

No. _____

**In the
United States Supreme Court**

CORCAMORE, LLC,
Petitioner,

~ v. ~

SFM, LLC
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1st Question.

Whether this Court’s *Lexmark* test is the sole determinant of the statutory *power* of the Trademark Trial and Appeal Board to adjudicate a § 1064 to cancel a trademark registration, or can the Federal Circuit’s make its “real interest” and “reasonable belief” approach an optional, more lenient to plead for the statutory remedy.

Whether the Federal Circuit panel erred in its decision (i) that does not adhere to this Court’s *Lexmark* precedent, and (ii) that also conflicts with the Fourth Circuit’s decision on the interpretation and application of the same statutory standard that applies to pleading for the remedy created in Section § 1064 of the Lanham Act.

2nd Question.

Can the Trademark Trial and Appeal Board, an Article I administrative tribunal, endow itself with “inherent authority,” not conferred by rule or statute, and use that to impose a punitive sanction on a party.

If the Trademark Trial and Appeal Board can impose a punitive terminating sanction, for reasons unrelated to trademark registerability, then must that administrative tribunal provide at least the same due process protections as an Article III court.

Parties to the Proceeding

Petitioner here, Corcamore LLC, was the defendant in the administrative proceeding below before the Trademark Trial and Appeal Board.

SFM, LLC is Respondent here, and was the plaintiff in the Board proceeding below.

Related Cases.

None.

CORPORATE DISCLOSURE STATEMENT

Petitioner Corcamore LLC is privately owned, it has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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Petition for a Writ of Certiorari

Petitioner Corcamore LLC respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

Opinions Below

SFM, LLC v. Corcamore, LLC, 978 F.3d 1298 (Fed. Cir. 2020), affirming, *SFM, LLC v. Corcamore, LLC*, 129 U.S.P.Q.2d 1072 (T.T.A.B. 2018)

Jurisdiction

The final judgment of the Federal Circuit court of appeals was entered on October 27, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Constitutional Provisions

Section 14 of the Lanham Act, 15 U.S.C. § 1064, provides in pertinent part:

A petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed as follows by any person who believes that he is or will be damaged, including as a result of a likelihood of dilution by blurring or dilution by tarnishment under section 1125(c) of this title, by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905:

(1) Within five years from the date of the registration of the mark under this chapter.

The present form of 15 U.S.C. § 1064 is in the 1946 Lanham Act. The background is the 1881 version, then the 1905 Act. The statutory history is discussed in *Stamatopoulos v. Stephano Bros.*, 41 App. D.C. 590, 591 (D.C. Cir. 1914) and, *Model Brassiere Co. v. Bromley-Shepard Co.*, 49 F.2d 482, 484–85 (C.C.P.A. 1931).

In regard to the Second Question Presented, the Fifth Amendment to our U.S. Constitution states in relevant part that “No person shall be ... deprived of life, liberty, or property, without due process of law...” “To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such

an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.” *Hovey v. Elliott*, 167 U.S. 409, 414 (1897).

**STATEMENT OF THE CASE
ON THE FIRST QUESTION PRESENTED.**

The U.S. Court of Appeals for the Federal Circuit affirmed the Trademark Trial and Appeal Board (the “Board”) decision in SFM’s trademark cancellation proceeding against Corcamore.

Congress empowered the Board to hear a petition to cancel a trademark registration, only if, it is “filed ... by any person who believes that he is or will be damaged... by the registration of a mark on the principal register.” 15 U.S.C. §1064. The statute circumscribes the authority of the Board, Article I tribunal, to cancel Corcamore’s registered trademark.

Months before SFM’s petition to the Board was filed, this Court decided *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In a unanimous decision, this Court interpreted this Lanham Act provision - “any person who believes that he or she is or is likely to be damaged” - to require the pleader, who is in the statutory “zone of interests,” to allege a “sufficiently close connection,” or even “proximate causation” between their allegations of “being damaged” and “the conduct the [Lanham Act]

prohibits.”¹ Here, the Board refused to consider *Lexmark* and rulings by any Article III “district court or that district court’s primary reviewing court” that had followed *Lexmark*’s two-prong pleading standard.

On *de novo* review of the statutory questions, the Federal Circuit affirmed the Board, which held to its pre-*Lexmark* approach to standing. It “concluded that SFM had standing because it sufficiently alleged a real interest in the cancellation proceeding and a reasonable belief of damage.”²

That frames one important question of federal statutory law: does *Lexmark*, 572 U.S. at 136-37, reject the “reasonable interest” and “reasonable belief” way to measure Lanham Act standing. This Court’s unanimous decision in *Lexmark* instructs that “[t]he relevant question is ... not whether there is a ‘reasonable basis’ for the plaintiff’s claim of harm, but whether the harm alleged is proximately tied to the defendant’s conduct.”³ Further, *Lexmark* held that “the principles” of a zone of interests and proximate cause test “will provide clearer and more accurate guidance” about the factual allegations the Lanham Act requires be pleaded to have standing to obtain its statutory remedies. *Id.*

¹ This Court held that the statutory phrase “will be damaged” requires asking the second “question” about “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.” *Lexmark*, at 133.

² *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1301 (Fed. Cir. 2020).

³ *Lexmark*, at 137.

A. The Decisions Below.

SFM pleaded a “likelihood of confusion” between Corcamore’s registered trademark for “SPROUT” that identified its “vending machine services,” and SFM’s three “Sprouts” trademarks registered to identify “retail grocery store services”⁴

1. The Board Rejects *Lexmark* and *Belmora* (4th Cir.).

In its initial Rule 12, FED. R. CIV. PROC., motion to dismiss Corcamore asked the Board to apply this Court’s two-prong test and the “accurate guidance” from *Lexmark* to the virtually identical text in Lanham Act §14. The Board denied Corcamore’s first motion, and refused to follow *Lexmark* or use its two-prong test for standing.

Weeks later, a second motion to dismiss was filed. The U.S. District Court for the Eastern District of Virginia, exercising its *de novo* jurisdiction over the Board under 15 U.S.C. §1071(b), had ruled that the *Lexmark* two-prong standard applies to trademark cancellation matters before the Board.⁵ Corcamore’s

⁴ The identified, commercial “usages ... —*i.e.*, those goods on which the mark appears along with, if applicable, their channels of distribution—are critical” limitations on the specific trade channels that a registered mark covers. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 143(2015), citing, 3 J. McCarthy, Trademarks and Unfair Competition §20:24 (4th ed. 2014).

