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

Proceeding no.	92071596
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of

US Trademark Reg. No. 5,440,864
Mark: CAMERA COPTERS (& Design)
Registered: April 10, 2018
Serial No.: 86774278
Filed: September 30, 2015
Int. Classes: 9 and 12 only

SCHIEBEL INDUSTRIES AG,

Petitioner,

v.

Cancellation No. 92071596

CAMERA COPTERS, INC.,

Registrant.

Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

CANCELLATION PETITIONER'S BRIEF AT FINAL HEARING

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INTRODUCTION

Cancellation Petitioner Schiebel Industries (“Schiebel” or “Petitioner”) files this Brief at Final Hearing pursuant to 37 C.F.R. § 2.128, and seeks a judgment cancelling the goods of Class 12 of U.S. Registration No. 5,440,864 for CAMERA COPTERS (& Design) (“’864 Registration”), based on the prior common law use since 2009 of the mark CAMCOPTER by Petitioner for goods in Class 12, and a denial of Petitioner’s own application S.N. 87820467 for CAMCOPTER for goods in Class 12 due to a likelihood of confusion objection made by the USPTO examining attorney based on the ‘864 Registration. The goods of the respective parties in Class 12 are substantially the same, being unmanned helicopters, also referred to as unmanned aerial vehicles (UAVs).

In addition to the USPTO examining attorney in S.N. 87820467 finding a likelihood of confusion, both parties agree that a likelihood of confusion exists due to similarity of the marks on substantially the same goods in Class 12. Petitioner has used the mark CAMCOPTER continuously since October 12, 2009, and Registrant has not introduced any evidence that Registrant used the mark CAMERA COPTERS (& Design) on any unmanned helicopters or UAVs for Class 12 goods any earlier than March 18, 2015.

SUMMARY OF ARGUMENT

In this proceeding, Petitioner will demonstrate that: (1) it has standing to petition to cancel in that it is likely to be damaged by the '864 Registration, and (2) there is a valid ground why the '864 Registration should not continue to be registered, based on priority of use. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). The burden of proof is preponderance of the evidence. *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626 (Fed. Cir. 2009). Because priority is in issue, Petitioner will carry its burden of proving priority of use. *Cent. Garden & Pet Co. v. Dorskocil Mfg. Co.*, 108 USPQ2d 1134, 2013 WL 5596197 (TTAB 2013). Cancellation based on priority can be made if the Registration is less than five years old when the Petition was filed. 15 U.S.C. 1064(1). The Registration issued April 10, 2018, and the Petition was filed on June 24, 2019, so cancellation can be based on priority.

The sole issue in this cancellation proceeding is whether Petitioner Schiebel has demonstrated common law use of its CAMCOPTER mark on goods in Class 12 commencing prior to the earliest date of March 18, 2015 in which Registrant Camera Copters, Inc. ("Registrant" or "Respondent") has alleged use of its mark CAMERA COPTERS (& Design) on its goods in Class 12. The respective goods in Class 12 are substantially identical, namely unmanned helicopters or unmanned aerial vehicles ("UAVs").

Petitioner will present evidence herein that it has used its CAMCOPTER mark for its unmanned aerial vehicles (UAVs) in the US continuously since at least as early as October 12, 2009. Petitioner filed Trademark Application S.N. 87820467 for CAMCOPTER on March 5, 2018 covering in Class 12, "Apparatus for motion by air, namely, helicopters, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities." The application was rejected, the examining attorney entering a likelihood of confusion objection over Registrant's '864 Registration for CAMERA COPTERS (& Design), thereby preventing Petitioner from obtaining its own Registration. Petitioner based its Petition for Cancellation on its prior common law use, and its inability to obtain its own Registration.

The goods recited in the '864 Registration in Class 12 are “Drones and structural parts therefor, Unmanned aerial vehicles (UAVs).” The respective goods of the parties in Class 12 are thus substantially identical. Both parties, as well as the USPTO, maintain that there is a likelihood of confusion between the parties’ respective marks based on the similarity of the marks on substantially the same goods.

In its Answer, Registrant failed to allege any defenses, and is thereby precluded from asserting defenses such as a *Morehouse* defense, “tacking”, abandonment or lack of distinctiveness. *H.D. Lee Company, Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1719, 2008 WL 1976596 (TTAB 2008); *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1289, 1291 n.2, 1292 (TTAB 2016); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana, Inc.*, 98 USPQ2d 1291, 1926 (TTAB 2011) (Tacking must be pled as an affirmative defense, and mere denial is not sufficient). Registrant has conceded that it has not asserted a *Morehouse* defense or “tacking” defense. Registrant asserts that its prior use of its mark in Class 41 for *services* somehow establishes its right to maintain its Registration in Class 12 for *goods*. This sounds like a *Morehouse* defense, but Registrant failed to allege a *Morehouse* defense in its Answer, and the TTAB has already found that Registrant represented that it is not asserting a *Morehouse* defense in its Orders dated August 2, 2021 (pp. 8-9) and May 13, 2022. (pp. 2-3). The TTAB has likewise ruled that because Registrant failed to plead a defense of “tacking” in its Answer, Registrant is precluded for relying on any argument of “tacking,” in its Order dated August 2, 2021 (p. 9) so Registrant’s services in Class 41 have no relevance to this proceeding. Again, Petitioner is not seeking cancellation of Registrant’s *services* in Class 41. Despite Registrant’s arguments to the contrary, Registrant’s activities in connection with *services* in Class 44 under the same mark have no relevance in this proceeding, which seeks only cancellation of Registrant’s *goods* in Class 12. Registrant has failed to cite any relevant authority in support of its position that use of its mark on *services* in Class 41 is relevant to this proceeding, and which would somehow deprive Petitioner of the relief it seeks.

DESCRIPTION OF THE RECORD

Petitioner filed its Notice of Reliance on 9/24/21 (Docket #27) with 650 pages of documents. These documents included Respondent's Responses to Petitioner's First Set of Interrogatories, and Respondent's Response to Document Requests referred to below.

Petitioner also filed five (5) batches of Petitioner's Testimony (broken into batches due to file size limits) on 10/19/21. (Docket #s 28, 29, 30, 31 and 32) All together, Petitioner filed Declarations of three (3) witnesses identified below, and documents identified by CAMCOP 000001-002752.

Petitioner's documents supporting its case on priority will be identified more specifically herein. Some pleadings are also identified.

Petition for Cancellation, June 24, 2019 (Docket #1)

Respondent's Answer, July 26, 2019 (Docket #4)

Respondent's Initial Disclosures, October 4, 2019

Respondent's Responses to Petitioner's First Set of Interrogatories, February 3, 2020 (pp. 611-624 to P's Notice of Reliance, Docket 27, 9/14/21)

Respondent's Response to Document Requests, undated by Registrant (pp. 625-650 to P's Notice of Reliance, Docket 27, 9/14/21)

Respondent's Expert Report, November 16, 2020 (Docket #44, pp. 9-35)

TTAB Decision on Respondent's Motion to Dismiss, August 2, 2021 (Docket #26)

TTAB Decision on Respondent's Motion for Leave to Amend its Notice of Reliance, and Petitioner's Motion to Strike and Preclude Evidence, May 13, 2022 (Docket #43)

Testimonial Declaration of Hans Georg Schiebel ("Schiebel Dec.") (filed 10/19/21)

Testimonial Declaration of Michael Schiller ("Schiller Dec.") (filed 10/19/21)

Testimonial Declaration of Angelo Scardullo (“Scardullo Dec.”) (filed 10/19/21)

Documents Cited in Schiebel Dec.

U.S. Trademark Application S.N. 87/820,467 for CAMCOPTER filed March 5,2018 by Petitioner Schiebel Industries, with file history, including:

Office Action June 18, 2018 in US SN 87/820467 (CAMCOP 000633-000686)

Response December 17, 2018 in US SN 87/820467 (CAMCOP 000626-000632)

Second Office Action January 8, 2019 in US SN 87/820467 (CAMCOP 000547–000625)

Amendment February 21, 2019 in US SN 87/820467 (CAMCOP 000263–000546)

Request for Reconsideration February 25, 2019 in US SN 87/820467 (CAMCOP 000253–000262)

USPTO Communication March 28, 2019 in US SN 87/820467 (CAMCOP 000251–000252)

USPTO Communication April 1, 2019 in US SN 87/820467 (CAMCOP 000246–000250)

USPTO Communication June 26, 2019 in US SN 87/820467 (CAMCOP 000243-000245)

Cease and Desist Letter Schiebel to Mundus December 29, 2008 (CAMCOP 001051)

Documents Cited in Schiller Dec.

