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

Proceeding	91178731
Party	Defendant Agora, Inc.
Correspondence Address	Sandra M. Drummond, Esq. Myers & Kaplan, LLC 3100 Cumberland Boulevard, Ste 1400 Atlanta, GA 30339 UNITED STATES RWard@mkiplaw.com
Submission	Opposition/Response to Motion
Filer's Name	Robert M. Ward
Filer's e-mail	rward@mkiplaw.com,litigation@mkiplaw.com,sdrummond@mkiplaw.com
Signature	/Robert M. Ward/
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**IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE TRADEMARK
TRIAL AND APPEAL BOARD**

TRADEMARK MANAGEMENT)	
COMPANY,)	Opposition No. 91178731
)	
Opposer,)	Application Serial No. 77/033,797
v.)	
)	Mark: PANCAKE POPPER
)	
AGORA, INC.)	Published in the <i>TRADEMARK</i>
)	<i>OFFICIAL GAZETTE</i> on
Applicant.)	June 5, 2007

**AGORA’S MEMORANDUM IN OPPOSITION TO OPPOSER’S MOTION FOR
EXTENDING THE DISCOVERY PERIOD**

Opposer, TMC, has submitted a motion that is both materially incomplete and facially inaccurate and has failed to articulate why it is unable, without discovery, to present by affidavit facts sufficient to respond to Applicant Agora’s Motion for Summary Judgment. TMC improperly attempts to gain more time to go on a fruitless fishing expedition, to raise illusory discovery issues outside the proper close of such opportunity, and to seek yet another extension without having taken any actions to further the case, and quite possibly to further stall the present matter at Agora’s expense to avoid the undoubtedly forthcoming adverse ruling and its potential impact on pending oppositions for related TMC applications 78287014 and 78298041.

In particular, there is nothing in the present motion for summary judgment that requires further discovery. In essence, TMC in equitably attempts to use the present summary judgment motion as an excuse to re-open general discovery, and all without any showing that such now terminated general discovery would have anything to do with the issues set forth in the present summary judgment motion showing that Agora is entitled to judgment.

Hence, it has become clear that, while TMC continues to harass and hold a continuing threat over small, family-owned Agora, TMC's POPPER applications are under challenge by senior registrants and well-known corporate users of other POPPER marks for particular frozen food products. Agora respectfully asks that the Board deny TMC's Motion for Extending the Discovery Period and proceed with Agora's Motion for Summary Judgment.

I. OPPOSER FAILED TO SHOW PROPERLY SPECIFIC NEED FOR DISCOVERY

TMC's Motion to Extend Discovery should be denied because TMC has offered no evidence to "show need for discovery as to specific issues." (emphasis added) *See Dyneer Corp. v. Automotive Products plc*, 37 USPQ2d 1251, 1253 (TTAB 1995) [Rule 56(f) request for discovery denied where applicant failed to show need for discovery as to specific issues, not merely a showing that it deferred taking discovery it otherwise would have taken had it known a motion for summary judgment would be filed].

A. Opposer Has Not Identified ANY Facts Controlled By Agora

"A typical situation where FRCP 56(f) is invoked, and the one most commonly seen by the Board in well-taken motions under the rule, is where the non-movant cannot present by affidavit facts essential to justify its opposition to the summary judgment motion because knowledge of these facts is exclusively or largely within the control of the moving party...The Board requires more than the non-movant's bare statement that the crucial information is within its opponent's knowledge..." TIPS FROM THE TTAB: Discovery Safeguards in Motions for Summary Judgment: No Fishing Allowed, 80 Trademark Rep. 413, 416 (1990). TMC has NOT described or identified any such facts, nor their purported existence within Agora's knowledge. And, further, as in the present matter, "A delay seems especially unwarranted when the

discovery sought appears to be unlikely to result in a denial of the pending motion.” *Id.* There are simply no facts at issue and none that remain to be “discovered” that are relevant to the proper determination of this matter.

1. Opposer Seeks to Fortuitously Create an Issue of Fact

“Notwithstanding the spirit of liberality of FRCP 56(f), the Board will not, of course, allow Rule 56(f) discovery merely to satisfy a non-movant’s speculative hope of finding some evidence through such discovery that might support its position. A party’s hope or hunch that discovery might fortuitously create an issue of fact for trial is simply not enough.” *Id.*, at 420, *citing* J. Moore and J. Wicker, Moore’s Federal Practice P56.24 (1988). “A party seeking the shelter of Rule 56(f) must comply with the standards enunciated by the Federal Circuit and followed by the Board.” *Id.*

“The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.” Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1564, 4 USPQ2d 1793, 1799 (Fed. Cir. 1987)[mere assertion in brief of need for discovery insufficient; no likelihood of confusion between applicant ULTRA SWEATS and opposer SWEATS], *citing* Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731F.2d 831, 836, 221 U.S.P.Q. (BNA) 561, 564 (Fed.Cir. 1984)].

2. Opposer Failed to Point to Specific Facts Discovery Will Produce

TMC failed to “point to specific facts that the discovery will produce,” as is required, wherein “counsel needs to be specific...[otherwise], every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant’s files. TIPS, 80 Trademark Rep. at 420, *citing* Keebler Co. v. Murray Bakery Products, 866 F.2d 1386, note 10, 9 USPQ2d

1736, 1738-1739 (Fed. Cir. 1989)[an affidavit falls short if the party only says, in essence, "we have no factual basis for opposing summary judgment, but, if you stay proceedings, we might find something."]; *see also*, Sweats Fashions, 833 F.2d at 1560, 4 USPQ2d at 1799; Strang Corp. v. The Stouffer Corp., 16 USPQ2d 1309 (TTAB 1990)[affidavit stating that, during discovery party will seek to elicit information on likelihood of confusion insufficient]. The only identified targets of the discovery sought, as best discerned, are some sort of evidence of a fact at issue regarding dissimilarity of the goods, dissimilarity of the marks, and the commonly understood meaning of the word POPPER. *See* Kiedrowski 9/19/08 Declaration, ¶ 22. Clearly, TMC seeks a non-specific fishing expedition that cannot lead to any relevant issue.

First, TMC has unambiguously admitted that the goods are not the same. *See* Opposer's Response to Applicant's Request for Admission, Request No. 12, **Exhibit A** attached hereto. Second, TMC stated on the record in both applications no. 78287014 and no. 78287041, on June 7, 2004, that the marks POPPERS and OVEN POPPERS were different with respect to both sound and appearance, and cannot now attempt to pretend to believe anything other than that the marks POPPERS and PANCAKE POPPER are also different with respect to both sound and appearance. Finally, Agora is not in "exclusive possession" of any information regarding the commonly understood meaning of the word POPPER, other than as already submitted.

By its very nature, the common meaning of any word is commonly available. TMC's Declaration falls short, may be summarized as "we have no factual basis for opposing summary judgment, but, if you stay proceedings, we *might* find *something*," and thus under the prevailing legal standards the Motion to Extend should be denied. Keebler Co., 866 F.2d at 1388-89, 9 USPQ2d at 1738 [unfocused requests for discovery are insufficient]. "If all one had to do to obtain a grant of a *Rule 56(f)* motion were to allege possession by movant of "certain

information" and "other evidence", every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files." *Id*; *See also Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985) [must show what facts are sought and how they are reasonably expected to create a genuine issue of material fact]; *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980) ["must conclusively justify entitlement to shelter of *Rule 56(f)* by presenting specific facts explaining inability to make substantive response required by *Rule 56(e)*"; "non movant may not simply rely on vague assertions that discovery will produce needed, but unspecified, facts"]; *Moore's Fed. Prac.*, 56.24.

In summary, no sought facts have been identified and no reasonable expectation of creating a genuine issue of material fact has even been suggested by TMC.

B. Opposer Was Not Diligent During Discovery

TMC did not proceed with diligence during the discovery period. "[O]nce the discovery period has closed, the Board is apt to look with disfavor upon a party which seeks to delay a case for Rule 56(f) discovery," recognizing that such "party should not be rewarded for failing to proceed with diligence during the period of discovery." *TIPS*, 80 Trademark Rep. at 416. Despite the fact that Mark Sosebee of Agora was twice available and ready for deposition, only to have TMC reschedule, TMC now seeks an extension of discovery to depose Mr. Sosebee, to "identify facts essential to justify TMC's opposition," failing to properly define those alleged facts with specificity. Kiedrowski 9/19/08 Declaration, ¶23

TMC has not shown (a) what "facts" are sought, and (b) how they are reasonably expected to create a genuine issue of material fact, but rather has created (c) an illusory possibility devoid of any factual basis, that (i) **maybe** Agora has not been candid in discovery responses, (ii) **maybe** there remains a document that will maybe reveal a secret and unidentified

officer, and finally, (iii) maybe the putative deponent may have knowledge of some unknown fact that might be beneficial to TMC's case. Kiedrowski 9/19/08 Declaration, page 7. Hence, TMC's level of speculation does not even rise to the level of fishing.

Following the third discovery extension granted April 3, 2008, no known effort toward communication, discovery, evidentiary submission, or otherwise was undertaken by TMC until the next request for further extension. In fact, the ONLY communication generated from April 3, 2008 to June 13, 2008 was by Agora as an inquiry regarding the silence, the status and the hope of potential settlement. See letter from Ward to Kiedrowski on May 7, 2008, **Exhibit B** attached hereto . TMC still took no action and was completely non-responsive to Agora's letter. Wherefore, no extension is justified under such facts, and no extension should be granted. Moreover, Kiedrowski's Declaration, paragraph 13 misstates that "the parties had been negotiating in good faith and were clearly in the process of exploring possible grounds for settlement..." Kiedrowski 9/19/08 Declaration, ¶13. On the contrary, despite repeated requests and inquiries from Agora, TMC made no settlement sounds of any kind. TMC did no negotiating, and there was nothing in TMC's conduct of continuing harassment that could be considered "good faith".

Accordingly, TMC's testimony period has closed without the introduction of any evidence, despite a vague, misleading and unsupported reference regarding "additional research" and a supposed collection of "further information that would likely impact the status of settlement discussions" offered by TMC, with not a single explanation of what this "information" might be. Kiedrowski 9/19/08 Declaration, ¶¶14, 15. Clearly, TMC should not be rewarded now for failure to act previously.