⁵ “The TTAB’s analysis of standing did not apply *Lexmark*. Accordingly, the Court conducts the standing analysis with the benefit of that decision.” *Belmora LLC v. Bayer Consumer Care*

second motion to dismiss was denied because the Board was unwilling to follow the Eastern District court or to apply *Lexmark*. It hewed tight to the “real interest” and “reasonable belief” approach of the Federal Circuit.

Later, the U.S. Court of Appeals for the Fourth Circuit agreed with its lower court that *Lexmark*’s two-prong test applies to §1064 trademark cancellation matters pleaded to the Board.⁶ The Fourth Circuit decision fully follows, and does not deviate from *Lexmark*. Relying on the Fourth Circuit decision in *Belmora*, Corcamore made its third motion to dismiss for lack of standing. The Board denied that third motion 18 months later (filed Dec. 30, 2015 -> denied May 5, 2017).

In denying Corcamore’s third motion, the Board made clear that the Federal Circuit’s “real interest” and “reasonable belief” of being “damaged” approach was incompatible with the Fourth Circuit’s *Belmora* decision, and with this Court’s two-prong *Lexmark* test. The Board ruled emphatically that it would “not consider a decision by a district court or that district

AG, 84 F.Supp.3d 490, 513-514 (E.D. Va. 2015), *aff’g in part and rev’g in part, Bayer Consumer Care AG v. Belmora LLC*, 110 USPQ2d 1623 (TTAB 2014) (subsequent history in Table of Authorities).

⁶ The “relevant language in § 14(3) closely tracks similar language that the Supreme Court considered in *Lexmark* ...[and] the same two-prong inquiry from *Lexmark* provides the mode of analysis.” *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 714 (4th Cir. 2016), *cert. denied*, 137 S.Ct. 1202 (2017) (full history in Table of Authorities).

court's primary reviewing court which may appear to apply or analogize from *Lexmark Int'l* a standard for pleading standing in a Board proceeding.”⁷

Filing three Rule 12 motions over §1064 standing caused agita with the Board. *Sua sponte*, asserting the “Board’s inherent authority,” Corcamore was sanctioned for having “filed an inordinate number of motions (all of which have been denied).” App. 20.

Article I administrative trademark “judges” on the Board, and a panel of the Federal Circuit cannot revise this Court’s unanimous decision. To restore the certain interpretation and definite application of *Lexmark*’s “clearer and more accurate,” two-prong pleading standard to all cancellation and opposition proceedings pleaded before the Board, respectfully it is requested that certiorari should be granted.

2. The Federal Circuit Essentially Nullifies

The *Lexmark* two-prong Test.

In affirming, the Federal Circuit began its analysis, noting that “there exists confusion in the law stirred by the inconsistent use of the term ‘standing,’” citing *fn. 4* in the *Lexmark* decision.⁸ It must be asked,

⁷ *SFM, LLC v. Corcamore, LLC, Dkt. # 32*, unreported ruling, pg. 4-5 (TTAB May 5, 2017).

⁸ In 1983, Federal Circuit Judge Rich remarked that “there has been much confusion in the cases between standing and damage which recent decisions and opinions have, hopefully, been straightening out.” *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1325 (Fed. Cir. 1983), cited approvingly in *Corcamore, supra*, at 1305.

Even now in 2021, with the *Lexmark* decision in hand, the Federal Circuit perceives “confusion” in the law respecting

where does that confusion lie? Certiorari was granted in *Lexmark* to decide “the appropriate analytical framework for determining a party's standing” to plead for Lanham Act remedies. *Supra*, at 125.

Given the choice here of uniformly following *Lexmark*, or authoring another “inconsistent” framework of semantic or juridical labels, the Federal Circuit amalgamated its “real interest” and “reasonable belief” of being “damaged” approach with the two-prong test that *Lexmark* plainly set forth.

Both sections A and B of the Federal Circuit opinion (978 F.3d at 1303 & 1305) begin with the holding, central to this petition for certiorari, that “we discern no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark*,” and the “real interest” and “reasonable belief” approach that the Board and the Federal Circuit used. So, it deemed them interchangeable. *Lexmark*, at 1306.

Instead of requiring, consonant with *Lexmark*, at 137, factual allegations of a nexus between a “person” within the “zone of interests” being “damaged” due to an economic or reputational injury “proximately tied to the defendant’s conduct,” the Federal Circuit subordinated that two-prong test to its more variable and lenient “real” and “reasonable belief” approach.

That fusion of *Lexmark*’s definite standard with the Federal Circuit’s “reasonable” interest and

standing for trademark cancellation and how to plead being “damaged” by another trademark registrant’s “conduct.”

“reasonable belief” approach, which *Lexmark* rejects, practically negates this Court’s straightforward, “clearer and more accurate” interpretation of the Lanham Act §1064 text. As explained, *infra*, the Federal Circuit approach is “meaningfully different” from and does not dovetail with the two-prong test in *Lexmark*.

The Federal Circuit panel “has decided an important federal question in a way that conflicts with” the unanimous *Lexmark* decision of the Supreme Court. U.S. Supreme Court Rule 10(c). Certiorari should be granted.

3. The Fourth Circuit Follows *Lexmark*, Then the Federal Circuit Issues a Conflicting Decision.

The Federal Circuit rulings conflict with the Fourth Circuit decision in *Belmora*, *supra*, which adheres to the precise, two-prong *Lexmark* standard.

In regard to a cancellation proceeding, the Fourth Circuit strictly followed *Lexmark*’s two-prong test and its interpretation of the Lanham Act §1064 text - “any person who believes that he or she is or is likely to be damaged.”

Belmora was a consolidated appeal of a civil suit and a Board cancellation proceeding. On *de novo* review, the Fourth Circuit recognized that exactly the same two-prong *Lexmark* test must be applied to the pleadings in both forums. *Belmora*, at 714. The Fourth Circuit correctly ruled that a statutory “person” must come within the §1064 “zone of interests,” and that “person” must allege an “economic or reputational injury” allegedly “flowing directly”

from, that is, “proximately caused” by defendant’s “conduct” of using a mark that the Lanham Act would disallow. *Belmora*, at 707-08, quoting *Lexmark*. “To determine what parties § 14(3) authorizes to petition [the Board] for cancellation, we again apply the *Lexmark* framework.” *Id.*, at 714.

