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

Proceeding	91204057
Party	Plaintiff Activision Publishing, Inc.
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Submission	Motion to Strike
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Date	04/16/2012
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ACTIVISION PUBLISHING, INC.,)	
)	
Opposer)	
)	
v.)	Opposition No. 91204057
)	App. No. 85145554
KABAM, INC.)	Mark: GLOBAL WARFARE
)	
Applicant)	

OPPOSER’S MOTION TO STRIKE APPLICANT’S AFFIRMATIVE DEFENSES

Opposer, Activision Publishing, Inc. (“Opposer”), submits this motion to strike Applicant’s Affirmative Defenses pursuant to Fed. R. Civ. P. 12(f) and TBMP §§ 311.02(b) and 506.01. Each of Applicant’s four Affirmative Defenses as pleaded is a bald, unsupported statement that is an “insufficient defense” under Rule 12(f), and thus this motion to strike should be granted.

Applicant’s Affirmative Defenses state as follows (Answer pp. 3-4):

1. Opposer’s claims are barred by Acquiescence.
2. Opposer’s claims are barred by the doctrine of Unclean Hands.
3. Applicant’s acts are privileged and lawful.
4. Applicant hereby reserves all rights to assert additional defenses should Applicant learn of grounds for such defenses during the course of this proceeding.

The statement at paragraph # 4 is obviously not an affirmative defense, although labeled as such. The statement is merely precatory and does not relate to Opposer’s claims.

Turning to acquiescence in paragraph #1, this defense is not available as to Opposer's pleading that Applicant's mark is merely descriptive (Notice of Opposition ¶ 11) and is generally not available in an opposition proceeding. *Callaway Vineyard & Winery v. Endsley CapitalGroup, Inc.*, 63 USPQ2d 1919, 1923 (TTAB 2002). *See also Barbara's Bakery Inc. v. Landesman*, 82 USPQ 1283, 1292 n. 14 (TTAB 2007) (defense is generally not available). *Cf. Embarcadero Technologies, Inc. v. Delphix Corp.*, Opp. No. 91197762, pp. 4-5 (January 10, 2012) (permitting defense when *Morehouse* defense of prior registration is applicable) (copy attached). Applicant has not pleaded any facts supporting a *Morehouse* defense and so this defense should be stricken.

Likewise, Applicant's pleading of unclean hands in paragraph # 2 should be stricken. *See San Francisco Baseball Associates L.P. v. Gogo Sports, Inc.*, Opp. No. 91203112, pp. 5-6 (March 2, 2012 (TTAB) (copy attached). Applicant's pleading lacks any specificity as to the nature of this defense. *See* TBMP § 311.02(b) ("the pleading should include enough detail to give the plaintiff fair notice of the basis for the defense"). Applicant's unspecified defense may harbor a collateral attack on the validity of Opposer's registration and, in that event, the grounds must be stated by way of a counterclaim. *See* 37 CFR § 2.106(b)(2). Applicant's defense also may harbor a defense based on fraud. *See Hornblower & Weeks*, 60 USPQ2d at 1738 ("[a]ssertion of the defense of unclean hands ... [is] often based on allegations of fraud"). In that regard, Rule 9(b) of the Federal Rules of Civil Procedure would require pleading with particularity.

The defense of unclean hands must directly relate to Opposer's claim. "It thus seems clear that misconduct in the abstract, unrelated to the claim in which it is asserted

as a defense, does not constitute unclean hands.” *Warnaco Inc. v. Adventure Knits, Inc.*, 210 USPQ 307, 313 (TTAB 1981). *See also VIP Foods*, 200 USPQ at 113 (“the defense of unclean hands may not be considered independently of the merits of the plaintiff’s claim”). Without further specifics, Applicant’s pleading must be regarded as insufficient under Rule 12(f) to meet this required element.

Similarly, Applicant’s paragraph #3 pleads, without any specificity, that “Applicant’s acts are privileged and lawful.” The nature of this alleged defense is unfathomable. It is thus unclear whether the Board has jurisdiction to hear this defense. Opposer has not pleaded that Applicant’s use of its mark in commerce was unlawful. Applicant’s asserted “privilege” is simply left to guesswork. This pleading clearly does not provide fair notice of any defense, and thus it should be stricken.

