

THIS OPINION IS A
PRECEDENT OF THE TTAB

Hearing:
August 22, 2012

Mailed:
September 30, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
Nationstar Mortgage LLC

v.

Mujahid Ahmad

—
Opposition No. 91177036
to Application Serial No. 78866376
filed on April 20, 2006

—
Bruce A. McDonald and Bassam N. Ibrahim of Buchanan Ingersoll & Rooney PC for
Nationstar Mortgage LLC.

Patrick I. Rea of Taylor & Rea PLC for Mujahid Ahmad.

—
Before Seeherman, Quinn, and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Overview

Opposer, Nationstar Mortgage LLC (“opposer”), claims that Mujahid Ahmad (“applicant”) committed fraud on the United States Patent and Trademark Office

(USPTO) by filing a use-based application to register the mark NationStar, in standard character form, for the services set forth below (as amended):

Real estate brokerage; rental of real estate; real estate management services, namely, management of commercial and residential properties; real estate investment; residential and commercial property and insurance brokerage; mortgage brokerage; and business finance procurement services, in Class 36.

Specifically, opposer, in its amended notice of opposition, alleged that applicant did not use the NATIONSTAR mark for any of the identified services prior to the filing date of his application, submitted a fabricated specimen that was not used in commerce at least as early as the application filing date, and thereby knowingly made false statements as to the use of his mark with the intent to deceive the USPTO. Applicant, in its amended answer, denied the salient allegations.

As explained below, we decide, based on the evidence and testimony of record, that applicant's averments as to his use of the NATIONSTAR mark for the services identified in the application were fraudulent. Because we sustain the opposition on the fraud claim, we do not reach the additional grounds for opposition based on likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), and applicant's lack of a *bona fide* intent to use the mark in commerce.

The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 CFR § 2.122(b), the application file. The record also includes the following evidence:

A. Opposer's Evidence.

1. Opposer's notices of reliance upon the following items:
 - a. Applicant's responses to opposer's first set of interrogatories;
 - b. Applicant's responses to opposer's requests for admission;
 - c. Applicant's responses to opposer's second set of interrogatories;
 - d. Applicant's discovery deposition with attached exhibits;
 - e. Printed publications and official records, namely,
 - i. Opposer's trademark applications (*see* the discussion regarding standing below); and
 - ii. Applicant's copending application Serial No. 77195561 for the mark NATIONSTAR for "real estate agent services, real estate consultancy, financial consultancy, real estate management and advisory services relating thereto";¹
 - f. Internet materials, *see Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010);
2. Testimony deposition of Steven L. Hess, opposer's Executive Vice President of Marketing, with attached exhibits; and
3. The expert testimony deposition of John D. Socknat, a partner at the Patton Boggs LLP law firm, whose specialty is mortgage banking regulatory issues, with attached exhibits.

¹ Filed June 1, 2007. Action on applicant's application has been suspended pending the final disposition of opposer's applications.

B. Applicant's evidence.

1. Applicant's testimony deposition with attached exhibits;
2. Testimony deposition conducted on June 8, 2010, of Abid Hussain, one of applicant's clients, with attached exhibits; and
3. Testimony deposition conducted on August 4 and September 22, 2010, of Zulfikhar Sharieff, one of applicant's clients, with attached exhibits.

Standing

On April 28, 2006, eight days after applicant filed his application, opposer filed two applications for the marks shown below, both for "mortgage lending services":

1. Serial No. 78871883 for the mark NATIONSTAR MORTGAGE in standard character form; and
2. Serial No. 78872148 for the mark NATIONSTAR MORTGAGE and design:



Opposer disclaimed the exclusive right to use the word "mortgage." As noted above, both applications have been made of record.

Applicant's application for his NATIONSTAR mark has been cited as a potential bar to the registration of the marks in opposer's applications, as shown by the copies of opposer's applications placed in the record. This is sufficient to

demonstrate that opposer has a real interest in this proceeding. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“to have standing in this case, it would be sufficient that appellee prove that it filed an application and that a rejection was made because of appellant’s registration.”).

Application No. 78866376

Applicant himself² prepared and filed application Serial No. 78866376 on April 20, 2006, basing it on his use of the mark in commerce for the identified services since at least as early as April 4, 2005. The application contained the statement: “The applicant, or the applicant’s related company or licensee, is using the mark in commerce” The application also contained the required declaration³ and was personally signed by applicant as the “Owner.” Applicant omitted specimens of use with the application, but provided them⁴ with a signed

² According to the application file, applicant prosecuted the application himself and retained counsel to represent him in the opposition. Subsequently, applicant changed counsel during the prosecution of the opposition. Applicant’s later-retained counsel is listed in the caption.

³ The declaration reads as follows:

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

⁴ The specimens consisted of a copy of applicant’s business card and an advertising flyer.

declaration under 37 C.F.R. § 2.20 in his October 19, 2006, response to an Office action. The trademark examining attorney accepted the specimens of use and approved the application for publication. The application was published for opposition on January 2, 2007, and this opposition followed.

During the course of this opposition proceeding, applicant, on advice of his initial counsel, filed a motion to amend the filing basis of his application, from use in commerce under Section 1(a), to intent to use the mark in commerce under Section 1(b).⁵ In an order dated June 17, 2008, the Board granted applicant's motion because the proposed amendment met the requirements of Section 1(b) and there was no evidence of record to suggest the absence of a continuing valid basis. The Board noted, however, that "amending the filing basis of the opposed application to Section 1(b) does not protect the application from the fraud claim."

We take this opportunity to confirm that once an opposition has been filed, fraud cannot be cured merely by amending the filing basis for those goods or services on which the mark was not used at the time of the signing of the use-based application. *See Sinclair Oil Corp. v. Kendrick*, 85 USPQ2d 1032, 1033 (TTAB 2007) (citing *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 78 USPQ2d 1696 (TTAB 2006)). An applicant's statements as to its use of a mark for particular goods and services are unquestionably material to registrability. *See, e.g., Hachette*

⁵ Despite being represented by counsel, applicant testified that he does not understand why the change to the filing basis was made. Ahmad Test. Dep. 64:17-65:22. After applicant filed his motion to amend his filing basis, applicant's original counsel filed a request to withdraw. Prosecution of the opposition was suspended until applicant's current counsel made his appearance on March 26, 2009.

