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

Proceeding	91222215
Party	Defendant Nicolon Corporation
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<b>LUMITE, INC.</b>	)	
	)	<b>Mark: ORANGE COLOR</b>
<b>v.</b>	)	
	)	<b>Serial No.: 86057945</b>
	)	
<b>NICOLON CORPORATION</b>	)	<b>Opposition No.: 91222215</b>
<b>Applicant.</b>	)	
_____	)	

**APPLICANT’S ANSWER AND AFFIRMATIVE DEFENSES**

Applicant, Nicolon Corporation (“Applicant”), through its attorneys, hereby answers the Notice of Opposition filed by Lumite, Inc. (“Opposer”) in the above-captioned proceeding as follows:

With respect to the allegations contained in the first unnumbered paragraph of the Notice of Opposition, Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny whether Opposer “believes it will be damaged by the issuance of registration of in Class 19 for the design mark underlying Application Serial No. 86/057,945 filed by Nicolon Corporation”, and therefore, Applicant denies this allegation, leaving Opposer to satisfy its burden of proof. Applicant admits that it is “a corporation organized and existing under the laws of Georgia, with a mailing address of 365 S. Holland Drive, Pendergrass, Georgia 30567”. All remaining allegations in the first unnumbered paragraph are denied.

For the sake of clarity, when Applicant references its “**Orange Woven Fabric**” it is speaking specifically to its orange woven geotextile/geosynthetic fabric used for “the purposes of drainage, stabilizing inclines, recultivation, plant support, absorption, filtration, separation, stabilization and reinforcement of the soil; geotextiles for use in connection with road construction, tunnel construction, waterway construction and public works construction; fabrics for use in civil engineering; erosion control fabric” which is the subject of its Application, Serial No. 86057945. In addition, when references to the August Response (as defined below) is made by Opposer, and in Applicant’s Answers, Applicant makes clear that in the August Response it defined Applicant’s Fabric as “Applicant’s woven geotextile/geosynthetic fabric used for base

course reinforcement and subgrade stabilization for road, runway and railway construction; embankment stabilizations on soft foundations; reinforcement for mechanically stabilized earth structures; and liner support”.

With respect to the allegations of the numbered paragraphs of the Notice of Opposition, unless expressly admitted herein, each allegation in the Notice of Opposition is denied:

1. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 1, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

2. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 2, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

3. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 3, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

4. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 4, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

5. Applicant admits that the color orange is used for traffic cones and hunting vests. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations asserted in Paragraph 5, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

6. Applicant is unclear as to what type of “[use] in roadwork construction” Opposer is referencing. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations asserted in Paragraph 6, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

7. Applicant admits that orange geotextile safety fencing is used on construction sites.

Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations asserted in Paragraph 7, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

8. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 8, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

9. The allegations of Paragraph 9 are irrelevant and are neither admitted nor denied.

10. The allegations of Paragraph 10 are irrelevant and are neither admitted nor denied.

11. The allegations of Paragraph 11 are irrelevant and are neither admitted nor denied.

12. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 12, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

13. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 13, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

14. To the extent Opposer is referencing the Office Action issued by the United States Patent and Trademark Office (USPTO) in which all the Examiner's refusals were withdrawn and the Application passed to publication, Applicant admits that the Office Action did contain the statement "high visibility signal barrier for future excavations," and the referenced webpage in the issued Office Action. The remaining allegations of Paragraph 14 are denied.

15. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 15, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

16. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 16, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

17. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 17, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

18. Applicant admits that on September 6, 2013, Applicant filed Application Serial No. 86057945, to register the Mark for the goods and services specifically stated in its Application. All remaining allegations of Paragraph 18 are denied.

19. Applicant admits that its first use of its Mark is as early as March 30, 2010, and use in commerce as early as May 20, 2010. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations asserted in Paragraph 19, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

20. Applicant admits that its Application's description of the mark states as follows: The mark consists of the color orange as applied to one or more yarns or threads woven into the body of a geosynthetic or geotextile fabric, producing a radiant orange surface when light strikes the fabric". The remaining allegations of Paragraph 20 are denied.

