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

Proceeding	92049926
Party	Plaintiff PENTHOUSE DIGITAL MEDIA PRODUCTIONS INC.
Correspondence Address	Floyd A. Mandell, Esq. Katten Muchin Rosenman LLP 525 W. Madison St. Chicago, IL 60661 UNITED STATES floyd.mandell@kattenlaw.com, lisa.shebar@kattenlaw.com, cathay.smith@kattenlaw.com
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Date	10/27/2008
Attachments	PENTHOUSEResponseToMotionToSuspend.PDF (6 pages)(234518 bytes) PenthouseExhibitsA-C.PDF (16 pages)(395163 bytes)

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

PENTHOUSE DIGITAL MEDIA PRODUCTIONS INC.,	)	
Petitioner,	)	
v.	)	Cancellation No. 92049926
CLOUDSTREET, INC. d/b/a ROXBURY ENTERTAINMENT,	)	
Registrant.	)	

PETITIONER'S RESPONSE TO REGISTRANT'S MOTION TO SUSPEND

Petitioner, Penthouse Digital Media Productions Inc., by and through its attorneys and for its response in opposition to Registrant's Motion to Suspend ("Registrant's Motion"), states as follows:

1. Registrant's Motion is based on the application of 37 CFR Sec. 2.117(a) to the instant action (the "Cancellation Proceeding"), which seeks the cancellation of three trademark registrations owned by Registrant for the mark ROUTE 66, namely, U.S. Registration Nos. 3189543, 3194255 and 3291736 (collectively, the "Registrations"). Registrant asserts that pending federal litigation filed on June 12, 2008, by Registrant against Petitioner and other co-defendants in the United States District Court for the Central District of California (the "Court"), captioned *Roxbury Entertainment v. Penthouse Media Group, Inc., et al.*, Case No. CV 08-03872 FMC (JWJx) (the "Litigation"), will have a significant bearing on the Cancellation Proceeding, warranting suspension of the Cancellation Proceeding.[1] *See* Registrant's Motion, pp. 1-2. As demonstrated below, Registrant is wrong.

[1] The Cancellation Proceeding and the Litigation are referred to, collectively herein, as the "Two Cases".

2. 37 CFR Sec. 2.117(a) provides:

> Whenever 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.

Id.

3. In requesting that the Trademark Trial and Appeal Board (the "Board") stay the Cancellation Proceeding pending disposition of the Litigation, Registrant incorrectly characterizes the Litigation as addressing the same issues presented in the Cancellation Proceeding. While Registrant correctly notes that "a significant issue" in the Litigation "is whether the Registrant's ROUTE 66 marks are infringed and are confusingly similar to Petitioner's use of ROUTE 66 as a trademark," Registrant blatantly misrepresents to the Board that the same issue is "raised in this Cancellation Proceeding." Registrant's Motion, p. 2.

4. The Cancellation Proceeding is based solely on Registrant's conduct, namely: (i) Registrant's fraud on the United States Patent and Trademark Office ("USPTO") with respect to the Registrations, and (ii) Registrant's abandonment of two of the three Registrations. The Litigation, on the other hand, is focused solely on Petitioner's conduct, in that Registrant has asserted therein that Petitioner allegedly infringed Registrant's purported trademark rights in Registrant's ROUTE 66 marks (the Registrations). Nothing that Petitioner has done or is doing is at issue in the Cancellation Proceeding, whereas the opposite is true in the Litigation. Accordingly, contrary to Registrant's representation to the Board in Registrant's Motion, the issues are not the same in the Two Cases.

5. There is one overlapping and potentially dispositive issue between the Two Cases, namely, the question of the validity of the Registrations. However, in Registrant's attempt to

invoke 37 CFR Sec. 2.117(a), Registrant distorts the ramifications of the foregoing and conclusorily asserts that a suspension of the Cancellation Proceeding is warranted because the Litigation will significantly affect the Cancellation Proceeding. *See* Registrant's Motion, p. 2 (claiming that the Litigation, "if not in fact dispositive of the issues raised in this Cancellation Proceeding, will have a significant bearing on this Cancellation Proceeding, warranting suspension under 2.117(a)").

