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TTAB

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CME

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Cancellation No. 92057196

Team International Marketing N.V.

v.

JMM Lee Properties, LLC

Cancellation No. 92059670

JMM Lee Properties, LLC

v.

Team International Marketing N.V.¹

**Before Zervas, Taylor and Wolfson,
Administrative Trademark Judges.**

By the Board:

JMM Lee Properties, LLC (“JMM Lee”) owns Registration No. 3890577 for the mark CALORIC for “gas and electric cooking appliances, namely, ranges, microwave ovens, barbeque grills, cooktops and kitchen range hoods” in International Class 11.² On May 7, 2013, Team International Marketing N.V. (“Team International N.V.”) filed a petition for cancellation of JMM

¹ On September 30, 2014, the Board consolidated the above-captioned proceedings.

² Filed on July 29, 2008, issued on December 14, 2010, and based on a claim of first use anywhere of October 9, 2010 and first use in commerce of October 22, 2010.

Lee's registration alleging prior use and registration of the following mark for


electric shoe polishers and scales:  ,³ and

prior common law use of the mark KALORIC for a range of household and cooking appliances, namely:

Electric egg beaters; wood beating machines; electric can openers; multi-purpose steam cleaners; cutting machines; electric food preparation apparatus, namely, tumblers for marinating food; multi-purpose, electric countertop food preparation apparatus, namely, a combination meat tenderizer and marinator, for household use; electric food processors; electric fruit presses for household use; electric clothing pressing machines for dry cleaning and laundry purposes including shirt press, collar and cuff press, utility press, legger press, drapery press, pants topper, mushroom topper and puff iron; electric mixers; electric food choppers; mixing machines; electric fruit peelers; electric vegetable peelers; electric pepper mills; electric floor polishing machines and apparatus; vacuum cleaners; electric whisks for household purposes; barbecues; beverage-cooling apparatus; electric coffee machines; electric bread cookers; electric coffee percolators; electric egg cookers; electric pressure cookers; electric rice cookers; electric slow cookers; electrical rice cookers; multi-purpose, electric countertop food preparation apparatus for cooking, baking, broiling, roasting, toasting, searing, browning, barbecuing and grilling food; apparatus for cooking, namely, cooktops; electric deep fryers; electric griddles; gas grills; electric grills; charcoal grills; hot plates; ice machines and apparatus; microwave ovens; rotisseries; electric toasters; electric waffle irons; water heaters (the "Unregistered Goods").

As grounds for cancellation, Team International N.V. alleges: (i) that JMM Lee's use of its mark is likely to cause confusion with Team

³ Registration No. 3382035, filed on June 24, 2005 and issued on February 12, 2008, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on International Registration No. 0494296, registered on May 6, 1985. At issuance, the registration covered additional goods, namely, "electrically heated hair-curlers and electric flat irons." Team International N.V. deleted these goods from the registration on August 12, 2014 when it filed a declaration pursuant to Section 71 of the Trademark Act.

International N.V.'s prior common law mark KALORIK and previously used and registered mark , (ii) abandonment, and (iii) fraud. In its answer, JMM Lee admits that Team International N.V. "has a registered trademark for Kalorik (Reg. No. 3382035)," with a registration date that predates the filing date of its underlying application. Answer, ¶¶ 4 and 15. JMM Lee denies the remaining salient allegations in the petition for cancellation and asserts affirmative defenses of unclean hands, laches, fraud, and estoppel.⁴ In addition, on July 21, 2014 – more than one year after it filed its answer in this proceeding – JMM Lee filed a separate petition to cancel Team International N.V.'s pleaded registration on the ground of fraudulent misuse of the registration symbol. JMM Lee's petition for cancellation has been assigned Cancellation No. 92059670.

This case now comes up on: (i) Team International N.V.'s motion, filed September 19, 2014,⁵ for partial summary judgment in Cancellation No. 92057196; (ii) JMM Lee's motion, filed November 17, 2014, to strike Team International N.V.'s reply brief in support of its motion for partial summary

⁴ We consider the remaining allegation(s) as merely amplifications of JMM Lee's denial that there is a likelihood of confusion.