TMC misstates that “TMC has been diligent in pursuing discovery from Agora,” and improperly alleges that Applicant has “thwarted TMC’s ability” to conduct discovery. *See* TMC’s 56(f) Motion, page 12, ¶ 2. TMC provides the Board with nothing but unsubstantiated allegations and misstatements, and has pursued no discovery from Agora but for additional, illusory documents that simply do not exist. Agora has not thwarted TMC’s ability to conduct discovery, but instead has promptly and completely responded to each and every request and communication, even agreeing to three (3) consecutive extensions requested by TMC, despite continued inaction by TMC. Simply put, TMC has not pursued the case – whether diligently or otherwise -- and now would like the Board to believe that somehow Agora is responsible for that inaction. Remedies clearly existed for TMC if such had been the case; however, no evidence has been offered, no motions to compel were timely filed, and no supplemental discovery requests or interrogatories were served. Thus, TMC’s unsupported, conclusory and false remarks should not be credited, and TMC’s total lack of diligence (or even concern) in this case should not be rewarded. In any event, the Record fully shows that TMC stands fully prepared to respond to the pending summary judgment motion.

II. OPPOSER’S MOTION CONTAINS FALSE AND MISLEADING STATEMENTS

“A party seeking the shelter of Rule 56(f) must comply with the standards enunciated by the Federal Circuit and followed by the Board,” *TIPS*, 80 Trademark Rep. at 420, and “must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts...Mere denials or conclusory statements are insufficient.” *Sweats Fashions*, 833 F.2d at 1564, 4 USPQ2d at 1799 [mere assertion in brief of need for discovery insufficient; no likelihood of confusion between applicant ULTRA SWEATS and opposer SWEATS], *citing* Barmer Maschinenfabrik, 731F.2d at 836, 221 U.S.P.Q. at 564.

TMC has not complied with the required standards of the law, has not pointed to any evidentiary conflict, and has, instead, founded its argument on demonstrably disingenuous statements.

A. Agora Responded to Opposer's 12/7/07 Letter in Two Business Days

Unfortunately, both paragraph 5 of TMC's "factual" background and paragraph 7 of the Kiedrowski Affidavit provide false statements to the Board: "After Agora *failed to respond* to TMC's settlement letter of Friday, December 7, 2007, the parties exchanged and responded to discovery requests and discussed the dates and location of Rule 30(b)(6) depositions;" and "Having *received no response* to TMC's request for consideration of possible grounds for settlement..." *emphasis added*. See TMC's 56(f) Motion, paragraph 5; Declaration of Carrie Kiedrowski dated September 19, 2008.

Firstly, Agora responded to TMC's December 7, 2007 within two business days, on Tuesday, December 11, 2007. See Letter from Ward to Fraelich of December 19, 2007, **Exhibit C** attached hereto. Further, to characterize TMC's letter as a "settlement letter" is misleading at best, wherein the letter states essentially nothing more than "we have not been diligent, but we will be now unless you agree to drop your PANCAKE POPPERS mark." See Letter from Fraelich to Ward of December 7, 2007, **Exhibit D** attached hereto. TMC's blatant misrepresentation of the facts and false statements appears to be borne either with deceptive intent or negligent understanding of the record in a manner similar to the August 17, 2007 Requests for Removal from Suspension filed for applications no. 78287014 and 78287041. See Agora's Motion for Summary Judgment, page 6, paragraph 6, and page 7, paragraph 8 [TMC filed misleading requests for removal from suspension and publication without addressing

likelihood of confusion rejections that remained pending and unresolved, either deceptively or negligently].

TMC's Motion to Extend Discovery should be denied for the additionally reason that it relies upon materially false statements.

B. Opposer Raised No Issue with Agora's Responses and Is Now Barred

Another materially incomplete statement and attempt to mislead the Board occurs in Paragraph 9, wherein TMC notes an alleged January 22, 2008 determination that Agora's interrogatory responses were "repetitive and vague," again with the same allegation in Paragraph 7 of the Kiedrowski Declaration. *See* TMC's 56(f) Motion, ¶ 5; Kiedrowski 9/19/08 Declaration, ¶7. Not a single communication by TMC raised any issue with Agora's interrogatory responses, and hence no evidence exists in support of TMC's statement.

Despite many months and countless consensual extensions to the discovery period, TMC never sought further interrogatory responses, never filed a motion to compel, and never served an additional interrogatory. Rather, TMC has done essentially nothing during this time period, and now, facing summary judgment, seeks to manufacture an unsupported issue. Moreover, and apparently in an effort to create a confusing illusion because none of Agora's discovery responses remain outstanding, TMC appears to focus much of its argument on TMC's own outstanding discovery responses to Agora's interrogatories as a basis for extending discovery? To be clear, Agora does not seek a delay in order to obtain the answers to Agora's interrogatories and finds it quite unreasonable that TMC would argue that Agora's Motion for Summary Judgment should not be considered because of any status of Agora's own discovery requests. TMC attempts to mislead the Board by raising a never before raised issue with Agora's interrogatory responses, and then confusingly interweaving argument regarding the outstanding

nature of TMC's own interrogatory responses as an alleged basis for extension. There is no logic in TMC's argument. TMC did not respond to Agora's responses with any complaint, but rather indicated that the responses were enough to likely render further document production and deposition unnecessary. *See* Letter from Kiedrowski to Ward on January 29, 2008, **Exhibit E** attached hereto. Even so, and even assuming *arguendo* that there were to be a forum for further interrogatory presentation by TMC (which is disputed), there is simply no relevant issue of material fact that could be discovered.

1. Opposer Failed to Timely File a Motion to Compel

"A motion to compel must be filed prior to the commencement of the first testimony period." 37 CFR §§ 2.120(e). TMC's testimony period commenced August 16, 2008, and closed September 16, 2008 with not a singular activity other than effort directed at prolonging an otherwise stagnant proceeding. No Motion to Compel was timely filed. Hence, no discovery issue may be heard. TBMP §523.03, citing Societa Per Azioni Chianti Rffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL, 59 USPQ2d 1383, 1383 (TTAB 2001)["A motion to compel...should be filed] within a reasonable time after the failure to respond to a request for discovery or after service of the response believed to be inadequate and must, in any event, be filed before the first testimony period opens."]

It is certainly well settled that "If a party that served a request for discovery receives a response thereto which it believes to be inadequate, but fails to file a motion to test the sufficiency of the response, it may not thereafter be heard to complain about the sufficiency thereof." TBMP §523.04, citing Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1656 (TTAB 2002)["having failed to file motion to compel, defendant will not later be heard to complain that interrogatory responses were inadequate"]; *also* Saul Lefkowitz and Janet E. Rice,

Adversary Proceedings Before the Trademark Trial and Appeal Board, 75 Trademark Rep. 323, 387 (1985)[“If a party who served a request for discovery receives a response thereto which he believes to be inadequate, but fails to file a motion to test the sufficiency of the response in the manner outlined above, he may not thereafter be heard to complain about the sufficiency of such response.], *citing* Procter & Gamble Co. v. Keystone Automotive Warehouse, Inc., 191 USPQ 468 (TTAB 1976); Comserv Corp. v. Comserv, 179 USPQ 1244 (TTAB 1973); Watercare Corp. v. Midwesco-Enterprise, Inc., 171 USPQ 696 (TTAB 1971).

No consideration of TMC’s discovery complaints should be granted at this time.

2. Agora Promptly Provided Relevant Documents

Agora provided relevant documents with discovery responses on January 22, 2008. *See* invoices, product label, referenced in Applicant’s Response to paragraphs 10 and 13 of Opposer’s First Request for Production of Documents, attached hereto as **Exhibit F**. “In Board cases, parties often extend each other the courtesy of copying documents and materials responsive to their respective requests for production; they then forward the copies...” No Fear Inc. v. Rule, 54 USPQ2d 1551, 1555 (TTAB 2000); *also* Electronic Industries Association v. Potega, 1990 TTAB LEXIS 189; 50 USPQ2d 1775 (TTAB 1999). Such a course of action was certainly prudent in the present case, wherein only a most minimal collection of documents existed, because Agora is a small, family business and not a large multi-national, corporate, document-creating organization. Perhaps because TMC is such an organization, it struggles to understand such a simple business structure as Agora. Whatever the reason, in a brief flurry of activity during a two week period in late February and early March, 2008, TMC sought an opportunity to personally visit Agora’s place of business to view documents. In a continuing exhibition of cooperation, Mr. Ward participated in a telephone conference with Carrie

Kiedrowski on March 10, 2008, expecting to discuss discovery; however, rather than discovery, TMC sought, and was again graciously granted further extension, even while Mr. Ward expressed Agora's strong interest in resolving the matter. If supplemental disclosure of any documents had been appropriate, Agora would have timely complied with such obligation by courteously copying and mailing same to TMC. *See* Letter from Ward to Kiedrowski on June 20, 2008, attached hereto as **Exhibit G**. TMC has not identified a single document, nor what such a document might contain because there is no document that could create a material fact at issue in this case.

3. Opposer Took No Action and Was Non-Responsive

Paragraphs 16-20 of TMC's 56(f) Brief further attempt to mislead the Board regarding the activities (more properly, lack thereof) that occurred following the April 3, 2008 discovery extension granted by Mr. Ward on March 10, 2008, until the extension deadline of June 13, 2008. *See* TMC's 56(f) Motion, ¶¶ 16-20. In fact, the ONLY communication generated during the period was Applicant's inquiry regarding status and settlement. *See* letter from Ward to Kiedrowski on May 7, 2008. TMC took no action and was non-responsive to Agora's letter. No extension is justified under such facts and no extension should be granted. Kiedrowski's Declaration, paragraph 13 misstates that "the parties had been negotiating in good faith and were clearly in the process of exploring possible grounds for settlement..." Kiedrowski 9/19/08 Declaration, ¶13. On the contrary, despite repeated requests and inquiries from Agora, no settlement offer was proposed.

