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

Proceeding	91160397
Party	Plaintiff Exel Oyj
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EXEL OYJ, Opposer, v. EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996, Applicant.	)	Opposition No. 91160397 Serial No. 76/272356

OPPOSER'S REPLY BRIEF IN SUPPORT OF OPPOSER'S MOTION TO REOPEN THE DISCOVERY PERIOD

Opposer, Exel Oyj ("**Opposer**") submits this Reply Brief in support of Opposer's Motion to Reopen the Discovery Period, filed on December 6, 2007 (the "**Motion**"). For the reasons set forth in the Motion and supported below, Opposer requests that the Board reopen the discovery period for a period of 120 days from the date that the Board rules on the Motion and allow Opposer to move for summary judgment at the conclusion of the reopened period.

ARGUMENT

Opposer seeks to reopen the discovery period in its opposition against application Serial No. 76/272356 (the "**Application**") for 120 days to give Opposer sufficient time to discover whether Applicant Edmont P. D'Ascoli ("**Applicant**") has an ongoing interest in the XCEL brand and the underlying business, which was transferred to Billabong. If, as reported, Applicant transferred the entire XCEL business and brand to Billabong, then he may no longer have the requisite interest and intent to use the XCEL mark for duffel bags, beach bags, backpacks and diving bags (collectively, the "**XCEL Bags**"). In short, Applicant may have

transferred his right to use the XCEL mark on any goods, and if so, the Application must be deemed abandoned and judgment should be entered in Opposer's favor.

Applicant first objects to Opposer's motion based on the language of TBMP § 512.01 and its applicability to the substitution of Billabong for Applicant in the Counterclaim. However, as Applicant noted in its opposition to the Motion, Opposer did not and does not Oppose substituting Billabong, the new owner of the XCEL brand and underlying business, for Applicant in the Counterclaim. Opposer's motion to reopen the discovery period is not focused on Billabong or the Counterclaim. Rather, Opposer seeks to determine whether Applicant has any remaining interest in the Application, which was not assigned and is the basis of this Opposition. Thus, § 512.01 is irrelevant to Opposer's Motion.

Further, Applicant suggests that he is not required to demonstrate use or an ongoing intent to use the XCEL mark, since the Application was filed based on an intent to use. Applicant's Memorandum, p. 4. This, however, is inconsistent with the arguments Applicant has made throughout this proceeding. Specifically, Applicant has relied on his alleged use of the XCEL mark on the XCEL Bags to argue that he should prevail in this Opposition. Applicant submitted as evidence in support of his allegations the deposition transcript of Applicant, Edmont D'Ascoli. As referenced in his Trial Brief, Applicant mentioned his sale of XCEL-branded general purpose bags, such as backpacks and duffel bags, several times in his testimonial deposition. *See* Applicant's Trial Brief, at 13 (*citing* D'Ascoli Dep. at pp. 24-28). Later in the Trial Brief, Applicant relied on this use in making his argument that he has priority in the XCEL mark. Applicant's Trial Brief, at 25.

It would prejudice Opposer to allow Applicant to rely on his alleged use of the XCEL mark in his attempt to establish priority to defeat Opposer's claims in the Opposition and

then later, in the same proceeding, allege that his interest in and to the XCEL mark and his ongoing intent to use the mark is not relevant to this Opposition. The publicly available information which was attached to Opposer's Motion clearly indicates that Applicant transferred the entire business associated with the XCEL brand to Billabong and retained no interest in the mark or the business for himself. Applicant did not dispute this fact. However, since Applicant has not assigned his rights in the Application to Billabong, as he has now several times stated, then it seems that he no longer has the requisite interest in and intent to use the XCEL mark for the XCEL Bags. In short, the Application must be deemed abandoned. Not only is the issue sought to be discovered by Opposer relevant to these proceedings, it is potentially dispositive.

Opposer's last attempt to defeat the Motion hinges on his suggestion that rejection of the Motion still would allow Opposer to institute a cancellation proceeding if the Opposition is not successful and the Application matures to registration. However, forcing Opposer to institute such a proceeding to litigate an issue that is currently existing between the parties and relevant to this proceeding, rather than simply reopening discovery on this issue, will prejudice and unduly burden Opposer. Such a ruling would require that Opposer expend additional time, money, and effort to institute and fully litigate this claim in a separate proceeding, duplicating much of the work that has been done here. In addition, this scenario would unnecessarily burden the Board with deciding an issue that is currently before it in an entirely new proceeding.

Finally, in the last sentence of his opposition to the Motion, Applicant makes the unsupported claim that granting the Motion will prejudice Applicant. As with Applicant's other objections, this claim is unfounded. Applicant cannot articulate any meaningful way in which it will be prejudiced by the Motion. On the other hand, Opposer has set forth the significant ways

in which rejection of the Motion will prejudice Opposer and burden it and the Board. Despite its several attempts, Applicant presented no justification for refusing the Motion.

CONCLUSION

For the reasons set forth above and in the Motion, reopening discovery will not prejudice or unduly burden Applicant. On the contrary, failure to reopen discovery could result in prejudice to Opposer if Applicant's alleged use of the XCEL mark is relied upon in the Opposition even though Applicant has assigned all interests in the mark and no longer seems to have a current and ongoing interest in the mark. Further, requiring Opposer to possibly institute a new proceeding rather than resolve this issue now will prejudice and unduly burden both Opposer and the Board. Accordingly, the Motion should be granted and Opposer respectfully requests the same.

WARNER NORCROSS & JUDD LLP

Dated: January 14, 2008

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this instrument is being sent by regular U.S. mail, first class, postage prepaid to Applicant's counsel, Martin E. Hsia, Cades Schutte Fleming & Wright, Cades Schutte Building, 1000 Bishop Street, Suite 1200, Honolulu, Hawaii 96813 on January 14, 2008.

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Jeffrey A. Nelson

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