⁵ Team International N.V. filed its motion for partial summary judgment on September 17, 2014, but filed a notice of errata to its motion on September 19, 2014. We consider the motion filed as of the date Team International N.V. submitted its notice of errata. *See* Board's order of September 24, 2014 (indicating that JMM Lee's deadline to respond to the motion runs from the date of service of the notice of errata).

Cancellation Nos. 92057196 and 92059670

judgment; and (iii) Team International N.V.'s motion, filed August 29, 2014, to dismiss Cancellation No. 92059670.

Motion to Dismiss Cancellation No. 92059670

In lieu of filing an answer in Cancellation No. 92059670, Team International N.V. filed a timely motion to dismiss on grounds that the petition for cancellation “constitutes a compulsory counterclaim in [Cancellation No. 92057196], which was not timely asserted,” because JMM Lee knew of the basis for its counterclaim when it filed its answer in Cancellation No. 92057196. Motion to Dismiss, p. 3. Team International N.V. also asserts that the petition fails to state a claim upon which relief can be granted because JMM Lee has: (i) alleged misuse of the registration symbol for goods not covered by the pleaded registration, and “any ‘misuse’ of the symbol on goods outside of those listed in the registration is irrelevant,” *id.* at p. 6 (emphasis omitted); (ii) not pleaded “when the alleged ‘misuse’ occurred,” *id.* (emphasis omitted); and (iii) not alleged “a single fact in support of its bald legal conclusion” that Team International N.V. misused the registration symbol with a fraudulent intent. *Id.* (emphasis omitted).

JMM Lee acknowledges that at the time it filed its answer, it was aware that Team International N.V.'s “use of the registration symbol may have extended beyond the goods and services under which [Team International N.V.] owned a valid registration,” but argues that “this does not constitute an admission that [it] knew of the grounds, factual or otherwise, for a

counterclaim at the time the Answer was filed.” Response to Motion to Dismiss, p. 4. More specifically, JMM Lee asserts that “the pleadings of affirmative defenses require only ‘fair notice’” while a petition for cancellation must meet the “higher hurdle” of “plausibility,” *id.* at p. 5; that it only learned of grounds for a plausible cancellation action “through the gathering of evidence through the discovery timeline,” *id.* at p. 7; and “the cancellation proceeding provides additional details gathered during the discovery period.” *Id.* at p. 8. JMM Lee also argues that its counterclaim is timely because it was filed “well before the close of discovery” and states a claim upon which relief can be granted. *Id.* at pp. 2 and 8-13.

JMM Lee’s petition to cancel Team International N.V.’s pleaded registration in Cancellation No. 92057196 is a compulsory counterclaim within the meaning of Trademark Rule 2.114(b)(2)(i). “To be timely, a [compulsory] counterclaim must be brought as part of defendant’s answer or promptly after the grounds therefore are learned.” *Turbo Sportswear Inc. v. Marmot Mountain Ltd.*, 77 USPQ2d 1152, 1154 (TTAB 2005). Accordingly, in assessing Team International N.V.’s motion to dismiss, we must consider: (i) whether grounds for the counterclaim were known to JMM Lee when it filed its answer, and (ii) if not, whether JMM Lee acted “promptly” in petitioning to cancel the involved registration after it learned of the grounds for such claim. *See id.*

As reflected in the chart below, a number of allegations in the petition for cancellation are substantially similar to the allegations made in JMM Lee’s answer.