TMC offered no evidence during its testimony period. Kiedrowski's Declaration is devoid of reference to any action by TMC between April 2, 2008 and June 13, 2008, or to any evidence, because no action was taken and no evidence exists. Nonetheless, a vague, misleading

and unsupported reference regarding “additional research” and collection of “further information that would likely impact the status of settlement discussions” is offered, with not a single explanation of what this “information” might be. Given that TMC’s testimony period has closed without the introduction of any evidence, the existence of this impacting “collection of further information” remains unsupported. Kiedrowski 9/19/08 Declaration, ¶¶14, 15.

C. Opposer Could Not Benefit From Discovery On Use of Third-Party Marks

TMC misstates Agora’s position regarding third-party marks, wherein Agora simply relies upon such marks as evidence of the well understood and commonly descriptive meaning of the word POPPER, a position that does not require proof of actual use. American Hospital Supply Corp. v. Air Products and Chemicals, Inc., 194 USPQ 340, 343 (TTAB 1997)[third-party registrations may be used “to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning; that this has been recognized to the Patent and Trademark Office by registering marks containing such a common feature for the same or closely related goods where the remaining portions of the marks are sufficient to distinguish the marks as a whole; and that therefore the inclusion of (the common element) in each mark may be an insufficient basis upon which to predicate a holding of confusing similarity.”] *Arguendo*, even if Agora were seeking to rely on the plethora of third-party POPPER food mark registrations in the manner alleged by TMC, extending discovery could in no way improve TMC’s position regarding same. That is, if Agora’s argument were premised as TMC alleges, then the third-party marks would simply not be considered by the Board. Further discovery could not yield a single fact that would be determinative to the outcome of the present matter.

D. Agora's Motion for Summary Judgment was Timely Filed and Proper

TMC characterizes Agora's Motion for Summary Judgment as "precipitous," but rather than hasty and abrupt, Agora's Motion was timely filed on the last day for such a filing, after having waited through months of extensions in the hopes that the matter would be more quickly resolved, as a means to seek a "just, speedy, and inexpensive determination" to the present matter. Sweats Fashions, 833 F.2d 1560, 1562, 4 USPQ2d 1793, 1799 (Fed. Cir. 1987), *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986)[“In contrast to implications drawn from earlier Supreme Court decisions, summary judgment may no longer be regarded as a disfavored procedural shortcut. Rather, the Court has counseled that summary judgment is a salutary method of disposition ‘designed’ to secure the just, speedy and inexpensive determination of every action.”]; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986). Consideration of Agora's Motion for Summary Judgment should not be delayed.

III. NO FACTS CAN BE DISCOVERED THAT WOULD CHANGE THE RESULT

The motion to extend discovery should be denied because there is no genuine issue as to any material fact, and more evidence than is already available could not reasonably be expected to change the result. Fed. R. Civ. Pro. 56; Kellogg Company v. Pack'Em Enterprises, Inc., 1990 TTAB LEXIS 3. *10, 13; 14 U.S.P.Q.2D (BNA) 1545, *referencing* Societe Des Produits Marnier Lapostolle v. Distillerie Moccia S.R.L., 10 USPQ2d 1241, 1244 (TTAB 1989) *and* Pure Gold, Inc. v. Syntex (U.S.A.) Inc., 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984).

A. It is an Undisputed Fact that the Identified Goods are Distinctly Dissimilar

None of TMC's Goods are included in Agora's Identification of Goods. Agora's subject application no. 77/033,797 identifies "prepared pancake wrapped sausage; sandwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; pancake batter wrapped meat with syrup or syrup flavor in breading or batter; foodstuffs in the nature of a meatball coated primarily with pancake batter infused with syrup; prepared breakfast meat pies; prepared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese," wherein Agora offers the described breakfast foods under the PANCAKE POPPER mark. In contrast, TMC's registration no. 1922249 identifies "coated and breaded vegetable pieces."

It is an undisputed fact that the identified goods are distinctly dissimilar. *See* Opposer's Response to Applicant's Request for Admission, Request No. 10, Exhibit 26; Opposer's Response to Applicant's Request for Admission, Request No. 11, Exhibit 26, emphasis added; Motion for Summ Judg, p. 5. No evidence can be "discovered" to change this fact. TMC has admitted on more than one occasion that it has only ever offered frozen appetizers, namely cream cheese jalapenos, cheddar cheese jalapenos, three cheese jalapenos, mozzarella sticks, mozzarella nuggets, nacho cheddar crisps, and breaded mushrooms under its registered POPPERS mark. *See* Opposer's Response to Applicant's Request for Admission, and serial nos. 78287014 and 78287041, files of record. There is clearly no existing evidence, nor any evidence that could be shown to genuinely dispute that pancake wrapped sausages are fundamentally different from stuffed jalapenos and breaded mushrooms. Further, and analogously applying

TMC's own repeated position-of-record in applications no. 78287014 and 78287041, it is clear that "the goods...do NOT belong to similar frozen food segments."

B. It is an Undisputed Fact that TMC's has Argued Dissimilarity of Such Marks

Given that the evidence of record irrefutably demonstrates TMC's repeated position regarding the dissimilarity of (a) its POPPERS mark, as compared with (b) other food-related, two-word marks with POPPERS as the second word, there is clearly no genuine issue of material fact surrounding the dissimilarity of the marks, and wherefore no likelihood of confusion could be found based upon this factor. No evidence could be discovered that will bear on the dissimilarity of the marks.

C. The Word POPPER has Well-Known Meaning in Common Use

Although "the probative value of third-party trademarks depends entirely upon their usage," Sweats Fashions, 833 F.2d at 1560; 1987 U.S. App. LEXIS 683; 4 U.S.P.Q.2d at 1793, referring to Scarves by Vera, Inc. v. Todo Imports, Ltd., 544 F.2d 1167, 1173 (2d Cir. 1976), third-party registrations may be used "to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning...." American Hospital, 194 USPQ 340, 343 (TTAB 1997). In the present case, there are no less than twenty-three (23) registered trademarks that include the word POPPER, or variation thereof, for food-related goods. See Agora's Motion for Summary Judgment, Exhibits 1-24. This meaning obviously relates to ease of consumption, "popping" into one's mouth, and has certainly become commonly used to refer to a variety of appetizers, particularly cheese stuffed jalapenos. It is without any serious argument that "the existence of a term in several third-party registrations may indicate that a term has a descriptive or suggestive significance which could minimize its impact when the mark is viewed in its entirety." AMF Inc., 474 F.2d at 1406, 177 USPQ at 269-70.

Moreover, as previously presented, the commonly understood meaning of the word POPPER is further evidenced in readily available common law materials, wherein a GOOGLE search of the word returns over 3 million hits, the vast majority of which refer to either of (1) appetizer recipes, or (2) amyl nitrate. There is no fact at issue that numerous registrations and non-registered third-party users for food-related marks containing variations of the word POPPER exist, and that the great majority thereof relies upon a commonly recognized definition of the word POPPER. Accordingly, no likelihood of confusion could be found based upon this factor, and no further discovery could alter this truth.

D. TMC has No Right to Exclude Agora from Using PANCAKE POPPER

It is a fact that TMC's registration no. 1922249 is limited to "coated and breaded vegetables," and that TMC's applications 78287014 and 78287041 are not only the subject of opposition proceedings, but if matured into issued registrations, will be facially invalid, at least based upon the unresolved confusing similarity rejections for registration no. 1882381

IV. CONCLUSION

Opposer has clearly failed to articulate why it is unable, without discovery, to present by affidavit facts sufficient to respond to Applicant Agora's Motion for Summary Judgment. Moreover, balancing all of the relevant *DuPont* factors, and in light of the undisputed material facts, there is no genuine issue that the PANCAKE POPPER mark sought to be registered by Agora for specifically identified breakfast foods is not likely to cause confusion with TMC's POPPER mark for the very different breaded vegetables¹, no specific evidence has been suggested or exists that could raise an issue of fact, no specific evidence has been articulated as

¹ Indeed, TMC's argument borders on the absurd. No one can argue with a straight face that there is any substantial number of consumers in the marketplace who eat breaded vegetables for breakfast

discoverable that could raise an issue of fact, and wherefore the Motion for Extension of Discovery is not supported and Agora is accordingly entitled to judgment as a matter of law.

Wherefore, the Opposer's 56(f) Motion for Extension of Discovery should be denied, and the same is respectfully urged.

Dated this 9th day of October, 2008.

/s/ Robert M. Ward
Robert M. Ward
Georgia Bar No. 775401
Sandra M. Drummond
Georgia Bar No. 668597

Myers & Kaplan
Intellectual Property Law, LLC
Cumberland Center II, Suite 1400
3100 Cumberland Boulevard
Atlanta, Georgia 30339
(770) 541-7444
(770) 541-7448

CERTIFICATE OF SERVICE

A copy of the foregoing *Agora's Memorandum In Opposition to Opposer's Motion for Extending the Discovery Period* was served on this 9th day of October via facsimile and U.S. First Class Mail with proper postage affixed thereto and addressed as follows:

Timothy P. Fraelich
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 579-0212 – fax

Carrie L. Kiedrowski
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309-3053
(404) 581-8330 – fax

Respectfully submitted this 9th day of October, 2008.

/s/ Robert M. Ward
Robert M. Ward
Georgia Bar No. 775401
Sandra M. Drummond
Georgia Bar No. 668597

EXHIBIT A

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

In the Matter of Application Serial No. 77/033,797
Published in the Official Gazette on June 5, 2007

TRADEMARK MANAGEMENT COMPANY,

Opposer,

v.

AGORA, INC.,

Applicant.

Opposition No. 91178731

**OPPOSER'S RESPONSES TO APPLICANT'S
FIRST SET OF REQUESTS FOR ADMISSION (NOS. 1-59)**

In accordance with Rules 26 and 36 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and 37 C.F.R. § 2.120, Trademark Management Company ("TMC" or "Opposer"), by and through its counsel, hereby serves upon Applicant, Agora, Inc. ("Agora" or "Applicant"), the following objections and responses to Applicant's First Set of Requests for Admission.

