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

Proceeding	92048260
Party	Defendant IPI ACQUISITION CORP.
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Date	07/09/2009
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FAMILY CLUBHOUSE, INCORPORATED,	:
d/b/a i play	:
	:
Petitioner,	: Reg. No.: 2,923,675
	:
	:
v.	: Cancellation No.:92048260
INTERNATIONAL PLAYTHINGS, INC.	:
	:
Respondent.	X

**RESPONDENT'S MOTION ON CONSENT TO REOPEN TIME ON BRIEF OF
RESPONDENT INTERNATIONAL PLAYTHINGS, INC. AND RESPONDENT'S
EVIDENTIARY OBJECTIONS TO PETITIONER'S EVIDENCE AND MOTION TO
STRIKE PETITIONER'S NOTICE OF RELIANCE DATED OCTOBER 2, 2008**

Respondent International Playthings, Inc., hereby files pursuant to Fed. R. Civ. P. 6(b)(1)(B) a motion on consent to reopen time for Respondent to file Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008.

Specifically, Respondent on May 22, 2009, filed a motion for an extension of time to extend the time for filing its trial brief from June 8, 2009, a period of 30 days. On June 5, 2009, the Trademark Trial and Appeal Board granted Respondent's request and gave Respondent up until July 6, 2009 to file Respondent's trial brief. Respondent's trial brief and its evidentiary objections were prepared and were in condition to be filed electronically on July 6, 2009. As set forth in the Declaration of Jamaal Cobbs and Geraldine Fellerman, which accompany this motion, the scanned in briefs were inadvertently put in the wrong electronic folder by Mr. Cobbs and before filing, Ms. Fellerman did not recognize that error. Instead, Ms. Fellerman refiled

what was in the matter's electronic folder, that being, Respondent's Motion to Extend Period of Time for Registrant to File Its Trial Brief which was previously filed on May 22, 2009. Believing that the two briefs were filed, Respondent's counsel served by mail and by e-mail on Petitioner's counsel, Steven Schnedler, on July 6, 2009, both the Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008. On July 8, 2009, Respondent's counsel discovered that an incorrect document was filed with the Trademark Trial and Appeal Board on July 6, 2009, and immediately called Mr. Schnedler that day and explained to Mr. Schnedler the problem. Mr. Schnedler, on behalf of the Petitioner, immediately consented to counsel's request to reopen time to file Respondent's Brief and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008.

The normal action by the Trademark Trial and Appeal Board ("TTAB") is to grant such a motion if the opposing party has consented to the request to reopen time. And this is the relief that Respondent requests. However, out of an abundance of caution, Respondent shall also demonstrate that the failure to act was a result of excusable neglect, such that this also forms a basis for granting Respondent's motion.

To determine if there was excusable neglect under Fed. R. Civ. P. 6(b)(1)(B), Respondent must show (1) the danger of prejudice to non-movant; (2) the length of the delay, and the potential impact on judicial proceedings; (3) the reason for the delay including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1586 (T.T.A.B. 1997).

With respect to the first factor, that being danger of prejudice to the non-movant, as set forth in the Declaration of Paul H. Kochanski (which accompanies this motion), the non-moving party, the Petitioner, has not been prejudiced at all, and therefore, there is no danger. Specifically, as reflected in the Kochanski declaration, upon believing that the Brief of Respondent and Respondent's Evidentiary Objections was filed with the TTAB, on July 6, 2009, Respondent's counsel served Petitioner's counsel with the pleadings he believed were filed with the TTAB. Therefore, there was no prejudice to the Petitioner at all since on the day the briefs were due, the Petitioner had received the briefs in question. The only error was with the filing with the TTAB. Therefore, there is no danger of prejudice to the Petitioner.

With respect to factor two, the length of delay and its potential impact on judicial proceedings, again, since these were Respondent's briefs and the Petitioner received the briefs the day that they were due, there was no delay in getting Petitioner the briefs in question, such that the Petitioner could begin to formulate its response. Therefore, this should have no impact on the judicial proceeding. With respect to the TTAB, the error was determined two days after the briefs were to be filed. The Interlocutory Attorney was immediately advised of the error on that second day. Moreover, the briefs are accompanying this motion on consent, thus, if accepted for filing, it would be only three days after the briefs were due at the TTAB that were filed. However, again, it must be remembered the party that could have been most effected by this delay was not. The Petitioner was timely served with the briefs on July 6, 2009.

With respect to factor three, the reason, for the delay, that is specifically set out in the Declarations of Mr. Cobbs and Ms. Fellerman (which accompany this motion), with respect to the inadvertent clerical error with respect to the electronic filing of the briefs. Clearly, the briefs were timely provided to Mr. Cobbs for purposes of scanning in the briefs in preparation for electronic filing on July 6, 2009, and as set forth by Mr. Cobbs, that was indeed accomplished.

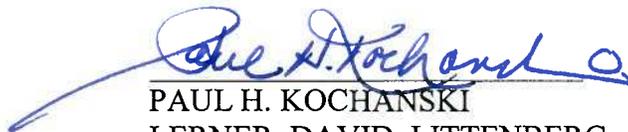
However, such briefs were put in the wrong electronic folder. As set forth in the declaration of Ms. Fellerman, Ms. Fellerman found a document in the correct folder, did not realize that this document was not the document to be filed and refiled the motion to extend time. The error was clearly inadvertent, there was all intention to file the briefs on July 6, 2009, as exhibited by the fact that the briefs were scanned in and actually served on the Petitioner.

Finally, with respect to the fourth factor, did the movant act in good faith, this has clearly been shown by the fact that the movant did scan the briefs, did attempt to file the briefs, and did indeed serve the Petitioner on the day the Petitioner was required to be served, that being July 6, 2009, believing that the briefs were filed.

Based upon the fact that the Petitioner has consented to this motion to reopen time to file Respondent's briefs and the foregoing showing of excusable neglect in filing the wrong document and further, based upon the fact that the Petitioner timely received a copy of the brief and evidentiary objections and is not prejudiced in any manner with respect to being able to file its reply, Respondent respectfully requests that its motion to reopen time to file Brief of Respondent International Playthings, Inc. and Respondent Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008, be accepted for filing at this time. Respondent's briefs accompany this motion for purpose of filing the same if Respondent's motion is granted.

Respectfully submitted,

Date: July 9, 2009


PAUL H. KOCHANSKI
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KRUMHOLZ & MENTLIK, LLP
600 South Avenue West
Westfield, NJ 07090
E-mail: pkochanski@ldlkm.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2009 a true copy of was served upon the attorney for Petitioner, Family Clubhouse, Incorporated by via e-mail and via first class mail addressed as follows:

1. Respondent's Motion On Consent To Reopen Time On Brief Of Respondent International Playthings, Inc. And Respondent's Evidentiary Objections To Petitioner's Evidence And Motion To Strike Petitioner's Notice Of Reliance Dated October 2, 2008;
2. Declaration of Paul H. Kochanski;
3. Declaration of Jamaal Cobbs;
4. Declaration of Geraldine Fellerman

Steven C. Schnedler, Esq.
CARTER & SCHNEDLER, P.A.
56 Central Avenue, Suite 101
P.O. Box 2985
Asheville, NC 28802
schnedler@ashevillepatent.com



PAUL H. KOCHANSKI

Trademark Trial and Appeal Board granted the request for an extension on June 5, 2009 and provided Respondent 30 days to file its brief up until July 5, 2009 which was a Sunday. Accordingly, the date for filing the brief would be July 6, 2009.

3. By July 6, 2009, I had fully prepared the Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008. Upon finalization of the papers, I went to our office services department to have both the brief and evidentiary objections scanned into the system for purposes of seeing to the electronic filing of these documents with the Trademark Trial and Appeal Board ("TTAB"). In that regard, I spoke with Jamaal Cobbs, an employee of this firm who was the person responsible for scanning in litigation pleadings including pleadings to be filed with the TTAB in to the system for electronic filing. I explained to Mr. Cobbs that the matter was to be put in an electronic folder specifically related to this matter.