Allegations in Petition for Cancellation No. 92059670	Allegations in Answer in Cancellation No. 92057169
<p>Para 5: “Team International’s misuse of the trademark registration symbol ‘®’ on goods sold under the KALORIK name constitutes fraud.”</p>	<p>Para. 51: “As the third Affirmative Defense, [JMM Lee] submits that [Team International N.V.’s] misuse of the trademark registration symbol ® on goods sold under the Kalorik name constitutes fraud.”</p>
<p>Para. 6: “[Team International N.V.’s] initial September 15, 2005 trademark application for the KALORIK mark [which matured into pleaded Registration No. 3382035] encompassed a wide range of goods including ‘[e]lectric beaters, electro-mechanical beverage preparation machines, electric can openers, coffee grinders other than hand-operated; electric crushers and grinders for household purposes; electric knives; electric shoe polishers, electric blenders for household purposes; electric mixers for household purposes; electric food processors; vacuums for household purposes; juice machines’ in class 07 and ‘[s]cales, electrically heated hair-curlers and electric flat irons’ in class 09.”</p>	<p>Para 52: “[Team International N.V.’s] initial trademark application for the Kalorik mark [which matured into pleaded Registration No. 3382035] encompassed a wide range of goods including ‘[e]lectric beaters, electro-mechanical beverage preparation machines, electric can openers, coffee grinders other than hand-operated; electric crushers and grinders for household purposes; electric knives; electric shoe polishers, electric blenders for household purposes; electric mixers for household purposes; electric food processors; vacuums for household purposes; juice machines’ in class 07.”</p>
<p>Para. 7: “Due to what the USPTO deemed to be a likelihood of confusion with another registered trademark, [Team International N.V.’s] list of goods and services on its final application was amended to include only [e]lectrical household apparatus, namely, electric shoe polishers, in Class 7, and scales, electrically heated hair-curlers and electric flat irons, in Class 9.”</p>	<p>Para 52: “Due to what the USPTO deemed to be a likelihood of confusion with another registered trademark, [Team International N.V.] agreed to limit its trademark registration under class 07 to include only electric shoe polishers.”</p>
<p>Para. 9: “Despite [Team International N.V.’s] limited trademark registration covering only electric shoe polishers in</p>	<p>Para 53: “Despite [Team International N.V.’s] limited trademark registration covering only electric shoe polishers in</p>

Allegations in Petition for Cancellation No. 92059670	Allegations in Answer in Cancellation No. 92057169
<p>class 07 and electrically heated hair-curlers and electric flat irons in class 09, on information and belief, [Team International N.V.] knowingly and willfully misused, and continues to misuse, the ‘®’ symbol in connection with KALORIK goods, including those not registered with the Patent and Trademark Office, with the intent to mislead consumers and others into believing that the mark is registered.”</p>	<p>class 07, [Team International N.V.] knowingly and willfully misused, and continues to misuse, the ® symbol in connection with Kalorik goods, including those not registered with the Patent and Trademark Office, with the intent to mislead consumers and others into believing that the mark is registered. The improper use of a registration notice in connection with an unregistered mark, if done with intent to deceive the purchasing public or others in the trade into believing that the mark is registered, is a ground for denying the registration of an otherwise registrable mark.”</p>
<p>Para. 10: “[Team International N.V.] filed a new trademark application for the mark KALORIK with a filing date of Jun. 28, 2012 (Serial No: 85664850).⁶ This newly filed application lists many of the same goods that appeared in [Team International N.V.’s] original (later scaled down) application, including; [e]lectric beaters, electric can openers, electric mixers, electric food processors and vacuum cleaners. Based on this new filing, [Team International N.V.] knew, or should have known, that such goods were not a part of its active but limited KALORIK registration.”</p>	<p>Para. 54: “[Team International N.V.’s] subsequent Kalorik trademark application with a filing date of Jun. 28, 2012 (Serial No: 85664850) lists many of the goods that appeared in [Team International N.V.’s] original (later scaled down to include only shoe polishers) application, indicating that [Team International N.V.] knew, or should have known, that such goods were not a part of its active but limited Kalorik registration.”</p>

While the petition for cancellation does include some additional amplifying allegations regarding Team International N.V.’s purported misuse of the trademark registration symbol, we find that the facts underlying the alleged ground of misuse of the registration symbol were known to JMM Lee

⁶ This application has been suspended pending disposition of prior-filed application Serial No. 85593674 for the mark CALORIC, in standard characters, owned by JMM Lee.

at the time it filed its answer. Accordingly, the counterclaim is untimely.⁷ Team International N.V.'s motion to dismiss Cancellation No. 92059670 is **GRANTED**, and the petition for cancellation is dismissed **with prejudice**.

