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

Proceeding	92043811
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang Respondent.	**Cancellation No.:** 92/043,811 **Registration No.:** 2,846,833 **Mark:** OAKTREE (& Design) **Date Registered:** May 25, 2004

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT *AND* RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO DISMISS FOR LACK OF STANDING

Dated: February 22, 2006
New York, New York

Respectfully submitted,

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TABLE OF CONTENTS

I. Introduction 3

II. Factual and Procedural Background 4

A. Respondent Hwang's Rights in the OAKTREE & Design Trademark 4

B. Petitioners' Allegations in the Petition to Cancel 6

III. Summary of Argument 13

A. The Petition to Cancel Should be Dismissed Based on Petitioners' Lack Standing 14

B. Petitioners Have Failed to Comply with their Discovery Obligations 14

C. The "Facts" on which Petitioner Relies are Disputed 16

IV. Legal Standard for Summary Judgment 16

V. Legal Standard for a Petition to Cancel pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. §§ 1052(d), 1064 17

A. Dissimilarity of the Marks 18

B. The Different Goods of Petitioner and Respondent 19

C. Dissimilarity of the Channels of Trade 19

D. Conditions Under Which Sales Are Made 19

E. The Fame of the Marks 20

F. Extent to Which Petitioners Have the Right to Exclude Others From Use of its OAK TREE FARMS and/or OAK TREE FARMS & Design Marks .. 20

G. Extent of Potential Confusion 21

H. Lack of Bad Faith of Junior User 21

VI. Conclusion 21

Respondent/Registrant Michael Hwang ("Hwang"), by and through his undersigned attorneys, hereby opposes the motion for summary judgment filed by Petitioners Roger Orozco and Nora Orozco ("Orozco") pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, 15 U.S.C. § 1064, and the rules of the Trademark Trial and Appeal Board, and makes a cross-motion for summary judgment, or in the alternative to dismiss, for lack of standing.[1]

In support of its opposition and cross-motions, Hwang submits herewith Declarations of John T. Johnson, Esq., Irene E. Hudson, Esq. and Michael Hwang and Exhibits thereto.

I. INTRODUCTION

The Petition to Cancel and motion for summary judgment filed by Petitioners Roger Orozco and Nora Orozco should be dismissed since neither Roger Orozco nor Nora Orozco have the requisite standing to seek the relief set forth in the Petition to Cancel. Petitioners do not own a registration for the mark with which they allege the subject registration is confusingly similar. Instead, they claim prior common law rights in an **OAK TREE FARMS** and **OAK TREE FARMS & Design** mark.[2] The evidence, however, tends to suggest that the alleged prior use, if any, of the **OAK TREE FARMS** and **OAK TREE FARMS & Design** mark was made by one or more entities of which Petitioners Roger Orozco and Nora Orozco are officers. Such use by an albeit related entity is not sufficient to confer standing on Petitioners. As such, the Petition to

[1] Respondent's response to the motion for summary judgment was originally due on February 15, 2006; however, the parties stipulated to a seven (7) day extension of that deadline.

[2] In its motion for summary judgment, Petitioners also claim prior common law rights to the mark **OAK TREE** and/or **OAK TREE & Design**; however, since those common law rights were not pled in the Petition to Cancel, they cannot form the basis for the motion for summary judgment. TBMP 528.07(a) ("A party may not obtain summary judgment on an issue that has not been pleaded.").

Cancel should be dismissed and/or summary judgment should be decided in favor of Respondent/Registrant Hwang based on Petitioner's lack of standing.

If Petitioners' Petition to Cancel is not dismissed based on a lack of standing, the motion for summary judgment must fail on its merits as there exist genuine and substantial questions of material fact as to at least the following issues: (i) what rights, if any, arose from the use, if any, of the **OAK TREE FARMS** and **OAK TREE FARMS & Design** by Petitioner, Petitioner's predecessor(s) in interest and licensee, and to whom those rights may belong; (ii) the similarities of the marks; (ii) the relatedness of the involved goods; (iii) the strength of Petitioners' **OAK TREE FARMS** and **OAK TREE FARMS & Design** marks; and (iv) the possibility of confusion between allegedly overlapping customers and channels of trade. Furthermore, the motion is premature and improper since it was filed by Petitioners before Respondent Hwang had a chance to conclude its discovery of Petitioners.

II. FACTUAL AND PROCEDURAL BACKGROUND

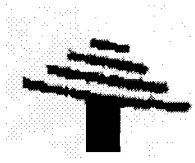
A. Respondent Hwang's Rights in the OAKTREE & Design Trademark

Hwang is the owner of Registration No. 2,846,833 for **OAKTREE & Design** for footwear in the following form:

The application from which this registration issued was filed by Hwang on February 10, 2003, based on a bona fide intent to use said mark in commerce. The application matured into Registration No. 2,846,833 on May 25, 2004, and recites a date of first use in commerce at least as early as December 20, 2003.

Hwang has been using the mark **OAKTREE & Design** in the registered form on or in connection with footwear, and, more particularly, hiking shoes and boots, since at least as early as December 20, 2003, as follows:

Hwang Decl. ¶¶ 4, 5. Hwang has and continues to also use the following designation on or in connection with the hiking shoes and boots:



Hwang Decl. ¶ 5. Representative examples of Hwang's use of the **OAKTREE & Design** mark are annexed as Exhibit A to his Declaration. Hwang Decl. ¶ 6, Ex. A. The **OAKTREE & Design** mark is present on the hiking shoes and boots themselves and on the packaging (i.e., box) accompanying the hiking shoes and boots when they are sold. Hwang Decl. ¶ 7, Ex. B.

Hwang's hiking shoes and boots have been sold in stores in the Northeast region of the United States, mostly in New York, New York, Hartford, Connecticut and Bronx, New York. Hwang Decl. ¶ 8. The stores in which Hwang's hiking shoes and boots are and have been sold are general shoe retailers that do not, upon information and belief, carry Western style (or "Cowboy") boots of the sort allegedly sold by Petitioners. Hwang Decl. ¶ 9.

Hwang has attended several trade shows and reviewed numerous lists of exhibitors for those trade shows and has never come across Petitioners and/or their brand of Western style

boots allegedly sold under the **OAK TREE FARMS** and/or **OAK TREE FARMS & Design** marks. Hwang Decl. ¶ 12.

B. Petitioners' Allegations in the Petition to Cancel

Petitioners Roger Orozco and Nora Orozco filed this proceeding on October 27, 2004, seeking cancellation of Hwang's registered **OAKTREE & Design** trademark, alleging that it is confusingly similar to a common law trademark for **OAK TREE FARMS** allegedly owned by Petitioners. In particular, Petitioners claimed that they "ha[ve] been and will continue to be damaged by the existence of Registration No. 2,846,833 in that the registration obtained by Respondent confers a *prima facie* exclusive right to use in commerce the mark **OAKTREE** on goods similar to those of Petitioner despite the Petitioner's prior and continuous use of the mark **OAK TREE FARMS**." *See* Petition to Cancel ¶ 7. In support of their allegations, Petitioners claimed prior rights to "the mark **OAK TREE FARMS** and other related marks … [for] various goods and services in a multitude of classes" and "the trademark **OAK TREE FARMS**, as well as composite marks bearing the words **OAK TREE FARMS** and a depiction of a leaf design, in connection with the sale of footwear." *See* Petition to Cancel ¶¶ 4, 5. Petitioners also alleged that they were the owner of Application Serial No. 78/304,288 for "footwear," an application for **OAK TREE FARMS & Design** in the following form:

In their motion for summary judgment, Petitioners claim that their predecessor in interest, Evolutions LLC, a California limited liability company wholly owned by Petitioners that has now been dissolved, sold a brand of shoes under the **OAK TREE FARMS** brand since at least

as early as October 1, 1995, Orozco Decl. ¶ 11, and that they obtained their rights to the brand from it. Orozco Decl. ¶ 2. Petitioners have failed to produce an assignment, acquisition agreement or other transfer of rights agreement evidencing this alleged transfer and/or evidencing what rights, if any, were transferred and when, even though such documents were requested by Respondent. Other than the statements of Petitioner Nora Orozco, there is no evidence of this transfer of rights in the **OAK TREE FARMS** brand and/or description of what rights, if any, were transferred. In particular, since the date of the alleged transfer is unknown, it is unclear what common law rights, if any, existed and were transferred in the **OAK TREE FARMS** brand. As shown below, Petitioners have also failed to produce documentary evidence of this alleged use in 1995, the form of such use, the extent of such use and by whom and for whose benefit such use made. Petitioners have also failed to show the time frame within which such use was allegedly made by Evolutions LLC. The only allegation made by Petitioner with respect to continuity of use is "Petitioners and their predecessors-in-interest have used the marks ... **OAK TREE FARMS** continuously and without interruption since 1995"; there is no mention of the form of the mark used, by whom, to what extent in terms of market size or geography or the types of customers. Material issues of fact exist as to what rights, if any, Petitioners have in the **OAK TREE FARMS** and/or **OAK TREE FARMS & Design** mark.

Petitioners also claim that they have licensed the "...**OAK TREE FARMS**" mark to Evolutions Footwear, Inc., a California corporation wholly owned by Petitioner, who is currently authorized and licensed to use the mark. Orozco Decl. ¶¶ 3, 4. Petitioners claim that "all use by Evolutions [Footwear, Inc.] inures to the benefit of Petitioner," that Evolutions Footwear, Inc. is a related company and that the use of the mark is "controlled by the Petitioner with respect to the nature and quality of the goods sold by Evolutions [Footwear, Inc.] under Petitioner's Mark." Orozco Decl. ¶ 4. Petitioners have failed, however, to produce the license agreement within which such terms are contained let alone a document that evidences the mark or marks subject to the agreement and/or the type of use authorized or licensed by Petitioners, even though such

documents were requested by Respondent. Material issues of fact exist as to what rights, if any, Petitioners have in the **OAK TREE FARMS** and/or **OAK TREE FARMS & Design** mark.

Despite their broad assertions, Petitioners claim to have continuously used, through its predecessor in interest and/or licensee, the **OAK TREE FARMS** mark on or in connection with footwear for at least 10 years. Orozco Decl. ¶ 11. The documentary evidence, however, makes clear that Petitioners have overstated the alleged use of the **OAK TREE FARMS** mark, whether made by them or their predecessor in interest or licensee or for their benefit. In essence, Petitioners have failed to prove that they have priority of use in any mark incorporating the terms "Oak Tree" or "Oaktree," let alone prove that such use was continuous. Material issues of fact exist as to Petitioners' alleged priority of use.

For example, the earliest document proffered by Petitioners as actually showing use of the **OAK TREE FARMS** brand is a catalog printed on or about May 15, 2001. Orozco Decl. ¶ 14, Ex. A. This document is a catalog entitled "Oak Tree Farms Western Bookmakers" that displays fourteen (14) ladies Western style boots. Orozco Decl. ¶ 14, Ex. A. The phrase "Oak Tree Farms" is superimposed on a large leaf design and appears on the majority of pages of the catalog. Orozco Decl. ¶ 14, Ex. A. In fact, the leaf portion of the composite design is clearly the larger and more prominent element with the phrase "Oak Tree Farms" appearing barely legible as set forth below:

Orozco Decl. ¶ 14, Ex. A. There is no mention in the catalog of Petitioners and the only contact information provided is for "Evolutions." Orozco Decl. ¶ 14, Ex. A. Apparently, the reference to Evolutions is to Evolutions Footwear, Inc. (the alleged licensee). Orozco Decl. ¶ 14.

Petitioners, through the Declaration of Nora Orozco, submit further "evidence" of their allegedly prior use of the **OAK TREE FARMS** mark.[3] Exhibit E, for example, is an advertisement from a catalog dated April 2002 entitled *Tack'n Togs* displaying "ladies western dress fashion boots" in connection with the terms Oak Tree Farms with a leaf design. Exhibit F is an advertisement from a catalog dated February 2003 entitled *Tack'n Togs* displaying "ladies western dress fashion boots" in connection with the terms Oak Tree Farms with a leaf design. The *Tack'n Togs* publications appear to be merchandising catalog geared to a Western style consumer base. Presumably, the intended readers and/or subscribers are retailers engaged in the sale and/or offering for sale of and/or interested purchasers of Western style clothing.