Operating, Flight, Equipment and Maintenance Manuals, and Pilot Operator Handbooks 2009-2020 (CAMCOP 000887–000936, 001003–001030, 001052–002764)

Full List of Manuals (Manuals submitted contain cover page and table of contents only)

<u>Date</u>	<u>Title</u>	<u>Production No. (CAMCOP)</u>
4/1/09	Aircraft Maintenance Manual	000887–906
3/12/10	Aircraft Maintenance Manual	000907–936

5/16/12	Aircraft Maintenance Manual	001003–1007
9/13/13	Aircraft Maintenance Manual	001008–1010
1/16/17	Aircraft Maintenance Manual	001011–1015
11/14/17	Pilot Operator Handbook	001016–1020
2/11/20	Pilot Operator Handbook	001021–1025
11/19/20	System Maintenance Manual	001026–1030
1/16/17	Aircraft Flight Manual	001052–1101
5/16/12	Aircraft Flight Manual	001102–1105
9/13/13	Aircraft Flight Manual	001107–1109
11/14/17	Pilot Operator Handbook	001110–1114
11/14/17	Pilot Operator Supp.	001115–1136
2/11/20	Pilot Operator Handbook	001137–1141
11/19/20	System Maintenance Manual	001142–1243
11/19/20	System Maintenance Manual	001244–1248
12/23/20	Illustrated Parts Catalog	001249–1269
4/2/20	Technical Specifications and Dict.	001270–1284
7/11/08	Payload Integ. Manual	001285–1305
6/12/08	Operator Manual Supp.	001306–1325
4/1/09	Aircraft Maintenance Manual	001326–1345
4/1/09	Aircraft Maintenance Manual	001346–1373

7/3/09	Ground Interface Specifications	001374–1399
11/2/10	Mission Planning Manual	001400–1418
9/1/10	Ground Interface Specifications	001419–1443
6/24/10	Technical Specifications	001444–1458
4/26/10	Payload Integ. Manual	001459–1479
9/1/10	Payload Integ. Manual	001480–1497
10/26/11	Mission Planning Manual	001498–1520
12/1/11	Servicing Aircraft Maintenance Manual	001521–1541
4/1/11	Elec. Pow. Aircraft Main Manual	001542–1546
4/1/11	Engine Fuel and Control AMM	001565–1587
10/26/11	Ground Interface Specifications	001588–1608
5/16/12	Mission Planning Manual	001609–1633
10/1/12	MXIO Payload	001634–1652
8/22/12	Alternator,...Equipment Manual	001653–1673
10/1/12	AirVehicle Wiring AMM	001674–1698
5/6/12	Shipboard Operation	001699–1714
4/5/13	Aircraft Flight Manual	001715–1746
9/13/13	Addit. Software Manual	001747–1763
9/13/13	Mission Planning Manual	001764–1795
9/13/13	Pilot Control Unit Manual	001796–1813

2/13/13	Payload Integ. Manual	001814–1832
8/15/14	Engine Fuel and Control AMM	001833–1854
10/6/14	Aircraft Maintenance Manual	001855–1877
10/6/14	AirVehicle Wiring AMM	001878–1902
10/6/14	Radio Data Link	001903–1920
1/13/14	Software Package	001921–1933
9/14/15	Mission Planning Manual	001934–1966
9/14/15	Aircraft Flight Manual	001967–2000
7/22/15	Ground Interface Specifications	002001–2027
2/2/15	34 IN Tracking Ant.	002028–2046
11/10/15	Software Package	002047–2059
7/18/16	Aircraft Flight Manual	002060–2090
6/9/16	Aircraft Maintenance Manual	002091–2115
6/21/16	Magneto Calibration	002116–2126
12/16/16	Software Version Desc.	002127–2141
5/6/16	Mission Planning Manual	002142–2165
4/24/17	Fault Isolation Manual	002166–2185
1/16/17	Aircraft Flight Manual	002186–2235
1/31/17	Software Version Desc.	002236–2251
11/14/17	Pilot Operator Handbook	002252–2279

11/14/17	Pilot Operator Supp.	002280–2310
3/19/18	Pilot Operator Handbook	002311–2337
3/27/18	Pilot Operator Handbook	002338–2364
8/20/18	Pilot Operator Handbook	002365–2391
2/5/18	Pilot Operator Supp.	002392–2421
3/21/18	Flight Operation Checklist	002422–2427
4/12/19	Oceanwatch	002428–2440
12/20/19	Pilot Operator Handbook	002441–2467
11/22/19	Pilot Operator Supp.	002468–2504
12/19/19	System Equip. Manual	002505–2519
6/3/19	Software Version Desc.	002520–2534
2/11/20	Pilot Operator Handbook	002535–2558
11/19/20	System Maintenance Manual	002559–2672
12/23/20	Illustrated Parts Catalog	002673–2704
4/2/20	Technical Specifications and Dict.	002705–2751
11/20/20	Software Version Desc.	002752–2754

CAMCOPTER Flight Logbook (CAMCOP 001031–001034)

Photographs of Schiebel Aircraft’s Trade Fair Booths at AUVSI and SOFIC (CAMCOP 000993–001002)

CAMCOPTER Promotional Materials (CAMCOP 001035–001048, 001049–001050, 000981–000992)

Schiebel Invoices 2009–2019 for CAMCOPTER Unmanned Helicopters and Parts (CAMCOP 000774–000886)

Full List of Invoices

<u>Date</u>	<u>Production No (CAMCOP)</u>
5/11/18	000774–779
3/18/19	000780–788
10/12/09	000789
2/26/10	000790
3/30/10	000791
4/8/10	000792
5/28/10	000793
11/19/10	000794–795
11/24/10	000796
5/29/11	000797
10/10/11	000798–807
10/19/11	000808
7/31/12	000809
12/21/12	000819–822
4/6/13	000823–831
5/24/13	000832

5/29/13	000833
12/6/13	000834-836
12/17/13	000837-838
6/28/13	000839-843
7/12/13	000844-845
7/31/13	000846-847
8/16/13	000848-849
11/8/13	000850-851
12/6/13	000852-854
12/17/13	000855-856
10/31/14	000857-858
10/12/15	000859-861
3/29/16	000862-863
5/11/17	000864-866
8/7/17	000867-869
9/11/17	000870-871
9/26/17	000872-873
11/17/17	000874-875
4/27/18	000876-877
5/11/18	000878-879

5/25/18	000880–881
8/3/18	000882–884
10/1/18	000885–886
3/18/19	none

Schiebel Packing Slips (Lists) for CAMCOPTER Unmanned Helicopters 2009–2019 (CAMCOP 000937–000976)

Full List of Packing Lists

<u>Date</u>	<u>Production No. (CAMCOP)</u>
10/12/09	000937
2/26/10	000938
3/30/10	000939
4/8/10	000940
5/26/10	000941
11/19/10	000942
11/24/10	000943
6/29/11	000944
10/6/11	000945
7/20/12	000946
7/26/12	000947–948
12/20/12	000949

12/20/12	000950
4/15/13	000951
4/15/13	000952
4/5/13	000953
5/24/13	000954
5/29/13	000955
7/8/13	000956
7/31/13	000957
8/14/13	000958
11/8/13	000959
12/6/13	000960
12/6/13	000961
12/16/13	000962
10/31/14	000963
10/12/15	000964
3/29/16	000965
5/11/17	000966
8/7/17	000967
9/11/17	000968
9/26/17	000969

11/17/17	000970
4/27/18	000971
5/11/18	000972
5/25/18	000973
8/3/18	000974
10/1/18	000975
3/18/19	000976

Schiebel Contracts for Sale of CAMCOPTER Unmanned Helicopters to Boeing 2009–2019 (CAMCOP 000687–000773, 000977–000980)

Full List of Schiebel Contracts

<u>Date</u>	<u>Production No. (CAMCOP)</u>
3/18/19	none
1/27/09	000687–000692
1/12/11	000693–000698
2/22/12	000699–000716
2/15/13	000717–000730
1/7/14	000731–000742
9/2/15	000743–000773
6/10/16	000977
10/13/17	000978

12/7/17 000979

7/27/18 000980

Documents Cited in Scardullo Declaration

CAMCOPTER Invoices 2009–2019, including March 18, 2019 (CAMCOP 000774–000886)

(Full List Above)

CAMCOPTER Packing Lists (Slips) (CAMCOP 000937–000976)

(Full List Above)

CAMCOPTER Flight Logbook (CAMCOP 001031–001034)

