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

Proceeding	91222461
Party	Defendant Lions Gate Entertainment Inc.
Correspondence Address	JILL M PIETRINI PAUL A BOST SHEPPARD MULLIN RICHTER & HAMPTON LLP 1901 AVENUE OF THE STARS, STE 1600 LOS ANGELES, CA 90067-6055 UNITED STATES pbost@smrh.com, lthompson@smrh.com, jpietrini@smrh.com, lmartin@smrh.com, mdanner@smrh.com, rwalsh@smrh.com
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Signature	/Jill M. Pietrini/
Date	10/21/2016
Attachments	Lionsgate Motion for leave to withdraw admissions.pdf(3312084 bytes)

funeral. Applicant's counsel's file clerk, who receives and distributes the mail for Applicant's counsel's intellectual property practice, was out of state from August 31, 2016 to September 8, 2016 due to the illness of her mother. The RFAs were not date-stamped received, per the standard practice of Applicant's counsel, nor were copies thereof distributed to the attorneys and docketed, again per the standard practice of Applicant's counsel. Due to these unfortunate circumstances, Applicant's counsel's office inadvertently filed the RFAs in its pleading file and did not docket or distribute copies to either attorney handling this case. The RFAs were not discovered until October 18, 2016. Upon discovering the RFAs, which are now deemed admitted, Applicant promptly filed this motion. Applicant requests that the Board grant the motion for leave to withdraw the admissions as the merits of this proceeding will be subserved by withdrawing the admissions.

Applicant's motion is supported by the accompanying brief and declarations of Paul A. Bost, Jill M. Pietrini, Beth Anderson, and Audencio Dimas, and such other papers and argument as may be presented to the Board.

Given that Opposer's testimony period is set to open on October 30, 2016, Applicant request a telephonic conference with the Interlocutory Attorney assigned to this case during the week of October 24, 2016 for the expedited resolution of this motion.

Respectfully submitted,

SHEPPARD MULLIN RICHTER & HAMPTON, LLP

By: Jill M. Pietrini

Jill M. Pietrini

Paul A. Bost

Dated: October 21, 2016

Attorneys for Applicant
Lions Gate Entertainment Inc.

BRIEF IN SUPPORT OF MOTION

I. RELEVANT FACTUAL BACKGROUND

A. The Parties

On July 24, 2014, Applicant filed U.S. Application Serial No. 86/346,513 to register the mark POPI (the “Application”), on an intent-to-use basis, for “Cosmetics; cosmetic preparations for body care; nail polish; nail decals; bath crystals; bath gel; bath oil; bath salts; body lotion; cream soaps; fragrances; moisturizing creams; shaving soap; soaps for personal use” in Class 3. On August 25, 2014, the Office issued an office action refusing registration of the Application based on, in part, a finding of likelihood of confusion with Opposer’s registration of POPPY’S in Class 3. On February 24, 2015, Applicant submitted a response to the office action presenting arguments and evidence while the refusal should be withdrawn. The Office withdrew its refusal to register the Application on the grounds of a likelihood of confusion with Opposer’s POPPY’S mark, and the Application was published for opposition on April 1, 2016.

On May 19, 2015, Opposer requested, and was granted, an extension of time to file an opposition to the Application. On June 20, 2015, Opposer instituted this opposition proceeding and asserted two grounds upon which registration of the Application should be refused: (1) Applicant allegedly made certain false or misleading statements in its February 24, 2015 office action response that constitute fraud on the Office; and (2) a likelihood of confusion with Opposer’s POPPY’S mark. (Dkt. 1.)

B. Applicant’s Motion to Dismiss is Denied and Discovery Period Begins

On July 16, 2015, Applicant filed a motion to dismiss Opposer’s fraud claim. (Dkt. 6.) Opposer did not reply to, or oppose, Applicant’s motion but, instead, filed a First Amended Notice of Opposition in an attempt to cure her deficient fraud claim (Dkt. 9), and rendering Applicant’s motion to dismiss the original pleading moot.

On September 8, 2015, Applicant filed a motion to dismiss Opposer’s fraud claim alleged in the First Amended Notice of Opposition. (Dkt. 11.) On January 11, 2016, the Board denied

Applicant's motion to dismiss and resumed the proceedings and reset the trial dates and the time for Applicant to answer Opposer's First Amended Notice of Opposition. (Dkt. 16.) On February 3, 2016, Applicant filed its answer to the Amended Notice of Opposition. (Dkt. 17.) In the Board's January 11, 2016 Order, the Board set the discovery period to open on March 4, 2016 and close on August 31, 2016. (*Id.*)

C. Applicant's Counsel and Primary File Clerk Were Unexpectedly Absent

Shortly after the opening of discovery, Jill M. Pietrini, lead counsel for Applicant, underwent invasive reconstructive foot surgery and was unable to return to her office full time until the beginning of August 2016. (Pietrini Decl., ¶ 2.) While Ms. Pietrini was preparing to return the office, she was notified that her mother had become seriously ill. (Pietrini Decl., ¶ 3.) As such, Ms. Pietrini traveled to be with and take care of her mother in August 2016, and to attend to her affairs when her mother passed in late August 2016. (*Id.*) The funeral was held on September 7, 2016, right after Labor Day weekend, with the necessary preparations leading up to it. (*Id.*) Due to this, Ms. Pietrini was unable to monitor her incoming mail for discovery requests. (Pietrini Decl., ¶ 4.)

Simultaneously, on August 31, 2016, Beth Anderson, the file clerk for Applicant's counsel's intellectual property practice, was notified that her mother was rushed to the hospital. (Anderson Decl., ¶ 2.) She abruptly left the office to travel to South Bend, Indiana to care for her elderly mother. (*Id.*) Ms. Anderson did not return to the office until September 8, 2016. (*Id.*) Due to her abrupt departure, she was unable to notify her temporary replacement of the extensive process for receiving, filing, and notifying the attorneys of litigation related materials received by first class mail. (Anderson Decl., ¶ 3.)

D. Ms. Anderson Extensive Filing Procedure

Ms. Anderson's filing procedure is extensive. (Anderson Decl., ¶ 4.) As soon as mail addressed to Ms. Pietrini, Paul Bost, or anyone else in the intellectual property department

arrives at the offices of Sheppard Mullin Richter & Hampton, LLP (“SMRH”), Ms. Anderson begins to process the mail. (*Id.*) Ms. Anderson places a priority on all litigation mail that arrives by first class mail. (*Id.*) Once she opens the mail, Ms. Anderson date stamps the correspondence with the date received. (*Id.*) Ms. Anderson then pulls the file for the corresponding client and determines which attorneys are working on the matter. (*Id.*) Once she determines these individuals, Ms. Anderson creates a pdf of the litigation materials including any cover letter, package label, and attachments and subsequently sends an email containing the pdf attachment to all the attorneys involved. (*Id.*) Furthermore, if the litigation is a discovery request, Ms. Anderson immediately makes a working copy that she puts in the responsible attorneys’ office. (*Id.*) Ms. Anderson then submits the materials to Audencio Dimas, the case clerk for the intellectual property practice, for upload to SMRH’s network drive. (*Id.*)

The intellectual property group of SMRH in the firm’s Century City office maintains a digital folder with pleadings, correspondence, and documents related to each litigation in which the firm is involved. (Bost Decl., ¶ 2.) Accordingly, SMRH maintains a sub-folder therein related to its representation of Applicant in this opposition proceeding filed by Opposer. (*Id.*) Upon receipt of the materials from Ms. Anderson, Mr. Dimas creates and saves a pdf of the documents to the appropriate subfolder. (Dimas Decl., ¶ 2) Mr. Dimas then sends an email containing the link to the pdfs on the network drive to the attorneys assigned to the matter. (*Id.*) Finally, Ms. Anderson attaches the litigation materials to the file and places the materials in that portion of the file room assigned to the intellectual property practice. (Anderson Decl., ¶ 4.) However, if the document does not come to Mr. Dimas in that form and instead arrives at his desk without a date stamp, Mr. Dimas only scans and uploads the document to the network drive without sending an email with the link and subsequently files the documents in the file room. (Dimas Decl., ¶ 4.)

E. Opposer Served Discovery Requests the Day Before the Discovery Deadline

On August 31, 2016, the day discovery was set to close, Opposer served Applicant with 308 RFAs by first class mail.¹ (Bost Decl., ¶ 3, Ex. A.) Because mail service was used, Applicant's written responses to the 308 RFAs were to be served on Opposer no later than October 5, 2016. (*Id.*)

F. Applicant Did Not Discover the RFAs Until October 18, 2016

Due to Ms. Anderson's absence, the RFAs were not properly subject to the extensive mail receipt procedure employed by Applicant's counsel. (Anderson Decl., ¶ 5.) On or around September 15, 2016, Mr. Dimas received a folder from someone in the firm with the RFAs hole-punched and inserted into the folder without a date stamp.² (Dimas Decl., ¶ 3.) Upon realizing that the RFAs were not yet uploaded to the network drive, Mr. Dimas created pdfs of the RFAs and uploaded them onto the network drive. (*Id.*) However, as per his usual procedure, Mr. Dimas did not send a link to the document to the attorneys assigned the matter because the document did not arrive from Ms. Anderson before being attached to the file. (*Id.*)

On October 18, 2016, Paul Bost, co-counsel on this matter, reviewed the network drive folder related to this proceeding to gather and review documents necessary for a motion to compel Applicant intended to file related to Opposer's refusal to respond to Applicant's second set of interrogatories. (Bost Decl., ¶ 3.) Mr. Bost noticed in the folder a document that he had never seen before that was titled "V. Kheel's 1st Set of RFA's.PDF." (*Id.*) Mr. Bost opened the pdf and saw that it was the RFAs purportedly served on Applicant by Opposer on August 31, 2016. (*Id.*) This was the first time Mr. Bost had seen the RFAs. (*Id.*) Upon further examination

¹ Opposer's RFAs are signed and dated as of August 30, 2016, however, the certificate of service is signed and dated on August 31, 2016.

² Documents received and filed by SMRH are not hole punched and put in a folder as such. This suggests that Opposer's RFAs may have come to SMRH in such a format, which may have added to Mr. Dimas' confusion.

of the details of the file, Mr. Bost noticed that they had been created on Applicant's counsel's network on September 15, 2016. (Id.) Mr. Bost subsequently checked his email and noticed that he had not received copies of the RFAs by email per office procedure. (Id.) Mr. Bost conferred with Ms. Pietrini and learned that she had not received a copy of the RFAs either. (Bost Decl., ¶ 5.) Thereafter, Applicant immediately filed the instant motion for leave to withdraw admissions.

