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

Proceeding	91222214
Party	Defendant Nicolon Corporation
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Submission	Motion to Consolidate
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Date	08/17/2015
Attachments	Motion to Consolidate Renewed Dandy.pdf(49549 bytes )

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

Dandy Products, Inc.		:	
	Opposer,	:	
v.		:	Opposition No. 91222214
		:	
Nicolon Corporation,		:	
	Applicant.	:	
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Lumite, Inc.,		:	
	Opposer,	:	
v.		:	Opposition No. 91222215
		:	
Nicolon Corporation,		:	
	Applicant.	:	
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Willacoochee Industrial Fabrics, Inc.		:	
	Opposer,	:	
v.		:	Opposition No. 91222223
		:	
Nicolon Corporation,		:	
	Applicant.	:	
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**APPLICANT’S MOTION TO CONSOLIDATE**

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Dear Sir or Madam:

Nicolon Corporation (the “Applicant”), by its undersigned attorney, in the interest of judicial and pecuniary economy, moves pursuant to Fed. R. Civ. P 42(a) and TBMP § 511, to consolidate the above-captioned oppositions filed by Dandy Products, Inc. (Opposition No. 91222214); Lumite, Inc. (Opposition No. 91222215); and Willacoochee Industrial Fabrics, Inc.

(Opposition No. 91222223) (collectively “the Opposers”). The Oppositions should be consolidated because the Applicant is the same and the Mark is the same, the issues are similar, and the Oppositions are at the earliest stage in the proceedings. It is Applicant’s understanding, that at this time, the Opposers have not consented to consolidation.

The grounds for the Motion to Consolidate are as follows:

1. Opposition Nos. 91222214, 91222215, and 91222223, involve the same Applicant, namely, Nicolon Corporation.
2. Opposition Nos. 91222214, 91222215, and 91222223, involve the same trademark, namely, U.S. Trademark Application No. 86057945 for the ORANGE COLOR Mark.
3. Opposition Nos. 91222214, 91222215, and 91222223 are at the earliest stage in the proceedings, with the answers filed, initial disclosures not yet served, and discovery not yet commenced, and common issues of fact and law are pleaded in all three proceedings.
4. Dandy Product, Inc. (“Dandy”) filed its Notice of Opposition on June 3, 2015. In its Notice of Opposition, Dandy asserted four grounds for opposition: (1) likelihood of confusion under Section 2(d) of the Trademark Act; (2) Applicant’s mark is functional under Section 2(e)(5) of the Trademark Act; (3) Applicant’s mark has not acquired distinctiveness under Section 2(e); and (4) inequitable conduct/fraud.
5. Lumite, Inc. (“Lumite”) filed its Notice of Opposition on June 3, 2015. In its Notice of Opposition, Dandy asserted three grounds for opposition: (1) Applicant’s mark is functional under Section 2(e)(5) of the Trademark Act; (2) Applicant mark has not acquired distinctiveness under Section 2(e) of the Trademark Act; and (3) inequitable conduct/fraud.

6. Willacoochee Industrial Fabrics, Inc. (“Willacoochee”) filed its Notice of Opposition on June 3, 2015. In its Notice of Opposition, Willacoochee asserted two grounds for opposition: (1) Applicant’s mark is functional under Section 2(e)(5) of the Trademark Act and (2) Applicant’s mark is descriptive and has not acquired distinctiveness under Section 2(e) of the Trademark Act.
7. The following shows that the overlap between the claims asserted by Dandy, Lumite, and Willacoochee:

	Priority/Likelihood of Confusion	Functionality	Lack of Acquired Distinctiveness	Inequitable Conduct/Fraud
Dandy	X	X	X	X
Lumite		X	X	X
Willacoochee		X	X	

