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

Proceeding	91210242
Party	Defendant Norseland Incorporated
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Date	05/15/2014
Attachments	Unlock a Smile Motion to Suspend.pdf(894330 bytes)

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

In the Matter of Trademark Application No.: 85/614,831
For the Mark: UNLOCK A SMILE! And Design
Filed on: May 2, 2012
Published: October 16, 2012

Fromageries Bel and Bel Brands USA,
Inc.,

Opposers,

vs.

Norseland Incorporated,

Applicant.

Opposition No. 91210242

MOTION TO SUSPEND FOR FEDERAL CIVIL ACTION

Applicant Norseland Incorporated (“Norseland”) moves, pursuant to 37 C.F.R. § 2.117, for suspension of the above-captioned proceeding in view of a pending civil action between the parties in the United States District Court Southern District of New York, filed on May 14, 2014, Civil Action No. 14 CV 3488 As support for the instant motion, Norseland advises the Trademark Trial and Appeal Board (hereinafter, the “Board”) of the following:

1. On April 15, 2013, Fromageries Bel S.A. and Bel Brands USA (“Bel Brands”) (collectively, “Bel”) commenced the instant opposition proceeding before the Board against Norseland seeking to prevent the registration of Application Serial No. 85/614,831 which covers the mark UNLOCK A SMILE! and Design.

2. Norseland manufactures and markets a snack cheese product known as “JARLSBERG MINIS” and the JARLSBERG MINIS product is sold individually-wrapped 20-gram cheese wheels, with an outer transparent-yellow plastic wrapper, having an inner yellow wax coating (the “JARLSBERG MINIS packaging”).

3. Some U.S. packaging for JARLSBERG MINIS includes Norseland’s “UNLOCK A SMILE!” stylized trademark & design mark (“UNLOCK A SMILE Logo”), as indicated below:



4. Bel’s Notice of Opposition claims, inter alia, that the trademark UNLOCK A SMILE! and Design is likely to cause confusion with Bel’s registered trademarks SPREAD SMILES (Reg. Nos. 3,441,442 and 3,472,994) and SHARING SMILES (Reg. No. 3,879,288) (collectively, “the SMILE Registrations”).

5. Bel’s Notice of Opposition also asserts that Norseland’s product design or trade dress is confusingly similar to Bel’s purported trade dress in its Mini Babybel products, which Bel describes as “including among other things, a small round cheese portion, a wax wrap and a strip opening which is a featured characteristic of the goods.”

6. Norseland has made a substantial investment in research and equipment to develop and market its product under the UNLOCK A SMILE! and Design trademark and in the JARLSBERG MINIS packaging.

7. Bel has threatened to enforce its purported common law rights in the Mini Babybel trade dress against Norseland based upon an alleged likelihood of confusion with Norseland's JARLSBERG MINIS.

8. A decision in this Opposition proceeding by the Board will not decide Norseland's right to use the JARLSBERG MINIS.

9. Proceedings before the Board have been protracted with the parties obtaining numerous extensions of discovery and trial dates.

10. Norseland was compelled to file a complaint for declaratory judgment against Bel to protect its investment and to obtain our expedited determination of its rights to register and use the opposed UNLOCK A SMILE! and Design trademark and the JARLSBERG MINIS packaging. A copy of the complaint is attached as Exhibit 1.

11. The civil action includes claims of non-infringement of the SMILE Registrations, non-infringement of Bel's asserted Mini Babybel trade dress, and invalidity of Bel's asserted Mini Babybel trade dress.

12. The civil action concerns many of the same issues that Bel has raised before the Board in this Opposition, namely, whether there is a likelihood of confusion between Norseland's use of its UNLOCK A SMILE! and Design trademark and Bel's SMILE Registrations, whether there is a likelihood of confusion between Norseland's JARLSBERG MINIS packaging and Bel's purported Mini Babybel trade dress, and whether Bel's purported trade dress is valid. The civil action also concerns Norseland's right to use the UNLOCK A SMILE! And Design trademark and Norseland's JARLSBERG MINIS packaging.

13. The final determination of the issues now before the court will be dispositive of the issues in the above-captioned proceedings. Moreover, the decision of the United States District Court for the Southern district of New York will be binding on the Board. See Trademark Trial and Appeal Board Manual of Procedure § 510.02(a).