II. APPLICANT'S MOTION SHOULD BE GRANTED

A. Granting Applicant's Motion is Proper Because Withdrawal of the Admissions Promotes the Presentation of the Merits and There is no Prejudice to Opposer

Under FRCP 36, a requested admission will be deemed admitted if the responding party fails to respond within 30 days of service of the requests. TBMP § 407.03(a) However, the Board may grant leave to withdraw the admissions which have been deemed admitted due to an untimely response:

If a party on which requests for admission have been served fails to timely respond thereto, the requests will stand admitted by operation of law unless the party is able to show that its failure to timely respond was the result of excusable neglect or *unless* a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b) and granted by the Board.

Id.; TBMP § 525; FRCP 36(b); *Giersch v. Scripps Networks Inc.*, 85 USPQ2d 1306, 1307 (TTAB 2007) (finding merits of action subserved by withdrawal of admissions and replacement with later served responses and finding no prejudice to petitioner under FRCP 36(b)); *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1721 (TTAB 1989) (presentation of merits of case aided by relieving opposer of admission on relevant issue and prejudice avoided by allowing applicant limited discovery as to the amended answer).

Under FRCP 36, withdrawal of admissions should be permitted if doing so will “promote the presentation of the merits of the action” and “the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.” FRCP 36(b); *see also* TBMP § 525 (stating the same language as FRCP 36).

The Board has applied a two-pronged test to determine whether to grant a party a motion for leave to withdraw admissions. First, the test is satisfied “when upholding the admissions would practically eliminate any presentation of the merits of the case.” *Giersch*, 85 USPQ2d at 1308 (citing *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)). In other words, the proposed withdrawal must “facilitate the development of the case in reaching the truth.” *Id.* (citing *Farr Man & Co., Inc. v. M/V Rozita*, 903 F.2d 871, 876 (1st Cir. 1990)). Second, the court must examine whether the “withdrawal [] will prejudice the party that has obtained the admissions.” *Id.* (citations omitted). Furthermore, the timing of a motion to withdraw an admission “plays a significant role in the Board’s determination of whether the propounding party will be prejudiced by withdrawal or amendment.” See *Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, 14 USPQ2d 2064, 2065 (TTAB 1990) (motion to withdraw admissions granted when propounding party’s testimony period had not yet opened).

Here, allowing the wholesale admission of 308 RFAs weighs against facilitating the development of the case in reaching the truth and would surely prejudice Applicant in defending the case on the merits. In contrast, allowing Applicant to withdraw its admissions will not prejudice Opposer because Applicant will respond to the 308 RFAs immediately should the Board grant this motion, and is working on the responses to the voluminous RFAs now. Opposer will not experience any special difficulties as a result. Lastly, the timing of the motion does not prejudice Opposer because Opposer’s testimony period has not yet begun. In short, the Board should hold that Applicant’s admissions are withdrawn.

1. Refusing Withdrawal of the Admissions Will Undermine the Presentation of the Merits

The Board has been willing to grant similar motions if the admissions are central to the asserted claims in the proceeding sufficient to prejudice the responding party. In *Giersch*, the Board granted a motion for withdrawal based on an untimely response to requests for admission and reasoned that “[i]f withdrawal [of the admissions] were not permitted, respondent would be

held to have admitted critical elements of petitioners' asserted claims." *Giersch*, 85 USPQ2d at 1308; *see also Brown & Bigelow, Inc. v. Freeflight, Inc.*, No. 102448, 1999 TTAB LEXIS 305, at *2 (T.T.A.B. July 7, 1999) (allowing withdrawal of admissions because, "it is clear that if the admissions are allowed to stand, applicant, having admitted to essentially every factual element . . . would have no hope of succeeding on the merits").

Here, like in *Giersch*, allowing Applicant's admissions to stand could be case dispositive. Opposer served Applicant with an exorbitant amount of RFAs for the nature of this case, 308 to be exact, many of which go directly to the central factual and legal issues in the dispute – particularly Opposer's fraud claim, which Applicant has already denied in its Answer. For instance, if allowed to stand, Applicant will have admitted the following:³

1. Admit that POPI is pronounced the same as POPPY.
2. Admit that the sound of the mark POPI and the mark POPPY is the same.
4. Admit that the you knew that the sound of YOUR mark POPI and the mark POPPY was the same at the time YOU filed YOUR RESPONSE.
7. Admit that POPI and POPPY are similar in sound.
9. Admit that adding a possessive's to the mark POPI makes it identical to the mark POPPY'S.
22. Admit that YOUR statement to the USPTO that "POPI and.. POPPY (Stylized) are completely different in.. .sound" was false.
23. Admit that YOUR statement to the USPTO on page 8 of YOUR RESPONSE that POPI and POPPY are completely different in sound was false.
25. Admit that YOUR statement to the USPTO on page 8 of YOUR RESPONSE that the marks POPI and POPPY (Stylized) are completely different in sound was false.

³ By no means is the above to be viewed as a complete or entire list of the RFAs that Applicant deems are central to the factual and legal issues in this case. Instead the list provided is meant to be a *representative sample* which includes, but is not limited to, the types of RFAs that are central to the current dispute.

29. Admit that when YOU told the USPTO on page 8 of YOUR RESPONSE that "POPI and.. POPPY (Stylized) are completely different in... sound," YOU knew this statement was false.
32. Admit that when YOU told the USPTO on page 8 of YOUR RESPONSE that "POPI and.. .POPPY (Stylized) are completely different in...sound," YOU committed a fraud on the USPTO.
33. Admit that when YOU told the USPTO on page 8 of YOUR RESPONSE that POPI and POPPY (Stylized) are completely different in sound YOU committed a fraud on the USPTO.
42. Admit that YOUR statement to the USPTO on Page 3 of YOUR RESPONSE that the "The Marks are Dissimilar in... Sound" was false as to the marks POPI and POPPY (Stylized).
43. Admit that YOUR statement to the USPTO on Page 3 of YOUR RESPONSE that POPI and POPPY (Stylized) are "Dissimilar in... Sound" was false.
44. Admit that YOUR statement to the USPTO on Page 3 of YOUR RESPONSE that POPI and POPPY (Stylized) are dissimilar in sound was false.
47. Admit that YOU made a misrepresentation to the USPTO when YOU wrote on Page 3 of YOUR RESPONSE that POPI and POPPY are dissimilar in sound.
55. Admit that when YOU told the USPTO in the bolded line on Page 3 of YOUR RESPONSE that POPI and POPPY are dissimilar in sound, YOU knew this statement was false, because YOU knew that the sounds of the two marks were identical.
56. Admit that when YOU told the USPTO on Page 3 of YOUR RESPONSE that POPI and POPPY are "dissimilar in... sound" YOU committed a fraud on the USPTO.
57. Admit that when YOU told the USPTO on Page 3 of YOUR RESPONSE that POPI and POPPY are dissimilar in sound, YOU committed a fraud on the USPTO.
62. Admit that Applicant's mark POPI is not dissimilar from the cited mark POPPY (Stylized) in all respects.
63. Admit that Applicant's mark POPI is similar to the cited mark POPPY (Stylized) in respect to sound.
77. Admit that when YOU told the USPTO on page 3 of YOUR RESPONSE that "Applicant's mark POPI is dissimilar from the cited marks.. .POPPY'S (Stylized) in all respects," YOU committed a fraud on the USPTO.

102. Admit that when YOU told the USPTO that the "Examining Attorney also erroneously concluded that Applicant's mark and the Cited Marks are similar in... sound" YOU committed a fraud on the USPTO.
118. Admit that similarity in sound alone between POPI and POPPY may be sufficient for a finding of likelihood of confusion.
123. Admit that the similarity of the sound of the marks POPI and POPPY favors a determination of likelihood of confusion.
124. Admit that the similarity of the sound of the marks POPI and POPPY'S favors a determination of likelihood of confusion.
125. Admit that the marks POPI and POPPY have a likelihood of confusion as to sound.
172. Admit that YOU chose the spelling of the mark POPI because YOU were aware of the trademark registrations for POPPY and POPPY'S.
235. Admit that the use of the spelling POPPY next to POPI on the POPI SOAP WEBSITE was material to a determination of likelihood of confusion.
236. Admit that the use of the spelling poppy next to the spelling popi in advertising is more likely to create consumer confusion.
300. Admit that prior to filing YOUR application, YOU discussed with YOUR attorneys the similarity in appearance between POPI and the registered mark POPPY's
304. Admit that the goods offered under the POPI mark are related to the goods offered under the POPPY'S mark.
305. Admit that the trade channels for soap offered under the POPI mark and soap offered under the POPPY'S mark are related.
306. Admit that the goods offered under the POPI mark and goods offered under the POPPY'S mark are used by the same classes of consumers.

(Bost Decl., ¶ 3, Ex. A; Opposer's RFAs.)

These admissions specifically relate to the elements considered by the Board in determining likelihood of confusion and fraud, such as similarity of the marks, relatedness of goods, and channels of trade, as well as intent. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) (setting forth the elements of likelihood of confusion analysis); *Dragon*

Bleu (SARL) v. VENM, LLC, 112 USPQ2d 1925, 1929 (TTAB 2014) (setting forth the elements of fraud).

These admissions would effectively dispose of the case in its entirety and not allow Applicant to proceed on the merits. Allowing the admissions to stand would not only fail to promote adjudication on the merits, but would be contrary to the purpose of Rule 36. FRCP 36(b), 1970 Committee Notes (“This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice”); *Johnston Pump/general Valve Inc.*, 13 USPQ2d 1719 (T.T.A.B. Sept. 28, 1989) (“[e]mphasized throughout the Federal Rules of Civil Procedure is the importance of resolving actions on the merits whenever possible”). Such a ruling would prejudice Applicant in defending the action on the merits.

Thus, the first prong of the test is satisfied in that upholding Applicant’s admissions would not promote adjudication of the claims on the merits.

2. Allowing Applicant to Withdraw Will Not Prejudice Opposer

In allowing Applicant to withdraw its admissions, Opposer will not suffer any prejudice because Opposer will still be able to litigate the matter and Opposer’s testimony period has not yet begun. In determining whether to grant a motion for leave to withdraw admissions, the Board looks to see whether the nonmoving party will suffer any prejudice. *Giersch*, 85 USPQ2d at 1308. Prejudice, as used in this context, is not simply that a party who initially obtained the admissions will now have to convince the finder of fact of its truth. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147 (6th Cir. 1997). Instead, prejudice relates to the special difficulties a party may face caused by the sudden need to obtain evidence upon withdrawal of admission. *Id.*; *Davis v. Noufal*, 142 F.R.D. 258, 259 (D.D.C. 1992) (holding that the burden of addressing the merits does not establish “prejudice”). The special difficulties include the “unavailability of key witnesses in light of the delay.” *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001).

