

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: February 3, 2016

Opposition No. 91217154

Nasty Pig, Inc.

v.

Janoskians LLC

George C. Pologeorgis,
Administrative Trademark Judge:

This proceeding now comes before the Board for consideration of Applicant's motion (filed October 12, 2015) for leave to amend its answer to add certain additional affirmative defenses, as well as a counterclaim that seeks to cancel Opposer's pleaded Registration No. 2800386 and recently issued Registration No. 4809230 on the grounds of fraud, genericness, mere descriptiveness, functionality, and that marks subject to the aforementioned registrations constitute immoral and/or scandalous matter under Section 2(a) of the Lanham Act.¹ The motion is fully briefed.²

¹ The Board notes that, by way of its motion, Applicant also seeks to reopen discovery in order to allow Applicant to take discovery on its proposed counterclaim and new affirmative defenses. Additionally, Applicant's change of correspondence address filed on December 8, 2015 is also noted. Board records have been updated accordingly.

² On January 8, 2016 and January 27, 2016, Opposer filed submissions of supplemental authority in further support of its opposition to Applicant's motion for leave to amend its pleading. By way of these submissions, Opposer seeks to bring to the Board's attention (1) the recent *en banc* decision issued on December 22, 2015 by the U.S. Court of Appeals for the Federal Circuit in *In re Tam*, 117 USPQ2d 1001 (Fed. Cir. 2015) which held the disparagement provisions under Section 2(a) of the Lanham Act unconstitutional, and (2) a

Background

Applicant seeks to register the mark DIRTY PIG, in standard characters, for the following goods in International Class 25:

Belts; Blouses; Bottoms; Flip flops; Footwear; Headbands; Headwear; Hosiery; Jackets; Jeans; Knitted underwear; Leggings; Lingerie; Long underwear; Loungewear; Mukluks; Neckwear; Pajamas; Pants; Pantyhose; Robes; Sandals; Sarongs; Scarfs; Shirts; Shorts; Sleepwear; Slipper socks; Slippers; Suits; Sweat bands; Sweat jackets; Sweat pants; Sweat shirts; Sweat shorts; Sweat suits; Thermal underwear; Tops; Underwear; Wearable blankets in the nature of blankets with sleeves; Wrist bands.³

On July 2, 2014, Opposer filed a notice of opposition opposing the registration of Applicant's involved mark solely on the ground of likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). In support of its asserted claim, Opposer, *inter alia*, pleaded ownership of a registration⁴ and a pending

letter brief filed by the Department of Justice in the matter of *In re Brunetti*, Case No. 2015-1109 (Fed. Cir.) currently pending before the Federal Circuit that states that the Board's decision affirming a refusal to register a mark under the scandalous/immoral provisions of Section 2(a) of the Lanham Act should be vacated and remanded for further proceedings because the ban on scandalous marks is no longer viable under the *In re Tam* decision. The Board is fully aware of the Federal Circuit's *In re Tam* decision. However, that decision did not specifically opine on the constitutionality of the scandalous/immoral provision under Section 2(a) of the Lanham Act. That being said, the Board notes that the Federal Circuit, in an order issued in *In re Brunetti*, Appeal No. 2015-1109 (Fed. Cir. December 22, 2015), has directed the parties in that matter to file briefs explaining how the *Brunetti* appeal, which involves the scandalous/immoral provision of Section 2(a) of the Lanham Act, should be resolved in light of the court's opinion in *In re Tam*.

³ Application Serial No. 86085785, filed on October 8, 2013, based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Lanham Act, 15 U.S.C. § 1051(b).

⁴ Registration No. 2800386, registered on December 3, 2003, Section 8 and 15 Affidavits accepted on December 30, 2013.

application⁵ both for the mark NASTY PIG, in standard characters, for various goods and services, including clothing items, bedding, leather goods, jewelry items and retail and online store services featuring the goods.

On July 22, 2014, Applicant filed its answer to the notice of opposition and asserted various affirmative defenses. Discovery in this matter, as last reset, closed on August 28, 2015.

