ESTTA Tracking number: **ESTTA147675**

Filing date: **06/25/2007**

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

Proceeding	91169419
Party	Defendant VODAFONE GROUP PLC VODAFONE GROUP PLC THE COURTYARD 2 - 4 LONDON ROAD GBX NEWBURY, BERKSHIRE RG14 1JX,
Correspondence Address	Nicole B. Emmons Baker & McKenzie LLP 2001 Ross Avenue 2300 Trammell Crow Center Dallas, TX 75201 UNITED STATES nicole.b.emmons@bakernet.com
Submission	Other Motions/Papers
Filer's Name	Nathan Engels
Filer's e-mail	nathan.a.engels@bakernet.com, nicole.b.emmons@bakernet.com
Signature	/nathan engels/
Date	06/25/2007
Attachments	Vodafone Response.pdf (45 pages)(3552456 bytes)

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

DANIEL A. MENDOZA,	§	
Opposer,	§	Opposition Nos.: 91169419, 91169697, 91170049, and 91170258
vs.	§	
	§	Application Nos.: 76/226,646; 76/375,495, 76/226,645 and 76/462,142
VODAFONE GROUP PLC,	§	
Applicant.	§	

APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR SUSPENSION OF PROCEEDINGS

Applicant, Vodafone Group PLC ("Applicant" or "Vodafone"), hereby files this Response in opposition to the Motion for Suspension of Proceedings filed by Opposer, Daniel Mendoza ("Opposer" or "Mendoza"). Opposer's Motion for Suspension of Proceedings should be denied because (1) the grounds upon which Opposer requests this suspension do not meet the required "good cause" standard, (2) Opposer's requested suspension is unnecessary, and (3) Opposer's requested suspension is unreasonable.

INTRODUCTION

More than 16 months have passed since Mendoza filed his Notice of Opposition on February 15, 2006 and Opposer has done nothing to advance this proceeding. In November 2006 and again in January 2007, Opposer requested extensions of all deadlines for the stated purpose of collecting evidence to support his alleged trademark use of the registered mark <">. Both times, Applicant stipulated to Mendoza's request, but Mendoza has done nothing in spite of those extensions. As a matter of fact, Mendoza's requests for extension are essentially the only

efforts Mendoza has made in this dubious proceeding, and it has become clear that Mendoza simply desires to frustrate and delay this proceeding as part of an effort to receive a nuisance settlement.

BACKGROUND

With this proceeding, Mendoza alleges that he intends to expand his business to such an extent that he would offer services substantially similar to Vodafone's telecommunications services. *See* Notice of Opposition ¶¶ 11, 13. Vodafone is the largest provider of telecommunications services in the world, but the only evidence of *any* alleged business operations that Mendoza has produced to date are seven pages printed from his website, true and correct copies of which are attached as Exhibit A. None of these documents demonstrate actual business operations of any kind, much less any genuine intent by Opposer to become a telecommunications service provider like Vodafone.

The plain facts of this proceeding demonstrate bad faith, and the same indications of Mendoza's bad faith exist in a number of Mendoza's other proceedings before the Board. In Opposition Proceeding No. 91174380, Mendoza opposed a trademark application filed by CitiGroup Inc., one of the world's largest providers of financial services. Like this proceeding, Mendoza alleged in that proceeding that he had plans to expand his business to include the use of his registered <"> trademark on services similar to those offered by CitiGroup. Mendoza also initiated Opposition Proceeding No. 91168871 against Digium, Inc., based on a different trademark but again based on his alleged plans for expansion of his services. The Board's website indicates Mendoza has also filed motions for suspension in both of those proceedings.

In addition to these three current opposition proceedings, Mendoza has initiated six other proceedings since December 2001. *See* Exhibit B (true and correct copy of search results from

TTABVUE showing Mendoza's history of Board proceedings). In at least one of those proceedings, Mendoza challenged another applicant under an expansion of trade argument, and the Board dismissed his opposition finding that Mendoza failed to support his allegations of expanding trade with any evidence at all. *See* Decision in Opposition No. 91158348 at 9-10 (for the Board's convenience, a true and correct copy is attached as Exhibit C).

ARGUMENT

A. *The Board Should Not Consider Mendoza's Ex Parte Filings*

Section 2.119(a) of Title 37, Code of Federal Regulations provides that, with the exception of the notice of opposition, every paper filed in an opposition proceeding must be served on every adverse party. In this case, Mendoza apparently filed groups of documents marked "Confidential" and "Confidential Sealed Envelope." Neither of these documents were served on Applicant or Applicant's counsel. Accordingly, the Board may not consider those documents and the filings should be stricken. To any extent that confidentiality is Opposer's reason for failing to comply with § 2.119(a), attached hereto as Exhibit D is Applicant's executed copy of the Board's standard Protective Order and such concerns cannot excuse Mendoza's failure to comply.

B. *Opposer's Alleged "High Litigation Workload" Is Not Good Cause For Suspension Of These Proceedings*

Section 2.117(c) of Title 37, Code of Federal Regulations provides that a party seeking suspension of a proceeding must support its motion by a showing of good cause. In his Motion, Mendoza asserted that he has an "exceedingly high litigation workload" comprised of this proceeding and two others, but Mendoza's argument provides no detail, no explanation of his

workload, no record of any efforts to advance this litigation during the past 16 months, and nothing that could otherwise constitute good cause for suspension of this proceeding.