However, mere inconvenience by the withdrawal of admissions does not itself constitute “prejudice.” *Hadley v. United States*, 45 F.3d 1345, 1349 (9th Cir. 1995). In fact, the Board has held that withdrawing admissions prior to the testimony period is not prejudicial. *See Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, 14 USPQ2d 2064, 2065 (TTAB 1990) (granting motion to withdraw admissions where propounding party’s testimony period had not yet opened and noting that “where the failure to timely respond to a request for admissions has a harsh result” withdrawal of the admissions provides a method of relief).

Here, there is no prejudice in allowing Applicant to withdraw its admissions. Like *Hobie Designs*, this proceeding has not yet reached the testimony period and has not yet proceeded to trial. (*See* Dkt. 16.); *Hobie Designs Inc.*, 14 USPQ2d at 2065 (reasoning that timing plays a significant role in the Board’s determination of whether the propounding party will be prejudiced by withdrawal). Furthermore, Applicant fully intends to serve Opposer with responses to its RFAs immediately upon determination of the Board and is working on the lengthy responses as of the date of filing this motion. Moreover, the slight delay⁴ in responding to Opposer’s RFAs does not preclude Opposer from accessing evidence or witnesses. Due to the circumstances and claims in this case, it is very unlikely that such evidence and witnesses would become unavailable in the future. Applicant’s untimely response was not aimed at gaming the system or improperly extending the deadlines. Instead, Applicant’s failure to respond to the time allotted was the unfortunate byproduct of the death of lead counsel’s mother and the family emergency resulting in another employee not following the standard procedures of Applicant’s counsel when opening the mail. Applicant filed this motion immediately upon finding the RFAs on its network drive. Furthermore, Applicant fully intends to participate wholly in this proceeding and defend the merits of its position.

⁴ October 5, 2016 was the deadline to respond to the RFAs, which is only 16 days prior to the filing of this motion. (Bost Decl., ¶ 3, Ex. A;)

Thus, the second prong of the test is satisfied in that allowing Applicant to withdraw its admissions will not lead to any prejudice to Opposer.

III. CONCLUSION

For the reasons stated above, Opposers respectfully requests that the Board grant its motion for leave to withdraw admissions.

Respectfully submitted,

SHEPPARD MULLIN RICHTER & HAMPTON, LLP

By: Jill M. Pietrini

Jill M. Pietrini

Paul A. Bost

Dated: October 21, 2016

Attorneys for Applicant
Lions Gate Entertainment Inc.

DECLARATION OF PAUL A. BOST

I, Paul A. Bost, declare as follows:

1. I am an attorney duly licensed to practice before the Board and I am an associate in the law firm of Sheppard Mullin Richter Hampton, LLP (“SMRH”), counsel of record for Applicant Lions Gate Entertainment Inc. (“Lionsgate”) in this matter. My supervising partner Jill Pietrini and I are the lawyers responsible for this case. I have personal knowledge of the facts set forth in this declaration and if called to testify, I could and would testify competently thereto.

2. The intellectual property group of SMRH in the firm’s Century City office maintains a folder with pleadings, correspondence, and documents related to each litigation in which we are involved. Accordingly, we maintain a sub-folder therein related to our representation of Lionsgate in this opposition proceeding.

3. On October 18, 2016, I reviewed the folder related to this proceeding to gather and review documents necessary for a motion to compel Lionsgate intended to file related to Opposer’s refusal to respond to Lionsgate’s second set of interrogatories. I noticed in the folder a document I have never seen before that was titled “V. Kheel’s 1st Set of RFA’s.PDF.” I opened the documents and saw that it was Opposer’s First Set of Requests for Admission (“RFAs) purportedly served on Lionsgate by Opposer on August 31, 2016. A copy of the RFAs is attached hereto as **Exhibit A**. This the first time I had seen the RFAs. I examined the details of the file, and noticed that they had been created on Applicant’s counsel’s network on September 15, 2016, as reflected in the below screenshot.



4. I subsequently checked my email and noticed that I had not received copies of these discovery requests by email per our office procedure.

5. I then conferred with Ms. Pietrini and learned that she had not received a copy of the RFAs either.

I declare all of the foregoing under the penalty of perjury under the laws of the United States of America. Executed this 21st day of October, 2016 in Los Angeles, California.

/Paul A. Bost/
Paul A. Bost

DECLARATION OF JILL M. PIETRINI

I, Jill M. Pietrini, declare as follows:

1. I am an attorney duly licensed to practice in the State of California. I am a partner in the law firm of Sheppard Mullin Richter & Hampton, LLP, (“SMRH”) counsel of record for Applicant Lions Gate Entertainment Inc. (“Lionsgate”) in this case. I have personal knowledge of the facts set forth in this declaration, and if called to testify, I could and would testify competently thereto.

2. On April 11, 2016, I underwent extensive reconstructive foot surgery to my right foot. I was in multiple casts and on crutches from April 11, 2016 through most of June 2016. Because the surgery was to my right foot, I was unable to drive until three months after the surgery. Due to the surgery, I was out of the office for almost four months returning to work full time in my office on August 1, 2016.

3. In early August, 2016, I received news that my mother had suddenly become extremely ill and physically unable to care for herself. I immediately traveled to see my mother and attend to her affairs. Shortly after, my mother passed away on August 24, 2016. Her funeral mass and service and burial, which I arranged, was held on September 7, 2016, right after Labor Day weekend. My mother’s illness, death, and funeral required me to travel to Northern California three consecutive weeks. I am still finishing matters relating to her burial and working on wrapping up her affairs.

4. Due to my absence I was unable to monitor my incoming mail and did not know that Opposer had served its First Set of Requests for Admission in this case.

I declare all of the foregoing under the penalty of perjury under the laws of the United States of America. Executed this 21st day of October, 2016 in Los Angeles, California.

/Jill M. Pietrini/

Jill M. Pietrini

DECLARATION OF BETH ANDERSON

I, Beth Anderson, declare as follows:

1. I am the filing clerk for Applicant's counsel's intellectual property practice in the Century City Office of the law firm of Sheppard Mullin Richter & Hampton, LLP ("SMRH"), which represents Applicant Lions Gate Entertainment Inc. ("Lionsgate") in this case. I have personal knowledge of the facts set forth in this declaration, and if called to testify, I could and would testify competently thereto.

2. On August 31, 2016, I received news that my mother had suddenly become extremely ill, and was rushed to the hospital. I immediately and abruptly left the office to travel to South Bend, Indiana to care for my elderly mother and tend to her affairs. I did not return to the office until September 8, 2016.

3. Due to my abrupt departure, I was unable to notify a temporary replacement of the extensive process for receiving, filing, and notifying the attorneys of litigation related materials received by first class mail.

4. My filing procedure is extensive. As soon as mail addressed to Ms. Pietrini, Paul Bost, or anyone else working in the intellectual property department arrives at the offices of SMRH, I begin to process the mail. In doing so, I place a priority on all litigation mail that arrives by first class mail. Once I open the mail, I date stamp the correspondence with the date received. I then pull the file for the corresponding client and determine which attorneys are working on the matter. Once I determine who these individuals are, I create a pdf of the litigation materials including any cover letter, package label, and attachments and subsequently send an email containing the pdf attachment to all the attorneys involved. If the litigation is a discovery request, I immediately make a working copy that I put in the responsible attorney's office. I then submit the materials to Audencio Dimas for upload to SMRH's network drive. I

then place the materials in that portion of the file room assigned to the intellectual property practice.

5. Due to my absence, Opposer's First Set of Requests for Admission were not properly subject to the extensive filing procedure employed by Applicant's counsel.

I declare all of the foregoing under the penalty of perjury under the laws of the United States of America. Executed this 21st day of October, 2016 in Los Angeles, California.

/Beth Anderson/
Beth Anderson

DECLARATION OF AUDENCIO DIMAS

I, Audencio Dimas, declare as follows:

1. I am the clerk for the intellectual property department in the law firm of Sheppard Mullin Richter & Hampton, LLP (“SMRH”), which represents Applicant Lions Gate Entertainment Inc. (“Lionsgate”) in this case. I have personal knowledge of the facts set forth in this declaration, and if called to testify, I could and would testify competently thereto.

2. I am primarily responsible for uploading and maintaining documents for litigation matters on the network drive. My procedure for doing so is as follows. Upon receiving newly received documents from Beth Anderson, I save a pdf of the documents and upload them to the appropriate subfolder on the network drive. I then send an email containing the link to the pdfs on the network drive to the attorneys assigned to the matter. However, if a document arrives to my desk without a date stamp, I only scan and upload the document to the network drive but do not send a link. I then forward the folder to be filed in the portion of the file room assigned to the intellectual property practice.

3. On or around September 15, 2016, I received a file with the Opposer’s First Set of Requests for Admissions hole-punched and inserted in the file without a date stamp. Upon realizing that the RFAs were not yet uploaded to the network drive, I created pdfs of the materials and uploaded them onto the network drive on that same day. However, as per my usual procedure, I did not send a link to the document to the attorneys assigned to the matter because the document did not arrive from Ms. Anderson before being filed. I do not know who placed the file with the RFAs on my desk. The file was there when I returned to my desk.

I declare all of the foregoing under the penalty of perjury under the laws of the United States of America. Executed this 21st day of October, 2016 in Los Angeles, California.

/Audencio Dimas/

Audencio Dimas

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this **APPLICANT LIONS GATE ENTERTAINMENT INC.'S MOTION FOR LEAVE TO WITHDRAW ADMISSIONS** is being transmitted electronically to Commissioner of Trademarks, Attn: Trademark Trial and Appeal Board through ESTTA pursuant to 37 C.F.R. §2.195(a), on this 21st day of October, 2016.

/LaTrina A. Martin/

LaTrina A. Martin

CERTIFICATE OF SERVICE

I hereby certify that this **APPLICANT LIONS GATE ENTERTAINMENT INC.'S MOTION FOR LEAVE TO WITHDRAW ADMISSIONS** is being deposited with the United States Postal Service, postage prepaid, first class mail, in an envelope addressed to:

Ilana Makovoz, Esq.
MAKOVOZ LAW GROUP
9350 Wilshire Blvd., Suite 203
Beverly Hills, CA 90212

on this 21st day of October, 2016.