Accordingly, in view of the foregoing deficiencies in Applicant’s pleading and the applicable law, Opposer respectfully requests that this motion be granted and that Applicant’s affirmative defenses be stricken from its Answer.

Date: April 16, 2012

By: Michael Culver

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Certificate of Service

This is to certify that a copy of the foregoing was served this 16th day of April 2012 by email and first-class mail, postage prepaid, on the following as Applicant's attorney of record:

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Attorney for Opposer

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

ACTIVISION PUBLISHING, INC.,)	
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Opposer)	
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v.)	Opposition No. 91204057
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KABAM, INC.)	Mark: GLOBAL WARFARE
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OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES

Attachments

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

Mailed: January 10, 2012

Opposition No. 91197762

Embarcadero Technologies, Inc.

v.

Delphix Corp.

Ann Linnehan, Attorney

This case now comes up for consideration of opposer's motion (filed April 18, 2011) to strike all four of applicant's affirmative defenses in the amended answer.¹ The motion is fully briefed.

The following affirmative defenses are at issue:

[1] Pursuant to Federal Rule of Civil Procedure 8 and 84 and Form 30, Opposer fails to state a claim upon which relief can be granted. Opposer's deficiencies include: (1) the failure to include all indispensable parties, such as the purported owner of the DELPHI mark, Codegear, LLC; (2) the failure to establish a likelihood of confusion between the DELPHI and DELPHIX marks; and (3) Opposer's lack of standing.

[2] Opposer's claims are barred, in whole or in part, by the doctrine of acquiescence. Specifically, on information and belief, Opposer's actions establish its assent to the Applicant's registration of U.S. Trademark Application Serial No. 77/944,256. On information and belief said actions include Opposer [sic] consent to the parties' substantial coexistence without any confusion and Applicant's Registration No. 3,768,914 for the DELPHIX mark, which furthered Applicant's activities in connection with U.S.

¹ The amended answer was filed on March 22, 2011.

Trademark Application Serial No. 77/944,256 and the DELPHIX mark.

[3] Opposer's claims are barred, in whole or in part, by the doctrine of laches. Specifically, on information and belief, Opposer has unreasonably delayed in asserting any claimed rights against Applicant causing material prejudice due to that delay. On information and belief, this unreasonable delay and prejudice includes the parties' substantial co-existence without any confusion or challenge by Opposer as well as Opposer's failure to oppose Applicant's Registration No. 3,768,914 for the DELPHIX mark.

[4] Opposer's claims are barred, in whole or in part, by the doctrine of equitable estoppel. Equitable estoppel "is not limited to a particular factual situation nor subject to resolution by simple or hard and fast rules" *A.C. Aukerman v. R.L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992). Nevertheless, Applicant has relied upon Opposer's misleading conduct including its delay in asserting any claimed rights and on information belief [sic] Opposer's consent to the parties' substantial co-existence without any confusion and Applicant's Registration No. 3,768,914 for the DELPHIX mark, which furthered Applicant's activities in connection with U.S. Trademark Application Serial No. 77/944,256 and the DELPHIX mark, and thereby materially prejudiced Applicant.

In support of its motion, opposer contends that applicant's affirmative defenses as pleaded "are legally insufficient and improper as a matter of law." Opposer further states that although the claimed affirmative defenses in applicant's amended answer provide more detail than the original conclusory affirmative defenses, each affirmative defense is still either improperly pleaded or inappropriate for the instant opposition proceeding and should be stricken.

The Board may, upon motion or by its own initiative, order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. See Fed. R. Civ. P. 12(f). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues under litigation. See, e.g., *FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 194 USPQ 42, 46 (SDNY 1976); *Leon Shaffer Golnick Advertising, Inc. v. William G. Pendil Marketing Co., Inc.*, 177 USPQ 401, 402 (TTAB 1977).