Applicant's Motion For Leave To Amend The Pleadings

For purposes of this order, the Board presumes the parties' familiarity with the pleadings, the history of the proceeding and the arguments and evidence submitted with respect to Applicant's motion for leave to amend its pleading.

For the reasons explained below, Applicant's motion for leave to amend is **denied** with regard to Opposer's pleaded Registration No. 2800386, but **granted** as it pertains to Opposer's recently-issued Registration No. 4809230 to the extent noted below.

Inasmuch as Applicant filed its original answer more than twenty one days ago, Applicant may amend its answer only by written consent of Opposer or by leave of the Board. *See* Fed. Civ. P. 15(a); TBMP § 507.02(a) (2015).

Under Fed. R. Civ. P. 15(a), leave to amend pleadings shall be freely given when justice so requires. Consistent therewith, the Board liberally grants leave to amend pleadings at any stage of the proceeding when justice requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the

⁵ Application Serial No. 86114145, filed on November 8, 2013. The Board notes that Opposer's pleaded pending application matured into a registration during the course of this proceeding on September 8, 2015, i.e., Registration No. 4809230.

adverse party or parties. *See Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993); *United States Olympic Committee v. O-M Bread Inc.*, 26 USPQ2d 1221 (TTAB 1993).

The timing of the motion for leave to amend is a major factor in determining whether Opposer would be prejudiced by allowance of the proposed amendment. *See* TBMP § 507.02 and cases cited therein. A motion for leave to amend should be filed as soon as any ground for such amendment, e.g., newly discovered evidence, becomes apparent. A long delay in filing a motion for leave to amend may render the amendment untimely. *See International Finance Company v. Bravo Co.*, 64 USPQ2d 1597, 1604 (TTAB 2002). Any party who delays filing a motion for leave to amend its pleading and, in so delaying, causes prejudice to its adversary, is acting contrary to the spirit of Rule 15(a) and risks denial of that motion. *See* Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d*, Section 1488 (1990); Chapman, *Tips from the TTAB: Amending Pleadings: The Right Stuff*, 81 Trademark Reporter 302, 307 (1991).

In this instance, we find that Applicant unduly delayed in filing its motion as it pertains to Opposer's pleaded Registration No. 2800386. The record demonstrates that on September 10, 2014 Applicant propounded written discovery on Opposer, including discovery regarding (1) the meaning and/or connotation of Opposer's pleaded NASTY PIG mark, (2) Opposer's knowledge and/or awareness of the use and/or registration of third party variations of Opposer's pleaded mark for any goods or services in the United States, (3) consumer surveys regarding Opposer's

pleaded NASTY PIG mark, (4) documents regarding the adoption, selection, and creation of the NASTY PIG mark, and (4) documents that refer or relate to efforts and investment in the growth of consumer recognition of Opposer's marks. The record further demonstrates that Opposer responded to Applicant's written discovery on November 14, 2014. To the extent Applicant deemed Opposer's responses to Applicant's discovery requests deficient in any manner, including Opposer's responses concerning the meaning or connotation of Opposer's pleaded NASTY PIG mark, Applicant should have promptly conducted a good faith effort to resolve the discovery dispute and, if the dispute could not be resolved, Applicant should have filed a motion to compel for the Board's consideration soon thereafter.⁶ Applicant did not do so and fails to explain why it did not do so. Instead, Applicant waited until after discovery had already closed and on the eve of trial (1) to serve Opposer with a deficiency letter regarding Opposer's responses to Applicant's written discovery,⁷ and (2) conduct its own independent investigation regarding the meaning and/or commercial impression of Opposer's pleaded NASTY PIG marks.

⁶ While the Board acknowledges that during the course of this proceeding this matter was suspended pending the disposition of various motions filed by the parties, the Board notes that there was more than ample time prior to and soon after these suspensions for Applicant to resolve its alleged discovery dispute or, alternatively, file a motion to compel after conducting a good faith effort to resolve the discovery dispute. Although Applicant did eventually file a motion to compel, it did so approximately a year after Opposer responded to Applicant's discovery requests. The motion was nonetheless denied without prejudice for failure to demonstrate a good faith effort to resolve the dispute prior to seeking Board intervention. See 21 TTABVUE. Notwithstanding, a motion to compel should be filed within a *reasonable time* after the failure to respond to a request for discovery or after service of the response believed to be inadequate. TBMP § 523.03.