/LaTrina A. Martin/

LaTrina A. Martin

SMRH:479573101.2

EXHIBIT A

EXHIBIT A
TO OPPOSER VICTORIA KHEEL'S
FIRST SET OF REQUESTS FOR
ADMISSIONS TO LIONS GATE

beauty

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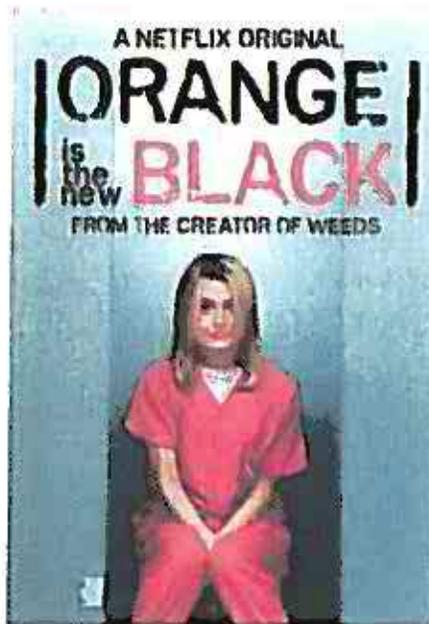
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JULY 1, 2015 BY



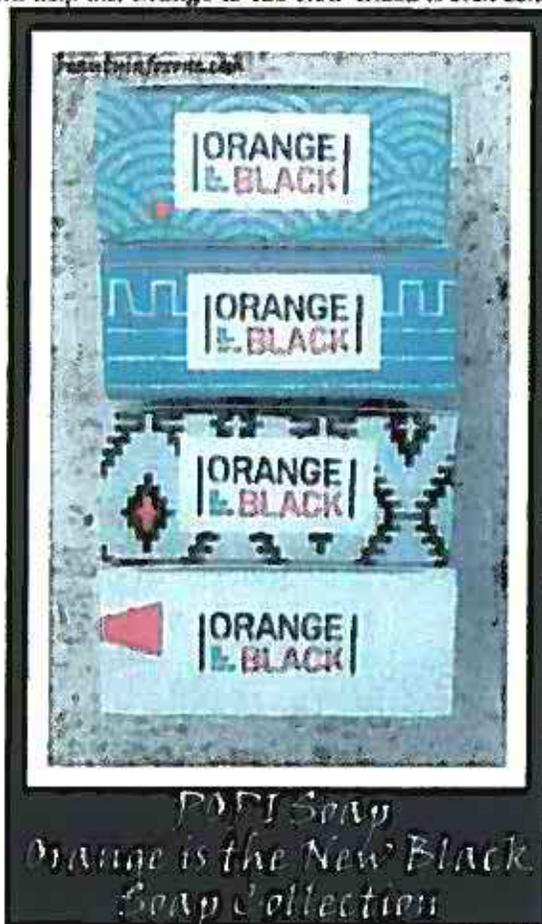
Have you 'binge watched' a TV show yet? There really isn't anything like it. A typical season is 13 episodes for cable and in the 20's for network TV. Watching an entire season all in a row is a dream come true for those of us with instant gratification issues...no need to wait an entire week to find out who slept with whom/who died/who realized it was all a dream! Of course, this also means assiduously avoiding any spoilers while the actual season is unfolding. I've been doing that for five seasons of *Mad Men* and let me tell you, it ain't easy.



www.aveeno.com



I discovered *Orange is the New Black* after the first season was already over, so if I had read any spoilers I didn't even remember them. I watched the first episode to see if it came close to being as awesome as *The Sopranos*, something a friend of mine loudly declared to be a total truth. I had very serious doubts, but after that first episode I was HOOKED. And I hadn't even planned on a binge session!! That meant sleepy mornings from late nights, secret watching, and an entire weekend meant for some serious decluttering spent instead planted in front of the television. My conclusion...I love *The Sopranos*, but lord help me, *Orange is the New Black* is even better.



Without giving too much away, in the first season the characters Piper and her best friend Pully were planning an artisan soap company called *POPI*. While we see them



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6750

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SHOPBOP

JUST ARRIVED



Tumi Alpha Bravo Griesom Travel Satchel

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FEATURED

10,000 items

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making soap together, we never see the finished product. It's a stroke of major genius. *Lionsgate Entertainment* and *Chivas* decided to partner together to create the *POPI* soap line, which debuted at the same time as Season 3. (By the way, I LOVE that season! It came out all at once...let the binging begin!!!) I was sent these awesome soaps to review, and am happy to report that they are as fantastic as the show itself.



POPI Orange is the New Black Soap Collection

There are four soaps in this collection from the now non-fictional *POPI* line. The soaps retail for \$12 and are available at www.chivas.com. The packaging is true to the plot line, with the wrappers proudly stating the products are "handcrafted by Polly and Piper." In reality, *POPI* is a division of the *Chivas* line, which was founded by a mother-daughter team who create beautiful soaps from the goat milk collected at their farm.



There are four different soaps available, and I love how the scent choices are a direct result of the dialogue from the show.

Piper: That smells fantastic... So, you can put anything in there?

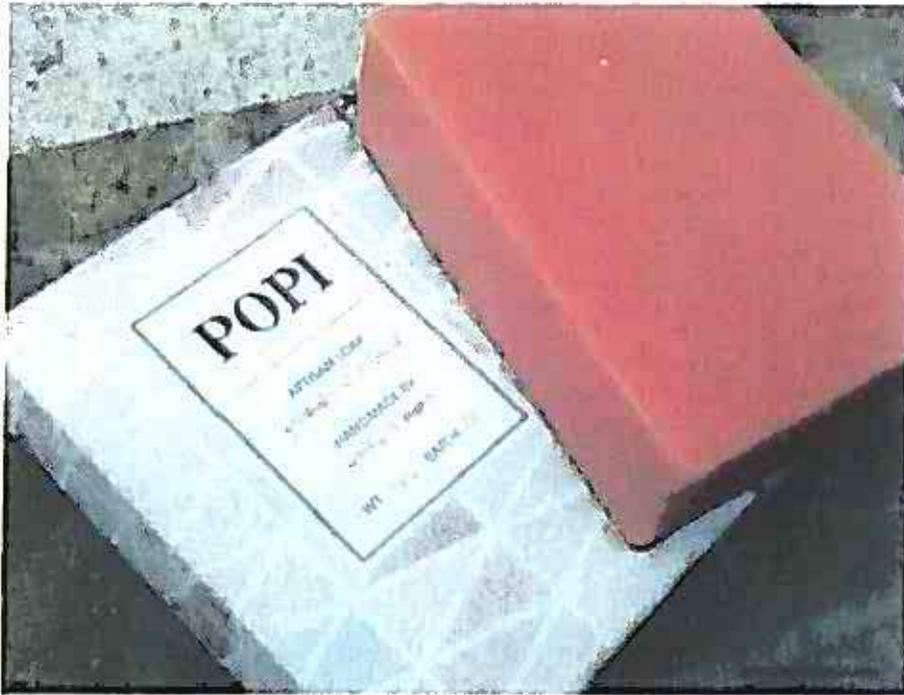
Polly: Just about. Peppermint, basil, grapefruit, vanilla.

Pete: She won't do chocolate...

Polly: We're making soap, not Jelly Bellies...I think you'd want something more along the lines of sage, patchouli...

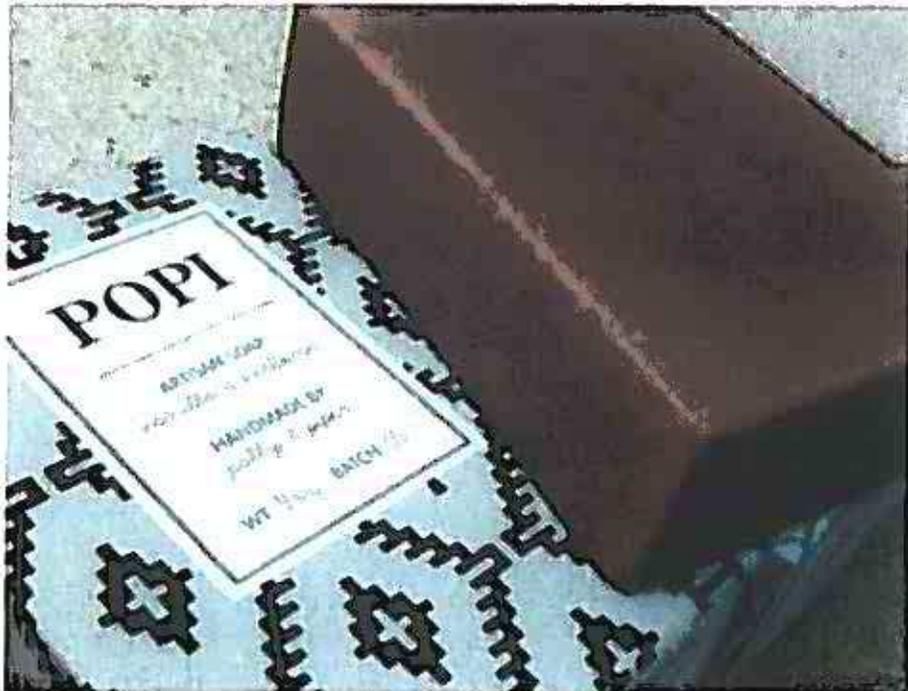
*Piper: You could sell these, you know. At farmers markets, little boutique stores...I could be your partner...market it right and package it right, this is money. I mean, it smells so f*cking good in here.*

Yup. These soaps smell pretty f*cking good.



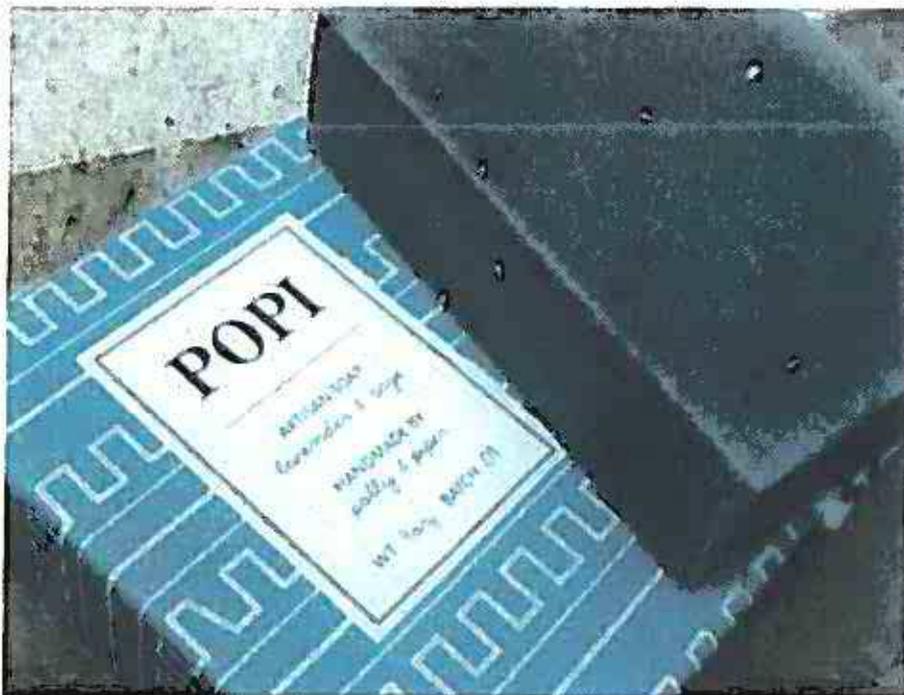
POPI Grapefruit & Basil Soap

The *Grapefruit & Basil Soap* is the most unisex scent of the line. My husband loves this clean citrus paired with earthy basil. It is a super sexy scent that makes it even more difficult to keep my hands to myself when I'm around him. The pink kaolin clay absorbs toxins and soothes dry, irritated skin.