PRELIMINARY STATEMENT

A. The responses and objections set forth herein are based upon documents and information presently known and available to TMC. TMC reserves all rights and objections, under the Trademark Rules of Practice and the Federal Rules of Civil Procedure, to supplement or amend these responses in the event that additional documents or information become known and available to TMC.

B. TMC makes each of these responses to Applicant's requests subject to the general and specific objections set forth herein, whether or not each such objection is incorporated

expressly into each particular response. Accordingly, each response herein is qualified by TMC's general and specific objections, and is limited to materials and information not covered thereby.

C. By serving these responses and objections to Applicant's requests, TMC does not concede that any of the documents or information produced pursuant hereto or referenced herein are relevant, material, admissible or reasonably calculated to lead to the discovery of admissible evidence.

GENERAL OBJECTIONS

1. TMC objects to Applicant's definition of "Opposer's Mark" in paragraph No. 2 of Applicant's Instructions and Definitions to the extent that Applicant has included presently pending third-party opposition, trademarks, service marks, trade names, and corporate names that are not subject to this Opposition proceeding. For purposes of responding to Applicant's First Set of Requests for Admission (Nos. 1-59), TMC hereinafter responds on the basis that "Opposer's Mark" only refers to the marks that TMC cited against Applicant's application no. 77033,797 in the Notice of Opposition, namely, U.S. Reg. No. 1,922,249; application nos. 78287,014 and 78287,041.

2. TMC objects to all definitions, instructions and requests to the extent they seek information protected by the attorney-client privilege, work product doctrine or any other applicable privilege, or information that constitutes material prepared in anticipation of litigation or for trial.

3. TMC objects to all definitions, instructions and requests to the extent they seek to impose any discovery obligations beyond that provided by the applicable provisions of the Trademark Rules of Practice and the Federal Rules of Civil Procedure.

4. TMC objects to Applicant's requests to the extent that they call for the production or identification of documents or information not relevant to the subject matter of this action and/or not reasonably calculated to lead to the discovery of admissible evidence.

5. TMC objects to Applicant's requests to the extent that they are vague, unclear and overly broad and/or sweeping, duplicative and harassing. Therefore, responding to them constitutes an overly burdensome and unnecessary undertaking.

6. TMC objects to Applicant's requests to the extent that they call for the production or identification of documents or information of a confidential or proprietary business nature, in the absence of an executed appropriate confidentiality agreement.

7. TMC objects to Applicant's requests to the extent that they call for the production or identification of documents or information in the possession, custody or control of persons or entities other than TMC.

8. TMC objects to Applicant's requests to the extent that they call for TMC to reach legal conclusions in order to respond to particular requests.

REQUESTS FOR ADMISSION

REQUEST NO. 1

Admit that Applicant's Mark in its entirety is not similar as to appearance to Opposer's Mark in its entirety.

RESPONSE:

Denied.

REQUEST NO. 2

Admit that Applicant's Mark in its entirety is not similar as to sound to Opposer's Mark in its entirety.

RESPONSE:

Denied.

REQUEST NO. 3

Admit that Applicant's Mark in its entirety is not similar as to connotation to Opposer's Mark in its entirety.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrase "as to connotation" is undefined. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 4

Admit that Applicant's Mark in its entirety is not similar as to commercial impression to Opposer's Mark in its entirety.

RESPONSE:

Denied.

REQUEST NO. 5

Admit that the nature of the goods and services as described in Applicant's Trademark Application No. 77/033,797 and the nature of the goods and services as described in Opposer's cited U.S. Trademark registration and suspended trademark applications are dissimilar.

RESPONSE:

Denied. The cited U.S. Trademark applications are not suspended.

REQUEST NO. 6

Admit that Opposer's Mark is not famous under the standard set forth in *The Toro Company v. ToroHead, Inc.*, 2001 TTAB Lexis 823, 61 U.S.P.Q.2d (BNA) 1164 (*Decided* December 12, 2001).

RESPONSE:

TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but as to matters or conclusions of law that are improperly the subject of requests for admissions. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 7

Admit that Applicant and Opposer are not in competition against each other in any markets.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrase "not in competition" is undefined as to the products or services. Also, the phrase "in any markets" is overly broad. TMC further objects on the basis that this request seeks information that is irrelevant to the subject matter of this opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC has performed a reasonable inquiry into this request and the information it currently has, or can readily obtain, is insufficient to enable TMC to admit or deny. TMC is currently

investigating the overlap between Opposer and Applicant's markets, particularly whether this is a basis for a resolution of this Opposition proceeding.

REQUEST NO. 8

Admit that there has been no actual confusion between Applicant's Mark and Opposer's Mark.

RESPONSE:

TMC has performed a reasonable inquiry into this request and the information it currently has, or can readily obtain, is insufficient to enable TMC to admit or deny.

REQUEST NO. 9

Admit that Opposer has only offered cream cheese jalapenos, cheddar cheese jalapenos, three cheese jalapenos, mozzarella sticks, mozzarella nuggets, nacho cheddar crisps, and breaded mushrooms under the mark POPPERS.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the term "offered" is undefined and overly broad. Moreover, the request is ambiguous as to time. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 10

Admit that Opposer does not offer and has never offered prepared pancake wrapped sausage; sandwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; pancake batter wrapped meat with syrup or syrup flavor in breading or batter; foodstuffs in the nature of a meatball coated primarily with pancake batter

infused with syrup; prepared breakfast meat pies; or prepared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese under Opposer's Mark.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the goods "prepared breakfast meat pies" is undefined. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 11

Admit that prepared pancake wrapped sausage; sandwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; pancake batter wrapped meat with syrup or syrup flavor in breading or batter; foodstuffs in the nature of a meatball coated primarily with pancake batter infused with syrup; prepared breakfast meat pies; and prepared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese are NOT coated and breaded vegetable pieces.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the goods "prepared breakfast meat pies" is undefined. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 12

Admit that prepared pancake wrapped sausage; sandwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; pancake batter wrapped meat with syrup or syrup flavor in breading or batter; foodstuffs in the nature of a

meatball coated primarily with pancake batter infused with syrup; prepared breakfast meat pies; and prepared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese are NOT frozen appetizers consisting primarily of vegetables, meat and/or cheese.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the goods “prepared breakfast meat pies” is undefined. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 13

Admit that cream cheese jalapenos, cheddar cheese jalapenos, three cheese jalapenos, mozzarella sticks, mozzarella nuggets, nacho cheddar crisps, and breaded mushrooms are in NO way similar to prepared pancake wrapped sausage; sandwiches consisting of hot cakes with meat filling; dough-based pockets with filling consisting primarily of sausage; pancake batter wrapped meat with syrup or syrup flavor in breading or batter; foodstuffs in the nature of a meatball coated primarily with pancake batter infused with syrup; prepared breakfast meat pies; and prepared foodstuffs consisting of batter and syrup filled primarily with beef, chicken, pork, egg, and cheese.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrase “in NO way” is undefined and overly broad. Moreover, the meaning of “prepared breakfast meat pies” is undefined. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 14

Admit that “a disclaimer does not remove the disclaimed matter from the mark. The mark must still be regarded as a whole, including the disclaimed matter, in evaluating similarity to other marks.” See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984); *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983); *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (C.C.P.A. 1965); *In re MCI Communications Corp.*, 21 USPQ2d 1534, 1538-39 (Comm’r Pats. 1991); TMEP 1213.

RESPONSE:

TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but as to matters or conclusions of law that are improperly the subject of requests for admissions. TMC further objects on the basis that this request seeks information that is irrelevant to the subject matter of this opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, as this request is improper, Opposer believes that a response to this admission is not required under the Federal Rules.

REQUEST NO. 15

Admit that Opposer’s use of the word POPPERS is not exclusive, at least in the area of food items and snacks.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrases "not exclusive" and "in the area of food items and snacks" are undefined and overly broad. TMC further objects on the basis that this request seeks information that is irrelevant to the subject matter of this opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 16

Admit that the word POPPERS has been in use by various third parties and is the subject of at least twelve (12) Federal Trademark Registrations and at least three (3) allowed applications for a wide variety of foods.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Further, TMC has performed a reasonable inquiry into this request and the information it currently has, or can readily obtain, is insufficient to enable TMC to admit or deny.

REQUEST NO. 17

Admit that no one party has an exclusive right in and to the word POPPERS for a wide range of products.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the phrases “no one party” and “wide range of products” are undefined and overly broad. TMC further objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but as to matters or conclusions of law that are improperly the subject of requests for admissions. TMC further objects on the basis that this request seeks information that is irrelevant to the subject matter of this opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, as this admission request is improper, Opposer believes that a response to this admission is not required under the Federal Rules.

REQUEST NO. 18

Admit that Opposer has had an opportunity to oppose at least twelve (12) active registrations that include the word POPPERS for use on food products, but has instead acquiesced to the use of the word POPPERS on such wide variety of food products.

RESPONSE:

Denied.

REQUEST NO. 19

Admit that Opposer has attempted to oppose registration of at least eight (8) pending registrations for marks that included the word POPPERS for use on food products, did not prevail in at least five (5) oppositions against registration of marks including the word POPPERS for a wide variety of food items, and did prevail in three (3) oppositions against registration of applications using the word POPPERS specifically on vegetable and pepper food products.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of “prevail” is undefined. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 20

Admit that the outcome of the at least (8) attempted oppositions referenced in REQUEST NO. 19 is evidence that any rights that Opposer may have to Opposer’s Mark is limited to vegetable and pepper food products.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrase “outcome” is undefined. Further, TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing Specific objections, TMC responds as follows:

Denied.

REQUEST NO. 21

Admit that the applications challenged by Opposer, namely nos. 76/462661 for PORK POPPERS and 75473649 for VEGGIE POPPERS, opposed by Opposer, and no. 74648402 for TRAILPOPPERS, the subject of a cancellation proceeding initiated by Opposer, each became

abandoned by default judgment because no Answer was timely filed and NOT by evaluation of Opposer's claims by the TTAB.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request because TMC never opposed the application numbers listed in Request No. 21. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application nos. 76462661 and 75473649 are recorded in the USPTO as abandoned and that application no. 74648402 is recorded in the USPTO as cancelled. TMC denies the remainder of the admission.