Even though that Fourth Circuit decision was extensively cited in the parties’ briefs here to the Federal Circuit, the *Corcamore* panel’s opinion leaves the *Belmora* decisions unmentioned.

A conflict between these two Circuits, on the very same issue of how a federal remedial statute applies, is untenable.⁹ Lanham Act §1071(b) permits a party to a final Board decision either to proceed to the Eastern District of Virginia with review in the Fourth Circuit, or optionally, to appeal to the Federal Circuit.¹⁰ The *Corcamore* decision means that the same pleaded allegations, and even the same Board decision on the same statutory issue would receive different treatment in the Fourth Circuit and the Federal Circuit. Now, *Corcamore* condones the “real interest” and “reasonable belief” approach as a workaround *Lexmark’s* two-prong test. That amplifies the conflict between these circuit courts.

⁹ The concurrent jurisdiction of the Federal and Fourth circuits over Board decisions means that “these two circuits play a significant role in TTAB [Board] disputes.” C.H. Farley, *No Trademark, No Problem*, 23 B.U.J. Sci. & Tech. L. 304, 317 (2017).

¹⁰ A party dissatisfied with a Board decision “can seek review in the U. S. Court of Appeals for the Federal Circuit, or it can file a new action in district court.” *B&B Hardware, supra*, 575 U.S. at 144.

The United States Court of Appeals for the Federal Circuit “has entered a decision in conflict with the decision of another United States court of appeals,” specifically the *Belmora* decision of the U.S. Court of Appeals for the Fourth Circuit “on the same important matter,” that is, the standing or entitlement of a statutory “person” to plead for the Lanham Act §1064 remedy of cancelling a registered trademark. U.S. Supreme Court Rule 10(a).

On the First Question Presented, Certiorari should be granted.

I.

ARGUMENT ON “STATUTORY STANDING” THE FIRST QUESTION PRESENTED

A. Factual Predicate

The case facts, in brief, are that the business of SFM, LLC is licensing its “Sprouts” Farmers Market trademarks for “retail grocery store services” to its non-party parent company, a publicly-traded operator of grocery stores.

Corcamore registered its SPROUT trademark for “vending machine services,” in 2009, without objection from the trademark examiner, or opposition from SFM. Corcamore’s SPROUT trademark identified a payment and loyalty card usable only in the vending machines of independent owner-operators that licensed software services associated with the SPROUTONE Card. App. 003. Corcamore has done no business with grocery stores, and its SPROUT trademark never was applied to groceries or any goods sold in retail grocery stores. The First Question Presented focuses on the second *Lexmark* prong of “being damaged,” which requires pleading a Lanham Act injury “proximately tied to the defendant’s conduct.”

Most cancellation cases plead that an application to register a mark was rejected after examination determined another existing trademark registration makes the applied for mark unregistrable. Not here; the trademarks of both SFM and Corcamore were registered years before the Board proceeding commenced. SFM pleaded two

registerability issues, however neither ever was adjudicated. (See, Second Questions Presented, *infra*).

Here, the Board found that SFM’s “alleged ownership of the three prior registrations and the services offered in connection therewith under the marks is sufficient to allege a direct commercial interest and its standing to petition for cancellation.” (unreported May 5, 2017 ruling on Corcamore’s third motion to dismiss). That “sufficient” finding, affirmed by the Federal Circuit, falls short of the statutorily-grounded requirements set out in *Lexmark* to plead “being damaged” by conduct of defendant that “proximately” causes a harm within the “zone of interests” that the Lanham Act protects against.

B. The Federal Circuit Rule – Only An “Intermeddler” With No “Reasonable” Belief of Being Damaged Can Be Barred.

The old maxim from *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (C.C.P.A. 1982), that anyone whose interest is “no more than a mere intermeddler” may oppose registration of another’s trademark, remains the law. The Federal Circuit embroidered onto that its “real interest” and “reasonable belief” approach.¹¹ Then, in 2020, it conflated those, so that a pleading can “demonstrate a real interest and reasonable belief of damage by producing and selling merchandise bearing the

¹¹ “The crux of the matter is ... whether that belief is reasonable and reflects a real interest in the issue.” *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999).

registered mark.”¹² *Corcamore* further equated that approach with the *Lexmark* test, holding that its *Lipton* approach supplants or is on an equal footing with *Lexmark*’s two-prong test. *Lipton* and *Cubatabaco*¹³ remain precedential authority.

The Federal Circuit erred in not following *Lexmark*. The panel misconstrued *Lexmark*’s two-prong test and mistakenly equated it to *Lipton*’s “real” and “reasonable” approach. In *Lexmark* at 136-37, this Court expressly “decline[d] to adopt” the “reasonable interest” approach that, as “typically formulated,” requires the pleader to “demonstrate (1) a reasonable interest to be protected” and “(2) a reasonable basis for believing that the interest is likely to be damaged by the alleged” conduct of the adverse party. The Federal Circuit approach plainly is the same ‘formulation’ that requires one to plead “a real commercial interest in its own marks, and a reasonable basis for its belief that it would be damaged.” *Lipton* at 1029, cited in *Corcamore* at 1304.

This Court repudiated the “reasonable interest” and “reasonable basis” approach, and held that the two-prong test was the law for Lanham Act remedies. The Federal Circuit in *Corcamore* cannot have read that passage, *Lexmark* at 136-137, and then have found “no meaningful differences” between its approach and the “zone of interests” and “proximate

¹² *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1375 (Fed. Cir. 2020).

¹³ *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1275 (Fed. Cir. 2014), *cert. den’d*, 547 U.S. (2006).

causation” test. This Court identified meaningful differences. As formulated, the reasonable interest approach “lends itself to widely divergent application,” and uses “vague language.” *Id.* The “theoretical difficulties” with a “reasonable basis for believing” approach are “even more substantial.” *Id.* This Court ruled, but the Federal Circuit refuses to accept, that the “zone of interests” and “proximate causation” test in *Lexmark* provide “clearer and more accurate guidance than the ‘reasonable interest’ test.”