Schiebel CAMCOPTER Operations Manuals, Maintenance Manuals, Aircraft Flight Manuals, Aircraft Operations Manuals and Pilot Operator Handbooks, 2011–2019 (CAMCOP 000887–000936, 001003–001030, 001052–002764) (Full List Above)

Respondent’s Trademark File Histories

U.S. Trademark Application S.N. 86774278 for CAMERA COPTERS (& Design) filed September 30, 2015 (now U.S. Reg. No. 5,440,864 in Classes 9, 12 and 41) by Registrant Camera Copters, Inc., with file history (CAMCOP 000001-000094)

U.S. Trademark Application S.N. 86417308 for CAMERA COPTERS filed October 7, 2014 (now U.S. Reg. No. 5,066,702 in Class 41) by Registrant Camera Copters, Inc., with file history (CAMCOP 0000095-000234)

STATEMENT OF THE ISSUES

1. Whether Schiebel has standing in this proceeding, based on prior common law rights since 2009 of CAMCOPTER on unmanned helicopters, and USPTO rejection of Schiebel's application based on Camera Copter's '864 Registration for CAMERA COPTERS (& Design) in Class 12
2. Whether Schiebel has demonstrated that its CAMCOPTER mark is distinctive, based on extensive sales on unmanned helicopters and use of CAMCOPTER from 2009-2019
3. Whether there is a likelihood of confusion between Schiebel's CAMCOPTER mark and Respondent's CAMERA COPTERS (& Design) mark on substantially the same goods, given that the USPTO rejected Schiebel's application S.N. 87/820,467 based on likelihood of confusion, and Respondent's experts concede that a likelihood of confusion exists
4. Whether Schiebel's substantial sales to Boeing are sufficient to obtain cancellation based on priority
5. Whether Schiebel's use of its CAMCOPTER mark on Flight Logbooks shipped with its unmanned helicopters, its use on its numerous CAMCOPTER manuals, and its reference to its product as CAMCOPTER unmanned helicopters, along with promoting use of its CAMCOPTER mark for unmanned helicopters at trade shows, is sufficient proper trademark use to obtain cancellation based on priority
6. Whether Respondent's use of CAMERA COPTERS (& Design) in providing *services* in Class 41 is relevant to this proceeding, which is based on the priority of the respective marks on Class 12 *goods*, and given that Respondent is precluded from asserting a *Morehouse* defense and a "tacking" defense
7. Whether Respondent's failure to plead any defenses in its Answer precludes Respondent from asserting any defenses in this proceeding

RECITATION OF THE FACTS

Petitioner refers to the statements made in Testimonial Declarations by its witnesses Hans Georg Schiebel (“G. Schiebel”), Michael Schiller (“Schiller”), and Angelo Scardullo (“Scardullo”), as follows.

1. G. Schiebel is a citizen of Austria, residing in Abu Dhabi, United Arab Emirates. (Schiebel Dec. ¶ 1)
2. G. Schiebel is the Managing Director of Schiebel Industries, AG, (Schiebel Industries) the Cancellation Petitioner in the present Cancellation and is also the Chairman of the Schiebel Group of companies comprising Schiebel Industries AG, and wholly owned subsidiaries: Schiebel Elektronische Gerate GmbH and Schiebel Aircraft GmbH (Schiebel Aircraft). (Schiebel Dec. ¶ 2)
3. G. Schiebel has been the Managing Director of Schiebel Industries since August 5, 2005. (Schiebel Dec. ¶ 3)
4. G. Schiebel has been the Chairman of the Schiebel Group since August 5, 2005. (Schiebel Dec. ¶ 4)
5. G. Schiebel’s duties and responsibilities as the Managing Director of Schiebel Industries include the management and administration of Schiebel Industries and all subsidiaries, as well as patent, domain and trademark issues. (Schiebel Dec. ¶ 5)
6. G. Schiebel’s duties and responsibilities as the Chairman of the Schiebel Group include coordination of marketing and sales efforts worldwide, as well as engineering supervision. (Schiebel Dec. ¶ 6)
7. Schiebel Industries created, adopted, and selected the CAMCOPTER mark for its unmanned helicopters back in 1995 for use in the European market. The CAMCOPTER unmanned helicopters are sold by Schiebel Aircraft under an implied license from Schiebel Industries, which insures to the benefit of Schiebel Industries. (Schiebel Dec. ¶ 7)
8. Schiebel Aircraft began to use the CAMCOPTER mark to identify its unmanned helicopters in the United States market in 2009. (Schiebel Dec. ¶ 8)
9. Schiebel Aircraft has used the CAMCOPTER mark to identify its unmanned helicopters sold in the US market from 2009 through 2019. (Schiebel Dec. ¶ 9)

10. Schiebel Industries controls all the activities of Schiebel Elektronische Gerate GmbH and Schiebel Aircraft, including all trademark activities, and maintains control over the quality of the CAMCOPTER unmanned helicopters. (Schiebel Dec. ¶ 10)
11. Schiebel filed US Trademark Application Serial No. 87/820467 for the mark CAMCOPTER on March 5, 2018 based on intent-to-use for unmanned helicopters in Class 12. (Schiebel Dec. ¶ 11)
12. In a first office action mailed on June 18, 2018, the examining attorney in US Trademark Application Serial No. 87/820467 for the mark CAMCOPTER refused to register the CAMCOPTER mark covering the unmanned helicopters in Class 12 on the grounds of likelihood of confusion citing Registrant's US Trademark Registration 5,440,864 for the mark CAMERA COPTERS (& Design) and on the grounds that the CAMCOPTER mark for unmanned helicopters merely describes unmanned helicopters. See Bates Nos. 000633 through 000686. (Schiebel Dec. ¶ 12)
13. On December 17, 2018 Schiebel Industries filed a response to the outstanding office action arguing that there was no likelihood of confusion between Schiebel Industries' mark CAMCOPTER for unmanned helicopters and Registrant's mark CAMERA COPTERS (& Design) for drones and parts therefor, UAVs. Schiebel also argued that CAMCOPTER had acquired distinctiveness and developed secondary meaning in the US marketplace. See Bates Nos. 000626 through 000632. (Schiebel Dec. ¶ 13)
14. On January 8, 2019, the examining attorney issued a second office action with a final refusal to register, maintaining the refusal to register on both the grounds of "likelihood of confusion" with Registrant's CAMERA COPTERS (& Design) and on the grounds that the mark CAMCOPTER merely describes unmanned helicopters. See Bates Nos. 000547 through 000625. (Schiebel Dec. ¶ 14)
15. On February 21, 2019, Schiebel filed an Amendment to Allege Use with the US Patent and Trademark Office and alleged use of the CAMCOPTER mark in commerce which the US Congress may lawfully regulate since at least as early as October 12, 2009. See Bates Nos. 000263 through 000546. (Schiebel Dec. ¶ 15)

16. On February 25, 2019, Schiebel Industries filed a Request for Reconsideration of the examining attorney's final refusal to register the CAMCOPTER mark for unmanned helicopters. The Request for Reconsideration included a claim under Section 2(f) of the Trademark Act that CAMCOPTER had acquired distinctiveness and developed secondary meaning in the US marketplace and so CAMCOPTER does not merely describe Schiebel Industries' unmanned helicopters, but actually is an indicator of the source or origin of the CAMCOPTER unmanned helicopters. The Request for Reconsideration also included an argument that CAMCOPTER and Registrant's mark CAMERA COPTERS(& Design) were not so similar that there would be a likelihood of confusion in the US marketplace between CAMCOPTER unmanned helicopters and Registrant's drones and parts therefor, UAVs sold under the mark CAMERA COPTERS (& Design). See Bates Nos. 000253 through 000262. (Schiebel Dec. ¶ 16)
17. On March 28, 2019, the US Patent and Trademark Office indicated that it had accepted Schiebel Industries' Amendment to Allege Use. See Bates Nos. 000251 and 000252. (Schiebel Dec. ¶ 17)
18. On April 1, 2019, the US Patent and Trademark Office agreed to drop the refusal to register the CAMCOPTER mark for unmanned helicopters on the grounds of mere descriptiveness, but did not agree to drop the refusal to register the CAMCOPTER mark for unmanned helicopters based on likelihood of confusion with the mark CAMERA COPTERS (& Design) in Registrant's US Trademark Registration 5,440,864. See Bates Nos. 000246 through 000250. (Schiebel Dec. ¶ 18)
19. On June 24, 2019, Schiebel Industries filed the cancellation petition against US Trademark Registration 5440864 for the mark CAMERA COPTERS (& Design), Classes 9 and 12. (Schiebel Dec. ¶ 19)
20. Schiebel Industries is the owner of US Trademark Application Serial No. 87820467 for CAMCOPTER, filed on 5 March 2018 covering in Class 12, "Apparatus for motion by air, namely, helicopters, apparatus for motion by air, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities" and common law rights in the mark CAMCOPTER. (Schiebel Dec. ¶ 20)

21. Schiebel Aircraft has used its CAMCOPTER mark in US commerce in connection with its helicopters, particularly its unmanned helicopters, continuously and without interruption since at least as early as 12 October 2009 up to the present day, which use has been under the quality control of, and inures to the benefit of, Schiebel Industries. (Schiebel Dec. ¶ 21)
22. The aircraft industry in the United States has come to associate the CAMCOPTER mark with Schiebel Industries indicating that any such unmanned helicopters, sold under the CAMCOPTER mark originate with the Schiebel Industries. As a result, Schiebel Industries has created, and is now the owner of, substantial good will in the CAMCOPTER mark. (Schiebel Dec. ¶ 22)
23. The unmanned helicopters, sold by Schiebel Aircraft under the mark CAMCOPTER and the “drones and structural parts therefor, unmanned aerial vehicles (UAVs)” identified in the Registrant’s US Trademark Registration 5440864 in Class 12 for CAMERA COPTERS and Design overlap or are closely related and the wording “drones” and “unmanned aerial vehicles (UAVs)” in the registration encompass Schiebel Industries’ “Apparatus for motion by air, namely, helicopters, apparatus for motion by air, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities.” (Schiebel Dec. ¶ 23)
24. Registrant’s CAMERA COPTERS (& Design) mark for its abovementioned Class 12 goods so resembles Schiebel Industries CAMCOPTER mark as to cause confusion, as to cause mistake, or to deceive as to the source, origin or sponsorship of the parties’ respective abovementioned Class 12 goods. (Schiebel Dec. ¶ 24)
25. Because Schiebel Aircraft has used its mark CAMCOPTER for unmanned helicopters in US commerce since at least as early as October 12, 2009, continuously and without interruption through 2019, Schiebel Industries is being damaged by the continued registration of the mark CAMERA COPTERS and Design covering drones and parts therefore UAVs in US Trademark Registration 5440864 in Class 12 for CAMERA COPTERS and Design. (Schiebel Dec. ¶ 25)

26. On December 29, 2008 Schiebel's attorneys sent a "cease and desist" email to the Mundus Group, Las Vegas, NV asking them to stop using the mark CamCopter on their website. (See Bates No. 001051). The Mundus Group discontinued the use of CamCopter on its website and the matter was terminated. (Schiebel Dec. ¶ 26)
27. To the extent not already stated, all of the documents referred to in paragraphs 1-26 above were kept by Schiebel in the ordinary course of business. It was in the ordinary course of Schiebel's business to keep such business records. (Schiebel Dec. ¶ 27)
28. Schiller is a citizen of Austria, residing in Vienna, Austria. (Schiller Dec. ¶ 1)
29. Schiller is the current Head of Programs Management within the Schiebel Group of companies comprising Schiebel Industries AG (Schiebel Industries), and its wholly owned subsidiaries: Schiebel Elektronische Gerate GmbH and Schiebel Aircraft GmbH (Schiebel Aircraft), as well as being the main point of contact (PoC) for its US customers. (Schiller Dec. ¶ 2)
30. Schiebel Industries controls all the activities of Schiebel Elektronische Gerate GmbH and Schiebel Aircraft, including all trademark activities, and maintains control over the quality of the CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 3)
31. Schiller started working for the Schiebel Group in May 2005 as an Operator and Maintainer for Schiebel Group's CAMCOPTER unmanned helicopters, as well as trainer for operations and program manager. The CAMCOPTER unmanned helicopter is distributed through Schiebel Aircraft and under a license from Schiebel Industries, which owns the trademark rights to the mark CAMCOPTER and which maintains control over the quality of the CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 4)
32. Part of Schiller's position as operator and trainer was to conduct demonstrations, proof of concept flights, acceptance flights, trainings in Austria as well as trainings at the customer site for Schiebel Industries' CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 5)
33. As an operator/ trainer, Schiller was part of demonstrations in the US in 2006 for the end-user in this case, the US Navy, as well as for a demonstration together with its customer Boeing to their end-user

in May 2009 in Dugway, Utah and during the acceptance flights together with Boeing and their end user in Dec. 2009 in Dugway, Utah for Schiebel Industries' CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 6)

34. Schiller held this position as operator/trainer from his start in the company in May 2005 until his promotion to program manager in August of 2011. (Schiller Dec. ¶ 7)
35. Throughout Schiller's years as operator/trainer in every communication and discussion, as well as on every document, presentation and training material that was given to the customer, Boeing, or to the end-user, the Schiebel Industries' unmanned helicopters were always referred to by their trademark CAMCOPTER and as a product originating from Schiebel Industries. (Schiller Dec. ¶ 8)
36. Following Schiller's promotion in 2011 to program manager for Schiebel Industries' CAMCOPTER unmanned helicopters, he worked directly with our customer Boeing or directly with the end-user in the US in a management role. (Schiller Dec. ¶ 9)
37. Schiller was responsible for organizing demonstrations, acceptance flights, training, customer meetings and everything connected with Schiebel Aircraft's contract fulfilment of existing contracts with customers. In this role, he always used in all communication, documents, presentations either the term Schiebel CAMCOPTER S-100, the CAMCOPTER S-100, or simply, the trademark CAMCOPTER, to refer to Schiebel Industries' unmanned helicopters. (Schiller Dec. ¶ 10)
38. In May 2014, Schiller was promoted to head of programs where he remains today. (Schiller Dec. ¶ 11)
39. Schiller has always personally used the trademark CAMCOPTER to identify Schiebel Industries' unmanned helicopters, as this is the trademark that everyone connected to Schiebel Industries' product uses, including Boeing and the end-users, since the time Schiebel Industries' unmanned helicopters were in production for the first time, more than 20 years ago, and when sales started in 2009 in the United States. (Schiller Dec. ¶ 12)
40. Whenever Schiebel Aircraft's customer Boeing ordered unmanned helicopters, Boeing identified the unmanned helicopters by reference to the trademark CAMCOPTER. (Schiller Dec. ¶ 13)

41. Schiebel Industries is the owner of US Trademark Application Serial No. 87820467 for CAMCOPTER, filed on 5 March 2018 covering in Class 12, “Apparatus for motion by air, namely, helicopters, apparatus for motion by air, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, “sold mainly to the military authorities,” as well as the common law trademark rights in the CAMCOPTER trademark. (Schiller Dec. ¶ 14)
42. Schiebel Aircraft has used its CAMCOPTER mark in US commerce in connection with its helicopters, particularly its unmanned helicopters, continuously and without interruption since at least as early as 12 October 2009 up to the present day, which use has been under the quality control of, and inures to the benefit of, Schiebel Industries AG. (Schiller Dec. ¶ 15)
43. The aircraft industry in the United States has come to associate the CAMCOPTER mark with Schiebel Industries indicating that any such unmanned helicopters, sold under the CAMCOPTER mark originate with Schiebel Industries. As a result, Schiebel Industries has created and is now the owner of substantial good will in the CAMCOPTER mark. (Schiller Dec. ¶ 16)
44. The unmanned helicopters, sold by Schiebel Industries under the mark CAMCOPTER and the “drones and structural parts therefor, unmanned aerial vehicles (UAVs)” identified in the Registrant’s US Trademark Registration 5,440,864 in Class 12 for CAMERA COPTERS (& Design) overlap or are closely related and the wording “drones” and “unmanned aerial vehicles (UAVs)” in the registration encompass Schiebel Industries’ “Apparatus for motion by air, namely, helicopters, apparatus for motion by air, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities.” (Schiller Dec. ¶ 17)
45. Registrant’s CAMERA COPTERS (& Design) mark for its abovementioned Class 12 goods so resembles the Schiebel Industries’ CAMCOPTER mark as to cause confusion, as to cause mistake, or to deceive as to the source, origin or sponsorship of the parties’ respective abovementioned Class 12 goods. (Schiller Dec. ¶ 18)

