

ESTTA Tracking number: **ESTTA159712**

Filing date: **08/29/2007**

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

Proceeding	91169240
Party	Plaintiff Marriott International, Inc.
Correspondence Address	Paul F. Kilmer Holland & Knight LLP 2099 Pennsylvania Avenue, N.W. Washington, DC 20006 UNITED STATES anthony.masiello@hklaw.com
Submission	Motion for Sanctions
Filer's Name	Anthony R. Masiello
Filer's e-mail	anthony.masiello@hklaw.com
Signature	/anthony masiello/
Date	08/29/2007
Attachments	marriola_8_29__Aug_29_2007_16_56_50_542.pdf (23 pages)(695140 bytes)

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

MARRIOTT INTERNATIONAL, INC.)	
)	
Opposer)	
)	
v.)	Opposition No. 91169240
)	
)	(Serial No. 78/523,204)
YUHAO, CHEN)	
)	
Applicant)	
<hr/>		

**OPPOSER'S MOTION FOR SANCTIONS;
MOTION FOR ENTRY OF JUDGMENT;
AND
MOTION TO SUSPEND AND RESET TRIAL DATES
OR, ALTERNATIVELY, TO ENLARGE OPPOSER'S TESTIMONY PERIOD**

Marriott International, Inc. ("Opposer") hereby moves the Trademark Trial and Appeal Board to impose sanctions on Applicant Yuhao, Chen ("Applicant") for failure to comply with the Board's order compelling discovery; to enter judgment against Applicant; and to suspend proceedings herein pending the disposition of this motion or, alternatively, to enlarge Opposer's testimony period.

On July 2, 2007, the Board issued an order compelling Applicant to respond to Opposer's first set of interrogatories and requests for production of documents, and allowed Applicant 30 days to comply (expiring August 1, 2007). The Board also ordered that the matters set forth in Opposer's requests for admission are deemed admitted.

At the date hereof, Opposer has received no responses of any kind to its outstanding discovery requests. In addition, Opposer's testimony period (which commenced August 3, 2007) is now running. (On July 30, 2007, Opposer filed a motion to reset the trial dates, but the Board has not yet acted on that motion. Applicant did not oppose the motion.)

A. Motion for Entry of Judgment.

(i) Failure to comply with the Board's order compelling discovery.

The Trademark Rules provide, "If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure..." 37 C.F.R. Section 2.120(g)(1). (The rule states exceptions not relevant to this motion.) Fed. R. Civ. P. 37(b)(2) provides, "If a party... fails to obey an order to provide or permit discovery..., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:..." Permissible sanctions set forth in the Rule 37(b)(2) include:

- (A) An order that... designated facts shall be taken to be established...;
- (B) An order refusing to allow the disobedient party to support...designated claims or defenses...;
- (C) An order... rendering a judgment by default against the disobedient party....

Fed. R. Civ. P. 37(b)(2)(A) through (C). See also TBMP Section 527.01.

It is clear that Applicant has chosen to willfully evade its obligations under the Board's rules relating to this proceeding, and that it has no intention of complying with the Board's order compelling discovery. The Board's order required discovery responses by August 1, 2007, which was 21 days ago. Moreover, Applicant has stated through its counsel to Opposer's counsel that Applicant "did not wish to pursue the opposition proceeding any further," and yet that "Applicant does not plan to withdraw the subject application." See Affidavit of Anthony R. Masiello, attached as Exhibit A hereto, and Annex 1 thereto (copies of e-mail exchanges of January 12, 2007). By Applicant's behavior, it is clear that Applicant intends to use the Board's proceedings to impose inconvenience and expense on Opposer while declining to participate in the proceeding or comply with the Board's orders.

The Board's rules indicate that "Default judgment is a harsh remedy, but may be justified where no less drastic remedy would be effective and there is a strong showing of willful evasion." TBMP Section 527.01. As Applicant has willfully disobeyed the Board's order compelling discovery and has shown that it is not willing to participate in the present proceeding insofar as

such participation places obligations on Applicant, Opposer respectfully requests that the Board sanction Applicant by entering judgment against Applicant.