In *Corcamore*, the Federal Circuit saluted *Lexmark*, but did not follow it. *Corcamore*, at 1306, holds that if a pleading “demonstrates a reasonable belief of damage by the registration of a trademark,” then that also “demonstrates proximate causation” as *Lexmark*’s second prong requires. The “real interest” and “reasonable belief” approach lives on in the Federal Circuit.¹⁴ After *Corcamore*, the TTAB quickly issued rulings to assure pleaders they need only allege standing using the “reasonable belief” approach.¹⁵

What party would not choose to plead the lenient,

¹⁴ “[L]owering the gates for one party lowers the gates for all.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 100 (2013).

¹⁵ After the *Corcamore* decision, the Board began ruling its “prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain applicable,” *Caribbeing Inc. v. Caribbeing Inc., Ltd.*, Cancellation No. 9206493, 2020 WL 7074759, at *6 (TTAB Nov. 30, 2020); “Hargis has a real interest, ... and a reasonable basis for its belief that it will be damaged. ... This conclusion is not altered by the recent [Federal Circuit] decision in *Corcamore*.” *Hargis Indus., Lp, B&B Hardware, Inc.*, Opposition No. 91230220, 2020 WL 6870122, at *3 (TTAB Nov. 6, 2020).

vague “reasonable belief” approach, instead of the more-specific *Lexmark* test? No party before the Board; but only those who plead for Lanham Act remedies in a district court of the Fourth Circuit, where *Lexmark* and *Belmora* govern §1064 standing.

Until the §1064 pleading option that *Corcamore* now allows, and the Federal Circuit’s “real” and “reasonable belief” approach are brought into uniformity with *Lexmark*, and the Fourth Circuit, then “confusion [will] exist[] in the law” (App. 008) that applies to all trademark cancellation and opposition cases. Certiorari should be granted to achieve that uniformity in the law and the Circuits.

C. The Federal Circuit’s Semantical Approach, Asking What is “Real” and Whether A “Belief” is “Reasonable,” Should Be Displaced With *Lexmark*’s Definite Two-Prong Test Tied to the Statutory Text in Lanham Act §1064.

The Federal Circuit has held, based on earlier decisions, that a “real” interest variously could mean a “personal” or “proprietary” interest,¹⁶ a “legitimate” (*viz.* not an intermeddler’s) interest,¹⁷ an “interest in

¹⁶ *Jewelers Vigilance*, 823 F.2d 490, 493 (Fed. Cir. 1987), cited with approval, *Corcamore*, *supra*, at 1306.

¹⁷ *Lipton Indus.*, *supra*, 670 F.2d at 1029 (Ralston “asserts an interest arising from its attempt to obtain a registration”).

the proceeding beyond that of the general public,”¹⁸ or a showing of not being a “mere intermeddler.”¹⁹

None of these non-specific labels are congruent with the Lanham Act “zone of interests.” As *Lexmark* explains, *supra* at 129 & 131, a “statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the’ Lanham Act,” and “a plaintiff must allege an injury,” and not any possible harm to any commercial interest, but rather, that “lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the Act protects.” at 137.

The *Lipton Ritchie*, *Selva* and *Jewelers* decisions are the semantic foundation upon which the Federal Circuit maintains its “real interest” and “reasonable belief” approach to pleading standing in Board cancellation cases. Continued reliance on these earlier Federal Circuit decisions continues the “confusion” that Circuit Judge Reyna acknowledged when authoring the *Corcamore* panel’s opinion.²⁰

¹⁸ *Lipton*, *supra*, at 1028 (must “plead facts sufficient to show a personal interest in the outcome beyond that of the general public”), distinguished in, *Ritchie*, *supra*, 170 F.3d at 1095-96 and cited with approval in *Corcamore*, *supra*, at 1306.

¹⁹ *Selva & Sons*, *supra*, 705 F.2d at 1325–26 (Fed. Cir. 1983), cited with approval, *Corcamore*, *supra*, at 1305 (a real interest bars the “mere intermeddlers or ... meddlesome parties acting as self-appointed guardians of the purity of the Register.”).

²⁰ Dissenting from denial of rehearing en banc, C.J. Wallach urged that “En banc action is necessary to maintain the uniformity our decisions and clarify the impact of *Lexmark* on those decisions.” *Australian Therapeutic*, *supra*, 981 F.3d at

Judge Reyna authored or joined in all three opinions in 2020 about § 1064 “statutory standing” and what facts must be alleged to plead for cancellation of another’s registered trademark.²¹ In the first two of those opinions, the Federal Circuit ignored or mentioned this Court’s holding in “*Lexmark* only in passing.” *Corcamore*, 978 F.3d at 1304.

The Federal Circuit affirmed the Board in *Corcamore* because the panel felt that *Lexmark*’s two-prong test has “no meaningful differences” with the “real interest” and “reasonable belief” aspects of its approach. This erroneous conclusion negates the clarity of *Lexmark*, diminishes its two-part test, and deviates from how each element of that test is tied to the Lanham Act.

Meaningful differences exist between the statutory limits of *Lexmark* “zone of interests” and a “real interest,” or other synonymous label for an alleged “interest” of the “person.” The *Lexmark* “zone of interests” asks what the Lanham Act protects and what marks it allows to be registered. For the Federal Circuit to find that examining the interests that the

1094.

²¹ *Australian Thera.*, *supra*, at 1372 (Fed. Cir. 2020) (“Australian satisfies the statutory requirements to seek cancellation of a registered trademark pursuant to § 1064.”), opinion by C.J. Reyna, *reh. and reh. en banc denied, with dissent* by C.J. Wallach, 981 F.3d 1083 (Dec. 4, 2020).

Kaszuba v. Iancu, 823 F. App'x 973, 979 (Fed. Cir. Aug. 5, 2020), *reh. and reh. en banc denied*, (Oct. 23, 2020) (“HVL sufficiently pled both the real interest and reasonable belief of damage elements of the cause of action under § 1064.”).

Act prohibits (*Lexmark*) is not “meaningfully” different from accepting any self-interest of the pleader (*Corcamore*), was error. Presumably, every commercial entity can assert some commercial intentions. Their commercial self-interest, perhaps to monopolize a brand name, is “real” but that is not tied to an actual injury or to lost sales, and is not tied to a registerability “interest” that the Act protects.