46. Because Schiebel Industries has used its mark CAMCOPTER for unmanned helicopters in US commerce since at least as early as October 12, 2009, continuously and without interruption through 2019, Schiebel Industries is being damaged by the continued registration of the mark CAMERA COPTERS and Design covering drones and parts therefore UAVs in US Trademark Registration 5440864 in Class 12 for CAMERA COPTERS and Design. (Schiller Dec. ¶ 19)
47. Under Schiller's supervision and direction, Schiebel Aircraft prepared and electronically sent the operating, flight, equipment and maintenance manuals, and pilot operator handbooks bearing the CAMCOPTER mark on a regular basis from Austria directly to Boeing's upload server in the United States from 2009 through 2020. Schiller has personal knowledge that Schiebel Aircraft sent all these documents to Boeing's upload server. (Schiller Dec. ¶ 20)
48. During the years 2009 through 2020 Schiller supervised the electronic sending of the operating, flight, equipment and maintenance manuals, and pilot operator handbooks bearing the CAMCOPTER mark from Austria to Boeing's upload server in the United States. These documents are continuously used by users to operate and maintain Schiebel Industries' CAMCOPTER unmanned helicopters so that end-users are continuously reminded of the CAMCOPTER trademark whenever they use these documents. (Schiller Dec. ¶ 21)
49. In order to establish that Schiebel Aircraft has used the mark CAMCOPTER in the sale of its unmanned helicopters in the United States, continuously and without interruption from 2009 through at least 2019, Schiller made of record the following documents, each of which Schiller was aware was used by Schiebel Aircraft and which are business records of Schiebel Aircraft, which were prepared under Schiller's supervision and direction and kept in the ordinary course of business and it is the ordinary course of Schiebel Aircraft's business to keep records of these documents, including operating, flight, equipment and maintenance manuals, and pilot operator handbooks all bearing the CAMCOPTER mark for the CAMCOPTER unmanned helicopters for the years 2009 through 2020 having Bates Numbers 000887 through 000936, 001003 to 001030, and 001052 through 002764. (Schiller Dec. ¶ 22)

50. During the years 2009 through 2019 when Schiebel Aircraft sent a CAMCOPTER unmanned helicopter from Austria to Boeing in the United States, there was always placed on board the CAMCOPTER unmanned helicopter, a flight logbook bearing the CAMCOPTER mark, which was prepared under Schiller's supervision and direction. Schiller has personal knowledge that Schiebel Aircraft always included such a flight logbook on board the CAMCOPTER unmanned helicopters. The Flight Logbooks are required to be used by users to log every flight taken by the CAMCOPTER unmanned helicopters, so end-users are continuously reminded of the CAMCOPTER trademark whenever they use a CAMCOPTER unmanned helicopter. (Schiller Dec. ¶ 23)
51. Schiller provided photographs of such Flight Logbooks bearing the CAMCOPTER mark. See Bates Nos. 001031 through 001034 which are photographs of the covers of the CAMCOPTER Flight Logbook. (Schiller Dec. ¶ 24)
52. During the years 2009 through 2019 Schiebel Aircraft promoted the sale of Schiebel Industries' CAMCOPTER unmanned helicopters in the United States through Boeing, in that Schiebel Aircraft maintained trade fair booths in the United States for the CAMCOPTER unmanned helicopters, including trade fair booths at the AUVSI and SOFIC Trade Fairs at which customers and potential customers who may purchase unmanned helicopters attend. See Bates Nos. 000993 through 001002 which are photographs of Schiebel Aircraft's trade fair booths displaying the mark CAMCOPTER for unmanned helicopters. (Schiller Dec. ¶ 25)
53. During the years 2009 through 2019 first as operator and trainer, next as program manager and later as program director for Schiebel Aircraft, Schiller directed the construction of the trade fair booths in the United States, including trade fair booths at the AUVSI and SOFIC trade fairs, and that at the trade fairs Schiller managed the operation of the CAMCOPTER trade fair booths and conducted demonstrations of the CAMCOPTER unmanned helicopters for those attending the trade fairs. Each time the unmanned helicopters were identified and promoted under the mark CAMCOPTER. (Schiller Dec. ¶ 26)

54. During the years 2009 through 2019 first as operator and trainer, next as program manager and later as program director for Schiebel Aircraft, Schiller visited the Boeing site in Mesa, Arizona where Schiller conducted demonstrations of the CAMCOPTER unmanned helicopters for both Boeing itself and for the end-users of the CAMCOPTER, including the US Navy. For each demonstration, the unmanned helicopters were identified as CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 27)
55. During the years 2009 through 2019 Schiebel Aircraft distributed promotional materials prepared under Schiller's supervision at the trade fairs in the United States to promote the sale of its CAMCOPTER unmanned helicopters as well as provided these materials on its website. Schiller had personal knowledge that Schiebel Aircraft provided these materials both at the trade fairs and on-line. See Bates Nos. 001035 through 001048, 001049 to 001050 and 000981 through 000992 which are promotional materials identifying the unmanned helicopters as CAMCOPTER unmanned helicopters. (Schiller Dec. ¶ 28)
56. During the years 2009 through 2019 Schiebel Aircraft issued invoices, prepared under Schiller's supervision and direction, to Boeing for the sale of CAMCOPTER unmanned helicopters and parts therefor as set forth in Bates Nos. 000774 to 000886 and an invoice from Schiebel Aircraft to Boeing dated March 18, 2019, the latter of which was served on Registrant on December 17, 2020 in response to Registrant's Second Set of Requests for Production of Documents well in advance of the close of the discovery period on February 14, 2021. (Schiller Dec. ¶ 29)
57. Schiebel Aircraft kept records of the invoices identified as business records in the ordinary course of business, and it is the ordinary course of Schiebel Aircraft's business to keep records of these invoices. (Schiller Dec. ¶ 30)
58. During the years 2009 through 2019, Schiebel Aircraft sent packing slips, prepared under Schiller's supervision and direction, bearing the CAMCOPTER mark to Boeing along with the CAMCOPTER unmanned helicopters and parts therefor, copies of which bear Bates Nos. 000937 through 000976. Schiebel Aircraft kept records of these packing slips bearing the CAMCOPTER mark as business

records, which were kept in the ordinary course of business and it is the ordinary course of Schiebel Aircraft's business to keep records of these packing slips. (Schiller Dec. ¶ 31)

59. Schiebel Aircraft and Boeing have had a contractual relationship since 2009 up to the present day where Schiebel Aircraft sells the CAMCOPTER unmanned helicopters to Boeing in the United States; See Bates Nos. 000687 through 000773 and 000977 through 000980 which are representative contracts between Schiebel Aircraft and Boeing for the sale of the Schiebel CAMCOPTER unmanned helicopters. These contracts are business records that Schiebel Aircraft kept in the ordinary course of business and it is the ordinary course of Schiebel's business to keep such records and that I directly participated in behalf of Schiebel Aircraft in negotiating the terms of these contracts with Boeing. (Schiller Dec. ¶ 32)

60. Schiebel Aircraft continues to offer the CAMCOPTER unmanned helicopters for sale, promotes and advertises this product, and supports the product through its warranty and customer support programs. (Schiller Dec. ¶ 33)

61. To the extent not already stated, all of the documents referred to in paragraphs 28-60 were routinely created on or about the dates appearing on said documents, and were kept by Schiebel Aircraft as part of its regularly conducted business. It was in the ordinary course of Schiebel Aircraft's business to keep such business records. (Schiller Dec. ¶ 34)

62. All of the activities described in paragraphs 28-60 above by Schiebel Aircraft were performed under the quality control of Schiebel Industries.

63. Scardullo is a citizen of the United States and resides in Vienna, Austria. (Scardullo Dec. ¶ 1)

64. Scardullo was an employee of the Boeing Company (Boeing) from 1991 to July 2020 and served as the program manager for Boeing US Department of Defense (US DoD) contract from 2011 to July 2020 in Mesa, Arizona, which procured and used the CAMCOPTER unmanned helicopters from Schiebel Aircraft GmbH (Schiebel Aircraft), a wholly owned subsidiary of Schiebel Industries AG, and supplied them to the US DoD. (Scardullo Dec. ¶ 2)