Mendoza's argument that "there is insufficient time" for him to "retrieve documents" and comply with his discovery obligations is unconvincing. Vodafone first worked in good faith to minimize the costs and burdens of discovery by requesting Mendoza's evidence of his alleged trademark use through informal discovery in lieu of written discovery. In November 2006 and in January 2007, Mendoza indicated that he needed additional time to collect his evidence of use and Vodafone granted Mendoza's requests for extensions of all deadlines.

In February 2007, when Mendoza proved unable to provide any evidence of trademark use, Vodafone moved to amend its pleadings to assert a counterclaim for cancellation. *See* Applicant's Motion for Leave to Amend Answer. Only days after Vodafone made its filing, Opposer served the few documents attached as Exhibit A, apparently contending that those documents are evidence of his trademark use. Thereafter, Mendoza opposed Vodafone's Motion for Leave to Amend Answer by arguing, among other things, that Mendoza would be prejudiced by further delays and that "[i]t [was] time to forge ahead with Discovery and Testimony." *See* Daniel A. Mendoza's Opposition to Vodafone's Motion for Leave to Amend Answer and Cancellation of Defendant's [sic] Mark at 8-9.

When the Board granted Vodafone's Motion, it reset the discovery and trial deadlines effectively giving both parties another extension of time. But Mendoza again made no progress in this proceeding and still failed to produce any actual evidence of trademark use.

On June 4, 2007, the last day to serve discovery requests, Vodafone served a limited number of written discovery requests to formally request Mendoza's billing invoices, customer lists, and other relevant business records, among other things. If Mendoza's business operations

were legitimate, surely at least some of these types of records could be easily attained. Further, even if Mendoza's records are voluminous, Applicant's counsel is willing to send a representative to inspect the records and/or to send a copy service to photocopy the documents at Mendoza's location. Opposer's contention that he needs "an unknown amount of time" to find a competent expert to search for documents among his "50 or more filed legal boxes" is simply unconvincing and does not constitute good cause, particularly in view of Mendoza's repeated and on-going delay tactics.

Indeed, it bears repeating that Mendoza has done virtually nothing in this proceeding since he filed the Notice of Opposition more than 16 months ago. Mendoza did not serve discovery, engage in motion practice, or engage in any good faith settlement negotiations. Mendoza cannot credibly contend that this Opposition has been burdensome or that he has worked in good faith to advance this proceeding, and Mendoza cannot show good cause for suspension of this proceeding.

C. *Opposer's Alleged Desire To "Consult" With A Trademark Specialist Does Not Warrant Suspension*

Section 510.03(a) of the TBMP provides that when counsel for one party *withdraws* its representation, that party may be allowed a short time period to seek new counsel, "usually 30 days." Mendoza filed his first extension of time to oppose on November 7, 2005 and Mendoza filed his Notice of Opposition on January 16, 2006. Mendoza chose to proceed *pro se* for the past 16 months and, based on filings available on the Board's website, Mendoza has also appeared *pro se* in each of his other opposition proceedings.

In addition to the time *before* Mendoza initiated this proceeding, Mendoza has had the past 16 months to select an attorney if he so desired, and Mendoza remains free to retain an attorney at any time. *See generally* TBMP § 510.03(b) (proceedings may go forward with a

party representing itself and the party may employ counsel at any time while the proceedings progress). Clearly, Mendoza is free to consult with or retain an attorney. But it is unreasonable and unfair to Vodafone to further delay its trademark applications by suspending these proceedings. After the past 16 months, Opposer cannot credibly claim he needs more time.

Moreover, Mendoza has already twice received extensions of time from Vodafone – first in November 2006 and again in January 2007 – and Mendoza effectively received a third extension when the Board extended all deadlines when it entered Vodafone's Counterclaim in March 2007. Again, Mendoza has had ample time to consult with a trademark specialist and Mendoza remains free to retain a trademark attorney at any time—but suspension of this proceeding is unnecessary and Mendoza's alleged desire to consult with a trademark specialist is not good cause for suspending this proceeding.

D. *Opposer's Request for a Nine-Month Suspension is Unreasonable*

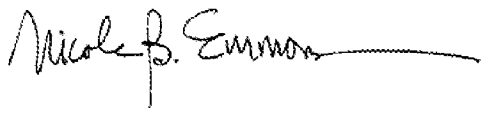
Mendoza has plainly failed to show good cause for *any* suspension of this proceeding. The fact that Mendoza requested a *nine-month* suspension is plain evidence of his dilatory and bad faith motives in bringing this proceeding. As noted above, Mendoza has engaged in a pattern of conduct in which he files trademark oppositions against parties with dissimilar goods and services based on his alleged expansion of his goods and services. Not only has Mendoza been unable to support his allegations of expanded use (*See* Decision in Opposition No. 91158348, Exhibit C), Mendoza has been wholly unable to provide any evidence of any legitimate trademark use in this or any other proceeding. *See* Digium's Motion to Compel (Opp. No. 91168871).

Mendoza has tied up Vodafone's trademark applications since November 7, 2005—this game has gone on long enough. The Board must not condone Opposer's latest delay tactic.