(ii) Applicant's expressed intention to take no further action.

As an alternative ground for Opposer's motion for entry of judgment against Applicant, Opposer notes that Applicant has indicated that it will not take further action in this case.

The Board's rules indicate that if a party advises the other party "that it will not take any further action in the case," a motion requesting entry of judgment is appropriate and, if uncontested, will normally be granted. TBMP Section 527.03. Alternatively, under "similar circumstances indicating that a party is no longer interested in the case, the Board may,... upon motion..., issue an order that the party show cause why the Board should not enter judgment...." Id.

As discussed above, on January 12, 2007, Applicant stated through its counsel that it "did not wish to pursue the opposition proceeding any further." Masiello Aff., Exhibit A at Annex 1. In response to further communications of Opposer's attorneys, on January 29, 2007, Applicant's attorney responded that "we are no longer authorized to act in this matter." Masiello Aff., Exhibit A at Annex 2. Nonetheless, Applicant did not file any revocation of its attorney's authority to represent Applicant in this proceeding, and no other attorney has ever appeared in this proceeding on behalf of Applicant. On February 2, 2007 and March 22, 2007, Opposer's counsel wrote to Applicant's counsel requesting discovery responses, and received no reply. Masiello Aff. ¶¶ 5 and 6 and Annexes 3 and 4.

Applicant's conduct and the facts described above indicate that Applicant does not intend to take further action in this case. Accordingly, Opposer's motion for entry of judgment is warranted, in accordance with TBMP Section 527.03. The Board's rules relating to such motions are particularly clear with respect to cases in which a party shows a loss of interest in the case in the context of discovery obligations. Board Rules provide that "If a party... fails to provide any response to a set of interrogatories or to a set of requests for production of documents and things, and such party or the party's attorney or other authorized representative informs the party seeking discovery that no response will be made thereto, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section." 37 C.F.R. Section 120(g)(2). The Board's rules confirm that "entering judgment against the disobedient party" is an available sanction in such a case. TBMP Section 527.01(b).

For the reasons set forth above, Opposer respectfully submits that a sanction against Applicant is warranted, and requests that the Board enter judgment against Applicant.

B. Motion to Suspend.

According to the Board's latest scheduling order, dated July 2, 2007, Opposer's testimony period will close on September 1, 2007. On July 30, 2007, Opposer filed a motion (which has not been opposed) to reset the trial dates so that Opposer's testimony period would close on October 31, 2007. However, the Board has not yet acted on Opposer's July 30, 2007 motion.

Applicant's refusal to provide any discovery responses to Opposer and its refusal to comply with the Board's order compelling discovery have injected an element of disorder in the proceedings, placing Opposer in the position of going forward with its case without the discovery responses to which it is entitled under Fed. R. Civ. P. 26(b)(1) and TBMP Section 402.01. Accordingly, Opposer respectfully moves the Board to SUSPEND proceedings herein pending the consideration of Opposer's outstanding motions, and to reset the trial dates, including a reasonable period for Opposer's testimony, upon resumption. Suspension of proceedings in this case is particularly appropriate because Opposer's motion is potentially dispositive. TBMP Section 510.03 ("When a party to a Board proceeding files a motion which is potentially dispositive of the proceeding,... the case will be suspended by the Board with respect to all matters not germane to the motion.")

C. Motion to Extend Opposer's Testimony Period.

In the alternative to the above motion to suspend, Opposer requests that its testimony period be enlarged by sixty (60) days. The time for taking testimony may be extended or rescheduled upon motion granted by the Board. 37 C.F.R. Section 2.121(a)(1); see TBMP Sections 701 and 703.01(c). As this motion is brought before the expiration of Opposer's current testimony period, the Board may extend the testimony period for good cause shown. Fed. R. Civ. P. 6(b); TBMP Section 509.01.