Filipacchi Presse v. Elle Belle LLC, 85 USPQ2d 1090, 1093 (TTAB 2007); *First Int’l Servs. Corp. v. Chuckles Inc.*, 5 USPQ2d 1628, 1636 (TTAB 1988). Moreover, “the law is clear that an applicant may not claim a Section 1(a) filing basis unless the mark was in use in commerce on or in connection with *all* the goods or services covered by the Section 1(a) basis as of the application filing date. 37 C.F.R. Section 2.34(a)(1)(i).” *Hachette*, 85 USPQ2d at 1093. The applicant’s statements are a fundamental statutory precondition to the issuance of a registration covering such goods and services and are relied upon by the USPTO’s examining attorney in approving a use-based application for publication. Additionally, a fraud claim in an opposition notice is predicated on the opposer’s belief in damage based on the application as published. *See* Section 13 of the Trademark Act, 15 U.S.C. § 1063; *Universal Overall Co. v. Stonecutter Mills Corp.*, 379 F.2d 983, 984, 154 USPQ 104, 105 (CCPA 1967). Thus, applicant’s amendment, made after publication and institution of a challenge based on fraud, cannot aid applicant in defense of that claim.

Fraud

Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with its application with intent to deceive the USPTO. *See In re Bose Corp.*, 580 F.3d 1240, 1245, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009); *see also Swiss Watch Int’l Inc. v. Fed’n of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1745 (TTAB 2012). A party alleging fraud in the procurement of a registration bears the heavy burden of

proving fraud with clear and convincing evidence. *Bose*, 91 USPQ2d at 1243 (quoting *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981)). For example, the Board will not find fraud if the evidence shows that a false statement was made with a reasonable and honest belief that it was true, rather than intent to mislead the USPTO into issuing a registration to which the applicant was not otherwise entitled. *See id.*; *see also Woodstock's Enters. Inc. (Cal.) v. Woodstock's Enters. Inc. (Or.)*, 43 USPQ2d 1440, 1443 (TTAB 1997), *aff'd (unpub'd)*, Appeal No. 97-1580 (Fed. Cir. Mar. 5, 1998).

The essence of opposer's fraud claim is that applicant filed an application under Section 1(a) claiming use of NATIONSTAR in commerce in connection with all of the identified services when he knew he had not used the mark in commerce for any of those services at the time of filing.⁶ Opposer also argues that applicant fabricated the particular documents used as a specimen in support of his application.⁷

Applicant's statements (and specimens) regarding his use of the NATIONSTAR mark for the identified services as of the application's filing date certainly were material to the examining attorney's approval of the application for

⁶ Opposer's Br. p. 37.

⁷ Opposer's Br. p. 35. Opposer also argued that "applicant rendered a false misrepresentation [sic] in his original application by alleging first use of his mark in April 2005." However, when faced with a fraud claim in connection with the use of a mark in a use-based application, an erroneous date of first use does not constitute fraud unless there was no valid use prior to the filing of the application. *Western Worldwide Enters. Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137, 1141 (TTAB 1990) ("The Board repeatedly has held that the fact that a party has set forth an erroneous date of first use does not constitute fraud unless, inter alia, there was no valid use of the mark until after the filing of the [Section 1(a)] application").

publication. Averments and evidence of use of a mark for the goods or services identified in a use-based application are critical to the approval of a use-based application, and if it had been disclosed to the examining attorney that the mark was not in use for the identified services (or that the specimen of use was fabricated), registration would have been refused. Materiality having been established, we must determine whether the testimony and evidence of record clearly shows that applicant's representations to the Office were false and knowingly made with the requisite intent to deceive the USPTO.

A. The testimony and evidence of record

The testimony and evidence of record establishes the following:

Applicant is a real estate agent and obtained a Virginia Real Estate Board Salesperson License on September 30, 2004.⁸ The license is in applicant's name (Mujahid Ahmad) in association with First American Real Estate, Inc., the real estate broker with whom applicant does business. Applicant testified that a real estate agent is required to be associated with a real estate broker.⁹ Applicant specifically testified: "I'm not a real estate broker."¹⁰

⁸ Ahmad Test. Dep. 13:3-11, 14:19-15:6; Applicant's Ex. 1 (APP 0003) (TTABVue 77, p. 196). We are here including the TTABVue location reference because there appears to have been duplication in marking certain exhibits.

⁹ Ahmad Test. Dep. 19:2-11 ("A real estate salesperson by himself . . . cannot do any transaction if he or she is not associated with a broker. And everyone has to be associated with a broker."), 67:3-11.

¹⁰ Ahmad Test. Dep. 67:17-18.

Since the “end of 2004,” applicant has been an “independent contractor” working in association with First American Real Estate, Inc.¹¹ According to applicant, once a real estate agent is associated with a broker, the real estate agent may use any chosen business name.¹²

Applicant testified that he conceived the name NATIONSTAR at the end of 2004 or the beginning of 2005, “in that time range.”¹³ He also testified that he checked the availability of the mark online through the Virginia State Corporation Commission, Network Solutions, and at the USPTO website.¹⁴ Applicant testified that he did not know, at the time he chose the name (and still did not know at the time of his deposition), whether he is required to register NATIONSTAR as a fictitious name under Virginia statute.¹⁵ Applicant testified that during his association with First American Real Estate, Inc., which was still in effect as of the time his deposition was taken, he has been using the trade name and service mark NATIONSTAR,¹⁶ although he is unaware whether anyone at First American Real Estate, Inc., knows of his use of that name and service mark.¹⁷

On April 4, 2005, Applicant registered the domain names “nationstarmortgage.com” and “nationstarmortgage.net,” and on April 25, 2005, he

¹¹ Ahmad Test. Dep. 18:21-22; Ahmad Disc. Dep. 9:18-22.

¹² Ahmad Test. Dep. 68:1-3, 70:13-14.

¹³ Ahmad Test. Dep. 9:20-10:1.

¹⁴ Ahmad Test. Dep. 11:9-16; Ahmad Disc. Dep. 20:5-9.

¹⁵ Ahmad Test. Dep. 74:15-17, 164:4-165:20; *see* VA. CODE ANN. § 59.1-69 (2008).

¹⁶ Ahmad Test. Dep. 78:2-9.

¹⁷ Ahmad Test. Dep. 78:10-16, 174:14-175:20.

registered the domain names “nationstar.org,” “nationstarrealestate.com,” and “nationstarrealestate.net.”¹⁸

On April 11, 2006, and April 18, 2006, opposer’s counsel sent applicant letters offering to buy applicant’s “nationstarmortgage.com” and “nationstarmortgage.net” domain names.¹⁹ Applicant declined opposer’s offer.

Within days of these letters, applicant, on April 20, 2006, filed the application at issue in this proceeding. Applicant prepared and filed the application himself.²⁰ He testified that he prepared the recitation of services based on the services that he felt he was providing to his clients.²¹

The services in the application as published are: “Real estate brokerage;²² rental of real estate; real estate management services, namely, management of commercial and residential properties; real estate investment; residential and commercial property and insurance brokerage;²³ mortgage brokerage;²⁴ and

¹⁸ Ahmad Test. Dep. 48:2-51:2, 132:7-17. Applicant owns approximately 36 other domain names (*e.g.*, cavacoffee.com, envirocab.com, and kabobcafe.com). Ahmad Test. Dep. 135:19-139:4; Opposer’s Ex. 2.