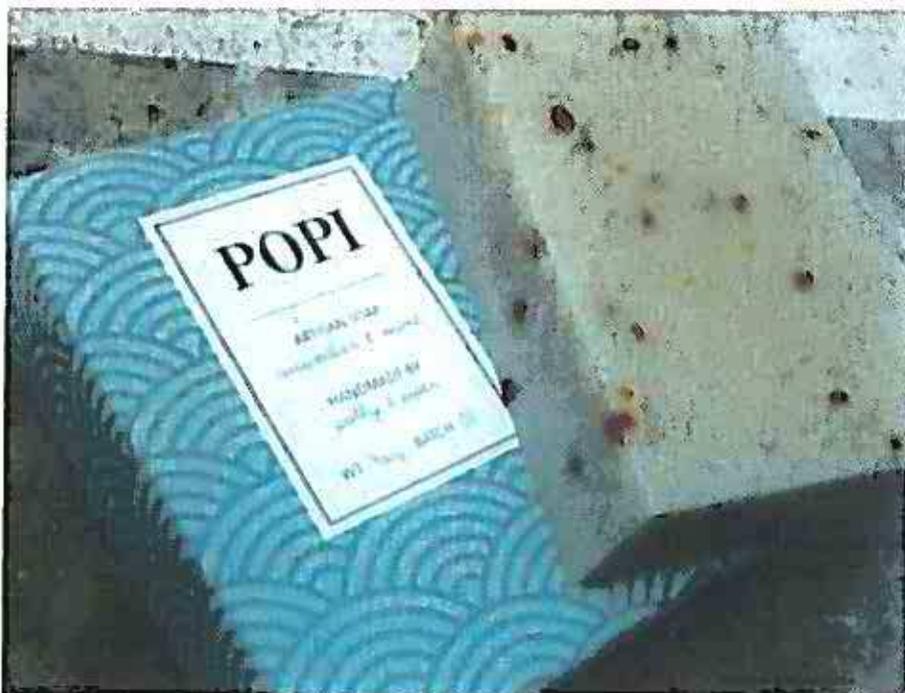


The *Vanilla & Verbena Soap* is heavenly. We are talking bourbon vanilla, rich hazelnut, and the swoon-worthy cinnamon/vanilla/clove combo of peru balsam oil. This is an immensely comforting scent that makes me feel all warm and happy inside, and all soft and moisturized outside thanks to the cocoa butter.



POPI Lavender & Sage Soap

The *Lavender & Sage Soap* is a great scent combo. I find lavender to be almost harsh sometimes, but the sage gives it a soothing earthiness. This beautiful soap is especially good for dry, irritated skin since it includes skin-calming oatmeal.



POPI Cucumber & Mint Soap

If you love refreshing, invigorating scents, then the *Cucumber & Mint Soap* is the one for you. This soap is the epitome of cool, with refreshing cucumber, hand chopped peppermint leaves, and peppermint essential oil. All this plus skin healing ... juice make this one cool customer for sure.

POP!’s big, thick soaps make a beautiful, sweet-smelling lather. Goat milk is terrific for soap because it has even more vitamins and fats than cow’s milk. Goat milk is extremely gentle, and is often recommended for those with sensitive or very dry skin. It’s intensely hydrating, plus it has a high content of lactic acid – yes, alpha hydroxy acid! We all know that AHA’s get rid of dead skin cells, so goat milk soap does it all – cleanses, hydrates, and makes skin look even younger. It also is an anti-bacterial so it’s a perfect soap for those prone to acne.

Plus...these soaps just smell so f*cking good.

A+ for the show and A+ for these soaps. No need to feel dirty for binge watching – just lather up. Lisa

**received for editorial consideration*



You may also like:



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EXHIBIT B
TO OPPOSER VICTORIA KHEEL'S
FIRST SET OF REQUESTS FOR
ADMISSIONS TO LIONS GATE

pop·py

pop·py (pɒp'ɪ) noun
plural pop·pies

1. Any of numerous plants of the genus *Papaver*, having nodding buds with four crumpled petals, showy red, orange, or white flowers, a milky juice, and capsules that dehisce through terminal pores.
2. Any of several similar or related plants, such as the California poppy.
3. An extract from the sap of unripe poppy seedpods, used in medicine and narcotics.



Poppy

4. Color. A vivid red to reddish orange.

[Middle English *popi*, from Old English *popig*, probably alteration of Vulgar Latin **papāvum*, alteration of Latin *papāver*.]

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EXHIBIT C
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poppies

- 1. *1 a* : any of a genus (*Papaver* of the family Papaveraceae, the poppy family) of chiefly annual or perennial herbs with milky juice, showy regular flowers, and capsular fruits including the opium poppy and several forms cultivated as ornamentals *b* : an extract or decoction of poppy used medicinally
- 2. *2* : a strong reddish orange

See [papaver](#), defined for English-language learners

See [papaver](#), defined for kids

Origin and Etymology of *poppy*

Middle English *popt*, from Old English *popæg*, *popig*, modification of Latin *papaver*

First Known Use: before 12th century

Rhymes with *poppy*

choppy, copy, crappie, floppy, gloppy, hoppy, kopje, sloppy, sippy, stroppy



POPPY Defined for Kids

poppy

noun pop py 'pā-pē'

Definition of *poppy* for Students

plural

poppies

- 1. : a plant with a hairy stem and showy usually red, yellow, or white flowers

Medical Dictionary

poppy

noun pop py 'pā-pē'

Medical Definition of *poppy*

plural

poppies

EXHIBIT D
TO OPPOSER VICTORIA KHEEL'S
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SHOP ABOUT LOOKBOOKS FARM CONTACT

OITNB FAN?
try POPI soap
inspired by the show



SAVE
WHEN
YOU BUY
ALL 4!

\$36.00
~~\$48.00~~

Quantity:
1

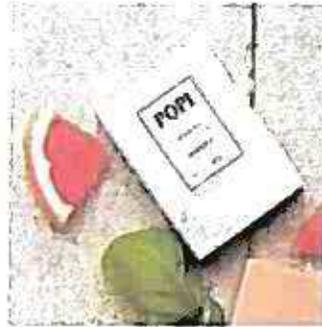
ADD
TO
CART



GETTING CLEAN
NEVER FELT SO
DIRTY.

In Season 1, Piper & Polly make soap together. Their soap company is called POPI ("poppy").

Chivas Skin Care has partnered with Lionsgate Entertainment to bring the fictional soap to life!



Vanilla & Verbena Soap
\$12.00

Quantity:

ADD TO CART

Cucumber & Mint Soap
\$12.00

Quantity:

ADD TO CART

Grapefruit & Basil Soap
\$12.00

Quantity:

ADD TO CART

Lavender Sage Soap
from \$6.00

Options:

Quantity:

ADD TO CART

AS SEEN IN ...

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SEASON 1 // SOAP REFERENCES

EPISODE 2. "TIT PUNCH"

In a flashback, Piper makes soap in

Episode 3. "Lesbian Request Denied"

Episode 5. "The Chickening"

Piper drops a prison phone call

Polly's kitchen. In prison, Piper creates lotion for Red's back pain.

Polly & Piper argue about how to run the soap business while Piper is in jail.

with Barney's to chase Red's mysterious chicken.

THE REAL SOAPMAKERS



Real-life POPI soaps are also handmade by two best friends - a mother and her daughter. Donna (mother) started making soaps in her home kitchen with small, hand-poured batches. Lauren (daughter) helped grow her Mom's hobby into a successful business - Chivas Skin Care.

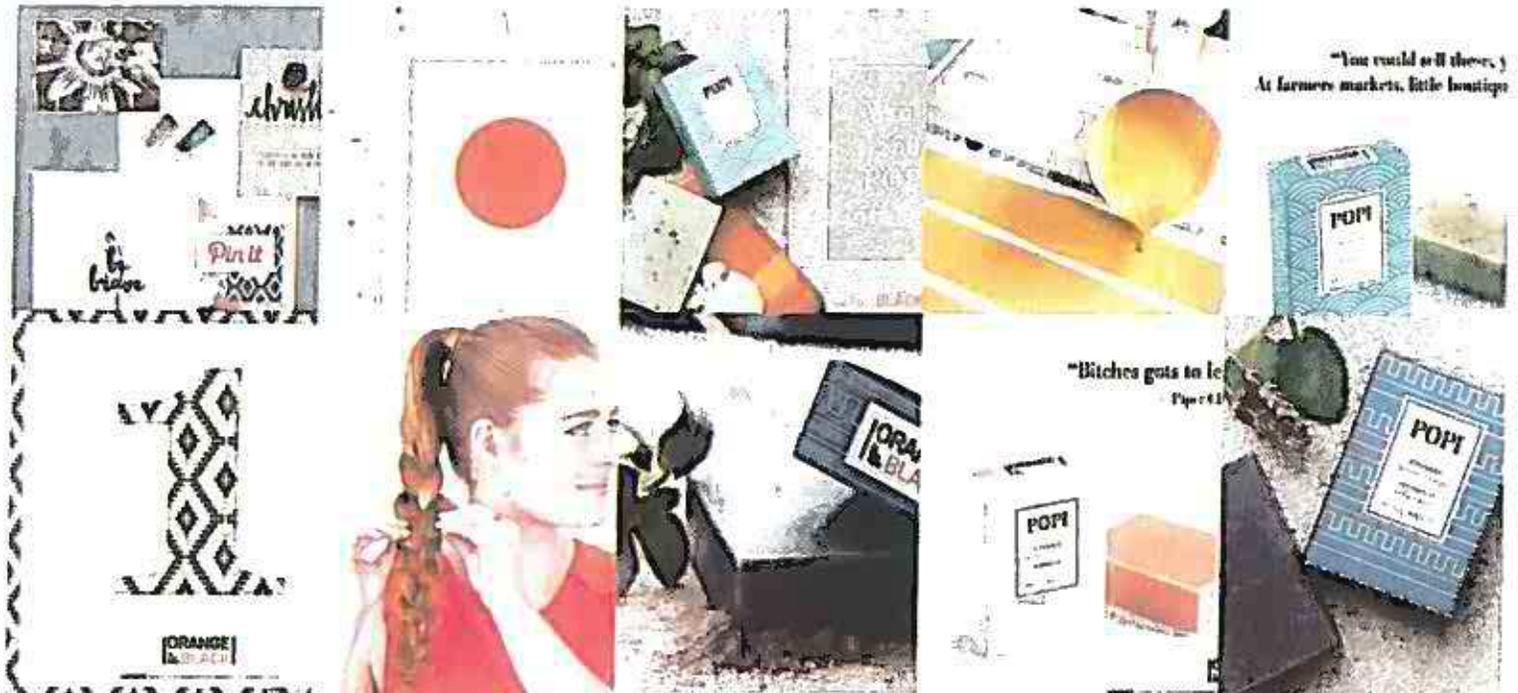
Like Polly and Piper, Donna and Lauren believe in the value of natural ingredients. They use essential oils, natural colorants and fair trade shea butter in every batch of soap. No chemical preservatives, parabens or pthalates.