CONCLUSION

Opposer's pattern of behavior before the Trademark Trial and Appeal Board largely speaks for itself. With respect to his registered <"> trademark, Mendoza asserts claims for expansion of trade that allegedly include the financial services offered by CitiGroup as well as the telecommunications services provided by Vodafone. Tellingly, however, Opposer has been unable to provide *any* evidence of *any* business operations or legitimate trademark rights in this or any other opposition proceeding. Mendoza's latest request for a nine month suspension would only further Mendoza's bad faith tactics and the Board should resoundingly deny Mendoza's request.

Respectfully submitted,



Dated: June 25, 2007

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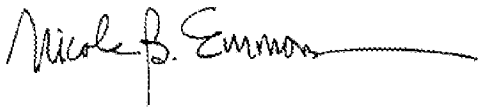
ATTORNEYS FOR APPLICANT
VODAFONE GROUP PLC

CERTIFICATE OF SERVICE

The undersigned certifies that on June 25, 2007, a true copy of the foregoing APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR SUSPENSION OF PROCEEDINGS was served on Opposer, via First Class mail, postage prepaid, as follows:

DANIEL A. MENDOZA
P.O. Box 193156
San Francisco, CA 94119-3156



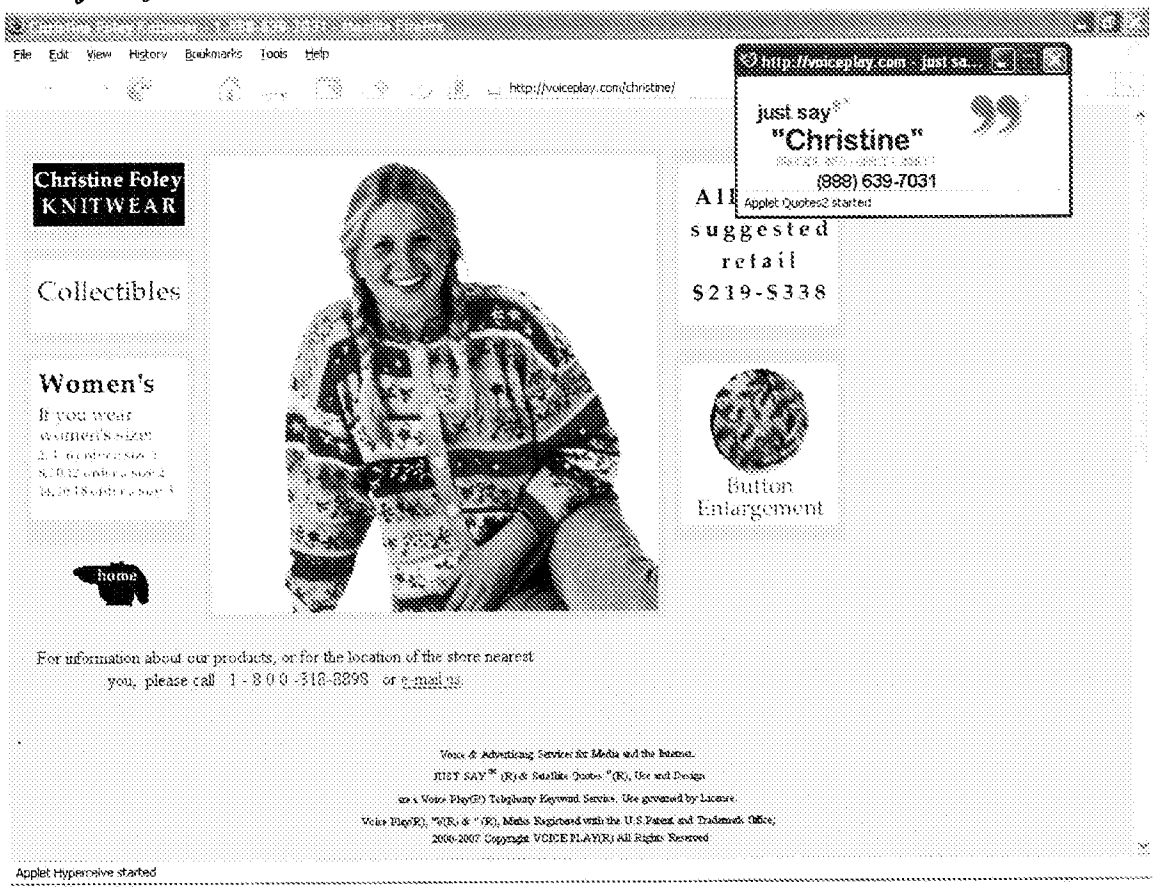
Nicole B. Emmons

EXHIBIT A

Nicole Batten Emmons, Esq

Feb. 2007

Daniel A. Mendoza
2/7/2007



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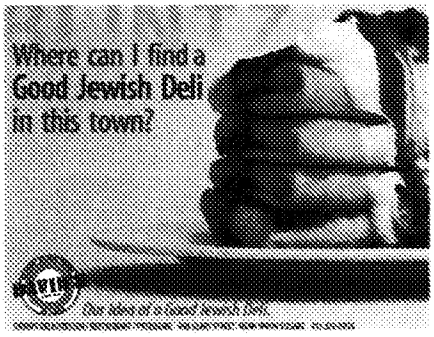