REQUEST NO. 22

Admit that the application challenged by Opposer, namely no. 75437117 for FIRE POPPERS, opposed by Opposer, was expressly withdrawn, and therefore Opposer's claims were NOT evaluated by the TTAB.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request because TMC never opposed application no. 75437117. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 75437117 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 23

Admit that Opposer attempted to register and maintain rights to the mark GOLDEN TEQUILA POPPERS for “coated and breaded vegetable pieces” under applications no. 74536410 and 74540543, wherein the resulting registration for no. 7453610 was cancelled as a result of challenge by a third-party in a cancellation proceeding, and wherein no. 74540543 was abandoned as a result of challenge by the same third-party in an opposition proceeding.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Further, TMC objects to this request because TMC never applied for GOLDEN TEQUILA POPPERS under application nos. 74536410 and 74540543. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74536410 is recorded in the USPTO as cancelled and that application no. 74648402 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 24

Admit that Opposer attempted to register and maintain rights to the mark LOBSTER POPPERS for “peppers stuffed with cheese and lobster pieces, breaded and sold frozen” under application no. 74659876, wherein the registration was opposed, the TTAB sustained the opposition, and the application became abandoned.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request because TMC never applied for LOBSTER POPPERS under application no. 74659876. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74659876 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 25

Admit that Opposer attempted to register and maintain rights to the mark SHRIMP POPPERS for "coated and breaded shrimp pieces" under application no. 74475747, wherein the registration was opposed, the TTAB sustained the opposition, and the application became abandoned.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request because TMC never applied for SHRIMP POPPERS under application no. 74475747. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74475747 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 26

Admit that Opposer attempted to register and maintain rights to the mark RED HOT LOBSTER POPPERS for “coated and breaded lobster’ pieces” under application no. 74476227, wherein the registration was opposed, the TTAB sustained the opposition, and the application became abandoned.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Further, TMC objects to this request because TMC never applied for RED HOT LOBSTER POPPERS under application no. 74476227. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74476227 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 27

Admit that Opposer attempted to register and maintain rights to the mark TADO POPPERS for “coated and breaded vegetable pieces” under application no. 74440928, wherein the application became abandoned as a result of challenge by a third-party in an opposition proceeding.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Further, TMC objects to this request because TMC never

applied for TADO POPPERS under application no. 74440928. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74440928 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 28

Admit that Opposer attempted to register and maintain rights to the mark POPPERS with design, for “coated and breaded vegetable pieces” under application no. 74440797, wherein the application became abandoned as a result of challenge by a third-party in an opposition proceeding.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Further, TMC objects to this request because TMC never applied for POPPERS under application no. 74440797. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 74440797 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 29

Admit that Opposer has attempted to register at least five (5) marks including the word POPPERS for food products unrelated to vegetables, and have been opposed by at least four (4) different parties in at least five (5) different filings, wherein all of the said at least five (5) application attempts were unsuccessful.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the meaning of the phrase “unsuccessful” is subjective and unclear. TMC further objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 30

Admit that Opposer has no trademark rights related to use of Opposer’s Mark for use on breakfast foods.

RESPONSE:

Denied.

REQUEST NO. 31

Admit that Opposer’s applications no. 78287014 and 78287041, previously cited as “suspended”, are both subject to pending extensions to oppose, as filed by a third-party registrant and user of at least one mark including the word POPPERS, namely Oven Poppers, Inc.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 32

Admit that the mark OVEN POPPERS has been and is in use by Oven Poppers, Inc. for frozen seafood dinners and entrees.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC has performed a reasonable inquiry into this request and the information it currently has, or can readily obtain, is insufficient to enable TMC to admit or deny.

REQUEST NO. 33

Admit that Opposer's applications no. 78287014 and 78287041, previously cited as "suspended", are both subject to pending extensions to oppose, as filed by a third-party user of at least one mark including the word POPPERS, namely Rich's SeaPak, Inc.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that a company named Rich Products Corporation has sought an extension to oppose application nos. 78287014 and 78287041. TMC is unaware of any requests for extension filed in the name of Rich's SeaPak, Inc.

REQUEST NO. 34

Admit that the mark SHRIMP POPPERS has been and is in use by Rich's SeaPak, Inc. for breaded minced shrimp nuggets sold frozen.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC has performed a reasonable inquiry into this request and the information it currently has, or can readily obtain, is insufficient to enable TMC to admit or deny.

REQUEST NO. 35

Admit that Opposer's application no. 78287014 for the word mark POPPERS, previously "suspended," was initially rejected on December 5, 2003 based upon 15 U.S.C. §1052(d), likelihood of confusion with U.S. Registration 1882381 for the mark OVEN POPPERS.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 36

Admit that Opposer presented argument on June 7, 2004, on behalf of Opposer's application no. 78287014 for the word mark POPPERS, in response to the rejections based upon

15 U.S.C. §1052(d), likelihood of confusion with U.S. Registration 1882381 for the mark OVEN POPPERS.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 37

Admit that Opposer's application no. 78287014 for the word mark POPPERS was suspended AND Opposer's arguments filed on June 7, 2004 were found to be unpersuasive on July 20, 2004.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 38

Admit that Opposer filed a Request for Removal from Suspension, for Opposer's application no. 78287014 for the word mark POPPERS, on August 17, 2007 and either with deceptive intent or negligent understanding of the file history, failed to reference the pending and

unresolved rejection for likelihood of confusion and instead advised the Examining Attorney that because the pending applications upon which the suspension was based were each abandoned (or commonly owned), that Opposer's application should be allowed for publication.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but as to matters or conclusions of law that are improperly the subject of requests for admissions. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 39

Admit that Opposer's application no. 78287041 for the design mark POPPERS, previously "suspended," was initially rejected on December 15, 2003 based upon 15 U.S.C. §1052(d), likelihood of confusion with U.S. Registration 1882381 for the mark OVEN POPPERS.

RESPONSE:

TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible

evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 40

Admit that Opposer presented argument on June 14, 2004, on behalf of Opposer's application no. 78287041 for the design mark POPPERS, in response to rejections based upon 15 U.S.C. §1052(d), likelihood of confusion with U.S. Registration 1882381 for the mark OVEN POPPERS.

RESPONSE:

TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 41

Admit that Opposer's application no. 78287041 was suspended AND Opposer's arguments, filed on June 14, 2004, were found to be unpersuasive on July 20, 2004.

RESPONSE:

TMC objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible

evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 42

Admit that Opposer filed a Request for Removal from Suspension for Opposer's application no. 78287041 on August 17, 2007 and either with deceptive intent or negligent understanding of the file history, failed to reference the pending and unresolved rejection for likelihood of confusion and instead advised the Examining Attorney that because the pending applications upon which the suspension was based were each abandoned (or commonly owned), that Opposer's application should be allowed for publication.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. TMC further objects to this request on the grounds that it seeks admission not as to fact or application of law to fact, but as to matters or conclusions of law that are improperly the subject of requests for admissions. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 43

Admit that (a) Opposer's applications no. 78287014 and 78287041 were both found to be confusingly similar with U.S. Registration 1882381 and (b) that finding was neither overcome or withdrawn prior to publication of either application.

RESPONSE:

TMC objects to this request on the grounds that it is unintelligible. Accordingly, subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 44

Admit that Opposer argued on the record in application no. 78287014, with respect to the comparative analysis of Opposer's mark POPPERS and the cited registered mark OVEN POPPERS, that the Examining Attorney must use the entire mark in making the comparison and that it was improper to consider POPPERS as the dominant, common word.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that it argued that the Examining Attorney should use the entire mark in making comparisons between its mark and the cited registered mark. TMC denies the remainder of the admission.

REQUEST NO. 45

Admit that Opposer argued on the record in application no. 78287014, with respect to the comparative analysis of Opposer's mark POPPERS and the cited registered mark OVEN POPPERS, that the marks POPPERS and OVEN POPPERS were different with respect to both sound and appearance.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 46

Admit that Opposer argued on the record in application no. 78287014, with respect to the comparative analysis of Opposer's mark POPPERS and the cited registered mark OVEN POPPERS, that the goods offered under the marks did not belong to similar frozen food segments.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 47

Admit that Opposer argued on the record in application no. 78287014, with respect to the comparative analysis of Opposer's mark POPPERS and the cited registered mark OVEN POPPERS, that Opposer has ALWAYS limited its use of the POPPERS mark to frozen appetizers.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that it argued that POPPERS was always in the business of frozen appetizers. TMC denies the remainder of the admission.

REQUEST NO. 48

Admit that Opposer argued on the record in application no. 78287041, with respect to the comparative analysis of Opposer's POPPERS design mark and the cited registered mark OVEN POPPERS, that the Examining Attorney must use the entire mark in making the comparison and that it was improper to consider POPPERS as the dominant, common word.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that it argued that the Examining Attorney should use the entire mark in making comparisons between its mark and the cited registered mark. TMC denies the remainder of the admission.

REQUEST NO. 49

Admit that Opposer argued on the record in application no. 78287041, with respect to the comparative analysis of Opposer's POPPERS design mark and the cited registered mark OVEN POPPERS, that the marks POPPERS and OVEN POPPERS were different with respect to both sound and appearance.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 50

Admit that Opposer argued on the record in application no. 78287041, with respect to the comparative analysis of Opposer's POPPERS design mark and the cited registered mark OVEN POPPERS, that the goods offered under the marks did not belong to similar frozen food segments.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the

discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Admitted.

REQUEST NO. 51

Admit that Opposer argued on the record in application no. 78287041, with respect to the comparative analysis of Opposer's POPPERS design mark and the cited registered mark OVEN POPPERS, that Opposer has ALWAYS limited its use of the POPPERS mark to frozen appetizers.

RESPONSE:

TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that it argued that POPPERS was always in the business of frozen appetizers. TMC denies the remainder of the admission.