65. Scardullo's statements herein relating to activities at Boeing are for the period of his employment by Boeing from 2011 to December 2019, and are not intended to include Boeing activities before or after that period. (Scardullo Dec. ¶ 3)
66. Since August 2020 after leaving Boeing, Scardullo has been employed by Schiebel Elektronische Geraete GmbH of Vienna Austria, a wholly owned subsidiary of Schiebel Industries. (Scardullo Dec. ¶ 4)
67. Boeing received at its Boeing Mesa facility located on 5000 East McDowell Road Mesa Arizona 85215, CAMCOPTER unmanned helicopters from Schiebel Aircraft in Austria during the period 2011 through 2019. (Scardullo Dec. ¶ 5)
68. Whenever Boeing received in the United States, a CAMCOPTER unmanned helicopter from Austria, the CAMCOPTER unmanned helicopter included an invoice bearing the CAMCOPTER mark, a packing list bearing the CAMCOPTER mark, and a flight logbook bearing the CAMCOPTER mark. See Bates Nos. 001031 through 001034 for the CAMCOPTER unmanned helicopter Flight Logbooks. See invoices Bates Nos. 000774 to 000886 and an invoice from Schiebel Aircraft to Boeing dated March 18, 2019. See Bates Nos. 000937 through 000976 for the CAMCOPTER unmanned helicopter packing slips. (Scardullo Dec. ¶ 6)
69. Boeing received from Schiebel Aircraft, CAMCOPTER Operations Manuals, CAMCOPTER Maintenance Manuals, CAMCOPTER Aircraft Flight Manuals, CAMCOPTER Aircraft Operations Manuals and CAMCOPTER pilot operator handbooks each year during the years 2011 through 2020 directly to Boeing through Boeing's upload server. See attached Bates Numbers 000887 through 000936, 001003 to 001030, and 001052 through 002764. (Scardullo Dec. ¶ 7)
70. Boeing received from Schiebel Aircraft updates to CAMCOPTER Aircraft Flight Manual Operations Manuals and updates to CAMCOPTER System Maintenance Manuals during the period 2011 through 2020 which Schiebel Aircraft provided directly to Boeing through Boeing's upload server. (Scardullo Dec. ¶ 8)

71. Whenever Scardullo saw a shipment of CAMCOPTER unmanned helicopters bearing the CAMCOPTER mark, Scardullo knew that the CAMCOPTER unmanned helicopter originated with Schiebel Industries and were shipped to Boeing by Schiebel Aircraft. (Scardullo Dec. ¶ 9)
72. In Respondent's Responses to Petitioner's First Set of Interrogatories, February 3, 2020 (pp. 611-624 to Petitioner's Notice of Reliance, Docket 27, 9/14/21), Response to Interrogatory No. 5, Respondent stated that its first sale of drone in Class 12 was March 18, 2015. In Respondent's Responses to Document Requests (undated by Registrant) (pp. 625-650 to Petitioner's Notice of Reliance, Docket 27, 9/14/21) in response to a request for documents for the earliest sales of goods in Class 12, (Document Request No. 5) and invoices for years of sales (Document Request No. 12) and annual sales volume (Document Request No. 23), Respondent did not produce any sales documents dated prior to 1/4/16 (p. 646). Respondent has not provided any statement, much less any evidence that it has used the mark CAMERA COPTERS (& Design) on its UAV *goods* in Class 12 prior to March 18, 2015 which is over (5) years after Petitioner's date of first use of October 12, 2009.

ARGUMENT

1. Schiebel has standing in this proceeding, based on prior common law rights since 2009 of CAMCOPTER on unmanned helicopters, and USPTO rejection of Schiebel's application S.N. 87/820,467 based on Camera Copter's '864 Registration for CAMERA COPTERS (& Design) in Class 12.

Schiebel Industries, AG's trademark application Ser. No. 87/820,467 for CAMCOPTER was subject to an Office Action refusing registration in view of Registrant's '864 Registration on alleged likelihood of confusion, because the Registration covered *goods* in Class 12, in the same Class 12 as Petitioner's *goods*. (CAMCOP 000633-686; 000547-000625; 000246-000250; Schiebel Dec. ¶s 12, 14, 18, 23, 24, Schiller Dec. ¶s 17, 18)

Petitioner has common law rights in CAMCOPTER for its *goods* back to at least October 12, 2009, based on sales by Schiebel Aircraft using the CAMCOPTER mark which inured to the benefit of Schiebel Industries, AG. References herein to sales and other activity by Schiebel are intended to refer to activity of Schiebel Aircraft, where appropriate, as the implied licensee of Schiebel Industries, AG. (Schiebel Dec. ¶ 8, 9, 21; Schiller Dec. ¶ 3) This date is over five (5) years earlier than Registrant's alleged date of first use on March 18, 2015, for Class 12 *goods*. Petitioner is being injured by Registrant's '864 Registration for Class 12 *goods*, based on Petitioner's prior common law rights in Class 12. (Schiebel Dec. ¶ 25; Schiller ¶ 19) The existence of Registrant's Registration for Class 12 *goods* will cause a likelihood of confusion to the public, because the public will likely mistakenly believe that Registrant, rather than Petitioner, has prior rights in Class 12 goods, even if Petitioner does not obtain a registration in Class 12. (Schiebel Dec. ¶ 25; Schiller ¶ 19)

Petitioner's alleged facts as stated above clearly establish that Petitioner has standing to bring and maintain this Cancellation proceeding. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029, 213 USPQ 185, 189 (CCPA 1982) (rejection of petitioner's pending application, on the basis of the challenged registration, supports standing to cancel); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d

1036, 1041 (TTAB 2012) (petitioner has standing in view of the refusal of its own application based on likelihood of confusion with the mark in respondent's registration); *Parfums Nautee Ltd. v. American Int'l Indus.*, 22 USPQ2d 1306, 1307 (TTAB 1992) (standing found where respondent admitted in its answer to petitioner's allegations that petitioner's application was refused based on respondent's registration).

Once Petitioner has established standing, it is entitled to rely on any pleaded ground for cancellation that may negate the Registrant's right to maintain the challenged registration. *Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ 1713, 1727-28 (Fed. Cir. 2012); *Jeweler's Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F. 2d 490, 493, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F. 2d 1024, 1031, 213 USPQ 185, 190 (CCPA 1982); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1877 (TTAB 2011); *ConAgra Inc. v. Saavedra*, 4 USPQ2d 1245, 1248 n. 8 (TTAB 1987).

Petitioner's allegation in its Petition that Registrant's Registration for *goods* in Class 12 is invalid due to Petitioner's prior rights for *goods* in Class 12 over (5) years earlier is a sufficient ground for cancellation of Registrant's '864 Registration in Class 12.

Moreover, standing does not require that a petitioner plead or demonstrate registrability of its mark. It is still enough to cancel a registration if a petitioner alleges and proves priority and likelihood of confusion based on common law rights. *Cent. Fid. Banks, Inc. v. First Bankers Corp. of Florida*, 225 USPQ 438, 439-40 (TTAB 1984) (prior common law rights found to be sufficient to cancel a registration; although the petitioner also pled that registrant's registration was cited against petitioner's application, petitioner did not prove up this rejection by offering its file history into the record, so the decision was based only on prior common law rights and likelihood of confusion).

For the forgoing reasons, Petitioner has standing on both its pending application being rejected over Registrant's Registration for *goods* in Class 12, and its prior common law rights for *goods* in Class 12, thereby satisfying the "case or controversy" requirement.

While Petitioner's cases cited above clearly demonstrate the existence of Petitioner's standing and a "case or controversy," Registrant has failed to cite any case or other authority which deprives Petitioner of standing in this proceeding, i.e., that a "case or controversy" does not exist based on the specific facts of this case.

As stated above, Petitioner's sole remedy sought is cancellation of Registrant's *goods* in Class 12, on grounds of priority and likelihood of confusion. Petitioner does not seek cancellation of Registrant's *services* in Class 41. Registrant's arguments regarding its Class 41 *services* are not relevant to this proceeding and merely confuse the main issue in this proceeding, which is priority of *goods* in Class 12. Registrant's allegations regarding priority of its Class 41 *services* are entirely irrelevant to this proceeding, and Registrant has failed to cite any relevant authority which would support its argument that its Class 41 *services* are relevant to this proceeding.

2. Schiebel has demonstrated that its CAMCOPTER mark is distinctive, based on extensive sales on unmanned helicopters and use of CAMCOPTER from 2009-2019

Schiebel has used the CAMCOPTER mark on its unmanned helicopters since at least October 12, 2009. In its trademark application S.N. 87/820467, the issue of distinctiveness was raised by the examining attorney in an Office Action dated June 18, 2018. (Schiebel Dec. ¶ 12; CAMCOP 000633-686). After several exchanges with the examining attorney and Schiebel's submission of evidence establishing acquired distinctiveness and development of secondary meaning, (See Schiebel Dec. ¶s 13, 15, 17; CAMCOP 000626-000632, 000263-546; 000253-000262), the examining attorney accepted Schiebel's evidence and withdrew the objection of mere descriptiveness. (Schiebel Dec. ¶ 17, 18;

CAMCOP 000251-252; 000246-250) The evidence Schiebel submitted amply demonstrated that the CAMCOPTER mark had acquired distinctiveness.

Further, extensive evidence has been submitted as part of the record in this proceeding to further demonstrate that the CAMCOPTER mark has acquired distinctiveness due to continuous sales since 2009, use of CAMCOPTER on Flight Logbooks, many different manuals, invoices, packing lists, tradeshows, and demonstrations to Boeing and the military, the intended end user. The evidence is being discussed elsewhere in this Brief.