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http://www.voiceplay.com/richard/gymnast/

"The Gymnast"

Applet Quotes2 started

Gymnast by Richard MacDonald ~1-800-972-5528 - Mozilla Firefox

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http://www.voiceplay.com/richard/gymnast/

One wonders when regarding it: Could he be competing in a game, his muscles tense with the possibility of gain or failure in the air, his whole being centered on an act which, if successful, will reward the fruits of his labors with his long-awaited prize? Or is he simply practicing, his mind lost on everything but the consciousness of his body spinning through the air, unaware of his own physical beauty (of tight, stretched muscles, of supple, tanned skin) as he performs his feats of skill and strength? One cannot know, for the question is integral to the piece, imparting it with a tense, pregnant mystery that echoes with the possibilities of thought and interpretation.

Such is the power of any great work: its mystery, its ability to suggest without being vague, to be like a stone cast into a deep pool, disappearing with shimmering ripples into a well of possibilities too numerous to be named and defined. So now we see "The Gymnast", spinning eternally and yet forever captured; "frozen" in bronze, is the perfect summation of this paradox. To say without telling, to reveal oneself bare while veiled in a cloak of ambiguities, **this** is the power of "The Gymnast"

MacDonald, in this piece as in so many others, assures his status as a modern master, comparable in form to so many in that great tradition who have gone before, and to whom he adds his voice, at times pregnant, at times clear and powerful, and always perfectly conceived and wonderfully expressed

99

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EXHIBIT B

United States Patent and Trademark Office

TTABVUE. Trademark Trial and Appeal Board Inquiry System

Summary

Query: Party Name contains all words: DANIEL MENDOZA
Number of results: 21

Proceeding Filing Date	Defendant(s), Property(ies)	Plaintiff(s), Property(ies)
91174380 08/23/2006	CITIGROUP INC. Mark: " " S# :76643015	Daniel A. Mendoza Mark: " S# :75582634 R# :2389214
91170258 03/29/2006	VODAFONE GROUP PLC Mark: VODAFONE LIVE! S# :76462142	DANIEL A. MENDOZA
91170049 02/28/2006	VODAFONE GROUP PLC S# :76226645	DANIEL A. MENDOZA
91169697 02/21/2006	VODAFONE GROUP PLC Mark: VODAFONE S# :76375495	DANIEL A. MENDOZA Mark: " S# :75582634 R# :2389214
91169419 02/15/2006	VODAFONE GROUP PLC S# :76226646	DANIEL A. MENDOZA
91168871 01/19/2006	Digium, Inc. Mark: ASTERISK S# :78479744	Mr.Daniel A.Mendoza S# :78188277 Mark: JUST SAY * S# :76179506 R# :2597355
76462142 12/27/2005	VODAFONE GROUP PLC Mark: VODAFONE LIVE! S# :76462142	Mr.DanielA,Mendoza DANIEL A. MENDOZA
76375495 11/22/2005	VODAFONE GROUP PLC Mark: VODAFONE S# :76375495	Mr.DanielA.Mendoza DANIEL A. MENDOZA Mark: " S# :75582634 R# :2389214
76226645 11/22/2005	VODAFONE GROUP PLC S# :76226645	Mr.DanielA.Mendoza DANIEL A. MENDOZA
76226646 11/07/2005	VODAFONE GROUP PLC S# :76226646	Mr.DanielA.Mendoza DANIEL A. MENDOZA
78479744 10/19/2005	Digium, Inc. Mark: ASTERISK S# :78479744	Mr.Daniel A.Mendoza S# :78188277 Asterisk LLC
78352741 07/06/2005	Mendoza, Daniel, A. Mark: JUST SAY IT S# :78352741	Nike, Inc.
91164303 02/17/2005	DVDPlay, Inc. Mark: ADPLAY S# :78349887	DANIEL A. MENDOZA
78349887 11/10/2004	DVDPlay, Inc. Mark: ADPLAY S# :78349887	DANIEL A. MENDOZA DanielA.Mendoza
78187548 11/14/2003	Hornung, Stephen, J. Mark: 1-800-JUSTSAY S# :78187548	Daniel A. Mendoza Mendoza, Daniel A. Mark: JUST SAY * S# :76179506 R# :2597355
91158348 10/24/2003	Hornung, Stephen, J. Mark: 1-888-JUSTSAY S# :78185701	Daniel A. Mendoza Mark: JUST SAY * S# :76179506 R# :2597355
91158473 10/24/2003	Hornung, Stephen, J. Mark: 1-800-JUSTSAY S# :78187548	Mendoza, Daniel A. Mark: JUST SAY * S# :76179506 R# :2597355

91158144 10/06/2003	Scientific Games Corporation Mark: VOICEPLAY S# :78177544	MENDOZA, DANIEL A. Mark: "VOICE PLAY" S# :73707267 R# :1539511
78185701 08/08/2003	Hornung, Stephen, J. Mark: 1-888-JUSTSAY S# :78185701	Daniel A. Mendoza Mark: JUST SAY * S# :76179506 R# :2597355
78177544 07/24/2003	Scientific Games Corporation Mark: VOICEPLAY S# :78177544	Daniel Mendoza MENDOZA, DANIEL A. Mark: "VOICE PLAY" S# :73707267 R# :1539511
91124952 12/21/2001	ONVOY, INC. Mark: ONVOICE S# :76175431	DANIEL A. MENDOZA

Results as of 06/25/2007 06:04 PM

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EXHIBIT C

Mailed:
January 25, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Daniel A. Mendoza

v.