¹⁹ Ahmad Test. Dep. 52:20-53:6; Applicant’s Ex. 1 (APP 0060-61).

²⁰ Ahmad Test. Dep. 11:1-3, 53:17-22.

²¹ Ahmad Test. Dep. 10:18-22; Ahmad Disc. Dep. 23:13-27:5, 71:8-74:14. As applicant put it: “Because when I say ‘one stop for all your real estate needs,’ it means any transaction that has to do with real estate.” Ahmad Disc. Dep. 73:11-13.

²² A “real estate broker” is defined as follows: “A broker who negotiates the contracts of sale and other agreements (such as mortgages or leases) between buyers and sellers of real property. Real estate brokers must be licensed in the states where they conduct business.” BLACK’S LAW DICTIONARY 202 (9th ed. 2009). The Board may take judicial notice of dictionary evidence. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

²³ An “insurance broker” is defined as follows: “A person who, for compensation, brings about or negotiates contracts for insurance as an agent for someone else, but not as an officer, salaried employee, or licensed agent of an insurance company. The broker acts as

business finance procurement services.” The application does not include “real estate agency services.”²⁵

Real estate brokerage, insurance brokerage, and mortgage brokerage services are regulated activities, requiring a license from the state in which business is being conducted to legally render such services.²⁶

Applicant at first testified that NationStar Mortgage, Inc. was in business “[s]ince the beginning of 2005.”²⁷ However, applicant filed to incorporate NationStar Mortgage, Inc., in Virginia in May 2006; and Virginia issued the certificate of incorporation on May 19, 2006.²⁸ Applicant testified that he is the owner and president and sole person who runs NationStar Mortgage, Inc., yet he also testified that he did not know if the company has earned any income or has had any revenue.²⁹ He admitted that, as of the date of his deposition, NationStar Mortgage, Inc., did not have a bank account and had never rendered a payment of

an intermediary between the insured and the insurer.” BLACK’S LAW DICTIONARY 202 (9th ed. 2009). Mr. Socknat testified that he did not find any record of applicant or NationStar Mortgage, Inc., being licensed to render insurance services in the Commonwealth of Virginia. Socknat Dep. 19:5-20:17. Mr. Socknat did not recall whether he checked in Maryland or the District of Columbia. Socknat Dep. 19:20-21.

²⁴ A “mortgage broker” is defined as follows: “An individual or organization that markets mortgage loans and brings lenders and borrowers together. A mortgage broker does not originate or service mortgage loans.” BLACK’S LAW DICTIONARY 202 (9th ed. 2009).

²⁵ A “real estate agent” is defined as follows: “An agent who represents a buyer or seller (or both, with proper disclosures) in the sale or lease of real property. A real-estate agent can be either a broker (whose principal is a buyer or seller) or a sales person (whose principal is a broker).” BLACK’S LAW DICTIONARY 74 (9th ed. 2009).

²⁶ Socknat Dep. 15:15-16:2, 19:5-20:17, 24:2-25:20.

²⁷ Ahmad Disc. Dep. 7:25-8:3.

²⁸ Ahmad Test. Dep. 41:11-42:14; Applicant’s Ex. 1 (APP 00045).

²⁹ Ahmad Test. Dep. 79:17-80:21; 95:9-101-8.

any kind.³⁰ He also admitted that the company had not done any business and has not filed any tax returns.³¹

On October 24, 2006, NationStar Mortgage, Inc., obtained its Virginia license to “engage in business as a mortgage broker.”³² NationStar Mortgage, Inc., was not licensed as a mortgage broker in Virginia before this date.³³ On February 28, 2007, NationStar Mortgage, Inc., obtained a mortgage broker license in Maryland.³⁴ On March 16, 2007, NationStar Mortgage, Inc., was issued a mortgage broker license by the District of Columbia.³⁵

On February 12, 2007, applicant began posting content on websites accessed through his NATIONSTAR domain names.³⁶ When asked at his deposition why he waited nearly two years after registering the domain names to post content, he stated “there is no reason,” explaining that he does everything himself and everything takes time and costs money.³⁷

³⁰ Ahmad Test. Dep. 99:15-100:7.

³¹ Ahmad Test. Dep. 81:6-82:9.

³² Ahmad Test. Dep. 44:19-45:14; Applicant’s Ex. 1 (APP 00046).

³³ Ahmad Test. Dep. 45:2-46:3. There is no testimony regarding when applicant initiated the mortgage broker licensing process, but applicant testified that it is “a lengthy process” involving investigation and interviewing and that the license is “hard to get.” *Id.* Applicant testified that if he didn’t have a license, he could take clients needing mortgages to an associate who was properly licensed. Ahmad Disc. Dep. 77:6-78:18.

³⁴ Ahmad Disc. Dep. 78:16-20.

³⁵ Ahmad Test. Dep. 195:17-196:19 and Opposer’s Ex. 17 (APP0033).

³⁶ Ahmad Test. Dep. 51:17—52:2.

³⁷ Ahmad Test. Dep. 52:3-16. We find applicant’s decision to wait two years to post content on websites surprising in light of his testimony that people looking for NATIONSTAR would go to a website rather than a telephone directory to find contact information for his business. Ahmad Test. Dep. 94:5-22.

Applicant maintains that he used the name NATIONSTAR in real estate transactions but testified that he has no documentary evidence showing that NATIONSTAR was used in any transactions.³⁸ All the documentation of record referencing any real estate transactions conducted by applicant are in applicant's own name without reference to NATIONSTAR.³⁹

Applicant testified that he had not used NATIONSTAR on any business documents (such as contracts or market analysis reports), there is no NATIONSTAR office, he had not placed any lawn sign bearing NATIONSTAR on any property, he had never issued an invoice with NATIONSTAR on it, he did not answer the telephone "NATIONSTAR," he had never listed the name NATIONSTAR or NationStar Mortgage in any telephone directory, and he had no knowledge of a directory assistance listing for NATIONSTAR.⁴⁰

Nonetheless, Applicant testified that, beginning in early 2005, he began advertising his real estate business under the name NATIONSTAR, using business cards, postcards, and flyers.⁴¹ However, Applicant could not identify which of these materials he created and which were created by other businesses whom he may

³⁸ Ahmad Test. Dep. 116:3-12.

³⁹ Ahmad Test. Dep. 19:12-20:8, 35:13-36:5, 36:16-37:3, 116:3-12; Applicant's Ex. 1 (APP 0014-15, 0044).