14. Suspension of these proceedings will conserve the Board's resources. WHEREFORE, Norseland respectfully requests that the instant motion be granted and the proceedings suspended until the disposition of the Norseland civil action.

Respectfully submitted,

FOX ROTHSCHILD LLP

Dated: New York, NY
May 15, 2014

By: /Perla M. Kuhn/

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CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, not a party to this action, and that on the 15th day of May, 2014, I caused to be served a true and correct copy of the foregoing Norseland's Motion to Suspend for Federal Civil Action by e-mail to counsel for the Opposer, addressed as follows:

Jess M. Collen
jcollen@collenip.com

Lisa A. McAndrews
Lmcandrews@collenip.com

I further certify under penalty of perjury that the foregoing is true and correct.

Dated: New York, NY
May 15, 2014

By: /Varant Ekmekjian/
Varant Ekmekjian

EXHIBIT 1

JUDGE KEEN

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14 CV 3488

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORSELAND, INC.,

Plaintiff,

v.

FROMAGERIES BEL S.A. and BEL
BRANDS USA, INC.,

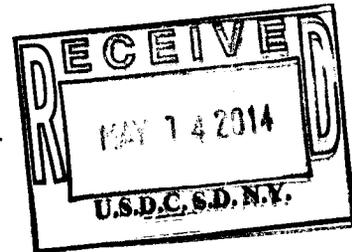
Defendants.

Civil Action No.

ECF CASE

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Jury Trial Demanded



Plaintiff Norseland, Inc. ("Norseland" or "Plaintiff"), by its attorneys, Fox Rothschild LLP, for its complaint for declaratory judgment against defendants Fromageries Bel S.A. ("Fromageries Bel") and Bel Brands USA, Inc. ("Bel Brands") (collectively, "Bel" or "Defendants") alleges as follows:

NATURE OF ACTION

1. This is an action for declaratory judgment of non-infringement of purported trademarks and trade dress owned by Bel. Bel has alleged, through detailed written demands, specific threats of legal action, and allegations made in the course of related pending legal action, that Norseland's JARLSBERG MINIS (small, individually packaged versions of its well-known

and established large JARLSBERG cheese wheels) infringe Bel's purported trade dress and trademark rights.

2. In particular, Bel claims that it has exclusive right to sell individual cheese portions in a rounded shape, wax wrap, an outer cellophane form, and with a "peel-able" opener, such as a string or paper strip to aid in breaking the wax seal. Bel sells its mini cheese wheels in a plastic net bag.

3. Bel also claims that Norseland's use of the mark UNLOCK A SMILE for JARLSBERG MINIS infringes Bel's purported exclusive rights in the marks SPREAD SMILES and SHARING SMILES for cheese spreads by virtue of Bel's federal registrations or purported common law rights.

4. Norseland seeks a declaration that, contrary to Bel's allegations, none of Bel's trademark or trade dress rights, if any, is infringed by the JARLSBERG MINIS products or Norseland's marks and advertising for those products.

PARTIES

5. Plaintiff Norseland is a corporation organized and existing under the laws of the state of Connecticut, having its principal place of business at 3 Parklands Drive, Darien, CT 06820.

6. Defendant Fromageries Bel is a corporation organized and existing under the laws of France, having its principal place of business at 16 Boulevard Malesherbes, F-75008 Paris, France.

7. Defendant Bel Brands is a corporation organized and existing under the laws of Wisconsin, having its principal place of business at 30 South Wacker Drive, Suite 3000, Chicago, Illinois 60606.

JURISDICTION AND VENUE

8. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 and the Lanham Act, 15 U.S.C. § 1051 *et seq.*

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1121(a), as Norseland's claims arise under the laws of the United States, namely the Lanham Act and Declaratory Judgment Act.

10. The Court has personal jurisdiction over Bel by virtue of Bel's specific and continuous contacts in this District and the State of New York. Specifically, Bel has in the past conducted and does presently conduct business in this District by marketing, promoting, advertising, offering for sale, and distributing products either through wholesalers or retailers or direct to consumers. Bel has purposefully and voluntarily placed its food products, including, but not limited to, the cheese products sold under the alleged trademarks and trade dress at issue in this action, into the stream of commerce with the expectation that retail businesses and consumers in this District and in the State of New York will purchase such products.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because both parties actively market their products in this District.