Stephen J. Hornung

Opposition No. 91158348
to
Application Serial Nos. 78185701
(filed November 15, 2002)

and

Opposition No. 91158473
to
Application Serial No. 78187548
(filed November 21, 2002)[1]

Daniel A. Mendoza (pro se)

John Cain of Wong, Cabello, Lustch, Rutherford & Brucculeri, L.L.P. for Stephen J. Hornung

---

Before Hairston, Zervas and Walsh, Administrative Trademark Judges.

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[1] These oppositions were consolidated by the Board's order of September 9, 2005, addressing opposer's motion to consolidate (filed December 1, 2004). On p. 2 of its consolidation order, the Board stated: "the decision in these consolidated proceedings [will] be rendered on the record in Opposition No. 91158473."

Opinion by Zervas, Administrative Trademark Judge:

Applicant, Stephen J. Hornung, seeks registration on the Principal Register of the marks 1-888-JUSTSAY[2] and 1-800-JUSTSAY[3] both in standard character form and both for the following services, "telecommunication services, namely, providing voice-activated communications through landline and wireless communications devices" in International Class 38.

Opposer, Daniel A. Mendoza, filed timely notices of opposition to registration of both of applicant's marks. In the notices of opposition, opposer pleads that he is the owner of Registration No. 2597355 for the mark JUST SAY* in standard character form for "dissemination of advertising for others via telephones and an on-line electronic communications network" in International Class 35; and "entertainment in the nature of prerecorded messages in the fields of arts and humanities by telephone and a global computer network" in International Class 41.[4] Further, opposer alleges that applicant's mark, as applied to the

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[2] Application Serial No. 78185701, filed November 15, 2002, claiming an intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 USC §1501(b).

[3] Application Serial No. 78187548, filed November 21, 2002, claiming an intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 USC §1501(b).

[4] Registration No. 2597355, issued July 23, 2002. The mark is depicted as:

JUST SAY *

services identified in the application, so resembles opposer's previously-used and registered mark JUST SAY* as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant answered the notices of opposition by denying the salient allegations thereof. Applicant did not take any testimony or submit any evidence in this proceeding. The case was fully briefed and neither party requested an oral hearing.

Evidentiary Matters

At the outset, we discuss several evidentiary matters. Two motions are pending in this case, namely, applicant's "Motion to Strike Opposer's Asserted 'Evidence,'" that is, opposer's notice of reliance on opposer's own responses to applicant's discovery requests (opposer's responses to applicant's first set of interrogatories, first set of requests for admissions, first set of document requests and documents produced in response to applicant's first set of document requests), and opposer's "Motion to Quash Defendant's Motion to Strike," filed with opposer's reply brief.

We first turn to opposer's "Motion to Quash Defendant's Motion to Strike." Opposer contends that applicant's motion "is in the improper form" because applicant's motion appears within applicant's brief; and that "[e]very motion must

embody or be accompanied by a brief," citing Trademark Rule 2.127(a), 27 C.F.R. 2.127(a). Motion at p. 2. Opposer's motion is denied – while the Board prefers that a motion be filed as a separate paper and not within a brief, this is by no means a requirement for all motions. Also, because applicant has briefed its motion within its main brief, it has satisfied Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a).

With respect to applicant's motion, we find it is well taken – a party may not make its own discovery responses of record by notice of reliance, except in certain circumstances, none of which apply in this case. Trademark Rule 2.120(j)(5), 37 C.F.R. § 2.120(j)(5). See also, TBMP § 701.10 (2d ed. rev. 2004). Thus, applicant's motion to strike is granted as well taken and we have not considered opposer's discovery responses in rendering our decision in this case.

Next, we address the two-page document attached to opposer's brief entitled "Evidentiary Objections" in which opposer states as follows: (i) "Applicant's exhibits submitted did not include a Notice of Reliance 37 CFR 2.120 or [sic] Testimony Declarations"; (ii) "Applicant's Discovery responses to Opposers [sic] were often uncooperative and failed to answer Opposer's Discovery requests even with a minimal amount of professional courtesy and decorum, per Authority or Statute"; and (iii) "Opposer

requested information that is not subject to reasonable dispute or that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Because applicant did not file any evidence during its trial period, opposer's "Evidentiary Objections" are given no further consideration.[5]

The Record

The record consists of the pleadings and the file of each involved application. Also, pursuant to opposer's notices of reliance, opposer has introduced the following into evidence: a status and title copy of opposer's pleaded registration and of Registration No. 2738851 for the mark "V (in standard character form)[6] showing opposer as the owner of record of both registrations and that the registrations are subsisting; a copy of applicant's responses to opposer's first set of requests for admission;[7] and a copy of

---

[5] If opposer intended its "Evidentiary Objections" as a motion to seek further responses to opposer's discovery requests such as a motion to determine the sufficiency of applicant's responses to opposer's requests for admission under Trademark Rule 2.120(h), opposer's motion is denied as having been filed well beyond the time permitted for filing discovery motions. Trademark Rules 2.120(e) and 2.120(h), 37 C.F.R. §§ 2.120(e) and 2.120(h). See also TBMP §§ 523 and 524 (2d ed. rev. 2004).