4. I also contacted Geraldine Fellerman, a paralegal of this firm to advise her that certain papers had to be filed on that day with the TTAB since this was the final day that such papers could be filed. I advised her to contact our Office Services department to determine when such papers were scanned and ready to be filed.

5. I also requested that Mr. Cobbs after scanning in the papers for filing, forward to me an electronic version of the papers and also the original copy of the papers together with a copy such that I could personally serve Petitioner's counsel, Steven Schnedler, that evening before I left work.

6. Subsequently, Mr. Cobbs advised me that he had scanned in the documents and that they were prepared to be filed with the TTAB. Additionally, Mr. Cobbs sent me electronic

copies of the two documents and also paper copies of the two documents to be served. I immediately put the paper copies in an envelop which was addressed to Mr. Schnedler so that the envelop was posted and mailed to him that day by first class mail. Additionally, I immediately wrote an e-mail to Mr. Schnedler on July 6, 2009 serving on him electronic copies of Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008. A copy of that e-mail is attached hereto as Exhibit A.

7. Mr. Schnedler wrote me a responding e-mail at 6:07 p.m. on July 6, 2009, the date the papers were to be filed to advise me that he had received the papers and thanked me for them. A copy of Mr. Schnedler's e-mail is attached hereto as Exhibit B.

8. Subsequently, I was advised by Geraldine Fellerman, that the papers had indeed been filed with the TTAB.

9. On Wednesday, July 8, 2009, I was advised, that the documents that were filed with the TTAB on July 6, 2009 was not the Brief of Respondent International Playthings, Inc. or Respondent's Evidentiary Objections, but rather, it was Respondent's Motion for Request to Extend Time to File a Brief previously filed on May 22, 2009. Upon determining an error had been made in that Ms. Fellerman filed the wrong documents, I contacted Mr. Schnedler for the purpose of obtaining his consent to reopen time to file Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008. Mr. Schnedler provided me his consent immediately.

10. Following my contacting Mr. Schnedler, I contacted the Interlocutory Attorney Richard Kim of the TTAB who advised me to file the accompanying motion.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated:

July 9, 2009

Paul H. Kochanski
Paul H. Kochanski

EXHIBIT A

Kochanski, Paul H

From: Kochanski, Paul H
Sent: Monday, July 06, 2009 6:08 PM
To: 'Steve Schnedler'
Cc: Kahana, Patty
Subject: re: i play v. International Playthings
Attachments: IPTI2.PDF; IPTI 10.5R-044.PDF

Tracking:

Recipient	Delivery
'Steve Schnedler'	
Kahana, Patty	Delivered: 7/6/2009 6:08 PM

Steve

Please find documents filed today.

Pauk

Paul H. Kochanski
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7/8/2009

EXHIBIT B

Kochanski, Paul H

From: Steve Schnedler [schnedler@ashevillepatent.com]
Sent: Tuesday, July 07, 2009 9:19 AM
To: Kochanski, Paul H
Subject: re: i play v. International Playthings

Received. Thank you.

At 06:07 PM 7/6/2009, you wrote:

Steve

Please find documents filed today.

Pauk

Paul H. Kochanski

Lerner, David, Littenberg, Krumholz & Mentlik, LLP

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7/8/2009

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

| | | |
|---------------------------------|---|---------------------------|
| FAMILY CLUBHOUSE, INCORPORATED, | : | |
| d/b/a i play | : | |
| | : | Reg. No.: 2,923,675 |
| Petitioner, | : | |
| v. | : | Cancellation No.:92048260 |
| INTERNATIONAL PLAYTHINGS, INC. | : | |
| | : | |
| Respondent. | X | |

DECLARATION OF GERALDINE FELLERMAN

I, GERALDINE FELLERMAN, do declare and state as follows:

1. I am employed as a paralegal with the law firm of Lerner, David, Littenberg, Krumholz & Mentlik, LLP, counsel for Respondent International Playthings, Inc. in the above-captioned cancellation proceeding and, as such, am responsible for a large percentage of the ECF filings done in this office. I submit this declaration in connection with Respondent's Motion on Consent to Reopen Time on Brief of Respondent International Playthings, Inc. and Respondent's Evidentiary Objections to Petitioner's Evidence and Motion to Strike Petitioner's Notice of Reliance Dated October 2, 2008 Out of Time. I am fully familiar with the matters set forth herein.

2. On Monday, July 6, 2009, I was asked by Paul H. Kochanski, lead attorney on this matter, to ECF file pleadings which I was told had been downloaded to a folder in "litigation pleadings to be filed" under the client and file for this matter.

I went to the folder indicated and, without opening the contents of the file, proceeded to file the document located therein.

3. I was unaware at the time that the pleadings that SHOULD have been filed had been downloaded to a different folder under a different file reference for International Playthings, Inc.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: July 9, 2009

Geraldine Fellerman
Geraldine Fellerman

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

| | | |
|---------------------------------|---|---------------------------|
| | : | |
| FAMILY CLUBHOUSE, INCORPORATED, | : | |
| d/b/a i play | : | |
| | : | Reg. No.: 2,923,675 |
| Petitioner, | : | |
| | : | |
| v. | : | Cancellation No.:92048260 |
| INTERNATIONAL PLAYTHINGS, INC. | : | |
| | : | |
| Respondent. | X | |

DECLARATION OF JAMAAL COBBS

I, JAMAL COBBS, do declare and state as follows:

1. I am an employee of Lerner, David, Littenberg, Krumholz & Mentlik, LLP in its Office Services Department. I am fully familiar with the facts set forth herein.

2. On Monday, July 6, 2009, I was requested by Paul Kochanski to scan in two documents which were to be filed electronically by our firm. I was also asked by Mr. Kochanski to make a copy of each of the documents and provide a paper copy to him and also to forward to Mr. Kochanski, electronic copies of the documents.

3. I, indeed, scanned in the documents in question, but inadvertently, placed them in the wrong folder in the firm's pdf filing system. Rather than put them in the folder related to this proceeding which the documents referred to, I inadvertently put them in to a U.S. District Court litigation folder for the same client.

4. After putting the pleadings in the folder, I sent to Mr. Kochanski the scanned electronic documents by e-mail. I then gave Mr. Kochanski the original copy of the documents

that I scanned in, gave him paper copies of these documents, and told Mr. Kochanski that the documents were ready to be electronically filed.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: 7/9/09



Jamaal Cobbs

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

| | |
|---------------------------------|-----------------------------|
| FAMILY CLUBHOUSE, INCORPORATED, | : |
| d/b/a i play | : |
| | : |
| Petitioner, | : Reg. No.: 2,923,675 |
| | : |
| | : |
| v. | : Cancellation No.:92048260 |
| INTERNATIONAL PLAYTHINGS, INC. | : |
| | : |
| Respondent. | X |

BRIEF OF RESPONDENT INTERNATIONAL PLAYTHINGS, INC.

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I. INTRODUCTION

The present brief is filed in support of the Respondent International Playthings, Inc.'s position that U.S. Registration No. 2,923,675 for the mark I PLAY AND DESIGN,



should not be cancelled. The basis for Respondent's position is that contrary to the Petitioner's position, there will not be a likelihood of confusion between Respondent's mark used in connection with the goods set forth in its registration and Petitioner's mark with respect to the goods set forth in its two pending applications. Indeed, as reflected in Respondent's evidentiary objections which separately accompany this brief, Petitioner has failed to put forth admissible evidence demonstrating that but for possibly non-disposable swim diapers, it has properly used its trademark with all other goods set forth in its application to establish trademark rights which are prior to Respondent's rights for all such other goods. Likewise, Petitioner has failed to demonstrate it has made proper use of its trademark with respect to all the goods it lists on page 10 of its brief. Therefore, if anyone has superior rights to the trademark I PLAY and DESIGN, it is Respondent.