6. While the Board's cancellation of the Registrations may dispose of the Litigation or at least significantly affect and narrow the issues to be determined by the Court, the reverse scenario claimed by Registrant is not true - *i.e.*, it is not necessarily the case that the outcome of the Litigation may dispose of or even significantly bear upon this Cancellation Proceeding. The Court's finding in the Litigation that Petitioner did, or did not, infringe on Registrant's alleged trademark rights will not "have a bearing on [the Cancellation Proceeding]" as contemplated under 37 CFR Sec. 2.117(a).

7. Accordingly, contrary to Registrant's conclusory assertion that suspension of the Cancellation Proceeding is warranted because the pending Litigation will have a significant bearing on it, Petitioner submits that the Board should exercise the discretion granted it under 37 CFR Sec. 2.117(a) to deny Registrant's Motion in the interest of judicial efficiency and economy, to prevent the possibility of inconsistent judgments, and based on the authority in several cases. For example, in *Microchip Tech., Inc. v. Motorola, Inc.*, Civ. No. 01-264-JJF, 2002 WL 32332753 (D. Del. May 28, 2002) (attached hereto as Exhibit A), precisely as in the Two Cases here, after the plaintiff asserted federal and common law trademark infringement claims in federal litigation against the defendant, the defendant filed a petition in the TTAB to cancel the registration of the mark on which the litigation was based. *Id.* at *1. The court in

Microchip accordingly exercised its inherent discretion and stayed the litigation pending disposition of the TTAB proceeding, including the actions grounded in common law trademark rights, because the TTAB decision "would promote judicial efficiency by either narrowing the issues for trial or making this case ripe for summary judgment." *Id.* at *3. *See also Citicasters Co. v. Country Club Communications*, 44 U.S.P.Q.2d 1223, 1224 (C.D. Cal. 1997) (staying district court action pending resolution of TTAB's pending cancellation proceeding "because of the efficiencies generated by the TTAB first addressing the issues involved in this matter").

8. Indeed, as noted by the court in *Kemin Industries v. Watkins Products, Inc.*, 183 U.S.P.Q. 799 (D. Minn. 1974):

> While in this case there are issues that cannot be ruled upon by the [TTAB], the determination of the threshold question of the ownership of the mark lies particularly within their field of expertise. They would know best the criteria for ownership and that seems to be the key. If that question were resolved in favor of plaintiff and the trademark cancelled, the other issues would be disposed of in a very short time by this Court.

Id. at 800. Thus, if anything, the Litigation should be stayed pending the disposition of the Cancellation Proceeding since resolution of this Cancellation Proceeding will certainly narrow and simplify, and indeed may even moot, the issues in the Litigation, whereas resolution of the Litigation, on the other hand, will not likely moot the issues in this Cancellation Proceeding.

9. Accordingly, Petitioner intends to move the Court to stay the Litigation pending the outcome of this Cancellation Proceeding pursuant to the Court's inherent power to stay and/or the doctrine of primary jurisdiction. In accordance with the Court's Local Rule 7-3 (*see* Central District of California's Local Rule 7-3, attached hereto as Exhibit B), Petitioner contacted Registrant on October 22, 2008, to confer prior to filing such a motion to stay the Litigation. (*See* Letter from F. Mandell to K. Hallam, dated October 22, 2008, attached hereto as Exhibit C.) Because Registrant advised Petitioner on October 27, 2008, that Registrant refuses

to consent to staying the Litigation, Petitioner intends to file with the Court on November 11, 2008, or sooner as may be authorized by the Court, a contested motion to stay the Litigation ("Penthouse's Motion to Stay").

10. For all the reasons set forth above, and as will be discussed more thoroughly in Penthouse's Motion to Stay, the Board should deny Registrant's Motion or, in the alternative, suspend this Cancellation Proceeding and delay decision on Registrant's Motion until the Court rules on Penthouse's Motion to Stay.

WHEREFORE, Petitioner respectfully requests that the Board deny Registrant's Motion to Suspend or, in the alternative, suspend this Cancellation Proceeding and delay decision on Registrant's Motion to Suspend until the Central District of California rules on Penthouse's Motion to Stay. In the event that the Board grants Registrant's Motion to Suspend, Petitioner has no objection to the relief requested in Registrant's Motion to Extend Time to Respond to Petition for Cancellation.

Respectfully submitted,

By: 10-27-08

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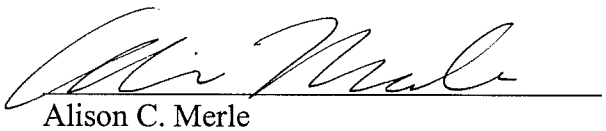
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PENTHOUSE DIGITAL MEDIA PRODUCTIONS INC.,	)	
Petitioner,	)	
v.	)	Cancellation No. 92049926
CLOUDSTREET, INC. d/b/a ROXBURY ENTERTAINMENT,	)	
Registrant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of PETITIONER'S RESPONSE TO REGISTRANT'S MOTION TO SUSPEND was served by first class mail, postage prepaid, on this 27th day of October 2008, upon:

Paul D. Supnik, Esq.
9401 Wilshire Boulevard, Suite 1012
Beverly Hills, California 90212



Alison C. Merle

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICROCHIP TECHNOLOGY, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 01-264-JJF
MOTOROLA, INC.,	:	
Defendant.	:	

John W. Shaw and Sara Beth A. Reyburn, Esquires of YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, Delaware.
Of Counsel: Edward A. Pennington, Esquire of SWIDLER, BERLIN, SHEREFF, FRIEDMAN, LLP, Washington, D.C.
Attorneys for Plaintiff.

Jack B. Blumenfeld, Esquire of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware.
Of Counsel: Roberta Horton, Michael Songer, James Walsh, and Jonathan Hooks, Esquires of ARNOLD & PORTER, Washington, D.C.
Attorneys for Defendant.

MEMORANDUM OPINION

May 28, 2002
Wilmington, Delaware

FARNAN, District Judge

Presently before the Court is a Motion To Stay This Action (D.I. 18) filed by Defendant, Motorola, Inc. (hereinafter "Motorola"). For the reasons set forth below, Motorola's Motion (D.I. 18) will be granted.

I. BACKGROUND

Plaintiff, Microchip Technology, Inc. (hereinafter "Microchip") is the owner of a U.S. trademark registration, which issued in 1981, for the mark "PIC." (D.I. 22 at 2). Microchip's "PIC" products are used in industries such as automotive, telecommunications, household appliances, and security. (D.I. 22 at 3). Motorola uses the designation "PIC" in marketing its products as an acronym for various terms including "personal interactive communicators," "program interrupt controller," "programmable interrupt controller," "position independent code," "personal intelligent communicator," "PC interrupt controller," and as a portion of other names and claimed trademarks, such as "CORE-PIC," "GPIC (Galileo Discovery Programmable Interrupt Controller)," and "EPIC (Embedded Programmable Interrupt Controller)." (D.I. 22 at 3).

In September 2000, Microchip notified Motorola of its rights to the "PIC" trademark and requested that Motorola cease all unauthorized use. (D.I. 22 at 3). Because Motorola continued to use the "PIC" designation, on April 24, 2001, Microchip initiated

this action. (D.I. 22 at 3). By its Complaint, Microchip alleges federal and common law trademark infringement, false designation of origin, trademark dilution, unfair competition, and deceptive trade practices. (D.I. 22 at 3). On May 29, 2001, Motorola filed an Answer asserting abandonment as an affirmative defense, as well as a counterclaim alleging that Microchip's "PIC" mark has become generic, and therefore, the "PIC" registration should be cancelled pursuant to 15 U.S.C. §1119. (D.I. 19 at 2).

Before the parties engaged in any discovery, this action was stayed for several months pending mediation before Judge Thynge. (D.I. 19 at 2). The mediation occurred on November 20, 2001, but was unsuccessful. (D.I. 19 at 2). On November 28, 2001, Motorola filed a petition with the Trademark Trial and Appeal Board (hereinafter "TTAB"), seeking cancellation of Microchip's trademark registration for "PIC" on the grounds that it is a generic term for integrated circuit chips. (D.I. 19 at 2-3). On April 9, 2002, the TTAB issued an Order suspending the TTAB proceedings pending final disposition of the civil action in this Court. (D.I. 40). The TTAB, however, noted that in the event this Court "elects to suspend the civil action to await determination of the Board proceeding, the Board will go forward with its proceeding." (D.I. 40, Ex. A at 3-4).

Subsequent to the unsuccessful mediation, the parties exchanged discovery requests. (D.I. 19 at 3). As of the filing date of Motorola's Motion To Stay (i.e. December 26, 2001), no documents had been produced, no written responses had been served, and no depositions had been noticed or taken. (D.I. 19 at 3). On 2/20/02, the Court entered a Scheduling Order setting 9/13/02 as the discovery cutoff date, 12/15/02 as the deadline for filing dispositive motions, 4/3/03 as the pre-trial date, and 5/12/03 as the trial date. (D.I. 29). The parties have since noticed depositions and responded to various interrogatories and document requests.

II. DISCUSSION

Motorola contends that the Court should exercise its discretion and stay this action in order to permit the TTAB to resolve the issue of whether "PIC" is a generic term that is not entitled to trademark protection. (D.I. 19 at 1). According to Motorola, the Court can stay this action by either exercising its inherent power to promote economy of judicial time and effort, or invoking the "primary jurisdiction" doctrine, which "comes into play whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body." (D.I. 19 at 3-4); Driving Force, Inc. v. Manpower, Inc., 498 F.Supp. 21, 24 (E.D. Pa. 1980); See also Texace, Inc. v. Borda, 383 F.2d 607, 608 (3rd Cir. 1967).

Motorola contends that the TTAB regularly decides issues of genericism and would be a material aid to this Court, as an opinion from the TTAB would significantly expedite the Court's treatment of the issues presented. (D.I. 19 at 60. Specifically, Mortorola contends that if the TTAB determines that Microchip's "PIC" designation is generic, and the Court adopts that determination, this decision would warrant dismissal of Microchip's entire suit. (D.I. 19 at 9). Motorola further contends that a stay would not harm or prejudice either party, since Motorola has been using "PIC" for many years and there is no expedited proceedings pending in this Court. (D.I. 19 at 13).

In response, Microchip contends that Motorola's reliance on the "primary jurisdiction" doctrine is misplaced. (D.I. 22 at 1). Microchip contends that the "primary jurisdiction" doctrine should only be applied when: 1) uniformity of regulation is appropriate; or 2) there is a need for an initial consideration of the problem by a tribunal with specialized knowledge. (D.I. 22 at 6). Additionally, Microchip contends that the "primary jurisdiction" doctrine should not be applied when the district court proceedings involve issues that would not be present in the TTAB proceeding. (D.I. 22 at 9-10). Because the genericism of the "PIC" designation is not a question that is within the special expertise of the TTAB, and because genericism is only one of several issues pending before this Court, Microchip contends

that the doctrine of primary jurisdiction is not applicable. (D.I. 22 at 1-2).

Microchip further contends that it would suffer prejudice in the event a stay is granted, and that a stay would not expedite the proceedings in this action or promote judicial efficiency. (D.I. 22 at 2). Microchip contends that a cancellation proceeding before the TTAB will likely run for years from the time of initiation, and that, regardless of the outcome, TTAB's decision must be reviewed by this court de novo. (D.I. 22 at 2, 11). Additionally, Microchip contends that any delay works to its disadvantage in combating genericide, as additional time will only provide Motorola the opportunity to increase its misuse of the "PIC" designation. (D.I. 22 at 14). According to Microchip, the fairest and most efficient course of action is to deny Motorola's Motion To Stay and proceed in this Court, which is capable of resolving all of the issues between the parties. (D.I. 22 at 1-2).

After reviewing the parties' arguments and the applicable law on this issue, the Court concludes that Motorola's Motion To Stay (D.I. 18) should be granted. A court has the inherent power to stay an action in the interests of efficient and fair resolution of the disputed issues. See Texaco, Inc. v. Borda, 383 F.2d 607, 608 (3rd Cir. 1967). In addition to this inherent power, a court may also enter a stay under the doctrine of

primary jurisdiction. Application of the primary jurisdiction doctrine is appropriate when there is a need for an initial consideration of issues by an agency with specialized knowledge, and those issues have been place before that agency by the parties. See Consolidated Rail Corp. v. City of Dover, 450 F.Supp. 966 (D.Del. 1978). In determining whether to apply the doctrine of primary jurisdiction, courts typically focus on whether the agency's decision could be dispositive of the district court action. See American Bakeries Co., 650 F.Supp. 563 (D. Min 1986)(holding that "the case for permitting the PTO to proceed first is bolstered where the PTO adjudication might serve as a final disposition of the matter"); Goya Foods v. Tropicana Prods. Inc., 846 F.2d 848 (2nd Cir. 1988)(holding "if a district court action involves only the issue of whether a mark is entitled to registration [(i.e., the same issue as was then before the TTAB)] . . ., the doctrine of primary jurisdiction might well be applicable"); E & J Gallo Winery v. F & P S.p.A., 899 F.Supp. 465, 468 (E.D. Cal. 1994)(holding that fact that issues raised in TTAB proceeding were "not dispositive" was the "most important" factor in denying a stay).

In this case, a determination that the "PIC" designation is generic, if adopted by the Court, would be dispositive of all of Microchip's claims, as each claim depends on Microchip owning a valid trademark. Additionally, because the TTAB is often called

upon to determine whether a commonly-used word or term is generic, the issue of genericism is within the special expertise of the TTAB. See Continental Airlines, Inc. v. United Air Lines, Inc, 53 U.S.P.Q.2d 1385 (TTAB Jan. 7, 2000)(holding that the term "e-ticket" for computerized reservation and ticketing services is generic); In re 3Com Corp., No. 74/495, 184, 2000 WL 1182872 (TTAB Aug. 14, 2000)(holding that "ATMlink" for computer network components was generic). Accordingly, despite Microchip's contentions, application of the primary jurisdiction would not be improper.

In an attempt to convince the Court that a stay would not expedite the proceedings in this action or promote judicial efficiency, Microchip contends that, regardless of the outcome, the TTAB's decision must be reviewed by this Court de novo. While Microchip is correct that the Court must review any TTAB decision, Microchip misrepresents the standard by which a TTAB decision is reviewed. The district court's role in reviewing a TTAB decision has been described as "unique," in that the Court acts as both a reviewing body and as a fact-finder. See CVP Systems, Inc. v. M-Tek Incorporated, 32 U.S.P.Q.2d 1951 (N.D. Ill. 1994); see also Loglan Institute v. Logical Language Group, 962 F.2d 1038, 1040 (Fed. Cir. 1992)(holding that it is "well settled" that a TTAB decision "must be accepted as controlling upon a finding of fact . . . unless the contrary is established

by testimony which in character and amount carries thorough conviction"). The standard of review has been explained as follows:

> It is true that new evidence must itself be considered de novo by the district court - in the sense of being fairly weighed without placing a thumb on the scales of dismissing it out of hand. The evidence must then be weighed against the Board's findings under the thorough conviction standard. Unless the new evidence leads to a thorough conviction that a finding of the Board is incorrect, that finding is controlling.