⁴⁰ Ahmad Test. Dep. 90:17-95:1, 95:9-101:8, 140:22-142:7, 147:19-153:3; Ahmad Disc. Dep. 15:2-16:18; Hussain Dep. 35:9-36:14. Applicant testified that lawn signs have to be in the broker's name. Ahmad Disc. Dep. 15:21-24.

⁴¹ Ahmad Test. Dep. 28:4-30:10, 85:10-86:15; Applicant's Ex. 1 (APP 00024-26); Ahmad Disc. Dep. 39:2-40:10.

have engaged, nor could he identify the businesses he engaged to create or print the materials that he did not create himself.⁴²

As shown below, at least some of his business cards identify applicant as a mortgage broker, yet his testimony discloses that he was not a licensed mortgage broker in early 2005, when applicant testified the business cards were made, and NationStar Mortgage, Inc., did not exist as a legal entity until October 2006.⁴³



Applicant stated that he could not recall where he had the business cards printed, how many cards he had printed, or how he paid for them.⁴⁶ Nevertheless, Zulfikhar Sharieff testified in August 2010 that, at “the end of 2004 or beginning of 2005,” applicant gave him business cards to put in his store,⁴⁷ and Abid Hussain testified in June 2010 that applicant gave him a business card in January 2005.⁴⁸

⁴² Ahmad Test. Dep. 117:13-122:7.

⁴³ Applicant is also identified as a “Mortgage Broker” on the business card he submitted as a specimen of use on October 19, 2006, before receiving a mortgage broker license.

⁴⁴ Applicant’s Ex. 1 (APP 00024).

⁴⁵ Applicant’s Ex. 1 (APP 00026).

⁴⁶ Ahmad Test. Dep. 85:21-90:8; Ahmad Disc. Dep. 89:25-90:19.

⁴⁷ Sharieff Dep. 11:2-12, 46:4-22.

⁴⁸ Hussain Dep. 9:10-10:3, 44:22-47:9. Mr. Hussain had both of applicant’s business cards (one indicating that applicant is a realtor and one indicating he is a mortgage broker) and testified that he could not remember when applicant gave him the mortgage broker card, but thought it was 2005. *Id.* at 51:18-53:13. He also testified that he keeps the business

Applicant testified that, in January 2005, he mailed the NationStar postcard shown below to prospective clients.⁴⁹



Successful home sales also require preparation and planning. My expertise is to ensure nothing is overlooked.

Call me for all your real estate needs!



JANUARY 2005 50

Applicant could not recall the name of the business that designed the postcards, where it was located, how many postcards he mailed, or how much he paid for them.⁵¹ Applicant testified that the January 2005 date printed on the lower right-hand corner indicated when the postcard was produced.⁵²

Applicant testified that he designed various promotional flyers that were distributed from the beginning of 2005 through late 2006.⁵³ The flyer shown below

cards at his home and happened to have them in his wallet when he met with applicant's counsel. *Id.*

⁴⁹ Ahmad Test. Dep. 31:4-32:4.

⁵⁰ Applicant's Ex. 1 (APP 00027).

⁵¹ Ahmad Test. Dep. 101:11-102:10; Ahmad Disc. Dep. 55:2-22.

⁵² Ahmad Test. Dep. 31:22-32:1.

⁵³ Ahmad Test. Dep. 33:1-34:7; Ahmad Disc. Dep. 38:12-40:20; Applicant's Ex. 1 (APP 00029-00035).

is dated December 2004; it identifies applicant as a “mortgage broker.”⁵⁴ Applicant submitted a virtually identical flyer as his specimen of use during the prosecution of the opposed application; the only difference is that “Created for Fall 2005” appears in the lower left corner on the flyer submitted as a specimen. Applicant testified that he could not recall where he had the flyers printed, how much he paid to have them printed, or how he paid for them.⁵⁵ Nevertheless, applicant testified that he had the presence of mind to print the date he produced the flyers.⁵⁶

⁵⁴ Applicant’s Ex. 1 (APP 00030). Based on applicant’s testimony, neither applicant nor NationStar Mortgage, Inc., was a licensed mortgage broker in December 2004.

⁵⁵ Ahmad Disc. Dep. 39:2-40:10.

⁵⁶ Ahmad Disc. Dep. 40:11-19 (“A. [] just for me to know when did I create[d] it, I always put the time frame.”).

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Mujahid Ahmad
Mortgage Broker

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Off: 703-525-8770
MakRealtor@yahoo.com

2001 North Daniel Street, # 102, Arlington, VA 22201

DECEMBER 2004

Mr. Sharieff testified that applicant gave him “eight or ten” similar flyers to post in his store.⁵⁷ Mr. Sharieff explained that he has “a little community board so if anybody wants to put the fliers, they can leave them, cards and fliers.”⁵⁸ Mr. Hussain testified that he has a copy of the flyer.⁵⁹

⁵⁷ Sharieff Dep. 11:7-14:8, 52:5-19.

⁵⁸ Sharieff Dep. 13:5-7, 47:3-13.

⁵⁹ Hussain Dep. 10:15-20, 44:22, 53:16-21.

Applicant testified that he mailed letters to clients and prospective clients using NATIONSTAR letterhead. The eight letters introduced into evidence are dated between March 25, 2005, and August 18, 2006.⁶⁰ With the exception of the date and address, all the letters are identical. Applicant testified that he prepared the letters on his computer and sent them to different clients at different times.⁶¹ Applicant testified that he searched his computers and these were all the letters he could find.⁶² On cross-examination, applicant testified that he did not send the letters out in a mass mailing; he mailed them “one at a time, could be five at a time, could be ten at a time,”⁶³ and he addressed them “Dear Sir/Madam.”⁶⁴ The letter shown below, dated October 14, 2005, and addressed to Mr. Hussain, is representative.

⁶⁰ Ahmad Test. Dep. 34:8-16; Applicant’s Ex. 1 (APP 00036-00043).

⁶¹ Ahmad Test. Dep. 34:20-35:2.

⁶² Ahmad Test. Dep. 108:15-109:3. Applicant testified that he owns a desktop and a laptop computer and that he searched both of them for records. *Id.* at 113:6-12. When asked how he could find only these letters, applicant explained that people change their computers and hard drives crash, but he didn’t have any knowledge of whether he changed his computers since 2005 and could not recall when either computer was purchased. *Id.* 112:1-15; 113:13-114:5.

⁶³ Ahmad Test. Dep. 110:19-111:3.

⁶⁴ Ahmad Test. Dep. 109:18-110:10.

NationStar Mortgage, Inc.