Motion to Strike in Cancellation No. 92057196

JMM Lee has moved to strike Team International N.V.'s reply brief in support of its motion for partial summary judgment on grounds that the reply brief exceeds the ten-page limit set out in Trademark Rule 2.127(a). Specifically, JMM Lee asserts that Team International N.V. has used "extensive single-spaced footnoted text totaling 42 lines, with the majority of the footnotes in small 9.5-point type" as a "tactic to avoid meeting the Board's reasonable ten page limit." Motion to Strike, pp. 1-2. Subsequently, however, JMM Lee filed a notice of errata acknowledging that the footnotes in the reply brief are "in both 10-point and 12-point text." TTABVUE # 31, p. 2.

In opposition to the motion, Team International N.V. argues that it included footnotes "to raise minor points for the sake of completeness" and that JMM Lee's acknowledgement that the footnotes are in 10-point and 12-point font "moots" JMM Lee's motion. Response to Motion to Strike, pp. 1-2. Team International N.V. further points out that the text of its reply brief was in 12-point font, which is larger than the 11-point font allowed by Trademark

⁷ However, even if the counterclaim had been timely filed, a cause of action does not lie herein because there is no allegation that Team International N.V. misused the registration symbol for the goods covered by the pleaded registration. *Compare Copelands' Enters. Inc. v. CNV Inc.*, 945 F.2d. 1563 20 USPQ2d 1295, 1298 (Fed. Cir. 1991) (plaintiff brought cancellation action on ground that prior to registration, defendant misused the registration symbol in connection with the goods covered by the involved registration).

Rule 2.126, and that the reply brief was 9.5 pages long, which is less than the ten-page limit. *See id.* at p. 2.

We find that Team International N.V.'s use of eight (8) footnotes, none of which include lengthy discussion, is neither excessive nor subterfuge to avoid the page limit. *Compare Consorzio del Prosciutto di Parma v. Parma Sausage Products Inc.*, 23 USPQ2d 1894, 1896 n.3 (TTAB 1992) (petitioner's brief included 47 footnotes, many of which contained substantial discussion, prompting the Board to warn against using footnotes as subterfuge to avoid the page limit). Accordingly, JMM Lee's motion to strike is **DENIED**.

Affirmative Defenses in Cancellation No. 92057196


Team International N.V.'s motion for partial summary judgment includes arguments that JMM Lee's affirmative defenses "fail as a matter of law." MSJ, p. 13-19. Accordingly, before addressing the arguments regarding priority and likelihood of confusion, we examine the sufficiency of Applicant's affirmative defenses.

The Board may strike from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. *See* Fed. R. Civ. P. 12(f); *Am. Vitamin Prods., Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992); TBMP § 506.01 (2014). A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. *See* TBMP § 506.01. Moreover, the primary purpose of the pleadings is to give fair notice of the

claims or defenses asserted. *Id*; see also TBMP § 309.03. Thus, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. See *Harsco Corp. v. Elec. Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988).

Affirmative Defense # 1: Unclean Hands

JMM Lee pleads an affirmative defense of unclean hands based on an allegation that, in connection with the application underlying pleaded Registration No. 3382035, Team International N.V. falsely claimed use of the

mark  in connection with electric shoe polishers as of May 2006, when the mark was not in use in connection with such goods until 2012. See Answer, ¶¶ 41-46. Under the equitable defense of unclean hands, a plaintiff may be estopped from relying on a pleaded registration because the registration was obtained or maintained on the basis of a false statement. See *Duffy-Mott Co., Inc. v. Cumberland Packing Co.*, 424 F.2d 1095, 165 USPQ 422, 424-25 (CCPA 1970); *Lever Bros. Co. v. Shaklee Corp.*, 214 USPQ 654, 659 (TTAB 1982) (“While ordinarily, in a proceeding before this Board, a Principal Register registrant is entitled to rely upon the presumptions of validity, ownership and exclusive right to use accorded under the provisions of the Trademark Act, we have determined that such presumptions are effectively rebutted where there is clear and unmistakable evidence in the record that the registered mark is invalid due to its having

been abandoned, obtained on the basis of a false statement or subject to some other material defect. Where such unmistakable evidence exists, the registration is not accorded any evidentiary value in regard to the issues in a proceeding before us.”).