Opposer respectfully submits that Applicant's failure to comply with the Board's order compelling discovery constitutes good cause for granting this motion. Under the Board's July 2, 2007 order, Applicant had until August 1, 2007 to mail its discovery responses to Opposer, and Opposer's testimony period would open on August 3, 2007, before the likely receipt of any materials mailed on August 1. Opposer, foreseeing that if discovery responses were forthcoming

it would need to use part of its testimony period for the review and analysis of Applicant's responses, sought to reset the trial dates by its motion of July 30, 2007. However, the Board has not acted on that motion. Under the existing schedule, Opposer would have to take testimony while substantial uncertainty exists as to the facts of the case and without the benefit of the discovery responses to which it is entitled under Fed. R. Civ. P. 26(b)(1) and TBMP Section 402.01. Accordingly, if the Board does not suspend proceedings, Opposer requests that its testimony period be enlarged by sixty days, to close on October 31, 2007, according to the schedule set forth in Opposer's motion of July 30, 2007, namely:

Discovery period to close:	CLOSED
30-day testimony period for the party in the position of plaintiff to close:	October 31, 2007
30-day testimony period for the party in the position of defendant to close:	December 30, 2007
15-day rebuttal testimony period for plaintiff to close:	February 13, 2008

Briefs will be filed in accordance with Trademark Rule 2.128(a) and (b).

For the reasons stated above, Opposer respectfully requests that the Board enter judgment against Applicant in this proceeding. Opposer also requests that the Board suspend proceedings herein pending the disposition of Opposer's outstanding motions, and reset the trial dates, including a reasonable period for Opposer's testimony, upon resumption. In the alternative, Opposer requests that the Board enlarge Opposer's testimony by sixty days.

Respectfully submitted,

MARRIOTT INTERNATIONAL, INC.

By:



Anthony R. Masiello
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
(202) 419-2405

Date: August 29, 2007

Attorneys for Opposer

EXHIBIT A

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

MARRIOTT INTERNATIONAL, INC.)	
)	
Opposer)	
)	
v.)	Opposition No. 91169240
)	
YUHAO, CHEN)	(Serial No. 78/523,204)
)	
Applicant)	
<hr style="border: 0.5px solid black;"/>		

AFFIDAVIT OF ANTHONY R. MASIELLO

I, Anthony R. Masiello, declare under penalty of perjury pursuant to the provisions of 28 U.S.C. § 1746(2) that the statements set forth below are true and correct.

1. I am senior counsel with Holland & Knight LLP and I represent Marriott International, Inc. ("Opposer"), as outside counsel, in this proceeding.

2. In connection with my representation of Opposer in this proceeding, I have been associated with Paul F. Kilmer, a partner with Holland & Knight LLP, who also represents Opposer in this proceeding.

3. The documents attached hereto as Annex 1 are true and correct copies of e-mail communications between Paul F. Kilmer and Robert A. Becker ("Opposing Counsel"), counsel of record for the Applicant in this proceeding, Yuhao, Chen ("Applicant"), which I received on my office computer at my e-mail address <anthony.masiello@hkllaw.com>.

4. The documents attached hereto as Annex 2 are true and correct copies of an e-mail communication sent by me to Opposing Counsel on January 29, 2007, and Opposing Counsel's response received by me on the same date, via my office computer and my e-mail address <anthony.masiello@hkllaw.com>.

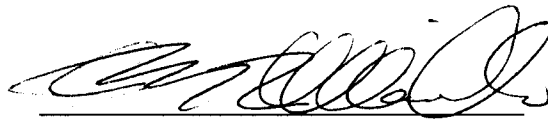
5. The document attached hereto as Annex 3 is a true and correct copy of an e-mail communication that I sent to Opposing Counsel on February 2, 2007 via my office computer from my e-mail address <anthony.masiello@hkllaw.com>. I have not receive any response to that message from Opposing Counsel.

6. The document attached hereto as Annex 4 is a true and correct copy of an e-mail communication that I sent to Opposing Counsel on March 22, 2007 via my office computer from my e-mail address <anthony.masiello@hkllaw.com>. I have not receive any response to that message from Opposing Counsel.