The only advertising and sales figures proffered by Petitioner is for the year 2002. Orozco Decl. ¶¶ 12, 13, Ex. J. While these numbers are not insignificant, it is unclear to what extent such dollars were used to promote and/or obtained through the sale of the **OAK TREE FARMS** brand as opposed to the **OAK TREE** brand. It is furthermore unclear whether such figures are indicative of the advertising and sales figures over the years. As such, they are of limited to no probative value from an evidentiary standpoint.

Mrs. Orozco also claims to have attended various trade shows, such as those hosted by Western & English Sales Association and the World Shoe Association, on behalf of Evolutions Footwear, Inc. since 1995 (Orozco Decl. ¶ 18), but fails to state whether her attendance at such shows was in connection with the **OAK TREE FARMS** brand of Western style boots or some other venture of Evolutions Footwear, Inc. Mrs. Orozco states that she attended these shows "on

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[3] Mrs. Orozco also attaches as Exhibit B and discusses in paragraph 16 of her Declaration, a catalog printed in 2002 displaying the **OAK TREE** with a leaf **Design** designation (with the word "Farms" removed). However, as stated above, since Petitioners have failed to plead prior use of an alleged **OAK TREE** and/or **OAK TREE & Design** mark in this cancellation proceeding, such evidence is not properly before the Board and should not be given any weight. In the unlikely event that the Board does consider this Exhibit as evidence, it should be noted that the use of "Oak Tree" is with the prominent use of a leaf design and that such use is limited to thirteen (13) pairs of Western style boots – eleven (11) pairs of women's Western style boots and two (2) pairs of men's Western style boots.

behalf of Evolutions Footwear, Inc." even though this entity is a licensee that did not presumably obtain any rights to the **OAK TREE FARMS** brand until after an alleged transfer from the predecessor in interest, Evolutions LLC, to the Petitioners and even though all efforts by the licensee allegedly inure to the benefit of Petitioners. Such attendance at these trade shows is thus of limited to no probative value from an evidentiary standpoint.

Petitioners have also provided evidence of the registration and/or attendance at certain trade shows of Evolutions Footwear, Inc.; however, as it can be seen from the titles of these shows, they are Western-style oriented shows and/or shows directed to Western-style boots. Orozco Decl. ¶ 24. Furthermore, it is unclear in what capacity Evolutions Footwear, Inc. attended these trade shows and what **OAK TREE FARMS** products, if any, were displayed at those shows.

Petitioners have also introduced alleged evidence of sales in all fifty United states, Orozco Decl. ¶ 35, and attached as Exhibit J to Mrs. Orozco's Declaration the first page of a multi-page document allegedly evidencing such sales. Orozco Decl. ¶ 35, Ex. J. This document is of no probative evidentiary value for several reasons. First, it is only an excerpt of a larger document that is not in evidence. Second, it is from 1997, and is therefore almost nine years old. There is no evidence that the sales from 1997 are indicative of the amount or extent of sales since that date or on the date that Hwang filed his application that matured into the registration at issue or today. Third, it is not evident from the document what mark was used in connection with the sales made and Ms. Orozco's declaration at paragraph 35, which was apparently cut off since the last sentence in the paragraph appears to be an incomplete sentence, does little to shed light on this defect. In particular, Ms. Orozco's proffered explanation that "OT" refers to Petitioners **OAK TREE** brand ignores the essential distinction between the **OAK TREE FARMS** and unplead **OAK TREE** brands. Finally, the document is also silent as to the types of customers to which sales were made in 1997, whether specialized Western-style oriented stores or general wearing apparel and footwear retailers. Material issues of fact exist as to whether or not

Petitioners have continuously used the marks in all 50 United states and the extent of that use, if any.

In support of their argument that the **OAK TREE FARMS** mark is exclusive and therefore strong, Petitioners cite to an alleged search or searches of the Google.com search engine. Orozco Decl. ¶¶ 25, 26. These searches are inconclusive of the alleged strength of the mark since Mrs. Orozco has failed to set forth what search criteria she used in performing such searches. For example, in a search performed by counsel for Hwang, a search of "oak tree" returned 5,880,000 "hits." Hudson Decl. ¶ 3. The first fifty of those "hits" made no reference to Petitioners or to its alleged **OAK TREE** brand of shoes. Hudson Decl. ¶ 3, Ex. A.

The remainder of the statements in Mrs. Orozco's Declaration, including without limitation paragraphs 27-31, have no basis in fact and are, at best, conclusory. For example, the statement in paragraph 31 relating to the conditions under which sales of Respondent Hwang's goods are made and to whom such sales are made is directly contracted by Hwang. Hwang Decl. ¶ 9. Hwang's goods are hiking shoes and boots that have been marketed to and sold in a stores in the Northeast that do not sell any Western style boots let alone the **OAK TREE FARMS** brand of Western style boots. Hwang Decl. ¶ 9. Paragraph 33, which is related to the types of goods of the parties, is similarly directly contradicted by Hwang. Hwang Decl. ¶ 9.

In further support of their motion for summary judgment, Petitioners also submitted a Declaration from Mr. Russell Chaney, an employee of Boot Village. Chaney Decl. ¶ 3. Boot Village apparently "operates a retail store in the state of New Jersey and an Internet website and is in the business of selling footwear, including shoes and boots," Chaney Decl. ¶ 2, and is and has been a retail customer of Petitioners and their predecessor in interest since 1995, Chaney Decl. ¶ 4. Chaney's Declaration is similarly conclusory in nature as it sets forth opinions as opposed to facts, and does not distinguish between the use of **OAK TREE** as opposed to **OAK TREE FARMS**.[4] *See, e.g.*, Chaney Decl. ¶¶ 5-13. Of particular note is Chaney's assertion that

[4] The two samples of "footwear" attached to the Declaration of Chaney are of Western style boots displaying the mark **OAK TREE FARMS**.

"[d]ue to its distinctive mark, substantial advertising, substantial promotional activities, and extensive sales, Petitioner has achieved widespread consumer recognition and acceptance of Petitioner's Mark for footwear." Chaney Decl. ¶ 13. As such, Chaney's Declaration should be given little to no weight.

Chaney's Declaration is also silent on the style of types of footwear sold by Boot Village in the retail setting or on the Internet. In fact, Chaney did not provide the URL for the Internet website on which such footwear is allegedly sold.[5] As such, there is a clear question of material fact as to the conditions under which Petitioner's goods are sold.

In essence, Petitioners have failed to establish as fact who had what rights to the **OAK TREE FARMS** brand and when, to what mark those rights related, to what extent any use was made of the mark(s) in terms of geography, quantity or channels of trade, what advertising efforts were directed to their plead prior rights and to whose benefit the advertising, marketing and good will inured. Petitioners, by citing alleged examples of use from only 1997, May 2001, April 2002 and February 2003, have also failed to prove that their use of the OAK TREE FARMS and/or OAK TREE FARMS & Design marks was continuous and in what geographic area of the United States such alleged use extended.

As stated above, Petitioners did not allege any common law rights in the marks **OAK TREE** or **OAKTREE** with or without a design as they now improperly attempt to do in their motion for summary judgment (*see, e.g.*, Petitioners' Brief at p. 2). Such unpleaded allegations cannot form the basis for summary judgment and should be given no weight by the Board. *See*

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[5] It is believed that the URL for Chaney's employer is www.bootvillage.com, which redirects to www.bootamerica.com. A review of the home page for that website shows that Boot Village sells the following type of footwear: biker boots, frontier/wedding boots, moccasins, police and military boots, western boots and work boots. Hudson Decl. 4, Ex. B. Hiking shoes and boots do not appear to be offered for sale on the website. Hudson Decl. 4, Ex. B. Petitioner's boots appear to be listed under the category of frontier/wedding boots and western boots; however, such boots are listed in connection with the **OAK TREE** with a leaf design mark as opposed to alleged prior rights plead in this action.

TBMP 528.07(a) ("A party may not obtain summary judgment on an issue that has not been pleaded.").[6] As such, these papers are only directed to the matters plead in the Petition to Cancel – Petitioners alleged prior use of **OAK TREE FARMS** and **OAK TREE FARMS & Design** for "various goods and services in a multitude of classes,"[7] including footwear.

III. SUMMARY OF ARGUMENT

The Petition to Cancel and Motion for Summary Judgment filed by Petitioners Roger Orozco and Nora Orozco should be dismissed since neither Roger Orozco nor Nora Orozco have the requisite standing to seek the relief set forth in the Petition to Cancel.

If Petitioners' Petition to Cancel is not dismissed based on a lack of standing, the motion for summary judgment must fail on its merits as there exist genuine and substantial questions of material fact as to at least the following issues: (i) what rights, if any, arose from the use, if any, of the **OAK TREE FARMS** and **OAK TREE FARMS & Design** by Petitioner, Petitioner's predecessor(s) in interest and licensee, and to whom those rights may belong; (ii) the similarities of the marks; (ii) the relatedness of the involved goods; (iii) the strength of Petitioners' **OAK TREE FARMS** and **OAK TREE FARMS & Design** marks; and (iv) the possibility of confusion between allegedly overlapping customers and channels of trade.

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[6] Any "facts" and exhibits (and reliance thereon in Petitioners' brief in support of their motion for summary judgment) that relate to these unpleaded matters, should be given no weight by the Board and stricken from the Record.

[7] Petitioner has apparently abandoned its alleged claims of use of the plead marks in for "various goods and services in a multitude of classes" since their motion for summary judgment and related affidavits and exhibits relate solely to Western style boots, in particular women's Western style boots, that fall within the broader category of "footwear."

A. The Petition to Cancel Should be Dismissed Based on Petitioners' Lack Standing

Petitioners have failed to show that they are the owners of the **OAK TREE FARMS** mark as used on or in connection with footwear, namely Western style boots, and/or that the alleged use of the **OAK TREE FARMS** mark since 1995 or even as late as 2003 was made by or on behalf of Petitioners.

An individual's position as an officer of the corporation making use of a trademark is not sufficient to grant that individual standing to petition to cancel a registered mark. *Societe Civile des Domaines Dourthe Freres v. S.A. Consortium Vinicole De Bordeaux et De La Gironde*, 6 U.S.P.Q.2d 1205 (T.T.A.B. 1988) (holding that where an individual "has shown no commercial activity or use of the name on his own behalf but only in terms of his position as corporate officer of [the company]," he has not proven his standing to challenge, as an individual, the application filed by another").

B. Petitioners Have Failed to Comply with their Discovery Obligations

Discovery, as set by the Trademark Trial and Appeal Board, was scheduled to close on May 17, 2005. Upon request, the discovery period was extended to close on November 13, 2005. In early November 2005, counsel for Petitioner made an oral request of counsel for Hwang for an extension of the discovery period and then, on November 10, 2005, contacted counsel for Petitioner seeking a sixty (60) day extension of the discovery period. Johnson Decl. ¶ 4. Counsel for Respondent consented to that request. Johnson Decl. ¶ 4. Despite numerous requests to ascertain whether the request had been filed, Counsel for Petitioners failed to return the calls of counsel for Respondent and it was later learned that Petitioners did not make the filing for which it sought consent, *see* Johnson Decl. ¶ 4, disregarded the discovery that was already propounded by Hwang and decided, instead, to proceed with the filing of this motion for

summary judgment. Given counsel for Petitioners failure to return calls, counsel for Respondent believed that Petitioners were abandoning this cancellation proceeding. Johnson Decl. ¶ 4. Respondents were even considering a motion to dismiss for failure to prosecute.

