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

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| Proceeding no. | 91218879 |
| Party | Defendant<br>Gibson Brands, Inc. |
| Correspondence address | ANDREA E BATES<br>BATES & BATES LLC<br>1890 MARIETTA BLVD NW<br>ATLANTA, GA 30318-2803<br>UNITED STATES<br>Primary email: abates@bates-bates.com<br>Secondary email(s): kschuettinger@bates-bates.com<br>404-228-7439 |
| Submission | Response to Board Order/Inquiry |
| Filer's name | Kevin J. Dawson |
| Filer's email | abates@bates-bates.com, kdawson@bates-bates.com, rberkow-itz@bates-bates.com, ajohnson@bates-bates.com |
| Signature | /Kevin J. Dawson/ |
| Date | 08/16/2022 |
| Attachments | 8.16.2022 - 91218879 - US Music v Gibson - MSJ w Dec.pdf(1010148 bytes ) |

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

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| ARMADILLO DISTRIBUTION ENTERPRISES INC., COLLINGS GUITARS, INC., CORDOBA MUSIC GROUP INC., ROMAN GUITARS, LLC, E.S.P. SHIUYA ENTERPRISES, INC., PEAVEY ELECTRONICS CORPORATION, SCHECTER GUITAR RESEARCH, INC., AND WESTHEIMER CORPORATION, | |
| *Opposers,* | Opposition No.: 91278879<br>App. No.: 86/168,793 |
| *v.* | |
| Gibson Brands, Inc. | **GIBSON BRANDS, INC.'S NOTICE OF DECISION AND MOTION FOR SUMMARY JUDGMENT** |
| *Applicant*. | |

**APPLICANT GIBSON BRANDS, INC.'S NOTICE OF DECISION AND MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Board's April 23, 2020, Order suspending this proceeding pending final disposition of the civil action, Applicant Gibson Brands, Inc. hereby provides the Board with Notice of the Decision in Civil Action No. 4:19-cv-00358-ALM ("Civil Action") filed in the United States District Court for the Eastern District of Texas. Based on the Final Judgment rendered by the Court confirming the validity and ownership of Applicant's Mark, Gibson requests: 1) the Board to grant summary judgment against Opposer Armadillo Distribution Enterprises, Inc. ("Armadillo") on the grounds that Applicant is entitled to judgement under the doctrine of issue preclusion; and 2) the Board grant summary judgment against all remaining opposers in this proceeding and confirm, as a matter of law, Gibson owns a valid trademark in Applicant's Mark on the grounds that

*res judicata* leaves no genuine dispute as to any facts material to this proceeding. As a result, Opposition No. 91218879 should be dismissed with prejudice and the Applicant's Mark should be passed to registration on the Principal Register.

## I. BACKGROUND

On January 17, 2014, Gibson Brands, Inc. filed Trademark Application No. 86/168,793 (the "Application") for ES BODY DESIGN  ("Applicant's Mark") used with "stringed musical instruments" in Class 15. Applicant's Mark consists of "the uniquely shaped three-dimensional configuration for the body portion of the guitar with a curved base, rounded body shape, and stylized cutaway rounded curves at the top left and right of the guitar body as illustrated in the drawing by the solid lines. The guitar strings, bridge and pickup as shown in broken lines are not a part of the mark and serves only to show the position and placement of the mark." Applicant notes that the guitar body shape comprising Applicant's Mark is also the subject of U.S. Reg. No. 2007277. On June 24, 2014, the Application was published.

On October 16, 2014, the above captioned companies ("Opposers") filed a Notice of Opposition (the "Opposition") against the Application, alleging that Applicant's Mark is generic. On April 23, 2020, the Board suspended proceedings pending final determination of Civil Action No. 4:19-cv-00358-ALM ("Civil Action") filed in the United States District Court for the Eastern District of Texas. *See* Dkt. 55.

