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

Proceeding	77220315
Applicant	Kusmaul Electronics Company, Inc.
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Submission	Applicants Request for Remand and Amendment
Attachments	Kusmaul - reconsideration.pdf (2 pages)(14409 bytes)
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Date	12/12/2008

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

In re Kussmaul Electronics Company, Inc.

Serial No.: 77/220,315

For Mark: AUTO EJECT

Filed: July 2, 2007

For: Electrical receptacles in International Class 009

**APPLICANT'S REQUEST FOR RECONSIDERATION
AND/OR MODIFICATION OF ORDER TO REMAND
DATED DECEMBER 11, 2008**

The Board's order of remand dated December 11, 2008 remanded the file to the Examining Attorney to correct the grounds for refusal of Applicant's mark and for purposes of issuing a corrected Final Refusal. It appears to Applicant that the Examining Attorney intends to modify her refusal from a contention that Applicant's mark is generic under Section 2(e)(1) of the Trademark Act to a contention that Applicant's mark is "merely descriptive" and that Applicant has not proffered sufficient evidence of acquired distinctiveness. However, the Board's Order requires the Examining Attorney to eliminate the "six-month response clause" of any final refusal which ultimately may issue and return the case to the Board.

Applicant concedes that the case should be remanded to the Examining Attorney, however, Applicant requests that it be permitted, during remand, to submit evidence of acquired distinctiveness for its mark. During prosecution of the application, Applicant amended the

application to assert a claim of acquired distinctiveness based on five years' use in commerce. However, the Examining Attorney, in a Final Action dated April 11, 2008, took a position that Applicant's mark is generic and that an allegation of five years' use is insufficient to show acquired distinctiveness. Although Applicant could have continued to submit evidence respecting distinctiveness of its mark, and likely would have submitted an affidavit and supporting documents by Applicant's president, it appeared to Applicant to be a fruitless approach because the Examining Attorney had indicated that she believed the mark to be generic. Evidence of distinctiveness likely would have been disregarded by the Examining Attorney in view of her genericness grounds for refusal. Applicant's attorney could not justify the time and expense to prepare an affidavit and supporting documents that ultimately would not be considered by the Examining Attorney given her ground for refusal.

Accordingly, Applicant requests that the Board issue a modified order of remand which permits Applicant a six (6) month period to respond to the Final Refusal.

Courtesy and cooperation of the Board are appreciated.

Respectfully,

KUSSMAUL ELECTRONICS COMPANY, INC.

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