FACTUAL BACKGROUND

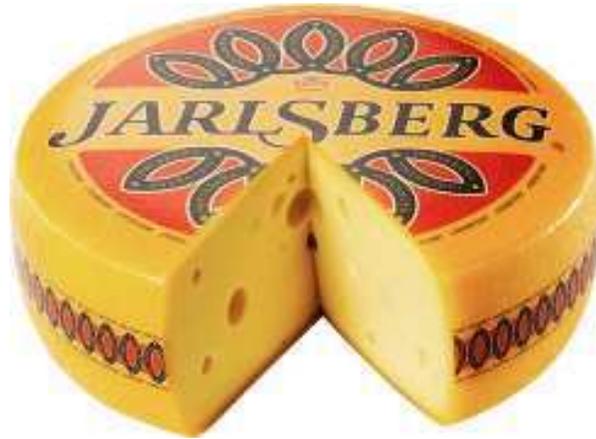
Norseland's Business and Products

12. Norseland is an importer of specialty cheeses into the United States market.

13. In particular, Norseland is the exclusive importer and sales and marketing agent for JARLSBERG® brand cheeses.

14. Full-size JARLSBERG cheese wheels are manufactured and produced in Norway by Tine S.A. and have a worldwide reputation for excellence.

15. JARLSBERG cheese is a semi-soft, part-skim cheese with a sweet, nutty taste and buttery texture, and is currently sold in wheel and loaf form. Wheels of JARLSBERG have a yellow wax coating, and are packaged with a distinctive JARLSBERG logo, indicated below:



16. The JARLSBERG mark and variations of the distinctive JARLSBERG logo, are registered trademarks of Tine S.A, including U.S. Registration Nos. 980,057; 3,021,151; 3,378,860; 3,464,335; and 4,159,763. By virtue of long registration and extensive use and sales, the JARLSBERG marks have acquired enormous good will.

17. Norseland is licensed to use the JARLSBERG trademarks in the United States and to produce JARLSBERG brand cheese in Ohio, USA.

Norseland’s JARLSBERG Minis Packaging Design

18. Norseland currently manufactures and markets a snack cheese product known as “JARLSBERG MINIS” in the United States market, under license from Tine S.A. Unlike the full size JARLSBERG cheese wheels, JARLSBERG MINIS are made in the United States.

19. Norseland has made substantial investments in equipment and research and development for the production of JARLSBERG MINIS.

20. JARLSBERG MINIS are intended to be miniature versions of the full-size JARLSBERG cheese wheels. Thus, the manufacture, marketing, and sale of the JARLSBERG MINIS capitalize on the wide recognition and fame of the JARLSBERG brand.

21. This product is sold in individually-wrapped 20-gram cheese wheels, with an outer transparent-yellow plastic wrapper featuring the distinctive JARLSBERG MINIS logo, which is substantially similar to the famous JARLSBERG logo. The consumer packaging—i.e., the bags containing multiple individually wrapped JARLSBERG MINIS—depicts the famous JARLSBERG logo.

22. The JARLSBERG MINIS also have an inner yellow wax coating similar to that used on full-sized JARLSBERG wheels (these elements in combination are referred to herein as the “JARLSBERG Minis U.S. Packaging”), as depicted below:



23. Some U.S. packaging for JARLSBERG Minis includes Norseland’s “UNLOCK A SMILE!” stylized trademark & design mark (“UNLOCK A SMILE Logo”), as indicated below:



24. The UNLOCK A SMILE Logo is also the subject of Norseland’s pending U.S. Application Serial No. 85/614,831 (“the ‘831 App.’”).

25. Bel has opposed registration of the ‘831 App. in Opposition No. 91210242, alleging that there is a likelihood of confusion between Norseland’s UNLOCK A SMILE Logo and Bel’s various SMILE marks, which are described in more detail below.

Bel’s Allegations Against Norseland

26. Bel’s “The Laughing Cow” brand of cheeses is imported from France. Among its products are MINI BABYBEL snack cheeses.