Donna and Lauren's favorite natural ingredient is farm-fresh goat milk, sourced from their family farm just outside Los Angeles. Goat milk is moisturizing, nourishing & gentle for all skin types. Goat milk is used in every POPI bar of soap.

MOST POPULAR CHIVAS SKIN CARE PRODUCTS >>>



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Not on Instagram, but want to stay in the loop? Sign up for our [newsletter](#) and/or follow [@chivasskincare](#) on [Facebook](#).

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CARRY "POPI" IN YOUR STORE

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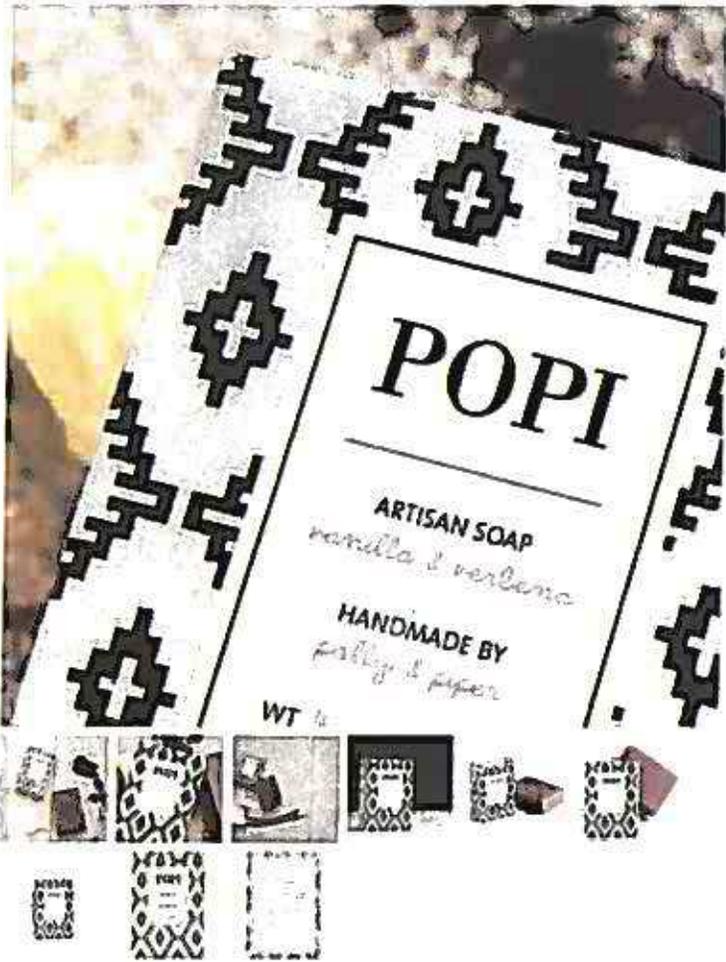
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POPI: VANILLA & VERBENA

\$12.00

"We steep bourbon vanilla beans in rich, nutty hazelnut oil. Then swirl with unrefined, raw cocoa butter, deeply nourishing goat milk & aromatherapeutic peru balsam essential oil."

Orange is the New Black (OITNB)

Chivas Skin Care has partnered with the Netflix hit-series, **OITNB**, to create POPI soap ... the soap that Piper started making in Polly's kitchen and later pitched to buyers via a collect call from prison! POPI (pronounced "poppy") is an amalgamation of the two best friends' names - Polly & Piper. We have worked hand-in-hand with the **OITNB** crew to develop scents and designs that perfectly reflect the vision of what POPI soap would have looked like.

Quantity:

1

ADD TO CART

Share

ORANGE
is the new **BLACK**

INGREDIENTS

Palm oil, coconut oil, olive oil, soybean oil, goat milk, water, sodium hydroxide, hazelnut oil, fragrance, cocoa butter, shea butter, peru balsam essential oil, vanilla bean powder, rosemary extract.

LIONSGATE

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Net Wt. 4.0 oz.

YOU MAY ALSO LIKE...



POPI: Lavender Sage

POPI: Cucumber & Mint

POPI: Grapefruit & Basil



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SHOP ABOUT LOOKBOOKS FARM CONTACT



POPI: CUCUMBER & MINT

\$12.00

"We harvest peppermint leaves from Piper's Brooklyn balcony. Then sun-dry, hand-chop & mix with cooling peppermint essential oil, soothing aloe vera juice & antioxidant-rich cucumber."

Orange is the New Black (OITNB)

Chivas Skin Care has partnered with the Netflix hit-series, **OITNB**, to create POPI soap ... the soap that Piper started making in Polly's kitchen and later pitched to buyers via a collect call from prison! POPI (pronounced "poppy") is an amalgamation of the two best friends' names - Polly & Piper. We have worked hand-in-hand with the **OITNB** crew to develop scents and designs that perfectly reflect the vision of what POPI soap would have looked like.

Quantity:

1



ADD TO CART

Share

ORANGE
is
the
new **BLACK**

THE INGREDIENTS

Palm oil, coconut oil, olive oil, soybean oil, goat milk, sodium hydroxide, water, fragrance, pepper-mint essential oil, aloe vera gel, shea butter, cucumber powder, rosemary extract, peppermint leaves, indigo powder, blue ultramarine powder.

Net Wt. 4.0 oz.

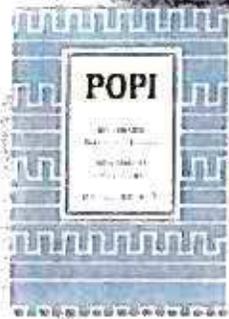
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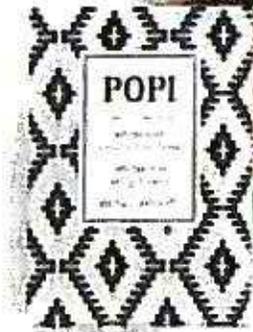
YOU MAY ALSO LIKE...



POPI: Grapefruit & Basil



POPI: Lavender Sage



POPI: Vanilla & Verbena



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POPI: GRAPEFRUIT & BASIL

\$12.00

"Like our friendship, this blend proves that opposites attract. Bright, zesty grapefruit essential oil & gentle pink clay contrast with deep, earthy basil essential oil & exfoliating commel."

Orange Is the New Black (OITNB)

Chivas Skin Care has partnered with the Netflix hit-series, **OITNB**, to create POPI soap ... the soap that Piper started making in Polly's kitchen and later pitched to buyers via a collect call from prison! POPI (pronounced "poppy") is an amalgamation of the two best friends' names - Polly & Piper. We have worked hand-in-hand with the **OITNB** crew to develop scents and designs that perfectly reflect the vision of what POPI soap would have looked like.

Quantity:

1



ADD TO CART

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ORANGE is the new BLACK

THE INGREDIENTS

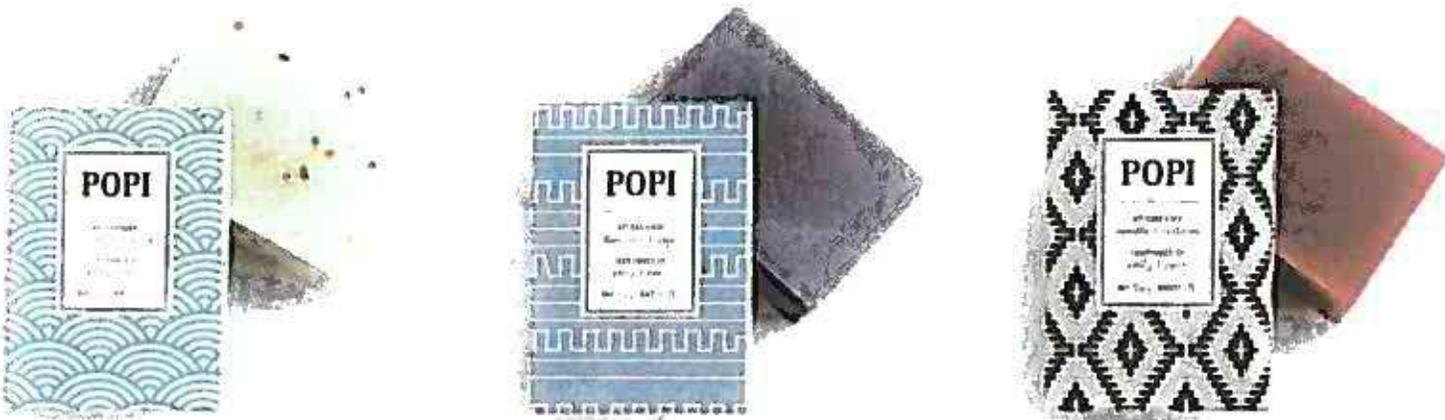
Palm oil, coconut oil, olive oil, soybean oil, goat milk, water, sodium hydroxide, shea butter, fragrance, grapefruit essential oil, basil essential oil, fennel essential oil, pink kaolin clay, cornmeal, grapefruit peel powder, rosemary extract.

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Net Wt. 4.0 oz.

