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01-16-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #30

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Drake Elvgren, an individual;  
John T. Dillard, an individual; and  
Louis K. Meisel, an individual;

Petitioners,

vs.

J. Daniel Vancas,

Registrant.

Cancellation No.: 92040459

Registration Nos.: 2095296 & 2097819

Marks: ELVGREN (STYLIZED)  
and  
ELVGREN (STYLIZED)

PETITIONERS' MOTION FOR SUMMARY JUDGMENT

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2900 CRYSTAL DRIVE  
ARLINGTON, VA 22202-3513

Sir:

Pursuant to Fed. R. Civ. Pro. 56(c) and TBMP §528.01, Petitioners, Drake Elvgren, John T. Dillard, and Louis K. Meisel, hereby moves that the Trademark Trial and Appeal Board

("Board") enter a judgment cancelling in their entirety Registration Nos. 2095296 and 2097819 for the "ELVGREN (STYLIZED)" marks filed by J. Daniel Vancas ("Registrant"). In support thereof, Petitioners submit herewith a MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT with attendant Exhibits, and state as follows:

1. Registrant's answer to Petitioner's Petition to Cancel rests solely on the following allegations:

A. Petitioners have no standing; and

B. Registrant has rights to the "ELVGREN" mark(s) based on a confidential settlement agreement with Brown & Bigelow, Inc.

2. As will be demonstrated by the attached Exhibits and Declarations, the following facts are provided:

A. Petitioners have standing sufficient to petition to cancel Registrant's marks.

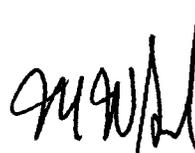
B. The Registrant's trademarks were obtained from the Patent and Trademark Office through the use of fraudulent means.

C. The Registrant has no rights to the "ELVGREN" mark(s) by virtue of the "settlement agreement" alleged, and even if the Registrant did have rights under the alleged agreement, those rights would no include *any rights* over the Elvgren works whose copyright status had passed into the public domain.

3. In light of the foregoing reasons, and, as explained more fully in the supporting Memorandum of Law submitted herewith, Petitioners are entitled to judgment as a matter of law granting Petitioners' Motion for Summary Judgment cancelling Registrant's registrations of the "ELVGREN" marks in their entirety.

WHEREFORE, Petitioners, Drake Elvgren, John T. Dillard, and Louis K. Meisel, respectfully request that the Board enter judgment cancelling the Registrant's "ELVGREN (STYLIZED)" registrations (Reg. Nos. 2095296 and 2097819) in their entirety, and provide any other remedy to Petitioners that the Board deems just and proper.

Respectfully submitted,



Date: January 16, 2003

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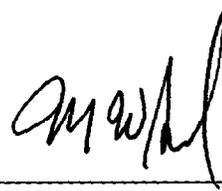
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Attorneys for Petitioners,  
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JOHN T. DILLARD, and  
LOUIS K. MEISEL

CERTIFICATE OF SERVICE

I hereby certify that a copy each of the foregoing PETITIONERS' MOTION FOR SUMMARY JUDGMENT and PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT was mailed FIRST CLASS mail, postage prepaid, this 16th day of January, 2003 on Opposer's counsel:

Mark A. O'Connor, Esq.  
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Post Office Box 3350  
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Mark W. Good

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Registrant.

Cancellation No.: 92040459

Registration Nos.: 2095296 & 2097819

Marks: ELVGREN (STYLIZED)  
and  
ELVGREN (STYLIZED)

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION  
FOR SUMMARY JUDGMENT**

**I. INTRODUCTION:**

This is a simple case of fraud on the United States Patent and Trademark Office. The Registrant made false statements to the USPTO in obtaining a Federal Registration on the actual signatures of the famous painter Gillette Elvgren without any cognizable claim for doing so. Aside from the obvious falsity of registering a famous artist's signature without

any relationship to that artist whatsoever, the Registrant has refused to provide any rationale for his fraudulent filings. In addition, the Registrant has completely refused to cooperate in the discovery process. He even refuses to state his true and correct name. The facts are set forth below.