In the Civil Action, Applicant sued Opposer Armadillo Distribution Enterprises, Inc. for trademark infringement and other causes and pleaded ES BODY DESIGN

U.S. Reg. No. 2007277 as a basis for the Civil Action. U.S. Reg. No. 2007277 is identical to Applicant's Mark that is the subject of this proceeding. Opposer Armadillo counterclaimed that that U.S. Reg. No. 2007277 was generic, which is the same claim Opposers make in this Opposition. On May 16, 2022, a jury trial to determine the issues of Armadillo's infringement of U.S. Reg. No. 2007277 and the status of the trademark commenced. On May 27, 2022, the jury handed down a verdict, which included a finding that U.S. Reg. No. 2007277 is a valid trademark and therefore *not* generic. On July 28, 2022, the Court issued a final judgment ("Final Judgment") on the validity of the ES BODY DESIGN trademark (U.S. Registration No. 2007277). A copy of the Court's Final Judgment is annexed as Exhibit 1 to the Declaration of Andrea E. Bates, dated August 16, 2022, attached hereto as **Exhibit A**. As the Opposition to the Application asserts that Applicant's Mark is generic, which is identical to the guitar body shape that the jury found to be valid and *not* generic in the Civil Action, the Board should grant this Motion, dismiss the Opposition with prejudice, and allow registration of the Application.

## II. LEGAL STANDARD

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute as to any material fact, thus allowing the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987). Summary judgment is an appropriate

method of disposing of cases in which there is no genuine dispute as to any material fact, thus allowing the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987). All evidence must be viewed in a light most favorable to the nonmovant, in this case Opposers, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992). In deciding a summary judgment motion, the Board may not resolve disputes of material fact; it may only ascertain whether such disputes exist. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). When the moving party sufficiently demonstrates that there is no genuine dispute of material fact, and that it is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. *Enbridge, Inc. v. Excelerate Energy L.P.*, 92 USPQ2d 1537, 1540 (TTAB 2009). The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. *See* Fed. R. Civ. P. 56(c); *Celotex,* 477 U.S. at 324. In general, to establish the existence of disputed facts requiring trial, the nonmoving party "must point to an evidentiary conflict created on the record[,] at least by a counterstatement of facts set

forth in detail in an affidavit by a knowledgeable affiant." *Octocom Sys., Inc. v. Hous. Computs. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

## III. ARGUMENT

### A. Issue Preclusion bars Opposers from Succeeding in this Opposition.

A motion for summary judgment is an appropriate procedural method to raise the assertion of issue preclusion "because if the factual question has been previously determined between the parties, there is no triable issue of fact on that matter." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 32:87 (5th ed. Sept. 2018); *see also NH Beach Pizza LLC v. Cristy's Pizza Inc.*, 119 USPQ2d 1861, 1863 (TTAB 2016). Issue preclusion bars the re-litigation of the same issue in a second action and is operative whether the second action is on the same or a different cause of action. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 136 S. Ct. 1293, 113 USPQ2d 2045, 2051 (2015); *Lukens Inc. v. Vesper Corp.*, 1 USPQ2d 1299, 1301 (TTAB 1986). The application of issue preclusion requires: (1) identity of an issue in the current and prior proceedings; (2) actual litigation of that issue in the prior proceeding; (3) that determination of the issue was necessary in entering judgment in the prior proceeding; and (4) that the party with the burden of proof on that issue in the second proceeding had a full and fair opportunity to litigate the issue in the prior proceeding. *NH Beach Pizza*, 119 USPQ2d at 1864 (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

#### 1. The identity of issue in the Civil Action and this Opposition are identical.

Turning to the first factor for issue preclusion, a review of the record demonstrates that there is no genuine dispute that the key issue to be determined in this proceeding is

identical to one of the issues decided in the Civil Action, namely whether Applicant's Mark is generic. Specifically, the Court found that: "[t]he following trademarks are not generic, as the term is used in the Lanham Act: … the ES Body Shape Design (U.S. Reg. No. 2007277) …" *See* Final Judgment 3. Opposer Armadillo asserts a claim that Applicant's Mark is generic in this proceeding. Accordingly, Applicant has satisfied the first factor for applying issue preclusion.