27. These MINI BABYBEL snack cheeses are sold in net bags featuring six to ten individually-wrapped 21-gram cheese wheels. Each wheel has an outer cellophane wrapper featuring Bel’s “Laughing Cow” mascot, the MINI BABYBEL mark, and an inner wax coating that can be removed by pulling on an integrated tab.

28. There are eight products in the Mini Babybel lineup; seven use red-colored wax for the inner coating, while one product - MINI BABYBEL BONBEL - has a yellow coating. The inner wax coating is not visible to consumers at point-of-purchase since all are sold in net bags.

29. All Mini Babybel products use a paper strip to aid the consumer in breaking the seal of the protective wax coating.



30. As touted by Bel's advertising, the wax coating functions to protect the cheese, and the integrated opening strip functions to make the various types of cheese "Fun and Easy to Open," because consumers may just "Peel and pull to enjoy this tasty little snack on the go," as depicted in one sample advertising image below:



31. Absent such an opening strip, the wax seal would be difficult for consumers to break without use of a knife or risk of deforming the cheese and thus would make the product much less desirable.

32. Bel uses similar opening strips in other snack-size cheese products, such as its LAUGHING COW brand individually wrapped cheeses, where the strip functions to open the wrapping, as depicted below.



33. The opening strip is also useful in manufacturing by allowing the cheese to be easily dipped into molten wax.

Bel's Letter to Norseland Threatening Litigation

34. On December 19, 2012, Bel sent a letter to Norseland asserting that: (1) Norseland's UNLOCK A SMILE Logo infringes Bel's family of SMILE trademarks, including PUT A SMILE IN YOUR STOMACH and SPREAD SMILES; (2) Norseland's JARLSBERG MINIS trademark infringes Bel's MINI BABYBEL trademark; and (3) the JARLSBERG MINIS U.S. Packaging infringes the alleged trade dress associated with the Mini Babybel products (the "Mini Babybel Trade Dress"). Bel's letter, dated December 19, 2012, is annexed hereto as Exhibit A.

35. The letter alleged that the Mini Babybel Trade Dress consists of “a round shape, a wax wrap with an outer cellophane form, and a ‘peel-able’ opener.” Bel’s letter also made reference to the color yellow and the 20-gram product portion. *See* Exhibit A, at 1.

36. In particular, the letter contained the following allegations of infringement, among others:

Your mark not only has appropriated our clients’ trademark in a manner which is *confusing* under the Lanham Act. This product is sold using a *confusingly similar* trade dress. In fact, the JARSLBERG MINIS product has adopted – wholesale – innumerable words, designs, and trade dress elements to replicate almost exactly our clients’ product. This is *undoubtedly causing great confusion* among consumers, and moreover, is highly damaging to Bel Brands and Fromageries Bel.

(emphasis added).

37. Significantly, the letter emphasized that Bel’s dispute goes beyond Norseland’s pending trademark application, in stating: “Our concern, therefore, is not limited only to this confusingly similar trademark application. *The product itself and its packaging are highly objectionable*” (emphasis added). Therefore, even if Norseland is able to prevail in the currently pending opposition proceeding (discussed below), Bel has made clear that it intends to pursue legal remedies against Norseland’s product itself and product packaging. Only a district court, not the U.S. Patent and Trademark Office, has authority to resolve that dispute.

38. Bel’s letter made clear that Bel is alleging willful infringement by stating, “Norseland is a company which is no stranger to Bel and its products, and this factor *precludes any possibility of innocent infringement*” (emphasis added).

39. In concluding its letter, Bel warned of “significant legal entanglements,” and encouraged Norseland to take “immediate action.” *See id.*, at 4.

40. Norseland, through its counsel, sent a letter in response on January 17, 2013.

Norseland's letter, dated January 17, 2013, is annexed hereto as Exhibit B.

Bel's Opposition to Norseland's Marks

41. On April 15, 2013, Bel commenced an Opposition proceeding at the Trademark Trial and Appeal Board ("TTAB") against Norseland, seeking to prevent the registration of the '831 App., which covers the UNLOCK A SMILE Logo.