[6] Registration No. 2738851, issued July 15, 2003. The mark is depicted as the letter "V" preceded by a double quotation mark.

[7] Opposer's first set of requests for admission consists of 405 requests. A proceeding such as this one – which only involves the registrability of two similar marks and has no counterclaims – does not require such a large number of requests for admission. Many of opposer's requests for admission are irrelevant to the issues in this case. See, e.g., Request for Admission No. 30, which states "Applicant does not believe that Irreparable Harm is inevitable, even over time."

applicant's responses to opposer's first set of interrogatories.

Priority

In view of opposer's ownership of a valid and subsisting registration for the pleaded mark JUST SAY*, there is no issue regarding opposer's priority. King Candy, Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue remaining for decision in this case is whether there is a likelihood of confusion.

Burden of Proof

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, that there is a likelihood of confusion. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989).

Discussion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed.

Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The salient question to be determined is not whether the involved services of the parties are likely to be confused, but rather whether there is a likelihood that the relevant purchasing public will be misled to believe that the services offered under the involved marks originate from a common source. See J.C. Hall Company v. Hallmark Cards, Inc., 340 F.2d 960, 144 USPQ 435 (CCPA 1965); and The State Historical Society of Wisconsin v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 190 USPQ 25 (TTAB 1976).

We begin our analysis by considering the second du Pont factor, i.e., the similarities or dissimilarities between opposer's and applicant's services. It is important to note that we must compare the services as they are described in the applications and the registration in determining whether there is a likelihood of confusion. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

First, we note that perhaps other than Registration No. 2738851, opposer has not cited any evidence which is properly of record to show that the services are related. (The evidence opposer relies on to show a relationship between the services comprises the subject of opposer's improper notice of reliance on documents opposer produced in response to applicant's discovery requests.) However, Registration No. 2738851 for the mark "V for "telephone communication services," which is of record, is entitled to little, if any, probative value in determining whether there is a similarity between applicant's and opposer's services.[8] Although opposer may offer both types of services identified in its registrations, the "telephone communication services" are offered under a mark different from the one identifying opposer's other services. Also, the "V mark is in no way similar to applicant's applied-for mark, and the registration is not evidence that the mark is in use or that purchasers are familiar with the mark.

Thus, we must compare the services as they appear in opposer's JUST SAY* registration and the involved

[8] Opposer states that he "has used the registered mark "V … in association with the mark JUST SAY* in connection with its Telecommunication service phone numbers, advertising, and voice-activated information services; available by landline or wireless device"; and that the "[m]ark "V … also solicits the same consumer trade-channels and base." (Brief at pp. 9 and 10.) In his reply, opposer states that "the Registration for [the] mark "V … embodies Telephone use as well." (Reply at p. 2.)

application. In doing so, we find that there is an important difference. Opposer's services are characterized as entertainment and advertising services, intended obviously as entertainment and to promote the goods and services of others, while applicant's services are telecommunications services – for communication purposes – which use voice activation.[9] Clearly, the nature of each service is different.

Opposer, in arguing that the services are similar, maintains that both parties offer "information and advertising services over [the] [t]elephone, both using voice-activated or voice recognition equipment, [and] … no cost [calls] to [the] calling party by way of Toll-Free Telephone Numbers." Reply at p. 7. Simply because a telephone, voice activated or voice recognition equipment and toll-free phone numbers are used in performing the services does not mean that the services are similar in the context of the likelihood of confusion analysis.

Opposer also makes an expansion of trade argument. Specifically, opposer contends that the "Opposer has

[9] In response to opposer's Interrogatory No. 7 which asked for a description "with particularity [of] the Telecommunication services you intend on offering," applicant responded "Horning identifies voice-activated telephone directory services accessible through the telephone number 1-800-587-8729." Also, applicant admitted opposer's Request for Admissions No. 142, which stated "Applicant will offer mark 1-800-JUSTSAY as a 'One' number to call, substituting an Office or Business numeric Telephone number."

expanded to voice-activated toll-free numbers," citing to exhibits which are the subject of applicant's motion to strike and which we have stricken above; and that the "[m]ark JUST SAY* has expanded to voice-activated services via the telephone for landline and wireless devices." (Brief at pp. 9 and 10. See also Brief at p. 5 ("Plaintiff … has expanded the marks use[d] to include voice-activation and toll-free numbers, and will continue to expand the channels-of-trade and the marks extensions.")). Because there is no evidentiary support for opposer's contentions, opposer's arguments regarding expansion are not well taken.

Thus, opposer has failed to persuade us that the parties' services are related. Absent any evidence suggesting that these services are related, and in view of the different nature of applicant's and opposer's services, we conclude that the services are not related and resolve the second du Pont factor in applicant's favor.