Here, however, there is no factual basis for such a defense because pleaded Registration No. 3382035 issued pursuant to Section 66(a) of the Trademark Act, and therefore, no claim of use was made in connection with the underlying application.⁸ Accordingly, affirmative defense # 1 is **STRICKEN**.⁹

Affirmative Defense # 2: Laches

JMM Lee asserts a laches defense on grounds that Team International N.V.: (i) “delayed asserting its alleged rights to the Kalorik mark for over four (4) years. [Team International N.V.] did not oppose Respondent’s CALORIC[] mark (Reg. No. 3890577) during the opposition period beginning Dec[.] 2, 2008...,”¹⁰ Answer at ¶ 48; and (ii) “knew or should have known of JMM Lee’s

⁸ In the Section 71 declaration filed in connection with the pleaded registration, Team International N.V. claims use of the registered mark in connection with electronic shoe polishers at least as early as August 12, 2014, which is *after* JMM concedes the mark was in use in connection with such goods. *See* Answer, ¶ 43.

⁹ Notwithstanding this determination, for the reasons explained *supra*, p. 14, JMM Lee may maintain an equitable defense of unclean hands based on allegations of misuse of the trademark registration symbol in connection with the Unregistered Goods.

¹⁰ JMM Lee also alleges that Team International N.V. did not “file an opposition to [its] subsequent application for Caloric[], which published for opposition on August 21, 2012” (Serial No. 85593674; fourth request for extension of time to file a Statement of Use granted on November 22, 2014). To the extent JMM Lee may have intended by this allegation to assert a *Morehouse* defense, such allegation is

senior registration” of the involved mark and if it “believed that it would be harmed ... it should have taken the opportunity to oppose such registration during the opposition period.” *Id.* at ¶ 49.

To adequately assert a laches defense, a defendant must plead “that there was undue or unreasonable delay [by the plaintiff] in asserting its rights, and prejudice to [the defendant] resulting from the delay.” *Bridgestone/Firestone Research Inc. v. Automobile Club de l’Ouest de la France*, 245 F.3d 1359, 58 USPQ2d 1460, 1462-63 (Fed. Cir. 2001). JMM Lee has not pleaded any prejudice as a result of Team International N.V.’s alleged delay in asserting its rights. Moreover, JMM Lee has not alleged that Team International N.V. had actual notice of the underlying application before the opposition period closed. In the absence of actual notice before the close of the opposition period, the date of registration is the operative date for calculating laches. *Teledyne Techs., Inc. v. Western Skyways, Inc.*, 78 USPQ2d 1203 (TTAB 2006).

insufficient as a *Morehouse* defense pertains to situations in which a party owns a *registration* for the substantially identical mark for substantially identical goods and services and JMM Lee has not alleged ownership of any such registration. See *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 160 USPQ 715, 717 (CCPA 1969); see also *Carl Karcher Enters. Inc. v. Gold Star Chili, Inc.*, 222 USPQ 727, 728 (TTAB 1983). Moreover, a *Morehouse* defense is not available with respect to claims of abandonment and fraud. *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1313-14 (TTAB 1989).

Accordingly, affirmative defense # 2 is **STRICKEN**, but JMM Lee is allowed until **THIRTY (30) DAYS** from the mailing date of this order to file an amended answer setting forth an adequately pleaded defense of laches.¹¹

Affirmative Defense # 3: Fraud

JMM Lee alleges that Team International N.V. has fraudulently used the registration symbol in connection with the mark KALORIC for the Unregistered Goods. We construe this allegation as a defense of unclean hands based on the use of the registration symbol in connection with the mark KALORIC for the Unregistered Goods, and therefore, allow this affirmative defense to stand. *See Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1290 (TTAB 2007) (allegation that opposer has misused federal registration symbol construed “as a species of the equitable affirmative defense of unclean hands”); *Penn Dairies, Inc. v. Penn. Agricultural Coop. Mktg. Ass’n*, 200 USPQ 462, 464 (TTAB 1978).

Affirmative Defense # 4: Estoppel

JMM Lee pleads that Team International N.V. is “estopped from maintaining this Petition for Cancellation” because: (i) in prosecuting the application underlying its pleaded registration, Team International N.V. argued that there was no likelihood of confusion between its mark KALORIK and the mark CALORIC owned by third-party Raytheon Company; and (ii)

¹¹ Team International N.V. argues that confusion between the parties' marks is inevitable, and therefore, the equitable defense of laches is not available. MSJ, pp. 16-17. There is, however, no basis on the current record for concluding that confusion is inevitable.