October 14, 2005

Mr. Abid Hussain
6143 Leesburg Pike, # 308
Falls Church, VA 22041

Dear Sir/Madam:

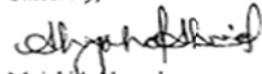
NationStar Mortgage, Inc. assists its customers in the purchase of Residential, Commercial and Land properties. If you are interested in buying a new property or want to refinance your current property, please feel free to contact us by email or call us at (703) 732-9899 to assist you in either transaction.

We can help you with multiple loan options available to you in today's market, such as home equity line of credit, interest only loan, no down payment with 80/20 program, full documentation, limited or no documentation loan and stated income loans.

We are here to help you make your real estate transaction as smooth as possible. If you are not ready at the moment, please feel free to forward this information to your friends or family members who might be interested to buy a real estate.

Thanks for your time and looking forward to hear from you at your earliest convenience.

Sincerely,



Mujahid Ahmad
President
NationStar Mortgage, Inc.
(703) 732-9899

2001 North Daniel Street, 102, Arlington, VA 22201
Phone: (703) 732-9899 Fax: (703) 525-8770 E-Mail: Msk35@nris.com

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Mr. Sharieff and Mr. Hussain⁶⁶ testified that they engaged applicant as a real estate agent and that they believed that they were doing business with

⁶⁵ Applicant's Ex. 1 (APP 00041) (TTABVue 77, p. 234); Hussain Ex. 1 (APP 0004) (TTABVue 77, p. 95).

⁶⁶ Mr. Hussain testified that he has known applicant since 2004 and they are "good friends" who speak by phone about every two weeks. Hussain Dep. 34:10-21, 65:21-22.

NATIONSTAR.⁶⁷ They testified that applicant assisted with getting insurance and mortgages on their homes by putting them in contact with insurance agents and mortgage brokers for assistance.⁶⁸ For example, Mr. Hussain described applicant as his real estate agent and testified that, in 2005, applicant took him to a loan officer to arrange for his mortgage and that the loan officer (not applicant) described everything to him and answered his financing questions.⁶⁹

B. Whether Applicant Made False Statements in His Application to Register NATIONSTAR

We begin our analysis by expressing our grave concerns about the credibility of applicant's testimony regarding his use of NATIONSTAR for the identified services at the time he filed the use-based application. We are particularly struck by applicant's evasiveness and his failure to respond directly to straightforward questions asked by opposer's counsel.

For example, applicant is the owner and president of NationStar Mortgage, Inc., yet he claimed to not know whether that business earned any income. The president, indeed, the sole officer, of a corporation, is expected to know such things. He seemingly tried to dodge answering simple yes and no questions such as whether the company had done any business or ever filed a tax return. Ultimately,

⁶⁷ Hussain Dep. 8:27-9:4, 10:4-12, 51:11-12; Sharieff Dep. 15:16-20, 20:3-7, 59:22-60:3. Both witnesses testified that NATIONSTAR did not appear on the settlement statements for the real estate transactions for which applicant was their agent. Hussain Dep. 73:1-10, Sharieff Dep. 59:13-21.

⁶⁸ Sharieff Dep. 17:15-18:11; Hussain Dep. 11:7-15:14.

⁶⁹ Hussain Dep. 12:13-18; 51:4-12.

he testified that NationStar Mortgage, Inc., had not done any business and had not filed any tax returns.⁷⁰

Similarly, applicant did not directly answer the straightforward question whether he knew of or had placed a telephone directory listing under the name NATIONSTAR. Only after much back and forth did applicant finally answer that he had not taken any steps to create a listing and did not place a listing for NationStar Mortgage in any telephone directory.⁷¹

Likewise, with respect to applicant's business cards, postcards, and flyers, we are troubled by applicant's inability or unwillingness to identify who created the materials, who printed them, and when they were printed – information which goes to the authentication of the very documents on which applicant relies to corroborate his testimony. We find it difficult to comprehend how applicant could not or would not identify which documents he created and which documents were created by professional printers whom he cannot recall having engaged. The following excerpt from applicant's testimony deposition is illustrative:

- Q. Do you know whether there is a single document in the record in this case that bears the name, Nationstar, other than the documents that were created on your computer?
- A. Some documents were created on the computer. Some of them, like I said, I produced business card, flyers, and all those things, from business locations that they printed for me. So it's not a necessity that they are produced all on my computer.

⁷⁰ Ahmad Test. Dep. 78:20-79:13, 79:17-80:17, 81:6-82:9.

⁷¹ Ahmad Test. Dep. 90:17-94:15, 148:7-152:6.

Q. I see. Well, did you ever produce documents at a printing company?

A. Yes, my business card, my mailing cards, and all those things that I told you before.

* * *

Q. [L]et's go back here and look at the business cards starting on APP00024.⁷² And looking through all of the [various business cards, postcards and flyers of record], you're saying that you created some of these on your computer; but others ones were created at a printer shop; is that what you're saying?

A. That's right, sir.

Q. By looking at them, can you tell which ones were created on your computer?

A. I don't have any knowledge of that, sir.

Q. You don't know which of those documents were created on your computer?

A. Yes, sir. It happened a long time ago, 2005. We're talking about, what, five years, six years. So there is no knowledge to remember which I created and which one was created by the business.

Q. But you did create some of those on your own computer?

A. Yes, sir.

Q. Looking at them comparing them with one another, is there any way you can distinguish which ones were prepared on your computer and which ones were prepared by the printers?

A. No, sir.

⁷² This business card is identified and reproduced above. *See supra* p. 15.

Q. In fact, all of the flyers are substantially identical but for the placement of a date in the bottom left; is that right?

A. I don't have an answer to that question, sir.

Q. Well, you can look at the document and tell me.

A. I look at the documents, and I know.

Q. You can't tell me whether they're substantially identical?

A. Yeah, they look similar.

Q. Not just similar but substantially identical; is that a fair statement? Is that a fair statement?

A. What is the difference between similar and substantially identical?

Q. Substantially identical means indistinguishable. Let me ask you again. Look at [seven flyers of record] and tell me whether you see any difference in these documents except for the date at the bottom left?

A. To me they look the same. Like I said, some of them were created by me; and some of them were printed at the business shop.

Q. So let's distinguish between creation and printing.

Were they created on your computer?

A. Not all of them.

Q. Not all of them. Which ones were not created on your computers?

A. I don't know, sir.

Q. And yet they're all substantially identical?

- A. Could be.
- Q. All right. So some [of] them were independently created; is that what you're saying?
- A. The flyers, I remember I created by myself.
- Q. All the flyers came from your computer then?
- A. I'm not sure, sir.
- Q. But you just said you created them all yourself?
- A. They come from a different computer. Maybe I created them, but it could have come from different computer.
- Q. Did anybody ever create any of these for you?
- A. No, sir.
- Q. So you created all of them?
- A. Not all of them, I said some of them.
- Q. But you can't say which ones were created by anybody else?
- A. No, sir. It happened back in 2004, 2005.
- Q. Did you create all of your business cards on your computer?
- A. No, sir. Like I said before, some by me and some by businesses.
- Q. But you don't know what businesses those were?
- A. That's right, sir.⁷³

⁷³ Ahmad Test. Dep. 117:13-122:7.

