

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

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Mailed: December 19, 2015

Opposition No. 91218363

*New Wave Innovations, Inc.*

*v.*

*Mr. Foamer, Inc.*

**Elizabeth A. Dunn, Attorney (571-272-4267):**

Inasmuch as the amended notice of opposition does not include a claim of judicial estoppel<sup>1</sup>, no consideration will be given to Opposer's motion for summary judgment on the unpleaded claim. *See American Express Marketing & Development Corp. v. Gilad Development Corp.*, 94 USPQ2d 1294, 1297 (TTAB 2010).

Dates remain as set by the Board's June 15, 2015 order.

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<sup>1</sup> The doctrine of judicial estoppel serves to prevent an unfair result by prohibiting a party from asserting a position inconsistent from one taken in a prior proceeding, and its application lies within the discretion of the court. *Boston Chicken Inc. v. Boston Pizza International Inc.*, 53 USPQ2d 1053, 1055 (TTAB 1999) (citing *DataGeneral Corp. v. GSA*, 78 F.3d 1556, 1565 (Fed. Cir. 1996)). The Board applies a seven factor test to determine whether it is appropriate in a given circumstance: (1) judicial acceptance of the previously asserted inconsistent position; 2) risk of inconsistent results; 3) effect of the party's actions on the integrity of the judicial process; 4) perception that the tribunal has been misled; 5) reliance by the opposing party; 6) prejudice to the opposing party's case as a result of the inconsistent position; and 7) the party against whom estoppel is invoked must have received some benefit from the previously taken position. *Brooks v. Creative Arts By Calloway LLC*, 93 USPQ2d 1823, 1826 (TTAB 2009)