⁷ The record demonstrates that Applicant served its deficiency letter on Opposer on September 18, 2015, approximately 10 months after Opposer responded to Applicant's written discovery.

Applicant has provided no justification as to why it did not serve its deficiency letter on Opposer earlier in this case or why it could not have conducted its own independent investigation regarding the meaning of Opposer's pleaded NASTY PIG mark much sooner in this proceeding. Applicant was obligated to investigate any potential counterclaims prior to filing its answer to the notice of opposition, and cannot now feign ignorance when the information upon which it relies was readily available at the time it filed its original answer. *Cf. Trek Bicycle Corporation v. StyleTrek Limited*, 64 USPQ2d 1540 (TTAB 2001) ("*Trek Bicycle* ") (motion for leave to amend filed prior to close of discovery but based on facts known to opposer prior to institution of the case denied due to unexplained delay).

The Board also finds that Opposer would suffer prejudice if Applicant is permitted to assert its proposed counterclaim and new affirmative defenses as they pertain to Opposer's pleaded Registration No. 2800386 at this juncture. In this particular instance, Applicant did not claim that it learned of these newly asserted claims through discovery or was otherwise unable to learn about these new claims prior to or shortly after filing its original answer to the notice of opposition. Moreover, as noted above, it was incumbent upon Applicant to identify all potential counterclaims that seek to cancel Opposer's pleaded registration promptly in order to provide Opposer with proper notice. Otherwise, allowing piecemeal prosecution of this case would unfairly prejudice Opposer by increasing the time, effort, and money that Opposer would be required to expend to defend against Applicant's challenge to its pleaded Registration No. 2800386.

Accordingly, the Board finds that based on the record before us, Applicant unduly delayed seeking to add its new affirmative defenses, as well as its counterclaim based on fraud, mere descriptiveness, genericness, functionality, and that Opposer's pleaded mark consists of scandalous or immoral matter under Section 2(a) of the Lanham Act with regard to Opposer's pleaded Registration No. 2800386. Accordingly, Applicant's motion for leave to amend its answer to assert a counterclaim and to add new affirmative defenses is **DENIED** as it pertains to Opposer's pleaded Registration No. 2800386.⁸

The Board finds, however, that since Opposer's Registration No. 4809230 only registered approximately a month prior to the filing of Applicant's motion for leave to amend its pleadings, and because a party cannot assert a counterclaim against a pending application, the Board finds that Applicant did not unduly delay in filing its motion with regard to Opposer's recently-issued Registration No. 4809230.

Notwithstanding, the Board finds that Applicant's proposed genericness, fraud and functionality claims, as they pertain to Opposer's Registration No. 4809230, are either improperly pleaded or futile.

In order to properly plead a claim of genericness, a plaintiff must affirmatively allege that the registered term is generic as applied to the specific goods and services for which it is registered. *See, e.g., In re Dial-A-Matress Operating Corp.*,

⁸ Even if Applicant's motion for leave to amend was timely with regard to Opposer's pleaded Registration No. 2800386, Applicant's proposed mere descriptiveness claim as it relates to this pleaded registration would be time-barred since Opposer's pleaded Registration No. 2800386 for the mark NASTY PIG issued more than five years ago, i.e., December 30, 2003. *See* Section 14(1) of the Lanham Act, 15 U.S.C. § 1064(1).

240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001). Further, a plaintiff must plead sufficient facts to allege that members of the relevant public primarily use or understand the wording NASTY PIG to refer to the genus of goods and/or services at issue. *H. Marvin Ginn Corp. v. Int'l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). Moreover, in cases where the proposed mark is comprised of multiple terms, as is the case here, a party is required to plead that the mark as a whole is generic. *In re American Fertility Soc'y*, 188 F.3d 1341, 1347, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999).