REQUEST NO. 52

Admit that, with reference to the applications that were the basis for the previous suspension of Opposer's applications no. 78287041 and 78287014, two applications (POPPER 78163511, PARTY POPPERS 74718364) were refused registration based upon a finding by the Examining Attorney that the word POPPERS has become descriptive for appetizers.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks

information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 53

Admit that, with reference to the applications that were the basis for the previous suspension of Opposer's applications no. 78287041 and 78287014, one application (PORK POPPERS 76462661) was found to be registerable, was published, and was opposed by Opposer, wherein abandonment resulted by default.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

TMC admits that application no. 76462661 is recorded in the USPTO as abandoned. TMC denies the remainder of the admission.

REQUEST NO. 54

Admit that, with reference to the applications that were the basis for the previous suspension of Opposer's applications no. 78287041 and 78287014, the applications that were refused registration based upon Opposer's registration no. 1922249 were so refused because the goods were "hors d'ouvres," wherein the rejected applications notably described "bite-sized" and "mini" foods.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 55

Admit that Opposer's application no. 75103788 for the mark QUESO SHRIMP POPPERS was rejected based upon 15 U.S.C. §1052(e), descriptiveness, and 15 U.S.C. §1052(d), likelihood of confusion with U.S. Registration 1882381 for the mark OVEN POPPERS, that Opposer's application was suspended, and finally, that Opposer filed a Request for Removal from Suspension and either with deceptive intent or negligent understanding of the file history, failed to respond to or reference the pending and unresolved rejections and instead advised the Examining Attorney that because the pending applications upon which the suspension was based were each abandoned (or commonly owned), that Opposer's application should be allowed for publication.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. TMC further objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 56

Admit that the marks NIP CHEE POPPERS, ANGRY POPPER, POPPER TOPPERZ, BISCOTTI POPPERS, FREQUENT POPPER'S CLUB, SNACK POPPERS, PRETZEL POPPERS, LANCE FRESHNESS POPPERS, PLANTERS NUT POPPERS, NEKOT S'MORES POPPERS, ICE CREAM POPPERS, CLODHOPPER POPPERS, CORN POPPERS, and TEENIE POPPERS have been in use by third parties and are the subject of Federal Trademark Registrations or Pending Federal Trademark Applications represent goods including foods and snacks.

RESPONSE:

TMC objects to this request on the grounds that it is compound as it contains multiple requests for admissions. Further, TMC objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 57

Admit that the word POPPERS has been and continues to be used by a third party and user of the domain name www.ialapenocafe.com, wherein the recipe category heading "Poppers" includes downloadable recipes for a variety of JALAPENO POPPERS.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the determination of whether the word POPPERS "has been and continues to be used by a third party" is not within

Opposer's first hand knowledge and cannot be confirmed by a reasonable inquiry. TMC further objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 58

Admit that the word POPPERS has been and continues to be used by a third party and user of the domain name www.allrecipes.com, wherein the recipe category heading "Poppers" includes downloadable recipes for a variety of JALAPENO POPPERS, DEER POPPERS, and CHERRY PEPPER POPPERS.

RESPONSE:

TMC objects to this request as vague and ambiguous. In particular, the determination of whether the word POPPERS "has been and continues to be used by a third party" is not within Opposer's first hand knowledge and cannot be confirmed by a reasonable inquiry. TMC further objects to this request on the grounds that it seeks information that is irrelevant to the subject matter of this Opposition proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

REQUEST NO. 59

Admit that a GOOGLE search for the word POPPERS results in approximately at least 3,160,000 hits, and wherein the word POPPERS is NOT associated with Opposer until the nineteenth (19th) result.

RESPONSE:

TMC objects to this request on the grounds that it is unintelligible. Accordingly, subject to and without waiving any of the foregoing specific objections, TMC responds as follows:

Denied.

Respectfully submitted,

Dated this 6th day of February, 2008.

By: 

Timothy P. Fraelich
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

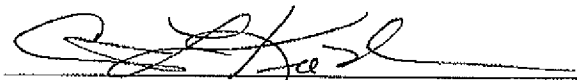
Carrie L. Kiedrowski
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
Telephone: (404) 521-3939
Facsimile: (404) 581-8330

ATTORNEYS FOR OPPOSER
Trademark Management Corporation

CERTIFICATE OF SERVICE

A copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR ADMISSION (Nos. 1-59)** was served on this 6th day of February, 2008, via regular U.S. mail upon:

Robert M. Ward, Esq.
Myers & Kaplan
Intellectual Property Law, L.L.C.
Cumberland Center II
3100 Cumberland Boulevard
Suite 1400
Atlanta, Georgia 30339



Attorney for Opposer

EXHIBIT B

**MYERS & KAPLAN
INTELLECTUAL PROPERTY LAW, L.L.C.**

Cumberland Center II, Suite 1400
3100 Cumberland Boulevard
Atlanta, GA 30339

PATENTS, TRADEMARKS, COPYRIGHTS
AND RELATED MATTERS

TELEPHONE (770) 541-7444
FACSIMILE (770) 541-7448
EMAIL: RWARD@MKIPLAW.COM

May 7, 2008

Carrie L. Kiedrowski
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309-3053

RE: Trademark Management Company vs. Agora, Inc.
Opposition No. 91178731

Dear Carrie:

As you know, our client has been most gracious in providing extensions of time to your client in the above Opposition proceeding in order to permit your client adequate discovery, and formulating a strategy for the present conflict.

Based upon the length of time that the opposition proceeding has been pending, it would be surprising if at least preliminary decisions had not been made within your clients sophisticated inhouse and outside counsel structure as to resolution of the opposition matter.

As we have previously discussed, we continue to believe that the Opposition should be settled upon suitable terms. Please advise us as to your client's views in regard to settling the Opposition Proceeding.

Sincerely,
Myers & Kaplan
Intellectual Property Law, LLC

Robert M. Ward

RMW:ap

EXHIBIT C

**MYERS & KAPLAN
INTELLECTUAL PROPERTY LAW, L.L.C.**

Cumberland Center II, Suite 1400
3100 Cumberland Boulevard
Atlanta, GA 30339

PATENTS, TRADEMARKS, COPYRIGHTS
AND RELATED MATTERS

TELEPHONE (770) 541-7444
FACSIMILE (770) 541-7448
EMAIL: RWARD@MKIPLAW.COM

December 19, 2007

Timothy P. Fraelich, Esq.
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190

RE: Trademark Management Company vs. Agora, Inc.
Opposition No. 91178731

Dear Mr. Fraelich:

We are in receipt of your presumptuous letter to Ms. Drummond, Esq., together with all of its inaccuracies and non sequiturs, but which is perhaps appropriately and ironically dated on Pearl Harbor Day. In summary, we decline your offer to engage in a letter writing contest.

Your statement that prior counsel on this case, Thomas H. Curtin, Esq. and/or the Lathrop & Gage law firm, are somehow not sufficiently "aggressive" or "diligent" for your liking is noted. But other than a gratuitous slap at another lawyer, I don't really see what point you are trying to make.

The inarticulated premise of your letter of attempted threat(s) appears to comprise the Opposer's strange, bad faith, and ultimately losing argument. Specifically, the Opposer TMC argues that somehow there is a likelihood of confusion between their "POPPERS" mark and our client's "PANCAKE POPPERS" mark, even though the record is replete with marks having the "____ POPPERS" format, such as for example "OVEN POPPERS", etc. The rather obvious problems with TMC's argument include, *inter alia*, the salient facts that (1) the third-party Registrants owning these "____ POPPERS"-format trademarks have rights superior to your client's "POPPERS" mark, and (2) your client's goods are far more similar to those listed in these senior trademarks than they are (if at all) to our client's goods. Accordingly, each of the multiplicity of *DuPont* factors is thereby auto-negated from having any relevancy in this Opposition Proceeding. On these facts, your client TMC can show no cognizable damage to itself.

Nonetheless, thank you for the (albeit illusory) offer to Agora constituting the opportunity to change its valid "PANCAKE POPPERS" mark to Agora's other valid

Timothy P. Fraelich, Esq.
December 19, 2007
Page 2

"PANCAKE DIPPERS" mark, which has been allowed. Wherefore, TMC's non-offer is respectfully rejected.

Penultimately, it also seems clear that your client TMC would have no real problem with our client Agora, but rather has developed the impotent strategy of improperly using this Opposition Proceeding as a make-weight tool in its battle with the "OVEN POPPERS" owner, and other owners having trademarks of the "_____ POPPERS" format, who have rights superior to those of your client TMC. In that regard, we believe that TMC should properly confine its trademark battles to the real parties in interest, and leave our client Agora out of it. Manifestly, TMC can gain nothing of value in its present and ill-advised Opposition.

Finally, your letter refers to your client's "burden of proof". Given the state of the Principal Register, and TMC's irrational argument, there would seem to be no available route for satisfying TMC's substantial burden of proof in this case. Accordingly, TMC is respectfully invited to withdraw its present Opposition.

Sincerely,
Myers & Kaplan
Intellectual Property Law, LLC


Robert M. Ward

RMW:ap
cc: Thomas H. Curtin, Esq.

EXHIBIT D

JONES DAY

NORTH POINT • 901 LAKESIDE AVENUE • CLEVELAND, OHIO 44114-1190

TELEPHONE: (216) 586-3939 • FACSIMILE: (216) 579-0212

Direct Number: (216) 586-1247
ttraelch@jonesday.com

JP315436:jmk
931063-645007

December 7, 2007

Rule 408 Communication

VIA EMAIL (SDRUMMOND@MKIPLAW.COM) AND U.S. MAIL

Sandra M. Drummond, Esq.
Myers & Kaplan
Intellectual Property Law, L.L.C.
Cumberland Center II
3100 Cumberland Boulevard
Suite 1400
Atlanta, Georgia 30339

Re: Trademark Management Company vs. Agora, Inc.:
Opposition No. 91178731

Dear Ms. Drummond:

I am writing in response to your letter of December 3, 2007 to Mr. Thomas H. Curtin concerning the above-referenced Opposition. As an initial matter, please be advised that responsibility for this matter has been transferred to Jones Day. Enclosed you will find a service copy of the Change of Correspondence form filed with the TTAB today.

