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

Proceeding	92050920
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Registration No. 3,009,990
Trademark: ENTELLECT
Registered November 1, 2005

INTELLECT TECHNICAL SOLUTIONS, INC.

Petitioner,

v.

MILENA SONI,

Respondent.

Cancellation No.: 92050920

TRIAL BRIEF FOR PETITIONER

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II. FACTUAL RECORD

A. Petitioner's Evidence

- Trial Testimony of James Barge on January 19, 2011 and exhibits thereto (“Barge Depo”).
- Trial Testimony of Rhonda Dabney dated January 20, 2011 and exhibits thereto. (“Dabney Depo”)
- Trial Testimony of Surjit Soni dated March 28, 2011 and exhibits thereto. (“S. Soni Depo”)
- Application file wrapper for subject trademark registration No. 3,009,990, already of record in this proceeding, and referenced in Petitioner’s First Notice of Reliance dated January 27, 2011 (the “ ‘990 File Wrapper”)
- Respondent’s answers to the initial petition and the first amended petition, already of record in this proceeding, and referenced in Petitioner’s First Notice of Reliance dated January 27, 2011.
- Articles of Incorporation, Annual Reports from 2000-2009 and Amended Annual Report from 2007, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibits. 1-12.
- Examples of business cards and proof copies for business cards and letterhead and invoices for the same, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibits. 13-14, 16-20.
- Various invoices for the printing of letterhead, envelopes and business cards, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, as Intellect’s Exhibits. 26, 27, 29, 32, 37-42, 47 and 49.
- A copy of the Intellect’s former website which was located at www.intellectstaffing.com as retrieved from Intellect’s server, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibit 53.
- A copy of a more recent version of Intellect’s website, copyright dated 2006, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibit 54.
- A copy of a more recent version of Intellect’s website, copyright dated 2010, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibit 55.

- A copy of the file listing on Intellect's server of the files in the business development folder, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 57.
- Copies of PowerPoint presentations to prospective clients on Intellect's server in the business development folder, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibits 58-68.
- Copies of marketing holiday cards, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibits 69-73.
- Press release dated November 2005, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 78.
- Press release dated August 2006, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 78.
- An article created for America Online career section, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 81.
- Order Confirmation of the purchase of the domain name intellectstaffing.com, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 82.
- Photograph of a mouse pad, used as marketing material, bearing the Intellect logo, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 94.
- Client tip sheet regarding resume fraud, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 102.
- Application for membership of Jim Barge, Vice President of Intellect, to the Society for Human Resource Management, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 103.
- Invoices from job posting websites, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibits 104-111.
- Letters of recommendation from clients, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibits 112-115.
- Full time Placement and Consulting Service Agreement, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 116.
- Client letter regarding agreement, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect's Exhibit 117.

- Candidate “Exclusive Right to Represent” agreement, and introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibit 118.
- Copies of Intellect Technical Solutions invoices to clients for placement services rendered, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and/or the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibits 119-124.
- Confidential exhibits, introduced in the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibits 126-137
- Copy of Intellect Technical Solutions’ client list, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, and the Trial Testimony of James Barge on January 19, 2011, as Intellect’s Exhibit 138.
- Dated printout of the web page available at www.InternetArchive.org for the website www.Intellect Staffing.com (Intellect’s Exhibit 139), filed with the Board via Petitioner’s Eleventh Notice of Reliance dated January 27, 2011, and introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011.
- Printed copy of the intellectstaffing.com website, introduced in the Trial Testimony of Rhonda Dabney dated January 20, 2011, as Intellect’s Exhibit 140.
- Application file wrapper for Petitioner’s trademark application Serial No. 77/363,060 (Intellect’s Exhibit 141), filed with the Board via Petitioner’s First Notice of Reliance dated January 27, 2011.
- Application file wrapper for Respondent’s Registration No. 3,546,885 (Intellect’s Exhibit 142), filed with the Board via Petitioner’s Second Notice of Reliance dated January 27, 2011.
- Petitioner’s discovery requests and Respondent’s initial and supplemental responses thereto, (Intellect’s Exhibits 143-147), filed with the Board via Notices of Reliance dated January 27, 2011.
- Random House Webster’s Unabridged Dictionary definition of “recruit” (Intellect’s Exhibits 148), filed with the Board via Petitioner’s Eighth Notice of Reliance dated January 27, 2011.
- The deposition testimony of Milena Soni on February 9, 2010 (Intellect’s Exhibit 149), filed with the Board via Petitioner’s Ninth Notice of Reliance dated January 27, 2011 (“M. Soni Depo”)
- Intellect Technical Solutions, Inc.’s corporate records (Intellect’s Exhibit 150), filed with the Board via Petitioner’s Tenth Notice of Reliance dated January 27, 2011.

- Dated printout of the web page available at www.potentialsdevelopment.org/pdicoaching.htm (Intellect's Exhibit 151), filed with the Board via Petitioner's Twelfth Notice of Reliance dated January 27, 2011.
- Dated printout of the web page available at www.potentialsdevelopment.org/pdinchome.htm (Intellect's Exhibit 152), filed with the Board via Petitioner's Thirteenth Notice of Reliance dated January 27, 2011.
- Dated printout of the web page available at <http://web.archive.org/web/20020330061802/http://intellectstaffing.com/> (Intellect's Exhibit 153), filed with the Board via Petitioner's Fourteenth Notice of Reliance dated January 27, 2011.
- Network Solutions Whois search of the domain name entellect.com (Intellect's Exhibit 154) filed with the Board via Petitioner's Notice of Reliance dated May 16, 2011
- Copy of the published website located at <http://www.sonilaw.com> (Intellect's Exhibit 155) filed with the Board via Petitioner's Notice of Reliance dated May 16, 2011

B. Respondent's Evidence

- Trial Testimony of Surjit P. Soni on March 28, 2011 and exhibits thereto.
- Certificate of Registration for Trademark Registration No. 3,009,990, introduced as Exhibit 1 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- Filing Receipt for trademark application Serial No. 76/539,434, introduced as Exhibit 2 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- A copy of a business card for Entellect, introduced as Exhibit 3 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- A copy of letterhead for Entellect, introduced as Exhibit 4 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- A Purpose Statement, introduced as Exhibit 5 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- A document which purports to describe Entellect's business model, introduced as Exhibit 6 to the Trial Testimony of Surjit P. Soni on March 28, 2011.
- Respondent's First Set of Request for Admission to Petitioner and Petitioner's response thereto, introduced in Respondent's First Notice of Reliance dated March 31, 2011.
- Respondent's First Set of Interrogatories to Petitioner and Petitioner's response thereto, introduced in Respondent's Second Notice of Reliance dated March 31, 2011.