Here, Applicant alleges that “the term ‘NASTY PIG’ has a meaning that identifies a particular person and or associated lifestyle, whereby consumers understand “NASTY PIG” as common and primarily referring to Registrant’s goods and target consumer, rather than to the source.” See ¶ 4 of Applicant’s proposed counterclaim. The Board finds these allegations insufficient to state a claim of genericness. As noted above, in order to state a proper claim of genericness, the plaintiff must allege that the term is generic for the ***goods/services identified in the subject application/registration***. Here, Applicant alleges that the term NASTY PIG identifies Opposer’s targeted consumers or their associated lifestyle, not that the term is generic for the goods identified in Opposer’s Registration No. 4809230. Moreover, Applicant failed to allege any supporting facts that members of the relevant public primarily use or understand the wording NASTY PIG to refer to the genus of goods and/or services at issue. Instead, Applicant merely alleges that because Opposer’s pleaded NASTY PIG mark identifies Opposer’s targeted

consumers or their associated lifestyle, consumers would somehow understand Opposer's pleaded "NASTY PIG" mark to primarily refer to Opposer's identified clothing, jewelry, bedding and leather goods, as well as its retail and online stores featuring such goods. Such allegations do not properly state a claim of genericness.

With regard to Applicant's proposed counterclaim based on fraud, it appears that Applicant is basing its fraud counterclaim on the following two theories: (1) because Opposer failed to disclose during the prosecution of its underlying applications for the mark NASTY PIG that its mark has an alleged vulgar connotation, Opposer in some way deceived the Office in obtaining a registration for which it was not entitled, and (2) fraud based on the declaration submitted with Opposer's underlying application for the mark NASTY PIG.

As to the first theory, the Board is unaware of and Applicant has not provided any legal authority which would require an applicant to disclose affirmatively the connotation and/or meaning of its applied-for mark during the prosecution of its application. Moreover, Applicant's pleading does not set forth any allegations that the examining attorney, during the prosecution of Opposer's underlying application, required such information pursuant to Trademark Rule 2.61 and that Opposer intentionally failed to disclose any alleged vulgar connotation in response to the examining attorney's inquiry. Accordingly, we find that Applicant's proposed fraud

claim based on the theory of nondisclosure of the meaning/connotation of its mark during the prosecution of its underlying application to be futile.⁹

As to Applicant's second theory of fraud, the Board notes that a plaintiff claiming that the declaration or oath in a defendant's application for registration was executed fraudulently, in that there was another use of the same or a confusingly similar mark at the time the oath was signed, must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights *superior* to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the U.S. Patent and Trademark Office, intended to procure a registration to which it was not entitled. *Qualcomm Inc. v. FLO Corp.*, 93 USPQ2d 1768 (TTAB 2010) (emphasis added).

Furthermore, the Board notes that a fraud claim based on a false oath regarding the rights of others to use the mark only lies where the other party's rights were clearly established, as by a prior agreement between the rights or a court decree. *See Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1207 (TTAB 1997). For the purpose of fraud, knowledge of another party's use of the mark is not equivalent to knowledge of another party's superior rights to the mark. *See*

⁹ In light of this ruling, the Board finds Applicant's proposed affirmative defense of unclean hands based on non-disclosure of the meaning/connotation of Opposer's NASTY PIG mark during the prosecution of Opposer's underlying application also to be futile.

Intellimedia Sports Inc., 43 USPQ2d at 1207 (“if the other person's rights in the mark, vis-a-vis the applicant's rights, are not known by applicant to be superior or clearly established, e.g., by court decree or prior agreement of the parties, then the applicant has a reasonable basis for believing that no one else has the right to use the mark in commerce, and the applicant's averment of that reasonable belief in its application declaration or oath is not fraudulent.”).¹⁰

Here, Applicant merely alleges that Opposer committed fraud by stating in the declaration that “no other person, firm, corporation or association has the right to use the term NASTY PIG, and whereby said deception was relied upon by the USPTO to issue and renew the same.” See ¶ 7 of Applicant’s proposed counterclaim. Applicant fails, however, to allege affirmatively any particular facts that, if proven, would establish that (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user(s) had legal rights **superior** to Opposer; (3) Opposer knew that the other use(s)r had rights in the mark superior to Opposer's, and either believed that a likelihood of confusion would result from Opposer’s use of its mark or had no reasonable basis for believing otherwise; and that (4) Opposer, in failing to disclose these facts to the U.S. Patent