We next consider the third and fourth du Pont factors, i.e., the channels of trade and the prospective purchasers of the parties' services. In support for his contention that the trade channels and purchasers are the same, opposer relies on documents he produced in response to applicant's discovery requests, which we do not consider for the reasons set forth above. In his brief, opposer concludes that "[t]he consumers are [a]like and related in the trade

areas." (Brief at p. 10.) Applicant, in his response, maintains as follows:

> Applicant's services are directed to consumers who are seeking directory assistance and assistance with dialing through a voice-activated communications portal. Applicant's consumers call the telephone number associated with Applicant's mark to access Applicant's services. On information and belief, Registrant's services are directed to internet or telephone users who may or may not be seeking any particular services. (Brief at p. 6.)

Additionally, in response to opposer's Interrogatory No. 17 which sought the identity of applicant's "marketing or trade channels," applicant responded, "any and all traditional marketing and advertising mediums, including direct marketing, the Internet, trade shows, print media and partnering." In response to opposer's Interrogatory No. 5, applicant identified his "prospective client base" as "businesses who utilize telephone directory services."

Since applicant's services are not otherwise restricted, it must be presumed that they travel through all trade channels suitable for services of that type. The same is true with respect to opposer's services as recited in the pleaded registration. The determinative question, then, is whether the ordinary and usual trade channels and classes of customers for the respective services overlap under circumstances where confusion would be likely for purposes of Section 2(d) of the Act.

Certainly, it is likely that both parties would use direct marketing, the Internet, and print media to offer their services. However, there is no evidence of record that opposer and applicant would offer their respective services in the same location, under the same Internet marketing sites or be listed in the same Internet directories. Further, there is no evidence that the parties would use the same print media or the same manner of direct marketing to offer their services, which have very different purposes.

With respect to prospective purchasers, because the identifications of services are unrestricted in terms of purchasers, we find that both sophisticated purchasers such as businesses and unsophisticated purchasers such as ordinary consumers would use both parties' services.

We are satisfied in this case that while the parties' purchasers may overlap and that both parties have unsophisticated purchasers as potential purchasers, the respective services, by their very nature, are very different and advertised in different trade channels. Also, as noted above, opposer bears the burden of proof in this opposition. We thus resolve the third du Pont factor in applicant's favor and find that the fourth du Pont factor neutral.

We now consider the first du Pont factor, i.e., the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The general impression of applicant's marks – based on the numerals and dashes in the marks and the number of letters in the marks – is that the marks are phone numbers, and more specifically, toll-free phone numbers, that incorporate JUSTSAY, which is comprised of the two English language words "just" and "say." Because the numerals and dashes in toll-free phone numbers have no or minimal source indicative function in and of themselves, we find that the dominant portion of applicant's marks is the wording JUSTSAY.

Opposer's registered mark is JUST SAY*. When spoken, we find that the purchasing public would pronounce the mark as "just say star" or "just say asterisk." Applicant maintains that the mark may also be pronounced as "just say," which is not unreasonable in view of the uncertain meaning of the "*" in the mark. In terms of the meaning of the mark in its entirety, applicant postulates that the mark "gives the impression of a three word phrase in which the third word is either variable or is omitted." Opposer has

not contested this assertion, and it appears reasonable to us. We add, however, that in the context of opposer's identified services which could involve entertainment or advertising by means of the spoken word such as by telephone or even voice messages transmitted on the Internet, the "*" could signify a phrase or even the "*" button on a telephone keypad. Thus, because the third word or missing phrase is not identified, and because "JUST SAY '*' button on the telephone keypad" has no apparent meaning, we find that the meaning of the mark is "just say." In terms of appearance, the wording JUST SAY dominates the mark, in part because of the number of letters that form the phrase, JUST SAY versus the single character "*"; and in part because the wording is the only portion of the mark that has any apparent meaning and the likely portion that would be used in calling for the services. Thus, we too conclude that the wording JUST SAY is the dominant portion of opposer's registered mark.

Because the dominant portions of the marks are the same in the involved marks, we find that the marks are similar, at least in meaning and commercial impression. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (for rational reasons, more or less weight may be given to a particular feature of a mark, provided that the ultimate conclusion rests on a consideration of the marks in their entireties.) In finding that the marks are similar,

we have kept in mind that the proper test in determining likelihood of confusion does not involve a side-by-side comparison of the marks, but rather must be based on the overall similarities and dissimilarities engendered by the involved marks.

In view of the foregoing, we resolve the first du Pont factor in opposer's favor.

Conclusion

We have found above that the first du Pont factor favors a finding of likelihood of confusion, the fourth du Pont factor is neutral and the second and third du Pont factors favor applicant. In our view, however, the key du Pont factor in this case concerns the similarity or dissimilarity of the services, and this factor favors applicant. It was opposer's burden to establish a likelihood of confusion by a preponderance of the evidence, and most of opposer's evidence was not properly made of record and has been stricken, leaving opposer with minimal or no evidence in support of its allegations. We cannot base a finding of a relatedness of services on mere speculation.

Thus, although the parties have similar marks, we find, based on this record, that opposer has failed to prove that applicant's services are sufficiently related to opposer's services that confusion is likely. When we consider all the

du Pont factors on which there is evidence, we find that opposer has not shown by a preponderance of the evidence that confusion is likely. Accordingly, we dismiss the opposition on the ground of likelihood of confusion.

DECISION: Both oppositions are dismissed.