- Respondent’s First Set of Request for Production to Petitioner and Petitioner’s response thereto, introduced in Respondent’s Third Notice of Reliance dated March 31, 2011.

III. INTRODUCTION

A. Brief History of Intellect Technical Solutions

Intellect Technical Solutions, Inc (“Intellect Tech”) was founded in December of 1997. Barge Depo at 10; Intellect’s Exhibit 1. Since its founding, Intellect Tech. has offered two categories of services to its prospects and customers: recruiting (helping customers to find permanent employees for technical, sales and management positions and helping prospective employees obtain such opportunities), and technical consulting (providing consultants engaged by Intellect Tech to fill specific positions for the duration of a given project). Barge Depo at 10, 51. The two business categories are related in that the services are sold through the same channels of trade and the same customers often utilize Intellect Tech in both capacities. *Id.* at 21, 112-113. Intellect Tech offers its services to customers nationally, and has been doing so since it was founded in December 1997. *Id.* at 10-11, 163-164; *see also* Intellect’s Exhibit 138 (customer list). With respect to the recruiting business, Intellect Tech has placed persons in positions across the U.S. Barge Depo at 118-119, 133-137. Intellect Tech has also been named in the Inc. 500 list of fastest growing private companies in the U.S. *See* Intellect’s Exhibits 78-79.

B. The Intellect Trademark Applications

In addition to using the trade name Intellect Technical Solutions, Inc., Intellect Tech has been using the service mark INTELLECT in connection with its services since its founding in 1997. Barge Depo at 163. In 2008, Intellect Tech sought to register INTELLECT in class 35 (for use in connection with employment hiring, recruiting, placement, staffing and career

networking services, namely recruiting and placing information technology professionals and staffing application development and information technology infrastructure positions) and in class 42 (for use in connection with consulting services in the field of computer-based information systems for businesses, namely providing software development, quality assurance, project management, and infrastructure consulting services) in a single trademark application (serial number 77/363,060). Intellect's Exhibit 141. The Examining Attorney indicated that she would allow registration in class 42 but rejected registration in class 35 based on Respondent's registration of the term ENTELLECT in that class, which claims a first use date of May 1, 2002, **more than four years after** Intellect Tech began using the INTELLECT mark. *Id.* Intellect Tech then divided its application into application serial number 77/363,060 in class 35 and application 77/975,757 in class 42. *Id.* Application 77/975,757 in class 42 then passed to publication and issued, while application 77/363,060 in class 35 was suspended pending completion of this Cancellation Proceeding. *Id.* After efforts between the parties to negotiate an amicable resolution to the matter failed, the present proceeding was initiated when Petitioner filed its Petition to Cancel on May 6, 2009.

C. Respondent's Inability to Demonstrate Use of the Subject Mark

During the ensuing months, Petitioner served a variety of discovery requests seeking various business records and agreements pertaining to Respondent's use of the term ENTELLECT in connection with the services recited in Respondent's registration. *See* Intellect's Exhibits 143-47. Respondent initially refused to provide any such records, and Petitioner filed a motion to compel. *Id.*; Doc. 30. After a telephone hearing, the Board issued an order requiring production of 1) annual sales and advertising figures, 2) agreements and information relating to relationships specific to the services identified in the registration, and 3)

documentation to show income derived from ENTELLECT services. Doc. 30 at 5-8.

Respondent then provided supplementary responses, but still failed to disclose any documentary evidence to support her claim that the subject mark was actually being used in commerce. With respect to evidence of revenue, income and expenditures relating to the claimed services, Respondent merely stated that she did not keep track of that information and had no documents from which it could be derived. Intellect's Exhibits 144 at Supp. Resps. 4-5; Intellect's Exhibits 147 at Supp. Resps. 1,2. With respect to agreements and relationships specific to the identified services, Respondent claimed that there were certain oral agreements in place, but refused to describe those agreements in any detail. Intellect's Exhibit 145 at Supp. Resps. 14-21 and 24-25.

Prior to filing its motion to compel, Petitioner also took the discovery deposition of Respondent. Respondent's deposition testimony indicated at most a few token offerings of services to family members and personal acquaintances, and admitted that Respondent's activities in connection with the ENTELLECT mark were limited to referring people to third parties for testing, and that she did "very little" for the business. M. Soni Depo at 31. As a result of these admissions, together with Respondent's refusal to produce even a single page of evidence documenting any actual sales of services, Petitioner sought, and was granted, leave to amend its petition to allege abandonment and/or non-use as additional grounds for cancellation. Doc. 30. In light of Respondent's admission that she possesses no such documents, made after the Board entered its order on the Motion to Compel, it has become clear that cancellation is appropriate both because Petitioner's use of INTELLECT and the trade name Intellect Technical Solutions, Inc. long before the date of first use claimed by Respondent, and because Respondent has not actually made bona fide use of the registered mark in commerce, thereby rendering the registration void *ab initio* or abandoned.

IV. ARGUMENT

To prevail in a cancellation proceeding, the Petitioner must have standing to challenge the registration at issue and must show a valid ground for cancelling that registration.

Cunningham v. Laser Golf Corp., 222 F.3d 943, 945, U.S.P.Q. 2d 1842 (Fed. Cir. 2000).