Even if Petitioner's evidence was admissible to establish such prior rights, Respondent submits there still would not be a likelihood of confusion. Specifically, as between toys and non-disposable swim diapers, there would not be a likelihood of confusion. Likewise, as will be shown below, there would not be a likelihood of confusion between Respondent's use of its I PLAY and DESIGN trademark on toys and Petitioner's use of its i play. trademark on infant headwear, infant wear, infant bibs, and the like. This will be shown by the evidence in this case which demonstrates that there will be no likelihood of confusion.

It is submitted, that Respondent's mark should not be cancelled in light of the arguments being made by the Petitioner in this proceeding.

II. RECORD BEFORE THE BOARD

The Petitioner has accurately reflected what has been submitted to the Board on behalf of each of the parties. As discussed separately in Respondent's evidentiary objections and motion to strike Petitioner's Notice of Reliance dated October 2, 2008, it is Respondent's position that certain of Petitioner's evidence is inadmissible before this Board and should not warrant any consideration.

III. STATEMENT OF FACTS

Petitioner is in the business of selling wholesale and retail infant products, including non-disposable swim diapers, infant bibs, infant headwear, and infant wear since 1996. (Cannon Test. 8:3-20.)



However, with respect to use of the mark i play. and i play. and DESIGN¹ by the Petitioner, Petitioner, at best, has been using the mark since at least as early as February, 1996 on non-disposable swim diapers. In light of the admissible evidence before the Board, Petitioner has not demonstrated trademark use on any of the other products set forth in its brief or in its trademark applications prior to Respondent's adoption and use of its I PLAY and

DESIGN trademark  mark in February, 2002.

¹ When referring to Petitioner's mark, it will be shown as "i play." or "i play. and DESIGN," whereas when referring to Respondent's mark which is the subject of the registration seeking to be cancelled, it will be identified as "I PLAY and DESIGN."

Respondent is in the wholesale business of selling toys, preschool toys, games, infant toys, and a variety of other products. (Varda Test. at 7:12-17.) Respondent does not sell baby wear, infant wear, bibs, children's headwear or nondisposable swim diapers which are the products which are set forth in Petitioner's applications. (Varda Test. 7:18-8:9.) Petitioner has admitted that it has not sold any toys or used its i play. and i play. and DESIGN trademarks on toy products. (Cannon Test. 26:20-27:3.)

The Respondent conceived of the trademark I PLAY and DESIGN in the fall of 2001. (Varda Test. 9:11-10:4.) The look of the I PLAY and DESIGN trademark was developed internally by Respondent. (Varda Test. 10:5-8.)

The Respondent first used the mark I PLAY and DESIGN on toys and shipped the toys in interstate commerce on February 2, 2002. (Varda Test. 10:9-11:6.) Since that first shipment, Respondent has used the mark on toy products continuously thereafter. The I PLAY and DESIGN trademark was placed on the toy packages. The use of the I PLAY and DESIGN trademark had not changed on Respondent's packaging since its introduction in February, 2002. (Varda Test. 11:7-13:7, Resp. Exh. 1.)

On December 5, 2001, Respondent filed an intent to use application to register the mark I PLAY and DESIGN . This registration issued February 1, 2005 as Registration No. 2,923,675. (Varda Test. 31:7-33:8, Resp. Exh. 12.) Respondent and Respondent's predecessors in interest, have owned the I PLAY and DESIGN trademark since its use starting in February 2002. (Varda Test. 32:8-37:9, Resp. Exhs. 13-18.) During the prosecution of the application resulting in the registration that is subject of this cancellation, the Examining Attorney never rejected under § 2(d) of the Trademark Act the application on the grounds that there would be a likelihood of confusion between Respondent's mark and the mark of another.

This is the case, notwithstanding that during prosecution of Respondent's mark, Petitioner's prior registration was still in force and had not yet lapsed. The first time that Respondent became aware of the Petitioner and Petitioner's use of the i play. and DESIGN trademark in connection with the sale of non-disposable swim diapers, was when the Petitioner opposed Respondent's application. Petitioner failed to prosecute the opposition with the result that Respondent obtained its registration. (Varda Test. 37:19-39:17.)

Respondent's I PLAY and DESIGN trademarked toy products are sold wholesale to wholesalers and retailers for subsequent resale to the end customer in specialty toy stores, through mail order catalogs, in e-commerce, through educational toy stores, and in limited mass market outlets. (Varda Test. 13:8-13.) Respondent does not sell directly to the ultimate customer. (Varda Test. 26:14-19.)

With respect to advertising its products, Respondent advertises its I PLAY and DESIGN trademark toy products in trade journals and brochures, such as EdPlay, ToyBlock, and Playthings, and other magazines geared toward toy retailers. Respondent does not directly advertise its products to the ultimate consumer, only retailers. (Varda Test. 16:17-19:13, Resp. Exh. 2.)

Since it introduced and began using the I PLAY and DESIGN trademark in February, 2002, Respondent has exhibited its I PLAY and DESIGN brand products in its catalogs which are solely distributed to Respondent's wholesale and retail store customers. (Varda Test. 20:16-26:13, Resp. Exh. Nos. 3-9.)

Respondent does attend trade shows to offer its products. At at least one tradeshow, both the Petitioner and the Respondent attended. (Varda Test. 26:20-27:17.) Respondent is unaware of any actual confusion at that tradeshow, (Varda Test. 49:23-50:7) and Petitioner provided no

evidence that there were any instances of actual confusion at tradeshows that both Petitioner and Respondent attended.

Although Respondent illustrates its I PLAY and DESIGN trademark products on its web site, the products are not sold by Respondent but rather by a third party, Shopatron, since the Respondent does not make direct sales to the ultimate consumer. (Varda Test. At 28:3-29:11.) The Respondent has been using this web site to illustrate its I PLAY and DESIGN product line since 2002. (Varda Test. 29:25-30:7.)

Since its introduction, the Respondent's toy products sold bearing the I PLAY and DESIGN trademark have been a huge success. Sales from these product introductions have increased almost 5-fold from \$3.5 million to \$14 million over the six years these products have been offered. (Varda Test. 30:14-25.)

IV. ARGUMENT

A. Priority Of Use Of The Mark Is Not Conceded By Respondent For All Goods Set Forth In The Petitioner's Applications

In its brief, Petitioner asserts that there is no issue of priority in that there is no question that the Petitioner used the mark i play. and DESIGN prior to Respondent's use of its I PLAY and DESIGN trademark. In that regard, although the Petitioner might have used the mark on non-disposable swim diapers as early as 1996, there is no admissible evidence before this Board that Petitioner utilized the mark in commerce on all the goods set forth in the two applications filed by Petitioner or on the additional products it lists in its brief on page 10. Thus, it is submitted, based upon Respondent's registration, which is evidence that the mark has been used on the goods set forth in the registration as of the earliest date set forth therein that being, February, 2002, it is the Respondent who has demonstrated prior use of the mark I PLAY and DESIGN in connection with all toy products. Notwithstanding the evidence that has been put

forward by the Petitioner such evidence is not evidence of trademark use in commerce on the goods in question and does not establish priority of use. In this regard, the law is clear in a use-based application, the application only proves use as of its filing date and not the date of first use alleged in the application. *Harvey Aluminum, Inc. v. Am. Screen Prod. Co.*, 305 F.2d 479, 481, 134 U.S.P.Q. 376, 377 (C.C.P.A. 1962). See also, *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 U.S.P.Q. 2d. 1844, 1847 (T.T.A.B. 2004) ("The dates of use alleged in applicant's application are not evidence of such use, nor are applicant's specimen evidence on Applicant's behalf.") It is up to a party asserting priority to come forward with such admissible evidence. This the Petitioner has not done. Accordingly, the earliest date of first use that Petitioner can allege is the filing date of its two applications is January 13, 2006, unless there is competent evidence entered in this proceeding to demonstrate otherwise.

In that regard, catalogs, catalog sheets and price lists, might identify on such documents the i play. trade name, but there is no indication that the I play. and DESIGN mark was used on packaging on or in connection with the sale of the goods. Likewise, the invoices being relied upon the Petitioner are not probative of that issue in that the invoices have no indication that the mark i play. and DESIGN or i play. was used in connection with the goods reflected on such invoices when such goods were shipped in interstate commerce. Therefore, it is submitted that with respect to priority of use on all goods other than possibly non-disposable swim diapers which Respondent has not conceded, such uses are subsequent to Respondent's use of its trademark in February, 2002, and therefore, it is Respondent that is in the superior position in this cancellation proceeding.

B. Pursuant To The *DuPont* Factors Registrant's Mark Should Not Be Cancelled In That There Would Not Be A Likelihood Of Confusion With Petitioner's Mark

The basis for Petitioner's seeking to cancel Respondent's registration for the mark I PLAY and DESIGN, is that there would be a likelihood of confusion between Respondent's use of the trademark I PLAY and DESIGN on toys and Petitioner's use of the trademark i play. and i play. and DESIGN on the goods set forth in Petitioner's applications and in its brief. As set forth above, although not conceded by Respondent, at best, Petitioner has demonstrated that it might have established a prior use of its i play. and DESIGN trademark on non-disposable swim diapers. However, the admissible evidence presented by Petitioner in this proceeding does not demonstrate that its i play. and i play. and DESIGN trademarks were ever used in connection with the sale of toys. And with respect to other products set forth in Petitioner's brief, Respondent's use on toys is prior to Petitioner's use on such products.

It is submitted, as set forth below, when the evidence is reviewed and analyzed pursuant to the factors set forth in *In re E.I. DuPont deNemours & Co.*, 476 F.2d 1357, 177, U.S.P.Q. 5763 (C.C.P.A. 1973), a determination can be made that there will not be a likelihood of confusion between the two marks and therefore Respondent's mark should not be cancelled.

1. The Similarity Or Dissimilarity Of The Mark

The first *DuPont* factor to be considered is the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. In that regard, Respondent, indeed, admits that in terms of sound, the marks are identical in that each of the marks includes the words "I" and "play." However, with respect to appearance, connotation and commercial impression, the facts suggest that the marks are dissimilar so as not to create a likelihood of confusion.

Specifically, in terms of the marks' appearance, the marks are not identical in design.



The Petitioner's design mark is an oval which has the words "i" and "play" contained therein, separated by a design feature which appears to be sunlike. The sunlike feature is not used to dot the "i" but only to separate "i" from "play." Additionally, the mark (be it the design or word mark) includes a period after the word "play" as if to end a sentence. This must



be contrasted to Respondent's mark which when viewed in its entirety, is entirely different. Specifically, the Respondent's mark has no oval surrounding the words "I" and "play" as does Petitioner's mark. The Respondent's mark includes no sun feature, but rather includes a bouncing ball. The ball represents the dot over the I. Finally, there is no period after the word "play" as in Petitioner's mark. Upon viewing the two marks, the marks in their appearance in no way, as suggested by the Petitioner, are "virtually identical." Rather, they show very little similarity and are quite distinctive from each other except for the use of the words "I" and "play." Thus, it is submitted that in viewing the marks, there will be no likelihood of confusion.

With respect to the issues of connotation and commercial impression, the marks clearly are different as to these issues. Initially, as testified to by Mr. Varda, Respondent's I PLAY and DESIGN trademark represents "I" for international, the first letter of Respondent's corporate name, and "play," short for playthings which is related to Respondent's sale of toys. (Varda Test. 9:11-10:4.) This is consistent with the connotation or commercial impression put forth by Respondent's mark, the sale of toys and playing with toys by showing the bouncing ball. This must be compared to Petitioner's mark which leaves the commercial impression of being outside

in the sun light. Clearly, this mark is more suggestive of Petitioner's goods such as non-disposable swim diapers, or infant wear or infant headwear.

It also should be pointed out that notwithstanding the similarity in sound, another factor which impacts on the issue of appearance, connotation, and commercial impression is Respondent's use of its trademark always in association with its house mark INTERNATIONAL PLAYTHINGS. (Varda Test. 45:2447:5.) This factor negates or at the very least, minimizes the likelihood of confusion between Petitioner's mark and Respondent's mark.

Thus, it is submitted based on the foregoing that notwithstanding the fact that each mark contains "I" and "play," the manner in which the marks are used and the commercial impression that is presented by such use will not result in a likelihood of confusion between the two marks in the market place. Moreover, as will be shown below, Petitioner, prior to filing the present cancellation proceeding, was of the opinion there was no likelihood of confusion between each mark as to its sound or appearance

2. The Similarity And Dissimilarity Of The Nature Of Goods And Services As Described In The Application Or Registration

As set forth in *DuPont*, the second factor to be considered is the "similarity or dissimilarity and nature of the goods or services as described in an application or registration . . ." In this regard, again, when analyzing this factor, Respondent submits that it favors that there would not be a likelihood of confusion when Respondent's mark and Petitioner's mark are used on their respective goods as set forth in Respondent's registration and Petitioner's applications or in its brief.

Specifically, the goods set forth in Respondent's registration are found in International Class 28 and are described as "educational toys, namely, stacking toys, rattles, blocks, rings and hammers and peg toys; bath toys; pretend play toys, namely, purse and make up sets, fishing

reels and rod and fake fish sets, kitchen sets, and doctor sets; sand box toys; water and outdoor play set, namely buckets, shovels, sand molds, sieves, sand mills and squirt toys; sports toys, namely, hula hoops, jump ropes, baseball bat and ball sets and soccer balls; games, namely, board games, card games, and plastic action games; puzzles, namely, jigsaw puzzles, manipulative, and cube type puzzles." Clearly, all toy related items. This must be compared with the goods set forth in Petitioner's applications in International Class 25, that being "children's and infants' cloth bibs; children's headwear; infant wear; and non-disposable swim diapers" and the goods identified in its brief as children's bedding and other clothes. Clearly, when comparing the list of goods for both Petitioner and Respondent, there are distinct differences. Children and infant headwear, clothes, bibs, bedding and swim diapers, are not the type of goods that suggest toys. It is true that Petitioner's goods are geared to small children and infants and Respondent's goods to young children, and accordingly, are arguably in the juvenile products industry. However, that is painting with too broad a brush. For example, does that also mean that if a child's formula or food product was named "I PLAY" that would under Petitioner's scenario also create a likelihood of confusion between Petitioner's goods and such products since such a product can also be said to be part of the juvenile product industry. The answer would be of course not. One must look at the specific products and the nature of the goods and not just the fact that the products are for children in general. Accordingly, Petitioner in making its argument, is being over expansive in arguing the similarity between the nature of Petitioner's goods and Respondent's goods since they both relate to children. Toys are a separate class of product from clothes, headwear, bibs, bedding or swim diapers, and thus, there is no similarity between Respondent's goods and Petitioner's goods that would lead to the conclusion there would be a

likelihood of confusion. Nor can they be generally called to be part of a juvenile product industry.

3. The Similarity Or Dissimilarity Of Channels Of Trade

The third factor to be considered under *DuPont* is the similarity or dissimilarity of the channels of trade. In this proceeding, as to Petitioner's goods sold under the I PLAY and DESIGN trademark and Respondent's goods sold under the I PLAY and DESIGN trademark, the channels of trade for each party's goods are distinctively dissimilar.

Specifically, as set forth in the testimony of Michael Varda, President of Respondent, Respondent's primary channel of trade is sales of its products to third parties, such as wholesalers or retailers, who then resell the products to the ultimate consumer through specialty stores, mail order catalogs, e-commerce, educational stores, and limited mass market outlets. (Varda Test. 13:8-13.) In this regard, the only mass market outlets that Mr. Varda identified that Respondent goods are sold in are TJ Maxx, Ross Stores, and to a very limited extent, Target. (Varda Test. 14:19-15:4.) On the other hand, Ms. Cannon testified that Petitioner sold its goods directly to the ultimate consumer through catalog sales and sales directly over the internet, and to third parties for sale in juvenile product stores, gift stores, apparel stores, natural products stores, outdoor stores, swim schools, municipalities, and mass merchandisers, such as Babies 'R' Us, Target, Meyer's, Burlington, Wal-Mart, Sears, Bye Bye Baby, Penney's, and Kohl's. (Cannon Test. 25:9-22.)

As testified to by Mr. Varda, Respondent's products under the I PLAY and DESIGN trademark were only sold on a very limited basis in one overlapping store, Target. Mr. Varda specifically testified that none of Respondent's products under the I PLAY and DESIGN trademark were sold in any of the other mass merchandisers where Petitioner's products are sold. (Varda Test. 15:8-16:9.) Clearly, this demonstrates that the products do not, or at best,

minimally travel in the same stores. Obviously, Respondent's products are not sold in gift stores, apparel stores, natural product stores, outdoor stores, swim schools, or municipalities.

As for the internet, and e-commerce, here again, the channels of trade are different, in that Petitioner sells directly to the ultimate end user over the internet. (Kubota Test. 11:8-12:4, 12:19-14:9, Petit. Exhs. 31, 32, and 33.) Whereas, Respondent does not sell directly to the end user. Clearly, there would not be a likelihood of confusion in this circumstance since a user would know it is at Petitioner's web site.

Likewise, the Respondent and Petitioner do not advertise their goods sold under each of the company's "I PLAY" trademarks in the same channels of trade. In that regard, Petitioner advertises its products in magazines such as Earnshaws Small World, a trade journal for juvenile apparel and products for newborn babies. Petitioner also advertises in World Water Park, a trade journal for water parks. With respect to direct advertising to the consumer, Petitioner also advertises in Mothering Magazine, Hudson's, an apparel magazine, Outdoor Retailer, Kiwi Magazine and American Baby Magazine. (Cannon Test. 23:7-25-2.) As testified to by Mr. Varda, he does not advertise in any of the magazines which contain Petitioner's advertisements. Respondent only advertises in trade journals direct to toy retailers, and therefore, Respondent does not advertise in magazines directed to apparel for infant care or in trade journals directed to water activities such as water parks or other outdoor activities for non-disposable swim diapers might be appropriate. (Varda Test. 16:17-20:5.) As set forth above, obviously, the channels of trade in which both Petitioner and Respondent advertise are totally different.

Petitioner also relies upon computer search to demonstrate similarity of channels of trade. (Kubota Test. 5:1-9:15, Petit. Exhs. 26-30.) Again, this evidence should not be considered since,

at best, it is contrived. It does not demonstrate what a non-interested party would do when reviewing a third-party web site. Nor does it demonstrate that there would be a likelihood of confusion. Accordingly, at best, it should be accorded minimal weight.

In suggesting that the channels of trade are identical, Petitioner relies a lot on the argument put forward by the Examining Attorney in rejecting Petitioner's two trademark applications. That is, as stated by the Examining Attorney, since Petitioner's and Respondent's marks "are geared toward infants and young children and since Petitioner's goods and Respondent's goods can be sold in the same retail stores, the goods travel through the same channels of trade." This argument relies on an unduly broad premise that because goods are sold in the same stores, they are sold in the same channels of trade, and therefore, there has to be a likelihood of confusion. This is clearly not the law. The mere fact that non-competing products, which apparel and toys are sold in the same stores does not establish that the products are related and thus travel in the same channels of trade and thus, there must be a likelihood of confusion. *Federated Food, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 26 (C.C.P.A. 1976). As exhibited by "Big Box" merchandisers such as Costco and Sam's Club, many types of stores sell wide varieties of disparate goods. Thus, one could not say in a trademark sense that in such stores, all such goods travel in the same channels of trade. This is the situation in the present case in that just because stores that sell both toys and children's and infant clothes and swim diapers (truly disparate goods), that these goods travel through the same channels of trade. This is just not so. As with looking at the nature of the goods, one must also look at the nature of the store.

Based upon all the foregoing, it is submitted that there will not be a likelihood of confusion because the products do not travel through the same channels of trade.

4. Conditions Under Which And Buyers To Whom Sales Are Made

With respect to this issue, contrary to what the Petitioner sets forth, it is a sophisticated person who is purchasing both Petitioner's and Respondent's product. The purchases of such products are not merely impulse purchases. Indeed, the purchaser is going to recognize if he/she wants an I PLAY and DESIGN toy. That person is not going to be confused with children or infant products in another part of the store that relate to bibs, infant headwear, infant wear, bedding or non-disposable swim diapers. The issue is not whether the goods are expensive or not, or whether they are offered to the general public, it is rather, a person seeking to purchase either an I PLAY and DESIGN toy or an i play. and DESIGN bib or non-disposable swim diaper, is going to be likely to be confused to believe that they arise from the same source. Respondent submits that such a purchaser will know and recognize that the products do not arise from the same source and there will not be a likelihood of confusion.

5. Fame Of The Prior Mark

The next *DuPont* factor to consider is the relative fame of the marks. It is submitted that this factor favors Respondent based on its prior use of its I PLAY and DESIGN trademark on toys as compared to Petitioner's use of its i play. and DESIGN trademark on the goods set forth in the applications in question. This is best demonstrated by the volume of sales of Respondent's products sold in connection with its mark and the alleged volume of sales made by Petitioner in connection with its mark.² Assuming arguendo that the goods did bear the Petitioner's trademark, Respondent's sales far outweigh Petitioner's sale. Specifically, Respondent's sale of I PLAY and DESIGN trademark products were over \$14 million for the last selling year. (Varda

² Respondent has objected to the testimony of Becky Cannon, Petitioner's principal, with respect to total sales volumes made under Petitioner's mark in that Ms. Cannon never established that the sales were of goods that had the trademark i play. and DESIGN.

Test. 30:14-15.) In comparison, Petitioner's sales were one-half as large, \$7 million. (Cannon Test. 17:18-24.) Therefore, when considering this factor, it is Respondent's overwhelming prior use and sales which creates fame in Respondent's I PLAY and DESIGN trademark which negates a finding of likelihood of confusion. Consumers know who Respondent is, and thus, will not be confused.

6. The Number And Nature Of Similar Marks And Use On Similar Goods

In this regard, there is no evidence for the Board to consider with respect to this factor.

7. The Nature And Extent Of Any Actual Confusion

Petitioner has asserted that there is admissible evidence of actual confusion before the Board between Respondent's mark and Petitioner's mark. This is indeed not the case. As set forth in Petitioner's brief, Petitioner points to three e-mails, all dated within three weeks of each other in January, 2004, which supposedly constitute actual confusion between Petitioner's use of i play. and DESIGN and Respondent's use of I PLAY and DESIGN. Initially, as set forth in Respondent's evidentiary objections, these e-mails or correspondence that the Petitioner relies upon to demonstrate actual confusion are inadmissible in this proceeding and not to be considered in determining if there is a likelihood of confusion. Specifically, these e-mails constitute inadmissible hearsay since Petitioner is relying on such documents to prove the truth of the matters set forth therein. Proper objection was made during Petitioner's principal's testimony, and therefore, Petitioner had the opportunity to take the depositions of the individuals who authored such correspondence to demonstrate actual confusion but failed to do so. Therefore, these letters do not constitute proof of actual confusion before this Board such that it should be considered in evaluating this *DuPont* factor.

However, even if the communications were an indication of actual confusion, they would have limited probative value. Initially, although there has been nine years of simultaneous use, Respondent is unaware of any instances of actual confusion as to customers, stores where each party's good are sold, and/or sales made through e-commerce. (Varda Test. 47:6-49:14, 61:12-17.) At most, after nine years, Petitioner is only aware of three instances of supposed confusion, all within three weeks of each other in January, 2004. Petitioner put forward no other evidence of actual confusion but for one additional letter discussed below. Clearly, even if these three letters were to be believed, this does not demonstrate that there will be a likelihood of confusion in the future.

The Petitioner also relies upon a letter and attachment from the U.S. Consumer Product Safety Commission to demonstrate actual confusion. Initially, as set forth in Respondent's brief in support of its evidentiary objections, Respondent has moved to strike Petitioner's Notice of Reliance of October 2, 2008, which attempts to put this letter and attachment into evidence. As set forth in Respondent's brief, this letter from the U.S. Consumer Product Safety Commission, constitutes inadmissible evidence. That is, Petitioner failed to authenticate the document and also failed to overcome hearsay issues with respect to the document. Thus, it should not even be considered by the Board. However, again, assuming it was considered, it still does not demonstrate actual confusion between Respondent's use of the I PLAY and DESIGN trademark and Petitioner's use of the i play. and DESIGN trademark. Respondent submits that the issue surrounding the U.S. Consumer Protection Agency letter arises not out of trademark use by both parties of the I PLAY trademark, but rather, the letter was sent to Petitioner as a result of Petitioner changing its corporate name in 2008 from Family Clubhouse, Inc. to i play, inc. It is submitted, but for the change in corporate name, Petitioner would not have received the letter.

Thus, this is not evidence of confusion among the buying public. Rather, it demonstrates a bureaucratic mistake based on Petitioner's subsequent change in corporate name in 2008.

Additionally, Respondent has specifically testified that although both Respondent and Petitioner have attended the same tradeshows, there have been no instances of actual confusion. (Varda Test. 49:23-50:7, 55:5-13.)

Finally, in the Trademark Co-Existence Agreement (Resp. Exh. 20) entered into by the parties, which forms part of the prosecution history (Petitioner's Notice of Reliance dated September 5, 2008), Petitioner specifically stated that it was unaware of any instances of actual confusion. As stated in the Agreement signed by Petitioner's principal Becky Cannon:

The Parties are of the view that there is no likelihood of confusion because, among other things, the respective goods are different, the goods of the two Parties are sold in different markets and through different channels of trade, and the Parties are not aware of any instances of actual confusion. (Emphasis added.)

As a result of all the foregoing, Respondent submits that this factor does not support that there would be a likelihood of confusion in the future.

8. The Duration And Conditions Under Which There Has Been Concurrent Use Without Evidence Of Actual Confusion

The Petitioner and Respondent have been using their current trademarks concurrently since at least as early as 2002. The conditions with respect to the concurrent use of each party's mark have not changed in the marketplace. Specifically, Respondent has sold its toys in the same channels of trade for the last seven years wherein the Petitioner has sold its products in its same channels of trade for a like period of time. As set forth above, evidence of instances of actual confusion arising out of these concurrent sales, are not existent, or at best, extremely limited to, at best, three circumstances within three weeks of each other. Thus, based on this long concurrent use without actual confusion, the likelihood of confusion in the future is also remote. Indeed, even with expanding markets including tradeshows and internet sales, there has

been no instances of actual confusion. Thus, the issue of concurrent use would not give rise to the conclusion that there would be a likelihood of confusion in the future.

9. The Variety On Goods On Which The Mark Is Or Is Not Used

In this regard, this factor also supports the Respondent in that there will not be a likelihood of confusion, that is, Respondent only uses the mark in connection with toy products. Respondent has not expanded its use of the mark but, has stayed within the scope of Respondent's registration. Respondent has made consistent use of its mark in this definable niche market. With respect to the Petitioner, giving the Petitioner the benefit of the doubt for purposes of argument's sake, that it has used the mark on all the goods set forth in the application and its brief, Petitioner has also consistently limited its use of the i play. and DESIGN trademark on bibs, bedding or non-disposable swimwear, infant wear, and infant headwear. Clearly, also a definable niche market. Therefore, each of the parties have shown that each intend to limit the use of the mark on specific goods without expansion. It is submitted that because of this limited use, there would not be a likelihood of confusion since each party has been able to define its market for potential purchasers of its products and such potential purchasers will be able to segregate the two different sources.

10. Market Interface

With respect to the factor, market interface by and between the parties, as set forth in *DuPont*, and as reflected in the file wrapper for each of the applications for which the Petitioner seeks registration, the Petitioner forwarded to the Trademark Office a Trademark Co-Existence and Consent Agreement. (Resp. Exh. No. 20.) In this agreement as submitted to the Examining Attorney by the Petitioner, the Petitioner acknowledged that there would not be a likelihood of confusion between the use of Petitioner's i play. i play. and DESIGN trademark and Registrant's I PLAY and DESIGN trademark. These representations were unsolicited by the Respondent but

rather were solicited by the Petitioner in an effort to register its mark. (Varda Test. 39:18-43:22.) The Petitioner now asserts it submitted the document to the Trademark Office only for the purpose of expediting registration in that the Petitioner believed that there always was a likelihood of confusion. (Cannon Test. 28:20-29:2.) Based upon this statement, the question arises whether the Petitioner was being less than candid with the Trademark Office. Clearly, as set forth in the testimony of Mr. Varda, Respondent was never of the opinion that there would be a likelihood of confusion.

Another factor to consider is, as testified to by Mr. Varda, after seeing an article in the Wall Street Journal (Resp. Exh. 21) suggesting that Petitioner was going to enter the toy market using the i play. and DESIGN trademark, Respondent brought suit because it was of the opinion that there would be a likelihood of confusion. (Varda Test. 50:15-54:7, Resp. Exhs. 22-23.) The matter was amicably settled with Petitioner agreeing not to use its i play. and DESIGN trademark on toys. Here again, this is evidence as to where the parties believe that the market interface is. Obviously, the parties are in agreement that if the use of the marks in question are limited to the goods set forth in Respondent's registration and Petitioner's applications, there will not be a likelihood of confusion.

C. Petitioner's Principal's Testimony Should Be Given Little Weight

Based upon the foregoing, Respondent submits that the amount of weight that the Board should place on Ms. Cannon's testimony in this proceeding should be scrutinized closely. Specifically, it appears that Ms. Cannon will do or say anything to get Petitioner's marks registered. For certain purposes, Ms. Cannon will sign a document and submit it to the Trademark Office alleging that there is no likelihood of confusion between Petitioner's and Respondent's marks. When that is shown to be unsuccessful, the Petitioner, and Ms. Cannon in particular, will assert that there is a likelihood of confusion to support bringing the present

cancellation. Ms. Cannon and the Petitioner want it both ways such that representations are made as to matters that are expedient at the time. Indeed, when weighing the veracity of Mr. Cannon's testimony and the motive behind it, was Ms. Cannon truthful when she signed the Trademark Co-Existence Agreement or was she truthful when providing her recent testimony. This goes to the heart of the credibility of Ms. Cannon's testimony as to what can and cannot be believed. This can be contrasted to Mr. Varda's testimony and opinions which have been consistent from when Respondent adopted the I PLAY and DESIGN mark that there would not be a likelihood of confusion between Respondent's and Petitioner's marks. Thus, Ms. Cannon's testimony should not be believed and accordingly should be given little weight in this matter.

D. Evidentiary Objections Made By Petitioner

Initially, Petitioner objects to Respondent referring to Mr. Varda's and Ms. Cannon's testimony related to the document entitled "Trademark Co-Existence and Consent Agreement" and the reference to the document itself. In this regard, Respondent is not relying upon this document to evidence the fact that Petitioner, through its principle Becky Cannon, admitted that there would not be a likelihood of confusion by and between Respondent's I PLAY and DESIGN trademark and Petitioner's i play. trademarks. Rather, Respondent relies upon this document the testimony surrounding the generation of this document to demonstrate that Petitioner has taken inconsistent positions. This document is part of the prosecution record of the two applications which Petitioner seeks to have registered. Therefore, this document is available for the Board's review and consideration.