We understand that this matter has not been attended to as aggressively as it might have been in the past. Be advised that it is our intention to proceed with this Opposition with greater diligence. Prior to doing so, however, we suggest that it would be more cost effective for your client to consider withdrawing its application for PANCAKE POPPERS and to utilize its PANCAKE DIPPERS trademark instead. As you are no doubt aware, your client is far closer to obtaining a registration for this alternative mark and it covers the identical goods as those described in the PANCAKE POPPERS application. Indeed, the product image identified next to your client's announcement of its new Pancake Poppers product appears to be a food on a "dipping" stick. See www.agorafoods.com. We believe that our suggested resolution satisfies the interests of both parties and would prevent your client from incurring the substantial legal fees and uncertainty and risk inherent in proceeding with this Opposition.

Please advise, within five (5) business days of the date of this letter, of whether your client intends to transition to the PANCAKE DIPPERS trademark. If your client intends not to undertake the transition to a new mark as described above, please advise the undersigned of this decision as well, so that we can proceed with obtaining information to satisfy our client's burden of proof in this Opposition.

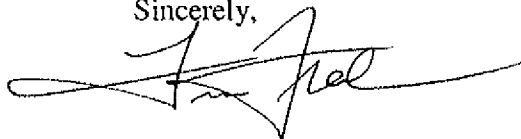
ATI-2299513v2

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JONES DAY

Ms. Sandra M. Drummond
December 7, 2007
Page 2

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Fraelich". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Timothy P. Fraelich

Enclosures

cc: Carrie L. Kiedrowski, Esq.
Pamela J. Cyngier



United States Patent and Trademark Office

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Electronic System for Trademark Trials and Appeals

Change of Correspondence Address.
English, Spanish, French, Chinese, Japanese, Korean, Vietnamese

ESTTA v 2.0

Validate and Submit

Review the information below and click on the "Submit" button if the information is correct. If you need to edit any information, go back to proper screen using navigation facilities on this web page and make your correction(s).
DO NOT USE THE BACK BUTTON ON YOUR BROWSER.

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

Change of Correspondence Address

Proceeding.	91178731
Plaintiff	Plaintiff Trademark Management Company

Please change the correspondence address for the above party here as follows:

Old Correspondence Address	Thomas H. Curtin Lathrop & Gage L.C. 230 Park Avenue, Suite 1847 New York, NY 10169 UNITED STATES tcurtin@lathropgage.com
New Correspondence Address	Timothy P. Fraelich Jones Day North Point, 901 Lakeside Avenue Cleveland, OH 44114 UNITED STATES tfraclich@jonesday.com, clkiedrowski@jonesday.com Phone:216-586-1247

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

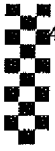
Respectfully submitted,
 /Sabrina Hudson/
 Sabrina Hudson

clkiedrowski@jonesday.com, aegagich@jonesday.com
12/07/2007

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12/07/2007 04:38 PM EST

EXHIBIT E



Facsimile Transmission

1420 Peachtree Street, N.E., Suite 800 • Atlanta, Georgia 30309-3053 • (404) 521-3939
Facsimile: (404) 581-8330
clkiedrowski@jonesday.com

January 29, 2008

Please hand deliver the following facsimile to:

Name: **Robert W. Ward, Esq.**

Facsimile No.: **(770) 541-7448**

Company: **Myers & Kaplan**

Number of pages (including this page): **2**

Telephone No.: **(770) 541-7444**

From: **Carrie L. Kiedrowski**

Send Copies To:

Direct Telephone No.: **(404) 581-8620**

JP No.: **JP003742**

Copies distributed

CAM No.: **931063-645007**

Operator's initials

Re:

NOTICE: This communication is intended to be confidential to the person to whom it is addressed, and it is subject to copyright protection. If you are not the intended recipient or the agent of the intended recipient or if you are unable to deliver this communication to the intended recipient, please do not read, copy or use this communication or show it to any other person, but notify the sender immediately by telephone at the direct telephone number noted above.

Message: Settlement Communication Attached

Please call us immediately if the facsimile you receive is incomplete or illegible. Please ask for the facsimile operator,

ATI-2305317v1

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Received Time Jan. 29. 5:21PM

JONES DAY

1420 PEACHTREE STREET, N.E. • SUITE 800 • ATLANTA, GEORGIA 30309-3033
TELEPHONE: 404-581-3939 • FACSIMILE: 404-581-8330

Direct Number: (404) 581-8620
ckkiedrowski@jonesday.com

JP315436:jmk
931063-645007

January 29, 2008

**SETTLEMENT
COMMUNICATION**

VIA FACSIMILE (770) 541-7448

Robert W. Ward, Esq.
Myers & Kaplan
Intellectual Property Law, L.L.C.
Cumberland Center II
3100 Cumberland Boulevard
Suite 1400
Atlanta, Georgia 30339

Re: Trademark Management Company vs. Agora, Inc.:
Opposition No. 91178731

Dear Robert:

This letter follows a voice mail message left for you today on my behalf by Ashley Wilkes in connection with the above-referenced matter.

Specifically, I am writing to inform you that our client is currently evaluating Agora, Inc.'s January 22, 2008 discovery responses to assess the likelihood of settling the Opposition. Based upon this evaluation, we may be able to forego document productions and depositions in connection with this matter. Accordingly, please be advised that we would like to postpone the previously scheduled deposition of Agora, Inc. set for February 6, 2008.

In light of our client's settlement considerations and the impending close of discovery on February 19, 2008, we are requesting your consent to a thirty (30) day extension of the TTAB Discovery and Testimony Period. Please confirm if this acceptable and we will promptly file the stipulated extension online.

Best regards,



Carrie L. Kiedrowski

cc: Timothy P. Fraelich, Esq.
Pamela Cyngier

ATI-2307106v1

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Received Time Jan. 29, 5:21PM

EXHIBIT F



Invoice

Date	Invoice #
7/20/2007	3915

Remit To: PO Box 690164, Charlotte, NC 28289-0164 * (706) 265-8304 Office (706) 265-2165 Fax

Bill To: Williams Institutional Foods PO Box 370 Douglas, GA 31534 912.384.5270 Phone 912.384.0533 Fax	Shlp To: Williams Institutional Foods 1325 SW Bowen Mill Road Douglas, GA 31533 7-12 and 1-4 1st come call for appt. 912.384.5270
--	---

P.O. No.	Terms	S.O. No.	Rep
592701	Net 7	1662	Integ

Item	Description	Ordered	Prev. Invoiced	Invoiced	Rate	Amount
SC973001	Breaded Tender Fritter Chunk 10# Case	100	0	100	14.20	1,420.00
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	100	0	100	29.30	2,930.00

<p>Invoices not paid within terms of the invoice are subject to a 1.5% interest charge per month. NO DISCOUNTS ALLOWED UNLESS PRE-APPROVED, IN WRITING, BY AGORA, INC. DOCUMENTATION MUST BE PROVIDED WITH PAYMENT.</p>	Total	\$4,350.00
	Payments/Credits	\$-4,350.00
	Balance Due	\$0.00
E-mail	Web Site	
lynne@agorafoods.com	www.agorafoods.com	

AGO-00331



Invoice

Date	Invoice #
7/26/2007	3930

Remit To: PO Box 890164, Charlotte, NC 28289-0164 * (704) 265-8304 Office (704) 265-2166 Fax

Bill To: Samples Institutional Foods 635 A Green Street, NW Atlanta, GA 30318 404.355.6990 Phone 404.355.6993 Fax	Ship To: CPU @ LANIER COLD STORAGE 770.869.7100 ATTN: MARY LYNN JOHNSON
---	---

P.O. No.	Terms	S.O. No.	Rep
SIF072707	Net 7	1673	Integ

Item	Description	Ordered	Prev. Invoiced	Invoiced	Rate	Amount
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	50	0	50	27.00	1,350.00
SC8020	TACO TENDER tm Fully Cooked Breaded Chicken Tender (10#)	50	0	50	33.50	1,675.00
SC2299	SPECIALTY CHICKEN tm CN Breaded Chicken Breast BREAKFAST Patties 1.65 oz. 10# Case	100	0	100	14.50	1,450.00

<p>Invoices not paid within terms of the invoice are subject to a 1.5% interest charge per month. NO DISCOUNTS ALLOWED UNLESS PRE-APPROVED, IN WRITING, BY AGORA, INC. DOCUMENTATION MUST BE PROVIDED WITH PAYMENT.</p>	Total	\$4,475.00
	Payments/Credits	\$-4,475.00
	Balance Due	\$0.00
E-mail	Web Site	
lynnc@agorafoods.com	www.agorafoods.com	

AGO-00332



Invoice

Date	Invoice #
9/12/2007	5011

Remittor: PO Box 850154, Charlotte, NC 28289-0154 * (706) 263-8504 Office (706) 265-2166 Fax

Bill To: Samples Institutional Foods 635 A Green Street, NW Atlanta, GA 30318 404.355.6990 Phone 404.355.6993 Fax	Ship To: CPU @ LANIER COLD STORAGE 770.869.7100 ATTN: MARY LYNN JOHNSON
---	---

P.O. No.	Terms	S.O. No.	Rep
SIP091107	Net 7	1715	Integ

Item	Description	Ordered	Prev. Invoiced	Invoiced	Rate	Amount
SC87000	SPECIALTY CHICKEN TM Breaded Chicken Breast Filet for Biscuit 10# Case	300	0	300	15.90	4,770.00
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	40	0	40	27.00	1,080.00

<p>Invoices not paid within terms of the invoice are subject to a 1.5% interest charge per month. NO DISCOUNTS ALLOWED UNLESS PRE-APPROVED, IN WRITING, BY AGORA, INC. DOCUMENTATION MUST BE PROVIDED WITH PAYMENT.</p>	Total	\$5,850.00
	Payments/Credits	\$-5,850.00
	Balance Due	\$0.00
E-mail	Web Site	
lynne@agorafoods.com	www.agorafoods.com	