MORE POPI SOAP SCENTS...





POPI: Cucumber & Mint

POPI: Lavender Sage

POPI: Vanilla & Verbena



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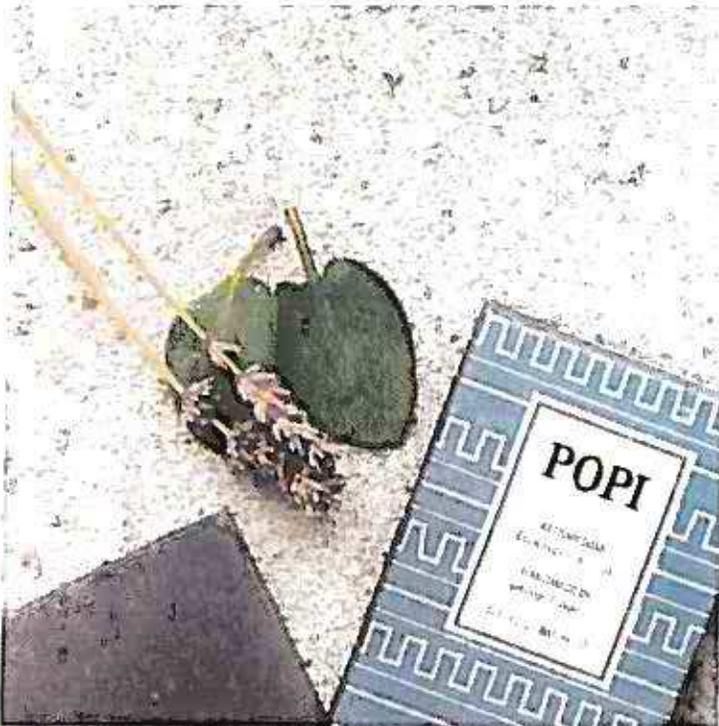
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SHOP ABOUT LOOKBOOKS FARM CONTACT



POPI: LAVENDER SAGE

\$12.00

"Purple Brazilian clay lends a deep, all-natural color & naturally detoxifies. We stir it with exfoliating oatmeal, calming lavender & purifying sage for a tranquil spa-in-a-box."

Orange Is the New Black (OITNB)

Chivas Skin Care has partnered with the Netflix hit-series, **OITNB**, to create POPI soap ... the soap that Piper started making in Polly's kitchen and later pitched to buyers via a collect call from prison! POPI (pronounced "poppy") is an amalgamation of the two best friends' names - Polly & Piper. We have worked hand-in-hand with the **OITNB** crew to develop scents and designs that perfectly reflect the vision of what POPI soap would have looked like.



Quantity:

1

ADD TO CART

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ORANGE is the new BLACK

THE INGREDIENTS

Palm oil, coconut oil, olive oil, soybean oil, goat milk, water, sodium hydroxide, shea butter, fragrance, purple brazilian clay, lavender essential oil, sage essential oil, ground oatmeal, rosemary extract.

LIONSGATE

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Net Wt. 4.0 oz.

MORE "POPI" SOAPS...



POPI: Vanilla & Verbena

POPI: Cucumber & Mint

POPI: Grapefruit & Basil



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SHOP ABOUT LOOKBOOKS FARM CONTACT

POPI SOAP 4-PACK

SALE

\$36.00 ~~\$48.00~~

This collection includes:

- Cucumber Mint
- Grapefruit Basil
- Lavender Sage
- Vanilla Verbena

Orange Is the New Black (OITNB)

Chivas Skin Care has partnered with the Netflix hit-series, **OITNB**, to create POPI soap ... the soap that Piper started making in Polly's kitchen and later pitched to buyers via a collect call from prison! POPI (pronounced "poppy") is an amalgamation of the two best friends' names - Polly & Piper. We have worked hand-in-hand with the **OITNB** crew to develop scents and designs that perfectly reflect the vision of what POPI soap would have looked like.

Quantity:

1



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ORANGE
is the
new **BLACK**

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MOST POPULAR CHIVAS PRODUCTS



Ojai Valley Retreat Goat Milk Soap | Calming Lavender Oatmeal

Nourishing Goat Milk Facial Cream: for normal to dry skin

Boutique Soap 6-Pack



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FOR OITNB FANS
popi soap 4-pack



chivasskincare

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16 likes

89w

chivasskincare On the 3rd day of Christmas, my true love gave to me... a #popisoap gift set!



Add a comment...

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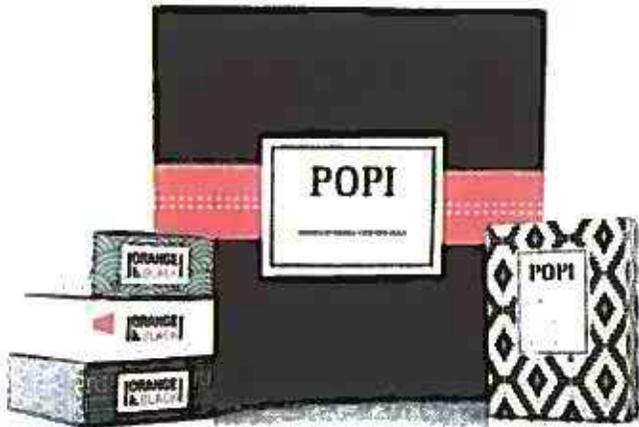


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ORANGE
| is the new **BLACK** |



Contact: Micole Richter
Mobile: 917-821-5191
Email: micole@gmail.com

FOR IMMEDIATE RELEASE

Chivas Skin Care Launches Limited Edition Artisanal Soaps Inspired by the TV Series "Orange is the New Black"

Los Angeles (April 10, 2015)— LA-based Chivas Skin Care has partnered with Lionsgate to create a limited-edition, artisanal bar soap collection based on Piper Chapman's soap company in "Orange is the New Black" (OITNB). Product will be on shelves this spring to coincide with the Season 3 premiere of OITNB, set for June 12th.

In Season 1, Piper and her best friend Polly's soap business named POPI ("poppy") was short-lived due to Piper's abrupt arrest, thus the finished product was never seen. While watching the show from her then Los Angeles home, Chivas Skin Care co-founder, Lauren Johanson, was inspired to pick up where the show left off and bring the fictional soap company to life.

"Watching Polly and Piper make soap in their kitchen brought back memories of how my Mom and I first got started," said Johanson. "So when I saw this similar story play out in the show, I thought it would be fun to bring their story to life."

POPI by Chivas Skin Care is available in four exclusive scents including: Cucumber & Mint, Grapefruit & Basil, Lavender & Sage and Vanilla & Verbena. The soaps are handmade in small batches utilizing high quality ingredients such as pure essential oils, natural colorants and fair trade shea butter.

The limited edition POPI by Chivas Skin Care collection is available at www.popisoap.com and retails for \$12 each.

ABOUT CHIVAS SKIN CARE: Chivas Skin Care is a boutique skin care company specializing in hand-crafted bar soaps made with fresh goat milk. Owned by mother and daughter partners, Donna Johanson and Lauren Johanson, Chivas Skin Care prides itself on using high-quality, natural ingredients such as pure essential oils, fair trade shea butter, and, most importantly, fresh goat milk from the Johanson's family goat farm located just north of Los Angeles. In addition to bar soaps, Chivas Skin Care now offers a full skin care line including an eye cream, moisturizer and lip balm, as well as body products such as goat milk lotion (Fall 2015). All products are available at www.chivasskincare.com and in over 80 stores nationwide.

ABOUT LIONSGATE: Lionsgate is a premier next generation global content leader with a strong and diversified presence in motion picture production and distribution, television programming and syndication, home entertainment, digital distribution, channel platforms and international distribution and sales. The Company currently has more than 30 television shows on over 20 different networks spanning its primetime production, distribution and syndication businesses, including such critically-acclaimed hits as the multiple Emmy Award-winning Mad Men and Nurse Jackie, the comedy Anger Management, the broadcast network series Nashville, the syndication success The Wendy Williams Show, the critically-acclaimed hit series Orange is the New Black and new series such as The Royals, Manhattan, Deadbeat, Casual and Chasing Life. Its feature film business has been fueled by such recent successes as the blockbuster first three installments of The Hunger Games franchise, the first two installments of the Divergent franchise, Now You See Me, John Wick, Warm Bodies, CBS Films/Lionsgate's The DUFF, Roadside Attractions' A Most Wanted Man, Lionsgate/Codeblack Films' Addicted and Pantelion Films' Instructions Not Included, the highest-grossing Spanish-language film ever released in the U.S. Lionsgate's home entertainment business is an industry leader in box office-to-DVD and box office-to-VOD revenue conversion rates. Lionsgate handles a prestigious and prolific library of approximately 16,000 motion picture and television titles that is an important source of recurring revenue and serves as the foundation for the growth of the Company's core businesses. The Lionsgate and Summit brands remain synonymous with original, daring, quality entertainment in markets around the world.

###

EXHIBIT L
TO OPPOSER VICTORIA KHEEL'S
FIRST SET OF REQUESTS FOR
ADMISSIONS TO LIONS GATE

To: Poppy Rhys (poppyproducts@gmail.com)
Subject: U.S. TRADEMARK APPLICATION NO. 86571786 - P POWERFUL O ORGANIC P EFFECTIVE P - N/A
Sent: 7/6/2015 6:29:43 PM
Sent As: ECOM103@USPTO.GOV

Attachments: [Attachment - 1](#)
[Attachment - 2](#)
[Attachment - 3](#)
[Attachment - 4](#)
[Attachment - 5](#)
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 86571786

MARK: P POWERFUL O ORGANIC P EFFECTIVE P

86571786

CORRESPONDENT ADDRESS:

POPPY RHYS

3374 Marsh Rd

Cayucos, CA 93430-1568

CLICK HERE TO RESPOND TO THIS LETTER:

http://www.uspto.gov/trademarks/teas/response_forms.jsp

[VIEW YOUR APPLICATION FILE](#)

APPLICANT: Poppy Rhys

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

poppyproducts@gmail.com

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE BELOW.**

ISSUE/MAILING DATE: 7/6/2015

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SUMMARY OF OUTSTANDING REQUIREMENTS AND REFUSALS

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- Trademark Act section 2(d) refusal
 - Request for Information
 - Revised identification required
 - Disclaimer required

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62(a), 2.65(a); TMEP §§711, 718.03.

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TRADEMARK ACT SECTION 2(d) REFUSAL

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Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration No. 4537279. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* See the enclosed registration.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that

it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

COMPARISON OF THE MARKS

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); TMEP §1207.01(b).