At the time that counsel for Petitioners requested an extension of discovery period, there were two outstanding notices of deposition, one for each of Petitioners Roger Orozco and Nora Orozco. Petitioners failed to appear for those noticed depositions. Johnson Decl. ¶ 6. Counsel for Petitioners, now, asserts that since discovery is closed – a circumstance that he unilaterally caused to happen by failing to file the agreed to request for an extension of the discovery period – he need not produce Petitioners Roger Orozco and Nora Orozco for deposition. Johnson Decl. ¶ 6.

Based on the facts set forth herein, counsel for Hwang intends to make a motion to extend the discovery period for a limited time so that the noticed depositions could go forward and/or to make a motion to compel the depositions of Petitioners Roger Orozco and Nora Orozco once these proceedings resume.[8]

It should be noted that the multiple extensions of time of the discovery period were filed to allow the parties sufficient time to discuss settlement. Until the motion for summary judgment was received, counsel for Hwang was under the impression that those settlement discussions

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[8] A motion to compel can be filed prior to the commencement of the first testimony period as originally set or as reset. TBMP 523.02, 37 C.F.R. § 2.120(e). Petitioners' testimony period was set to open on January 12, 2006. However, by virtue of Petitioners' filing of its motion for summary judgment on January 11, 2006, the proceedings were suspended and the testimony period has yet to open. *See* 37 C.F.R. § 2.127(d) ("[W]hen any party files … a motion for summary judgment … the case will be suspended by the [Board] with respect to all matters not germane to the motion and no party should file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order.").

were continuing. When the agreed to extension of the discovery period was not filed by Petitioner, counsel for Hwang assumed that Petitioner had decided to drop the matter.

C. The "Facts" on which Petitioner Relies are Disputed

As shown above, most if not all of the undisputed "facts" are in fact disputed or are conclusory opinions disguised as facts. In essence, Petitioners have failed to prove prior and continuous use of their plead marks in all geographic regions. At a minimum, there exists a material issue of fact as to whether or not Hwang is the junior user, or, in the alternative, to what extent, if any, do Petitioners' common law rights in the plead marks extend.

Petitioners, on pages 16 through 17 in their brief, have erroneously asserted that certain alleged facts are deemed admitted by Respondent based on an allegedly late response to Petitioners First Set of Requests for Admission. What Petitioners fail to note is that counsel for Respondent after obtaining consent for more time, filed a request for an additional thirty (30) days, or until June 5, 2005, to respond to those Requests and that Petitioners did not oppose or otherwise object to that request. Johnson Decl. ¶¶ 7, 8. As such, Hwang's responses were timely and Petitioners citation to allegedly admitted facts is without basis in law or in fact. A copy of the actual responses to Petitioners' Request for Admission are annexed as Ex. D to Mr. Johnson's Declaration.

IV. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law . . . ." TBMP § 528.01 (citing Fed. R. Civ. P. 56(c)).

In considering a motion for summary judgment, the Board must view the facts in the light most favorable to Respondent/Registrant, drawing all inferences in its favor, and find that Petitioner is entitled to summary judgment because no reasonable fact finder could decide this case in Respondent/Registrant's favor. See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Milliken & Company v. Image Industries, Inc.*, 39 U.S.P.Q.2D (BNA) 1192, 1196 (TTAB 1996). Mere statements by a party without any factual support are not evidence. *See generally In re Classic Beverage*, 6 U.S.P.Q.2d 1383, 1386 (T.T.A.B. 1988).

V. LEGAL STANDARD FOR A PETITION TO CANCEL PURSUANT TO SECTION 2(d) OF THE LANHAM ACT, 15 U.S.C. §§ 1052(D), 1064

Section 2(d) provides, in pertinent part, that a mark shall be refused registration on the Principal Register if it

> ... consists of or comprises a mark which so resembles ... a mark or trade name previously used in the United States by another and not abandoned, as to be likely when used on or in connection with the goods of the application, to cause confusion, or to cause mistake, or to deceive ...

15 U.S.C. 1052(d). The party contesting the registration, bears the burden of proving its asserted grounds of priority and likelihood of confusion by a preponderance of the evidence. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.3d 943, 55 U.S.P.Q.2d 1842, 1848 (Fed. Cir. 2000). Petitioners have failed to carry their burden on both grounds.

First, with respect to priority, as stated above, Petitioners have failed to prove who had what rights to the **OAK TREE FARMS** brand and when; to what mark those rights related; to what extent any use was made of the mark(s) in terms of geography, quantity or channels of

trade; what advertising efforts were directed to their plead prior rights and to whose benefit the advertising, marketing and good will inured.

Furthermore, with respect to likelihood of confusion, Petitioners have failed to prove by a preponderance of the evidence that Respondent/Registrant Hwang's **OAKTREE & Design** trademark is confusingly similar to its alleged common law use of **OAK TREE FARMS** and/or **OAK TREE FARMS & Design**.

The determination of a likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re duPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Respondent will only address those factors raised by Petitioners in their Brief at pages 10 through 15.

A. Dissimilarity of the Marks

A side by side comparison of Petitioners' **OAK TREE FARMS** and **OAK TREE FARMS & Design** marks and Respondent's **OAKTREE & Design** mark clearly shows that the marks are different in their appearance, sound and meaning and convey different commercial impressions. First of all, Registrant's mark is a composite mark wherein the "T" in the term "OAKTREE" is highly stylized while Petitioners' pled mark consists of three dictionary words – "Oak" "Tree" and "Farms" – superimposed, in most circumstances where evidence of use has been proffered by Petitioner, on a leaf larger than the words themselves. The marks also differ in their sound or pronunciation to the extent that Petitioner's mark includes the word "farms." As for meaning and/or connotation, the notable difference is in Petitioner's use of the term "farms," which means and invokes a reference to a tract of land cultivated for the purpose of agricultural production or farm.

B. The Different Goods of Petitioner and Respondent

As stated above, Petitioners' alleged use of the **OAK TREE FARMS** and **OAK TREE FARMS & Design** marks has been limited to Western (or "Cowboy") style boots. While it is true that both Respondent's and Petitioners' goods can most broadly be characterized as "footwear," they are far from identical and arguably not even similar. This is evident from Petitioner Nora Orozco's acknowledgment that these boots are sold through "***specialty shoe stores and related retailers***" as opposed to general shoe stores and retailers. Orozco Decl. ¶ 24 (emphasis added).

C. Dissimilarity of the Channels of Trade

As stated above and acknowledged by Petitioner Nora Orozco – the Western style boots sold in connection with the **OAK TREE FARMS** and/or **OAK TREE FARMS & Design** marks are sold through "***specialty shoe stores and related retailers***," Orozco Decl. ¶ 24 (emphasis added), as opposed to "the general public without any restriction as to the conditions of sales or services associated therewith" as argued in Petitioners' Brief at page 13. Such ***specialized*** or restricted channels of trade are clearly different from those through which Respondent's goods travel. At a minimum, there is a question of fact as to the similarity or dissimilarity of the channels of trade through which the respective parties' goods travel.

D. Conditions Under Which Sales Are Made

Footwear normally is sold through general retail shoe and/or clothing outlets, which can comprise department stores, mass merchants, boutiques, and pushcarts. It can safely be said that more brands of shoes compete for the consumer dollar than is the case in the market for most other products. There are, for example, far more brands of sneakers than there are of computers,

automobiles or most other products. This is a readily observable, everyday experience.

Another matter of everyday knowledge is that the vast majority of footwear, while it has a function, is bought in significant degree for personal adornment. Petitioners' footwear is directed to the Western style women's fashion community while Registrant's clothing is directed to those interested in buying hiking shoes and/or boots. In short, most footwear is carefully, even painstakingly, purchased and may be one of the most careful, sophisticated purchases that the typical purchaser makes.

E. The Fame of the Marks

As stated above, the evidence proffered by Petitioners to establish the alleged fame of its mark(s) is neither current nor indicative of what it was proffered to show.

F. Extent to Which Petitioners Have the Right to Exclude Others from Use of its OAK TREE FARMS and/or OAK TREE FARMS & Design Marks

As stated above, the alleged evidence proffered by Petitioners regarding this factor – an undefined search of the GOOGLE.COM search engine – itself raises a genuine issue of material fact as to the rights of Petitioners to exclude others. As further stated above, there are genuine issues of material fact with respect to at least the following "facts": to who, among Petitioners and/or their alleged predecessors in interest and/or alleged licensees, has rights, if any, to the **OAK TREE FARMS** brand; when and to what mark those rights relate; to what extent such use was made in terms of geography, quantity or channels of trade; and to whose benefit the advertising, marketing and good will inured. All of these disputed facts have a bearing on the extent to which Petitioners have a right, if any, to exclude others.

G. Extent of Potential Confusion

As stated above, since there exist issues of fact with respect to Petitioners' allegations concerning prior and continuous use, there is a genuine question of facts as to the extent of potential confusion. There are further genuine issues of fact regarding the parties' respective channels of trade and target consumers.

H. Lack of Bad Faith of Junior User

As stated above, based on the lack of conclusive evidence proffered by Petitioners, there exists a question of fact as to whether or not Hwang is the junior user. Petitioners have also failed to proffer any evidence relating to any alleged bad faith of the Respondent. In fact, Hwang never encountered Petitioners and/or their alleged use of the plead marks despite his attendance at several trade shows. Hwang Decl. ¶ 12.

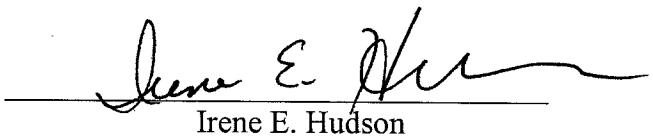
VI. CONCLUSION

For the foregoing reasons, Respondent/Registrant Hwang respectfully requests that this Board dismiss Petitioner's Petition to Cancel based on lack of standing, deny their motion for summary judgment and allow Respondent/Registrant Hwang to proceed with obtaining the discovery it has sought, either through an extended discovery period or a motion to compel.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT *AND* RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO DISMISS FOR LACK OF STANDING** was sent via first class mail, postage prepaid, on February 22, 2006 to Petitioner's Attorney of Record at the following address:

Kurt Koenig
KOENIG & ASSOCIATES
220 East Figueroa Street
Santa Barbara, California 93101



Irene E. Hudson

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

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang Respondent.	**Cancellation No.:** 92/043,811 **Registration No.:** 2,846,833 **Mark:** OAKTREE (& Design) **Date Registered:** May 25, 2004

DECLARATION OF JOHN T. JOHNSON, ESQ.

I, **John T. Johnson**, hereby declare that the following is true and correct to the best of my knowledge, information and belief and that this Declaration is made based upon my personal knowledge and information made available to me.

1. I am a principal of Fish & Richardson P.C., counsel for Respondent, Michael Hwang ("Hwang").

2. I make this Declaration to bring to the Board's attention information concerning discovery in this action and in support of Respondent's opposition to the Motion for Summary Judgment filed by Petitioner.

Procedural Background Regarding Discovery

3. Discovery, as originally set by the Trademark Trial and Appeal Board (the "Board"), was scheduled to close on May 17, 2005. The parties have agreed to several extension requests over time. For example, on July 13, 2005, and then on September 13, 2005, Petitioners filed sixty (60) day extensions of the discovery period, both of which were approved by the Board. The Board set discovery to close on November 13, 2005.

4. In early November 2005, counsel for Petitioner, Kurt Koenig, made an oral request to file with the Board another extension of time of the discovery period, and later contacted me via electronic mail seeking a further extension of the discovery period. I consented to that request. Because I had received no notice that the extension had been filed, I (and others in my office) made several attempts to contact Mr. Koenig as to the status of the extension request as well as his client's intentions in this proceeding. I received no response to my inquires. Several months after, in January, still having not heard back from Mr. Koenig, I began to think that Petitioners were abandoning this proceeding.

Petitioners Failure to Provide Discovery

5. On April 28, 2005, Counsel for Respondent/Registrant Hwang served on Petitioners Roger Orozco and Nora Orozco two notices of deposition, one for Roger Orozco and the other for Nora Orozco. Those depositions were noticed for early June 2005. Annexed hereto as **Exhibits A** and **B** are true and accurate copies of the Notices of Deposition for Petitioners Roger Orozco and Nora Orozco, respectively.