Further straining credulity is applicant's testimony regarding to whom he rendered the services identified in his application and the documents purportedly corroborating that testimony.

Q. Can you tell me of any specific transactions where you provided these services prior to the filing date of your application?

A. We provided you all the documents and it says clearly in those documents what date and what I did for what client.⁷⁴

* * *

Q. What is meant by property and insurance brokerage?

A. To provide insurance brokerage, insurance services to my clients in conjunction with my real estate transactions.

Q. Do we need to look at the documents for you to give me any example of those prior to April 20, 2006?

A. That's right. You guys have documents. You can look there.

Q. So you don't remember any specific property and insurance brokerage transactions?

A. Not on top of my head, but we give you all documents. You guys have it.

Q. Can you please describe what mortgage brokerage is in this description here?

A. Sure. Anyone who wants to buy property, they would come to me because I will tell them what is best source to get a mortgage, to get a loan, from a lender to finance the property.

⁷⁴ Ahmad Disc. Dep. 23:13-18.

Q. Can you tell me any specific examples of mortgage brokerage services that you provided prior to April 20, 2006?

A. Again, we give you all the documents. You guys have it.⁷⁵

* * *

Q. Do you have any examples of any specific transactions where you've assisted a client in rental services?

A. Yes. I mean, few clients that I helped I—they had a house and they came to me. They asked that if I can rent the house for them because they couldn't do it by themselves. So what I did, I put the listing in the MLS system. I checked everything for them. I contacted clients. I qualified them, run credit reports and everything and told him my opinion what was that he should rent to these guys or not based on the credit report.

Q. Which client was this?

A. I'm not sure which client. I don't remember it, but, once again, we give you all the document. It says specifically what I did for what client. Because some of these transaction, I mean, doesn't go all the way to the end. Some of them, I mean, the credit score's not good so you have to drop it. The guy doesn't have any money to move it, or maybe they just don't want the place.

So we provide all the services, but if the transaction is not complete, then there's nothing we can do, but we still provide the services.⁷⁶

⁷⁵ Ahmad Disc. Dep. 25:13-26:12.

⁷⁶ Ahmad Disc. Dep. 106:08-107:5.

Although applicant repeatedly testified that specific information could be found in the documents he produced, he did not introduce or identify any documents corroborating his testimony. For example, in response to inquiries regarding to whom applicant rendered the specific services listed in the recitation of services in his application, applicant referenced the documents he produced during discovery. However, none of these documents indicated what services he rendered to particular customers and, with the exception of the above-noted business cards, postcards, flyers, and letters, no documents displayed the mark NATIONSTAR.

It has long been recognized that oral testimony “should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.” *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583, 66 USPQ 232, 236 (CCPA 1945). This precept has been cited in numerous Board decisions. *See, e.g., Automedx Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1983 (TTAB 2010); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1108 (TTAB 2007). Nonetheless, oral testimony is obviously strengthened by documentary evidence which corroborates use. *Elder Mfg. Co. v. Int’l Shoe Co.*, 194 F.2d 114, 118, 92 USPQ 330, 333 (CCPA 1952). In the case at hand, the documents on which applicant relies cannot be considered corroborative, for the testimony is so lacking in conviction and credibility as to be virtually incapable of corroboration. Applicant does not so much seek to have the documents corroborate his testimony as to speak for him. Further, the testimony actually undercuts any corroborative value such documents might otherwise have, because we do not know who created

them and when. Under these circumstances, we can accord virtually no probative value to the documents to which applicant constantly deferred during his testimony.

We also note that applicant did not, during his testimony, refer to particular documents as support for particular assertions of fact. It is not our burden to rummage through the record looking for the specific document(s) that applicant may have had in mind. Further, applicant's failure to point to any documents he produced that support his assertions leads us to infer that no such documents exist. This failure further undermines the credibility of applicant's testimony.

Our extreme skepticism regarding the credibility of applicant's testimony in this case is also influenced by the fact that, as a licensed real estate agent who assists with the buying and selling of properties, applicant is well aware that legal documents, such as sales agreements, must be accurate and reviewed carefully prior to signing. Applicant's testimony indicates that he also is well aware of the restrictions on his activities as a real estate agent and that separate licensure is required to engage in other real-estate-related services such as real estate brokerage, insurance brokerage, and mortgage brokerage.

In short, we find applicant's testimony not at all credible. We therefore do not credit, standing alone, applicant's testimony or documentary evidence offered during his testimony and discovery depositions purporting to show the use of the NATIONSTAR mark in connection with the broad range of services identified in his application prior to the filing date of his application.⁷⁷

⁷⁷ We similarly do not believe Mr. Hussain's testimony that he remembered receiving a letter from applicant five years prior to his testimony that was addressed to "Dear

As to whether applicant's averments regarding his use of the mark for the identified services were false, based on the testimony and evidence of record, we find that applicant was not using the mark NATIONSTAR in commerce in connection with any of the services identified in the application prior to filing the application. The record at best establishes that applicant may have rendered real estate agency services under the mark NATIONSTAR prior to the filing date of the application, as corroborated by applicant's witnesses, Messrs. Hussain and Sharieff, both of whom testified that they engaged applicant as a real estate agent and received business cards and flyers with NATIONSTAR on them. Real estate agency services, however, are not listed services in this application. We therefore find that applicant made false representations in his application that he was using the mark NATIONSTAR in connection with all of the identified services at the time he filed the application.

