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

Proceeding	92049146
Party	Defendant Studio Moderna SA
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Date	05/23/2008
Attachments	MotiontoSuspend.PDF (20 pages)(736408 bytes)

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

In the Matter of Registration No. 3,389,652

TOP SHOP TV

International Class: 35

Registration Date: February 26, 2008

Arcadia Group Brands Ltd.,)	Cancellation No. 92049146
)	
Petitioner,)	RESPONDENT STUDIO MODERNA’S
)	OPPOSITION TO MOTION TO
v.)	CONSOLIDATE; AND
)	
Studio Moderna SA,)	MOTION AND MEMORANDUM IN
)	SUPPORT OF CROSS-MOTION TO
Respondent.)	SUSPEND PENDING OUTCOME OF
_____)	OPPOSITION NO. 91169226; AND

**MOTION AND MEMORANDUM IN
SUPPORT OF RESPONDENT’S
ALTERNATIVE MOTION TO STRIKE
UNDER FED. R. CIV. P. 12(F)
PARAGRAPHS 8-11 OF PETITIONER’S
AMENDED PETITION TO CANCEL**

This matter is before the Board on Petitioner’s Motion to Consolidate the present Cancellation proceeding (No. 92049146 – the “Cancellation”) with a long-pending Opposition proceeding (No. 91169226 – the “Opposition”).

Respondent Studio Moderna SA (“Studio Moderna” or “Respondent”), hereby opposes the Motion To Consolidate, and Cross-Moves to Suspend the Cancellation pending the outcome of the Opposition - No. 91169226.

Although there are some overlapping legal or factual issues there also are significant differences between the Opposition and Cancellation proceedings, making suspension the more efficient and just way to proceed. Resolution of the overlapping legal or factual issues in the

Opposition first— notably likelihood of confusion - will inform and narrow the issues for the Cancellation and conserve judicial resources, supporting suspension of the Cancellation.

In the alternative, should the Board deny the Motion to Suspend, Respondent Studio Moderna SA hereby moves under Rule 12(f), FED. R. CIV. P. to strike paragraphs 8-11 of Petitioner Arcadia Group Brands' Amended Petition to Cancel. In brief summary, those paragraphs are an illegitimate attempt by Petitioner to re-open an issue already decided against Petitioner by the Board in the Cancellation – in the award of partial summary judgment in favor of Studio Moderna therein.

Respondent Studio Moderna hereby consents to entry of the Amended Petition to Cancel.

I. The Most Efficient Way To Resolve The Issues In This Proceeding Is To Suspend The Cancellation Pending Resolution Of The Opposition

The Board may, in its discretion, suspend a proceeding before it, pending the final determination of another Board proceeding involving one or both of the same parties. *See* 37 C.F.R. § 2.117(a); TBMP 510.02(a). Exercise of the Board's discretion to suspend is particularly appropriate here because the overlapping issues can be decided in the Opposition, avoiding duplication; while simultaneously, the issues newly raised in and/or unique to the Cancellation should and can properly be decided separately, following disposition of the Opposition. Suspension of a Board case pending the termination of another Board case is appropriate so long as the disposition of the other proceeding will have a bearing on the issues before the Board. *See* 37 C.F.R. § 2.117 (2008) (“[w]henver it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another

Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding”).

Indeed it is likely disposition of the Opposition will lead to a resolution of the Cancellation, even though the Cancellation involves additional questions – should the parties’ ongoing negotiations on a settlement not render both matters moot in the interim.

The pending Opposition and the Present Cancellation involve the same parties and overlapping, but not identical issues of law and fact. The most expeditious way to resolve those issues would be to see the Opposition through to its conclusion - without injecting the new issues interposed by Petitioner in the Amended Petition To Cancel.

Among the overlaps between the long-pending Opposition and the Cancellation is that the parties are identical, and the marks at issue in the proceedings both contain the words TOP SHOP TV (although the opposed mark also contains a design element not present in the registered mark).