AGO-00333



Invoice

Date	Invoice #
9/14/2007	5016

Remit To: PO Box 850164, Charlotte, NC 28289-0164 * (705) 269-8304 Office (706) 263-2166 Fax

Bill To:	Ship To:
Williams Institutional Foods PO Box 370 Douglas, GA 31534 912.384.5270 Phone 912.384.0533 Fax	Williams Institutional Foods 1325 SW Bowen Mill Road Douglas, GA 31533 7-12 and 1-4 1st come call for appt. 912.384.5270

P.O. No.	Terms	S.O. No.	Rep
681201	Net 7	1716	Integ

Item	Description	Ordered	Prev. Invoiced	Invoiced	Rate	Amount
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	100	0	100	29.30	2,930.00

<p>Invoices not paid within terms of the invoice are subject to a 1.5% interest charge per month. NO DISCOUNTS ALLOWED UNLESS PRE-APPROVED, IN WRITING, BY AGORA, INC. DOCUMENTATION MUST BE PROVIDED WITH PAYMENT.</p>	Total	\$2,930.00
	Payments/Credits	\$-2,930.00
	Balance Due	\$0.00

E-mail	Web Site
lyne@agorafoods.com	www.agorafoods.com

AGO-00334



Invoice

Date	Invoice #
10/15/2007	5085

Remit To: PO Box 890164, Charlotte, NC 28289-0164 * (706) 263-8304 Office (706) 265-2166 Fax

Bill To: Samples Institutional Foods 635 A Green Street, NW Atlanta, GA 30318 404.355.6990 Phone 404.355.6993 Fax	Ship To: CPU @ LANIER COLD STORAGE 770.869.7100 ATTN: TONYA SMITH
---	---

P.O. No.	Terms	S.O. No.	Rep
101507SIF	Net 7	1746	Integ

Item	Description	Ordered	Prev. Invoiced	Invoiced	Rate	Amount
SC87000	SPECIALTY CHICKEN TM Breaded Chicken Breast Filet for Biscuit 10# Case	300	0	300	14.90	4,470.00
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	30	0	30	27.00	810.00

<p>Invoices not paid within terms of the invoice are subject to a 1.5% interest charge per month. NO DISCOUNTS ALLOWED UNLESS PRE-APPROVED, IN WRITING, BY AGORA, INC. DOCUMENTATION MUST BE PROVIDED WITH PAYMENT.</p>	Total	\$5,280.00
	Payments/Credits	\$-5,280.00
	Balance Due	\$0.00

E-mail	Web Site
lynne@agorafoods.com	www.agorafoods.com

AGO-00335



Sales Order

Date	S.O. No.
12/26/2007	1816

Remit To: PO Box 800164, Charlotte, NC 28282-0164 * (706) 265-0204 Office (706) 265-2166 Fax

Name / Address
Williams Institutional Foods PO Box 370 Douglas, GA 31534 912.384.5270 Phone 912.384.0533 Fax

Ship To
Williams Institutional Foods 1325 SW Bowen Mill Road Douglas, GA 31533 7-12 and 1-4 1st come call for appt. 912.384.5270

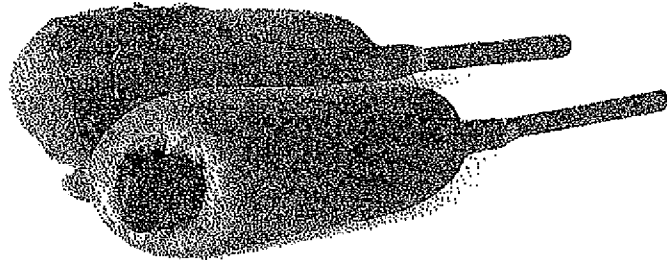
P.O. No.	Ship Date	Rep
808101	1/4/2008	Integ

Item	Description	Ordered	Rate	Amount
SC87200B	SPECIALTY CHICKEN Hot & Spicy Breast Filet w/Bug 10# Case	140	29.20	4,088.00
PP7000	CN Fully Cooked PANCAKE POPPER! tm on a Stick 10# Case	60	23.00	1,380.00

Total	\$5,468.00
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AGO-00336

PANCAKE POPPER!



PRODUCT ANALYSIS

Product Code	Product Description	Serving Size	Pack Size
PP7000	PANCAKE POPPER! Low Fat Sausage with Maple Flavored Pancake Batter & Syrup Dots	1 Pancake & Sausage 2.7 oz.	10 # Case 60 Individually Wrapped Ovenable Mylar
Calories 180		Calories from Fat 70	
Total Fat		8g	
Saturated Fat		1.5g	
Trans Fat		0g	
Cholesterol		15mg	
Sodium		510mg	
Total Carbohydrate		19g	
Dietary Fiber		2g	
Sugars		6g	
Protein		7g	

CN Equivalent Statement – Agora Foods certifies that this product meets a 1 M / MA serving and 1 Bread Serving. (CN LABEL Pending)



P.O. Box 829 Dawsonville GA 30534 / (706) 265-8304 Phone • (706) 265-2166 Fax
www.agorafoods.com

AGO-00337

EXHIBIT G

Jonathan Turner

From: Robert Ward
Sent: Friday, June 20, 2008 3:27 PM
To: Carrie L Kiedrowski
Cc: Sandy Drummond; Ashley Wilkes; Litigation; Justin Ward
Subject: RE: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Yes.

I think that under the circumstances we will just copy and forward any responsive documents directly to you.

bob

Robert M. Ward

Registered United States Patent Attorney

rward@mkiplaw.com

Myers & Kaplan Intellectual Property Law, LLC

Cumberland Center II

3100 Cumberland Blvd.

Suite 1400

Atlanta, Georgia 30339

(770) 541-7444 phone

(770) 541-7448 fax

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-----Original Message-----

From: Carrie L Kiedrowski [mailto:clkiedrowski@JonesDay.com]
Sent: Friday, June 20, 2008 3:16 PM
To: Robert Ward
Cc: Sandy Drummond; Ashley Wilkes
Subject: Re: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Dear Bob,

I'm working on scheduling some upcoming meetings and wanted to know whether you are in receipt of my letter of June 18, 2008 regarding a document collection visit to Agora either on July 1 or 2.

I look forward to hearing from you soon.

Carrie

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

----- Original Message -----

From: "Robert Ward" [Rward@mkiplaw.com]
Sent: 06/18/2008 11:11 AM
To: "Carrie L Kiedrowski" <clkiedrowski@JonesDay.com>
Cc: "Sandy Drummond" <SDrummond@mkiplaw.com>
Subject: RE: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Carrie,

Our client respectfully declines to consent to the requested yet further extension of the discovery period.

bob

Robert M. Ward

Registered United States Patent Attorney

rward@mkiplaw.com

Myers & Kaplan Intellectual Property Law, LLC

Cumberland Center II

3100 Cumberland Blvd.

Suite 1400

Atlanta, Georgia 30339

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-----Original Message-----

From: Carrie L Kiedrowski [mailto:clkiedrowski@JonesDay.com]
Sent: Wednesday, June 18, 2008 9:15 AM
To: Robert Ward
Cc: Sandy Drummond
Subject: Re: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Bob or Sandy,

As I'm sure you can appreciate, please advise by 11:00 a.m. whether we can file a consented motion to extend for the 60 days requested, or another reasonable period that your client will find acceptable, so that we can proceed accordingly.

Carrie

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----- Original Message -----

From: "Robert Ward" [Rward@mkiplaw.com]
Sent: 06/17/2008 03:36 PM
To: "Carrie L Kiedrowski" <clkiedrowski@JonesDay.com>
Cc: "Sandy Drummond" <SDrummond@mkiplaw.com>
Subject: RE: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Carrie,

We are in the process of checking with our client.

bob

Robert M. Ward

Registered United States Patent Attorney

rward@mkiplaw.com

Myers & Kaplan Intellectual Property Law, LLC

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Atlanta, Georgia 30339

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-----Original Message-----

From: Carrie L Kiedrowski [mailto:clkiedrowski@JonesDay.com]

Sent: Tuesday, June 17, 2008 2:35 PM

To: Robert Ward

Subject: RE: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.

Importance: High

Bob,

I have not heard back from you yet. Please let me know if your client will consent to the requested extension.

Best regards,

Carrie

Carrie L. Kiedrowski
Jones Day
1420 Peachtree Street, N.E., Ste. 800
Atlanta, Georgia 30309-3053
Ext: 4-8620
Direct Tel: 1.404.581.8620
Tel: 1.404.521.3939
Fax: 1.404.581.8330
clkiedrowski@jonesday.com
www.jonesday.com

"Robert Ward"

<RWard@mkiplaw.co

m>

To

"Carrie L Kiedrowski"

<clkiedrowski@JonesDay.com>

cc

06/13/2008 03:56

PM

Subject

RE: Request for Extension -

Opposition No. 91178731 TMC v.

Agora, Inc.

Carrie,

I will investigate whether the client will authorize this request for a further extension. It is hoped that I can get back to you Monday PM or Tuesday morning.

In light of the written record, shouldn't we be discussing a full and final resolution of this case??

bob

Robert M. Ward

Registered United States Patent Attorney

rward@mkiplaw.com

Myers & Kaplan Intellectual Property Law, LLC

Cumberland Center II

3100 Cumberland Blvd.

Suite 1400

Atlanta, Georgia 30339

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-----Original Message-----

From: Carrie L Kiedrowski [mailto:clkiedrowski@JonesDay.com]

Sent: Friday, June 13, 2008 1:47 PM

To: Robert Ward
Subject: Request for Extension - Opposition No. 91178731 TMC v. Agora, Inc.
Importance: High

Dear Bob,

Please advise whether you will consent to an additional 60 day extension to the Discovery and Trial Periods. I have received additional information from my client and will need to follow up with you in greater detail within the next week.

Many thanks,

Carrie

Carrie L. Kiedrowski
Jones Day
1420 Peachtree Street, N.E., Ste. 800
Atlanta, Georgia 30309-3053
Ext: 4-8620
Direct Tel: 1.404.581.8620
Tel: 1.404.521.3939
Fax: 1.404.581.8330
clkiedrowski@jonesday.com
www.jonesday.com

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