Another essential difference between *Lexmark*’s clear tests and the Federal Circuit’s semantic labels, is that the “zone of interests” considers the interests protected by the Lanham Act, and then asks whether the “person” can tie their pleaded, protected interest to “harm” from conduct that the Act prohibits. *Lexmark* at 131-32.

Also, the “belief” of some hypothetical or remote harm could be alleged, without crossing a Rule 11 boundary, but then, *Lexmark*’s ruling that “a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute” should force a dismissal.²² *Lexmark*, at 132, reminds of the “principle” that “the judicial remedy cannot encompass every conceivable harm.” *Id.* Certiorari should be granted to correct and unify the law that governs the Board’s “limited” statutory power to decide trademark cancellation cases.

²² A “proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Lexmark*, at 133, quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

D. *Lexmark* Requires Allegations that the Adversary’s “Conduct” Proximately Caused a “Harm,” Tied to the Pleader’s “Zone of Interests,” as Defined in the Lanham Act.

The Federal Circuit routinely affirms the Board’s rubber-stamp application of its “real” and “reasonable” approach. Practically any commercial entity’s “interest” and “belief” assertions will pass muster with the Federal Circuit’s approach, even those insufficient to meet this Court’s *Lexmark*’s two-prong test. The Board accepts and the Circuit affirms almost any pleaded “belief” of harm that is not *unreasonable*, even pleadings with no allegations of harm “connect[ed] to the conduct the statute prohibits,” *Lexmark* at 133,” and with no allegations of “harm ... proximately tied to the defendant’s conduct.” *Id.*, at 137.

Causation is the nexus between the prongs of *Lexmark* test and too, that ties the alleged “harm” to the Lanham Act text. Requiring that nexus is another “meaningful” difference between abstract averments of a “real interest” and a “reasonable belief” unconnected to what the Lanham Act protects and conduct that it prohibits.

The Federal Circuit’s analytical framework relies on abstract or semantic labels, not tied to “conduct” prohibited by or “interests” protected by the Lanham Act, and that approach differs meaningfully from the two-prong test and guidance set forth in *Lexmark*. The “zone of interests” and “proximate

causation” prongs are both essential to entitlement to Lanham Act remedies. Thus, both “must be adequately alleged at the pleading stage,” *Lexmark*, at *fn.* 6. Whenever those required “allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed.” *Id.*

In *Corcamore*’s appeal, the Federal Circuit held that pleading a “reasonable basis” for a “belief” of being “damaged” was an adequate alternative to the two-prong test this Court established in *Lexmark*. *Corcamore*, at 1306. The panel found “no meaningful or substantive differences” between its “belief” approach and the “causation” prong of the *Lexmark* test, at *e.g.*, 136-37. It is meaningfully and substantively different to accept any “belief” when this Court rejected that approach, and held that the “relevant question is ... not whether there is a ‘reasonable basis’ for the plaintiff’s claim of harm, but whether the harm alleged is proximately tied to the defendant’s conduct.” *Id.*, at 137.

The Federal Circuit balked at adopting, singularly, the statute-based test from *Lexmark*, at 137, that requires plausible allegations of fact showing the pleader is in the Lanham Act “zone of interests,” and is facing lost sales or reputational damage “proximately tied to the defendant’s conduct.” Instead, the panel mixed together its approach with the *Lexmark* test, and that admixture is a much more lenient version of this Court’s two-prong test.

Here, the Federal Circuit panel held, for the first time, that *either* its “reasonable belief” approach, *or* this Court’s *Lexmark* “proximate cause” standard,

are acceptable options to plead §1064 standing before the Board in cancellation as well as §1063 opposition cases. The panel held that alleging any “reasonable basis” was tantamount to *Lexmark’s* statute-based standard for pleading commercial harm or reputational damage “proximately caused” by, that is, harm having a “sufficiently close connection to the conduct” that the Lanham Act prohibits. *Lexmark*, at 133. In sum, the Federal Circuit says any “party that can demonstrate a reasonable belief of damage by the registration of a mark also demonstrates damage proximately caused by the registered mark.” *Corcamore*, at 1306. The act of “registration” (15 U.S.C. §§1052-1053) is not logically or statutorily equivalent to a “person” being “damaged” §1064).

The ‘new’ amalgamated *Corcamore* approach is meaningfully different from and effectively nullifies the second prong of the *Lexmark* test. This ‘new’ version plainly is the Federal Circuit’s old approach, with the panel’s imprimatur.²³ What is new is that the Federal Circuit’s old approach now is an acceptable exception or alternative to this Court’s two-prong test for standing that the Lanham Act and *Lexmark* require be applied as the singular standard.

The Federal Circuit has reduced *Lexmark’s* definite, two-prong standard to one that is a mile wide and an inch deep. The Federal Circuit’s “real” and

²³ The Federal Circuit has acknowledged that its “real interest” and “reasonable belief” are “judicially-created standing requirements” but to be clear, before the Board “standing is conferred by statute.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012).

“reasonable” approach reads into § 1064 “words that aren't there.” *Romag Fasteners, Inc v. Fossil, Inc.*, ___ U.S. ___, 140 S. Ct. 1492, 1495 (2020). The Federal Circuit’s ‘new’ or amalgamated approach, first adopted in *Corcamore*, deserves to be revised into full uniformity with *Lexmark*.

Significantly, *Corcamore* conflicts with the Fourth Circuit. Rather than falling in line with the *Belmora* decisions of the Fourth Circuit and Eastern District, which strictly follow *Lexmark*, the Federal Circuit strikes off in its own dissonant direction. One troubling impact of that is, in enacting 15 U.S.C. §1071, Congress granted the Federal and Fourth Circuits coordinate authority to review the Board’s final determinations. Now, when one petitions the Board to cancel a mark, standing still can be evaluated using the Federal Circuit’s more lenient “real” and “reasonable” approach. If that same party pleads the same cancellation allegations in a U.S. District Court in the Fourth Circuit, the more stringent *Lexmark* two-prong test must be met.²⁴

²⁴ In a case this Court recently decided, the U.S. Solicitor General argued, in favor of certiorari being granted, that any Fourth Circuit and Federal Circuit “division of authority is especially destabilizing because the Lanham Act's judicial-review provisions allow dissatisfied parties to challenge TTAB decisions in either the Federal Circuit or ...the [U.S.] District Court for the Eastern District of Virginia, where the USPTO is located and where the Fourth Circuit's decision in this case will be binding precedent.” Petition for Certiorari, pg. 13, *USPTO, et al v. Booking.com B.V.*, 2019 WL 2966240 (U.S.).

The Federal Circuit panel has muddied up the two-prong test and deviated from the “clearer accurate and more accurate guidance” spelled out in *Lexmark*. Certiorari should be granted.

E. Certiorari Should Be Granted on the First Question Presented.

A grant of certiorari is needed to clarify whether the operative text of §1064, to paraphrase *Lexmark*, fn. 4, ‘implicates the administrative Board’s statutory *power* to adjudicate’ a petition to cancel a trademark.

Review on certiorari could confirm that the sole, appropriate, and statute-based test for cancellation pleadings is *Lexmark*’s two-prong inquiry and its “clearer and accurate guidance.”

Because the Federal Circuit’s decision in *Corcamore* does not follow this Court’s *Lexmark* precedent, and it conflicts with the Fourth Circuit on the same issue, the petitioner will request that the Board’s decision to cancel the mark be vacated. When a party “prevails under its APA claim, it is entitled to a remedy under the statute, which normally will be a vacatur of the agency’s order.” *Andrx Pharm., Inc. v. Biovail Corp.*, 276 F.3d 1368, 1379 (Fed. Cir. 2002).

II.

ARGUMENT ON “INHERENT AUTHORITY” THE SECOND QUESTION PRESENTED

The second question asks how can an Article I administrative agency, the Trademark Trial and Appeal Board (the “Board”) grant unto itself “inherent authority” equivalent to the powers of an Article III court.²⁵ The Board invoked “inherent authority” to impose a punitive, terminating sanction against the party Corcamore for motion filings and private communications by its attorney. App. 043.

Now, the tribunal of any administrative agency can cite, *Corcamore*, (Fed. Cir., aff’d), as precedent allowing a board to grant itself the “inherent” powers of an Article III court.

A. Condensed Factual Background.

The Federal Circuit affirmed the Board’s final decision to cancel Corcamore’s trademark registration on non-substantive grounds, and thereby to forfeit the “significant... benefits of registration.”²⁶ “[P]ointing to its inherent authority to control its cases and docket, the Board entered judgment as a sanction against Corcamore for litigation misconduct.” *Corcamore*, 978 F.3d at 1302 & App. 007. The Board

²⁵ The Court “has rejected the notion,” however, “that a tribunal exercises Article III judicial power simply because it is called a court and its decisions called judgments.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, — U.S. —, 138 S.Ct. 1365, 1378 (2018).

²⁶ *B&B Hardware, Inc. v. Hargis Indus.*, *supra*, at 143.

never adjudicated any allegation of un-registerability that SFM pleaded.

The Board's aggravation with Corcamore's counsel began with the three Rule 12 motions, urging the *Lexmark* test, then the *Belmora* decisions. (*See, supra*, here at pages 5-7). Although grounded in solid federal court precedent, counsel's motions provoked the Board, which *sua sponte*, invoked, its "inherent authority" to sanction Corcamore. (App. 20). As the Board's May 5, 2017 ruling explained its "December 30th order also imposed a procedural sanction against Respondent, prohibiting Respondent from filing any future unconsented or unstipulated motions without first obtaining prior permission from the Board."

Invoking its "inherent authority," the Board refused to consider Corcamore's motion to compel discovery (App. 022) and its motion for summary judgment. The Board's "inherent authority" sanction orders were deemed violated when Corcamore filed those motions, even though Corcamore first filed requests "for leave" to file. (*e.g.*, App. 21).

This "inherent authority" was ultimately the Board's basis for the punitive, terminating sanction that ended the administrative proceeding in favor of SFM, and forfeited Corcamore's trademark. (App.043) In its order imposing a terminating sanction, the Board reasoned that when attorney conduct, or "misconduct does not squarely fall within the reach of Fed. R. Civ. P. 11, Fed. R. Civ. P. 37(b)(2) or Trademark Rule 2.120(h), the Board may invoke its inherent authority to enter sanctions" directly against the party. Corcamore argued below that these

properly-promulgated rules of civil practice set the limits of the Board's authority.²⁷

The Board acted to punish the party-registrant Corcamore for actions of its counsel outside the presence of the Board.²⁸ After the first, *Lexmark*-based Rule 12 motion, and before the two *Belmora*-based motions (*supra*, pages 5-6), Corcamore's counsel sent a confidential settlement proposal to SFM's counsel. The settlement letter made an allusion to classical history, alluding to the procedural hiatus after the Board order rejecting *Lexmark* and before the *Belmora* motion as a "procedural Rubicon." This aphorism implied that the cases were at a procedural juncture when the parties might consider settlement, before more time was spent skirmishing over the more complex issue of any likelihood of confusion between

²⁷ Article III "federal courts" have "certain 'inherent powers,' not conferred by rule or statute" to sanction a litigant for bad-faith conduct, but before imposing a "punitive" penalty, a federal "court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof." *Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S. Ct. 1178, 1186 (2017).

²⁸ The Board's concern with attorney "misconduct," that is conduct "which occurred outside the presence" of the Board," *Codispoti v. Pennsylvania*, 418 U.S. 506, 534(1974), could have been addressed under extant rules issued under 35 U.S.C. §32. The USPTO "Director may, after notice and opportunity for a hearing, suspend or exclude ...any... attorney shown to ...guilty of gross misconduct, or who does not comply with the regulations established under [Title 35] section 2(b)(2)(D)." That "lesser sanction" against counsel should have been considered before terminating the trademark registration of Corcamore.

“Sprouts” for “retail” grocery store services, and “SPROUT” for vending machine services.

The Board deemed the settlement letter as a ‘threat’ or a “promise.” 129 USPQ2d fn. 36 at 1078. It invoked “inherent authority” to impose a terminating sanction against Corcamore. Also cited for punishment was counsel for Corcamore having hung-up the phone during a ‘meet & confer’ with SFM’s counsel. Counsel’s letter proposing a settlement, or manifest expressions of frustration with discovery dispute stalemates, provide the Board no basis in law or the Lanham Act to impose a punitive, terminating sanction that negates a party-registrant’s trademark.²⁹

Even with substantial evidence that Corcamore’s counsel’s meet and confer efforts lacked civility, or that his *Lexmark/Belmora* motions were “an inordinate number of motions (all of which have been denied) at a very early stage,” App. 028, the Second Question that must be asked, is whether such attorney conduct “warrants the sanction of judgment” against the party Corcamore, and is there any legal authority for the “Board’s inherent authority to enter sanctions.” (App.22 & 043). While those Rule 12 motions could be denied, no statute or rule grants the Board “inherent authority” to punish a party with a terminating sanction.

²⁹ “[E]ven assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct.” *In re Snyder*, 472 U.S. 634, 647 (1985).

The Federal Circuit affirmed the Board’s use of “inherent” powers or authority. In doing so it affirmed as well, any procedural safeguards used by the Board before imposing the terminating sanction against the blameless party Corcamore due to its counsel’s conduct. The Federal Circuit was unpersuaded by Corcamore’s contentions that the Board lacks “inherent” power to order a terminating sanction, and even if it does, that the Board must observe due process and utilize at least the same procedural safeguards as an Article III court.³⁰ The Federal Circuit was unpersuaded that the terminating sanction and taking away Corcamore’s trademark registration required greater regard for due process, and so, it affirmed how the Board handled it.

B. The Board Has No Powers Except Those Congress Has Granted.

The Board only has power to determine the registerability of trademarks according to the provisions of the Lanham Act.³¹ In this case, the Board has authority to determine whether SFM is, or is not, a “person” within the zone of interests who is or may face commercial or reputational damage “proximately

³⁰ Allowing the Board “to make the rule, adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness.” *Int’l Union UMW v. Bagwell*, 512 U.S. 821, 840 (1994), Scalia, J., concurring.

³¹ 3 J. McCarthy, *Trademarks and Unfair Competition* §20:99 (5th ed.). The Board “is an administrative adjudicatory entity of limited jurisdiction” and its “only power is to pass on questions of the registerability of trademarks.”

tied to” conduct of Corcamore that violates the registerability provisions in the Lanham Act, per §1064 and *Lexmark*.

The Board has no power and no “inherent authority” to cancel trademarks for reasons unrelated to the registerability provisions of the Lanham Act.³²

C. The Lanham Act Does Not Grant the Board “Inherent Authority” To Cancel Trademark Registrations.

The “powers” of the Board, “are limited by what has been given to it by specific act of Congress.” *In re U.S.*, 877 F.2d 1568, 1571 (Fed. Cir.).³³ No inherent power to impose a terminating sanction was conferred in the Lanham Act 15 U.S.C. 1064, 1067 – 1068 and 1123.³⁴

The Board “may not confer power upon itself,” and allowing that “would be to grant to the agency

³² Administrative “agencies ...must follow the procedures ‘specifically authorized’ by Congress and cannot rely on their own notions of implied powers.” *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 334 (1961); *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1185 (Fed. Cir. 1994)(the “board’s power is limited to that power expressly granted by statute and does not include the inherent authority of federal courts”).

³³ *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016)(“As a creature of statute the Board has only those powers conferred upon it by Congress.”).

³⁴ When “an agency exercises power beyond the bounds of its authority, it acts unlawfully.” *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, ___ U.S. ___, 140 S. Ct. 1891, 1921 (2020), Justice Thomas, Justices Alito and Gorsuch joined, concurring and dissenting in part.

power to override Congress,” the rule of law, and the separation of powers between the Article I Board and the Article III courts.³⁵ As the adjunct tribunal of an administrative “agency [the Board] literally has no power to act, ... unless and until Congress confers power upon it.” *Louisiana PSC, supra*. The Board is a “creature[] of statute, bound to the confines of the statute that created [it], and lack the inherent equitable powers that courts possess.”³⁶

Simply put, the Board lacks the “inherent” power to impose a punitive, terminating sanction. Certiorari should be granted to make certain its powers are limited, and to prevent “inherent authority,” punitive sanctions.³⁷

The decision of the Federal Circuit panel “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by” an Article I tribunal, “as to call for an exercise of” the Supreme “Court’s supervisory power.” U.S. Supreme Court Rule 10(a).

³⁵ *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1313 (Fed. Cir. 2015), citing, *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986).

³⁶ *Genetics & IVF Inst. v. Kappos*, 801 F. Supp. 2d 497, 509 (E.D. Va. 2011) (cit. om.).

³⁷ Allowing the Board to create inherent authority to terminate cases, without regard to Lanham Act registerability, empowers it to utilize unauthorized powers like “a headless fourth branch of the U.S. Government.” Then C.J. Kavanaugh dissenting in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018), *abrogated by Seila Law LLC v. Consumer Fin. Prot. Bureau*, ___ U.S. ___, 140 S. Ct. 2183 (2020).

The Board endowed itself with “inherent” powers to penalize a party with a terminating sanction, powers equal to Article III court, and equal to civil contempt. It based that on the Board’s amplified reading of a decision about attorney discipline. *In re Bailey*, 182 F.3d 860, 876 (Fed. Cir. 1999). In that case from the Court of Veterans Appeals, no terminating sanction was imposed, and the Circuit court cautioned that even “inherent power cannot carry with it the authority to exercise such power outside the bounds of constitutionally-mandated Due Process.” *Id.*, at 865 fn. 4 (Fed. Cir. 1999), citing, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Corcamore expands so greatly on the limited powers recognized in *Bailey*, that a grant of certiorari is necessary.

D. The Terminating Sanction Against the Party-Registrant Corcamore was Imposed Without the Protections of Due Process.

Even *if* the Board has “inherent authority” to impose a penalizing sanction terminating the administrative proceeding, it must observe at least the due process guarantees attendant to matters in an Article III court.³⁸ The Board stepped beyond “the reach” of civil Rule 11 (App. 035), which it admitted would require the “issuance of an order to show cause and an opportunity for the party to be heard.” App.

³⁸ An Article III “court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process.” *Chambers, supra*, 501 U.S. at 50.

034. Empowered by its “inherent authority” the Board imposed a punitive sanction on the “party” without observing those due process measures.

Furthermore, Corcamore argued that the due process factors set forth, for examples, in *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503-05 (4th Cir. 1977), *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1475-80 (D.C. Cir. 1995) and *Bonds v. D.C.*, 93 F.3d 801, 808 (D.C. Cir. 1996) (reversed sanction), were not evaluated by the Board, or had received only perfunctory treatment (App. 040).³⁹ Unpersuaded by the due process concerns, the Federal Circuit affirmed.⁴⁰ Consider that prejudice never is mentioned in the opinion.

The Second Question here is limited solely to the “inherent authority” of the Board, *vel non*, (App. 040-043), but some details about the two main Rule 37(b) issues are appropriate to mention. In regard to neither party sitting for a Rule 30(b)6 deposition, the Board sanctioned one party. Corcamore filed a motion for a protective order prior to the day noticed for a deposition, and after an unproductive meet & confer.

³⁹ “If administrative tribunals offered extra procedural guarantees that were especially reassuring, it might see reasonable to accept some diminished due process.” Hamburger, Philip, “The Administrative Evasion of Procedural Rights.” NYUJL & Liberty, Vol. 11: 915 (2015).

⁴⁰ The legal and due process concerns around the terminating sanction were not “clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.” *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). See, App. 040.

That motion filing was ruled a violation of the “inherent authority” order. Non-appearance of the deponent on the noticed day was ruled a violation of the “inherent authority” order, and of an order entered *ex parte* denying the protective order.

Corcamore argued below ‘no prejudice’ and disregard for the earlier notice of ‘lesser sanctions.’ It pointed to the Board’s earlier order compelling discovery that had addressed and rejected SFM’s claim of prejudice. That order advised that, if Corcamore was non-compliant that “[i]nasmuch as ... this case is in the pre-trial stage, [that] any potential prejudice can be mitigated by extending the discovery period as necessary to accommodate the deposition.” (Board Discovery Order 2/27/2018, pg. 4). That earlier Board order gave due process notice of the “lesser sanction” of simply extending the discovery deadline, so that the deadline could not be used as a sword or a shield.

Essentially the same ‘no notice’ and ‘never considered lesser sanction’ argument applied to other Rule 37(b) claims. Corcamore’s counsel failed to use email, and used express mail delivery service, to serve a 1000+ page document production that included many documents stamped Confidential. No claim was made that any documents material to SFM’s case were withheld, and the Board found no prejudice. An earlier order informed that the further sanction, *if any*, would be a Rule 37(c) preclusion of material that was not produced. No terminating sanction was threatened. The Board’s final sanction order does not evaluate the threatened “lesser” sanctions of

preclusion or of simply “extending the discovery period as necessary,” that expressly were stated in the Board’s earlier discovery order.

Instead of the “lesser sanction,” plainly noticed in its earlier order, the Board imposed the harsh, punitive, penalty of terminating Corcamore’s trademark rights. No prejudice and no claim that material information was withheld is mentioned anywhere in the Board’s final order.

It is Corcamore’s contention that the terminating sanction was based on the *combination* of “inherent authority” and Rule 37(b). App. 043. The Board has no “inherent” power to issue a punitive, terminating sanction, and so, that final order must be vacated. Even if the Board has authority to impose a punitive, terminating sanction for attorney conduct, then the party-registrant Corcamore is entitled to due process protections, consistent with Article III precedent, before such a sanction can be imposed.⁴¹

E. The Board Order Imposing a Punitive Sanction Based on “Inherent Authority” Should be Vacated.

Again, if certiorari is granted, and Corcamore “prevails under its APA claim, it is entitled to a remedy under the statute, which normally will be a vacatur of the agency’s order.” *Andrx Pharm., Inc. v. Biovail, supra*.

⁴¹ “[N]o doubt, dispensing with constitutionally prescribed procedures is often expedient.” *Oil States Energy Servs., supra*, 138 S. Ct. at 1380, J. Gorsuch and C.J. Roberts, dissenting.

Corcamore would argue that the terminating sanction should be vacated, and the cancellation case be remanded for the Board (1) to reconsider the pleaded allegations consistent with the guidance and two-prong test of *Lexmark*, then (2) to rule on all the substantive allegations specifically those related to registerability.

III. Reasons for Granting the Writ.

A precedential decision interpreting a federal statute, that this Court issued unanimously, should not be modified, and its holding should not be diminished by a panel of the Federal Circuit Court of Appeals. The Federal Circuit does not adhere to the precedential decision in *Lexmark* and does not accept the two-prong test as the singular way for standing to be pleaded in a §1064 Lanham Act claim to cancel another's trademark. The Federal Circuit's approach to standing is meaningfully different from *Lexmark's* two-prong test.

Rather than rule in unison with *Lexmark's* "clearer and accurate" rule of law, the Federal Circuit adds onto its semantic labels⁴² and continues using its "reasonable" approach that this Court rejected. *Lexmark*, at 136-37.

The Federal Circuit's new, alternative, and much more lenient interpretation of §1064 standing conflicts with the Fourth Circuit, which follows

⁴² "This case and many others do not permit of syllogistic resolution by mere application of statutory language to the facts." *Am. Novawood Corp. v. U. S. Plywood-Champion Papers, Inc.*, 426 F.2d 823, 828 (C.C.P.A. 1970).

Lexmark. These two circuit courts have coordinate jurisdiction to hear appeals from the Board, and so, a conflict between how each circuit applies the same federal remedial statute is untenable.

Furthermore, certiorari should be granted to decide an exceptionally important issue of administrative law. Congress never granted the Article I Board the “inherent authority” of an Article III federal court. Here, the Board granted to itself, and then used, “inherent authority” to penalize and punish the blameless party Corcamore. The Federal Circuit affirmed the Board taking on new powers, not conferred by rule or statute, then using its own grant of “inherent authority” to impose a punitive, terminating sanction. Certiorari should be granted because the Board took away Corcamore’s trademark registration for reasons *un*-related to Lanham Act registerability, and acted without the due process procedures that an Article III federal Court would be required to provide.

This Court’s supervisory power needs to be used here, because the Article I Board refused to “consider” Article III precedent (fn. 7, *supra*), and it acted by administrative fiat to grant itself “inherent” powers equal to those of Article III courts.

CONCLUSION

It is respectfully requested that the Court grant certiorari to consider the two questions of §1064 Lanham Act standing and an administrative tribunal’s exercise of “inherent authority” that are presented in this petition.

Respectfully submitted,

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