¹⁰ See also *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 76 (TTAB 1983) (“A failure to disclose to the Office the asserted right of another cannot be said to constitute fraud unless such other person was known by the nondisclosing party to possess a superior right to use the same or substantially identical mark for the same or substantially identical goods as those in connection with which registration was sought.”); *Yocum v. Covington*, 216 USPQ 211, 216-217 (TTAB 1982) (“the statement of an applicant that no other person “to the best of his knowledge” has the right to use the mark does not require the applicant to disclose those persons whom he may have heard are using the mark if he feels that the rights of such others are not superior to his.”).

and Trademark Office, intended to procure a registration to which it was not entitled. In view thereof, the Board finds that Applicant's counterclaim of fraud based on the declaration submitted with Opposer's underlying application for the mark NASTY PIG is not properly pleaded and is insufficient to state a claim.

Further, to the extent that Applicant seeks to add a claim that Opposer's pleaded registered NASTY PIG mark is functional under Section 2(e)(5) of the Lanham Act, the Board finds that Applicant misconstrues the relevant law. While an applicant may not obtain trademark protection for structural features of a product or its packaging if those features are purely functional, that principle has no bearing on an application to register a word mark (or a mark that is already registered, as is the case here). *See AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1833 (TTAB 2013).

Additionally, the Board notes that Applicant failed to submit the appropriate filing fee for its proposed counterclaim. *See Trademark Rule 2.6(16)*.

As a final matter, the Board further notes that Applicant, in its original answer, asserted various affirmative defenses, including the following: (1) the notice of opposition fails to state a claim upon which relief may be granted, (2) the opposition is barred by the doctrines of acquiescence and laches, and (3) the opposition is barred by the doctrines of waiver and estoppel. Each of the aforementioned affirmative defenses is hereby stricken from Applicant's original answer for the reasons stated below.¹¹ *See Fed. R. Civ. P. 12(f)*.

¹¹ As to the remaining affirmative defenses set forth in Applicant's originally-filed answer, the Board construes these defenses as mere amplifications of Applicant's denials set forth

First, the Board has *sua sponte* reviewed Opposer's notice of opposition and finds that Opposer's allegations regarding its standing, as well as its asserted claim of likelihood of confusion, are sufficiently pleaded. Second, with regard to Applicant's affirmative defenses of laches, acquiescence, and estoppel, the Board notes that in general the affirmative defenses of laches, estoppel and acquiescence are inapplicable in opposition proceedings. *See National Cable Television Ass'n Inc. v. Am. Cinema Editors Inc.*, 19 UPSQ2d 1424, 1432 (Fed. Cir. 1991). Finally, with respect to Applicant's affirmative defense of waiver, the Board finds that Applicant failed to set forth any specific allegations of conduct on the part of Opposer that would constitute waiver.

Summary

In view of the foregoing, Applicant's motion for leave to amend its answer to assert a counterclaim and new affirmative defenses, as it pertains to Opposer's Registration No. 2800386 is **DENIED** in its entirety. Applicant's motion, however, as it pertains to Opposer's Registration No. 4809230, is **GRANTED**¹² to the extent

in its original answer and, therefore, will allow these defenses to remain part of Applicant's original pleading. *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995); *Harsco Corp. v. Electrical Sciences, Inc.*, 9 USPQ2d 1570 (TTAB 1988).

¹² Applicant's request to reopen discovery to allow Applicant to take discovery on the proposed counterclaims permitted by this order is **DENIED**. The Board finds that Applicant has already taken sufficient discovery regarding the meaning/connotation of Opposer's NASTY PIG mark, as well as consumers' perception of the mark. Moreover, since Applicant unjustifiably waited until after the close of discovery to conduct its own independent investigation regarding the alleged meaning of Opposer's NASTY PIG mark when such information was readily available to Applicant prior to or soon after filing its original answer, Applicant will not now be heard that it needs additional time to take further discovery on its proposed counterclaims.

that Applicant is allowed until **February 23, 2016** in which (1) to file and serve an amended answer and counterclaim that properly asserts the claims of genericness and fraud, pursuant to the guidelines set forth herein, or whichever of these claims, if any, may be properly asserted on the circumstances of this case,¹³ and which deletes any reference to Opposer's pleaded Registration No. 2800386,¹⁴ and (2) to submit the \$600.00 filing fee for its counterclaim,¹⁵ failing which Applicant's proposed counterclaim, as it pertains to Opposer's Registration No. 4809230, as well as its proposed affirmative defenses, will be given no further consideration.

As a final matter, because the U.S. Court of Appeals for the Federal Circuit, in *In re Tam*, Appeal No. 2014-1203 (Fed. Cir. December 22, 2015), has held the disparagement provision of Lanham Act Section 2(a) unconstitutional and since that court, in an order issued in *In re Brunetti*, Appeal No. 2015-1109 (Fed. Cir.

¹³ As with any amended pleading, Applicant and its counsel are reminded that under Rule 11 of the Federal Rules of Civil Procedure, they are certifying that all claims and other legal contentions asserted therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law. *See* Fed. R. Civ. P. 11.

¹⁴ In its amended pleading, Applicant may re-assert its claim that Opposer's NASTY PIG mark that is subject to Opposer's Registration No. 4809230 is merely descriptive of the consumers of Opposer's identified goods and has not acquired distinctiveness, if it so chooses. Applicant, however, is precluded from re-asserting a claim that Opposer's pleaded mark is functional for the reasons stated above or the affirmative defenses of laches, acquiescence, estoppel, unclean hands based on nondisclosure of the meaning/connotation of Opposer's mark or that Opposer's pleading fails to state a claim of upon which relief may be granted. If Applicant re-asserts its affirmative defense of waiver, it must include sufficient factual allegations to support such affirmative defense. Moreover, Applicant is precluded from filing an amended pleading which only encompasses its proposed affirmative defenses, as restricted by this order, since such defenses constitute a collateral attack on Opposer's Registration No. 4809230 and may not be heard absent a counterclaim.

¹⁵ The Board notes that Opposer's Registration No. 4809230 identifies two classes of goods. Trademark Rule 2.6(11) provides that the filing fee for a petition to cancel (or counterclaim to cancel) is \$300.00 per class.

December 22, 2015), has directed the parties to file briefs explaining how the *Brunetti* appeal, which involves the scandalous/immoral provision of Lanham Act Section 2(a), should be resolved in light of the court's opinion in *In re Tam, supra*, the final decision of *In re Brunetti*, or of any appeal thereof, including an appeal to the United States Supreme Court, may have a bearing on the present proceeding in the event Applicant proceeds in filing its amended counterclaim that includes a claim under the immoral/scandalous provision of Section 2(a) of the Lanham Act in that the decision may determine whether the noted counterclaim states a constitutionally permissible cause of action.

In the interest of judicial economy, and consistent with the Board's inherent authority to regulate its proceedings to avoid the possibility of reaching a conclusion inconsistent with any final resolution of *In re Brunetti* case, the Board will issue an order suspending this proceeding in its entirety upon Applicant's filing of its amended pleading permitted herein if it includes a claim under the scandalous/immoral provisions of Section 2(a) of the Lanham Act pending a final decision in *In re Brunetti*, including any appeal of the Federal Circuit's decision or remand of the *In re Brunetti* application.

Proceedings otherwise remain suspended except to the extent indicated herein.¹⁶

¹⁶ In the event Applicant decides not to file and serve an amended answer and counterclaim pursuant to the guidelines set forth in this order by the deadline provided above, (1) Applicant's answer filed on July 22, 2014 will remain Applicant's operative pleading in this matter, as restricted by this order, and (2) the Board will issue an order resetting trial dates appropriately. Alternatively, if Applicant does file an amended pleading consistent with this order that **does not** include a counterclaim based on the immoral/scandalous provisions under Section 2(a) of the Lanham Act, the Board will issue an order resetting trial dates to reflect Applicant's counterclaim, including the deadline by which Opposer must file its answer or otherwise respond to Applicant's amended answer and counterclaim.