Petitioner's standing in the present case arises both from its common law rights in a confusingly similar mark, and the Office's final rejection of Petitioner's application to register its own mark in light of Respondent's registration. Intellect's Exhibit 141. With respect to grounds for cancellation, Petitioner bases its challenge on two separate grounds. First, as Petitioner has been using the trade name Intellect Technical Solutions, Inc. and the mark INTELLECT in commerce throughout the United States since at least December 31, 1997, and Respondent admits that her earliest possible use of ENTELLECT occurred on May 1, 2002 (*See Intellect's Exhibit 143 at Resp. to Reqs. 108-111*), Petitioner has priority. Second, as Respondent has made at most only token use of the mark ENTELLECT in commerce, Respondent's registration should be held void *ab initio*, or abandoned, for lack of bona fide use in commerce. As Petitioner is not asserting fraud as a basis for cancellation, Petitioner need only show by a preponderance of the evidence that Respondent's registration should be cancelled. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 U.S.P.Q. 2d 1307 (Fed. Cir. 1989). As is discussed in more detail below, the facts and evidence set forth in the record clearly establish that Petitioner has standing and has more than met its burden of establishing that it is entitled to cancellation of Respondent's registration by a preponderance of the evidence.

A. Petitioner Has Standing

Under 15 U.S.C. § 1064, "any person who believes that he is or will be damaged ... by the registration of a mark on the principal register" has standing to cancel that registration within

five years of its issuance. Respondent's registration issued on November 1, 2005, and the present cancellation proceeding was filed on May 6, 2009. *See* Doc. 1. Therefore, Petitioner has acted within the prescribed five year window. Additionally, as is set forth in more detail below, Petitioner has presented evidence of its prior and continuous use of the trade name Intellect Technical Solutions, Inc. and its prior and continuous use of the mark INTELLECT, which differs from Respondent's registered mark by only one letter, for services virtually identical to some of the services claimed in the subject registration. Intellect's Exhibits 1-14, 16-20, 26, 27, 29, 32, 37-42, 47, 49, 53-55, 57-73, 78, 81-82, 94, 102-140, 150, and 153 (hereinafter jointly "Intellect Prior Use Exhibits"). Petitioner has also presented evidence of the Office's rejection of Petitioner's application to register INTELLECT for use in connection with employment hiring, recruiting, placement, staffing and career networking services, namely recruiting and placing information technology professionals and staffing application development and information technology infrastructure positions in light of Respondent's registration. Intellect's Exhibit 141. Therefore, there is no question that Intellect Tech will be damaged by the registration of the subject mark on the principal register and, therefore, has standing to bring this proceeding.

B. A Likelihood of Confusion Exists

Under 15 U.S.C. § 1052(d), a mark may not be registered on the principal register if it "so resembles...a mark or trade name previously used in the United States by another" that it would create a likelihood of confusion. Determining there is a likelihood of confusion requires an analysis of the *DuPont* factors, which include, among other factors, (1) the similarity of the marks, (2) the similarity of the services, and (3) the similarity of the channels of trade and

customers. *In re DuPont DeNemours & Co.* 476 F.2d 1357, 1361, (C.C.P.A. 1973); *Roger & Gallet S.A. v. Venice Trade Co., Inc.*, 1 U.S.P.Q.2d 1829, 1832 (T.T.A.B. 1987). While the likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record, the relevance and weight given to each factor may vary based on the facts of the case. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847 850 (Fed. Cir. 1992). For example, in the present case, given that Respondent has made at most token use of the subject mark in commerce, the lack of any evidence of actual confusion should be given little or no relevance, because there has been little or no opportunity for such confusion to arise. In contrast, the factors addressing the similarity of the marks and the similarity of the services should be given great weight, even to the point of being dispositive, given the close similarity of the marks and services. *See Herbko Intl., Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002)(“[t]he likelihood of confusion analysis ... may ... focus on dispositive factors, such as similarity of the marks and relatedness of the goods”). When viewed in light of the relevant factors (as set forth below), there can be, therefore, no question that a likelihood of confusion exists in the present case.

1. Similarity of Marks

Two marks are considered similar when they have the same appearance, sound when spoken, or meaning. *In re DuPont DeNemours & Co.* 476 F.2d at 1377; *In re White Swan Ltd.*, 8 USPQ.2d 1534, 1536 (T.T.A.B. 1988). As was pointed out by the Examining Attorney during the prosecution of the 77/363,060 application (Intellect’s Exhibit 141 at 4/2/08 Office Action), the subject mark ENTELLECT differs from INTELLECT by only one letter. As such, the marks have the same appearance and sound. While Respondent may argue that ENTELLECT has no meaning in the English language, while INTELLECT does, the applicable test does not require

that the marks be identical in all three respects. Instead it requires only that they be similar enough in any one respect to create a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ.2d at 1536.

It may be argued that Intellect Tech's examples of early usage of the term INTELLECT have additional distinguishing features, such as the blue oval and arrow when used as a logo, or the use of the descriptive terms TECHNICAL SOLUTIONS or STAFFING. However, such arguments miss the point, as the dominant portion in all uses has consistently been INTELLECT. Neither the addition of descriptive elements nor the addition of graphic elements changes the overall commercial impression of the mark to an extent sufficient to remove the likelihood of confusion. *See generally* T.M.E.P. § 1207.01(b)(iii) ("Comparing Marks That Contain Additional Matter").

To the extent it may be argued that any given specimen provided as evidence of use herein represents trade name use instead of trademark use, that argument too is misplaced. Under 15 U.S.C. § 1052(d), a mark may not be registered on the principal register if it "so resembles...a mark **or trade name** previously used in the United States by another" that it would create a likelihood of confusion. *Emphasis added.* Accordingly, prior trade name use by Intellect Tech is a further ground for cancellation.

Because INTELLECT and ENTELLECT differ by only one letter, and therefore have virtually identical appearance and sound when spoken, and because the dominant portion of the trade name Intellect Technical Solutions, Inc. is INTELLECT, it is clear that this factor weighs heavily in support of a finding of a likelihood of confusion.