With regard to applicant's affirmative defense no. 1 that the notice of opposition fails to state a claim specifically because of opposer's lack of standing and opposer's failure to establish a likelihood of confusion, the question to be determined is whether the notice of opposition does indeed set forth facts which, if proved, would entitle opposer to the relief it is seeking.² Upon careful review of the notice of opposition, we find that opposer has set forth sufficient allegations to establish, if proven, that opposer has standing to bring this proceeding and to support a pleading of likelihood of confusion under Section 2(d) of the Trademark Act. With

² A plaintiff may utilize the defendant's assertion of failure to state a claim to test the sufficiency of its pleading by moving under Rule 12(f) of the Federal Rules of Civil Procedure to strike this defense from the answer. *S.C. Johnson & Sons, Inc. v. GAF.*, 177 USPQ 720 (TTAB 1973).

regard to applicant's specific assertion that opposer has failed to include all indispensable parties, such as the purported owner of the DELPHI mark, Codegear, LLC, we find that because opposer has alleged that it is also the owner of the pleaded registration through a wholly owned subsidiary, opposer has alleged a sufficient interest in this proceeding for us to conclude that the notice of opposition contains an acceptable assertion of opposer's standing. Therefore, the inclusion of the owner of record, Codegear, LLC, is not required. Applicant's defense of failure to state a claim is, therefore, without merit and will be stricken.

With regard to applicant's second affirmative defense and third affirmative defense concerning acquiescence and laches, the Board notes that generally acquiescence and laches are unavailable in an opposition proceeding. These defenses start to run from the time of knowledge of the application for registration (that is, from the time the mark is published for opposition), not from the time of knowledge of use. See TBMP Section 311.02(b) (3d ed 2011) and cases cited therein. However, there are certain exceptions. For example, if the defendant already owns a registration for essentially the same mark for essentially the same goods or services, acquiescence and laches may be deemed to run from the time action could be taken against

the prior registration. See *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 56 C.C.P.A. 946, 160 USPQ 715 (CCPA 1969). After carefully reviewing applicant's second and third affirmative defenses, we find that such defenses are based on the *Morehouse* defense, are properly pled, and need not be stricken.

With regard to applicant's fourth affirmative defense based on equitable estoppel, the Board finds that applicant has sufficiently pled such a defense and, therefore, it will not be stricken.

In view thereof, opposer's motion to strike is granted with respect to the first affirmative defense and denied with respect to the second, third, and fourth affirmative defenses.

Proceedings herein are resumed. Dates are reset as follows:

Deadline for Discovery Conference	2/10/2012
Discovery Opens	2/10/2012
Initial Disclosures Due	3/11/2012
Expert Disclosures Due	7/9/2012
Discovery Closes	8/8/2012
Plaintiff's Pretrial Disclosures	9/22/2012
Plaintiff's 30-day Trial Period Ends	11/6/2012
Defendant's Pretrial Disclosures	11/21/2012
Defendant's 30-day Trial Period Ends	1/5/2013
Plaintiff's Rebuttal Disclosures	1/20/2013
Plaintiff's 15-day Rebuttal Period Ends	2/19/2013

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.

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

GCP

Mailed: March 2, 2012

Opposition No. 91203112

San Francisco Baseball
Associates L.P.

v.

Gogo Sports, Inc.

By the Trademark Trial and Appeal Board:

This case now comes before the Board for consideration of opposer's motion (filed February 21, 2012) to strike applicant's Affirmative Defense Nos. 1, 5, 6, 9-11 and 14-17 asserted in its answer filed on January 31, 2012.

While the time for applicant to file a response to the motion to strike has yet to expire, the Board, pursuant to its inherent authority to manage its docket, suggested that the issues raised in opposer's motion should be resolved by telephonic conference as permitted by TBMP § 502.06 (3d ed. 2011). The Board advised applicant that it may advance arguments in response to the motion to strike during the telephone conference. The Board contacted the parties to discuss the date and time for holding the phone conference.

The parties agreed to hold a telephone conference on Friday, March 2, 2012 at 2 p.m. Eastern time. The conference was held as scheduled among Richard S. Mandel and Mary L. Kevlin, as counsel for opposer, Al Mohajerian, as counsel for applicant, and George C. Pologeorgis, as a Board attorney responsible for resolving interlocutory disputes in this case.

The Board carefully considered the arguments raised by the parties, as well as the supporting correspondence and the record of this case, in coming to a determination regarding the above matters. During the telephone conference, the Board made the following findings and determinations:

Opposer's Motion to Strike

Opposer's motion to strike is granted, in its entirety, for the reasons set forth below.