EXHIBIT D

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

DANIEL A. MENDOZA, Opposer, vs. VODAFONE GROUP PLC, Applicant.	§	Opposition Nos.: 91169419, 91169697, 91170049, and 91170258 Application Nos.: 76/226,646; 76/375,495, 76/226,645 and 76/462,142

PROVISIONS FOR PROTECTING
CONFIDENTIALITY OF INFORMATION
REVEALED DURING BOARD PROCEEDING

Information disclosed by any party or non-party witness during this proceeding may be considered confidential, a trade secret, or commercially sensitive by a party or witness. To preserve the confidentiality of the information so disclosed, either the parties have agreed to be bound by the terms of this order, in its standard form or as modified by agreement, and by any additional provisions to which they may have agreed and attached to this order, or the Board has ordered that the parties be bound by the provisions within. As used in this order, the term "information" covers both oral testimony and documentary material.

Parties may use this standard form order as the entirety of their agreement or may use it as a template from which they may fashion a modified agreement. If the Board orders that the parties abide by the terms of this order, they may subsequently agree to modifications or additions, subject to Board approval.

Agreement of the parties is indicated by the signatures of the parties' attorneys and/or the parties themselves at the conclusion of the order. Imposition of the terms by the Board is indicated by signature of a Board attorney or Administrative Trademark Judge at the conclusion of the order. If the parties have signed the order, they may have created a contract. The terms are binding from the date the parties or their attorneys sign the order, in standard form or as modified or supplemented, or from the date of imposition by a Board attorney or judge.

TERMS OF ORDER

1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all inter partes proceeding files, as well as the involved registration and application files, are open to public inspection. The terms of this order are not to be used to undermine public access to files. When appropriate, however, a party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

Confidential—Material to be shielded by the Board from public access.

Highly Confidential—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the parties and/or their attorneys.

Trade Secret/Commercially Sensitive—Material to be shielded by the Board from public access, restricted from any access by the parties, and available for review by outside counsel for the parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the parties.

2) Information Not to Be Designated as Protected.

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating party with the approval of the designating party.

3) Access to Protected Information.

The provisions of this order regarding access to protected information are subject to modification by written agreement of the parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the parties or their attorneys make it a condition of

employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- Parties are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.
- Attorneys for parties are defined as including in-house counsel and outside counsel, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.
- Independent experts or consultants include individuals retained by a party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the party or its attorneys.
- Non-party witnesses include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their attorneys shall have access to information designated as confidential or highly confidential, subject to any agreed exceptions.

Outside counsel, but not in-house counsel, shall have access to information designated as trade secret/commercially sensitive.

Independent experts or consultants, non-party witnesses, and any other individual not otherwise specifically covered by the terms of this order may be afforded access to confidential or highly confidential information in accordance with the terms that follow in paragraph 4. Further, independent experts or consultants may have access to trade secret/commercially sensitive information if such access is agreed to by the parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

4) Disclosure to Any Individual.

Prior to disclosure of protected information by any party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the party or attorney proposing to disclose the information has received the signed certification from the individual. A form for such certification is attached to this order. The party or attorney receiving the completed form shall retain the original.

5) Disclosure to Independent Experts or Consultants.

In addition to meeting the requirements of paragraph 4, any party or attorney proposing to share disclosed information with an independent expert or consultant must also notify the party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice of the name, address, occupation and professional background of the expert or independent consultant.

The party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the parties must negotiate the issue before raising the issue before the Board. If the parties are unable to settle their dispute, then it shall be the obligation of the party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the parties have made to settle their dispute. The party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

6) Responses to Written Discovery.

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

7) Production of Documents.

If a party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding party makes documents available for inspection and copying by the inquiring party, all documents shall be considered protected during the course of inspection. After the inquiring party informs the responding party what documents are to be copied, the responding party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

8) Depositions.

Protected documents produced during a discovery deposition, or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the appropriate designation.

During discussion of any non-documentary protected information, the interested party shall make oral note of the protected nature of the information.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

9) Filing Notices of Reliance.

When a party or its attorney files a notice of reliance during the party's testimony period, the party or attorney is bound to honor designations made by the adverse party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

10) Briefs.

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing party, or any adverse party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this order.

11) Handling of Protected Information.

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

12) Redaction; Filing Material With the Board.

When a party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief

discussing the same should be redacted from the remainder. A rule of reasonableness should dictate how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. Occasions when a whole document or brief must be submitted under seal should be very rare.

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

CONFIDENTIAL

This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.

13) Acceptance of Information; Inadvertent Disclosure.

Acceptance by a party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

14) Challenges to Designations of Information as Protected.

If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties are unable to resolve their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time.

The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

15) Board's Jurisdiction; Handling of Materials After Termination.

The Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the parties and their attorneys shall return to each disclosing party the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information. In the alternative, the disclosing party or its attorney may make a written request that such materials be destroyed rather than returned.

16) Other Rights of the Parties and Attorneys.

This order shall not preclude the parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

STIPULATED AND AGREED TO BY THE PARTIES:

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ATTORNEYS FOR APPLICANT
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IT IS SO ORDERED.

DATED this _____ day of _____, 2007.

TRADEMARK TRIAL & APPEAL BOARD