7. To the best of my knowledge and belief, (a) Applicant has not filed with the Trademark Trial and Appeal Board any revocation of Opposing Counsel's authority to represent Applicant in this proceeding, (b) Opposing Counsel has not withdrawn as counsel to Applicant in this proceeding, and (c) the records of the Trademark Trial and Appeal Board do not indicate that any filings relating to such revocation or withdrawal have been filed with the Board, nor do such records indicate that any other counsel has appeared to represent Applicant in this proceeding.

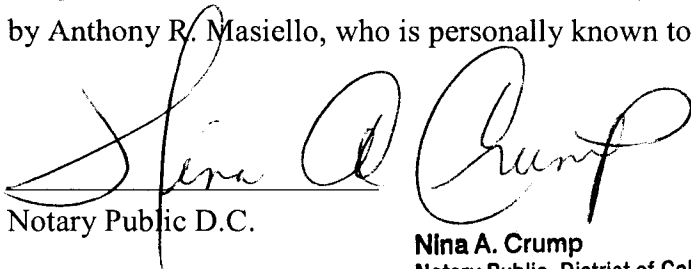
Respectfully submitted

Date: August 29, 2007



Anthony R. Masiello
Counsel for Applicant
HOLLAND & KNIGHT
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202/419-2405

Subscribed and Sworn to Before Me this 29th day of August, 2007
by Anthony R. Masiello, who is personally known to me.



Notary Public D.C.

Nina A. Crump
Notary Public, District of Columbia
My Commission Expires Jan. 1, 2010

My commission expires: _____

ANNEX 1

Masiello, Anthony R (WAS - X72405)

From: Robert A. Becker [RBecker@frosszelnick.com]
Sent: Friday, January 12, 2007 2:04 PM
To: paul.kilmer@hklaw.com; anthony.masiello@hklaw.com
Cc: Lawrence Apolzon; PTDocketing@hklaw.com
Subject: RE: MARRIOLA trademark proceeding

Applicant does not plan to withdraw the subject application.

From: paul.kilmer@hklaw.com [mailto:paul.kilmer@hklaw.com]
Sent: Friday, January 12, 2007 1:58 PM
To: Robert A. Becker; anthony.masiello@hklaw.com
Cc: Lawrence Apolzon; PTDocketing@hklaw.com
Subject: RE: MARRIOLA trademark proceeding

Thanks, Rob. We look forward to receipt of a copy of the withdrawal of the subject application. If the applicant does not plan to withdraw the application, please let us know.

Paul

From: Robert A. Becker [mailto:RBecker@frosszelnick.com]
Sent: Friday, January 12, 2007 12:17 PM
To: paul.kilmer@hklaw.com; anthony.masiello@hklaw.com
Cc: Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

Paul -

By coincidence, just this morning our client informed us that he did not wish to pursue the opposition proceeding any further.

Rob

From: paul.kilmer@hklaw.com [mailto:paul.kilmer@hklaw.com]
Sent: Friday, January 12, 2007 12:09 PM
To: Robert A. Becker; anthony.masiello@hklaw.com
Cc: Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

January 12, 2007

Rob,

Any word from your client regarding settlement? Thanks,

Paul

8/29/2007

Paul F. Kilmer, Esq.
Partner, Intellectual Property Law
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Direct 202 663 7269
Fax 202 955 5564
Email paul.kilmer@hklaw.com

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From: Robert A. Becker [mailto:RBecker@frosszelnick.com]
Sent: Thursday, December 21, 2006 4:48 PM
To: Masiello, Anthony R (WAS - X72405)
Cc: Kilmer, Paul (WAS - X77269); Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

Still no word from our client. I'll be out next week, so, realistically, we will have to deal with this the first week of January.

From: anthony.masiello@hklaw.com [mailto:anthony.masiello@hklaw.com]
Sent: Thursday, December 21, 2006 4:45 PM
To: Robert A. Becker
Cc: paul.kilmer@hklaw.com
Subject: RE: MARRIOLA trademark proceeding

REMINDER -- December 21, 2006

From: Robert A. Becker [mailto:RBecker@frosszelnick.com]
Sent: Friday, December 08, 2006 4:53 PM
To: anthony.masiello@hklaw.com
Cc: paul.kilmer@hklaw.com; Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

Tony -

I have been working on that with our client and will forward it to you when it's ready.