**2. Opposer Armadillo had a full and fair opportunity to litigate genericness, the issue was litigated in the Civil Action, and the determination of the issue was necessary to enter the Court's Final Judgment.**

Regarding the remaining factors for applying issue preclusion, there is no genuine dispute that Opposer Armadillo had a full and fair opportunity to litigate genericness and the lack of acquired distinctiveness, the issue of genericness and lack of acquired distinctiveness was raised, litigated, and adjudged in the Civil Action. On May 16, 2022, the Civil Action came on for trial before a jury, and on May 27, 2022, the jury reached a unanimous verdict, upon which the court entered the Final Judgment. *See* Final Judgment 1. The Final Judgment "**CONSIDERED, ADJUDGED, and DECREED** that: "[t]he following trademarks are not generic, as the term is used in the Lanham Act: … ES Body Shape Design (U.S. Reg. No. 2007277) …" *See* Final Judgment 3.

**B. *Res Judicata* Bars Opposers from succeeding in this Opposition.**

The Final Judgment determined Applicant's Mark, as a matter of law, is valid and owned by Applicant. There is no question of material fact as to whether Gibson is the owner of a valid trademark in Applicant's Mark. The Final Judgment "**CONSIDERED, ADJUDGED, and DECREED** that: "[t]he following trademarks are not generic, as the term is used in the Lanham Act: … ES Body Shape Design (U.S. Reg. No. 2007277) …"

*See* Final Judgment 3. Additionally, the Final Judgment found "Plaintiff Gibson Brands, Inc. ("Gibson") validly owns: (a) the ES Body Shape Design (U.S. Reg. No. 2007277)…." *See* Final Judgment 1. "Congress has made it clear that a federal court hearing a case involving a registered trademark has the power not only to determine registrability, but to order the cancellation or restoration of registrations, or to otherwise 'rectify the register.'" *Patsy's Italian Rest., Inc. v. Banas*, 508 F. Supp. 2d 194, 207 (E.D.N.Y. 2007) (citing 15 U.S.C. §1119). As a result, "a federal court's decision regarding registration is binding upon the Commissioner of Patents and Trademarks and the administrative tribunals of the PTO." *Id.* "When a district court, as part of its judgment, decides an issue that overlaps with part of the TTAB's analysis, the TTAB gives preclusive effect to the court's judgment." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, U.S., 135 S. Ct. 1293, 1305-06 (2015). "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action*." See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). *See Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362, 1366, 55 USPQ2d 1355 (Fed. Cir. 2000). "[S]ubject to certain well-known exceptions, the general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S.

138, 148, 113 USPQ2d 2045, 2051 (2015) (quoting RESTATEMENT 2D OF JUDGMENTS§ 27, p. 250 (1980)).

The Final Judgment in the Civil Action determined that Gibson owned a valid trademark in Applicant's Mark (the ES Body Shape Design (U.S. Reg. No. 2007277)). *See* Final Judgment. The Final Judgment further found that Opposer Armadillo had infringed Applicant's Mark, only legally feasible if Applicant's Mark had acquired distinctiveness. *Id.* at 1. Armadillo, in privity with the other Opposers, allege in this proceeding that Gibson's "'793 Body Shape is a generic electric guitar body shape and, therefore, cannot function as a source identifier" and "Applicant cannot have acquired distinctiveness in the '793 Body Shape." *See* Notice of Opposition, ¶¶ 46-47. The Texas jury, confirmed by the Final Judgment, unanimously found that Gibson owned a valid trademark in Applicant's Mark. As a result, Applicant's Mark, as a matter of law, has acquired distinctiveness and is not generic. Under the doctrine of *res judicata,* this issue has been decided, therefore there is no genuine issue of material fact remaining. Accordingly, the TTAB should give preclusive effect to the Final Judgment given by the Court as a result of the Civil Action and thus grant Gibson Summary Judgment and dismiss this Opposition with prejudice.

## IV. CONCLUSION

In sum, as a result of the Civil Action between the parties, there is no genuine dispute that the issue of genericness or acquired distinctiveness of the guitar body portion of Applicant's Mark in the Opposition is identical to the issue involved in the Civil Action; that the issue of genericness or acquired distinctiveness of the guitar body portion of Applicant's Mark was actually raised, litigated, and adjudged in the Civil Action; and that

the determination of whether the guitar body portion of Applicant's Mark was necessary to the resulting Final Judgment. Further, there is no genuine dispute that Opposer Armadillo had a full and fair opportunity to litigate the issue of genericness in the Civil Action. . In view of the foregoing, Applicant hereby requests the Board: 1) resume proceedings; and 2) conclude that, as a matter of law, Applicant is entitled to summary judgment based on issue preclusion against Opposer Armadillo and 3) conclude that Applicant is entitled to summary judgment against all Opposers based on the Civil Action finding Applicant's Mark is valid and not generic. Applicant further requests entry dismissal of the Opposition, with prejudice, and that the Application be allowed to register.

