

ESTTA Tracking number: **ESTTA308304**

Filing date: **09/25/2009**

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

Proceeding	91177036
Party	Plaintiff Nationstar Mortgage LLC
Correspondence Address	Bryce J. Maynard Buchanan Ingersoll & Rooney PC P. O. Box 1404 Alexandria, VA 22314 UNITED STATES bryce.maynard@bipc.com
Submission	Other Motions/Papers
Filer's Name	S. Lloyd Smith
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Signature	//SLS//
Date	09/25/2009
Attachments	91177036PETITION.pdf ( 9 pages )(344584 bytes ) 91177036EXH1.pdf ( 5 pages )(123942 bytes ) 91177036EXH2.pdf ( 7 pages )(192447 bytes ) 91177036EXH3.pdf ( 7 pages )(222818 bytes )



preference for ruling on the merits, as well as the governing precedent in *Cooper Technologies Company v. Denier Electric Co., Inc.* 89 USPQ2d 1478 (TTAB 2008).

Opposer filed its Motion for Summary Judgment ("Opposer's Motion") on August 28, 2009, *four days prior* to the originally scheduled commencement of the testimony period (September 1, 2009). On September 2, 2009, the Board denied Opposer's Motion for failure to comply with Trademark Rule 2.127(a), which requires that briefs filed by the Board shall not exceed 25 pages. Opposer's Motion was 25 pages in substance, with one additional page each for a Table of Contents and a Table of Authorities. Thus, Opposer complied in good faith with the 25 page limit and merely included the Table of Contents and Table of Authorities for the convenience of the Board.

In its September 2, 2009 Order, the Board specifically stated that it was not suspending the proceedings and that the testimony period had opened as scheduled on September 1, 2009. Opposer was thus precluded from filing a revised Motion for Summary Judgment, without the Table of Contents and Table of Authorities. Opposer respectfully submits that it is unaware of any Federal Court in the United States where substantive filings are rejected on the merits without leave to cure because the inclusion of a Table of Contents and Table of Authorities violates page limits.

On September 4, 2009, Opposer filed a Request for Reconsideration asking that the Board reconsider its decision not to suspend the opening of Opposer's testimony period and to allow Petitioner to file a revised Motion for Summary Judgment without a Table of Authorities and Table of Contents complying with the page limit requirements. Opposer argued that this was contrary to the Board's normal procedure as well as established precedent. Opposer submitted a revised Motion for Summary Judgment along with the Request for Reconsideration and asked

that the Board suspend the opening of the testimony period and consider Opposer's revised Motion.

The Board issued a second order (the "Order") denying Opposer's Request for Reconsideration on September 9, 2009. The Board denied the request to reconsider the Board's original order, and refused to consider Opposer's revised Motion. Although the Board suspended the opening of Plaintiff's testimony period until October 8, 2009, the Board has refused to consider a revised Motion for Summary Judgment. For the reasons set forth herein, Opposer respectfully argues that the Board's decision is contrary to established precedent and procedure, and therefore petitions the Director for review of the Board's decision. Opposer requests that the Director order the Board to suspend proceedings and allow Opposer to submit a revised Motion prior to the October 8, 2009 opening of Opposer's Testimony period.<sup>1</sup>

## **II. THE BOARD'S ACTION IS CONTRARY TO ESTABLISHED PRECEDENT AND PROCEDURE**

The Board's decision to refuse Opposer's Motion is directly contrary to the Board's prior holding in *Cooper Technologies Co. v. Denier Electric Co., Inc.* 89 USPQ2d 1478 (TTAB 2008), which the Board actually cited in its Order refusing to consider Opposer's Motion. In *Cooper*, the respondent filed a brief in support of its motion for summary judgment which was 30 pages in length. The applicant filed a response and cross-motion for summary judgment which was 27 pages. The Board concluded that both parties' motions violated the Board's rule regarding page limits for briefs and therefore refused to consider the motions.

However, although the Board in *Cooper* denied both parties' motions, the denials were without prejudice. Moreover, the Board gave the parties time to file revised motions complying with the page limits. The testimony period had originally been scheduled to open on July 16,

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<sup>1</sup> Opposer is filing, concurrently with this Petition to the Director, a Request for Suspension with the Board to

2008, and respondent's summary judgment motion was filed on July 15, 2008. Ex. 1. The Board did not originally enter a suspension order until after the Testimony period had opened.

However, instead of ruling that the testimony period had already opened (as the Board did in the present case in its original order) or resetting the testimony period back a month but denying the respondent the opportunity to file a revised motion (as the Board did in its Order denying Opposer's Request for Reconsideration), the Board in *Cooper* denied the motions without prejudice, moved the testimony period back, and allowed the parties an opportunity to file revised motions complying with the page limits. Both parties eventually filed revised cross-motions for summary judgment, which the Board considered on their merits in May of 2009.

Ex. 2.

Opposer should be entitled to rely on the reasoning of the Board in *Cooper*, and the Board should be required to follow the same procedure as it did in *Cooper*. The Board's decision in *Cooper* clearly states that "This Opinion is A Precedent of the TTAB." Ex. 3. Only a very small percentage of the TTAB's decisions are marked as precedential.<sup>2</sup> Parties appearing before the Board should be entitled to rely on the reasoning of the Board in cases marked as precedential, and should not have to expect that a case with a fact pattern nearly identical to that in a recent precedential decision will be treated differently based on the contradictory reasoning of an interlocutory attorney.

In the present case, the Interlocutory Attorney has failed to explain why he did not follow the precedent set in *Cooper* by i) suspending the case upon receipt of the motion and ii) resetting the trial dates and allowing Opposer the opportunity to file a revised Motion for Summary

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suspend proceedings pending the outcome of this Petition.

<sup>2</sup> For example, in 2006, the Board disposed of 9,378 cases, including 561 decisions after a hearing. [http://www.uspto.gov/go/com/annual/2006/50323\\_table23.html](http://www.uspto.gov/go/com/annual/2006/50323_table23.html). However, the Board issued only 55 decisions as citable precedents. [http://www.uspto.gov/go/com/annual/2006/3020203\\_trdmkttab.html](http://www.uspto.gov/go/com/annual/2006/3020203_trdmkttab.html).

Judgment. The Interlocutory Attorney attempts to distinguish *Cooper* by arguing that "[i]n the instant situation, the motion for summary [sic] was not considered on its merits because it was procedurally defective." Order, at 6. However, the same thing happened in *Cooper* - the motion for summary judgment was procedurally defective because it exceeded the page limit - and the Board still suspended the case, denied the motion without prejudice, and reset the testimony period to allow the parties time to file revised motions for summary judgment. *Cooper*, 89 USPQ2d at 1480.

The Interlocutory Attorney also claims that "Opposer should have known that . . . the Board would not suspend proceedings pending any order on such a defective motion." Reconsideration Order, at 7. However, the Interlocutory Attorney has not explained why Opposer "should have known" that the Board would not suspend proceedings. As Opposer argued in its Request for Reconsideration, TBMP § 510.03(a) states that "when a party to a Board proceeding files a motion which is potentially dispositive of the proceeding, such as . . . a motion for summary judgment, the case will be suspended by the Board."

In the Order denying Opposer's request for reconsideration, the interlocutory attorney pointed out that the next sentence of TBMP § 510.03(a) states that the case is not suspended until the Board issues a suspension order and that all times continue to run until the Board does so. Order, at 5. However, this does not change the fact that the section also states that the Board "will" suspend the case upon the filing of a motion for summary judgment. The sentence cited by the Interlocutory Attorney is included merely to remind parties that they must comply with all outstanding obligations until the Board issues its suspension order; it does not contemplate that the Board may not issue a suspension order.

There is no basis for treating this case differently from the precedential decision in

*Cooper*, nor for not suspending the case. If anything, Opposer in this case is more deserving of an opportunity to file a revised motion than the parties in *Cooper*. Opposer filed its Motion for Summary Judgment a full four days before the testimony period opened, whereas in *Cooper* the respondent's summary judgment motion was not filed until the day before the opening of the testimony period. Moreover, the respondent's summary judgment motion in *Cooper* was 30 pages, exceeding the limit by five full pages, including substantive argument, whereas Opposer's Motion in the present case only contained 25 pages of substantive argument and only exceeded the page limit because Opposer included a Table of Contents and Table of Authorities for the Board's convenience.

The action taken by the Interlocutory Attorney in this case is arbitrary, capricious, and directly contrary to both TBMP § 510.03(a) and the Board's precedential holding in *Cooper*. In addition, in the instant case the Interlocutory Attorney waited until one day after the opening of the testimony period, September 2, 2009, to issue the harsh procedural denial of Opposer's Motion. Due to the Opposer's early August 27, 2009 filing of Opposer's Motion, the Interlocutory could have rejected Opposer's Motion on August 31, 2009, the day before Opposer's testimony period was set to open on September 1, 2009, so that Opposer had time to cure. Thus, the Interlocutory Attorney's delay contributed to the absurd result of denial on the merits.

Further, the Board's action is contrary to the Board's policy of resolving dispositive matters on the merits rather than imposing harsh procedural results. See TBMP §507.01 (citing F.R.C.P. 15(b) allowing consideration of evidence at trial by amendment of pleadings where presentation on the merits will be subserved thereby); TBMP §525 (citing F.R.C.P. 36(b)

allowing withdrawal or amendment of admission where presentation of the merits will be subserved thereby).

In the instant case, re-submission of a corrected brief is particularly appropriate given that Opposer's Motion was filed days before the Federal Circuit's decision in *In re Bose*, No. 08-1448 (Fed.Cir. 2009). Opposer's Motion was filed on August 28, 2009 and relied on the prior fraud standard. *In re Bose* was decided on August 31, 2009, after Opposer's good faith filing of its Opposer's Motion. Thus, a timely or retroactive suspension of Opposer's testimony period prior to its opening on September 1, 2009 would permit Opposer to address *In re Bose*, which it could not have anticipated when it filed Opposer's Motion several days before the ruling. A revised motion by Opposer addressing the new standard for fraud in *In re Bose* will particularly serve presentation on the merits and will frame the issue for trial, if necessary.

Therefore, the Director should grant Opposer's Petition for Review and allow Opposer the opportunity to file a revised Motion for Summary Judgment without a Table of Contents and Table of Authorities.

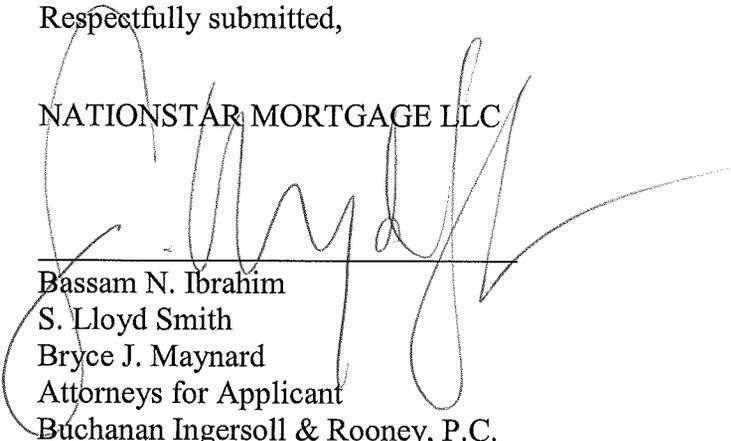
**IV. CONCLUSION**

For the reasons listed above, Opposer respectfully requests that the Director issue an Order requiring the Board to reset the trial dates and allow Opposer an opportunity to file an amended Motion for Summary Judgment.

Respectfully submitted,

NATIONSTAR MORTGAGE LLC

Date: September 25, 2009



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing OPPOSER'S PETITION TO  
DIRECTOR was served this 25<sup>th</sup> day of September, 2009 by first-class mail, postage prepaid, on:

Patrick I. Rea, Esquire  
Taylor & Rea, PLC  
3925 Old Lee Highway, Ste. 200  
Fairfax, VA 22030

Jean Bayou



# EXHIBIT 1



UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

April 11, 2008

PROCEEDING NO. 92048042  
Cooper Technologies Company

v.

Denier Electric Co., Inc.

MOTION TO EXTEND GRANTED

By the Board:

Cooper Technologies Company's consent motion to extend,  
filed Apr 11, 2008, is granted. Dates are reset as set out in  
the motion.

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Search: 

## Cancellation

**Number:** 92048042

**Filing Date:** 08/30/2007

**Status:** Pending

**Status Date:** 08/30/2007

**Interlocutory Attorney:** ANGELA LYKOS

### Defendant

**Name:** Denier Electric Co., Inc.

**Correspondence:** Kathryn E. Smith  
 Wood, Herron & Evans, LLP  
 441 Vine Street, 2700 Carew Tower  
 Cincinnati, OH 45202  
 UNITED STATES  
 ksmith@whepatent.com

**Serial #:** 76350923      Application File

**Registration #:** 2615330

**Application Status:** Cancellation Pending

**Mark:** ROUGH-IN READY

### Plaintiff

**Name:** Cooper Technologies Company

**Correspondence:** Jill A. McWhirter  
 King & Spalding LLP  
 1100 Louisiana St., Suite 4000  
 Houston, TX 77002  
 UNITED STATES  
 cstone@kslaw.com, jmcwhirter@kslaw.com, cduval@kslaw.com

### Prosecution History

#	Date	History Text	Due Date
<u>27</u>	<u>07/13/2009</u>	<u>SUSPENDED</u>	
<u>26</u>	<u>07/13/2009</u>	<u>STIP TO SUSPEND PEND SETTLEMENT NEGOTNS</u>	
<u>25</u>	<u>05/27/2009</u>	<u>MOTION FOR SUMMARY JUDGMENT DENIED</u>	
<u>24</u>	<u>03/27/2009</u>	<u>D'S REPLY IN SUPPORT OF MOTION</u>	
<u>23</u>	<u>03/10/2009</u>	<u>P'S OPPOSITION/RESPONSE TO MOTION</u>	
<u>22</u>	<u>02/23/2009</u>	<u>P'S MOTION GRANTED/PROCEEDING REMAIN SUSPENDED PENDING OUTSTANDING MOTION FOR SJ</u>	
<u>21</u>	<u>02/20/2009</u>	<u>D'S OPPOSITION/RESPONSE TO MOTION</u>	
<u>20</u>	<u>02/17/2009</u>	<u>P'S REPLY IN SUPPORT OF MOTION</u>	
<u>19</u>	<u>02/16/2009</u>	<u>P'S MOTION TO STRIKE</u>	
<u>18</u>	<u>01/26/2009</u>	<u>D'S OPPOSITION/RESPONSE TO MOTION</u>	
<u>17</u>	<u>01/12/2009</u>	<u>SUSPENDED</u>	
<u>16</u>	<u>01/06/2009</u>	<u>P'S MOTION FOR SUMMARY JUDGMENT</u>	
<u>15</u>	<u>12/17/2008</u>	<u>MOTION FOR SUMMARY JUDGMENT DENIED</u>	
<u>14</u>	<u>10/27/2008</u>	<u>P'S OPPOSITION/RESPONSE TO MOTION</u>	
<u>13</u>	<u>10/14/2008</u>	<u>D'S MOTION TO STRIKE</u>	
<u>12</u>	<u>10/07/2008</u>	<u>CHANGE OF CORRESPONDENCE ADDRESS</u>	
<u>11</u>	<u>10/06/2008</u>	<u>P'S REPLY IN SUPPORT OF MOTION</u>	

**Prosecution History**

<b>#</b>	<b>Date</b>	<b>History Text</b>	<b>Due Date</b>
<u>10</u>	09/03/2008	<u>D'S REPLY IN SUPPORT OF MOTION</u>	
<u>9</u>	08/18/2008	<u>P'S OPPOSITION/RESPONSE TO MOTION</u>	
<u>8</u>	07/28/2008	<u>SUSPENDED</u>	
<u>7</u>	07/15/2008	<u>D'S MOTION FOR SUMMARY JUDGMENT</u>	
<u>6</u>	04/11/2008	<u>EXTENSION OF TIME GRANTED</u>	
<u>5</u>	04/11/2008	<u>STIPULATION FOR AN EXTENSION OF TIME</u>	
<u>4</u>	10/09/2007	<u>ANSWER</u>	
<u>3</u>	08/31/2007	<u>PENDING, INSTITUTED</u>	
<u>2</u>	08/31/2007	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	10/10/2007
<u>1</u>	08/30/2007	<u>FILED AND FEE</u>	

Search:

# EXHIBIT 2

**THIS OPINION  
IS NOT AS PRECEDENT  
OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Lykos

Mailed: May 27, 2009

Cancellation No. 92048042

Cooper Technologies Company

v.

Denier Electric Co., Inc.

Before Grendel, Rogers and Taylor, Administrative Trademark Judges.

By the Board:

On August 30, 2007, petitioner filed a petition to cancel respondent's registration on the Principal Register for the mark ROUGH-IN READY for "electric switches and receptacles with attached metal clad cables" in International Class 9<sup>1</sup> on the grounds that respondent's mark is merely descriptive under Section 2(e)(1) of the Lanham Act and has not acquired distinctiveness and is therefore unregistrable pursuant to Section 2(f). In its answer, respondent denied the salient allegations and asserted various affirmative defenses.

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<sup>1</sup> Registration No. 2615330, registered on September 3, 2002, alleging September 14, 2001 as the date of first use anywhere and in commerce.

This case now comes before the Board for consideration of petitioner's motion for summary judgment on the issue of descriptiveness and acquired distinctiveness, and respondent's cross-motion for summary judgment. The parties have fully briefed the motions.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). The evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). The mere fact that both parties have moved for summary judgment does not mean necessarily that summary judgment is appropriate. See *University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994).

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to each motion in favor of the respective nonmoving party, we find that neither party has demonstrated the absence of a genuine issue of material fact for trial. We find that at a minimum, genuine issues of material fact exist as to whether respondent's mark ROUGH-IN READY is used descriptively to refer to its goods; whether respondent has established acquired distinctiveness of its mark during the relevant time frame; and whether respondent's mark may be construed as a double entendre, and therefore registrable without resort to Section 2(f).

In view thereof, the cross-motions for summary judgment are denied.

The parties are advised to consider resolving the instant proceeding by Accelerated Case Resolution ("ACR") in lieu of trial.<sup>2</sup> While, as noted above, the existence of genuine issues of material fact preclude us from granting either party's motion for summary judgment, we advise the parties that they may forego trial and stipulate that their cross-motions for summary judgment and evidence be treated

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<sup>2</sup> For general information regarding ACR, the parties are directed to consult the USPTO web site at [www.uspto.gov/web/offices/com/sol/notices/agronoticerule.pdf](http://www.uspto.gov/web/offices/com/sol/notices/agronoticerule.pdf).

as comprising a portion of the final record.<sup>3</sup> See, for example, *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998). This stipulation would not necessarily preclude the parties from submitting additional evidence under a schedule that could be established to facilitate ACR, or presenting additional argumentation on brief. The parties would, however, have to agree to have the Board reach conclusions as to any issues of material fact in dispute.

In the event of such a stipulation, Board will expedite determination of this matter but decide it in accordance with the evidentiary burden at trial, that is, by preponderance of the evidence. Cf., *Gasser Chair Co. Inc. v. Infanti Chair Manufacturing Corp.*, 60 F.3d 770, 34 USPQ2d 1822, 1824 (Fed Cir. 1995) (in addition to proving elements of claim by preponderance of the evidence, a party moving for summary judgment must also establish no genuine issue of material fact as to those elements). If the parties choose to stipulate to ACR, they must inform the Board in writing prior to the opening of petitioner's first testimony period. The assigned interlocutory attorney from the Board is available to assist the parties in discussing and arranging resolution of the case through ACR.

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<sup>3</sup> Petitioner is reminded that in order to prevail, it must demonstrate its standing to bring this proceeding.

Proceedings herein are resumed, and trial dates are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close:	7/20/09
30-day testimony period for party in position of defendant to close:	9/18/09
15-day rebuttal testimony period for plaintiff to close:	11/2/09

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NEWS FROM THE TTAB:**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:  
<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>

# EXHIBIT 3

THIS OPINION  
IS A PRECEDENT  
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Lykos

Mailed: December 17, 2008

Cancellation No. 92048042

Cooper Technologies Company

v.

Denier Electric Co., Inc.

Before Seeherman, Rogers and Holtzman, Administrative  
Trademark Judges.

By the Board:

On July 15, 2008, respondent filed a motion for summary judgment. In response thereto, on August 18, 2008, petitioner filed a combined brief in opposition to respondent's motion for summary judgment as well as a cross-motion for summary judgment. For the reasons set forth below, both motions are denied without prejudice because the briefs exceed the page limit.

Trademark Rule 2.127(a), which was recently amended to codify the Board's policy stated in *Saint-Gobain v. Minnesota Mining and Manufacturing Company*, 66 USPQ2d 1220 (TTAB 2005) ("*Saint-Gobain*"), concerning page limitations for briefs on motions, provides in relevant part:

Neither the brief in support of a motion nor the brief in response to a motion shall exceed twenty-five pages in length in its

entirety, including table of contents, index of cases, description of record, statement of the issues, recitation of the facts, argument, and summary.<sup>1</sup>

The page limitation for a "brief in response to a motion" applies to a brief in which an opposition to a motion and a cross-motion are combined but address the same issues. In other words, one cannot subvert the page limitation for a brief by filing a combined brief in opposition and cross-motion, when both portions of the combined filing address the same issue raised by the original motion. Similarly, one cannot subvert the limit by filing both a brief in opposition and a separate brief in support of a cross-motion, when both address the same issue. *C.f. Estate of Shakur v. Thug Life Clothing Co.*, 57 USPQ2d 1095, 1096 (TTAB 2000) (respondent improperly attempted to circumvent the page limitation set forth in Trademark Rule 2.127(a) by "dissect[ing] what is a single motion to compel into two motions separately addressing the interrogatories and document requests in order to file briefs totaling 50 pages"). Thus, the rule with regard to page limits applies to the situation presented here, where the combined response

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<sup>1</sup> The rule does not require briefs on motions to include a table of contents, index of cases, description of record, statement of the issues, recitation of the facts, argument, and summary. However, if any of the above are included, they are counted as part of the stated page limit. See *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 72 F.R. 42242, 42256 (August 1, 2007) (comments on briefing of motions).

and cross-motion are filed as a single brief and pertain to the same issues raised in the original motion.<sup>2</sup>

In this particular case, the brief in support of the original motion for summary judgment and the combined brief in response and cross-motion deal with the same issue, specifically, whether either party is entitled to judgment on petitioner's claims; and each brief exceeds the twenty-five page limit. Respondent's brief in support of its motion, including argument, table of contents and index of cases and authorities, is thirty pages in length; and petitioner's combined brief in opposition to respondent's motion and cross-motion for summary judgment, including argument, table of contents and index of cases and authorities, is twenty-seven pages in length.

Although we note that neither party objected to the excessive length of its adversary's brief, the page limitation for briefs on motions is intended to prevent the

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<sup>2</sup> It should be noted that if the original motion and cross-motion involve different issues, the brief in support of the cross-motion will not count against the page limit applicable to the response to the original motion. For example, if the initial motion for summary judgment is on the plaintiff's pleaded ground of priority and likelihood of confusion, but the cross-motion seeks summary judgment on a counterclaim for cancellation of the plaintiff's pleaded registration on the ground of abandonment, the defendant could permissibly file a brief in opposition to the original motion and a brief in support of the cross-motion, and because they would not be addressing the same issue, each could be 25 pages, whether the briefs were filed separately or combined.

filing of unduly long briefs and consequent unnecessary burdens on the Board. The page limitation on briefs cannot be waived by action, inaction or consent of the parties. See *Saint-Gobain, supra*.<sup>3</sup>

Accordingly, we find that both parties' briefs on their respective summary judgment motions violate the Board rule regarding page limitations for briefs on motions. In consequence thereof, opposer's motion for summary judgment and applicant's cross-motion for summary judgment are denied, without prejudice.<sup>4</sup>

Proceedings herein are resumed and trial dates are reset as follows:

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<sup>3</sup> In addition, briefs on motions must be double spaced and in at least 11-point type. See Trademark Rules 2.126(a)(1) and (b).

<sup>4</sup> Respondent's motion to strike petitioner's reply brief (filed October 14, 2008) is therefore moot.

While we have not considered the parties' respective briefs, we nonetheless draw the parties' attention to the following observations. First, respondent has not submitted any evidence that its ROUGH-IN READY mark would be perceived by the purchasing public as a double entendre. Second, evidence that a mark had acquired distinctiveness as of the date of registration can include "material that came into being after the date of registration provided that such material tended to show that as of the time of registration, the mark had acquired a secondary meaning." *Neapco, Inc. v. Dana Corp.*, 12 USPQ2d 1746, 1747 (TTAB 1989). Third, with respect to respondent's contention that petitioner has not properly pleaded its standing, respondent is referred to *Binney & Smith Inc. v. Magic Markers Industries, Inc.*, 222 USPQ 1003 (TTAB 1984) (allegations that a petitioner is engaged in the manufacture or sale of the same or related products as those listed in respondent's involved registration, or that the product in question is one which could be produced in the normal expansion of petitioner's business, constitute a sufficient pleading of standing).

THE PERIOD FOR DISCOVERY TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close:	2/15/09
30-day testimony period for party in position of defendant to close:	4/16/09
15-day rebuttal testimony period for party in position of plaintiff to close:	5/31/09

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NEWS FROM THE TTAB:**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:  
<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>