Earlier, we acknowledged opposer's alternative basis for its fraud claim, i.e., that the documents applicant submitted as his specimens of use were fabricated and thus fraudulent. Because we are finding for opposer on its principal claim of fraud, we need not attempt to determine whether one or more of the proffered specimens was fabricated. Indeed, given the inability or unwillingness of applicant to testify

Sir/Madam." Hussain Dep. 55:6-58:2. Mr. Hussain testified that he received the letter at his home, despite the fact that the street address, 6143 Leesburg Pike, No. 308, is not the street where Mr. Hussain testified to have been residing at the time. *Id.* at 56:1-57:8.

about the creation and use of the specimens, it would be virtually impossible for us to do so.⁷⁸

We hasten to add that even if applicant's specimens could be found to be technically acceptable, this would have no effect on our finding that applicant falsely represented that he was using the NATIONSTAR mark in commerce in connection with the services identified in the application at the time he filed the application. Section 45 of the Trademark Act defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this Act, a mark shall be deemed to be in use in commerce – . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce. . . ." 15 U.S.C. § 1127.⁷⁹ To qualify for federal registration, the use of a mark in commerce also

⁷⁸ We acknowledge that applicant's witnesses Sharieff and Hussain testified that in the late 2004 to mid-2005 time frame—approximately five years prior to their depositions—they received the business card and flyer (or similar versions of those documents) that applicant submitted as specimens of use after he filed his application. Given that NationStar Mortgage, Inc., did not exist as a legal entity until May 2006, we are skeptical that these witnesses received the documents when they said they did. And given the uncertainty about the creation of the documents created by applicant's testimony, we would be skeptical of the testimony of any witness who testified firmly about a matter apparently beyond the recall of applicant. But even if we accept their testimony, it at best goes to the theory that applicant committed fraud by fabricating the specimens, which we need not decide. More importantly, the testimony of these witnesses speaks primarily to a possible date of first use and neither rehabilitates our view of applicant's credibility nor helps applicant show that he was providing all the services he listed in the application at the time he filed it. Indeed, both witnesses testified that on the real estate transactions that applicant assisted them with in 2005, they dealt with other providers to obtain their mortgages and insurance.

⁷⁹ The requirement that a mark be used in the ordinary course of trade to meet the definition of "use in commerce" was put in place by The Trademark Law Revision Act of 1988. The purpose of the revised definition was to eliminate token use as a basis for registration and impose a higher hurdle for the quantum and nature of use of mark for obtaining and maintaining a registration. *See* S. Rep. No. 100-515, p. 6-7, p. 44-45 (Sept. 15, 1988). The Senate's report specifies that "[t]he committee intends that the revised

must be lawful. *See In re Stellar Int'l, Inc.*, 159 USPQ 48, 51 (TTAB 1968); *In re Midwest Tennis & Track Co.*, 29 USPQ2d 1386, 1386 n.2 (TTAB 1993); *see also CreAgri, Inc. v. USANA Health Sciences, Inc.*, 474 F.3d 626, 81 USPQ2d 1592, 1595 (9th Cir. 2007); *United Phosphorus Ltd. v. Midland Fumigant Inc.*, 205 F.3d 1219, 53 USPQ2d 1929, 1932 (10th Cir. 2000); Trademark Manual of Examining Procedure (TMEP) § 907 (Apr. 2014 Rev.). In this case, there is no corroborating evidence that applicant offered any of the services identified in the application at the time he filed it. Moreover, the record establishes that applicant could not lawfully hold himself out as a mortgage broker, insurance broker, or real estate broker because he was not properly licensed at the time he filed the application. Thus, we find that applicant was not using the NATIONSTAR mark in commerce for the identified services as of the filing date of the application and that his representations in the application to the contrary were false.

C. Whether applicant knowingly made the false statements and possessed the requisite intent to deceive the USPTO

Based on our review of the evidence and in light of the manifest lack of credibility of applicant's testimony, we find that applicant's false representations regarding his use of NATIONSTAR in connection with all of the services listed in the application were made knowingly and with the intent to deceive the USPTO. This record does not support a finding that applicant's misrepresentation was occasioned by mere inadvertence or reasonable mistake or misunderstanding.

definition of 'use in commerce' be interpreted to mean commercial use which is typical in a particular industry" *Id.*

Instead, the conclusion that applicant committed fraud on the USPTO seems, to us, to be inescapable. The record clearly establishes that applicant knew he was not rendering all of the identified services as of the filing date of his application, and nevertheless he swore that he was using the mark NATIONSTAR in commerce in connection with all of the services. The listing of services is central to the registration rights acquired.⁸⁰ Moreover, “[s]tatements under oath are made with a degree of solemnity requiring thorough investigation prior to signature and submission to the USPTO.” See *Herbaceuticals Inc. v. Xel Herbaceuticals Inc.*, 86 USPQ2d 1572, 1577 (TTAB 2008). Applicant’s naming of services on which he knew the mark had not been used amounted to an attempt to obtain a right based on the false statement, *i.e.*, to induce the USPTO into approving registration of his mark.

In making our finding that applicant’s misrepresentations as to his use of NATIONSTAR were fraudulent, we are mindful that allegations of fraud should not be taken lightly and that “[s]ubjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis.” *Bose*, 91 USPQ2d at 1941. While fraud will not lie if a statement, though false, was made with a reasonable and honest belief that it was true, there are limits to what may be claimed in good faith. Thus, the law does not require “smoking gun” evidence of deceptive intent but instead has long recognized that direct evidence of deceptive intent is rarely available and deceptive intent may be inferred from the surrounding facts and

⁸⁰ A certificate of registration of a mark is prima facie evidence of the validity and ownership of the registered mark and the “owner’s exclusive right to use the registered mark in commerce *on or in connection with the goods or services specified in the certificate.*” 15 U.S.C. § 1057(b) (emphasis added).

circumstances. *See id.* We may infer deceptive intent where “the involved conduct, viewed in light of all the evidence . . . indicate[s] sufficient culpability to require a finding of intent to deceive.” *Id.* (quoting *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 876, 9 USPQ2d 1384, 1392 (Fed. Cir. 1988) (en banc)). Specifically, we have inferred culpable intent in cases where we have found an accused party’s testimony to lack credibility. *See, e.g., Global Maschinen GmbH v. Global Banking Sys., Inc.*, 227 USPQ 862, 867 (TTAB 1985) (having found respondent’s testimony “to be wholly lacking in credibility,” the Board drew the inference that respondent’s statements to the PTO during prosecution of the application were fraudulent); *Doctor Vinyl & Assocs. v. Repair-It-Indus., Inc.*, 220 USPQ 639, 645 (TTAB 1983) (“In view of our conclusion regarding the falsity of the testimony and documents offered by Speer [applicant’s witness] . . . , we treat the balance of Speer’s testimony purporting to show use prior to 1977 as having no credibility whatsoever.”).⁸¹ We find that this standard is met here. The surrounding facts and circumstances provide clear and convincing evidence that applicant did not have a good faith reasonable basis for believing that he was using the NATIONSTAR mark in commerce for all the services identified in the application.

We note in particular the following:

⁸¹ In other circumstances, courts have similarly inferred fraudulent intent based on the accused party’s lack of credibility. *See, e.g., McKesson Information Solutions, Inc. v. Bridge Med., Inc.*, 487 F.3d 897, 916 (Fed. Cir. 2007) (affirming the district court’s finding of intent to deceive based on the incredibility of the accused party’s explanation); *Williamson v. Fireman’s Fund Ins. Co.*, 828 F.2d 249, 252 (4th Cir. 1987) (“a determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the [accused party]”)

1. Applicant testified that he is the sole person involved in his business.

2. Applicant is well aware of the importance of reading and verifying the accuracy of what he signs. He works as a real estate agent in the real estate industry, where the significance of reading, understanding, and verifying the accuracy of documents one signs is critical.