21. The allegations of Paragraph 21 are admitted.

22. The allegations of Paragraph 22 are admitted.

23. Applicant admits that its Mirafi ® Delineation Nonwoven Geotextiles are described in the cited website [www.tencate.com](http://www.tencate.com), specifically at

[www.tencate.com/amer/geosynthetics/products/geotextiles/TenCate-Mirafi-Delineation/default.aspx](http://www.tencate.com/amer/geosynthetics/products/geotextiles/TenCate-Mirafi-Delineation/default.aspx), as

follows: TenCate Mirafi® delineation geotextiles are staple fibers used for soil separation and drainage. They combine high durability, along with excellent physical and hydraulic properties. TenCate Mirafi® delineation geotextiles are produced from polypropylene staple fibers and combine high water flow rates and durability while providing excellent soil retention. TenCate Mirafi® nonwoven geotextiles are used in a wide variety of applications in the environmental and general civil markets. These include separation, filtration and protection applications. TenCate Mirafi® delineation geotextiles are is used in many critical subsurface systems. The delineation fabric allows for safe excavations where utilities or other sensitive structures may be buried. The highly visible nonwoven geotextile serves as a warning to construction workers when the excavation reaches a buried structure. Applicant refers to and markets the delineation geotextiles as “TenCate Mirafi® Delineation Nonwoven Geotextiles,” which are not the Orange Woven Fabrics that are the subject of the Application. The remaining allegations of Paragraph 23 are denied.

24. With respect solely to TenCate Mirafi® Delineation Nonwoven Geotextiles, Applicant admits that its website states that “TenCate Mirafi Delineation ... TenCate Mirafi® Delineation Nonwoven Geotextiles specifically designed for visual barrier, soil separation and drainage”. Applicant incorporates its Answer in Paragraph 23. The remaining allegations of Paragraph 24 are denied.

25. The allegations of Paragraph 25 are admitted.

26. Paragraph 26 does not contain any allegations of fact requiring a response.

27. To the extent Opposer is referencing the Office Action issued by the United States Patent and Trademark Office (USPTO), Applicant admits that the Office Action speaks for itself and no response is required. To the extent a response is required as to the remainder of the allegations, the allegations of Paragraph 27 are denied.

28. Applicant avers that Opposer is willfully attempting to mislead or confuse the Board by quoting Applicant’s application out of context. Applicant admits that its Application states: “[t]he mark consists of the color orange as applied to one or more yarns or threads woven into the body of geosynthetic or geotextile fabric of indefinite length and width producing a radiant orange surface when light strikes the fabric and the matter shown in broken lines is not part of the mark and serves only to show the position or

placement of the mark”. The remaining allegations of Paragraph 28 are denied.

29. Applicant avers that Opposer is willfully attempting mislead or confuse the Board by stating that “it is clear from this prosecution history and initial application that Applicant filed the ‘945 Application in an attempt to claim exclusive use of the color orange in geotextiles for its ‘high visibility in construction and environmental settings.’” (Emphasis added). The allegations in Paragraph 29 are not based in fact or logic; therefore, no response is required. To the extent a response is required, the allegations of Paragraph 29 are denied.

30. Opposer is in no position to assess Applicant’s “true motivation” for “claiming exclusive use of the color orange in geotextiles”. Applicant avers that Opposer is willfully attempting to mislead or confuse the Board by referencing a nonwoven geotextile that it knows is not the Orange Woven Fabric that is the subject of the Application. In addition, Applicant avers that Opposer failed to sufficiently review the Application details prior to filing its Opposition. Applicant’s Application clearly defines the mark as: “[t]he mark consists of the color orange as applied to **one or more yarns or threads woven into the body of geosynthetic or geotextile fabric**”. The Orange Woven Fabric that is the subject of the Application is woven, not nonwoven. Nevertheless, Opposer references a “highly visible orange nonwoven geotextile” shown on Applicant’s website. The allegations in Paragraph 30 are not based in fact or logic; therefore, no response is required. To the extent a response is required, the allegations of Paragraph 30 are denied.

31. Applicant admits that “Applicant’s Fabric does **not** serve as a warning to construction workers when the excavation reaches a buried or utility structure”. Based on Opposer’s use of the wording “Nevertheless,” and to the extent Paragraph 31 addresses the claims alleged in Paragraph 30, which Applicant has denied, the remaining allegations in Paragraph 31 are denied.