6. Neither Roger Orozco nor Nora Orozco appeared for their noticed depositions. Petitioners furthermore failed to move for a protective order seeking to quash the Notices of Deposition. After Petitioners filed their motion for summary judgment, I, and other colleagues from my office, again contacted Mr. Koenig several times concerning the scheduling of the depositions of Mr. and Mrs. Orozco. Mr. Koenig initially failed to respond to those requests and now refuses to schedule such depositions, stating that discovery had closed and that he would not permit such depositions outside the discovery period.

Mr. Koenig's Allegations Concerning the Requests for Admission Served on Respondent

7. On May 3, 2005, Respondent Hwang made a motion to extend his time to answer Petitioners' First Request for Admission. A copy of that Request is annexed as **Exhibit C** hereto. The certificate of service on Petitioners' discovery requests stated that they were served by mail on April 1, 2005, although counsel for Respondent did not receive them until April 18, 2005. Based on that April 1, 2005 service date, Registrant's responses were due on May 6, 2005. Given the lateness in receipt, Respondent requested from Petitioner some additional time to respond, and Petitioner's counsel orally consented to an extension in a telephone conference. Before that telephone conference took place, however, Respondent made a request to the Board for an additional thirty (30) days, or until June 5, 2005, to respond to those Requests. As stated in the request, my colleague Stacy Grossman, Esq. attempted to contact Mr. Koenig and his colleague Laurel Phillips on May 2, 2005, and May 3, 2005, but received no response.

8. After that motion was filed, I spoke with Mr. Koenig, and he consented to an extension. Nonetheless, Respondent was forced to file a request for an extension with the Board. As stated above, Petitioners neither opposed this motion nor contacted me to object to the extension request. Attached as **Exhibit D** hereto is a true and correct copy of Respondent's Responses to Petitioner's First Set of Requests for Admission.

9. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, declares that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated: February 22, 2006 /John T. Johnson/

JOHNSON
EXHIBIT A

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

Roger Orozco and Nora Orozco, Petitioner, v. Michael Hwang Registrant.	Cancellation No.: 92043811

Registration No.: 2,846,833

Date Registered: May 25, 2004

For the mark: OAKTREE (& Design)

NOTICE OF DEPOSITION OF PETITIONER ROGER OROZCO

PLEASE TAKE NOTICE that pursuant to 37 CFR 2.120, Registrant Michael Hwang, by his counsel, will take the deposition upon oral examination, as recorded by videographic and stenographic means, of Petitioner Roger Orozco.

The deposition take place before a court reporter and officer qualified to administer oaths, at the offices of Fish & Richardson P.C., Citigroup Center – 52nd Floor, 153 East 53rd Street, New York, NY 10022 on June 1, 2005 beginning at 9:30 a.m., or at such other time and place as may be agreed upon by counsel. The deposition will be videotaped and/or recorded stenographically and will continue from day to day until completed.

You are invited to attend.

Dated: April 28, 2005

John T. Johnson, Esq.
Stacy J. Grossman, Esq.
Attorneys for Michael Hwang
Fish & Richardson P.C.
Citigroup Center
153 East 53rd Street, 52nd Floor
New York, New York 10022-4611
Tel.: (212) 765-5070
Fax.: (212) 258-2291

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing NOTICE OF DEPOSITION OF PETITIONER ROGER OROZCO has been served on attorneys for Petitioners by mailing the same by first class mail, postage prepaid, to:

Kurt Koenig, Esq.
Koenig & Associates
220 East Figueroa Street
Santa Barbara, CA 93101

this 28th day of April 2005.

Neil Ramsaroop

30230430.doc

JOHNSON
EXHIBIT B

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

Roger Orozco and Nora Orozco, Petitioner, v. Michael Hwang Registrant.	Cancellation No.: 92043811

Registration No.: 2,846,833

Date Registered: May 25, 2004

For the mark: OAKTREE (& Design)

NOTICE OF DEPOSITION OF PETITIONER NORA OROZCO

PLEASE TAKE NOTICE that pursuant to 37 CFR 2.120, Registrant Michael Hwang, by his counsel, will take the deposition upon oral examination, as recorded by videographic and stenographic means, of Petitioner Nora Orozco.

The deposition take place before a court reporter and officer qualified to administer oaths, at the offices of Fish & Richardson P.C., Citigroup Center – 52nd Floor, 153 East 53rd Street, New York, NY 10022 on June 2, 2005 beginning at 9:30 a.m., or at such other time and place as may be agreed upon by counsel. The deposition will be videotaped and/or recorded stenographically and will continue from day to day until completed.

You are invited to attend.

Dated: April 28, 2005

John T. Johnson, Esq.
Stacy J. Grossman, Esq.
Attorneys for Michael Hwang
Fish & Richardson P.C.
Citigroup Center
153 East 53rd Street, 52nd Floor
New York, New York 10022-4611
Tel.: (212) 765-5070
Fax.: (212) 258-2291

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing NOTICE OF DEPOSITION OF PETITIONER NORA OROZCO has been served on attorneys for Petitioners by mailing the same by first class mail, postage prepaid, to:

Kurt Koenig, Esq.
Koenig & Associates
220 East Figueroa Street
Santa Barbara, CA 93101

this 28th day of April 2005.

Neil Ramsaroop

30230430.doc

JOHNSON
EXHIBIT C

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OF
BEFORE THE TRADEMARK TRAIL AND APPEAL BOARD

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang Registrant.	Cancellation No.: 92043811

Registration No.: 2,846,833

Date Registered: May 25, 2004

For the mark: OAKTREE (& Design)

MOTION TO EXTEND DISCOVERY

Registrant Michael Hwang respectfully requests that the Board grant him a 30-day extension of time to answer, oppose or otherwise respond to Petitioners' First Set of Interrogatories and First Requests for Production of Documents and Things, and to Petitioners' First Request for Admissions. The certificate of service on these documents states that they were served by mail on April 1, 2005 (although counsel for Registrant did not receive them until on or about April 18, 2005), so that Registrant's responses are presently due on May 6, 2005. With the requested extension, the new deadline for its discovery responses will be June 5, 2005.

The requested extension is necessary because Registrant requires additional time to properly evaluate and respond to the requests.

Because discovery is currently set to close on May 17, 2005 and because the parties both require additional time in which to complete discovery, Registrant requests a

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U.S. Patent & TMOfc/TM Mail Rcpt Dt. #66

60-day extension of the discovery period and all corresponding trial dates. With the requested extension, the new deadlines will be:

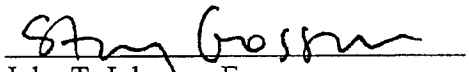
Discovery to Close:	July 16, 2005
Plaintiff's Testimony to Close:	October 14, 2005
Defendant's Testimony to Close:	December 13, 2005
Rebuttal Testimony to Close:	January 27, 2006

On May 2, 2005 and May 3, 2005, counsel for Registrant telephoned counsel for Petitioners to request consent to this motion, but was unable to reach either Kurt Koenig or his colleague, Laurel Phillips.

Wherefore, Registrant respectfully requests that the Board grant it a 30-day extension of time to respond to Petitioners' discovery requests, and a 60-day extension of the discovery period and all corresponding trial dates.

Respectfully submitted,

Dated: May 3, 2005

By: 

John T. Johnson, Esq.
Stacy J. Grossman, Esq.
Attorneys for Michael Hwang
Fish & Richardson P.C.
Citigroup Center
153 East 53rd Street, 52nd Floor
New York, New York 10022-4611
Tel.: (212) 765-5070
Fax.: (212) 258-2291

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONERS' DISCOVERY REQUESTS has this 3rd day of May, 2005, been mailed by prepaid first class mail to the below-identified attorney at his place of business:

Kurt Koenig, Esq.
Koenig & Associates
220 East Figueroa Street
Santa Barbara, CA 93101

Lise M

JOHNSON
EXHIBIT D

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

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang, Registrant.	Cancellation No.: 92043811

RESPONDENT'S RESPONSE TO
PETITIONERS' FIRST REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit that Respondent is the owner of the U.S. Trademark Registration No. 2,846,833.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Admitted.

REQUEST FOR ADMISSION NO. 2:

Admit that Respondent owns U.S. Trademark Registration No. 2,846,833 solely and not in association with any other individual, entity or through any partnership or other business relationship.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Admitted.

REQUEST FOR ADMISSION NO. 3:

Admit that Respondent offers for sale footwear which bears the mark OAKTREE.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Admitted.

REQUEST FOR ADMISSION NO. 4:

Admit that Respondent has sold boots in conjunction with the mark OAKTREE.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Admitted.

REQUEST FOR ADMISSION NO. 5:

Admit that Respondent did not sell footwear under the mark OAKTREE prior to December 20, 2003.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Denied.

REQUEST FOR ADMISSION NO. 6:

Admit that Respondent promotes and sells the goods identified in U.S. Trademark Registration No. 2,846,833 to consumers at the retail level.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Denied.

REQUEST FOR ADMISSION NO. 7:

Admit that Respondent promotes and sells the goods identified in U.S. Trademark Registration No. 2,846,833 to wholesalers.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Denied.

REQUEST FOR ADMISSION NO. 8:

Admit that Respondent's products offered under the mark OAKTREE are footwear.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Registrant objects to this request on the ground that it is vague. To the extent that the Request seeks an admission that the goods offered for sale under U.S. Trademark Registration No. 2,846,833 are footwear, Registrant's response is: Admitted.

REQUEST FOR ADMISSION NO. 9:

Admit that Respondent's Mark "OAKTREE" is virtually identical to Petitioners' Mark "OAK TREE FARMS."

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Denied.

REQUEST FOR ADMISSION NO. 10:

Admit that Respondent's Mark "OAKTREE" conjures up the same mental impression as Petitioners' Mark "OAK TREE FARMS."

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Denied.

REQUEST FOR ADMISSION NO. 11:

Admit that Respondent uses advertising media to promote his footwear sold under the OAKTREE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Registrant objects to this request on the ground that the term "advertising media" is not defined. Registrant understands the term "advertising media" to incorporate any form of advertising, whether paid or unpaid. Based on Registrant's understanding of this request, Registrant's response is: Admitted.

REQUEST FOR ADMISSION NO. 12:

Admit that Respondent uses the Internet to promote his footwear sold under the OAKTREE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Denied.

REQUEST FOR ADMISSION NO. 13:

Admit that Respondent uses the same channels of trade as Petitioners to sell his footwear under the OAKTREE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Denied.

REQUEST FOR ADMISSION NO. 14:

Admit that the customers likely to be interested in purchasing Respondent's footwear might also be interested in purchasing Petitioners' footwear.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Registrant objects to this request on the ground that he has no independent knowledge of customer interest. In Registrant's opinion, customers who purchase Registrant's footwear would not be interested in purchasing Petitioners' footwear, so Registrant's response is: Denied.

REQUEST FOR ADMISSION NO. 15:

Admit that Respondent did not conduct a detailed search regarding the use of the mark OAKTREE on footwear prior to filing his application for OAKTREE.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Denied.

REQUEST FOR ADMISSION NO. 16:

Admit that Respondent did not pay a third party search firm regarding the use of the mark OAKTREE on footwear prior to filing his application for OAKTREE.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Admitted.

REQUEST FOR ADMISSION NO. 17:

Admit that Respondent was aware of Petitioners' footwear, particularly boots, being sold under the mark OAK TREE FARMS prior to filing his application for OAKTREE.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Denied.

REQUEST FOR ADMISSION NO. 18:

Admit that Respondent was aware of Petitioners' footwear, particularly boots, being sold under the mark OAK TREE FARMS prior to December 20, 2003 when he first began selling footwear bearing the OAKTREE mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Denied.