42. Bel's Notice of Opposition claims that the UNLOCK A SMILE Logo is likely to cause confusion with Bel's registered trademarks SPREAD SMILES (Reg. Nos. 3,441,442 and 3,472,994) and SHARING SMILES (Reg. No. 3,879,288) (collectively, "the SMILE Registrations). The Notice of Opposition No. 91210242 is annexed hereto as Exhibit C.

43. Bel's Notice of Opposition also asserts that Norseland's product design is confusingly similar to the Mini Babybel Trade Dress, which Bel describes as "including among other things, a small round cheese portion, and a strip opening which is a featured characteristic of the goods."

Conclusion

44. In light of Bel's cease-and-desist letter and an ongoing legal proceeding between the parties, Bel has communicated an imminent threat of legal action in pursuit of its trademark and trade dress claims and has taken legal action against Norseland.

CAUSES OF ACTION

AS AND FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment of Non-Infringement of Bel's Asserted Trademarks)

45. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 35 of the Complaint with the same force and effect as if fully stated herein.

46. Bel has threatened to enforce its rights in the SPREAD SMILES mark, Registration No. 3,441,442, against Norseland based upon an alleged likelihood of confusion with Norseland's UNLOCK A SMILE trademark.

47. Bel has threatened to enforce its rights in the SPREAD SMILES mark, Registration No. 3,472,994, against Norseland based upon an alleged likelihood of confusion with Norseland's UNLOCK A SMILE trademark.

48. Bel has threatened to enforce its rights in the SHARING SMILES mark, Registration No. 3,879,288, against Norseland based upon an alleged likelihood of confusion with Norseland's UNLOCK A SMILE trademark.

49. Bel has threatened to enforce its purported common law rights in the SPREAD SMILES and SHARING SMILES marks against Norseland based upon an alleged likelihood of confusion with Norseland's UNLOCK A SMILE trademark.

50. Bel has taken action to enforce its "Smiles" marks against Norseland through its Opposition.

51. Norseland actively markets and sells cheese snacks bearing the JARLSBERG MINIS U.S. Packaging and the JARLSBERG, JARLSBERG MINIS, and UNLOCK A SMILE trademarks or otherwise advertised and sold in connection with the aforementioned marks and intends to continue doing so indefinitely.

52. Prominent use of the famous JARLSBERG marks alleviates any possible likelihood of confusion between Norseland's UNLOCK A SMILE mark and Bel's SMILE marks as well as between the trade dress of the respective parties.

53. An actual and justiciable controversy exists between Norseland and Bel with respect to Bel's SMILE Registrations and purported common law rights in the SMILE mark.

54. Declaratory relief will resolve this controversy.

55. Accordingly, Norseland respectfully asks this Court to declare that Norseland's use of the mark UNLOCK A SMILE in connection with the sale and marketing of JARLSBERG MINIS does not infringe Bel's SMILE Registrations and common law rights.

AS AND FOR A SECOND CAUSE OF ACTION

(Declaratory Judgment of Non-Infringement of Bel's Purported Trade Dress)

56. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 46 of the Complaint with the same force and effect as if fully stated herein.

57. Bel has asserted in written demands, in the form of a demand letter and in pleadings and discovery in the Opposition, that Norseland's JARLSBERG MINIS products infringe Bel's purported trade dress in its Mini Babybel products.

58. Bel has alleged in its Opposition that "Applicant's use of the stylized representation of a small round cheese opening with a strip is highly similar Bel's trade dress which Bel uses to sell its cheese products." *See* Exhibit C, at ¶14.

59. Bel has identified, as its protected Mini Babybel Trade Dress, "a round shape, a wax wrap with an outer cellophane form, and a 'peel-able' opener." *See* Exhibit A, at 1.

60. Bel has threatened to enforce its purported trade dress rights in the Mini Babybel products against Norseland based upon an alleged likelihood of confusion with Norseland's JARLSBERG MINIS products.

61. Bel has alleged a likelihood of confusion between purported trade dress against Norseland through the Opposition.

62. Norseland actively markets and sells cheese snacks bearing the JARLSBERG Minis U.S. Packaging and the JARLSBERG, JARLSBERG MINIS, and UNLOCK A SMILE

trademarks or otherwise advertised and sold in connection with the aforementioned marks and intends to continue doing so.