32. Opposer is in no position to determine Applicant’s “original motivation,” with respect to “its claim to exclusive use of the color orange in geotextiles”. Applicant admits that its use of the color orange is deeply rooted in its corporate history, identity, and branding, and such use stems from the historical use of orange as symbolic for the Netherlands. To the extent Paragraph 32 addresses the claims alleged in Paragraph 30, and being that Opposer has not based its allegations in Paragraph 32 on fact or

logic, no response to the remaining allegations in Paragraph 32 are denied.

33. Applicant admits that the color orange serves as a source identifier for its woven geosynthetic fabric. Applicant also admits that it sells woven geosynthetic fabrics in colors other than orange. The remaining allegations of Paragraph 33 are denied.

34. Applicant admits that it sells “geosynthetic fabric[s] that [are] black in color (with no contrasting interwoven threads)”. The remaining allegations of Paragraph 34 are denied.

35. Applicant admits that it sells a woven geosynthetic fabric that has blue threads woven into the body of the geosynthetic fabric. The remaining allegations of Paragraph 35 are denied.

36. Applicant admits and confirms that Applicant’s Mark is not functional, and further admits and confirms that in its August 20, 2014, Response to Office Action, one of its many arguments was that “orange is no more economical with respect to the manufacture of Applicant's Fabric, and provides no competitive advantage to applicant.” (Emphasis added). The remaining allegations of Paragraph 36 are denied.

37. Opposer willfully ignores the fact that allegations should be based in fact and logic, not mere speculation. The allegations of Paragraph 37 are not based in logic or fact, and no response is required. To the extent a response is required, the allegations of Paragraph 37 are denied.

38. The allegations of Paragraph 38 are void of fact or logic, and no response is required. To the extent a response is required, the allegations of Paragraph 38 are denied.

39. The allegations of Paragraph 39 are void of fact or logic, and no response is required. To the extent a response is required, the allegations of Paragraph 39 are denied.

40. The allegations of Paragraph 40 are admitted.

41. Applicant avers that specifying a particular pantone number or otherwise restricting its Application to a particular shade of orange is not a requirement under U.S. trademark law. The allegations of Paragraph 41 are admitted.

42. Applicant admits that the USPTO accepted its claim of acquired distinctiveness and withdrew its refusal. Opposer should be well aware that, pursuant to TMEP § 1202.05, “color marks are **never** inherently distinctive, and **cannot be registered on the Principal Register without a showing of acquired distinctiveness** under §2(f) of the Trademark Act”. Accordingly, Applicant admits that its COLOR ORANGE Mark has not become “inherently distinctive,” but rather through Applicant’s continuous and notorious use of its Mark, the Mark has acquired secondary meaning among the relevant consuming public. The remaining allegations of Paragraph 42 are denied.

43. To the extent this Paragraph 43 is a continuation of the allegations of Paragraph 42, Applicant restates that pursuant to TMEP § 1202.05, “color marks are **never** inherently distinctive, and **cannot be registered on the Principal Register without a showing of acquired distinctiveness** under §2(f) of the Trademark Act”. Accordingly, Applicant admits that its COLOR ORANGE Mark has not become “inherently distinctive,” but rather through Applicant’s continuous and notorious use of its Mark, the Mark has acquired secondary meaning among the relevant consuming public. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations of Paragraph 43, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

44. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 44, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

45. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 45, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

46. The Orange Woven Fabric that is the subject of Applicant’s Application does not serve as and is not used as an “orange warning barrier, an “adequate warning ... to protect anyone carrying out future excavations,” or a “contamination warning layer,” and does not need to be “clearly seen”. Applicant avers that Opposer is willfully attempting mislead or confuse the Board by referencing

geotextiles/geosynthetics that are not similar to or utilized in the same way as Applicant's Orange Woven Fabric. The remaining allegations of Paragraph 46 are denied.