REQUEST FOR ADMISSION NO. 19:

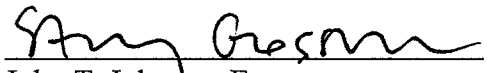
Admit that Respondent was aware of Petitioners' footwear, particularly boots, being sold under the mark OAK TREE FARMS subsequent to filing his application for OAKTREE but prior to October 27, 2004 when this Cancellation was filed.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Denied.

Respectfully submitted,

Dated: May 16, 2005

By: 

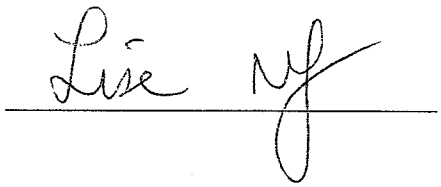
John T. Johnson, Esq.
Stacy J. Grossman, Esq.
Attorneys for Michael Hwang
Fish & Richardson P.C.
Citigroup Center
153 East 53rd Street, 52nd Floor
New York, New York 10022-4611
Tel.: (212) 765-5070
Fax.: (212) 258-2291

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S RESPONSE TO PETITIONERS' FIRST REQUEST FOR ADMISSIONS has been served on attorneys for Petitioners by mailing the same by first class mail, postage prepaid, to:

Kurt Koenig, Esq.
Koenig & Associates
220 East Figueroa Street
Santa Barbara, CA 93101

this 16th day of May, 2005.



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

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang Respondent.	**Cancellation No.:** 92/043,811 **Registration No.:** 2,846,833 **Mark:** OAKTREE (& Design) **Date Registered:** May 25, 2004

DECLARATION OF IRENE E. HUDSON, ESQ.

I, **Irene E. Hudson**, hereby declare that the following is true and correct to the best of my knowledge, information and belief and that this Declaration is made based upon my personal knowledge and information made available to me.

1. I am an associate of Fish & Richardson P.C., counsel for Respondent, Michael Hwang ("Hwang").

2. I make this Declaration to bring to the Board's attention information in support of Respondent's opposition to the Motion for Summary Judgment filed by Petitioner.

3. I performed a search on the GOOGLE.COM search engine for the term "oak tree." That search returned 5,880,000 "hits." The first fifty of those "hits" made no reference to Petitioners or to its alleged **OAK TREE FARMS** brand of shoes. Attached as **Exhibit A** hereto is a printout of that search.

4. I also performed a search on the GOOGLE.COM search engine to find the website operated by Boot Village that Mr. Chaney referred to in his Declaration. Upon information and belief, that website is www.bootvillage.com, which redirects to

www.bootamerica.com. A review of the home page, a copy of which is annexed hereto as **Exhibit B**, shows that Boot Village sells the following type of footwear: biker boots, frontier/wedding boots, moccasins, police and military boots, western boots and work boots. Upon information and belief, hiking shoes and boots do not appear to be offered for sale on the website. Petitioner's boots appear to be listed under the category of frontier/wedding boots and western boots; however, such boots are listed only in connection with the **OAK TREE & Design** (i.e., leaf design) mark as opposed to alleged prior rights plead in this action – **OAK TREE FARMS** and/or **OAK FARMS & Design.**

5. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, declares that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated: February 22, 2006

Irene E. Hudson

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HUDSON
EXHIBIT A

Sign in

Web Images Groups News Froogle Local more »

"oak tree" Search Advanced Search Preferences

Web

Results **1** - **10** of about **5,880,000** for **"oak tree"**. (**0.11** seconds)

Interesting Facts about Oak Trees
The largest **oak tree** of record is the Wye oak in the community of Wye Mills ... In there they mention that the largest certified **Oak tree** is one named "The ...
www.arcytech.org/java/population/facts_oaks.html - 24k - Cached - Similar pages

Santa Anita Race Track
Up-to-date information on the best Horse Racing in America from the Great Race Place "Santa Anita".
www.santaanita.com/ - 19k - Feb 20, 2006 - Cached - Similar pages

The **oak tree** - King of the greenwood
The **Oak Tree** and its place within not only Druidic culture but its association to the thunder gods of Thor and Zeus then the folklore this Tree of England ...
www.whitedragon.org.uk/articles/oak.htm - 15k - Cached - Similar pages

Oak Tree Racing
Thoroughbred racing from Southern California at Santa Anita Park.
www.oaktreeracing.com/ - 25k - Feb 20, 2006 - Cached - Similar pages

Oak - Wikipedia, the free encyclopedia
Jump to: navigation, search. This article is about oaks (Quercus). For other uses of "Oak" or "**Oak tree**", see Oak (disambiguation) ...
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Oak Tree Software, Inc. Accordance Demo for Standard English Bible Study Accordance Demo for Scholars Greek and Hebrew Study Get Help with Accordance ...
www.accordancebible.com/ - 17k - Cached - Similar pages

Oak Tree Church
Oak Tree Church - Church of Christ serving the Rochester, Minnesota area.
oaktree.faithsite.com/ - 25k - Cached - Similar pages

Big **Oak Tree** State Park - Missouri State Parks and Historic Sites ...
Department of Natural Resources, Information concerning state parks and state historic sites in Missouri.
www.mostateparks.com/bigoak.htm - 10k - Cached - Similar pages

The Oaktree Foundation. - Young People. Learning Through Partnership.

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PlantNJ.com

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We've Found the Best 4 Sites For **Oak Tree**
Gardens.Best4Sites.net

The Oaktree Foundation. The Oaktree Foundation... Young People. Learning Through Partnership. Mission Statement: To empower developing communities through ...
www.theoaktree.org/ - 4k - Cached - Similar pages

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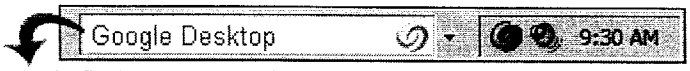

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OAK TREE VINTAGE (COOL STUFF!!!! PICS!!!) Used Home Stereo Stereos Receiver
Receivers Speakers By Pioneer Sansui Kenwood Marantz Teac Nakamichi Yamaha ...
www.oaktreeent.com/ - 45k - Feb 20, 2006 - Cached - Similar pages

about oak trees quercus species
Using this site, you will find detailed information about a wealth of different
types of oaks, as well as **oak tree** pictures, and places where you can buy ...
www.about-**oak-tree**s.com/ - 5k - Cached - Similar pages

The **Oak Tree** Stained Glass, The Crafters Choice
The Oaktree Stained Glass - free stained glass patterns, stained glass grinders,
stained glass software, stained glass starter kits.
www.oaktreesg.com/ - 32k - Feb 20, 2006 - Cached - Similar pages

The National Arbor Day Foundation
This official site of the National Arbor Day Foundation provides information
about planting and caring for trees, our Rain Forest Rescue and Tree City USA ...
www.arborday.org/programs/nationaltree/ - 15k - Cached - Similar pages

Oak Tree Care
OAK TREE CARE. The California Oak Foundation is dedicated to the conservation and
... Landscape and **Oak Tree** Consulting Simi Valley, CA Ph: 805/577-8432 ...
www.californiaoaks.org/html/oak_tree_care.html - 46k - Cached - Similar pages

Valley Oaks
a dicot in the Fagaceae family - canopy of Valley oak west of weir on #1 Loop
Trail Click here for more Valley **Oak Tree** images ...
kaweahoaks.com/html/valley_oaks_new.html - 7k - Cached - Similar pages

Home Page
Oak Tree Press has moved!! Note our new mailing address and contact information!!!
Publisher's Periodical, Popular Fiction! Open to All Genres! ...
www.oaktreebooks.com/ - 13k - Cached - Similar pages

Oak Tree Inn - accommodation Balmaha, Loch Lomond, Scotland
Accommodation, bar and restaurant situated in Balmaha on the West Highland Way
in the Loch Lomond and Trossachs National Park in West Central Scotland.
www.**oak-tree**-inn.co.uk/ - 9k - Cached - Similar pages

Oak Tree Lodge - Heber Springs, Arkansas - BBOnline.com / Introduction
Come Stay With Us and Experience The Friendliness of Our People, The Beauty of

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Buy Your **Oak Tree** Online
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www.Fast-Growing-**Tree**s.com

Park-1948 by Ansel Adams
Mat: White Ripple/Baker's White
Frame: Satin Black -- 1.75"
SHOP.COM

Our Mountains, The Thrill of Water Sports on Our Lake, The Exhilaration of ...
www.bbonline.com/ar/oaktree/ - 11k - Cached - Similar pages

The **Oak Tree**
Since 1986 the **Oak Tree** has provided quality furniture that will last a lifetime. Most of our pieces are made with solid oak and/or oak ply construction. ...
www.wcfcourier.com/marketplace/profiles/oak.tree/ - 5k - Cached - Similar pages

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Computerized electronic controls for model railroads, and electronic products for hobbyists and engineers. Home of the Railroad Control Interface.
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Please enter your user name and password to login UserName : Password :
www.supportdynamics.com/ - 2k - Cached - Similar pages

The **Oak Tree** in the Courtyard. Zen Poetry.
Hogen said, "I have heard about Joshu and the **oak tree**; itsn't this so?" ... The monk said, "When does the **oak tree** attain Buddhahood?" ...
www.gardendigest.com/zen/oaktree.htm - 35k - Cached - Similar pages

Oak Tree, Sunset City, California, 1932 Print by Ansel Adams at ...
Oak Tree, Sunset City, California, 1932 Print by Ansel Adams - at AllPosters.com. Choose from over 300000 posters and prints.
www.allposters.com/-sp/ Oak-Tree-Sunset-City-California-1932-Posters_i415530_.htm - 48k - Cached - Similar pages

Direct Mail Services At **Oak Tree** Marketing
Oak Tree Marketing is your one-stop source for direct mail and web design needs.
www.oaktreemarketing.com/ - 15k - Cached - Similar pages

Historic Council **Oak Tree** at UW-Eau Claire
For nearly three centuries, the Council **Oak tree** stood on the south lawn of the lower campus of ... Remaining Council **Oak tree** after lightning strike, 1966 ...
www.uwec.edu/Library/archives/exhibits/oak.htm - 9k - Cached - Similar pages

The Quiet Giant, The Wye Oak
Wye Oak from Wye Oak State Park Maryland's Wye Oak was long recognized as the largest white **oak tree** in the nation. Its stately presence in the village of ...
www.dnr.state.md.us/forests/trees/giant.html - 7k - Cached - Similar pages

Kitaj, RB: The **Oak Tree**
The **Oak Tree** 1991 Oil on canvas 60 1/8 x 60 in. (152.7 x 152.4 cm) Private collection. Click to view full-sized image. This is only a thumbnail image. ...
www.artchive.com/artchive/K/kitaj/oak_tree.jpg.html - 4k - Cached - Similar pages

Tate Collection | An **Oak Tree** by Michael Craig-Martin

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Cipriano Farms
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Making Outdoor Living Spaces Unique
PlantNJ.com

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We've Found the Best 4 Sites For **Oak Tree**
Gardens.Best4Sites.net

Michael Craig-Martin An **Oak Tree** 1973 · © Michael Craig-Martin. An **Oak Tree** 1973 Glass, water, shelf and printed text sculpture **...**
www.tate.org.uk/servlet/ViewWork?workid=27072 - 14k - Cached - Similar pages

Amazon.com: The Natural History of the **Oak Tree**: An Intricate **...**
Amazon.com: The Natural History of the **Oak Tree**: An Intricate Visual Exploration of the Oak and Its Environment: Books: Richard Lewington,David Streeter by **...**
www.amazon.com/exec/obidos/ tg/detail/-/1564583074?v=glance - 83k - Cached - Similar pages

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Oak Tree Systems, Inc.
Oak Tree Systems training management software LMS custom applications development.
www.oaktree-systems.com/ - 6k - Cached - Similar pages

Oak Glen, California
Oak Tree Village: 14 Acres of Family Fun in the heart of Oak Glen. Animal Park,
Trout Ponds, ... places in **Oak Tree** Village, the Village Candy Kitchen: ...
www.oakglen.net/oaktree.htm - 6k - Cached - Similar pages