Spraying Systems Co. v. Delvan, Inc., 975 F.2d 387, 391 (7th Cir. 1992).

In light of the deference that a district court must give to a TTAB decision under the "hybrid" standard of review and the fact that the genericism of the "PIC" designation is a dispositive issue, the Court concludes that staying this action to await a decision from the TTAB would promote judicial efficiency by either narrowing the issues for trial or making this case ripe for summary judgement. For these reasons, the Court will grant Motorola's Motion To Stay This Action (D.I. 18).

III. CONCLUSION

For the reasons discussed, the Motion To Stay This Action (D.I. 18) filed by Motorola will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICROCHIP TECHNOLOGY, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 01-264-JJF
MOTOROLA, INC.,	:	
Defendant.	:	

ORDER

At Wilmington this 28th day of May, 2002, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1) Motorola's Motion To Stay This Action (D.I. 18) is **GRANTED**;

2) This case is administratively **CLOSED**;

3) The parties shall promptly notify the Court when the TTAB has reached a decision regarding the genericism of the "PIC" designation.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

L.R. 7-3 Conference of Counsel Prior to Filing of Motions . In all cases not listed as exempt in L.R. 16-12, and except in connection with discovery motions (which are governed by L.R. 37-1 through 37-4) and applications for temporary restraining orders or preliminary injunctions, counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person,* the substance of the contemplated motion and any potential resolution. If the proposed motion is one which under the F.R.Civ.P. must be filed within a specified period of time (*e.g.*, a motion to dismiss pursuant to F.R.Civ.P. 12(b), or a new trial motion pursuant to F.R.Civ.P. 59(a)), then this conference shall take place at least five (5) days prior to the last day for filing the motion; otherwise, the conference shall take place at least twenty (20) days prior to the filing of the motion. If the parties are unable to reach a resolution which eliminates the necessity for a hearing, counsel for the moving party shall include in the notice of motion a statement to the following effect:

"This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)."

EXHIBIT C

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FLOYD A. MANDELL
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October 22, 2008

Via E-Mail, Telecopy and U.S. Mail
Mr. Kirk M. Hallam
Law Offices of Kirk M. Hallam
201 Wilshire Boulevard, 2nd Floor
Santa Monica, California 90401

Re: Roxbury Entertainment v. Penthouse Media Group, Inc. et al.
Case No. CV 08-03872 FMC (JWJx)

Dear Kirk:

I am contacting you and formally requesting that we have a conference pursuant to Local Rule 7.3.

It is our intention to file a Motion seeking to stay the lawsuit in the Central District of California until our cancellation proceeding in the United States Patent and Trademark Office is resolved. We believe that the validity of the registration on which you rely in connection with the "Route 66" trademark is central to your claims in the District Court action. Based upon the authority in several cases, including *Citicasters Co. v. Country Club Communications*, 44 U.S.P.Q.2d 1223 (C.D. Cal. 1997) and *Microchip Technology, Inc. v. Motorola, Inc.*, 2002 WL 32332753 (D. Del. 2002), we believe that it is well within the discretion of the Court, and in the interest of justice, to stay the litigation in Los Angeles. It is our hope that you will consent to this Motion and we do wish to discuss it with you in good faith.

If you will provide me with a time and day you are available this week to receive a telephone call, either Kristin Holland or I will call you. If you are not available this week, can you kindly provide me with a day and time early next week when we can speak.

If we do not hear back from you within the time limit provided in Local Rule 7.3, we will file our Motion and attach a copy of our correspondence to you to show our good faith attempt to comply with the Local Rule.

Thank you in advance for your professional courtesy, and we look forward to hearing from you.

Very truly yours,

Floyd A. Mandell

FAM/jth
Transmittal/U.S. Mail

cc: Kristin Holland, Esq. (via e-mail)