Pursuant to Fed. R. Civ. P. 12(f), the Board may order stricken from a pleading any insufficient or impermissible defense, or any redundant, immaterial, impertinent or scandalous matter. See also Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a); and TBMP § 506 (3d ed. 2011). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. See, e.g., *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999); and *Harsco Corp. v. Electrical*

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Sciences Inc., 9 USPQ2d 1570 (TTAB 1988). Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. See, e.g., *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken). Further, a defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. See, generally, Wright & Miller, 5C Fed. Prac. & Proc. Civ.3d § 1381 (2008). Nonetheless, the Board grants motions to strike in appropriate instances.

The affirmative defenses at issue are as follows:

Affirmative Defense No. 1

As a First and Separate Affirmative Defense, Applicant alleges that Opposer's claims in its Notice are barred, in whole or in part, by the doctrine of unclean hands of Opposer.

Affirmative Defense No. 5

As a Fifth and Separate Affirmative Defense, Applicant alleges that Opposer has waived any claims that it may have against Applicant, based on, without limitation, Opposer's knowing delay in enforcing its trademark rights.

Affirmative Defense No. 6

As a Sixth and Separate Affirmative Defense, Applicant alleges that Opposer's claims as set forth in its Notice are barred by the equitable doctrine of laches based on Opposer's delay by failing to, without limitation, claim exclusive ownership of its alleged marks, adequately police its trademarks from use by others, and exercise quality control over the products or services displaying the marks in commerce.

Affirmative Defense No. 9

As a Ninth and Separate Affirmative Defense, Applicant alleges that it acquired the right to use in this case in good faith and has the right under the doctrine of fair use to use this mark in commerce. The term "San Francisco" is merely descriptive, and is used by numerous private and retail agencies and outlets throughout the United States.

Affirmative Defense No. 10

As a Tenth and Separate Affirmative Defense, Applicant alleges that its use of the subject mark in this case is permissible and protected under the First Amendment of the Constitution of the United States.

Affirmative Defense No. 11

As a Eleventh and Separate Affirmative Defense, Applicant alleges that Opposer has failed to mitigate any alleged damages suffered by it and any damages must be reduced by an amount equal to its failure to mitigate.

Affirmative Defense No. 14

As a Fourteenth and Separate Affirmative Defense, Applicant alleges that Opposer cannot establish that Applicant's alleged use creates a likelihood of impairment of the distinctiveness of any alleged famous mark owned by Opposer and Opposer cannot establish the requisite causation necessary to establish harm to any alleged famous mark under the Lanham Act or other applicable state and federal laws.

Affirmative Defense No. 15

As a Fifteenth and Separate Affirmative Defense, Applicant alleges that Opposer cannot establish that

Applicant has engaged in acts of false designation of origin prohibited under the Lanham Act on grounds including, without limitation, that Applicant legitimately used the trademarks, service marks, and/or trade names to identify products and services to the public and are exercising its legitimate trademark rights.

Affirmative Defense No. 16

As a Sixteenth and Separate Affirmative Defense, Applicant alleges that Opposer cannot establish that applicant has engaged in acts of trademark infringement prohibited under the Lanham Act on the grounds including, without limitation, that Applicant legitimately used the trademarks, service marks, and/or trade names to identify products and services to the public and are exercising its legitimate trademark rights. Applicant's mark is unique to Opposer's alleged marks in style, color, and content, is a permissible use of the generic city name and term "San Francisco", and in no way refers to or implies any relation to the San Francisco Giants baseball team.

Affirmative Defense No. 17

As a Seventeenth and Separate Affirmative Defense, Applicant alleges that Opposer cannot establish that Applicant has engaged in acts of unfair competition prohibited by the Lanham Act, state and federal law, and state and federal common law on the grounds including, without limitation, that Applicant legitimately used the trademarks, service marks, and/or trade names to identify products and services and a website to the public and are exercising its legitimate trademark rights. Applicant's mark is unique to Opposer's alleged marks in style, color, and content, is a permissible use of the generic city name and term "San Francisco", and in no way refers to or implies any relation to the San Francisco Giants baseball team.

Turning first to applicant's Affirmative Defense No. 1 of unclean hands, we find that inasmuch as applicant has failed to set forth any allegations of conduct on the part of opposer that would constitute unclean hands, the defense lacks the

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necessary specificity and is therefore stricken as insufficient. See *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987).

We next turn to applicant's Affirmative Defense Nos. 5 and 6 which state that opposer is barred from bringing this case by the doctrine of laches and waiver based upon undue delay.