Rob Becker

From: anthony.masiello@hklaw.com [mailto:anthony.masiello@hklaw.com]
Sent: Friday, December 08, 2006 4:51 PM
To: Robert A. Becker
Cc: paul.kilmer@hklaw.com
Subject: MARRIOLA trademark proceeding

Rob,

Thanks for filing for the suspension. Please let us have your client's substantive response to our settlement proposal as soon as

8/29/2007

possible, so we can make good use of the suspension period.

Sincerely,

Tony Masiello

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hkllaw.com

From: Masiello, Anthony R (WAS - X72405)
Sent: Friday, December 01, 2006 10:59 AM
To: 'Robert A. Becker'
Cc: Kilmer, Paul (WAS - X77269)
Subject: RE: MARRIOLA trademark proceeding

Rob,

Marriott agrees to the proposed suspension. Please file the consent motion to suspend.

Please let us have your client's more detailed response to our settlement proposal, and hopefully we will be able to make these negotiations progress.

Thank you.

Tony Masiello

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hkllaw.com

From: Robert A. Becker [<mailto:RBecker@frosszelnick.com>]
Sent: Friday, December 01, 2006 10:03 AM
To: anthony.masiello@hkllaw.com
Cc: paul.kilmer@hkllaw.com; Craig Mende; Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

Anthony -

I have now heard from our client. He is willing to agree to most of the terms of your client's settlement proposal, but some negotiation of terms will be required. So we now think there is an even greater reason for there to be a two-month suspension of all non-settlement-related activity in this case, so that we can negotiate a settlement and save both parties the money that would otherwise be spent on discovery that appears to be unnecessary. Please let me know at your earliest convenience today whether your client agrees to this suspension. Thanks.

Rob Becker

From: anthony.masiello@hkllaw.com [<mailto:anthony.masiello@hkllaw.com>]
Sent: Thursday, November 30, 2006 3:54 PM

8/29/2007

To: Robert A. Becker
Cc: paul.kilmer@hklaw.com
Subject: MARRIOLA trademark proceeding

<<marricola1__Nov_30_2006_15_46_47_390.pdf>> <<marricola2__Nov_30_2006_15_47_35_139.pdf>>

Re: Marriott International, Inc. v. Yuhao Chen
U.S. Opposition No. 91169240

Rob,

Please see the two attached letters relating to this matter.

Sincerely,

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hklaw.com

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ANNEX 2

Masiello, Anthony R (WAS - X72405)

From: Robert A. Becker [RBecker@frosszelnick.com]
Sent: Monday, January 29, 2007 2:29 PM
To: anthony.masiello@hklaw.com
Cc: paul.kilmer@hklaw.com; Lawrence Apolzon
Subject: RE: MARRIOLA trademark proceeding

Anthony -

As I told Paul by e-mail earlier, we are no longer authorized to act in this matter.

Rob

From: anthony.masiello@hklaw.com [mailto:anthony.masiello@hklaw.com]
Sent: Monday, January 29, 2007 2:10 PM
To: Robert A. Becker
Cc: paul.kilmer@hklaw.com
Subject: MARRIOLA trademark proceeding

Re: Marriott International, Inc. v. Yuhao Chen
Opposition No. 91169240

Dear Rob,

Your motion to suspend filed on December 1, 2006 did not include a trial schedule upon resumption of the proceeding. As resumption is set for February 1, 2007 and the Board has not yet acted, we would like to file a motion to set a definite schedule. If you would consent to the following schedule, I would be happy to file the motion. (If you would like to adjust any of these dates, please let me know):

Proceedings resume: February 1, 2007

Discovery period: Closed (with 30 days allowed to respond to outstanding discovery)

Close of Plaintiff's testimony: May 31, 2007

Close of Defendant's testimony: July 31, 2007

Close of Plaintiff's rebuttal period: September 15, 2007.