“more importantly, [Team International N.V.] began selling Kalorik goods in the marketplace as if no confusion existed ...[which] demonstrates that [Team International N.V.] rejected the confusingly similar position taken by the USPTO in its refusal.” Answer, ¶¶ 56-62. Such allegations, if proven, may be relevant to the likelihood of confusion analysis, but they cannot bar Team International N.V.’s likelihood of confusion claim. *See Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153-154 (CCPA 1978) (finding that a likelihood of confusion argument made in support of an application for registration is a legal conclusion, and therefore, cannot constitute an admission because only facts may be admitted); *Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1223 (TTAB 2011) (recognizing that a party’s position in a prior proceeding “is not an admission, but may be considered only as illuminative of shade and tone in the total picture”); *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271 (TTAB 2009) (“The doctrine of ‘file wrapper estoppel’ does not apply in trademark cases” nor does a party’s position in a prior proceeding “rise to the level of an admission against interest”). Accordingly, affirmative defense # 4 is **STRICKEN**.¹²

¹² Even though the affirmative defense of “estoppel” has been stricken, JMM Lee is not prohibited from asserting Team International N.V.’s alleged prior inconsistent position in defending against the likelihood of confusion claim. We note, however, that such a prior inconsistent position is not viewed as a judicial admission. *See Celestial Seasonings, Inc.*, 198 USPQ at 153-54; *see also, Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984) (“[T]hat a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be

Motion for Partial Summary Judgment in Cancellation No. 92057196

Team International N.V. has moved for partial summary judgment on the ground that it has prior common law rights in the mark KALORIK for the Unregistered Goods and that use of the involved mark is likely to cause confusion with its previously used common law mark KALORIK.¹³ See Motion, p. 4. and 14, n.2. Summary judgment is only appropriate where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to a judgment under the applicable law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. See *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). Evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-

received in evidence as merely illustrative of shade and tone in the total picture confronting the decision maker.”).

¹³ Team International N.V. expressly states that “to narrow the issues” in its motion, it “asserts only its prior common law rights in KALORIC for cooking appliances.” Motion, p. 14, n.2.

movant's favor. *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. The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine disputes as to material facts exist. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1542.

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences in favor of JMM Lee as the non-moving party, we find that there are genuine disputes of material fact that preclude granting partial summary judgment in favor of Team International N.V. Specifically, there are genuine disputes of material fact regarding (i) the similarities and dissimilarities of the parties' marks in appearance, pronunciation, connotation, and commercial impression, (ii) the relatedness of the parties' goods, and (iii) the similarity or dissimilarity of the parties' channels of trade and classes of consumers. With respect to priority, there also is a genuine dispute of material fact regarding whether Team International Group of America, Inc. is a *bona fide* licensee of Team International N.V. such that its use of the KALORIK mark inures to the benefit of Team International N.V.¹⁴

¹⁴ The license agreement between Team International Marketing S.A./N.V. and Team International Group of America, Inc. does not include Exhibit A to the agreement, which identifies the licensed mark. *See* MSJ Response, Exhibit XVI. As such, it is uncertain what mark has been licensed.

In view of the foregoing, Team International N.V.'s motion for partial summary judgment is **DENIED**.¹⁵ Proceedings herein are resumed, and discovery, disclosure, trial and other dates are reset as follows:

Expert Disclosures Due	3/16/2015
Discovery Closes	4/15/2015
Plaintiff's Pretrial Disclosures Due	5/30/2015
Plaintiff's 30-day Trial Period Ends	7/14/2015
Defendant's Pretrial Disclosures Due	7/29/2015
Defendant's 30-day Trial Period Ends	9/12/2015
Plaintiff's Rebuttal Disclosures Due	9/27/2015
Plaintiff's 15-day Rebuttal Period Ends	10/27/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

¹⁵ The parties should note that the evidence submitted in connection with the motion for partial summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *Am. Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981). Furthermore, the fact that we have identified certain genuine disputes as to material facts should not be construed as a finding that these are necessarily the only disputes which remain for trial.