Our reviewing court has held that the affirmative defense of laches and/or undue delay in bringing a proceeding is inapplicable in opposition proceedings.¹ See *National Cable Television Ass'n Inc. v. Am. Cinema Editors Inc.*, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991). Accordingly, applicant's Affirmative Defense Nos. 5-6 are stricken.

With regard to applicant's Affirmative Defense No. 9, which is based on the "fair use" doctrine, we note that the defense of fair use is inapplicable in situations where, as here, applicant is using its mark as a trademark in commerce. See Section 33(b)(4) of the Trademark Act; 15 U.S.C. Section

¹ The Board notes, however, that "under certain circumstances, a laches defense in an opposition proceeding may be based upon opposer's failure to object to an applicant's earlier registration of substantially the same mark for substantially the same goods." See *Aquion Partners L.P. v. Envirogard Prod. Ltd.*, 43 USPQ2d 1371, 1373 (TTAB 1997). Here, however, applicant has not alleged ownership of an earlier-issued registration of substantially the same mark for substantially the same goods as its involved mark and identified goods to form a valid basis for its laches defense.

Opposition No. 91203112

1115(b)(4). Accordingly, this affirmative defense is inapplicable and therefore also stricken.

We next turn to applicant's Affirmative Defense No. 10 which is based upon applicant's First Amendment constitutional right to use its mark. We note that, as an administrative tribunal, the Board lacks jurisdiction to adjudicate constitutional claims and defenses. See *Blackhorse v. Pro Football, Inc.*, 98 USPQ2d 1633 TTAB 2011) ("the Board does not have authority to determine constitutional claims"). Accordingly, applicant's Affirmative Defense No. 10 is hereby stricken.

Applicant's Affirmative Defense No. 11 is predicated on opposer's failure to mitigate damages. This defense is applicable to claims of trademark infringement and/or unfair competition over which the Board does not have jurisdiction. See e.g., *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768, 1771 n. 5 (TTAB 1994) (the Board has no jurisdiction over claims of trademark infringement and unfair competition.) Accordingly, this affirmative defense is inapplicable in Board proceedings and is therefore stricken.

We next turn to applicant's Affirmative Defense No. 14 which contends that opposer cannot establish that applicant's alleged use of its involved mark creates a likelihood of impairment of the distinctiveness of any alleged famous mark owned by Opposer and Opposer cannot establish the requisite

causation necessary to establish harm to any alleged famous mark under the Lanham Act or other applicable state and federal laws. We note that opposer has not alleged that any of its pleaded marks are famous nor has opposer asserted a claim of dilution by blurring or tarnishment based on an allegation of fame of its pleaded marks. Accordingly, this affirmative defense is not relevant to this proceeding and is hereby stricken.²

With regard to applicant's Affirmative Defense No. 15, we note that opposer has not asserted a claim of false designation of origin and such a claim is nonetheless beyond the scope of the Board's jurisdiction. See TBMP § 102.01 (3d ed. 2011) and cases cited therein. Accordingly, this affirmative defense is not relevant to this proceeding and is therefore stricken.

As to applicant Affirmative Defenses Nos. 16 and 17, we note that the Board does not have jurisdiction to entertain claims of trademark infringement or unfair competition, see *Paramount Pictures Corp. v. White*, *supra*, and nonetheless opposer has not asserted such claims as grounds for opposition. In view thereof, we find that applicant's

² The Board notes, however, that the fame of opposer's pleaded marks is a *DuPont* factor to be considered in our determination of opposer's asserted claim of likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Opposition No. 91203112

Affirmative Defense Nos. 16 and 17 have no relevance to this case and are therefore stricken.

In sum, opposer's motion to strike is granted in its entirety and applicant's Affirmative Defense Nos. 1, 5, 6, 9-11, 14-17 are stricken.

Proceedings herein are resumed. Trial dates are reset as follows:

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Initial Disclosures Due	5/1/2012
Expert Disclosures Due	8/29/2012
Discovery Closes	9/28/2012
Plaintiff's Pretrial Disclosures	11/12/2012
Plaintiff's 30-day Trial Period Ends	12/27/2012
Defendant's Pretrial Disclosures	1/11/2013
Defendant's 30-day Trial Period Ends	2/25/2013
Plaintiff's Rebuttal Disclosures	3/12/2013
Plaintiff's 15-day Rebuttal Period Ends	4/11/2013

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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.