47. Opposer is in no position to know what Applicant "knew at the time it filed the '945 Application". Applicant denies that it uses the "color orange as a visual cue to those encountering it in construction setting". Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the remaining allegations asserted in Paragraph 47, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

48. Opposer is in no position to know what Applicant "was fully aware" of when it filed its Application. Applicant denies knowingly making "material misrepresentations with the intent to deceive the USPTO during the prosecution of its Application, and in particular, in its August 20, 2014 Response to Office Action". Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted regarding "[a]t the time Applicant filed the '945 Application, it was fully aware that it was using the same or a similar orange color in geotextiles and in the same manner as its competitors," in Paragraph 48, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

49. The allegations of Paragraph 49 are denied.

50. The allegations of Paragraph 50 are denied.

51. Applicant admits that it stated to the USPTO that "Applicant is the first, and has been since as early as May 2010, the only user of the color orange for woven textiles/geosynthetic fabrics for, among other things, for [sic] base course reinforcement and subgrade stabilization for road, runway and railway construction; embankment stabilizations on soft foundations; reinforcement for mechanically stabilized earth structures; and liner support." While Opposer seeks to reference Applicant's August 20, 2014 Response to the Office Action (the "August Response") out of context, Applicant wishes to clarify that it stated to the Examiner as follows, in Footnote 1:

Recently, one infringer has entered the marketplace using the color orange for woven geotextile/geosynthetic fabrics but Applicant has taken affirmative action against this company. Futher [sic], unauthorized users of Applicant's mark does not

impair the distinctiveness of the Applicant's Mark. See TMEP § 1212.05(b) (use of mark by Applicant need only be *substantially* exclusive – “this makes allowances for use of others which may be inconsequential or infringing.”) (emphasis added).

Applicant also stated in its Affidavit of Lee Bryan at 11 as follows:

TenCate is the sole manufacturer of orange woven geosynthetic fabrics. In 2013, Willacoochee Industrial Fabrics, Inc. ("Willacoochee") began copying TenCate's use of orange colored yarns in woven geosynthetic fabrics. TenCate objected to Willacoochee's use of the color orange in its woven geosynthetic fabric, and demanded that Willacoochee cease and desist its use of TenCate's orange trademark.

The remaining allegations of Paragraph 51 are denied.

52. Applicant avers that Opposer is willfully attempting to mislead or confuse the Board by quoting Applicant's application out of context. Applicant admits that in the August Response it stated as follows:

As stated in TMEP § 1202.05, “a color trademark might consist of ... pink used on the handle of a shovel.” A pink handled shovel would undoubtedly be highly visible in a display next to naturally colored wood handled shovels. Yet, increased visibility has nothing to do with the performance of the shovel moving dirt. This is analogous with the appearance of Applicant's Mark. While Applicant's Fabric, under certain lighting conditions, can appear as a predominantly orange fabric, the high visibility created by the light striking the orange threads has “nothing to do with the performance” of the fabric when used as a base course reinforcement and subgrade stabilization for road, runway and railway construction; embankment stabilizations on soft foundations; reinforcement for mechanically stabilized earth structures; and liner support. Applicant's Fabric incorporates orange threads in its predominantly black fabric. "the high visibility created by the light striking the orange threads 'has nothing to do with the performance' of the fabric when used as a base course reinforcement and subgrade stabilization for road, runway and railway construction; embankment stabilizations on soft foundations; reinforcement for mechanically stabilized earth structures; and liner support."

The remaining allegations of Paragraph 52 are denied.

53. Applicant admits that "[t]he color orange is not commonly used in the industry on woven geotextile/geosynthetic fabrics." The remaining allegations of Paragraph 53 are denied.

54. Applicant admits that in its August Response it stated as follows: "Applicant's use of the color orange in connection its [sic] Fabric is original, unique and unusual in the geotextile/geosynthetic materials industry." The remaining allegations of Paragraph 54 are denied.

55. Applicant admits that in its August Response it stated as follows: "the Mark does in fact serve as a source indicator and is a registrable trademark". The remaining allegations of Paragraph 55 are denied.

56. Applicant admits that in its August Response it stated as follows: "[t]he color orange as used in TenCate's woven geosynthetic fabric is non-functional and is an arbitrary use of color." The remaining allegations of Paragraph 56 are denied.

57. Applicant avers that Opposer is willfully attempting to confuse and mislead the Board. Applicant admits that its Declaration of Lee Bryan states as follows:

TenCate is the sole manufacturer of orange woven geosynthetic fabrics. In 2013, Willacoochee Industrial Fabrics, Inc. ("Willacoochee") began copying TenCate's use of orange colored yarns in woven geosynthetic fabrics. TenCate objected to Willacoochee's use of the color orange in its woven geosynthetic fabric, and demanded that Willacoochee cease and desist its use of TenCate's orange trademark.

The remaining allegations of Paragraph 57 are denied.

58. Applicant admits that in its August Response it stated as follows: "Applicant selected the color orange in connection with its Fabric not to ornament or make its product aesthetically pleasing, but rather to distinguish its goods from competitors, and to indicate Applicant as the Fabric's source." The remaining allegations of Paragraph 58 are denied.

59. Applicant admits that in its August Response it stated as follows: "Applicant first adopted the color orange in connection with the Fabric as early as May 2010." The remaining allegations of Paragraph 59 are denied. Applicant avers that the Fabric contemplated in its August Response is the same as "Applicant's Fabric".

60. Applicant admits that in its August Response it stated as follows: Applicant admits that "there are no other competitors using the color orange or any other color (other than Carbon Black) in connection with products similar to Applicant's Fabric." The remaining allegations of Paragraph 60 are denied.

61. Paragraph 61 does not contain any allegations of fact requiring a response.

## COUNT I - NON-DISTINCTIVENESS

62. Paragraph 62 does not contain any allegations of fact requiring a response. To the extent a response is required, Applicant denies that its Mark lacks secondary meaning/acquired distinctiveness.

63. Paragraph 63 states a legal conclusion requiring no response. To the extent a response is required, Applicant denies that its Mark does not function as a trademark, is non-distinctive and has not acquired secondary meaning or distinctiveness. The remaining allegations of Paragraph 63 are denied.

64. Paragraph 64 states a legal conclusion requiring no response. To the extent a response is required, Applicant denies that its “[M]ark is not a trademark and falls short of the requirements of the Trademark Act, including Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, and 1127”. The remaining allegations of Paragraph 64 are denied.

65. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 65, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

66. The only orange geotextile marketed, advertised and promoted by Applicant that serves as a “warning signal to those who encounter it” is the Mirafi ® Delineation Nonwoven Geotextile Fabric, which is not the Orange Woven Fabric that is the subject of the Application. The remaining allegations of Paragraph 66 are denied.

67. With respect to the first and last sentences of Paragraph 67, Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof. As it relates solely to the Orange Woven Fabric, Applicant admits that Applicant has the “exclusive right to use the color orange to identify” its Orange Woven Fabric for the purposes described in its Application. The remaining allegations of Paragraph 67 are denied.

68. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations of Paragraph 68, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

69. As it relates solely to the Orange Woven Fabric, Applicant admits that Applicant can “take enforcement measures against Opposer and others for” the unauthorized use of its Mark and for use of its Mark on identical and similar Orange Woven Fabrics that are the subject of the Application. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations of Paragraph 69, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

70. The allegations of Paragraph 70 are denied.

#### **COUNT II - FUNCTIONALITY**

71. Paragraph 71 does not contain any allegations of fact requiring a response. To the extent a response is required, Applicant denies that its Mark is functional.

72. Paragraph 72 states a legal conclusion requiring no response. To the extent a response is required, Applicant denies that its Mark is functional. Applicant denies that its Mark for the Orange Woven Fabric is used in geotextiles to serve as a warning signal to those encountering it. Applicant restates that the Orange Woven Fabric which is the subject of the Application is not the Mirafi® Delineation Nonwoven Geotextiles which is used as a “warning signal to those encountering it”. The remaining allegations of Paragraph 72 are denied.

73. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations asserted in Paragraph 73, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

74. Pursuant to TMEP § 1202.05, “color marks are never inherently distinctive, and cannot be registered on the Principal Register without a showing of acquired distinctiveness under §2(f) of the Trademark Act”. Paragraph 74 states a legal conclusion requiring no response. To the extent a response is required, Applicant admits that the color marks are never inherently distinctive, and that through

Applicant's continuous and notorious use, its ORANGE COLOR Mark has acquired secondary meaning among the relevant consuming public. Applicant restates that the Orange Woven Fabric which is the subject of the Application is not the Mirafi® Delineation Nonwoven Geotextiles which is used as a "warning signal to those encountering it". The remaining allegations of Paragraph 74 are denied.