The Petitioner further argues that this document is inadmissible since it was a document that arose out of settlement negotiations. This is clearly not the case as testified to by Mr. Varda. The Trademark Co-Existence Agreement came into existence as a result of Petitioner asking Respondent to enter such an agreement such that Petitioner could obtain its trademark

registrations for the i play. and i play. and DESIGN applications. There was no settlement negotiation with respect to entering into the Trademark Co-Existence and Consent Agreement. This document was requested by the Petitioner and was signed by the Respondent since Respondent did not believe that with respect to each of the party's goods, there would not be a likelihood of confusion. Unlike the Petitioner, Respondent was not trying to pull the wool over the Trademark Office's eyes or create a subterfuge to obtain a registration. The entry into the Trademark Co-Existence Agreement was used by the Petitioner to create such a subterfuge. As a result, the Petitioner should not be rewarded for its questionable tactics.

With respect to the Settlement Agreement, it is submitted that the Settlement Agreement in the litigation between the Petitioner and Respondent is relevant to the fact that Petitioner and Respondent believed in view of such settlement agreement, that the parties could co-exist in the market place since the goods sold by each party do not travel in the same channels of trade if each party maintained its use of the trademark on the goods set forth in Respondent's registration and Petitioner's applications.

With respect to the testimony of Mr. Varda concerning the goods sold by Respondent under the I PLAY and DESIGN trademark and the manner in which the trademark is used on the packaging, this testimony is very relevant to demonstrate there will not be a likelihood of confusion.

Likewise, Petitioner's objection with respect to Mr. Varda's testimony regarding channels of trade, that it is of minimal relevance is unfounded. Channels of trade is a *DuPont* factor that must be evaluated to argue that Mr. Varda's testimony and thus, Ms. Cannon's testimony would be irrelevant and forgets the realities of this matter.

Finally, with respect to Exhibits 26 through 30, it is Respondent's position, that the manner in which an organization such as Babies 'R' Us or Toys 'R' Us have a search function on its web site for the purchaser of products, is not a demonstration that there would be a likelihood of confusion. As set forth in Respondent's Evidentiary Objections, the protocol used by a principle of the Petitioner in an attempt to evidence some type of confusion, is contrived and staged and not demonstrative of what happens in the real world. Therefore, as set forth therein, the testimony of Ms. Kubota and the accompanying exhibits should be disregarded.

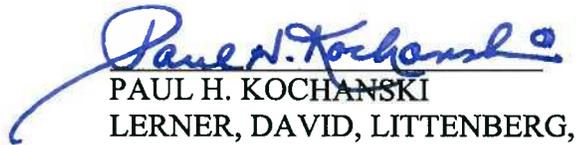
V. **CONCLUSION**

Based on all of the foregoing, Respondent respectfully requests that the Board rule in its favor and deny Petitioner's request to cancel Respondent's Registration No. 2,923,675.

Respectfully submitted,

Date:

July 6, 2009



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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2009 a true copy of BRIEF OF RESPONDENT INTERNATIONAL PLAYTHINGS, INC and RESPONDENT'S EVIDENTIARY OBJECTIONS TO PETITIONER'S EVIDENCE AND MOTION TO STRIKE PETITIONER'S NOTICE OF RELIANCE DATED OCTOBER 2, 2008 were served upon the attorneys for Petitioner, Family Clubhouse, Incorporated by via first class mail addressed as follows:

Steven C. Schnedler, Esq.
CARTER & SCHNEDLER, P.A.
56 Central Avenue, Suite 101
P.O. Box 2985
Asheville, NC 28802


PAUL H. KOCHANSKI

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

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|---------------------------------|---|
| _____ | : |
| FAMILY CLUBHOUSE, INCORPORATED, | : |
| d/b/a i play | : |
| | : |
| Petitioner, | : |
| | : |
| v. | : |
| INTERNATIONAL PLAYTHINGS, INC. | : |
| | : |
| Respondent. | : |
| _____ | X |

Reg. No.: 2,923,675
Cancellation No.: 92048260

**RESPONDENT'S EVIDENTIARY OBJECTIONS TO
PETITIONER'S EVIDENCE AND MOTION TO STRIKE
PETITIONER'S NOTICE OF RELIANCE DATED OCTOBER 2, 2008**

Pursuant to T.M.E.P. § 801.03 and *Harjo v. Pro-Football Inc.*, 45 U.S.P.Q.2d 1789, 1792 (T.T.A.B. 1998), Respondent International Playthings, Inc., submits this brief in support of its evidentiary objections to Petitioner i play, Inc.'s evidence. Additionally, pursuant to T.M.E.P. § 707.02(c), Respondent also raises objections to and seeks to strike the Notice of Reliance filed by Petitioner on October 2, 2008. The basis for the evidentiary objections and the motion to strike are set forth below.

I. EVIDENTIARY OBJECTIONS

A. Petitioner's Exhibit No. 1

Respondent objects to Petitioner's Exhibit No. 1 on the grounds that it constitutes inadmissible hearsay pursuant to Fed. R. Evid. 801 and 802. The document constitutes an out of court statement being offered in evidence to prove the truth of the matters asserted therein. The

Petitioner has not established that such exhibit falls within one of the exceptions to the hearsay rule pursuant to Fed. R. Evid. 803.

Respondent also objects to any testimony of Petitioner's principal, Becky Cannon, concerning what the document relates to, also on hearsay grounds. Respondent also objects to Ms. Cannon's testimony as it relates to Petitioner's lapsed registration for the trademark i play. and DESIGN as being irrelevant to any issue in this proceeding. (Cannon Test. 5:9-6:2.)

B. Petitioner's Exhibit No. 2

Respondent objects to the admission into evidence of Petitioner's Exhibit No. 2, Petitioner's lapsed registration for the trademark i play. and DESIGN pursuant to Fed. R. Evid. 401 and 402 on the grounds that it is irrelevant to any issue in this proceeding.

Petitioner also objects to the testimony of Ms. Cannon (Cannon Test. 6:7-7:9) as to this exhibit (the prior lapsed registration) and the basis why such registration lapsed as being irrelevant to any issue in this proceeding.

C. Petitioner's Exhibit No. 4

Respondent objects to Petitioner's Exhibit No. 4, pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including the fact that it is not probative of actual trademark use by the Petitioner of the Trademark i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:6-21) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 4 does not demonstrate the use of the i play. and DESIGN trademark on the goods set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name by Petitioner in that Petitioners' use of the trade name is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

D. Petitioner's Exhibit No. 5

Respondent objects to Petitioner's Exhibit No. 5 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the Trademark i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 5 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are actually sold and are shipped in commerce. Use of Petitioner's trademark in catalogs and in catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

E. Petitioner's Exhibit No. 6

Respondent objects to Petitioner's Exhibit No. 6 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 6 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

F. Petitioner's Exhibit No. 7

Respondent objects to Petitioner's Exhibit No. 7 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 7 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

G. Petitioner's Exhibit No. 8

Respondent objects to Petitioner's Exhibit No. 8 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 8 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401

and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

H. Petitioner's Exhibit No. 9

Respondent objects to Petitioner's Exhibit No. 9 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 9 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

I. Petitioner's Exhibit No. 10

Respondent objects to Petitioner's Exhibit No. 10 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods

set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 10 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

J. Petitioner's Exhibit No. 11

Respondent objects to Petitioner's Exhibit No. 11 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 11 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets,

and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

K. Petitioner's Exhibit No. 12

Respondent objects to Petitioner's Exhibit No. 12 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and i play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 12 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications in question as such goods are shipped in commerce. Use of Petitioner's trademark in catalogs and on catalog sheets, and price lists, is not evidence of actual trademark use in interstate commerce to support registration.

Respondent also objects to this exhibit as demonstrating the use of i play. as a trade name in that it is not an issue in the present proceeding and is irrelevant pursuant to Fed. R. Evid. 401 and 402, the issue is whether Petitioner has actual trademark use of the trademarks in question and whether there will be a likelihood of confusion between Respondent's mark and Petitioner's mark.

L. Petitioner's Exhibit No. 13

Respondent objects to Petitioner's Exhibit No. 13 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and I play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit.