Respectfully submitted this 16th day of August 2022.

Bates & Bates, LLC

/Andrea E. Bates/

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Motion for Summary Judgment has been served, via email, on the 16th day of August 2022 to:

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# EXHIBIT A

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

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|---|---|
| ARMADILLO DISTRIBUTION ENTERPRISES INC., COLLINGS GUITARS, INC., CORDOBA MUSIC GROUP INC., ROMAN GUITARS, LLC, E.S.P. SHIUYA ENTERPRISES, INC., PEAVEY ELECTRONICS CORPORATION, SCHECTER GUITAR RESEARCH, INC., AND WESTHEIMER CORPORATION, | |
| Opposers, | Opposition No.: 91278879<br>App. No.: 86/168,793 |
| v.<br>Gibson Brands, Inc. | |
| *Applicant*. | |

**DECLARATION OF ANDREA E. BATES IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

Andrea E. Bates, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a partner at Bates & Bates, LLC, 1890 Marietta Blvd, NW, Atlanta, Georgia, 30318 and serve as counsel for Applicant Gibson Brands, Inc. ("Gibson") in the current opposition proceeding.

2. I was also counsel to Gibson in an action before the United States District Court, Eastern District of Texas, Sherman Division, in the matter of Gibson Brands, Inc., against Armadillo Distribution Enterprises, Inc. and Concordia Investment Partners, LLC, civil action no. 4:19-cv-00358-ALM (the "EDTX Action").

3. I offer this declaration in support of Gibson's motion for summary judgment in support of the dismissal of Opposition No. 91218879 (the "Opposition") to Gibson's Trademark Application No. 86168793. The basis of my declaration is my review of the annexed documents

and my personal knowledge of the matters set forth herein, including the EDTX Action. I submit this declaration with an accompanying brief in support of Gibson's motion for summary judgment before the TTAB.

4. Opposition to U.S. App. No. 91218879 should be dismissed with prejudice because of the preclusive effect of the judgment in the EDTX Action, which found U.S. Trademark No. 2007277 valid and not generic.

5. Annexed to this Declaration, as Exhibit 1, is a copy of the Final Judgment in the EDTX Action entered July 28, 2022.

6. On the basis of the judgment in the EDTX Action, there are no issues of fact herein.

WHEREFORE, I respectfully request that this Board grant the within motion, together with such other and further relief that it deems just and proper. I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: August 16, 2022

/ Andrea E. Bates /

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# EXHIBIT 1

# United States District Court
## EASTERN DISTRICT OF TEXAS
## SHERMAN DIVISION

| | | |
|---|---|---|
| GIBSON BRANDS, INC.,<br><br>*Plaintiff,*<br><br>v.<br><br>ARMADILLO DISTRIBUTION ENTERPRISES, INC., and CONCORDIA INVESTMENT PARTNERS, LLC,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. 4:19-CV-358<br>Judge Mazzant |

**FINAL JUDGMENT**

On May 16, 2022, this action came on for trial before a jury and the Court. On May 27, 2022, the jury in this case reached and returned its unanimous verdict (Dkt. #498). Pursuant to Rule 58 of the Federal Rules of Civil Procedure, the jury's unanimous verdict, and the Memorandum Opinion and Order entered on this date, the Court enters judgment.