3. Applicant's testimony indicates that he knows and understands: (i) the restrictions on him as a real estate agent; (ii) the distinctions in the real estate industry between the activities of a real estate agent, a real estate broker, an insurance broker, and a mortgage broker; (iii) that each is a term of art in the industry; (iv) that each requires appropriate licensure; and (v) that he was not licensed as a real estate broker, insurance broker, or mortgage broker as of the filing date of the application.⁸² Applicant testified in detail about how a real estate agent who is not licensed as a broker must be associated with a real estate broker, and that he was a real estate agent associated with a broker. Applicant also testified as to the common practice of real estate agents to help clients find insurance agents and brokers. Applicant similarly testified that it is common for real estate agents to refer clients to associates who are properly licensed mortgage brokers and that, as a real estate agent, he would make such referrals. In view of the foregoing, applicant could not reasonably have believed that his acts as a real estate agent of putting clients in contact with licensed insurance and mortgage

⁸² Applicant did become licensed as a mortgage broker, but this did not occur until many months after he filed his service mark application.

brokers equated to his own provision of insurance and mortgage brokerage services under the NATIONSTAR mark.

4. Applicant testified that he did not use the NATIONSTAR mark on any business documents (such as contracts or market analysis reports), lawn signs, or invoices, that he did not operate a NATIONSTAR office, that he did not answer the telephone NATIONSTAR, and that he did not place a directory assistance listing for NATIONSTAR.

5. Applicant's testimony that he used NATIONSTAR on business cards, flyers, postcards, and letters prior to the filing date of his application is contradictory, inconsistent, and indefinite. He could not identify who created the business cards, flyers, and postcards, or who printed them, and some of the materials dated 2004 and 2005 also refer to "NationStar Mortgage, Inc.," even though that entity was not incorporated until May 2006, after the application was filed.

6. Applicant did not file his service mark application until after opposer contacted applicant about acquiring his NATIONSTAR domain names.

7. Applicant did not post any content on websites at his NATIONSTAR domain names until 2007—two years after registering them and months after applicant filed his trademark application, yet he testified that consumers would check websites for contact information before they check telephone directories.

The facts before us are distinguishable from the facts in *In re Bose*, where the corporate representative who signed the declaration of use believed that repairing

damaged, previously-sold tape recorders and players and returning them to customers met the “use in commerce” requirement. *In re Bose Corp.*, 91 USPQ2d at 1939, 1942; *see also Maids to Order of Ohio Inc. v. Maid-to-Order Inc.*, 78 USPQ2d 1899, 1907 (TTAB 2006) (Board found that it was not unreasonable for applicant’s principal, as a layperson, to believe that applicant’s activities constituted use of its mark in interstate commerce). In this case, we are not dealing with a nuance of trademark law that applicant may have incorrectly interpreted. Rather, this case involves applicant making false statements about his own industry and his own activities, knowing the requirements regarding what he was allowed to do and not do if he did not have the appropriate licenses.

We recognize that applicant filed the application without the assistance of counsel and did not obtain counsel until after this opposition was filed. But applicant’s choice to file the application by himself without consulting a lawyer does not give applicant a free pass to disregard the straightforward requirements of a use-based application and the solemnity of the application declaration that he signed subject to criminal penalties under 18 U.S.C. § 1001. As we have expressed before, “[t]he language in the application that the ‘applicant ... is using the mark ...’ is clear and unambiguous.” *First Int’l*, 5 USPQ2d at 1636. *See also Herbaceuticals*, 86 USPQ2d at 1577 (“The nature of the goods identified in the notices of allowance at issue was not complicated or highly technical. The mark was either in use on all of those goods, or it was not.”); *Hachette*, 85 USPQ2d at 1094 (“The language contained in the subject application is clear and unambiguous. The wording

‘applicant has adopted and is using the trademark shown’ which precedes the listing of goods is simple and straightforward.”). Statements regarding the use of goods or services are made “under penalty of ‘fine or imprisonment, or both, ... and [knowing] that such willful false statements may jeopardize the validity of the application or any resulting registration....” *Herbaceuticals*, 86 USPQ2d at 1577. An error “in this statement cannot be characterized as mere carelessness or misunderstanding to be winked at as of no importance.” *See First Int’l*, 5 USPQ2d at 1636 (citing *Duffy-Mott Co. v. Cumberland Packaging Co.*, 424 F.2d 1095, [1098-1100,] 165 USPQ 422[, 425] (CCPA 1970)).

Applicant was obligated to read and understand what he was signing and investigate the accuracy of his statements in the application to confirm they had evidentiary support prior to signature and submission to the USPTO.⁸³ *See Herbaceuticals, supra*. *See also Hurley Int’l LLC v. Volta*, 82 USPQ2d 1339, 1345 (TTAB 2007) (Board explained that applicants from Australia representing themselves knew they were seeking a registration in the United States and “were under an obligation to investigate thoroughly the validity of [their] belief [their mark was in use in commerce] before signing their application under certain penalties.”). Even if counsel had been retained to file the involved application, applicant would have “shared the duty to ensure the accuracy of the application and

⁸³ Applicant’s signature and submission of the application to the Office was subject to the requirements of 37 C.F.R. § 11.18, which requires that a party signing and presenting a paper to the Office conduct a reasonable inquiry to confirm that legal contentions are warranted by existing law and factual contentions have evidentiary support.

the truth of its statements.” *Hachette*, 85 USPQ2d at 1094 (citing *Smith Int’l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1047 (TTAB 1981)).

In the case at hand, the application contains the sworn statement: “The applicant, or the applicant’s related company or licensee, is using the mark in commerce,” Considering similar language in *Hurley*, the Board stated:

The involved application includes the following statement: “Applicant is using or is using through a related company the mark in commerce on or in connection with the ... identified goods/services.” Also, applicants signed the oath at the conclusion of the application under penalty of “fine or imprisonment, or both ... that ... willful false statements may jeopardize the validity of the application or any resulting registration” ... The fact that applicants allegedly misunderstood a clear and unambiguous requirement for an application based on use, were not represented by legal counsel, and were suffering health problems does not change our finding of fraud herein.

Hurley, 82 USPQ2d at 1345.

In view of the foregoing, we find that applicant committed fraud on the USPTO.

Decision: The opposition is sustained on the ground of fraud, and registration to applicant is refused.