2. Relatedness of Services

With respect to class 35, as set forth in the subject registration, Respondent claims to offer services including employment counseling and recruiting, business consultation, business management and consultation, business management consultation, personnel management consultation, and psychological testing for the selection of personnel. With respect to class 41, respondent claims to offer career counseling services.

Intellect Tech offers identical and closely related services of placement services, namely placing information technology professionals into information technology positions. Intellect's Ex. 141; Barge Depo at 10. As testified to by Mr. Barge and Ms. Dabney, and further evidenced by the documentary evidence made of record in this proceeding, Intellect Tech has been offering these services since December of 1997 and continues to offer them today. Barge Depo at 10,163; Dabney Depo at 7-9; Intellect Prior Use Exhibits. Mr. Barge further testified that Intellect Tech also provides testing for applicants seeking job positions as part of Intellect Tech's staffing and placement services and counsels its applicants based on the results of those tests. Barge Depo at 54-59. Therefore, it is clear that the services recited in the subject registration in classed 35 and 41 include services that are virtually identical to the testing, counseling, recruiting and placement services being offered by Intellect Tech. As such, this factor also clearly weighs in favor of finding a likelihood of confusion.

3. Trade Channels and Target Consumers are Identical

In comparing the channels of trade, it must be presumed the Respondent's services will be offered in all of the normal channels of trade to all of the normal consumers of such services, unless the description in the subject registration states otherwise. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490 (Fed. Cir. 1987). In this case, there is no

limitation to specific channels of trade recited in the subject registration. It must therefore be presumed that Respondent's services would be offered in all normal channels for such services.

Id.

The description of services in the subject registration include "employment counseling" in class 35 and "career counseling" in class 41. By definition, such services would ordinarily be offered to persons seeking employment and would be offered through channels of trade ordinarily utilized by job seekers. In addition, the subject registration claims "recruiting ... personnel management consultation, [and] psychological testing for the selection of personnel." Therefore, in addition to job seekers, it is apparent that the target consumers must also be presumed to be companies seeking to find and evaluate potential employees, and must be presumed to be offered through channels of trade commonly used by such companies. *Canadian Imperial Bank*, 811 F.2d 1490.

As described in the testimony of Mr. Barge, Intellect Tech's customers are (i) businesses seeking technical, sales, and executive employees to fill job positions and (ii) job seekers looking for such positions. Barge Depo at 41-43, 54-61. This testimony is supported by Intellect Tech's websites (see Intellect's Exhibits 53-55, 82), including the website from 2001, which specifically recites services including "Consulting," "Contract-to-Perm," "Direct Hire," and "Outsourced Project Work," in the area of information technology staffing. A list of customers has been made of record as Intellect's Exhibit 138, with representative customers also appearing on the websites (Intellect's Exhibits 53-55) and in sample sales presentations (*see e.g.* Intellect's Exhibit 59 at P1214).

The testimony of Ms. Dabney further evidences the customers to whom Intellect Tech sells its services (Dabney Depo at 29-40), as do the sample invoices included in the exhibits

attached to her deposition transcript and to James Barge's deposition (Intellect's Exhibits 119-124). As stated by Mr. Barge in his testimony, and supported by the additional documentary evidence made of record, Intellect Tech has been providing services to these types of customers since its founding in December 1997, and has done so continuously through the present. Barge Depo at 163.

It is significant to note that these services include both services to employers and services to job seekers. With respect to job seekers, Petitioner offers testing to assist prospective employees in determining the types of jobs for which they are best suited, including the DISC profile test. *Id.* at 57. Intellect Tech. employees also often counsel the job seekers regarding the test results and various aspects of the job search, interview and hiring processes. *Id.* 58-59. Similar services are also offered to employers seeking candidates, with Intellect Tech. employees working with recruiting and hiring managers to improve their hiring processes. *Id.* at 92. As such, in addition to recruiting, staffing and technical consulting services, Petitioner also offers testing and counseling services for job seekers and business consulting services for employers as part of its full service recruiting and staffing operation. *Id.* at 58.

As set forth in the testimony of Respondent, to the extent Respondent offers services at all, they are offered to persons seeking jobs and employers seeking to fill positions. S. Soni Depo at 24-27. Accordingly, it is clear that both Intellect Tech and Respondent, to the extent she offers services at all, are seeking to offer services to the same types of customers.

In sum, with respect to channels of trade, it is presumed that Respondent's services are being offered through all channels of trade ordinarily associated with such services. *Canadian Imperial Bank*, 811 F.2d 1490. As set forth in the testimony of Mr. Barge, Intellect Tech offers its services through means such as direct marketing to employers, print advertising, online

advertising on job sites, and attendance at trade shows. Barge Depo at 21-23, 96-108, 158. Such channels are commonly used by job seekers and employers seeking employees. It is therefore clear that the channels of trade through which Intellect Tech has been offering services since December 1997 are the ordinary channels of trade utilized in the recruiting and staffing industry and include those through which Respondent claims (with no supporting documentary evidence) to offer services. Therefore, this factor too supports a finding of a likelihood of confusion.

4. Balancing of the Factors

When balancing the factors, all factors of which evidence is presented should be considered. *In re DuPont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311 (Fed Cir 2003). However, similarity of the marks and similarity of the services being offered are fundamental to the determination of a likelihood of confusion. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”). In the present case, similarity of marks, similarity of services, and similarity of channels of trade are each addressed in the evidence before the Board and are each highly relevant to the likelihood of confusion analysis. As has been set forth above, all three of these factors weigh heavily in favor of a finding of a likelihood of confusion.