Another underlying common question justifying suspension is the question of whether Arcadia has any pre-existing continuously-used trademark rights in the United States that bar registration in class 35. The facts and law underlying this question will be the same whether resolved in the Opposition (where substantial discovery on the issue has already been conducted) or opened anew in the Cancellation.

A further area of overlap supporting suspension includes, *inter alia*, Arcadia’s meritless allegation that a prior one-page Agreement between the parties pertaining to Class 25 prevents Respondent from filing applications for registration of trademarks for services in Class 35. This issue was already decided in the Opposition in a summary judgment ruling against Petitioner Arcadia. A copy of the Summary Judgment decision is annexed as Exhibit A. There is no legal

basis for Arcadia to go for a second bite at the same apple via consolidating the brand new Cancellation action with the long-pending Opposition.¹ This is a further reason to deny the Motion To Consolidate, while granting the Motion to Suspend.

A question present in the Opposition, not present in the Cancellation will be whether the design element (in the Opposition) avoids a likelihood of confusion, even in the unlikely event Arcadia proves antecedent trademark rights. However, if a likelihood of confusion is found in the Opposition, despite the presence of the design element, the same holding would inform the suspended Cancellation.

In addition, the services at issue in the Opposition and Cancellation only overlap in a small portion of the class 35 services. The application in the Opposition involves a broader range of class 35 services. The Opposition also involves classes 10, 20, 24 and 41, which are not present in the Cancellation.²

¹ In the alternative motion in this paper, Respondent moves to strike the allegations in the Amended Petition to Cancel relating to the Agreement.

² In the Cancellation (Registration No. 3,389,652 – TOP SHOP TV (word)), the services description includes:

on-line retail services in the field of general consumer merchandise. (Class 35)

In contrast, in the Opposition (Serial No. 78/239,079 – TOP SHOP TV and design), the services description includes International Classes 10, 20, 24 and 41, which are not present in the Cancellation registration. In addition, the Opposition includes services in Class 35 not present in the Cancellation. The Class 35 recitation is:

Providing home shopping services in the field of general consumer merchandise by means of television; order taking for goods of others; order processing and fulfillment services; advertising, marketing and promotional services for goods of others, namely preparing and placing advertisements in print, radio, television, catalogs and via a global communications network; direct response retail services by means of infomercials in the field of general consumer merchandise; production and distribution of infomercials; promoting the sale of goods and services of others and preparing and placing advertisements through a global computer network; import, export and distributorship services featuring general consumer

There also are other differences between the proceedings weighing further: (i) in favor of Registrant's Motion to Suspend - to resolve the common issues one time in the Opposition, and (ii) against the Motion To Consolidate. One such difference is that the Opposition involves an intent-to-use trademark application, for which there has been no Statement Of Use. In contrast, the Cancellation involves a registered trademark (Registration No. 3,389,652) for which there has been a Statement Of Use. Petitioner Arcadia has raised the question of use in the amended petition to cancel. Use of the mark is irrelevant to the Opposition involving an intent-to-use application. Moreover, Petitioner has raised new allegations concerning bad faith and/or fraud that are not present in and would be prejudicial to consolidation with the Opposition. Studio Moderna intends to vigorously refute these reckless (and irrelevant) allegations.

A further reason to Suspend the Cancellation, while denying the Motion to Consolidate is that the Opposition is well on its way toward a final decision; it has been progressing for over two years and the parties have exchanged discovery.³ The Cancellation, on the other hand, is still in the pleadings stage.

Accordingly, suspension of the Cancellation proceeding would lead to conservation of judicial resources and prevent prejudice and confusion from consolidating non-overlapping matters.

merchandise; mail order catalog services featuring general consumer merchandise; arranging and conducting sales and marketing conferences; mail order services, mail order catalog services, on-line retail services and electronic catalog services in the field of general consumer merchandise.

³ To the extent Petitioner tries to create new issues and inject them into this Cancellation, entirely new rounds of discovery rehashing the now familiar facts underlying this dispute would have to start from scratch.

