

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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Cissel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Speedway Motorsports, Inc.

Serial No. 75/160,194

Request for Reconsideration

Warren G. Olsen of Fitzpatrick, Cella, Harper & Scinto for
Speedway Motorsports, Inc.

Cathleen Pace Cain, Trademark Examining Attorney, Law
Office 104 (Sidney Moskowitz, Managing Attorney).

Before Cissel, Chapman and Drost, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On January 30, 2003, the Board affirmed the refusal to register the mark in the above-referenced application under Section 2(e)(2) of the Lanham Act. Among other things, our opinion explained that the application had been amended, in accordance with applicant's instructions, to delete reference to all but two classes of goods and services, Classes 25 and 41.

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This case now comes up before us for consideration of four requests made by applicant on February 28, 2003.

Applicant's first request is for an extension of time in which to appeal the Board's ruling. This request is moot pursuant to Trademark Rule 2.145(d)(1), as time to appeal shall expire two months from the date of this decision on applicant's request for reconsideration. If additional time is needed beyond that resulting from the due date based on the Board's ruling on applicant's reconsideration request, applicant may file a request to extend the time to appeal with the Director in accordance with Trademark Rule 2.145(e).

Applicant's second request is for reconsideration and modification of our January 30, 2003 decision, and the third request is for permission to file a divisional application. We have considered the arguments applicant presents in support of these requests, but both must be denied.

Essentially, applicant again asserts that the eight classes of goods it deleted from the application should be reinstated, and that after this is accomplished, applicant should be allowed to "divide out" those classes of goods so

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that an application could go forward as to those eight classes of goods. As we stated on pages 11 and 12 of our January 30, 2003 decision, however, applicant's amendment deleting the eight classes was not a conditional "offer" which would take effect only upon acceptance by the Examining Attorney. Even if that were the case, however, the Examining Attorney made it clear that from that point forward, the application was considered to have been amended in accordance with applicant's instructions.

We find no error in our January 30, 2003 decision, and applicant's requests to modify it and to permit applicant to divide out the eight classes of goods and services are denied.

Applicant's fourth request is for permission to file a supplemental appeal brief in view of a third-party registration which issued on July 23, 2002. Although applicant couches this request in terms of filing a supplemental brief, it appears that what applicant wants is for the Examining Attorney (and the Board, if the Examining Attorney does not find the new evidence persuasive) to consider this registration. In order for that to happen, the Board would have to remand the application to the Examining Attorney for consideration of this evidence under

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Trademark Rule 2.142(d), but this is done only when the evidence sought to be made of record was not available to submit timely, i.e., prior to the appeal. Applicant characterizes this registration as "evidence not earlier available," but we note that this registration issued several months before the Board ruled on this appeal. Moreover, it is well settled that we are not bound by decisions regarding registrability made at the examination level of the administrative process. Applicant's request to file a supplemental brief (and additional evidence) is accordingly denied.

In summary, applicant's request for an extension of time in which to appeal our January 30, 2003 decision is moot (applicant's time to appeal runs from the mailing date of this decision); applicant's request for modification of our ruling affirming the refusal to register is denied; applicant's request for permission to "divide out" the eight classes which are no longer in the application is denied; and applicant's request to file a supplemental brief is also denied.

As previously noted, Trademark Rule 2.145(d) and (e) govern the time for applicant to appeal our January 30,

2003 decision or to request an extension of time in which
to do so.