3. There is a likelihood of confusion between Schiebel's CAMCOPTER mark and Respondent's CAMERA COPTERS (& Design) on substantially the same goods, given that the USPTO rejected Schiebel's application based on likelihood of confusion, and Respondent's experts concede that a likelihood of confusion exists.

In Petitioner's Application S.N. 87/820,467 for the mark CAMCOPTER, the examining attorney refused registration because of a likelihood of confusion with Registrant's '864 Registration. See Bates Nos. 000243-000686, especially Bates Nos. 000246-000248. The USPTO's position is that there is a likelihood of confusion between the parties' respective marks and goods.

Registrant's expert reports, (November 16, 2020), also allege that there is a likelihood of confusion between Registrant's *services* in Class 41 and Petitioner's *goods* in Class 12. (Paul Morris expert report) (Laverne Dalley expert report) That same likelihood of confusion would logically also exist between the parties' respective *goods* in Class 12.

Although evidence on a number of factors may be relevant for a likelihood of infringement analysis, the similarity of the marks and the similarity of the goods are the most important factors to be considered to find a likelihood of confusion. *Federated Foods Inc. v. Ft. Howard Paper Co.*, 554F2d 1089, 1103, 192 USPQ 24, 29 (CCPA 1976); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F3d 1261, 1265 62 USPQ2d 1101, 1003 (Fed. Cir. 2002) (the likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record but "may focus...on dispositive factors, such as similarity of the

marks and relatedness of the goods.”); *Han Beauty, Inc. v. Alberto Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001) (where the Board must consider each factor for which there is evidence, the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods); *In re Dixie Rest.*, 105 F.3d 1405, 1406, 41, USPQ2d 1531, 1533 (Fed. Cir. 1997)

Moreover, both parties and the USPTO examining attorney in Petitioner’s S.N. 87/820,467 have all agreed that the likelihood of confusion would exist in using the parties’ respective marks for *goods* in Class 12.

Accordingly, there is a likelihood of confusion of the parties’ marks given the similarity of the marks on goods which are substantially the same.

4. Schiebel’s sales to Boeing are sufficient to obtain cancellation based on priority.

Petitioner Schiebel has numerous sales for unmanned helicopters to customer Boeing. Such sales to Boeing occurred continuously over the years 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019 (see Full List of Schiebel Contracts, (CAMCOP 000687–000773, 000977–000980); Full List of Packing Lists (CAMCOP 000937–000976); Full List of Invoices (CAMCOP 000774-886) (Schiller Dec. ¶s 29-24; Scardullo Dec. ¶6). Such use of CAMCOPTER mark for unmanned helicopters to Boeing is sufficient trademark use on which to establish prior common law use.

There is no requirement that use of a trademark be established for more than one customer in order for trademark rights to exist, as long as the use of the mark is for public and commercial activity. *Alland Enterprises, Inc. v. Advanced Programming Resources, Inc.*, 146 F.3d 350,358,46 USPQ2d 1865, 1998, FED App. 0175P (6th Cir. 1998) (“As long as there is a genuine use of the mark in commerce, . . . , ownership may be established even if the first uses are not extensive and do not result in deep market penetration or widespread recognition.”)

Moreover, the availability of Schiebel's unmanned helicopters were by no means secret to the public, as Petitioner Schiebel also promoted sales of its CAMCOPTER unmanned helicopters at public trade shows and trade fairs, and on its website, and in promotional materials, to make the relevant buying public aware of its trademarked goods. (Schiller Dec. ¶s 25-28; CAMCOP 000993-1002; 001035-1048; 001049-1051, 000981-000982)

In addition to sales to Boeing and promotions to the industry, Schiebel also demonstrated its unmanned helicopters to Boeing and Boeing's end user the U.S. Navy. (Schiller Dec. ¶ 27). Schiebel also advertises its CAMCOPTER unmanned helicopters and supports its product through warranty and customer support programs. (Schiller Dec. ¶ 33). Such use of CAMCOPTER is sufficient to obtain cancellation based on priority.

5. Schiebel's use of its CAMCOPTER mark on Flight Logbooks shipped with its unmanned helicopters, its use on its numerous CAMCOPTER manuals, and its reference to its product as CAMCOPTER unmanned helicopters, along with promoting use of its CAMCOPTER mark for unmanned helicopters at trade shows, is sufficient proper trademark use to obtain cancellation based on priority.

Petitioner Schiebel has presented extensive evidence establishing use of the CAMCOPTER mark on many documents. A Flight Logbook was provided with each CAMCOPTER unmanned helicopter, which was used during each flight. (Schiller Dec. ¶ 23, 24; Scardullo Dec. ¶ 6; CAMCOP 001031-1034) The CAMCOPTER mark appeared prominently on the front cover on numerous types of manuals referred to by customers of the CAMCOPTER unmanned helicopters. Aircraft and System Maintenance Manual editions were issued for the years 2009, 2010, 2012, 2013, 2014, 2016, 2017 and 2020. (CAMCOP 000887-906, 000907-936, 001003-1007, 001008-1010, 001011-1015, 001026-1030, 001244-1248, 001249-1269, 001326-1345, 001346-1373, 001855-1877, 002091-2115 and 002559-2672) Pilot Operator Handbooks editions were issued for the years 2008, 2017, 2018, 2019, 2020. (CAMCOP 001016-1020, 001021-1025, 001110-1114, 001115-1136, 001137-1141, 001306-1325, 002252-2279, 002280-2310, 002338-2364, 002365-2391, 002392-2421, 005441-2467, 002468-2504 and 002535-

2558) Aircraft Flight Manuals editions were issued for the years 2012, 2013, 2015, 2016 and 2017.

(CAMCOP 001052–1101, 001102–1105, 001110–1114, 001715–1746, 001967–2000, 002060–2090 and 002186–2235)

Numerous other manuals were also issued, including Illustrated Parts Catalog, Technical Specifications and Dict., Payload Integ. Manual, Ground Interface Specifications, Mission Planning Manuals Servicing Aircraft Maintenance Manual, Electric Power Aircraft Maintenance Manual, Engine Fuel And Control AMM, MXIO Payload, Alternator... Equipment Manual, AirVehicle Wiring AMM, Shipboard Operation, Software Package Manuals, Pilot Control Unit Manuals, Radio Data Link, Tracking Antenna, Magneto Calibration, Fault Isolation Manuals, Flight Operation Checklist, Oceanwatch, And System Equipment Manual. (CAMCOP 001249–1269, 001270–1284, 001285–1305, 001374–1399, 001400–1418, 001419–1443, 001444–1458, 001459–1479, 001480–1520, 001521–1541, 001542–1546, 001565–1587, 001588–1608, 001609–1633, 001634–1652, 001653–1673, 001674–1698, 001699–1714, 001749–1763, 001764–1795, 001796–1813, 001814–1832, 001833–1854, 001878–1902, 001903–1920, 001921–1933, 001934–1966, 002001–2027, 002028–2046, 002047–2059, 002116–2126, 002127–2141, 002142–2165, 002166–2185, 002236–2251, 002422–2427, 002428–2440, 002505–2519, 002520–2534, 002673–2704, 002705–2751 and 002752–2754)

As noted, each of the above listed numerous manuals had the CAMCOPTER mark prominently appearing on the cover of the manual. Such use of the mark on manuals alone is sufficient trademark use. *In re Ultraflight Inc.*, 221 USPQ 903, 906 (TTAB 984) (“We believe that the instruction manual is as much a part of the applicant’s goods as are the various parts that are used to build gliders. Application of the mark to the manual of assembly instructions, then, must be considered affixation to the goods.”) See also, *Kiekhaefer Corp. v. Corporate Products, Inc.*, 103 USPQ 365 (Comr. Pats. 1954) (use of the mark on instruction book and parts price list inserted into the shipping cartons for outboard motors was sufficient use in commerce.)

As noted, a Flight Logbook was provided with each CAMCOPTER unmanned helicopter. The manuals were prepared and electronically sent on a regular basis over 2009-2020 from Schiebel's offices in Austria directly to Boeing's upload server in the United States (Schiller Dec. ¶ 20; Scardullo Dec. ¶ 7). Whenever Schiebel's customer Boeing saw the CAMCOPTER mark, it knew the unmanned helicopter originated with Schiebel (Scardullo Dec. ¶ 9). Schiebel's customer Boeing was thus continuously reminded in the Flight Logbooks and various manuals during initial operation and use of Schiebel's unmanned helicopters that CAMCOPTER was Schiebel's trademark. (Schiller Dec. ¶ 21)

Use of the CAMCOPTER mark on the Flight Logbooks and the many types of manuals constitutes sufficient trademark use of the CAMCOPTER mark.

6. Respondent's use of CAMERA COPTERS (& Design) in providing *services* in Class 41 is not relevant to this proceeding, which is limited to the priority of the respective marks on Class 12 *goods*, and given that Respondent is precluded from asserting a *Morehouse* defense and a "tacking" defense

Registrant asserts that its prior use of its mark in Class 41 for *services* somehow establishes its right to maintain its Registration in Class 12 for *goods*. But such "defense" is nothing more than a *Morehouse* defense. Registrant failed to allege a *Morehouse* defense in its Answer, and the TTAB has already ruled that Registrant is precluded from asserting a *Morehouse* Defense in its Orders dated August 2, 2021 (pp. 8-9) and May 13, 2022 (pp.2-3). The TTAB has likewise ruled that Registrant is precluded for relying on any argument of "tacking" in its Order dated August 2, 2021 (p. 9) so Registrant's *services* in Class 41 have no relevance to this proceeding.

Petitioner could explain if needed why a *Morehouse* defense and a "tacking" defense would fail, but need not do so because Respondent is precluded from asserting those defenses. Again, Petitioner is not seeking cancellation of Registrant's *services* in Class 41. Despite Registrant's arguments to the contrary, Registrant's activities in connection with *services* in Class 41 under the same mark have no relevance in this proceeding, which seeks only cancellation of Registrant's *goods* in Class 12. Registrant's allegations

about *services* in Class 41 are not only irrelevant, but also attempt to complicate this proceeding beyond the simple scope, which is priority of *goods* in Class 12.

7. Respondent's failure to plead any defenses in its Answer precludes
Respondent from asserting any defenses in this proceeding

Respondent's Answer filed July 26, 2019 contained only general denials. The effect of such denials is that Petitioner was required to carry its burden of proof that it had priority of use in Class 12 goods, which it has done. Respondent's failure to plead defenses in its Answer precludes Respondent from relying on any defenses in this proceeding. See Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 311.02 (c)(2022), entitled Unpleaded Affirmative Defenses, and cases cited therein. ("Except as provided in Fed.R.Civ.P. 12(b) and 12(h)(2)(which allow a defendant to raise certain specified defenses by motion), an unpleaded defense cannot be relied upon by the defendant unless the defendant's pleading is amended (or deemed amended) pursuant to Fed.R.Civ.P. 15(a) or 15 (b), to assert the matter.") Respondent failed to amend its Answer, which is fatal to Respondent's attempt to rely on any defenses in this proceeding.

The importance of pleading defenses is that a plaintiff will be put on notice, and conduct appropriate discovery, plan its case and budget, and engage experts if needed on any issues. Petitioner here relied on the absence of any pleaded defenses, and it would be fundamentally unfair for Respondent to pursue any purported defenses not raised in its Answer. Petitioner does not consent to any purported defense issues being raised in this proceeding, and any discussion of such issues by Petitioner should not be construed as consent by Petitioner to have any purported defense litigated by consent or waiver.

Petitioner has not consented or acquiesced in Respondent's attempt to raise any defenses in this proceeding. While Respondent in its Notice of Reliance attempts to assert defenses, Petitioner objected to this attempt and filed its Motion to Preclude and evidence on any defenses. In its Order dated May 12, 2022, the TTAB noted that Respondent failed to allege any defenses in its Answer and that Respondent is

not relying on a *Morehouse* defense or “tacking” defense. By the same logic, Respondent is precluded from relying on any other defense such as abandonment or lack of distinctiveness.

For example, Respondent in its Notice of Reliance has alleged that Petitioner has failed to police its CAMCOPTER mark in the industry. Such allegation is a type of “abandonment” defense. Because Respondent has failed to assert such a defense in its Answer, Respondent should be precluded from asserting it in this proceeding.

Moreover, even if considered on the merits, the “abandonment” defense lacks merit. Petitioner’s discussion herein of the Mundus issue, or any other alleged “defense” of Respondent, should not be taken as acquiescence or consent that any such issue should be considered on its merits in this proceeding. The alleged defense is based on a single third-party user, the Mundus Group, who for a short period used the CAMCOPTER mark. Petitioner sent Mundus a cease-and-desist letter on December 8, 2008, and thereafter the Mundus Group ceased using the mark. (CAMCOP 001051, Schiebel Dec. ¶26) Respondent cites third party publications attempting to show that the Mundus Group continued using the mark for some period in 2009, but these publications were late reportings of past events not attributed to Petitioner or the Mundus Group, and are inadmissible hearsay for what they purport to show. Suffice to say, the true facts are that the Mundus Group ceased use of the CAMCOPTER mark, so that even if this defense was considered on the merits, Respondent has failed to prove it.¹ Moreover, Respondent has not produced any evidence that Mundus used that mark beyond 2009, and after 2009 until the present Petitioner has used the CAMCOPTER mark exclusively from a date well before Respondent’s alleged use in Class 12 of March 18, 2015.

As another example, Respondent has alleged in its Notice of Reliance that Petitioner’s CAMCOPTER mark lack distinctiveness. Because Respondent failed to allege this defense in its Answer, such defense

¹ To be clear, Petitioner’s discussion of this purported defense or any other purported defense should not be taken as any agreement or consent by Petitioner that any such purported defense should be considered on the merits in this proceeding.

should not be considered in this proceeding. Even if considered on the merits, as noted above, Petitioner has submitted evidence in the prosecution of its trademark application that its CAMCOPTER mark is distinctive, and the examining attorney has ruled that such evidence established that the CAMCOPTER mark is distinctive. The extensive evidence presented herein only adds to that showing of distinctiveness. For the foregoing reasons, Respondent should be precluded from raising any affirmative defenses in this proceeding.

SUMMARY

Petitioner Schiebel has demonstrated by a preponderance of the evidence, which has not been challenged by Respondent, extensive common law use of its CAMCOPTER mark on goods in Class 12 since at least October 12, 2009, prior to the earliest date of March 18, 2015 which Respondent alleges use of its mark CAMERA COPTERS (& Design) on its goods in Class 12. The respective goods are substantially identical, namely unmanned helicopters or unmanned aerial vehicles (“UAVs”).

Petitioner has demonstrated that it has used its CAMCOPTER mark for its unmanned aerial vehicles (UAVs) in the US continuously since at least as early as October 12, 2009. Petitioner filed Trademark Application S.N. 87820467 for CAMCOPTER on March 5, 2018 covering in Class 12, “Apparatus for motion by air, namely, helicopters, namely, unmanned helicopters, apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities.” The application was rejected, the examining attorney entering a likelihood of confusion objection over Registrant’s ‘864 Registration for CAMERA COPTERS (& Design), thereby preventing Petitioner from obtaining its own Registration. Petitioner based its Petition for Cancellation on its prior common law use, and its inability to obtain its own Registration.

The goods recited in the ‘864 Registration in Class 12 are “Drones and structural parts therefor, Unmanned aerial vehicles (UAVs).” The respective goods of the parties are thus substantially identical. Both parties, as well as the USPTO, maintain that there is a likelihood of confusion between the parties’ respective marks based on the similarity of the marks on substantially the same goods.

Registrant’s allegation is that its prior use of its mark in Class 41 for *services* somehow establishes its right to maintain its Registration in Class 12 for *goods*. But such allegation is nothing more than a *Morehouse* defense. Registrant failed to allege a *Morehouse* defense in its Answer, and the TTAB has already ruled that Registrant is precluded from relying on a *Morehouse* defense in its Orders dated

August 2, 2021 and May 13, 2022. The TTAB has likewise ruled that Registrant is precluded for relying on any argument of “tacking” in its Order dated August 2, 2021, so Registrant’s *services* in Class 41 have no relevance to this proceeding. Petitioner could explain if needed why a *Morehouse* defense and a tacking defense would fail, but need not do so because Respondent is precluded from relying on those defenses. Again, Petitioner is not seeking cancellation of Registrant’s *services* in Class 41. Despite Registrant’s arguments to the contrary, Registrant’s activities in connection with *services* in Class 41 under the same mark have no relevance in this proceeding, which seeks only cancellation of Registrant’s *goods* in Class 12.

CONCLUSION

In view of the forgoing, Petitioner seeks judgment that Respondent's CAMERA COPTERS (& Design) mark in US Registration No. 5,440,864 be cancelled in Class 12.

/s/ Peter J. Phillips

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on attorney for Registrant as follows, this day of August 29, 2022.

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