Cork Oak - Flora ProvenceBeyond
... leaf instead of the classic oak-leaf shape. Our article, Truffles - Searching
for the Black Diamond, has a photo of an **oak-tree** truffle plantation. ...
www.beyond.fr/flora/oakcork.html - 8k - Cached - Similar pages

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Qualified orders over $25 ship free
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Frame: Satin Black -- 1.75"
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Amazon.com: **Oak Tree** (Webs of Life): Books
Amazon.com: **Oak Tree** (Webs of Life): Books by Paul Fleisher,Jean Cassels.
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Oak Tree, Sunrise Print by Ansel Adams at Art.com
Oak Tree, Sunrise Print by Ansel Adams - Find the **Oak Tree**, Sunrise Fine Art Print by Ansel Adams or another poster, print, photograph, photo or artwork in ...
www.art.com/asp/sp-asp/ _/pd--10083105/Oak_Tree_Sunrise.htm - 58k - Cached - Similar pages

Bruce Jackson: Killing an **Oak Tree**
Killing an **Oak Tree**. A Gratuitous Death. by BRUCE JACKSON. My neighbor is killing his **oak tree**. It's taking a long time. He's not doing it himself. ...
www.counterpunch.org/jackson01252003.html - 23k - Cached - Similar pages

White Oak
White Oak. This tree is easily recognized because of its lightly colored bark. The tree can be found in the eastern portion of the United States, ...
www.units.muohio.edu/dragonfly/itb/white_oak.htmlx - 3k - Feb 20, 2006 - Cached - Similar pages

Vintage Used Preowned Pre-owned Microphones Mics Mic's 1950's 50's ...
Vintage Used Preowned Pre-owned Microphones Mics Mic's 1950's 50's Elvis style Deco Antique Prop Props RCA 77-DX BK-1 1A RCA 44 for sale Sennheiser MD409 ...
www.oaktreeent.com/microphones.htm - 101k - Cached - Similar pages

Oak Tree, Snowstorm, Yosemite National Park, 1948 Prints by Ansel ...
Oak Tree, Snowstorm, Yosemite National Park, 1948 Prints by Ansel Adams - at AllPosters.com. Choose from over 300000 posters and prints.
www.allposters.com/-sp/ Oak-Tree-Snowstorm-Yosemite-National-Park-1948-Posters_i415529_.htm - 50k - Cached - Similar pages

The PGA of America Event Ticket Center

The 67th Senior PGA Championship will be contested at **Oak Tree** Golf Club in Edmond, Oklahoma from May 22 to 28, 2006. **...**
ticketing.pgalinks.com/index.cfm?presales=10 - 14k - Cached - Similar pages

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OAK TREE INN - YAMPA - YAMPA Hotel Reservations
UNITED STATES : COLORADO : YAMPA : **OAK TREE** INN. **OAK TREE** INN, Overall Average Rating:. 98 MOFFAT AVENUE YAMPA, CO 80483 United States. Property Type: ...
hotelsinsider.travelhero.com/index.cfm/ id/134550/aid/1620 /city/YAMPA/index.html - 18k - Cached - Similar pages

OAK TREE INN - LIVONIA - LIVONIA Hotel Reservations
UNITED STATES : LOUISIANA : LIVONIA : **OAK TREE** INN. **OAK TREE** INN. 7875 AIRLINE HIGHWAY LIVONIA, LA 70755 United States Display Map. Property Type:, Hotel ...
hotelsinsider.travelhero.com/index.cfm/ id/93467/aid/1620 /city/LIVONIA/index.html - 14k - Cached - Similar pages
[More results from hotelsinsider.travelhero.com]

Oak-killing disease found on a tree in New York state / Case on ...
The discovery of a red **oak tree** in New York state infected with the ... The Nassau County **oak tree** may be one of many infected trees on the east coast, ...
www.sfgate.com/cgi-bin/article.cgi?file=/ c/a/2004/07/28/MNGOR7U81 K1.DTL - 27k - Cached - Similar pages

Oak Tree Lodge, Sevierville Hotels - Yahoo! Travel
Oak Tree Lodge Hotel, Sevierville, TN: Find the best deals, reviews, photos, rates, and availability for the **Oak Tree** Lodge Hotel on Yahoo! Travel.
travel.yahoo.com/p-hotel-383269-oak_tree_lodge-i - 63k - Cached - Similar pages

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Oak Tree Inn - Hearne Hotel, Hearne, TX: Find the best deals, reviews, photos, rates, and availability for the **Oak Tree** Inn - Hearne Hotel on Yahoo! Travel.
travel.yahoo.com/p-hotel-363600-oak_tree_inn-i - 58k - Cached - Similar pages

Oak Tree on Centerstage Chicago - **Oak Tree** : 900 N. Michigan Ave ...
Oak Tree on Centerstage, Publisher of Honest Info By Chicago, For Chicago - This Web Site is All About Chicago. 900 N. Michigan Ave., 6th Floor, Chicago, ...
centerstage.net/restaurants/**oak-tree**.html - 29k - Cached - Similar pages

Red Oak Trees | Fall Foliage | White Oak Trees | Pin Oaks
Photo of a pin **oak tree** with its fall foliage colors. David Beaulieu. Stay up to date! click for more images. pin **oak tree** with its fall foliage ...

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PlantNJ.com

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landscaping.about.com/cs/ fallfoliagetrees/a/fall_foliage8.htm - 25k - Cached - Similar pages

Oak Tree Elementary School
About **Oak Tree** Elementary . . . "Soaring to Excellence" is our motto. Helping students achieve is our goal. Teachers, students, and parents work together in ...
www.gilbert.k12.az.us/info/schools/oaktree/oaktree.html - 8k - Cached - Similar pages

What are **oak tree** borers?
Lauri Jean Crowe explains **oak tree** borers, the larvae of beetles and moths. Learn how to prevent and control these insect infestations and damage.
ks.essortment.com/oakstreesborer_rkek.htm - 10k - Cached - Similar pages

BBC - Radio 4 - The Living World 21/11/2004
The **Oak Tree** Planters In the Living World, Brett Westwood heads for the oak ... Brett Westwood reveals the life of the **oak tree** planter in the Living World. ...
www.bbc.co.uk/radio4/science/livingworld_20041121.shtml - 49k - Cached - Similar pages

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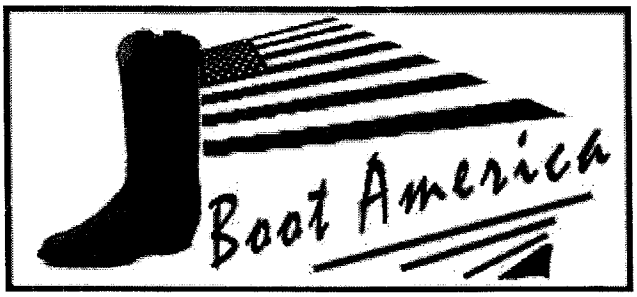
EXHIBIT B



Free Shipping on all mens and ladies boots!
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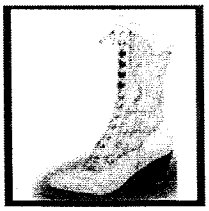
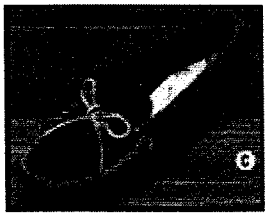
Biker Boots


Frontier / Wedding Boots


Moccasins

Police and Military Boots

Western Boots

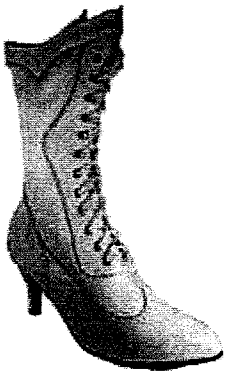
Work Boots

You Are Here
Oaktree
└► Ladies ***└► Ladies***
└► Frontier / Wedding Boots ***└► Westerns***

Click on a picture to get a full list of details, a detailed photo and ordering information

AltarBlack.jpg

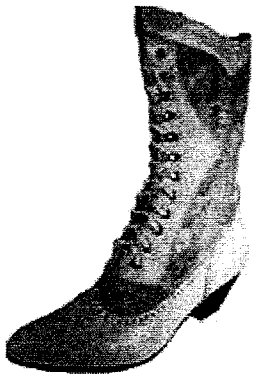
AltarIvory.jpg



AltarWhite.jpg

CathedralBlack.jpg

CathedralIvory.jpg



CathedralWhite.jpg

ChapelBlack.jpg

ChapelIvory.jpg

ChapelWhite.jpg

VowsWhite.jpg

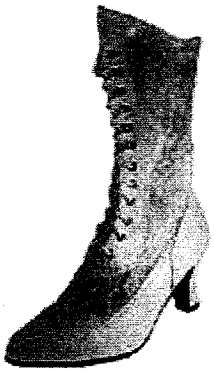
SteepleAntiqueSaddle.jpg

SteepleBlack.jpg

SteepleBrownNubuck.jpg

SteepleIvory.jpg

SteepleWhite.jpg



VesperBlack.jpg

VesperJYIvory.jpg

VesperWhite.jpg

VowsAntiqueSaddle.jpg

VowsBlack.jpg

VowsBrownNubuck.jpg

VowsIvory.jpg

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

Roger Orozco and Nora Orozco, Petitioners, v. Michael Hwang Respondent.	**Cancellation No.:** 92/043,811 **Registration No.:** 2,846,833 **Mark:** OAKTREE (& Design) **Date Registered:** May 25, 2004

DECLARATION OF MICHAEL HWANG

I, Michael Hwang, declare as follows:

1. I submit this declaration in support of Respondent's opposition to Petitioner's Motion for Summary Judgment in the above-referenced matter. This declaration is based on my personal knowledge and if called to testify as a witness I could competently testify to the matters herein.

2. I am the owner of Registration No. 2,846,833 for **OAKTREE & Design** for footwear in the following form:

3. The application from which the above-referenced registration issued was filed on my behalf on February 10, 2003, based on my bona fide intent to use said mark in commerce. The application matured into Registration No. 2,846,833 on May 25, 2004.

4. I have continuously used the **OAKTREE & Design** trademark on and in connection with footwear, and more particularly with hiking shoes and boots, in interstate commerce since at least as early as December 20, 2003, and continue to do so today.

5. I have continuously used since December 20, 2003, and continue to use the **OAKTREE & Design** mark on and in connection with hiking shoes and boots as follows:

and also use the following designation on or in connection with the hiking shoes and boots:

6. Annexed hereto as **Exhibit A** are pictures of the hiking shoes and boots that I have continuously sold and continue to sell in connection with the **OAKTREE & Design** mark.

7. Annexed hereto as **Exhibit B** are pictures of the packaging (i.e., box) and point of sale advertisement used in connection with the sale and offer for sale of the hiking shoes and boots associated with the **OAKTREE & Design** mark.

8. The hiking shoes and boots associated with the **OAKTREE & Design** mark have been sold in stores in the North East region of the United States, namely in New York, New York, Hartford, Connecticut and Bronx, New York.

9. Upon information and belief, the stores in which the hiking shoes and boots associated with the **OAKTREE & Design** mark have been sold are general shoe retailers that do not, upon information and belief, sell or offer for sale Western style (or "Cowboy") boots.

10. I understand that Petitioners Roger Orozco and Nora Orozco filed this proceeding on October 27, 2004, seeking cancellation of my registered **OAKTREE & Design** trademark alleging that it is confusingly similar to a common law trademark for word mark **OAK TREE FARMS** and/or the design mark **OAK TREE FARMS & Design** in the form below, both of

which are allegedly owned by Petitioners:

11. I also understand that they allege that they use the OAK TREE FARMS & Design in the form below:

12. Over the years, I have attended several trade shows and reviewed numerous lists of exhibitors for the trade shows and have never encountered Petitioners Roger Orozco and/or Nora Orozco and/or products sold or offered for sale by them and/or any brand of shoes, including Western style boots, sold in connection with the **OAK TREE FARMS** and/or **OAK TREE FARMS & Design** designation.

13. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, declares that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated: February 22, 2006
New York, New York

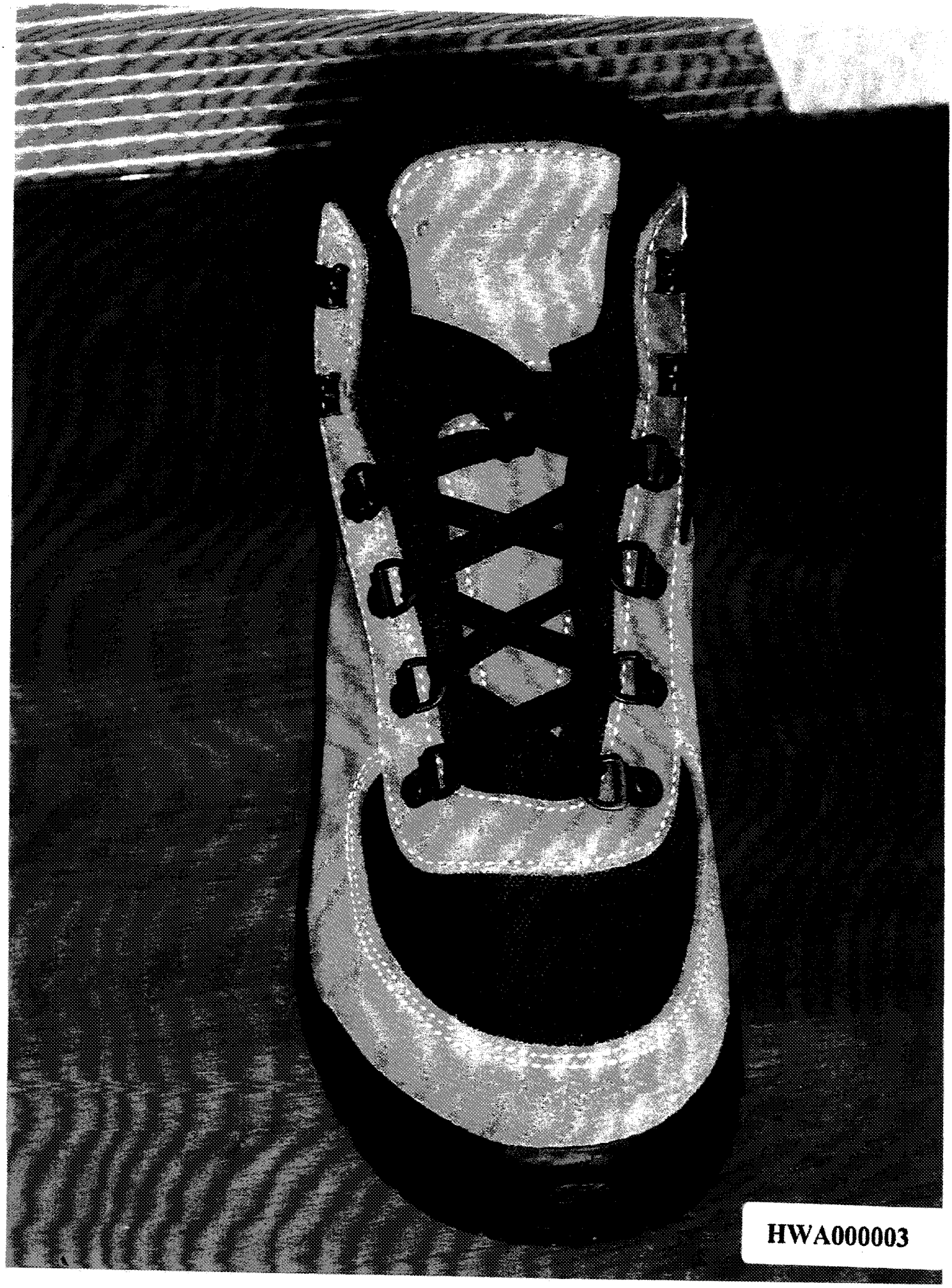
Michael Hwang

02/22/2006 20:59 FAX 7184458616 LawOffice of CharlesKhym 002

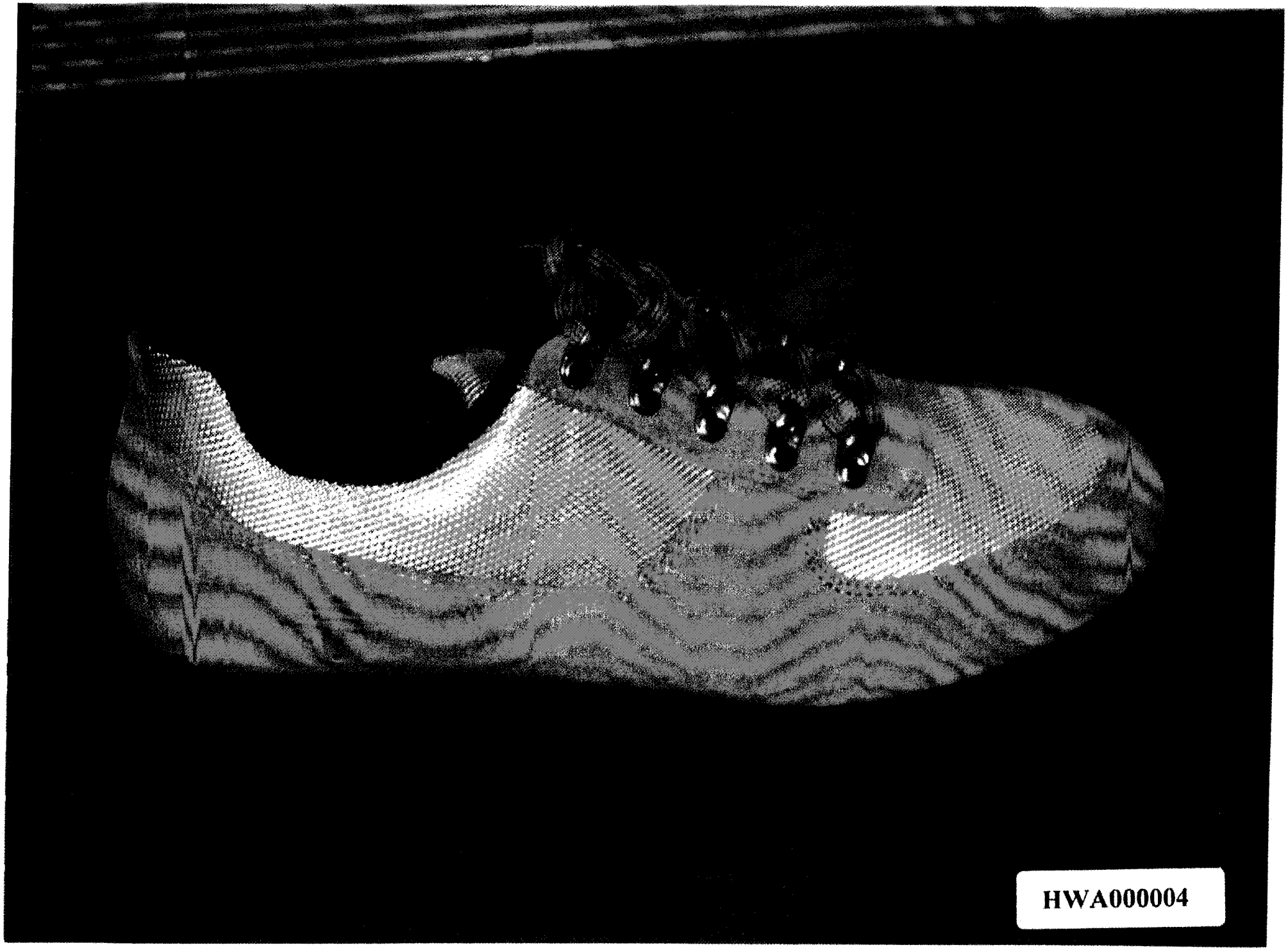
HWANG
EXHIBIT A

HWA000001

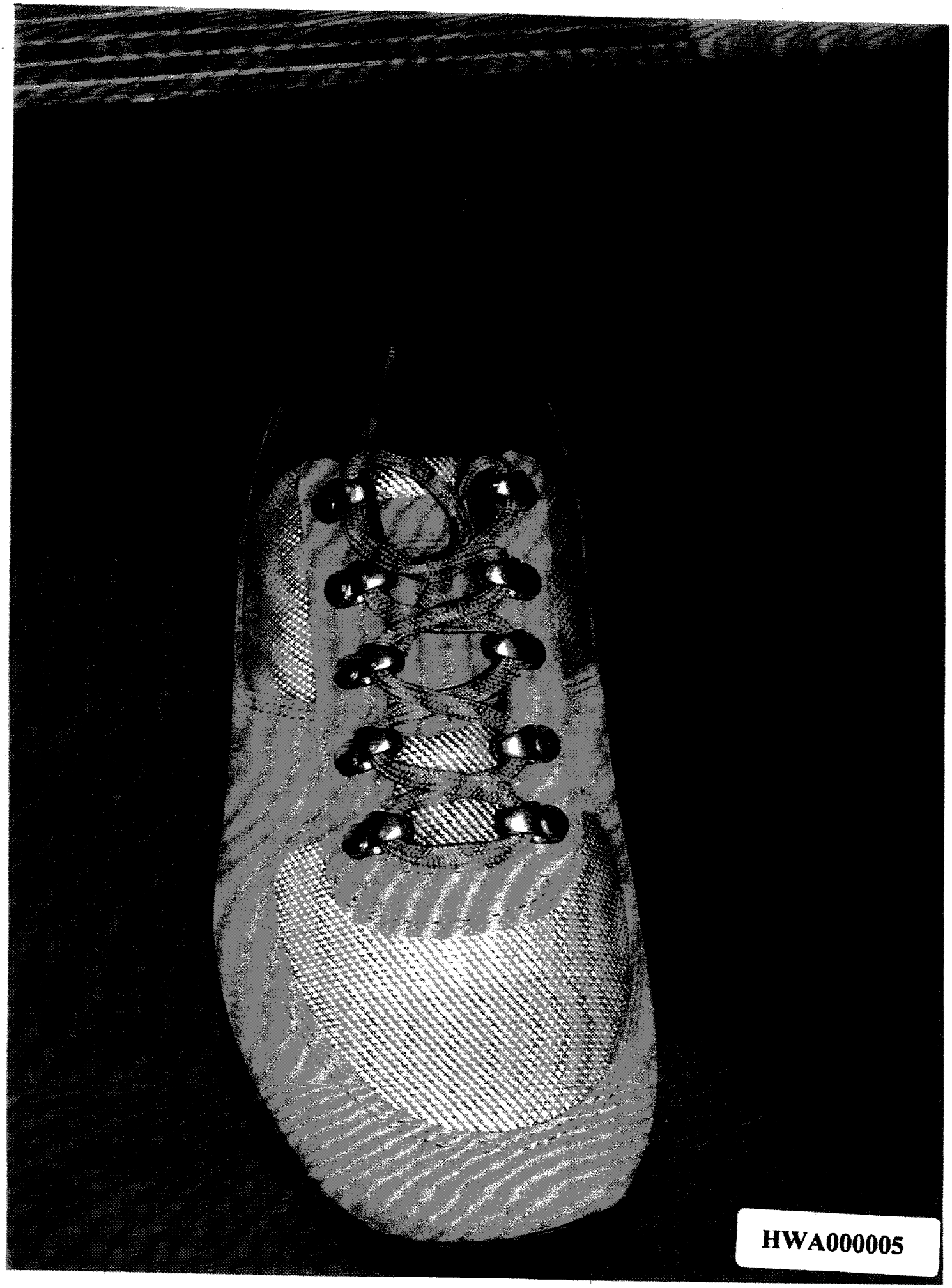
HWA000002



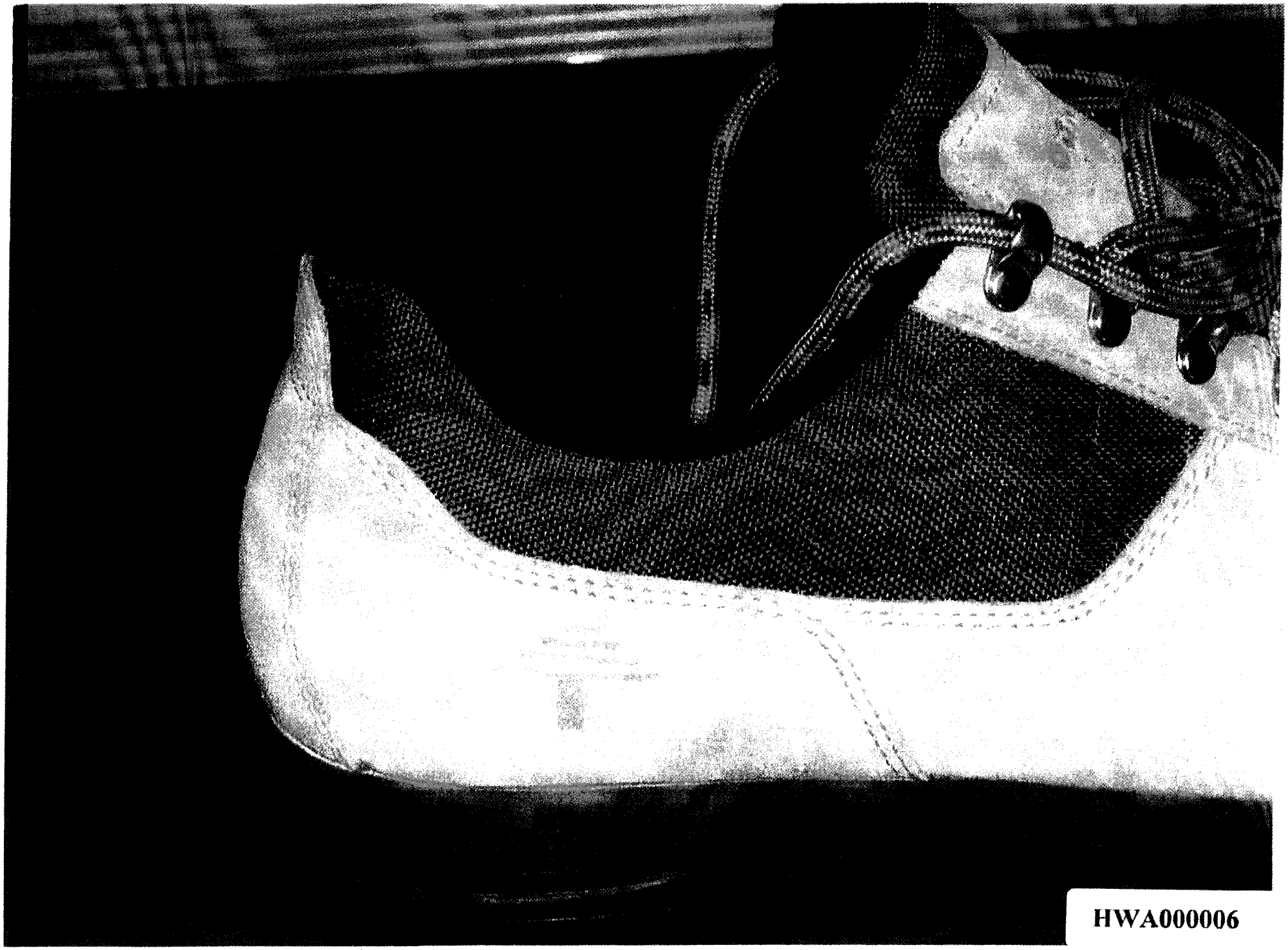
HWA000003



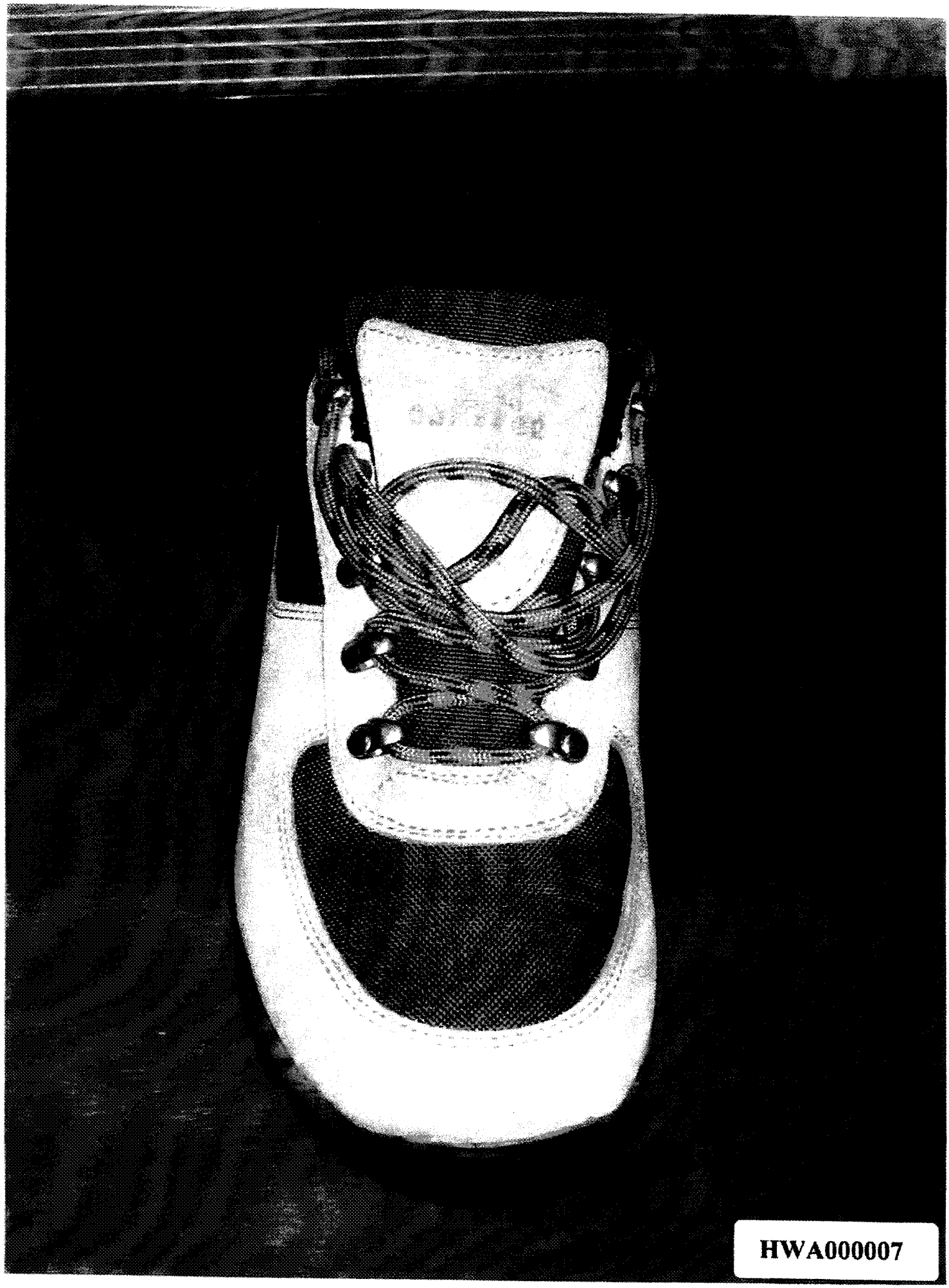
HWA000004



HWA000005



HWA000006



HWA000007

OAKTREE OUTDOORS, INC.

KIMO

Grey / Red