To the extent it may be argued that there is no evidence of actual confusion, or other factors, that is hardly surprising given Respondent can only provide evidence of, at most, token use of the subject mark. Where there is little or no use of the mark by Respondent, it cannot be surprising that there are no examples available of such confusion. *See Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (stating that for an absence of actual

confusion to have significant probative value, there must have been a meaningful opportunity for such confusion to have arisen). As is set forth in his testimony, after 14 years in the recruiting industry, Mr. Barge had never even heard of Respondent prior to the onset of the present dispute, thereby indicating that there has been very little opportunity for actual confusion to arise. Barge Depo at 161-162; *see also* Dabney Depo at 42-43. This is unsurprising given that Respondent was unable to provide any documents evidencing even a single sale of services. M. Soni Depo at 48; *see also* Intellect's Exhibit 144 at Supp. Resps. 4-5; Intellect's Exhibit 147 at Supp. Resps. 1, 2. Accordingly, it is clear that when the relevant factors are considered, including the key factors of similarity of the marks and similarity of the services, the conclusion, that there is a likelihood of confusion, is inescapable.

C. **Petitioner's Rights Precede Respondent's Alleged First Use**

In addition to demonstrating a clear likelihood of confusion, the evidence of record also demonstrates that Intellect Tech has a proprietary interest in the INTELLECT mark and in the trade name Intellect Technical Solutions, Inc. that arose prior to both the application date of the subject registration (August 6, 2003) and the alleged date of first use (May 1, 2002).¹ Petitioner notes that Respondent's interrogatory responses and admissions make clear that she claims no use date earlier than May 1, 2002. Intellect's Exhibits 143 at Admission Nos. 108-111; 144 at Supp. Resp. 1. As is described further below, the testimony of Mr. Barge and Ms. Dabney,

¹ Petitioner notes that the operative date is the earlier of Respondent's application date and the date on which first use **is proven** by Respondent. *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156 (Fed. Cir. 2002) *emphasis added*. As is argued below, Petitioner does not believe bona fide use in commerce has been proven by Respondent, let alone use as of May 1, 2002. Petitioner, on the other hand, has provided evidence of use of the INTELLECT mark and the Intellect Technical Solutions, Inc. trade name dating back to before even the alleged date of first use stated in Respondent's registration. Therefore, to the extent the operative date is deemed relevant in light of the prior use evidence presented, Petitioner argues that the operative date is August 6, 2003.

together with substantial documentary evidence provided by Petitioner (Intellect Prior Use Exhibits), establishes that Intellect Tech has been continuously providing recruiting and technical consulting services since 1997, throughout the United States, and has been doing so both under the trade name Intellect Technical Services, Inc. and under the mark INTELLECT, thereby clearly establishing that Petitioner has priority.

1. The Formation of Intellect Technical Solutions, Inc.

Intellect was formed in 1997 by James Barge and T. Scott Ferrante. Barge Depo at 8, 12-13, and 163; Intellect's Exhibit 1. Since its founding, Intellect has operated under the trade name Intellect Technical Solutions, Inc. Barge Depo at 12-13; Intellect's Exhibits 2-12; *see also* Intellect Prior Use Exhibits. The business was formed to engage in providing both recruiting and consulting services, and has been offering those services since its founding through today. Barge Depo at 163; Dabney Depo at 43.

In addition to the undisputed testimony of Mr. Barge and Ms. Dabney, Petitioner offers documentary evidence that clearly establishes that Intellect Tech's formation date and continued use of the trade name Intellect Technical Services, Inc. from that date forward, including copies of the articles of incorporation filed with the State of Florida (Intellect's Exhibit 1) and uniform business reports for each year from 1998 through the inception of this proceeding, also filed with the state of Florida (Intellect's Exhibits 2-12). Certified copies of the same documents from the Florida Department of State are also of record. Intellect's Exhibit 150.

2. Petitioner's Materials, Websites and Presentations

From its inception in December of 1997 (Barge Depo at 8-10), Intellect has utilized the INTELLECT mark and the Intellect Technical Solutions, Inc. trade name in a variety marketing and sales methods. Business cards and letterhead were used in direct sales efforts by various

Intellect employees (See Barge Depo. at 20-37 and Intellect's Exhibit 13-14, 16-20). PowerPoint presentations describing the services offered by Intellect were given to a variety of actual and potential customers. See Barge Depo at 60-84 and Intellect's Exhibits 58-68. Both dates on those exhibits and the testimony of Mr. Barge establish that each was given prior to Respondent's alleged date of first use. In addition, the use of the logo and various references to INTELLECT services, and the descriptions of services in the presentations, demonstrate substantial trademark and trade name use of INTELLECT and Intellect Technical Services, Inc. all long before Respondent's alleged date of first use.

Intellect also used websites to offer its services in commerce, from at least as early as August 19, 2001. See Barge Depo at 37-48; Intellect's Exhibits 53, 82; *and* Dabney Depo at 23-28; Intellect's Exhibits 139-140. As can clearly be seen on Intellect's Exhibit 53, the 2001 website also utilized INTELLECT as a service mark and further evidenced consistent trade name use of Intellect Technical Services, Inc., beginning long before the date of first use alleged by the Respondent. Barge Depo at 37-45. The website described the INTELLECT brand services being offered and also listed customers who had purchased them, several of which were given the presentations referenced above. *See e.g.* Intellect's Exhibit 64 (presentation to Nielson Media Research) *and* Intellect's Exhibit 53 (listing Nielson Media Research on the client roster page). While the websites have changed over the years, the Internet has consistently been an important marketing and sales channel for Petitioner, and remains so today. Barge Depo at 37-54; *see e.g.* Intellect's Exhibit 54-55, 81 (showing examples of websites and pages in use between Intellect Tech's founding and today). In each version, the mark INTELLECT and the trade name Intellect Technical Services, Inc. has been prominently displayed, together with clear descriptions of the services being offered. *Id.*

As is made clear in the testimony of Mr. Barge and by the other materials made of record, the INTELLECT mark and Intellect Technical Services, Inc. trade name have also been used by Intellect over the years in a variety of ways, including on promotional holiday cards (Intellect's Exhibits 69-73; Barge Depo at 85-87), promotional materials such as mouse pads that were given out at various presentations (Intellect's Exhibit 94; Barge Depo at 90-91), and on other documents such as tip sheets, contracts, and invoices (*See e.g.* Intellect's Exhibits 102, 116-24).