Petitioner's Exhibit No. 13 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications as such goods are shipped in commerce. Use of Petitioner's trade name in catalogs and on catalog sheets, and price lists is not evidence of actual trademark use in interstate commerce to support registration. Petitioner's Exhibit No. 13 only demonstrates that there appears to be packaging bearing the trademark in question used in connection with the sales of non-disposable swim diapers as of 2006. However, there is no evidence it was actually used in that fashion. The extent of its probative value should be limited to that fact.

M. Petitioner's Exhibit No. 14

Respondent objects to Petitioner's Exhibit No. 14 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and I play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit. Petitioner's Exhibit No. 14 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications as such goods are shipped in commerce. Use of Petitioner's trade name in catalogs

and on catalog sheets, and price lists is not evidence of actual trademark use in interstate commerce to support registration. Petitioner's Exhibit No. 14 only demonstrates that there appears to be packaging bearing the trademark in question used in connection with the sales of non-disposable swim diapers as of 2007. However, there is no evidence it was actually used in that fashion. The extent of its probative value should be limited to that fact.

N. Petitioner's Exhibit No. 15

Respondent objects to Petitioner's Exhibit No. 15 pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present matter, including not being probative of actual trademark use by the Petitioner of the trademarks i play. and I play. and DESIGN on the goods set forth in Petitioner's applications. Likewise, Respondent objects to any testimony of Becky Cannon (Cannon Test. 8:22-12:6) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in suit. Petitioner's Exhibit No. 15 does not demonstrate the use of the i play. and i play. and DESIGN trademarks on the goods as set forth in Petitioner's applications as such goods are shipped in commerce. Use of Petitioner's trade name in catalogs and on catalog sheets, and price lists is not evidence of actual trademark use in interstate commerce to support registration. Petitioner's Exhibit No. 15 only demonstrates that there appears to be packaging bearing the trademark in question used in connection with the sales of non-disposable swim diapers as of 2008. However, there is no evidence it was actually used in that fashion. The extent of its probative value should be limited to that fact.

O. Petitioner's Exhibit No. 16

Respondent objects to Petitioner's Exhibit No. 16 pursuant to Fed. R. Evid. 401 and 402 in that the collection of materials making up this exhibit are irrelevant and not probative as to any issue in the present proceeding. Petitioner has failed to establish a proper evidentiary basis as to the contents of these exhibits except to testify that the exhibit is comprised of packaging

bearing the trademark which is the subject of Petitioner's applications. Petitioner has not established when such packaging was actually used. Respondent also objects to the testimony of Becky Cannon (Cannon Test. 12:16-13:1) with respect to this exhibit pursuant to Fed. R. Evid. 401 and 402 in that such testimony is irrelevant to any issue in the present proceeding.

P. Petitioner's Exhibit No. 17

Respondent objects to Petitioner's Exhibit No. 17 and the testimony accompanying this exhibit of Becky Cannon (Cannon Test. 13:2-24) pursuant to Fed. R. Evid. 401 and 402 as being irrelevant to any issue in the present proceeding. The exhibit which is a collection of tags and packaging and the testimony of Ms. Cannon which discusses this exhibit does not establish the date such packaging and hand tags were actually in use on the goods which are the subjects of Petitioner's applications.

Q. Petitioner's Exhibit No. 18

Respondent objects to Petitioner's Exhibit No. 18 on the grounds that it constitutes inadmissible hearsay pursuant to Fed. R. Evid. 801 and 802. The document constitutes an out of court statement being offered in evidence to prove the truth of the matters asserted therein. The Petitioner has not established that such exhibit falls within one of the exceptions to the hearsay rule pursuant to Fed. R. Evid. 803. Respondent also objects to the testimony of Becky Cannon (Cannon Test. 13:25-15:7) concerning what the document relates, also on hearsay grounds.

R. Petitioner's Exhibit No. 19

Respondent objects to Petitioner's Exhibit No. 19 pursuant to Fed. R. Evid. 401 and 402 in that it is irrelevant to any issue in the present proceeding. Respondent also objects to the testimony of Becky Cannon (Cannon Test. 15:12-16:10) as it relates to this exhibit pursuant to Fed. R. Evid. 401 and 402 in that it is irrelevant to any issue in this proceeding. Petitioner has

failed to establish what portion of the advertising expenditure relates to promotion of i play. and DESIGN trademark goods.

S. Petitioner's Exhibit No. 20

Respondent objects to Petitioner's Exhibit No. 20 pursuant to Fed. R. Evid. 401 and 402 in that it is irrelevant to any issue in the present proceeding. Specifically, Petitioner's Exhibit No. 20 is a collection of invoices illustrating products shipped from Petitioner to third parties. The invoices only evidence, in general, that goods were sold by Petitioner but do not document any trademark use of i play. and i play. and DESIGN on such goods. Respondent objects to the testimony of Becky Cannon (Cannon Test. 16:16-17:7) as it relates to these documents illustrating trademark use pursuant to Fed. R. Evid. 401 and 402 since such documents only represent the sale of products by Petitioner but does not demonstrate the use of the trademark i play. and DESIGN on the goods in question as they travel through interstate commerce.

T. Petitioner's Exhibit No. 21

Respondent objects to Petitioner's Exhibit No. 21 pursuant to Fed. R. Evid. 401 and 402 in that it is irrelevant to any issue in the present proceeding. Specifically, Petitioner's Exhibit No. 20 is a summary of sales of products of Petitioner. The summary only evidences, in general, that goods were sold by Petitioner but does not document any trademark use of i play. and i play. and DESIGN on such goods. Respondent objects to the testimony of Becky Cannon (Cannon Test. 17:25-18:7) as it relates to this document illustrating trademark use pursuant to Fed. R. Evid. 401 and 402 since such documents only represent the sale of products by Petitioner but does not demonstrate the use of the trademark i play. and DESIGN on the goods in question as they travel through interstate commerce.

U. Petitioner's Exhibit No. 22

Respondent objects to Petitioner's Exhibit No. 22 in that each of the documents which comprise this exhibit, constitute inadmissible hearsay pursuant to Fed. R. Evid. 801 and 802 since such documents represent out of court statements being offered in evidence to prove the truth of the matter asserted in such documents. Likewise, Respondent objects to the testimony of Becky Cannon (Cannon Test. 19:9-16) with respect to Petitioner's Exhibit No. 22 in that it is also inadmissible hearsay since Ms. Cannon is merely reciting what is set forth in letters which reflect inadmissible hearsay.

V. Petitioner's Exhibit Nos. 26-30

Respondent objects to Petitioner's Exhibit Nos. 26-30 pursuant to Fed. R. Evid. 401 and 402 in that these documents are irrelevant to any issue in the present proceeding. Respondent also objects to the testimony of Emi Kubota with respect to these exhibits (Kubota Test. 5:1-9:16) in that such testimony is also irrelevant to any issue in this proceeding. The fact that Petitioner was able to manipulate the web sites in question so as to have Petitioner's goods and Respondent's goods appear on the same result page, does not demonstrate actual confusion. No where it should be considered in determining whether there would be a likelihood of confusion between the use of Petitioner's trademark and Respondent's trademark. There is no evidence of any individual actually attempting the task attempted by Ms. Kubota.

II. MOTION TO STRIKE NOTICE OF RELIANCE

On October 2, 2008, Petitioner filed a Notice of Reliance seeking to enter into this record a letter dated September 30, 2008, allegedly from the U.S. Consumer Products Safety Commission dated September 30, 2008. The Respondent objects to the document annexed to the notice of reliance and its attachments in that the Petitioner has not authenticated the document pursuant to Fed. R. Evid. 901 as a condition to admissibility. Moreover, the document is not a

self authenticating document under Fed. R. Evid. 902(1) and (2) since Petitioner has not made the necessary showing required there under.

Respondent also objects to this exhibit pursuant to Fed. R. Evid. 801 and 802 as comprising inadmissible hearsay since the document and attachments are out of court statements which the Petitioner is relying on to prove the truth of the matters asserted therein.

Finally, the document is also objectionable pursuant to Fed. R. Evid. 805 in that the document includes hearsay within hearsay and therefore inadmissible.

Respectfully submitted,

Date:

July 6, 2009


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