Because of the approaching resumption date, please let us have your reply by noon on Wednesday, January 31, 2007. Please give me a call if you'd like to discuss.

Thanks for your cooperation.

Sincerely,

Tony Masiello

1/29/2007

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hklaw.com

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1/29/2007

ANNEX 3

Masiello, Anthony R (WAS - X72405)

From: Masiello, Anthony R (WAS - X72405)
Sent: Friday, February 02, 2007 2:03 PM
To: 'Robert A. Becker'
Cc: Kilmer, Paul (WAS - X77269)
Subject: MARRIOLA trademark proceeding

Attachments: sched__Jan_31_2007_16_18_19_754.pdf



sched__Jan_31_20
07_16_18_19_75...

Re: Marriott International, Inc. v. Yuhao Chen
Opposition No. 91169240

Dear Rob,

I am writing to you because at this time we have no other contact for your client in this matter.

As you know, proceedings resumed yesterday in this matter, in accordance with your motion for suspension filed on December 1, 2006. We have filed the motion attached to this message to ask the Board to set a definite schedule.

As we have not yet received your client's responses to our discovery requests, we ask that those responses be supplied by March 2, 2006. As you know, the Board's general practice upon resumption of proceedings is to allow 30 days for responses to outstanding discovery.

Thank you for your attention to this matter.

Very truly yours,

Tony Masiello

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hklaw.com

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ANNEX 4

4763826_v1

Masiello, Anthony R (WAS - X72405)

From: Masiello, Anthony R (WAS - X72405)
Sent: Thursday, March 22, 2007 2:29 PM
To: 'Robert A. Becker'
Cc: Kilmer, Paul (WAS - X77269)
Subject: MARRIOLA trademark proceeding

Re: Marriott International, Inc. v. Yuhao Chen
Opposition No. 91169240

Dear Rob,

I must continue to write to you on this matter, because no other attorney has yet appeared for Mr. Chen in this proceeding.

We have still not received your client's responses to our discovery requests, which we asked for by March 2, 2006. If we do not have responses within five days, we shall have to file a motion to compel.

Please don't hesitate to contact me regarding this matter.

Very truly yours,

Tony Masiello

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hklaw.com

From: Masiello, Anthony R (WAS - X72405)
Sent: Friday, February 02, 2007 2:03 PM
To: 'Robert A. Becker'
Cc: Kilmer, Paul (WAS - X77269)
Subject: MARRIOLA trademark proceeding

Re: Marriott International, Inc. v. Yuhao Chen
Opposition No. 91169240

Dear Rob,

I am writing to you because at this time we have no other contact for your client in this matter.

As you know, proceedings resumed yesterday in this matter, in accordance with your motion for suspension filed on December 1, 2006. We have filed the motion attached to this message to ask the Board to set a definite schedule.

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Thank you for your attention to this matter.

Very truly yours,

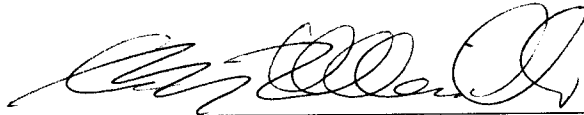
Tony Masiello

Anthony R. Masiello
Holland & Knight LLP
(202) 419-2405
anthony.masiello@hklaw.com

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **OPPOSER'S MOTION FOR SANCTIONS; MOTION FOR ENTRY OF JUDGMENT; AND MOTION TO SUSPEND AND RESET TRIAL DATES OR, ALTERNATIVELY, TO ENLARGE OPPOSER'S TESTIMONY PERIOD** was sent by first class mail, postage pre-paid, to Applicant's counsel, Robert A. Becker, Esq., Fross Zelnick Lehrman & Zissu, P.C., 866 United Nations Plaza, New York, New York 10017, on this 29th day of August, 2007.

A handwritten signature in black ink, appearing to be "Robert A. Becker", written over a horizontal line.