75. Color marks are never "inherently distinctive". Application admits that in the minds of the relevant public, its Orange Woven Fabric has acquired secondary meaning, and is now associated with Applicant's goods. The remaining allegations of Paragraph 75 are denied.

76. Paragraph 76 states a legal conclusion requiring no response. To the extent a response is required, Applicant denies the allegations of Paragraph 76 are denied.

77. With respect to the first and last sentences of Paragraph 77, Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof. As it relates solely to the Orange Woven Fabric, Applicant admits that Applicant has the "exclusive right to use the color orange to identify" its Orange Woven Fabric for the purposes described in its Application. The remaining allegations of Paragraph 67 are denied.

78. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations of Paragraph 78, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

79. As it relates solely to the Orange Woven Fabric, Applicant admits that Applicant can "take enforcement measures against Opposer and others for" the unauthorized use of its Mark and for use of its Mark on identical and similar Orange Woven Fabrics that are the subject of the Application. Applicant is without knowledge or information sufficient to form a belief or sufficient to truthfully admit or deny the allegations of Paragraph 79, and therefore denies the allegations, leaving Opposer to satisfy its burden of proof.

80. To the extent the allegations of Paragraph 80 are verbatim the allegations of Paragraph 70, the allegations of Paragraph 80 are denied.

**COUNT III-INEQUITABLE CONDUCT**

81. Paragraph 81 does not contain any allegations of fact requiring a response. To the extent a response is required, Applicant denies that it knowingly made material misrepresentations with the intent to deceive the USPTO.

82. The allegations of Paragraph 82 are denied.

83. The allegations of Paragraph 83 are denied.

84. The allegations of Paragraph 84 are denied.

85. The allegations of Paragraph 85 are denied.

**OPPOSER'S REQUEST FOR RELIEF**

Opposer's Request for Relief does not state any factual allegations, and therefore, no response is required. Applicant denies that Opposer is entitled to any such relief.

**AFFIRMATIVE DEFENSES**

Applicant asserts that the following affirmative defenses bar Opposer's requested relief in its Notice of Opposition.

**FIRST AFFIRMATIVE DEFENSE**

Opposer's claims alleged in the Notice of Opposition fail to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Opposer's claims alleged in the Notice of Opposition lack merit and are insufficient to support refusing the registration of the Application.

**THIRD AFFIRMATIVE DEFENSE**

Opposer's claims alleged in the Notice of Opposition fail to state short and plain statements of grounds for the Opposition, and therefore, Applicant does not have proper notice of the actual asserted grounds for this Opposition.

**FOURTH AFFIRMATIVE DEFENSE**

Opposer will not suffer any damages by U.S. registration and use by Applicant of the opposed Mark.

**FIFTH AFFIRMATIVE DEFENSE**

Applicant applied for the opposed mark in good faith.

**SIXTH AFFIRMATIVE DEFENSE**

Applicant reserves its right to amend its answer to the “Notice of Opposition” and its affirmative defenses, assert such additional affirmative defenses as it deems appropriate and such counterclaims as may be permitted that may now exist or in the future are available based upon discovery and further factual investigation in this proceeding.

**WHEREFORE**, Applicant Nicolon Corporation respectfully requests that the Trademark Trial and Appeal Board dismiss the above-captioned Notice of Opposition in its entirety, that United State Trademark Application Serial No. 86057945, for ORANGE COLOR be allowed for registration, and that the Board grant Applicant Nicolon Corporation such other and further relief as it deems just and appropriate.

Dated: July 13, 2015

Respectfully submitted,  
**Nicolon Corporation**

By: /Stacy R. Stewart/  
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Attorneys for Nicolon Corporation

**CERTIFICATE OF SERVICE**

I, Stacy Raphael Stewart, counsel to Applicant Nicolon Corporation, in Opposition No. 91222215, certify that, on the 13th day of July, 2015, I served a copy of the **APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES**, via first class prepaid mail, upon:

Jacquelynn Regan  
Gardner Groff Greenwald & Villanueva,  
PC  
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/Stacy R. Stewart/  
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