II. In The Alternative, Paragraphs 8-11 Of The Amended Petition To Cancel Should Be Stricken

Should the Board deny Studio Moderna's Motion To Suspend, Studio Moderna hereby moves under FED. R. CIV. P. 12(f) to strike paragraphs 8-11 of the Amended Petition to Cancel.

The Board "may strike from any pleading ... any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f); TBMP 506.01. It is appropriate to remove immaterial matter when the challenged allegations are, as here, devoid of merit, unworthy of consideration or entirely irrelevant.

The Board already has granted partial summary judgment against Arcadia in the Opposition on matters raised in paragraphs 8-11 of the Amended Petition To Cancel, as set forth in more detail below. Petitioner Arcadia seeks to have the Board consider the same allegations all over again. The time for a Motion for Reconsideration long has passed. 37 C.F.R. 2.127(b) (Thirty days to file Motion For Reconsideration; here the thirty day period expired May 26, 2007, almost one year ago). Accordingly, paragraphs 8-11 should be stricken from the Amended Petition To Cancel for these reasons alone.

Moreover, the principles of issue preclusion apply as well. Issue preclusion prevents re-litigation of an issue previously decided by a court of competent jurisdiction. *See Larami Corp. v. Talk To Me Programs, Inc.*, 36 U.S.P.Q.2d 1840, 1843-44 (T.T.A.B. 1995). The four factors required for issue preclusion are: (1) the issue to be determined must be identical to the issue involved in the prior action; (2) the issue must have been raised, litigated and actually adjudged in the prior action; (3) the determination of the issue must have been necessary and essential to the resulting judgment; and (4) the party precluded must have been fully represented in the prior action. *Id.*; *Jean Alexander Cosmetics, Inc. v. L'Oreal USA*, Opposition No. 91156843, 2004

TTAB LEXIS 471, *10 (Aug. 9, 2004). The summary judgment ruling provides sufficient basis for a finding of issue preclusion. *See Alfred Dana III v. E.S. Originals et al.*, 342 F.3d 1320, 1323 (Fed. Cir. 2003).

All of the factors required for issue preclusion are present here. As a threshold matter, it is undisputed that the parties herein are identical to the parties in the Opposition. As to identity of the issue, paragraphs 8-11 of the amended pleading allege that a document entitled “Agreement” entered into by Petitioner and Respondent on or about April 29, 2004 (“Agreement”) regarding articles of clothing, footwear and headgear in class 25 precludes Respondent from filing trademark applications for services including “general consumer merchandise” in class 35. In the Opposition, Arcadia raised this identical issue on a motion for summary judgment. There, Arcadia argued that Studio Moderna breached the Agreement by filing an application for registration of its TOP SHOP TV and design in class 35 even though the Agreement pertained to class 25 (i.e. clothing, footwear and headgear labeled with a mark). The issue was briefed and adjudicated in the Opposition summary judgment motion and the Board ruled on the issue granting summary judgment against Arcadia’s allegation. Arcadia did not file a motion for reconsideration within the thirty day period for doing so.

The determination of this issue was necessary and essential to the Board’s judgment. The Board denied Arcadia’s motion for summary judgment and instead decided that Studio Moderna, was entitled to summary judgment (Exhibit A). In that opinion, the Board held there was no genuine issue of fact as to the meaning of the Agreement, *viz.*, that “[t]he agreement, however, does not preclude applicant [Studio Moderna] from using the TOP SHOP mark in conjunction with any services.” *Id.* (emphasis in original).

Accordingly, Arcadia's allegations that the Agreement prevents a registration by Studio Moderna for services in Class 35 - as here - have already been adjudicated by the Board against Arcadia.

Moreover, Arcadia was and is fully represented in the Opposition by Katten Muchin Rosenman LLP – the same law firm as in the Cancellation. Its summary judgment brief on this issue was authored by counsel.