Taken together, Intellect Prior Use Exhibits and the undisputed testimony of Mr. Barge and Ms. Dabney clearly establishes that Petitioner began using both the INTELLECT mark and the Intellect Technical Services, Inc. trade name in December 1997, and has used them consistently through and including the present day in the delivery of recruiting, technical consulting, testing, counseling and business consulting services.

3. Petitioner's Sales

Petitioner's evidence of use is further supported by business records demonstrating actual sales of services from 1998 through and including the present.

Financial statements for each year between 1998 and 2009 (filed under seal) each show substantial revenue generated from recruiting services alone (shown as "Permanent Placement Fees" and "Direct Hire Fees"), totaling more than ██████████ dollars during that time period. Barge Depo at 141-155. It is also important to note that, as explained by Mr. Barge, the consulting and recruiting businesses are intertwined. *Id.* at 12, 112-113. Accordingly, the total services revenue of over ██████████ dollars indicated on those same statements provides further evidence of Intellect's actual and continuing business operations during those years. Intellect's Exhibit 138 further corroborates Intellect's evidence of actual provision of services in commerce by identifying customers who have actually purchased recruiting services. *Id.* at 153-

155. As is shown on that list, those customers are across the United States, in states including Florida, California, Colorado, Texas, New York, Georgia, Kentucky, and Tennessee. Intellect's Exhibit 138. Mr. Barge's testimony further corroborates the national focus of Intellect's marketing and sales efforts. *Id.* at 134-135.

Further evidence of Petitioner's operations is provided in the form of invoices from job sites such as Monster.com, which are famous for assisting employers and job seekers to come together, and Petitioner's membership in industry organizations such as the Society for Human Resources Management, that are dedicated to serving hiring professionals, examples of which are in evidence as Exhibits 103-111. *Id.* at 94-108. Further evidence, in the form of sample thank you and reference letters received from Intellect clients are also in evidence (Intellect's Exhibits 112-115; Barge Depo at 108-114), as are example contracts and hiring letters (Intellect's Exhibits 116-118; Barge Depo at 114-123). Still further evidence of Intellect's operations in the recruiting industry long before Respondent's alleged date of first use are in the form of examples of invoices for placement services rendered in 1998, 1999 and 2000, including for placements in Respondent's home state of California (the only state in which Respondent claims to offer services), long pre-dating Respondent's alleged date of first use. Intellect's Exhibits 119-125; Barge Depo at 123-133; Dabney Depo at 21-23.

4. Conclusion

The evidence before the Board with respect to Petitioner's actual use of the mark INTELLECT and the trade name Intellect Technical Solutions, Inc. in connection with recruiting and consulting services, dating from well before Respondent's alleged date of first use and continuing through the present, is conclusive and uncontroverted. Intellect Tech. began its operations in 1997 and continues to serve consulting customers, recruiting customers and job

seekers today. As has been set forth above, its early efforts are evidenced not just by the testimony of Mr. Barge and Ms. Dabney, but also by documentary evidence including (i) copies of websites, presentations and other materials bearing the mark and trade name, (ii) invoices from printers, online job search sites and professional organizations dedicated to serving the recruiting industry, (iii) letters from actual customers, (iv) example invoices identifying actual accomplished placements (including in Respondent's home state), (v) a customer list demonstrating the nationwide scope of Intellect's practice, and (vi) financial statements showing the revenue earned from placement and consulting services and documenting marketing and sales expenditures. Given this evidence, there can be no doubt Petitioner has priority, in that Intellect is a legitimate, nationally recognized, staffing and consulting business that has been doing business across the U.S. since well before the filing date of the subject registration and the date of first use alleged by Respondent, and during that time, Petitioner has consistently been using both the mark INTELLECT and the trade name Intellect Technical Services, Inc. in connection with its business operations.

D. Respondent Offers No Evidence of Actual Use in Commerce

The mass of evidence of use that Petitioner has offered stands in stark contrast to the virtually complete absence of evidence offered by Respondent to substantiate her alleged use of the subject mark in commerce. When the petitioner establishes a prima facie case of abandonment or non-use, the burden shifts to the respondent to rebut that prima facie showing with evidence of bona fide use in commerce. *Quality Candy Shoppes/Buddy Squirrel of Wisconsin, Inc. v. Grande Foods*, 90 USPQ.2d 1389, 1393 (TTAB 2007). To meet that burden and establish actual use in commerce, evidence of mere token use is not sufficient. *See Paramount Pictures v. White*, 31 USPQ.2d 1768, 1774 (TTAB 1994)(explaining that mere token

use is not bona fide use in commerce and that the legislative history of the Lanham Act “contemplates instead commercial use of the type common to the industry in question”); and *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ.2d 1179, 1185 (TTAB 2008) (concluding that, where no evidence was presented of the number of items bearing the subject mark that were made or sold, no evidence of actual use had been presented).

Here, Respondent’s discovery deposition testimony indicated that her use of the ENTELLECT mark has been at most token use, consisting of nothing more than referrals of friends, family members, and acquaintances to a third party for motivational testing. M. Soni Depo at 8-14, 24-25, 27, 30-31, 70. The testimony raises further questions of use, given that it appears to rely on use by third parties who operate independently without meaningful oversight by Respondent (*Id.* at 31). Based on Respondent’s own testimony, Petitioner argues that a prima facie showing of non-use has been made, as was confirmed by the Board when permission was granted to amend the Petition to Cancel. *See* Doc. 30. As the Board has held, once a Petitioner brings forward sufficient evidence to raise a question as to the bona fide use of a mark by a registrant, the burden shifts to the registrant to demonstrate that use. *Quality Candy Shoppes*, 90 USPQ.2d 1393 Respondent in this case, however, has been completely unable to provide meaningful evidence of use, instead relying solely on her and her husband’s own, self-serving testimony, without a single document evidencing even a single sale of services.

1. Respondent’s Deposition Testimony Claims at Most Token Use

Respondent was deposed during discovery in this proceeding, on February 9, 2010. The transcript of her testimony has been made of record as Intellect’s Exhibit 149 (also referred to herein as M. Soni Depo). In her testimony, Respondent made several statements that suggested

her use of the mark was at most token use and insufficient to support her rights as a trademark registrant.

Initially, when asked if she was employed, Mrs. Soni responds that she “help[s] her husband” in connection with a real estate development business. M. Soni Depo at 7. It is not until she is expressly asked about the business that allegedly uses the mark that is the subject of this proceeding that she mentions it in connection with her business activity. *Id.* Respondent then goes on to describe the business activity as providing motivational tests for a Mr. Patrick Niels. *Id.* at 8-11. She is unable to state, however, whether she, as the registrant, has any agreement with Mr. Niels. *Id.* In her subsequent testimony, Respondent testifies that she merely refers people to Mr. Niels’ test and that it is Mr. Niels who scores the test and then sends it to Respondent’s husband or directly to the client. *Id.* at 9-14. When asked about a website on which the test results are available, Respondent references a site run by Mr. Niels (www.potentialdevelopment.com). *Id.* at 16. A copy of the website apparently operated by Mr. Niels and hosted at www.potentialdevelopment.com has been made of record as Intellect’s Exhibits 151 and 152. Significantly, nowhere on that website is Respondent mentioned or is the ENTELLECT mark used in any way. *Id.* Respondent later testifies that Mr. Niels is not part of her “company” and the mark ENTELLECT does not appear on the motivational assessment tests. *Id.* at 21. Respondent also admits to never having had a website associated with these activities.² *Id.* at 23. Respondent goes on to admit that she does not provide the services listed in the registration, instead stating that Mr. Niels offers those services. *Id.* at 70. This is telling in

² In his trial deposition testimony, Mr. Soni testifies that there is a domain name “entellect.com”. S. Soni Depo at 50. That domain name, however, is not registered by Respondent and, according to Respondent’s own testimony, has never been used in connection with her activities. Instead, the domain name appears to be owned by Mr. Soni’s law firm (see Intellect’s Exhibit 154). A copy of the website of Mr. Soni’s law firm has been made of record in this proceeding as well as Intellect’s Exhibit 155. Significantly, while the website does seek to offer aggressive legal services, it nowhere mentions the services recited in the subject registration or the term ENTELLECT. *Id.*

light of her earlier testimony that Mr. Niels is not part of her “company” (*Id.* at 21) and that she is unaware of the details of any agreement with Mr. Niels. *Id.* at 9. Perhaps Mrs. Soni sums it up best herself when she testifies:

Q: So what specifically do you do for the company Entellect?

A: Very little.

Id. at 31.

The registration at issue in this proceeding is registered to Mrs. Soni personally, and not to Mr. Niels, Mrs. Soni’s husband, Mr. Soni’s law firm, or any business entity. Mrs. Soni, however, by her own testimony, does “very little” in connection with the testing she relies on to support her use of the subject mark. Instead, she appears to rely on the activities of Mr. Niels (who makes no use of the mark on his website or test), her husband (a full time attorney who also makes no use of the subject mark on his website), and an unused domain name owned by her husband’s law firm in an attempt to support her alleged use in commerce. She is aware, however, of no agreement with Mr. Niels that would enable her to control the quality of the services offered under the mark, and when asked in an interrogatory if her husband was an “employee” she responded that she did not know what that meant. Intellect’s Exhibit 143 at Admission No. 27. She further responded that she did not even correspond with Mr. Niels. M. Soni Depo at 28. Based on this testimony, it is apparent that Respondent does not use the ENTELLECT mark in commerce, herself, other than to occasionally refer family members, friends and acquaintances to the test offered by Mr. Niels. To the extent her husband or Mr. Niels offer any services recited in the subject registration, they are not employees of hers in any meaningful sense and do not act under her control and supervision as contractors. This testimony in and of itself is evidence that the subject registration was void *ab initio*, as

Respondent does not appear to have made bona fide use of the mark in commerce or has abandoned the mark by virtue of her long-standing consent to allow others to use it without any control or supervision.

Even the alleged use by others is called into question by Respondent's testimony. When asked who was the first person she referred to Mr. Niels for testing, she responded that it was her daughter. *Id.* at 47. This confirms her earlier testimony that her customers were primarily friends, family and cousins. *Id.* at 24-25. She further states that her activity is limited to referrals to Mr. Niels either in person or on the phone. *Id.* at 31. Respondent admits to not having a website (*Id.* at 23), not doing email marketing (*Id.* at 32), not doing speaking engagements (*Id.*), not having advertised (*Id.* at 36; Intellect's Exhibit 143, Responses 2-7, 12), not having used brochures (M. Soni Depo. at 37), and has done no radio, television, or newspaper advertising (*Id.*). In fact, Respondent admits that the only documents on which the term ENTELLECT appears are business cards and letterhead. *Id.*; *see also* Intellect's Exhibit 144 at Supplemental Interrogatory 3. She further admits that, within the United States, she has operated only in Los Angeles and San Francisco and, therefore, has never operated in any state other than California. M. Soni Depo at 70. Taken together, Respondent's testimony evidences at most token use of the subject mark, through word of mouth communications, mostly to friends and family, within a very limited geographic region within one state, without meaningful advertising or promotion of any kind. Petitioner respectfully argues that such limited use, even if proven, could at most be token use insufficient to support registration under U.S. law.

2. Lack of Any Documentary Evidence of Use

When, in light of Respondent's testimony, discovery requests were made on Respondent for documentary evidence of her use, those requests were met with flat refusals. See Intellect's

Exhibit 144 at Interrogatory Response at Requests 4-5 and 10; Intellect's Exhibit 145 at Interrogatory Response at Requests 14-21 and 24-25; Intellect's Exhibit 146 at Response to Document Request 7; and Intellect's Exhibit 147 at Response to Document Request 1-2. When Petitioner's motion to compel was granted (Doc. 30) and Respondent was required to respond, the reason for the lack of documentary evidence became clear: Respondent has no documentary evidence of use of the subject mark in commerce. See Intellect's Exhibit 144 at Supplemental Interrogatory Response at Requests 4-5 and 10; Intellect's Exhibit 145 at Supplemental Interrogatory Response at Requests 14-21 and 24-25; Intellect's Exhibit 146 at Supplemental Response to Document Request 7; and Intellect's Exhibit 147 at Supplemental Response to Document Request 1-2. In other words, Respondent possesses no documentary evidence to evidence sales, revenues, agreements with Mr. Niels, Mr. Soni, the Soni law firm or other third parties, or any other business activities. There are no invoices, purchase orders, receipts, or other documents to support that she even participates in an operating business of any kind. Respondent admits that the only such documents she possesses are business cards and blank letterhead (Intellect's Exhibits 144 at Supplemental Interrogatory Response at Request 3; Intellect's Exhibit 143 at Admission 7), and that she cannot even produce a customer list. M. Soni Depo at 56-57. It is inconceivable in today's age that a bona fide business could operate from 2002 until the present day and have no documentation to evidence its revenue or business activities. Mrs. Soni's testimony and records are far more consistent with token use (if any), that is more akin to a hobby than a bona fide use in commerce, as contemplated under the Lanham Act. Allowing such unproven token use to maintain a registration on the Primary Register would amount to allowing Respondent to obtain the kind of "rights in gross" that are forbidden under the Act.

3. Lack of Licenses or Credentials to Support Claimed Services

Among the services recited in the subject registration is “psychological counseling.” In the state of California, the state in which Respondent claims to operate, persons offering psychological counseling are required to be licensed:

§ 2903. Licensure requirement; Practice of psychology; Psychotherapy; Fee

No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter. The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations.

...

As used in this chapter, "fee" means any charge, monetary or otherwise, whether paid directly or paid on a prepaid or capitation basis by a third party, or a charge assessed by a facility, for services rendered.

Cal Bus & Prof Code § 2903 (2009), *emphasis added*.

Neither Respondent, nor her husband, have such a license. Intellect’s Exhibit 144, Resp. Nos. 92-94, 96-98. Respondent further admits that she has no education or training as a psychologist. M. Soni Depo at 6; *see also* Intellect’s Exhibit 144, Resp. Nos. 92-94, 96-98. Therefore, if such services are being offered lawfully, they must be being offered by a third party licensee. Respondent, however, failed to produce, identify or describe any such license agreement in response to discovery requests or questions at deposition. As neither Respondent nor her husband can lawfully provide the services recited in the subject registration, and no

license agreement authorizing a third party to offer those services on behalf of Respondent has been produced or described, only three possibilities remain: (i) the services are being rendered by Respondent contrary to California law and without proper training, (ii) the services are being rendered by a third party who is not subject to a valid license agreement enabling Respondent to control the nature and quality of those services, or (iii) the services are not being offered in connection with the subject mark. Regardless of which possibility is the case, it is clear that there is no bona fide use by Respondent in commerce of the subject mark in connection with those services.

4. Conclusion

It is difficult or impossible to prove a negative. The Board has recognized this, however, and has set forth the rule that once the burden of going forward on the issue on non-use or abandonment has been carried, the burden shifts to the Respondent to demonstrate use of a mark in commerce. *Quality Candy Shoppes*, 90 USPQ.2d at 1293. Petitioner has more than met the burden of establishing a prima facie case of non-use by demonstrating how Respondent's own testimony suggests at most token (if any) use by herself, a lack of meaningful agreements that would enable her to control the quality of the services between Respondent and third parties who she appears to rely on to support her alleged use, a complete lack of marketing and advertising expenditures or efforts, and a lack of the licenses and other credentials necessary to perform services she purports to offer in the subject registration. Perhaps the most significant showing, however, is in Respondent's own admission that she possesses no documents to evidence even a single legitimate sale of services since her claimed first use date in 2002.

The burden now rests with Respondent to **prove** actual, bona fide, and continuous use in commerce in order to demonstrate that there was bona fide use when the application was filed

and, if so, that the mark has not been abandoned since. The only such evidence provided, however, is the self serving testimony of Respondent and her husband. No business records, financial records, contracts, invoices, communications, or other documents are offered to support that testimony other than business cards and blank letterhead, documents relating to a domain name that has never been used, and an undated document offered by Mr. Soni, of which Respondent appears to have had no knowledge. *Compare* S. Soni Depo at 17-18 (discussing documents used to describe the services allegedly offered by Respondent *and* M. Soni Depo at 36-37 (stating that Respondent has not used brochures) *and* Intellect's Exhibit 143 at Resps. 5-7 (admitting that Respondent does not engage in direct mail or email advertising, and has not used the ENTELLECT mark on printed documents distributed to others, with the exceptions of letterhead and business cards); *compare also* S. Soni Depo at 50 (discussing entellect.com) and M. Soni Depo at 23 (stating that her business does not have an operating website). Petitioner respectfully argues that the evidence put forth by Respondent falls woefully short of proving bona fide use in commerce to support Respondent's registration, and that such registration should be held void *ab initio*.

V. CONCLUSION

Petitioner was forced to bring this proceeding when the subject registration prevented Petitioner from registering a mark it had been using in commerce since 1997. Through the course of the proceeding Petitioner has demonstrated substantial, continuing trade name and trademark use of terms confusingly similar to the mark that is the subject of Respondent's registration, dating years prior to Respondent's alleged date of first use. Respondent, in stark contrast, has offered no evidence of use in commerce to support her registration, other than her own self serving testimony and that of her husband. For these reasons, and pursuant to the

evidence made of record in this proceeding and the arguments presented herein, the Board should grant Petitioner's petition and cancel the subject registration in its entirety, or, in the alternative cancel the subject registration with respect to all services recited in classes 35 and 41, and declare that there is no likelihood of confusion with respect to class 44.

Respectfully submitted,

Date: July 15, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioner's Trial Brief to counsel at the following addresses:

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