In this case, applicant's mark, POPPY POWERFUL ORGANIC EFFECTIVE SKINCARE, is similar in sound, appearance and meaning to the registered mark(s), POPPY'S. Both marks begin with or solely consist of a similar sounding term – POPPY versus POPPY'S. Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP

§1207.01(b)(ii)-(iii).

The only notable difference between the marks is applicant's addition of a slogan. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). See *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii). In the present case, the marks are identical in part.

Given the similar terms common to both marks and their similar structure, they convey a similar commercial impression.

COMPARISON OF THE GOODS AND/OR SERVICES

Adding to the confusion as to source is the relatedness of applicant's goods to those of the registrant. The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective goods and/or services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 01 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Here, applicant's goods are identified as: After sun creams; After-sun lotions; Age retardant lotion; Age spot reducing creams; Anti-aging cream; Anti-aging creams; Anti-aging moisturizer; Anti-freckle creams; Anti-wrinkle creams; Baby oil; Beauty balm creams; Beauty lotions; Body lotions; Cosmetic preparations, namely, firming lotions; Cosmetic sun milk lotions; Face and body lotions; Face oils; Facial lotion; Lotions for cosmetic purposes; Lotions for face and body care; Moisturizing body lotions; Scented body lotions and creams; Skin and body topical lotions, creams and oils for cosmetic use; Skin cleansing lotion; Skin lotion; Skin lotions; Sun care lotions; Toning lotion, for the face, body and hands

Similarly, registrant's goods include: bath soap; hand soap; liquid soap for hands, face and body; soaps

Attached is third party website information showing that makers of cosmetic skincare goods such as those listed herein also produce soaps such as those described in the cited application. For example, Aveda produces anti-wrinkle creams, body lotion, scented body products, firming lotions and hand and body soaps and washes. See the attached information. For example, The Body Shop produces cosmetic creams and lotions, scented lotions, suntanning lotions and products and soaps. See the attached information. Similarly, Neutrogena produces facial lotion, body lotions, toning lotions, sun care items as well as soaps. Cumulatively, the evidence of record illustrates the relatedness of applicant's goods to registrant's in that they emanate from the same sources and travel in the same channels of trade.

Given the similarity of the marks and the relatedness of applicant's goods to those of registrant, confusion as to source is likely and registration is refused under Trademark Act section 2(d).

Although applicant's mark has been refused registration, applicant may respond to the refusal(s) by submitting evidence and arguments in support of registration.

If applicant responds to the refusal(s), applicant must also respond to the requirement(s) set forth below.

IDENTIFICATION OF GOODS

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The use or intended use of the applied-for mark on goods and/or services that do not in fact have or contain organic ingredients is or will be deceptive. *See* TMEP §1203.02-.02(b). To avoid a deceptiveness refusal, applicant must amend the identification to indicate that the goods and/or services possess this relevant feature or characteristic. *See* TMEP §§1203.02(e)(ii), (f)(i), 1402.05 *et seq.* Merely amending the identification to exclude goods or services with the named feature or characteristic will not avoid a deceptiveness refusal. TMEP §1203.02(f)(i).

Therefore, applicant must amend the identification to the following, if accurate:

CLASS 3: After sun creams; After-sun lotions; Age retardant lotion; Age spot reducing creams; Anti-aging cream; Anti-aging creams; Anti-aging moisturizer; Anti-freckle creams; Anti-wrinkle creams; Baby oil; Beauty balm creams; Beauty lotions; Body lotions; Cosmetic preparations, namely, firming lotions; Cosmetic sun milk lotions; Face and body lotions; Face oils; Facial lotion; Lotions for cosmetic purposes; Lotions for face and body care; Moisturizing body lotions; Scented body lotions and creams; Skin and body topical lotions, creams and oils for cosmetic use; Skin cleansing lotion; Skin lotion; Skin lotions; Sun care lotions; Toning lotion, for the face, body and hands , *all of the foregoing comprised in whole or substantial part of organic ingredients*

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REQUEST FOR INFORMATION

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To permit proper examination of the application, applicant must submit additional information about the goods and/or services. *See* 37 C.F.R. §2.61(b); *In re AOP LLC*, 107 USPQ2d 1644, 1650-51 (TTAB 2013); *In re Cheezwhse.com, Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008); *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1457-58 (TTAB 2004); TMEP §§814, 1402.01(e). Specifically, applicant must submit answers to the following:

(1) Are applicant's goods comprised in whole or substantial part of organic ingredients?

Factual information about the goods must make clear how they operate, salient features, and prospective customers and channels of trade. For the services, the factual information must make clear what the services

are and how they are rendered, salient features, and prospective customers and channels of trade. Conclusory statements will not satisfy this requirement for information.

Failure to comply with a request for information can be grounds for refusing registration. *In re AOP LLC*, 107 USPQ2d at 1651; *In re DTI P'ship LLP*, 67 USPQ2d 1699, 1701-02 (TTAB 2003); TMEP §814. Merely stating that information about the goods or services is available on applicant's website is an inappropriate response to a request for additional information and is insufficient to make the relevant information of record. *See In re Planalytics, Inc.*, 70 USPQ2d at 1457-58.

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DISCLAIMER REQUIRED

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Applicant must disclaim the wording "ORGANIC" and "SKINCARE" because it merely describes an ingredient, quality, characteristic, function, feature, purpose, or use of applicant's goods and/or services, and thus is an unregistrable component of the mark. *See* 15 U.S.C. §§1052(e)(1), 1056(a); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); TMEP §§1213, 1213.03(a).

The attached evidence from makers of organic skin care goods shows this wording "organic" refers to characteristics or features of the goods, namely, that they are comprised of organic ingredients. For example, Avalon Organics advertises its moisturizer that contains certified organic ingredients. See the attached. Likewise, Juice Beauty advertises its skin care goods as "authentically organic products." See the attached. Thus, "organic" and "skincare" must be disclaimed because they merely describe the function or purpose of the goods -- to care for the skin -- and describe them as "made without the use of artificial chemicals" or from "organic" ingredients. See the attached information. As such, the wording must be disclaimed.

An applicant may not claim exclusive rights to terms that others may need to use to describe their goods and/or services in the marketplace. *See Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 1560, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991); *In re Aug. Storck KG*, 218 USPQ 823, 825 (TTAB 1983). A disclaimer of unregistrable matter does not affect the appearance of the mark; that is, a disclaimer does not physically remove the disclaimed matter from the mark. *See Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 978, 144 USPQ 433, 433 (C.C.P.A. 1965); TMEP §1213.

If applicant does not provide the required disclaimer, the USPTO may refuse to register the entire mark. See *In re Stereotaxis Inc.*, 429 F.3d 1039, 1040-41, 77 USPQ2d 1087, 1088-89 (Fed. Cir. 2005); TMEP §1213.01(b).

Applicant should submit a disclaimer in the following standardized format:

No claim is made to the exclusive right to use "ORGANIC" and "SKINCARE" apart from the mark as shown.

For an overview of disclaimers and instructions on how to satisfy this disclaimer requirement online using the Trademark Electronic Application System (TEAS) form, please go to <http://www.uspto.gov/trademarks/law/disclaimer.jsp>.

APPLICANT MAY WISH TO CONSULT TRADEMARK COUNSEL

Because of the legal technicalities and strict deadlines involved in the USPTO application process, applicant may wish to hire a private attorney specializing in trademark matters to represent applicant in this process and provide legal advice. Although the undersigned trademark examining attorney is permitted to help an applicant understand the contents of an Office action as well as the application process in general, no USPTO attorney or staff is permitted to give an applicant legal advice or statements about an applicant's legal rights. TMEP §§705.02, 709.06.

For attorney referral information, applicant may consult the American Bar Association's Consumers' Guide to Legal Help at <http://www.abanet.org/legalservices/findlegalhelp/home.cfm>, an attorney referral service of a state or local bar association, or a local telephone directory. The USPTO may not assist an applicant in the selection of a private attorney. 37 C.F.R. §2.11.

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RESPONSE GUIDELINES

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For this application to proceed toward registration, applicant must explicitly address each refusal and/or requirement raised in this Office action. If the action includes a refusal, applicant may provide arguments and/or evidence as to why the refusal should be withdrawn and the mark should register. Applicant may also have other options for responding to a refusal and should consider such options carefully. To respond to requirements and certain refusal response options, applicant should set forth in writing the required changes or statements.

If applicant does not respond to this Office action within six months of the issue/ mailing date, or responds by expressly abandoning the application, the application process will end, the trademark will fail to register, and the application fee will not be refunded. *See* 15 U.S.C. §1062(b); 37 C.F.R. §§2.65(a), 2.68(a), 2.209(a); TMEP §§405.04, 718.01, 718.02. Where the application has been abandoned for failure to respond to an Office action, applicant's only option would be to file a timely petition to revive the application, which, if granted, would allow the application to return to active status. *See* 37 C.F.R. §2.66; TMEP §1714. There is a \$100 fee for such petitions. *See* 37 C.F.R. §§2.6, 2.66(b)(1).

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If applicant has questions about the application or this Office action, please telephone the assigned trademark examining attorney at the telephone number below.

TEAS PLUS OR TEAS REDUCED FEE (TEAS RF) APPLICANTS – TO MAINTAIN LOWER FEE, ADDITIONAL REQUIREMENTS MUST BE MET, INCLUDING SUBMITTING DOCUMENTS ONLINE: Applicants who filed their application online using the lower-fee TEAS Plus or TEAS RF application form must (1) file certain documents online using TEAS, including responses to Office actions (see TMEP §§819.02(b), 820.02(b) for a complete list of these documents); (2) maintain a valid e-mail correspondence address; and (3) agree to receive correspondence from the USPTO by e-mail throughout the prosecution of the application. *See* 37 C.F.R. §§2.22(b), 2.23(b); TMEP §§819, 820. TEAS Plus or TEAS RF applicants who do not meet these requirements must submit an additional processing fee of \$50 per international class of goods and/or services. 37 C.F.R. §§2.6(a)(1)(v), 2.22(c), 2.23(c); TMEP §§819.04,

820.04. However, in certain situations, TEAS Plus or TEAS RF applicants may respond to an Office action by authorizing an examiner's amendment by telephone without incurring this additional fee.

/Emily K. Carlsen/

Trademark Attorney

Law Office 103

571.272.2235

emily.carlsen@uspto.gov

TO RESPOND TO THIS LETTER: Go to http://www.uspto.gov/trademarks/teas/response_forms.jsp. Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned trademark examining attorney. E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at TrademarkAssistanceCenter@uspto.gov or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS: Use the TEAS form at
<http://www.uspto.gov/trademarks/teas/correspondence.jsp>.