It is therefore **CONSIDERED, ADJUDGED, and DECREED** that:

1. Defendant Armadillo Distribution Enterprises, Inc. ("Armadillo") has manufactured, advertised, and sold products in the United States that infringe on the following trademarks Plaintiff Gibson Brands, Inc. ("Gibson") validly owns: (a) the ES Body Shape Design (U.S. Reg. No. 2007277); (b) the SG Body Shape Design (U.S. Reg. No. 2215791); (c) the HUMMINGBIRD wordmark (U.S. Reg. No. 1931670); (d) the Flying V Body Shape Design (U.S. Reg. No. 2051790); (e) the Explorer Body Shape Design (U.S. Reg. No. 2053805); and (f) the Dove Wing Headstock Design (U.S. Reg. No. 1020485);

2. Armadillo has not manufactured, advertised, and sold products in the United States that infringe on Gibson's FLYING V wordmark (U.S. Reg. No. 1216644);
3. Armadillo's infringement of the ES Body Shape Design (U.S. Reg. No. 2007277), the SG Body Shape Design (U.S. Reg. No. 2215791), the HUMMINGBIRD wordmark (U.S. Reg. No. 1931670), the Flying V Body Shape Design (U.S. Reg. No. 2051790), and the Explorer Body Shape Design (U.S. Reg. No. 2053805) was willful;
4. Armadillo sold or marketed a counterfeit of the following, validly owned trademarks: (a) the SG Body Shape Design (U.S. Reg. No. 2215791); (b) the HUMMINGBIRD wordmark (U.S. Reg. No. 1931670); (c) the Flying V Body Shape Design (U.S. Reg. No. 2051790); and (d) the Explorer Body Shape Design (U.S. Reg. No. 2053805);
5. Armadillo did not sell or market a counterfeit of the Dove Wing Headstock Design (U.S. Reg. No. 1020485) or FLYING V wordmark (U.S. Reg. No. 1216644);
6. Defendant Concordia Investment Partners, LLC ("Concordia") contributed to Armadillo's infringement of: (a) the ES Body Shape Design (U.S. Reg. No. 2007277); (b) the SG Body Shape Design (U.S. Reg. No. 2215791); (c) the HUMMINGBIRD wordmark (U.S. Reg. No. 1931670); (d) the Flying V Body Shape Design (U.S. Reg. No. 2051790); (e) the Explorer Body Shape Design (U.S. Reg. No. 2053805); and (f) the Dove Wing Headstock Design (U.S. Reg. No. 1020485);
7. Gibson delayed without excuse in asserting its trademark rights in the Flying V Body Shape Design (U.S. Reg. No. 2051790), the Explorer Body Shape Design (U.S. Reg. No. 2053805), and the Dove Wing Headstock Design (U.S. Reg. No. 1020485) against Armadillo and Concordia, thereby causing Defendants undue prejudice;

8. Neither Armadillo nor Concordia at any point had "unclean hands" in connection with their use of a trademark Gibson validly owned;
9. The following trademarks are not generic, as the term is used in the Lanham Act: (a) the ES Body Shape Design (U.S. Reg. No. 2007277); (b) the SG Body Shape Design (U.S. Reg. No. 2215791); (c) the Flying V Body Shape Design (U.S. Reg. No. 2051790); and (d) the Explorer Body Shape Design (U.S. Reg. No. 2053805); and
10. Gibson did not tortiously interfere with Armadillo's prospective business relation(s).

It is further **ORDERED** that Armadillo is permanently enjoined from the manufacture, advertisement, and/or sale of its: (1) LUNA Athena 501 guitar; (2) DEAN Gran Sport guitar; (3) guitars bearing, using, or advertising with the word "Hummingbird;" (4) DEAN V guitar; and (5) DEAN Z guitar.

It is further **ORDERED** that Concordia is permanently enjoined from contributing, either through the use of intellectual property owned by Concordia or in any other way, to the manufacture, advertisement, and/or sale of the: (1) LUNA Athena 501 guitar; (2) DEAN Gran Sport guitar; (3) guitars bearing, using, or advertising with the word "Hummingbird;" (4) DEAN V guitar; and (5) DEAN Z guitar.

It is further **ORDERED** that within thirty (30) days of entry of this judgment, Armadillo and Concordia will pay Gibson a total of $4,000 in accordance with the jury's finding as to counterfeiting.

It is further **ORDERED** that all costs of court spent or incurred in this cause are adjudged against Armadillo and Concordia.

The Court retains jurisdiction over the parties to enforce any and all aspects of this judgment. Finally, this judgment is entered subject to, and without waiving, any post-trial issues

that may be raised in post-trial motions by any party, including requests for attorneys' fees.

**IT IS SO ORDERED.**

**SIGNED this 28th day of July, 2022.**

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE