using the words "CAPTAIN RAT" in any manner in conjunction or connection with the identification or advertisement of their musical group;

II. Defendants be required to reimburse plaintiff in the amount of plaintiff's costs incurred in relation to this action; and

III. Any other and further relief this court deems appropriate.

COUNT III

1. Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, on May 13, 1985, registered with the Illinois Secretary of State the name, "CAPTAIN RAT" as a service mark, and has used that name without change from that time up to and including the present time in connection with his performance as a musician.

2. The above service mark was used orally to indicate the stage name of plaintiff in the musical group professionally known as "Captain Rat and the Blind Rivets."

3. The members of Captain Rat and the Blind Rivets comprised a partnership under the laws of the State of Illinois up to the date of April 20, 1987, at which time the plaintiff was told he was no longer desired as a member of the said partnership.

4. Plaintiff, through its authorized agents and attorneys, has made demand on defendants and its authorized representatives to cease and desist from using plaintiff's service mark or any picture of the plaintiff in conjunction with defendants' business of performing as a musical group.

5. Despite demands by plaintiff, and in flagrant disregard of plaintiff's rights, defendant has continued to use and will continue to use plaintiff's service mark and his picture in conjunction with defendants' business of performing as a musical group.

6. The defendants' have used and continue to use the plaintiff's picture and his service name, "Captain Rat," as a valuable asset to increase the profits of the partnership.

7. Although the defendants' have profited through the use of the plaintiff's picture and service name, none of these gains have been transferred to the plaintiff.

WHEREFORE, the plaintiff prays as follows:

I. All profits gained by the defendants' unauthorized use of the plaintiff's picture and his service name, "Captain Rat," be paid to the plaintiff;

II. The defendants' be enjoined from the further unauthorized use of the plaintiff's picture and his service name, "Captain Rat," for any business purpose whatsoever.

III. Any other relief as this court deems appropriate.

COUNT IV

1. Plaintiff, FRED WISNIEWSKI, a/k/a CAPTAIN RAT, is engaged as a musician in the State of Illinois, and particularly in the County of Champaign and adjoining counties, with his principal place of business in the City of Champaign, County of Champaign, State of Illinois.

2. On and prior to April 20, 1987, plaintiff was a member of a partnership, a musical group known as Captain Rat and the Blind Rivets.

3. During the course of his membership in said partnership and prior thereto, plaintiff had established a professional reputation through his registered stage name, "CAPTAIN RAT," which reputation was an asset to the partnership as a whole and the plaintiff as an individual.

4. After the dissolution of the partnership, plaintiff attempted to organize new musical groups whose name would include the name Captain Rat.

5. Knowing of these attempts, the defendants did maliciously and without legal right contact prospective members in said new musical groups and threatened to involve them in lawsuits and threatened their contractual rights with Plaintiff, if the prospective members did not abandon their dealings with the plaintiff.

6. As a direct and proximate result of defendants' acts, plaintiff lost the opportunity of employment in new musical groups, all to plaintiff's damage.

7. As a further direct and proximate result of defendant's acts, plaintiff has suffered injury to plaintiff's business reputation and good will, all to plaintiff's further damage.

WHEREFORE, plaintiff prays as follows:

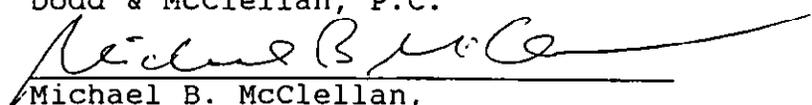
I. Defendants be required to pay plaintiff actual damages for the plaintiff's lost business opportunities caused by defendants' tortious interference with plaintiff's employment;

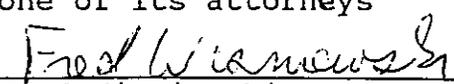
II. Defendants be required to pay plaintiff actual damages for the adverse affect to plaintiff's business reputation and good will caused by defendants' tortious interference with plaintiff's employment;

III. Defendants be assessed punitive or exemplary damages for willful and egregious nature of their actions; and

IV. Any further relief as this court deems appropriate.

Dodd & McClellan, P.C.


Michael B. McClellan,
one of its attorneys


Fred Wisniewski

DODD & MCCLELLAN, P.C.
ATTORNEYS AT LAW
201 MARINE BANK BUILDING
303 SOUTH MATTIS AVENUE
CHAMPAIGN, IL 61821-3051
TELEPHONE: (217) 356-6363

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI,)
a/k/a CAPTAIN RAT,)
)
Plaintiff,)
)
-vs-) 87-C-485
)
TIM VEAR, MARK RUBEL and)
ROGER PRILLAMAN,)
)
Defendants.)

RECEIVED SEP 30 1991

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Amended Petition for Preliminary Injunction, Affidavit and Petition to Reinstate and For Leave to File Amended Pleadings was served on:

Mr. Roger Prillaman
Attorney at Law
115 W. Main, Suite 300
Urbana, IL 61801

by depositing same in the United States Mail, with proper postage affixed, this 27th day of Sept, 1991, at Champaign, Illinois.



DODD & McCLELLAN, P.C.
ATTORNEYS AT LAW
201 MARINE BANK BUILDING
303 SOUTH MATTIS AVENUE
CHAMPAIGN, IL 61821-3051
TELEPHONE: (217) 356-6363

RECEIVED OCT 30 1991

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI,
a/k/a CAPTAIN RAT,

Plaintiff,

-vs-

TIM VEAR, MARK RUBEL and
ROGER PRILLAMAN,

Defendants.

87-C-485

NOTICE OF HEARING

TO: Mr. Roger Prillaman, Attorney at Law, 115 W. Main, Suite 300
Urbana, IL 61801

YOU ARE HEREBY NOTIFIED that on the 19th day of November, 1991
at 11:30 o'clock, a.m., or as soon thereafter as counsel may be
heard, I shall appear before Judge Harold Jensen in Courtroom "A"
the room usually occupied by said Judge as a Courtroom, or in the
absence of said Judge, before any other Judge that may be presiding
in said Courtroom in the Champaign County Courthouse at Urbana,
Illinois, and then and there have a hearing on Petition to
Reinstate and For Leave to File Amended Pleadings, a copy of which
was previously served on you.

DODD & McCLELLAN, P.C.

BY: Michael B. McClellan
/ A Member of the Firm

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the above and foregoing
Notice was deposited in the United States Mail at Champaign
Illinois in an envelope securely sealed, postage prepaid and
legibly addressed to the above-named parties, on this 29th day of
October, 1991.

DODD & McCLELLAN, P.C.

By: Michael B. McClellan
/ A Member of the Firm

DODD & McCLELLAN, P.C.
ATTORNEYS AT LAW
201 MARINE BANK BUILDING
303 SOUTH MATTIS AVENUE
CHAMPAIGN, IL 61821-3045
TELEPHONE: (217) 356-6363

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a CAPTAIN RAT

Plaintiff/Counter-Defendant,

vs.

TIM VEAR, MARK RUBEL, AND ROGER
PRILLAMAN, d/b/a CAPTAIN RAT AND
THE BLIND RIVETS, and d/b/a
CAPTAIN RAT,

Defendants/Counter-Plaintiffs.

FILED
SIXTH JUDICIAL CIRCUIT

NOV 14 1990 P. 87-C-485

S. F. ...
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

RESPONSE TO PLAINTIFF/COUNTER-DEFENDANT'S
PETITION TO REINSTATE/RESPONSE TO
PLAINTIFF'S LEAVE TO FILE AMENDED PLEADINGS

NOW COME the Defendants/Counter-Plaintiffs, TIM VEAR, MARK RUBEL AND ROGER PRILLAMAN, d/b/a CAPTAIN RAT AND THE BLIND RIVETS, and d/b/a CAPTAIN RAT, and in response to the Plaintiff/Counter-Defendant's Petition to Reinstate, state as follows:

1. Plaintiff/Counter-Defendant alleges he should be entitled to reinstate this cause of action which was dismissed by the court on 8/28/91 for want of prosecution. In support thereof, Plaintiff/Counter-Defendant alleges "Plaintiff has continued to pursue his case, through discovery, and he has actively sought advice from legal counsel, with the intention of filing additional pleadings; he has actively consulted with three separate attorneys, in Chicago, since December, 1990".

2. In further support thereof, Plaintiff/Counter-Defendant filed his Affidavit, stating under oath that "he has consulted with three different attorneys in Chicago on this matter, since December, 1990, and has been in active pursual of this case at all relevant times".

3. Local Court Rule 3.8, Dismissal for Want of Prosecution, states as follows:

(a) Procedure. In all cases where no appeal is pending and there has been no action of record for a period of two (2) years, the court may summarily dismiss the cause of action and it shall not thereafter be re-docketed without both good cause and

P1

leave of court. (Emphasis added.)

4. Defendants submit that Plaintiff's reasons for reinstating this case fall substantially short of constituting "good cause", as set forth in Local Court Rule 3.8.

5. A review of the official court file indicates that the last hearing in this matter was held October 3, 1988, which involved resolving discovery differences over Defendants' discovery propounded upon Plaintiff. Plaintiff's discovery propounded to Defendants had already been completed by this time.

6. Attached hereto and incorporated by reference herein is the Affidavit of Defendant, ROGER L. PRILLAMAN, countering Plaintiff's assertion that he has continued to pursue his case through discovery or otherwise. At best, Plaintiff's assertions in this regard are an exaggeration. Plaintiff's indication that he has consulted with three separate Chicago attorneys is irrelevant and immaterial.

7. As a matter of law, Plaintiff's Affidavit in support of his Petition to Reinstate is conclusory and sets forth little in the way of facts.

8. Plaintiff seeks equitable relief from this court, but is guilty of laches and should be barred from reinstating this cause of action. Defendants would be prejudiced by the granting of Plaintiff' relief in that Defendants have continued to accept employment and have signed employment agreements with various purchasers of Defendants' talent well into the year 1992, and said purchasers have requested the specific and unique services of the current members of CAPTAIN RAT AND THE BLIND RIVETS.

9. Plaintiff makes mention that Judge Miller, who originally recused himself from these proceedings, entered the Order of Dismissal for Want of Prosecution. Defendants urge that said order was and is a valid order as a lawful administrative function of the court.

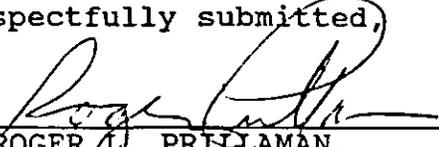
Plaintiff's request for relief is in the form of a Petition to Reinstate, thereby recognizing Judge Miller's Order.

10. Plaintiff has no absolute right to have his case reinstated or for leave to file amended pleadings; same is within the sound discretion of the trial court.

WHEREFORE, Defendant/Counter-Plaintiffs pray that this honorable court deny Plaintiff/Counter-Defendant's petition to reinstate this cause, and, deny the Plaintiff/Counter-Defendant leave of court to file amended pleadings, for the reasons above mentioned and for such further relief as the court deems just and equitable.

Respectfully submitted,

DATED: 11-14-91

BY 
ROGER L. PRILLAMAN,
individually and on behalf
of all defendants, a/k/a
CAPTAIN RAT AND THE BLIND
RIVETS, and CAPTAIN RAT

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a CAPTAIN RAT)
)
Plaintiff/Counter-Defendant,)
)
vs.) No. 87-C-485
)
TIM VEAR, MARK RUBEL, AND ROGER)
PRILLAMAN, d/b/a CAPTAIN RAT AND)
THE BLIND RIVETS, and d/b/a)
CAPTAIN RAT,)
)
Defendants/Counter-Plaintiffs.)

COUNTER-AFFIDAVIT OF ROGER L. PRILLAMAN

ROGER L. PRILLAMAN, being first duly sworn upon oath hereby deposes and states as follows:

1. That he is a Defendant in the above-captioned lawsuit, is age 39, and if called as a witness herein could competently testify to the matters contained in this Affidavit.

2. That from the inception of this lawsuit by Plaintiff/Counter-Defendant, FRED WISNIEWSKI, on or about April 28, 1987 through present, I have been the "official record-keeper" of all court documents, discovery documents, correspondence and all other records associated with this litigation.

3. That to the best of Affiant's knowledge and belief, his records are full and complete.

4. That Affiant has recently conducted a diligent search and inquiry into all of the records contained in his various files and finds that the last matter regarding any activity concerning discovery in this litigation occurred on December 21, 1988, when Affiant received Plaintiff, FRED WISNIEWSKI'S Supplemental Answers to First Interrogatories. In support thereof, Affiant attaches hereto and incorporates by reference into this Affidavit a copy of Attorney MICHAEL MCCLELLAN'S Proof of Service dated December 20, 1988, and the first page of the Supplement Answers to First Interrogatories stamped Received December 21, 1988.

5. Since the inception of this litigation, Affiant has received no communication from any attorney claiming to represent

P4

Plaintiff, FRED WISNIEWSKI, other than Attorney MICHAEL MCCLELLAN, the attorney of record. Specifically, Affiant has received no communications whatsoever from any Chicago attorneys regarding Plaintiff, FRED WISNIEWSKI.

6. FRED WISNIEWSKI'S Affidavit in support of his petition to reinstate this case, indicates that he "...has been in active pursual of this case at all relevant times". Affiant states that in reviewing the full file hereto, nothing contained indicates any activity whatsoever on the part of FRED WISNIEWSKI, his attorney or any other representative, which would indicate any intention on the part of the Plaintiff to pursue a cause of action.

7. To date, Defendants have never received any offer or demand of ~~settlement~~ from Plaintiff, FRED WISNIEWSKI, other than that contained in MICHAEL MCCLELLAN'S letter dated November 10, 1987, a copy of which is attached hereto and incorporated by reference herein. Said letter also makes loose reference to Plaintiff's claim for an accounting, receiving a share of his value of the name as well as a further claim for damages concerning use of Plaintiff's likeness in promoting our band, all of which are the basis for the amended pleadings Plaintiff now seeks to file with this court if his case is allowed to be reinstated, a passage of time in excess of four years.

8. Since the inception of this litigation, the Defendants have continued to regularly perform, on an approximate average of 75 to 85 times per calendar year, under the name of Captain Rat and The Blind Rivets, throughout the State of Illinois, with the same identity of membership, TIM VEAR, MARK RUBEL, ROGER PRILLAMAN, and JEFF EVANS. Based upon information and belief, Plaintiff, FRED WISNIEWSKI, has performed only several times over the same time period. Based upon the lack of communication received from Plaintiff's attorney, MICHAEL MCCLELLAN over the past three years approximately, as well as the apparent lack of any substantial activity of the Plaintiff performing in the area, it was Affiant's belief that the Plaintiff, FRED WISNIEWSKI had abandoned any activity with regard to the present litigation.

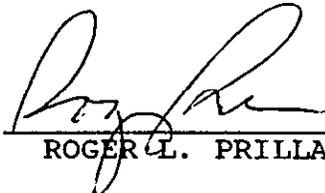
9. That TIM VEAR, MARK RUBEL, ROGER PRILLAMAN, and JEFF

EVANS, d/b/a CAPTAIN RAT AND THE BLIND RIVETS, have entered into numerous employment contracts with various purchasers of our talent; as of this writing, CAPTAIN RAT AND THE BLIND RIVETS is booked through the end of 1991, nearly every weekend, having twelve such signed agreements in that regard. Further, we have twenty-four firm bookings into calendar year 1992 as of this writing. Affiant has negotiated nearly all of these bookings in response to our various purchasers' contacting Affiant's office to hire the specific performance of CAPTAIN RAT AND THE BLIND RIVETS, based upon our current reputation and popularity. Based upon Affiant's information and belief, prejudice would enure to not only CAPTAIN RAT AND THE BLIND RIVETS, but also to the detriment of our various purchasers of talent, as well as to the public and fans, if our group was prevented from utilizing the name CAPTAIN RAT AND THE BLIND RIVETS, and/or CAPTAIN RAT.

10. In sum, Affiant categorically denies any knowledge that FRED WISNIEWSKI has actively pursued this litigation as set forth in his Affidavit.

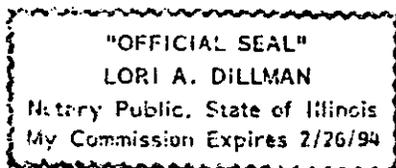
FURTHER, Affiant sayeth not.

DATED: 11-14-91

BY: 
ROGER L. PRILLAMAN

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 14th DAY OF NOVEMBER,
1991.


NOTARY PUBLIC

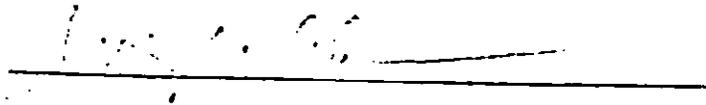


PROOF OF SERVICE

The undersigned certifies that two (2) true and correct copies of the foregoing Supplemental Answers to First Interrogatories were served on:

Roger Prillaman
PRILLAMAN, PRILLAMAN & SAVAGE
115 W. Main, Suite 300
Urbana, IL 61801

by depositing same in the United States Mail, with proper postage affixed this 7th day of December, 1988, in Champaign, IL.



Law Offices of
MICHAEL B. McCLELLAN
412-414 Robeson Building
206 N. Randolph St.
Champaign, IL 61820
(217) 352-0528

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a
CAPTAIN RAT,

Plaintiff/Counter
Defendant,

-vs-

NO: 87-C-185

TIM VEAR, MARK RUEEL,
and ROGER PRILLAMAN, in-
dividually and as a general
partnership, d/b/a "CAPTAIN
RAT AND THE BLIND RIVETS" and
"CAPTAIN RAT".

Defendant/Counter
Plaintiffs,

SUPPLEMENTAL ANSWERS TO FIRST INTERROGATORIES

Now comes FRED WISNIEWSKI, a/k/a CAPTAIN RAT, by his attorney,
Michael B. McClellan, and for his Supplemental Answers to First Interrogatories,
he states:

INTERROGATORY NO. 1, ANSWER

George Dion
121 Bridge
Rockton, IL 61072
PH: (815) 624-4663

Tom Erickson
address and phone
unknown

Bob Corey
address and phone
unknown

INTERROGATORY NO. 2, ANSWER

None

INTERROGATORY NO. 3, ANSWER

Some people occasionally used the term improperly. They were always corrected.
No names or addresses are known to Plaintiff, except for Defendant, Tim Vear's,
friend, Laurie Garrett.

McCLELLAN & GORDON

ATTORNEYS AT LAW

Suite 412 - 414

206 N. Randolph

Champaign, Illinois 61820

Telephone: (217) 352-0528

RECEIVED NOV 12 1987

MICHAEL B. McCLELLAN
THOMAS J. GORDON

FORMERLY:
HARPER & McCLELLAN
HAGIN HARPER 1917-1977

November 10, 1987

Mr. Roger Prillaman
PRILLAMAN, PRILLAMAN & SAVAGE
115 W. Main, Suite 300
Urbana, IL 61801

Dear Roger:

Enclosed, please find a copy of our Objections to Interrogatories and Motion for Extension of Time.

As I recited the other day, we assert that our numbers 4, 5, 6, 15, 19, 20, 25, 29, and 30 require individual responses from each Defendant.

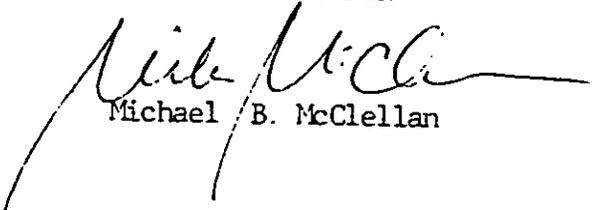
The answer to number 7 is incomplete; numbers 10 and 12 are not responsive (on the latter, the question related to taxes).

Fred's "demand" is simply that you not use the name Captain Rat. If this is not agreed, and if this band was a partnership, he wants an accounting, and he would seek his share, including the value of the name. Since we got into this, a further claim for damages has arisen, as I mentioned in court, due to your use of Fred's likeness in promoting your band.

I am sorry I omitted a response to your letter of September 10, before, as well as focusing on our problems with your Answer, but I have been quite distracted by a root canal. I would be happy to discuss any of this, informally, in the future, now that the Defendants' pro se status has been clarified.

Yours,

McCLELLAN & GORDON


Michael B. McClellan

MBM/df
enclosure

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a CAPTAIN RAT)

Plaintiff/Counter-Defendant,)

vs.)

No. 87-C-485

TIM VEAR, MARK RUBEL, AND ROGER)

PRILLAMAN, d/b/a CAPTAIN RAT AND)

THE BLIND RIVETS, and d/b/a)

CAPTAIN RAT,)

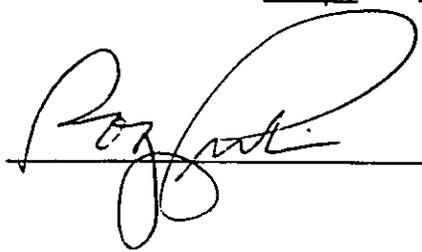
Defendants/Counter-Plaintiffs.)

CERTIFICATE OF SERVICE

I, the Undersigned, certify that a copy of the foregoing Response to Plaintiff/Counter-Defendant's Petition to Reinstate was served upon the parties named therein by enclosing said document in an envelope addressed to:

Michael McClellan
Attorney at Law
201 Marine Bank Building
303 S. Mattis Ave.
Champaign, IL 61821-3051

with postage fully pre-paid, and by depositing said envelope in the U.S. Mail in Urbana, Illinois, on the 14 day of November, 1991.



Captain Rat and the Blind Rivets
c/o Roger L. Prillaman
115 West Main, Suite 300
Urbana, IL 61801
217/384-1310

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FRED WISNIEWSKI, a/k/a CAPTAIN RAT)
Plaintiff/Counter-Defendant,)
vs.) No. 87-C-485
TIM VEAR, MARK RUBEL, AND ROGER)
PRILLAMAN, d/b/a CAPTAIN RAT AND)
THE BLIND RIVETS, and d/b/a)
CAPTAIN RAT,)
Defendants/Counter-Plaintiffs.)

POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION TO REINSTATE

There is no absolute right to amend pleadings, the timeliness of such a request is a discretionary determination by the trial court. Urman v. Walter, 57 Ill.Dec. 371, 428 N.E.2d 1051, 101 Ill.App.3d 1085.

Dismissal of action for want of prosecution is within hearing court's discretion, as is right to reinstate action. People v. Brown, 235 N.E.2d 562, 39 Ill.2d 307.