63. There is no likelihood of confusion between Norseland’s JARLSBERG MINIS packaging and Bel’s purported trade dress.

64. An actual and justiciable controversy exists between Norseland and Bel with respect to Bel’s Mini Babybel Trade Dress.

65. Declaratory relief will resolve this controversy.

66. Accordingly, Norseland respectfully asks this Court to declare that Norseland’s use of the JARLSBERG MINIS U.S. Packaging in connection with the sale and marketing of JARLSBERG MINIS does not infringe Bel’s rights concerning the Mini Babybel Trade Dress.

AS AND FOR A THIRD CAUSE OF ACTION

(Invalidity of Bel’s Purported Trade Dress)

67. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 57 of the Complaint with the same force and effect as if fully stated herein.

68. Bel has identified, as its protected Mini Babybel Trade Dress, “a round shape, a wax wrap with an outer cellophane form, and a ‘peel-able’ opener.” *See* Exhibit A, at 1.

69. Bel’s Mini Babybel Trade Dress is functional.

70. Upon information and belief, wax wrap is a common method of packaging cheese and functions to protect the cheese and serve as a primary wrapper.

71. Upon information and belief, the peel-able opener functions to provide an easy and quick way for a consumer to remove the wax wrap. Bel’s own advertising touts this utility by describing the Mini Babybel as “Fun and Easy to Open.”

72. Upon information and belief, the round shape functions to allow for optimal coverage from the wax wrap, and is reminiscent of a full-sized cheese wheel.

73. Upon information and belief, the color yellow is a typical color for cheese rinds and functions to identify the contents as cheese.

74. Foreclosing Norseland from using the aforementioned features would place Norseland at a significant non-reputation-related disadvantage.

75. Additionally, the aforementioned features of Bel's purported trade dress do not hold secondary meaning in the cheese snack marketplace.

76. Upon information and belief, the round shape is generically used as a shape for cheese wheels. Similarly, a wax wrap or covering is generically used to cover and protect cheese.

77. Upon information and belief, the color yellow is descriptive of cheese.

78. An actual and justiciable controversy exists between Norseland and Bel with respect to Bel's Mini Babybel Trade Dress.

79. Declaratory relief will resolve this controversy.

80. Accordingly, Norseland respectfully asks this Court to declare that Bel's Mini Babybel Trade Dress is not valid and unprotectable because it is functional and does not have secondary meaning.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Norseland respectfully requests that the Court grant the following relief:

- A. Render judgment in favor of Plaintiff and against Defendants;
- B. Declare that Plaintiff has not and does not infringe the SPREAD SMILES Registration (U.S. Registration No. 3,441,442);

- C. Declare that Plaintiff has not and does not infringe the SPREAD SMILES Registration (U.S. Registration No. 3,472,994);
- D. Declare that Plaintiff has not and does not infringe the SHARING SMILES Registration (U.S. Registration No. 3,879,288);
- E. Declare that Plaintiff has not and does not infringe any common law trademark rights of Defendant in the SMILE marks;
- F. Declare that Plaintiff has not and does not infringe any trade dress rights of Defendant in the Mini Babybel Trade Dress;
- G. An Order requiring Defendant to pay Plaintiff's costs, expert and attorney's fees in this action; and
- H. Awarding such further and other relief as this Court deems appropriate, just and equitable.

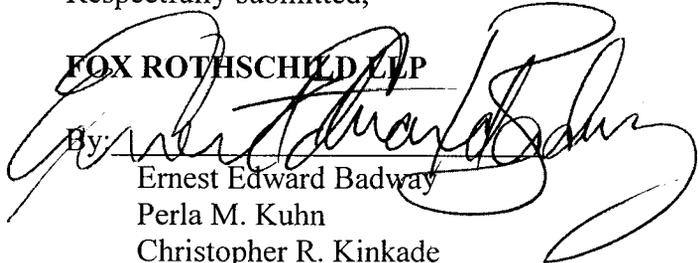
JURY TRIAL DEMANDED

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Norseland, Inc. hereby demands a trial by jury as to all issues properly so tried.

Dated: New York, New York
May 14, 2014

Respectfully submitted,

FOX ROTHSCHILD LLP

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