In 1937, Gillette Elvgren began painting calendar pin-ups for Louis F. Dow, one of America's leading publishing companies. These pin ups are easily recognizable because they are signed with a printed version of Elvgren's name (hereinafter the "Printed Signature"). Examples of this Printed Signature, and the later Cursive Signature which are the actual signatures of Gillette Elvgren as affixed to his artwork, are attached hereto and incorporated by reference as **Exhibit "A."** The Printed Signature, like any other signature, was used by Gillette Elvgren to indicate that he was the author of the paintings he signed. [See pages 60, 62 and 63 et seq. of the book "Gil Elvgren, All His Glamorous American Pin-Ups" incorporated herein in its entirety by reference and attached hereto as **Exhibit "B"** for additional representative examples of the Printed Signature.] Around 1944, Gillette was approached by Brown and Bigelow, a firm that still dominates the field in producing calendars and advertising specialties relating to "pin-up" art. Elvgren entered into a contract with Brown and Bigelow to produce further works for them. In order to differentiate the works done for Brown and Bigelow from his previous work, Elvgren used a different signature, his cursive signature (hereinafter the "Cursive Signature".) [See **Exhibit "A"** as well as pages 82, and 86-89 of **Exhibit "B"**]

Gillette Elvgren died in 1980, leaving his son, Drake Elvgren, as heir to the Gillette Elvgren estate.<sup>1</sup> Many of Gillette Elvgren's works are now in the public domain, the remainder are still protected by copyright.<sup>2</sup>

A large secondary market has come into existence that trades, reproduces, and sells many variations of Gillette Elvgren's artworks. These include those that have come into the public domain and those that are reproduced with permission of the copyright owner(s).<sup>3</sup> Nearly all of these works are reproduced with either Gillette Elvgren's Printed or Cursive signatures, exactly as it appeared on the original works of art.<sup>4</sup> Works containing either the earlier Printed Signature or the later Cursive Signature are reproduced, sold, trade, purchased and displayed by literally thousands of people.<sup>5</sup>

In November of 1996, the Registrant applied for Federal Trademark Registrations on both the Printed Signature and the Cursive Signature, which was affixed to paintings created by Gillette Elvgren. The Registrant had no relationship whatsoever with Gillette Elvgren and had no right to use his signature. The Registrant obtained registrations for "artwork and paintings, namely, originals and reproductions of paintings, printed and painted reproductions, illustrations, prints, lithographs, gift cards, posters, and post cards,

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<sup>1</sup> See Declaration of Drake Elvgren #1 attached hereto and incorporated by reference as **Exhibit "C"**.

<sup>2</sup> All Elvgren works created with the Printed Signature are in the public domain. Approximately Eighty (80) Elvgren works created with the Cursive Signature are in the public domain.

<sup>3</sup> See Declaration of John T. Dillard #1 attached hereto and Incorporated by reference as **Exhibit "D"**.

<sup>4</sup> See FN 2. *Supra*

<sup>5</sup> See Declaration of Louis K. Meisel #3 attached hereto and incorporated by reference as **Exhibit "E"**.

trading cards with art work thereon, portfolios, poster books, calendars." [See Patent and Trademark Office Registration Numbers 2,095,296 and 2,097,819, incorporated herein by reference as **Exhibit "F"** and **Exhibit "G"** respectively, (hereinafter "Registrations")] This is exactly the manner and types of works in which Gillette Elvgren affixed his signature to artwork and paintings of his own creation.<sup>6</sup> This is also the manner in which the Petitioners trade in Elvgren works that have a public domain copyright status.<sup>7</sup> Moreover, Registrant never disclosed to the examining attorney that he did not create the Registrations but instead, merely took the signatures of a famous painter and submitted registration applications claiming the signatures as his own.

As soon as the Registrant obtained Federal Registrations for the "Elvgren" signatures, he engaged in a systematic operation of attempting to "extort" money and attribution from people that traded in Elvgren artwork.<sup>8</sup> As a result of the Registrant's conduct and harassment, the instant cancellation petition was filed by the Petitioners, standing for a representative group of the Elvgren Art Community, who have been harassed and otherwise molested by the Registrant, using his Federal Trademark Registrations as weapons.

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<sup>6</sup>See Meisel Declaration # 4.

<sup>7</sup>See Elvgren Declaration # 2; Meisel Declaration # 3; Dillard Declaration # 2.