Burden is on party wishing to vacate an order of dismissal to establish by affidavit or otherwise that its failure to comply with rules or court orders was warranted by extenuating circumstances. Big Three Food & Liquor, Inc. v. State Farm Fire & Cas. Co., 34 Ill.Dec. 589, 398 N.E.2d 264, 79 Ill.App.3d 63.

Dismissal for want of prosecution should be set aside where satisfactory explanation of apparent delay has been given. People ex rel. Dept. of Revenue v. Countryman, 113 Ill.Dec. 126, 514 N.E.2d 1038, 162 Ill.App.3d 134.

Motion to dismiss for lack of diligence is addressed to sound discretion of trial court, and reviewing court will not substitute its judgment for that of trial court absent showing of abuse of discretion. S.H.A ch. 110A, par. 103(b), Jarmon v. Jinks, 117 Ill.Dec. 432, 520 N.E.2d 783, 165 Ill.App.3d 855, appeal denied 119 Ill.Dec. 386, 522 N.E.2d 1245, 119 Ill.2d 558.

In seeking to determine whether or not a claim has been

prosecuted with due diligence, the conduct of the parties over the entire period of the pendency of the claim must be considered, and the mere fact that claimant urges that he is ready, willing and able to proceed with his claim does not require the conclusion that the claimant has exercised due diligence when his conduct in the past is to the contrary. Koos v. Pere Marquette Bldg. Corp., 221 N.E.2d 668, 77 Ill.App.2d 127.

Where defendant had moved for a change of venue and judge had already removed himself from the case, disqualification of the judge did not preclude his acting purely in a formal or ministerial manner. People ex rel. Walker v. Pate, 292 N.E.2d 387, 53 Ill.2d 485.

Judge who has previously been substituted from case may perform formal or ministerial functions concerning case as long as action has little or no direct relation to merits. S.H.A., ch. 38, par. 114-5(a,c); People v. Washington, 76 Ill.Dec. 894, 459 N.E.2d 1029, 121 Ill.App.3d 479.

Dismissal for want of prosecution is not considered adjudication on merits. Fanaro v. First Nat. Bank of Chicago, 112 Ill.Dec. 432, 513 N.E.2d 1041, 160 Ill.App.3d 1030.

Champaign County Circuit Court

No. 89-C-485

ATTORNEYS

CH

Michael B. McCellan

FRED WISNIEWSKI,
a/k/a CAPTAIN RAT

Injunction

Prillaman, Prillaman & Savage

TIM VEAR, MARR ROBEI, and
ROGER PRILLAMAN

8/425

Filed: Apr. 26, 1987

Apr. 28, 1987

May 1, 1987 HJJ a/p bt

Petition for Preliminary Injunction on file.

Plaintiff present with his Attorney Michael McCellan.
Defendants present pro se.

Motion to Amend by the defendants on file.
Arguments heard. Motion denied.

Evidence and arguments heard on the plaintiff's petition for
Preliminary Injunction. Prayer of petition denied.
Petition of defendants to Cancel Service Mark Registration on file.
Answer of defendants/counter-plaintiffs to petition for Preliminary Injunction on file.

May 1, 1987
June 10, 1987

Motion of the Defendants/ Counter-Plaintiffs for Entry of Default on file.

Apr. 17, 1987

8/28/91 GSM/LSM
87-C - 485

Upon the court's own motion, cause stricken
for want of prosecution. 4

9/27/91 CIVIL
87-C - 485
Nov. 14, 1991

Petition of Plaintiff to Reinstate and for leave
to file amended Pleadings on file.
Response to Plaintiff/Counter Defendant's Petition to Reinstate/Response to
Plaintiff's leave to file Amended Pleadings on file.

Robert Dodd present for the Plaintiff.
Defendants Prillaman and Rubel present pro se.
Defendants' response and affidavits on file.
Defendants' points and Authorities on file.
Arguments heard on Plaintiff's petition for leave
to re-instate, etc. Prayer of petition denied.
No written order required.

11/19/91 HLT/PT/BT
87-C - 485