8. Applicant understands that the Opposers are separate parties.
9. With the exception of Dandy’s priority/likelihood of confusion claim, Dandy’s and Lumite’s Notices of Opposition are virtually identical. S. Industries Inc. v. Lamb-Weston Inc., 45 USPQ2d 1293, 1297 (TTAB 1997) (granting consolidation where both proceedings involve the same mark and virtually identical pleadings).
10. Willacoochee’s Notice of Opposition overlaps with Dandy’s and Lumite’s Notice of Opposition. Like Dandy and Lumite, Willacoochee asserted the grounds of (1) functionality and (2) lack of acquired distinctiveness.
11. TMBP § 511, citing New Orleans Louisiana Saints LLC v. Who Dat? Inc., 99 USPQ2d 1550, 1552 (TTAB 2011) states that “[a]lthough identity of the parties is another factor considered by the Board in determining whether consolidation should be ordered, it is not always necessary”. Id. at n. 4 (“if multiple oppositions brought by different opposers are at the same stage of litigation and plead the same claims, the Board may consolidate for

consistency and economy”). See New Orleans Louisiana Saints LLC v. Who Dat? Inc., 99 USPQ2d at 1552.

12. Opposers will not be prejudiced if the oppositions are consolidated. If Applicant successfully defends against Dandy’s prior/likelihood of confusion claim, there will be no bearing on the ability of Lumite and Willacoochee to bring their claims of functionality and lack of acquired distinctiveness since Dandy also asserted claims of functionality and lack of acquired distinctiveness. If Applicant successfully defends against Dandy’s and Lumite’s claim of inequitable conduct/fraud, there will be no bearing on the ability of Willacoochee to bring its claims of functionality and lack of acquired distinctiveness since Dandy and Lumite have asserted the grounds of functionality and lack of acquired distinctiveness.
13. The three Oppositions bought by the Opposers are identical on the salient claims of functionality and lack of acquired distinctiveness. The claims of functionality and lack of acquired distinctiveness will require similar evidence, witnesses, testimony, and arguments, as well as significant discovery.
14. Consolidation will “avoid unnecessary cost or delay”. The oppositions filed by Dandy, Lumite, and Willacoochee require similar evidence, discovery, witnesses, testimony, and arguments. If these oppositions are consolidated, Applicant’s witnesses will be deposed once, and not three times by each Opposer. In addition, duplicate discovery will be avoided, if these oppositions are consolidated. Consolidation will promote efficiency and avoid unnecessary repetition, costs, and delays. TBMP § 511.

15. Further, in Paragraph 16 of its Notice of Opposition, Lumite avers that its has “received and fulfilled orders for such orange-colored geotextiles, including orders for orange-colored woven monofilament fabric in 2009 for its customer, Dandy Products, Inc., a Delaware corporation (“Dandy”)”. While Dandy and Lumite are separate parties, they appear to have a unified legal interest in the outcome of these oppositions based on their pleading. See Opposition 91222215, Docket No. 1.

16. In addition, Dandy, Lumite, and Willacoochee will not be prejudiced or inconvenienced if these oppositions are consolidated. Consolidation will avoid the risk of inconsistent judgements on identical issues. See TBMP § 511 n. 4; See Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6<sup>th</sup> Cir. 1993) (holding risk of inconsistent adjudications is a factor to consider under Fed. R. Civ. Pro. 42, in determining whether to consolidate).

17. The Board upon its own initiative may consolidate the proceedings. See TBMP § 511 n. 5.

**WHEREFORE**, pursuant to TBMP § 511 and Fed. R. Civ. P. 42(a), in order to promote administrative efficiency and save time and expense for the parties, Applicant moves and requests that the TTAB consolidate Oppositions Nos. 91222214, 91222215, and 91222223.

Dated: August 17, 2015

Respectfully submitted,  
**Nicolon Corporation**

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**CERTIFICATE OF SERVICE**

I, Stacy Raphael Stewart, counsel to Applicant Nicolon Corporation, in Opposition No. 91222214, certify that, on the 17th day of August, 2015, I served a copy of the **APPLICANT'S MOTION TO CONSOLIDATE**, via first class prepaid mail, upon:

TERRY L CLARK  
BRIAN IVERSON  
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/Stacy R. Stewart/  
Stacy R. Stewart, Esq.