<sup>8</sup> See Dillard Declaration #3,4,5,6,7,8,9; Meisel Declaration # 5,6,8,9,10,11,12; Elvgren Declaration #4, 5, 6, 7.

II. SUMMARY JUDGMENT IS APPROPRIATE AND SHOULD BE GRANTED IN PETITIONERS' FAVOR.

A. SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.

Resolution of *inter partes* proceeding by means of summary judgment is encouraged by the Courts. "The practice of the U.S. Claims Court . . . in routinely disposing of numerous cases on the basis of cross-motions for summary judgment has much to commend it. The adoption of similar practice is to be encouraged in *inter partes* cases before the Trademark Trial and Appeal Board, which seem particularly suitable to this type of disposition." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627, 222 USPQ 741 (Fed. Cir. 1984) The Petitioners believe that the sham registrations obtained by the Registrant in this case are particularly amenable to summary judgment for cancellation because of the fraudulent manner in which the Registrant has asserted rights in marks which do not belong to him. Both Registrations are actually copies of Petitioner Drake Elvgren's father's signatures which have served as designations of origin for someone other than the Registrant for more than fifty years prior to the Registrant's application for the Elvgren marks.

B. STANDARD OF REVIEW

A party is entitled to summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); TBMP §528. "An issue is material when its resolution would affect the outcome of the proceeding under governing law." *Institut National Des Appellations D'Origine and the Bureau National Interprofessional du Cognac v. Brown-Forman Corp.*, 1998 WL 285158

(TTAB 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The initial burden is on the movant to prove that there is no genuine issue of material fact. See *Perma Ceram Enters., Inc. v. Preco Indus. Ltd., d/b/a Fosroc-Preco*, 23 USPQ2d 1134 (TTAB 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). “[T]he burden on the moving party is discharged by ‘showing’ . . . that there is an absence of evidence to support the nonmoving party’s case.” *Mirage Resorts, Inc. v. Solo Cup Co.*, 1995 WL 237193, \*2 (TTAB 1995) (citing *Celotex Corp.*, 477 U.S. at 325).

“[A]s a general rule, the resolution of Board proceedings by means of summary judgment is to be encouraged.” *University Book Store, Brown’s Book Shop and the Wisconsin Merchant’s Fed’n v. Board of Regents of the Univ. of Wisconsin Sys.*, 33 USPQ2d 1385 (TTAB 1994) (citing *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560 (Fed. Cir. 1987)). Where, as here, there is no genuine issue of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result, summary judgment should be granted in the interests of judicial economy. See *Mattel, Inc. v. Cindy Bunin Nuyrick*, 1997 TTAB LEXIS 148, \*2 (TTAB 1997) (citing *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984)).

C. **FURTHER PROCEEDINGS WOULD ADD NOTHING TO THE ISSUES BEFORE THE BOARD BECAUSE OF REGISTRANT’S STONE WALL TACTICS.**

Petitioners have attempted to gather additional supporting evidence from Registrant without any success because of Registrant’s blatant violation of the TTAB

discovery process. Despite being served with a total of Fifty-Nine (59) discovery requests, the Registrant refused to answer a single one, in what appears to be a continuing pattern of fraudulent conduct, and unsupported claims submitted in his applications for the Elvgren marks.<sup>9</sup> For example, the Registrant has refused to provide such basic and elementary information such as: his full and correct name, address, and telephone number; (Petitioner's Interrogatory No. 1) the source and origin of the Elvgren marks that he claims rights to under his two Federal registrations; (Petitioner's Interrogatory Nos. 12, 13.) whether or not he created the marks claimed; (Petitioner's Interrogatory No. 14) and the source and origin of the specimens he submitted as his evidence of interstate commerce with the aforementioned applications for registration of the Elvgren marks. (Petitioner's Interrogatory Nos. 17, 18.)

Such a failure to cooperate in the discovery process by a party is looked upon with extreme disfavor by the Board. TBMP §412.01. In this case, the Registrant's conduct has been little more than a wholesale disregard of the discovery process. Furthermore, Petitioners have spent a great deal of money in the preparation of the futile discovery they have propounded to date. The facts of this case are sufficiently clear to enter judgment in the Petitioners' favor. Continuing the process beyond the instant Summary Judgment

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<sup>9</sup> Petitioner's Interrogatories Set One and Set Two, Request for Admissions Set One and Request For Production Set One, attached herewith and incorporated by reference as **Exhibit "H"**; Respondent's Responses to Petitioner's Interrogatories Set One and Set Two, Request for Admissions Set One and Request For Production Set One, attached herewith and incorporated by reference as **Exhibit "I"**

Motion will only result in the expenditure of more money for the Petitioners with little likelihood of any further evidence being produced by the Registrant.

**III. PETITIONERS HAVE STANDING TO PETITION FOR CANCELLATION OF THE FEDERAL REGISTRATIONS OF THE ELVGREN MARKS.**

A person "who believes that he is or will be damaged . . . by the registration of a mark on the principal register" may petition to cancel the registration under 15 U.S.C. § 1064 (2000). To obtain cancellation of the registration, the petitioning party must show both standing and valid grounds for cancellation. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Standing requires only that the petitioner have a "real interest" in the cancellation proceeding. *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1092, 220 USPQ 1017, 1020 (Fed. Cir. 1984). In most settings, a direct commercial interest satisfies the "real interest" test. *Cunningham*, 222 F.3d at 945. Except when dealing with incontestable marks, any reason that would have precluded registration in the first instance suffices as a valid ground for cancellation. *Id.* at 946. As will be demonstrated below, all three Petitioners easily satisfy the "real interest" test, because all have direct commercial interests in freely trading in the works of Gillette Elvgren without interference and harassment from the Registrant.

**A. DRAKE ELVGREN:** Drake Elvgren, is the son of Gillette Elvgren, and heir to the Gillette Elvgren estate.<sup>10</sup> As such, Drake has been involved in the publication of two

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<sup>10</sup> Gillette Elvgren died intestate at Sarasota, Florida in 1980. See Elvgren Declaration, # 1.

books about his father, and his father's work.<sup>11</sup> The Registrant has harassed Drake's publisher and tried to interfere with the printing of these books.<sup>12</sup> As the son of Gillette Elvgren, Drake is an authority on his father's work. The Registrant's act of obtaining a trademark on Drake's father's signatures has inhibited Drake's ability to trade in his father's work. Drake has heard from several other collectors of his father's work saying that they have also been intimidated by the Registrant against selling Elvgren works.<sup>13</sup>

Drake believes that because he is Gillette Elvgren's son and heir, he should be able to trade in his father's work without being harassed by the Registrant. Drake prefers that the Elvgren work that is in the public domain remains there, for all to appreciate and enjoy. He does not want the dissemination of his father's works to be impeded by an individual attempting to usurp the Elvgren name. As a result, there is an actual case and controversy as to the actual use and possession of his deceased father's signatures that have been misappropriated by the Registrant in this case.

**B. JOHN T. DILLARD:** Dillard sells reproduction art prints, including prints painted by Gillette Elvgren. Since 1997, the Registrant has harassed Dillard several times via e-mail with claims that the Registrant owned all of Gillette Elvgren's artwork and that Dillard's publication of non-copyrighted images violated the Registrant's "Elvgren"

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<sup>11</sup> See Elvgren Declaration # 3.

<sup>12</sup> See Elvgren Declaration # 4.

<sup>13</sup> See Elvgren Declaration # 5,6.

trademarks.<sup>14</sup> Dillard has known several other small business people whom the Registrant had similarly accused and bothered by the Registrant - whether they were selling Elvgren image reproductions or originals on eBay.<sup>15</sup> Most recently, the Registrant filed a Notice of Infringement with eBay against Dillard on June 8, 2001, and disrupted his sales for 2 weeks - causing Dillard to lose approximately \$350 in sales. During that time period, Dillard was de-listed and prohibited from selling any articles at eBay as a direct result of the Registrant's actions asserting trademark rights in Gillette Elvgren's signatures.<sup>16</sup> Dillard is currently unable to continue publication of public domain images without enduring additional aggravation caused by the Registrant.<sup>17</sup> As a result, there is an actual case and controversy between the Registrant and Petitioner Dillard, both as a result of the Registrant's use and possession of the marks, and the affirmative actions taken by the Registrant to disrupt the business of Dillard.<sup>18</sup>

C. LOUIS K. MEISEL: Meisel wrote a historical book on pinup art entitled, "The Great American Pinup," and in addition, authored the authoritative book on Gillette Elvgren and his artwork "Gil Elvgren, All His Glamorous American Pin-Ups."<sup>19</sup> Since registering the

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<sup>14</sup> See Dillard Declaration # 3.

<sup>15</sup> See Dillard Declaration # 5.

<sup>16</sup> See Dillard Declaration #6,7,8.

<sup>17</sup> See Dillard Declaration # 9.

<sup>18</sup> *Id.*

<sup>19</sup> "Gil Elvgren, All His Glamorous American Pin-Ups" by Charles G. Martignette and Louis K. Meisel, [Exhibit "B"]; "The Great American Pin-Up" by Charles G. Martignette and Louis K. Meisel, incorporated herein by reference and attached hereto as Exhibit "J"; (hereinafter "Meisel books")

"Elvgren" signatures in 1997, the Registrant has been continually harassing Meisel over the Registrant's claimed ownership of all rights to images created by the famous pinup artist Gil Elvgren which contained the signature "Elvgren". The Registrant claimed that Meisel could not even use the printed words "Gil Elvgren" without paying the Registrant and giving the Registrant credit.<sup>20</sup> The Registrant has written to and harassed and threatened no fewer than 18 of Meisel's publishers and their distributors including but not limited to Random House, Taschen and Bud Plant.<sup>21</sup> The Registrant further threatened that he had enlisted the FBI (Federal Bureau of Investigation) to pursue and prosecute Meisel and his associates, and gave Meisel the name of the agent he allegedly enlisted to do this.<sup>22</sup>

As the leading authority on Gillette Elvgren, Meisel has been approached by and has knowledge of at least 30 to 40 others who sell Elvgren prints, calendars, books and similar products over the Internet who have also been threatened and actually scared by the Registrant.<sup>23</sup> Meisel has spent thousands of dollars in legal fees, not to mention hundreds of valuable hours, defending himself against the Registrant's false claims and assisting others to do the same.<sup>24</sup> Meisel is not aware of every bookstore and distributor contacted by the Registrant, but based on his conduct to date can only assume that Registrant has intimidated

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<sup>20</sup> See Meisel Declaration, # 6.

<sup>21</sup> See Meisel Declaration, # 8.

<sup>22</sup> See Meisel Declaration, # 9; See also **Exhibit "A"** to Meisel Declaration (Freedom of Information Act Document); Respondent's Answer #15.

<sup>23</sup> See Meisel Declaration, # 10; See also **Exhibit "B"** to Meisel Declaration

<sup>24</sup> See Meisel Declaration, # 11; See also **Exhibit "B"** to Meisel Declaration

some stores to remove Meisel's books from sale. Meisel owns an art gallery in New York City, and personally owns more than 100 original Gillette Elvgren paintings.<sup>25</sup> All of these paintings bear either the printed or cursive "Elvgren" signatures, originally painted by the artist, which are identical to the two trademarks registered by the Registrant.<sup>26</sup> As a result, there is an actual case and controversy between the Registrant and Petitioner Meisel, both as a result of the Registrant's use and possession of the marks, and the affirmative actions taken by the Registrant to disrupt the business of Meisel.

**IV. THE REGISTRATIONS FALSELY ATTEMPT TO CHANGE THE DESIGNATION OF ORIGIN FROM GILLETTE ELVGREN TO THE REGISTRANT.**

**A. TRADEMARK RIGHTS ARE ACQUIRED THROUGH LEGITIMATE USE, NOT FRAUDULENT TRADEMARK APPLICATIONS.**

Nothing could be more of a designation of origin than a person's signature. Trademarks are akin to signatures as they both indicate that a particular item came from a particular source. In the instant case, the Registrations do exactly the opposite. They confuse the source of origin. Registrant wishes that when an individual sees Gillette Elvgren's name on a piece of art work which Gillette Elvgren created that the public associate that name with Daniel Vancas (the Registrant). Therefore, the Registrations actually cause confusion and should therefore be cancelled for this reason alone. Section 2(a) of the

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<sup>25</sup> See Meisel Declaration, # 1,12; See also Exhibit "B" to Meisel Declaration

<sup>26</sup> See Meisel Declaration, # 4; See also Meisel books.

Trademark Act, 15, U.S.C. §1052(a), is an absolute bar to the registration of deceptive matter on both the Principal Register and, pursuant to §23(a), 15 U.S.C. §1091(a), the Supplemental Register. TMEP § 1203.02

Further, the basic requirements for establishing trademark rights have not been met. TMEP §1201.02(b) states that “[a]n application filed by a party other than the owner of a mark is invalid, and this defect cannot be cured by amendment or assignment. . .” As the registrant was never the owner of Gillette Elvgren’s signatures, his application for each of the “ELVGREN” mark was and remains invalid.

In fact, using another's signature is a crime:

Forgery contemplates writing which falsely purports to be writing of person other than actual maker; signing one's own name with intent that writing be received as written by another person, or impersonating another in signature of instrument, or signing in such way as to make writing purport to be that of another, are all acts of forgery; *United States v Price* (1981, CA9 Cal) 655 F2d 958.

**B. THERE IS NO EVIDENCE THAT REGISTRANT HAS ACQUIRED TRADEMARK RIGHTS IN THE REGISTRATIONS.**

Petitioners have conducted substantial discovery and independent research in order to prove that Registrant has no trademark rights in the Registrations. Registrant has refused to offer any evidence of legitimate use of the Registrations despite the following interrogatories submitted to the Registrant by the Petitioners:

**INTERROGATORY NO. 12:**

Identify the source and origin of the Elvgren mark which you claim rights to in registration number 2,095,296.

**RESPONSE TO INTERROGATORY NO. 12:**

Responding party objects to this interrogatory on grounds it is vague, ambiguous, compound, contains multiple sub-parts, seeks information equally within the possession, custody or control of petitioners, including the information produced and/or generated in the United States District Court for the District of Minnesota, Case No. 98-2281 JRT/FLN, and is an unreasonable request.

**INTERROGATORY NO. 13:**

Identify the source and origin of the Elvgren mark which you claim rights to in registration number 2,097,819.

**RESPONSE TO INTERROGATORY NO. 13:**

Responding party objects to this interrogatory on grounds it is vague, ambiguous, compound, contains multiple sub-parts, seeks information equally within the possession, custody or control of petitioners, including the information produced and/or generated in the United States District Court for the District of Minnesota, Case No. 98-2281 JRT/FLN, and is an unreasonable request.

Since the Registrant refused to offer any substantiation for his claimed trademark rights, Petitioners have undertaken independent research and the results offer no support for the claimed rights. A random search of the word "Elvgren" on the google.com search engine showed 8,490 hits for web pages. [See Exhibit "K" attached herewith and incorporated by reference.] Virtually all of these hits (based on a statistical survey of the search engine hits) are related to the artist Gillette Elvgren, and his works of art. None of the sampled web pages in any way referred to the Registrant.

C. THE REGISTRANT'S APPLICATIONS APPEAR TO CONTAIN FALSE AND FRAUDULENT INFORMATION.

The declarations for both Registrations signed on October 31, 1996 by J. Daniel

Vancas state:

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application this application (sic) on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or if the application is being files (sic) under 15 U.S.C. 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief not other person, firm, corporation, or association has the right to use the above identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Mr. Daniel J. Vancas' registrations were for "artwork and paintings, namely, originals and reproductions of paintings, printed and painted reproductions, illustrations, prints, lithographs, gift cards, posters, and post cards, trading cards with art work thereon, portfolios, poster books, calendars." [See Registrations] This is exactly the manner and types of works in which Gillette Elvgren affixed his signature to artwork and paintings of his own creation. [See Meisel books]

These declarations signed by the Registrant appear to contain false statements.

First, the Registrant claimed to be the owner of the marks, with demonstrated knowledge

of the actual origin, ownership and use of the mark(s) by another (namely, Gillette Elvgren) within the application itself. As an art dealer, the Registrant was obviously aware of the huge secondary market for the art works bearing the signature of Gillette Elvgren. Second, the Registrant declared that no one else had the right to use the mark(s), while knowing full well of the large, existing secondary market trading in public domain Elvgren works that the Registrant was in fact, a part of.

When the Registrant claimed first use in interstate commerce of the Elvgren signatures, [00/00/1994 for Registration No. 2,095,296 and 00/00/1996 for Registration No. 2,097,819] more than ten million (10,000,000) reproductions of Elvgren work (bearing his signatures) had already been introduced into interstate commerce. Gillette Elvgren had been signing his works with the exact two signatures claimed as trademarks by the Registrant, on the exact same subject matter claimed by the Registrant, for more than fifty years previous to the Registrant's claim of first use.

All images shown as specimens for the two trademark applications submitted by the Registrant were not products of the Registrant's origin, but were merely copies of artwork painted by Gillette Elvgren, as early as 1939.<sup>27</sup> Because these works of art were painted by Gillette Elvgren, they also bore his signature. The claim that the Registrant first used Gillette Elvgren's signature in commerce in the 1990's is untenable. [See Dillard

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<sup>27</sup> See Dillard Declaration, No. 10, Exhibit "C", and Ramirez Declaration, attached hereto and Incorporated by Reference as **Exhibit "L"**

Declaration's list of Registrant's exhibits included with the Registrations, together with the year created and copyright status attached to Dillard Declaration as Exhibit "C".]

V. **THE REGISTRANT HAS NO TRADEMARK RIGHTS UNDER ANY "SETTLEMENT AGREEMENT."**

Since the inception of the instant Petition to Cancel, the Registrant has continually stated that he has trademark rights by virtue of a "Settlement Agreement" with Brown & Bigelow dated March 21, 2001, sanctioned by the United States District Court for the District of Minnesota (Case No. 98-2281 JRT/FLN).<sup>28</sup>

A. **THE ALLEGED AGREEMENT WAS NOT PROVIDED PURSUANT TO A LEGITIMATE DISCOVERY REQUEST.**

As a result of the Registrant claiming rights under this alleged agreement in its answer, during discovery, the Petitioners asked the Registrant to produce this document in Petitioners' Request for Production No. 2. The Registrant not only refused to produce the alleged agreement in response to this discovery request, but then went on to cite this same alleged settlement agreement as justification for his objections in Petitioners' Request for Production Numbers 3, 4, 6, 7 and 8. Aside from the fact that private parties may not bestow trademark rights on others that they do not possess, the Registrant's refusal to provide this document during the discovery process makes his claim of right even more suspect.

B. **"ELVGREN" MAY NOT BE REGISTERED AS A TRADEMARK TO ILLEGALLY EXTEND THE DURATION OF COPYRIGHT.**

Assuming arguendo that the Registrant held copyrights on some Elvgren

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<sup>28</sup> Respondent's Answer, page 2, No. 6, Affirmative Defense No. 9, and repeatedly throughout Respondents's Responses to Petitioner's discovery requests.

works by virtue of this “settlement agreement,” he would still have no trademark rights in the word “Elvgren.” That reason results from the interplay between copyright and trademark law. Specifically, while trademarks endure as long as the mark is used, copyrights eventually expire. In the case at bar, Petitioners deal and trade in Elvgren works that have fallen out of copyright protection and into the public domain. That much even the Registrant has admitted.<sup>29</sup> Upon expiration of the copyright, others have the right to reproduce the literary or artistic work and to use the title to identify the work. See 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 10:4 (4th ed. 2002) (citing J.L. Vana, *Single Work Titles and Group Artist or Author Names: Registrability Revisited*, 88 Trademark Rep. 250 (1998)). As the Federal Circuit Court of Appeal explained when examining a book title whose copyright had expired,

[O]nce the copyright to *Gone with the Wind* expires, a variety of publishers may wish to market copies of the work. A trademark in the title to this single book would compromise the policy of unrestricted use after expiration of the copyright because a book with a trademarked title, of course, could be published only under a different title. *Gone with the Wind* would perhaps become *That Book About Scarlett O'Hara and Rhett Butler* or *My Life with Tara, 1864*. The policy against proprietary rights in the titles to single books therefore finds additional support in the interface with copyright law.<sup>30</sup>

Granting the Registrant the right to exclude others from using the claimed mark(s) would result in an unconstitutional restraint on alienation of works in the public

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<sup>29</sup> Registrant's Answer, #6: “Respondent admits that certain Elvgren works are in the public domain. . .”

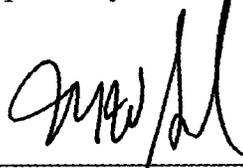
<sup>30</sup> *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 2002 U.S. App. LEXIS 18064 (Fed. Cir. Sept. 3, 2002) Reconsideration denied by: *Kappa Books, Inc. v. Herbko Int'l, Inc.*, 2001 TTAB LEXIS 526, 60 U.S.P.Q.2d (BNA) 1733, 60 U.S.P.Q.2d (BNA) 1765 (Trademark Trial & App. Bd. July 18, 2001).

domain through the use of trademark to extend copyright protection beyond life of the copyright. In this case, it is all the more extreme, as the registrant does not even possess the expired copyrights in question.

**VI. CONCLUSION**

For the foregoing reasons, Petitioners, Drake Elvgren, John T. Dillard, and Louis K. Meisel respectfully request that the Board enter Summary Judgment cancelling the Registrant's "Elvgren" marks #2095296 and #2097819 in their entirety, because no facts beyond those available in connection with this Motion can reasonably be expected to change that result. Petitioners respectfully request that their Motion for Summary Judgment be granted and provide any other remedy to Petitioners that the Board deems just and proper.

Respectfully submitted,



Date: January 16, 2003

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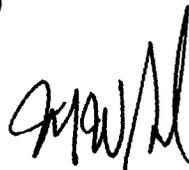
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DRAKE ELVGREN,  
JOHN T. DILLARD, and  
LOUIS K. MEISEL

**CERTIFICATE OF SERVICE**

I hereby certify that a copy each of the foregoing PETITIONERS' MOTION FOR SUMMARY JUDGMENT and PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT was mailed FIRST CLASS mail, postage prepaid, this 16th day of January, 2003 on Opposer's counsel:

Mark A. O'Connor, Esq.  
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Mark W. Good

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I, ANGELA RAMIREZ, hereby certify that this document is being deposited with the United States Postal Service as Express Mail, postage prepaid, in an envelope addressed to BOX TTAB, NO FEE, COMMISSIONER FOR TRADEMARKS, 2900 CRYSTAL DRIVE, ARLINGTON, VA 22202-3513

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Printed Name of Person Mailing Document: ANGELA RAMIREZ

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Date of Deposit: JANUARY 16, 2003

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

Drake Elvgren, an individual;  
John T. Dillard, an individual; and  
Louis K. Meisel, an individual;

Petitioners,

vs.

J. Daniel Vancas,

Registrant.

**Cancellation No.: 92040459**

**Registration Nos.: 2095296 & 2097819**

**Marks: ELVGREN (STYLIZED)  
and  
ELVGREN (STYLIZED)**

**EXHIBITS LIST**

- A. Examples of the Printed Signature and the later Cursive Signature which are the actual signatures of Gillette Elvgren as affixed to his artwork
- B. The book entitled *Gil Elvgren, All His Glamorous American Pin-Ups*
- C. Declaration of Drake Elvgren
- D. Declaration of John T. Dillard
- E. Declaration of Louis K. Meisel
- F. PTO Trademark Registration Certificate No. 2,095,296
- G. PTO Trademark Registration Certificate No. 2,097,819
- H. Petitioner's Interrogatories Set One and Set Two, Request for Admissions Set One and Request For Production Set One

- I. Respondent's Responses to Petitioner's Interrogatories Set One and Set Two, Request for Admissions Set One and Request For Production Set One
- J. *The Great American Pin-Up* by Charles G. Martignette and Louis K. Meisel
- K. A random search of the word "Elvgren" on the google.com search engine showed 8,490 hits for web pages
- L. Ramirez Declaration.

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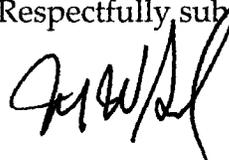
In connection with the above-referenced trademark registration cancellation proceedings, transmitted herewith are the following:

(1) Petitioners' Motion for Summary Judgment (4 pages), along with the supporting Memorandum of Law (20 pages) and 12 Exhibits (A thru L); and

(2) Postcard.

Please date-stamp the enclosed postcard and return same to the undersigned in acknowledgment of receipt of all transmitted materials.

Respectfully submitted,



Mark W. Good

MWG:pte  
January 16, 2003  
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