4 to 11

Grey / Charcoal
7 to 12

Grey / Pink
4 to 7

Grey / Blue
4 to 11

HWA000010

OAKTREE OUTDOORS, INC.

JACK

Charcoal / Black
7 to 13

TREK

Black
7 to 13

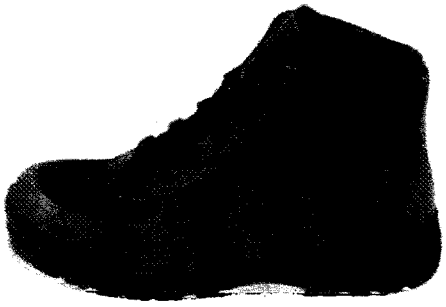
KIMO

Black
7 to 13

HWA000011

OAKTREE OUTDOORS, INC.

CROSS COUNTRY



Sand / Blue
302
Veratex
7 to 13

Black
301
Veratex
7 to 13

oakTree

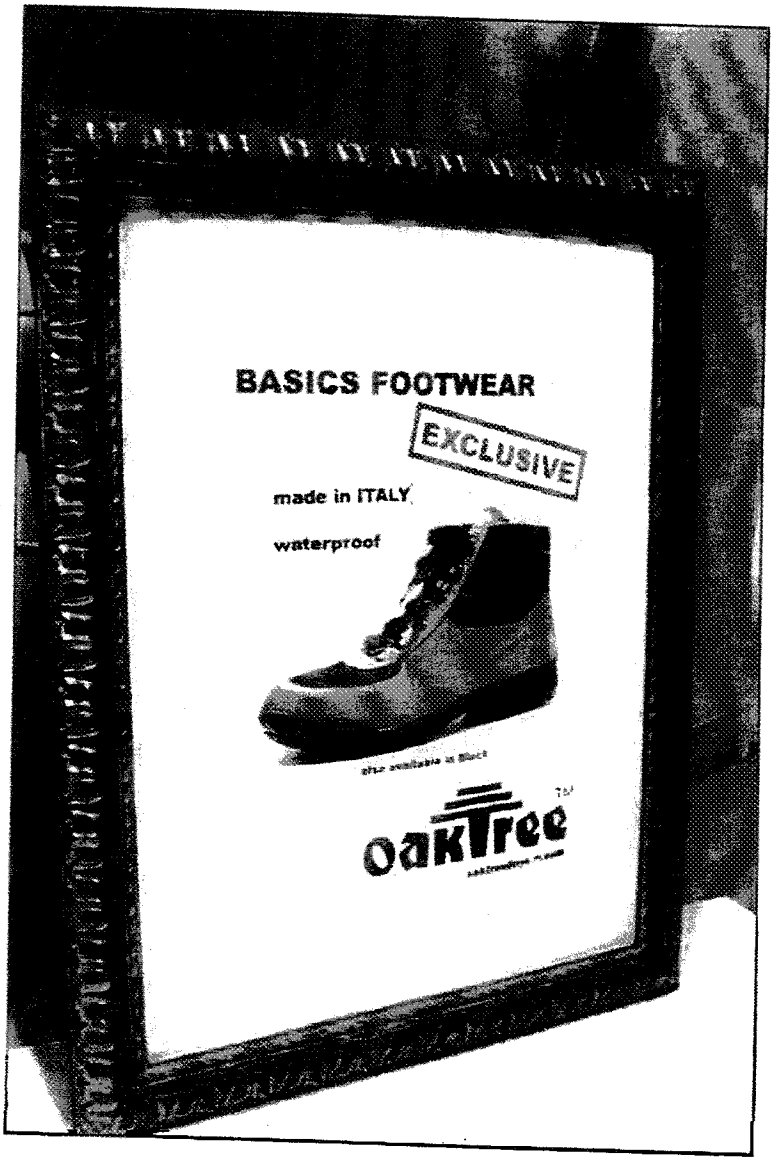
Cross Country Sand/Navy 302	Men's 8
MADE IN ITALY	

8

HWA000008

HWANG
EXHIBIT B

oakTree
Cross Country
Men's
9
MADE IN ITALY


BASICS FOOTWEAR
EXCLUSIVE
made in ITALY
waterproof
oakTree

HWA000009