Accordingly, the Agreement has no bearing on this proceeding and Petitioner's repeated allegations to the contrary are barred by issue preclusion and should be stricken. These allegations (Paragraphs 8-11) should be stricken.

In addition there are further reasons to strike portions of Paragraphs 10 and 11. Those additional portions are discussed below.

- Allegation: “Additionally, the documents produced by Registrant in the Related Opposition reveal that Registrant is marketing articles of clothing, footwear and other Class 25 goods under the TOP SHOP name and mark.” Amended Petition To Cancel, Paragraph 10.

This incorrect statement is immaterial and impertinent to the issues in this Cancellation. It relates to infringement, and whether Studio Moderna markets or sells particular class 25 goods labeled with its decade-plus-old trademark has no relationship to Petitioner's claims that it has priority rights in the marks at issue. To the extent this allegation relates to the alleged violation of the Agreement, that issue already has been decided against Arcadia in the summary judgment decision.

- Allegation: “on February 25, 2008, Registrant filed applications for the marks TOP SHOP in International Classes 35, 38, and 41 (U.S. Application Serial No. 77/405,680), and TOP SHOP TV in International Classes 35, 38, and 41 (U.S. Application Serial No. 77/405,689).” From paragraph 11 of the Amended Petition to Cancel.

This statement is immaterial and impertinent to the issues in this Cancellation. The Cancellation is an attempt to cancel Respondent's Registration No. 3,389,652. The fact that Studio Moderna was entitled to protect its trademark via trademark applications related to additional services (which the Examining Attorney already has indicated are partially allowable) has no bearing on Petitioner's claims that it has priority requiring cancellation of the registration.

- Allegation: "Such new applications demonstrate further progressive encroachment on Petitioner's rights, as well as bad faith intent to appropriate Petitioner's goodwill," From paragraph 11 of the Amended Petition To Cancel.

This statement is scandalous, immaterial and impertinent to the issues in this Cancellation. Studio Moderna's other trademark applications are immaterial to cancellation of its registered trademark – the sole question in a Petition To Cancel. The issue of encroachment might have some pertinence to laches, where a trademark owner has actual trademark rights and the trademark owner failed to assert those rights. Here, there is no question of whether the Petition to Cancellation was timely filed and accordingly encroachment is immaterial to the present proceeding. Moreover, these allegations should be stricken for failure to state a claim under Rule 12(b)(6). The matter is not yet ripe for consideration in that the pending applications have not yet been published.

- Allegation: "Registrant is aware – from the numerous documents produced by Petitioner in the Related Opposition – that Petitioner has been using the mark TOP SHOP for online retail services in the United States since 1998," from paragraph 11 of the Amended Petition to Cancel.

This statement is immaterial and impertinent to the issues in this Cancellation (much less a false characterization since actually Petitioner has not been continuously using a mark in the United States for online retail since 1998). What Respondent may or may not be aware of as a result of Petitioner's allegations and discovery in the Opposition is irrelevant to the issue of

which party has priority to the marks at issue. In any event, the statement is unsupported by the discovery in the Opposition. In fact, Arcadia repudiated use in the United States.

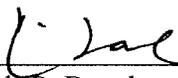
III. Conclusion

For at least the foregoing reasons, Respondent Studio Moderna respectfully requests that the Board (i) Deny the Motion to Consolidate; (ii) Grant Studio Moderna's Motion To Suspend this Cancellation proceeding pending resolution of the Opposition proceeding; and/or (iii) In the alternative, Grant Studio Moderna's Motion to Strike paragraphs 8-11 of Petitioner's Amended Petition to Cancel.

Please address all correspondence to Mitchell P. Brook, Esq., c/o Luce, Forward, Hamilton & Scripps, 11988 El Camino Real, Suite 200, San Diego, California 92130.

Dated: May 23, 2008

Respectfully submitted,

By: 
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Eric L. Lane
Attorneys for Respondent

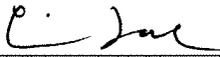
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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing RESPONDENT STUDIO MODERNA'S OPPOSITION TO MOTION TO CONSOLIDATE; AND MOTION AND MEMORANDUM IN SUPPORT OF CROSS-MOTION TO SUSPEND PENDING OUTCOME OF OPPOSITION NO. 91169226; AND MOTION AND MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE UNDER FED. R. CIV. P. 12(F) PARAGRAPHS 8-11 OF PETITIONER'S AMENDED PETITION TO CANCEL to the following attorneys via electronic mail at the e-mail addresses set forth below and via U.S. mail at the postal address set forth below.

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EXHIBIT A

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Pologeorgis

Mailed: April 26, 2007

Opposition No. 91169226

Arcadia Group Brands Ltd.

v.

Studio Moderana SA

Before Walters, Zervas and Cataldo,
Administrative Trademark Judges.

By the Board:

Studio Maderna SA ("applicant") seeks to register the mark TOP SHOP TV and design for, among other things, the following services in International Class 35:¹

"providing home shopping services in the field of general consumer merchandise by means of television; order taking for goods of others; order processing and fulfillment services; advertising, marketing and promotional services for goods of others, namely preparing and placing advertisements in print, radio, television, catalogs and via a global communications network; direct response retail services by means of infomercials in the field of general consumer merchandise; production and distribution of infomercials; promoting the sale of goods and services of others and preparing and placing advertisements through a global computer network; import, export and distributorship services featuring general consumer merchandise; mail order catalog services featuring

¹Application Serial No. 78239078, filed on April 17, 2003, based on Section 44(e). In said application, applicant also seeks to register its proposed mark for goods and services in International Classes 10, 20, 24 and 41.

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general consumer merchandise; arranging and conducting sales and marketing conferences; mail order services, mail order catalog services, on-line retail services and electronic catalog services in the field of general consumer merchandise."

On February 17, 2006, Arcadia Group Brands Ltd.

("opposer") filed a notice of opposition to registration of applicant's proposed TOP SHOP TV and design mark only with respect to the Class 35 services identified in the subject application. As grounds for opposition, opposer alleges likelihood of confusion and a violation of an alleged settlement agreement entered into between opposer and applicant whereby applicant has agreed not to use the mark TOP SHOP in connection with articles of clothing, footwear and headgear. Applicant, in its answer, denied the salient allegations in the notice of opposition and asserted various affirmative defenses.

This case now comes up for consideration of opposer's motion (filed August 9, 2006) for partial summary judgment solely on the issue of whether applicant's use of the mark TOP SHOP TV and design in connection with its identified services in International Class 35 that feature general consumer merchandise violates the parties' alleged settlement agreement. The motion for partial summary judgment has been fully briefed.

In support of its motion, opposer states that applicant and opposer entered into a settlement agreement, dated April

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29, 2004, whereby Paragraph 1 of said agreement specifically provides that applicant "undertakes not to use the mark TOP SHOP for designation of goods from Class 25 of Nice classification (articles of clothing, footwear and headgear) in any country."² Opposer argues that the plain meaning of the contractual language in the agreement can have no interpretation other than an undertaking from the applicant not to use the TOP SHOP mark for clothing, footwear and headgear.

In light of the foregoing, opposer contends that the "general consumer merchandise" sold through the various identified Class 35 retail services could be construed to include clothing, footwear and headgear identified by the TOP SHOP mark and, as a result, the scope of the application would be inconsistent with the terms of the parties' settlement agreement. As such, opposer requests that the Board give effect to the plain meaning of applicant's undertaking pursuant to the parties' settlement agreement by requiring applicant to amend the subject application in this proceeding to specifically exclude articles of clothing, footwear and headgear from the Class 35 recitation of services.

²Opposer has attached a copy of the settlement agreement as Exhibit A to its motion for summary judgment.

In opposition to opposer's motion, applicant argues that the plain meaning of Paragraph 1 of the parties' settlement agreement only requires applicant not to use the mark TOP SHOP on goods identified in International Class 25. Applicant further contends that the parties' settlement agreement does not preclude applicant from using the TOP SHOP mark to identify its retail services, such as applicant's home shopping services, through which goods that may be classified in International Class 25, but which do not bear the TOP SHOP mark, are sold. Furthermore, in the event the Board finds that a genuine issue exists in regard to the appropriate interpretation of the parties' settlement agreement, applicant requests the Board for leave to conduct narrowly tailored discovery pursuant to Fed. R. Civ. P. 56(f) in order to obtain further evidence regarding the parties' intent in entering into and understanding of the terms of the settlement agreement at issue.

A party is entitled to summary judgment when it has demonstrated that there are no genuine issues as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to the motion in favor of the applicant, we find that there is no genuine issue of material fact for trial with regards to the plain meaning of the parties' settlement agreement at issue. The agreement expressly precludes applicant from using the mark TOP SHOP only in association with goods in International Class 25, specifically, clothing, footwear and headgear. The agreement, however, does not preclude applicant from using the TOP SHOP mark in conjunction with any services. Opposer has not submitted any evidence which demonstrates that applicant sells Class 25 goods through its home shopping, online retail or mail order catalog services. And even assuming arguendo that applicant does sell clothing, footwear or headgear items through its various retail services, there is no evidence of record which shows that the goods themselves are marketed under the TOP SHOP mark. In fact, the record clearly demonstrates that applicant does not seek to register its proposed TOP SHOP TV and design mark for any goods in International Class 25.

The Board, thus, finds that while opposer, the moving party, is not entitled to partial summary judgment, applicant, the nonmoving party, is so entitled. In such circumstances, the Board has the power to enter the proper

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judgment, although a cross-motion therefor was not made. Under Rule 54(c) of the Federal Rules, which is applicable to Board proceedings pursuant to Trademark Rule 2.116(a), the Board has the power to enter final judgment to which the prevailing party is entitled, even if the party has not demanded such relief. See *Missouri Pacific Railroad Company v. National Milling Co., Inc.*, 409 F.2d 882, 13 FR Serv2d 1231 (3d Cir. 1969); *Sarelas v. Porikos*, 320 F.2d 827, 7 FR Serv2d 1033 (7th Cir. 1963); *Local 33, International Hod Carriers, Building & Common Laborers Union of America v. Mason Tenders District Council of Greater New York*, 291 F.2d 496, 4 FR Serv2d 939 (2d Cir. 1961); *Kent v. United States*, 228 F.Supp. 929, 8 FR Serv2nd 56(c) 54, Case 1 (S.D.N.Y. 1964), *aff'd* 343 F.2d 349 (2d Cir. 1965); and 6 Moore's Federal Practice, ¶56.12 (3d ed. 1997) and the cases cited therein.

Therefore, because the Board finds that there is no genuine issue of material fact that the provisions of the parties' settlement agreement do not place any limitations upon applicant's use of the mark TOP SHOP in association with any services, but only in connection with goods classified in International Class 25, and because applicant is entitled to judgment as a matter of law on this issue, opposer's motion for partial summary judgment is denied, partial summary judgment in favor of applicant is hereby

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entered on this issue, and the opposition will go forward to trial only on the issue of likelihood of confusion.³

Furthermore, in light of the instant order, applicant's request to conduct 56(f) discovery is now moot and will be given no further consideration.

Proceedings herein are RESUMED. Discovery and trial dates are reset as follows:

DISCOVERY TO CLOSE:	June 1, 2007
Thirty-day testimony period for party in position of plaintiff to close:	August 30, 2007
Thirty-day testimony period for party in position of defendant to close:	October 29, 2007
Fifteen-day rebuttal testimony period to close:	December 13, 2007

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

³The parties should note that the evidence submitted in connection with a motion for summary judgment or opposition thereto is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983). Additionally, the issues for trial are not limited to those identified by the Board in explaining the denial of this motion for summary judgment.

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Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.
