THOMAS F. FITZPATRICK
GOODWIN PROCTER LLP
135 Commonwealth Drive
Menlo Park, California 94025
Telephone: 650-752-3100
Facsimile: 650-853-1038
E-Mail: TFitzpatrick@goodwinprocter.com

Attorneys For Defendants
CONAIR CORPORATION and RITE AID HDQTRS. CORP.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE TONYTAIL COMPANY, INC.,

Plaintiff,

v.

CONAIR CORPORATION, SCUNCI INT'L, LTD., RITE AID HDQTRS. CORP., L&N SALES & MARKETING, INC., and DOES, 1 – 10, inclusive,

Defendants.

Case No. 3:07-cv-05895-WHA

DECLARATION OF THOMAS F. FITZPATRICK IN SUPPORT OF DEFENDANTS CONAIR CORPORATION'S AND RITE AID HDQTRS. CORP.'S OPPOSITION TO PLAINTIFF'S MOTION TO SHORTEN TIME OF HEARING REGARDING PLAINTIFF'S PARTIAL MOTION TO DISMISS

I, Thomas F. Fitzpatrick, declare:

1. I am the attorney of record for Defendant Conair Corporation ("Conair") and Rite Aid HDQTRS. Corp. ("Rite Aid") in the above captioned action. Accordingly, I am familiar with the facts and circumstances of this case.

2. Tonytail commenced this action in November 2007 by filing its Complaint for Damages ("Tonytail's Complaint").

3. In its Complaint, Tonytail asserts causes of action against numerous defendants arising out of the alleged infringement of patents and trademarks. Tonytail alleges Conair and Rite Aid infringe Tonytail's U.S. Patent No. 6,263,884.

4. The parties filed a Joint Claim Construction and Prehearing Statement on May 2, 2008

and a Corrected Joint Claim Construction and Prehearing Statement ("Joint Statement") on May 5, 2008, listing the proposed claim terms to be construed by the Court at the May 28, 2008 *Markman* hearing. A true and accurate copy of the Corrected Joint Statement as filed with the Court is attached hereto as Exhibit A.

5. As agreed to by all the parties, the Corrected Joint Statement jointly proposes only terms from claim 4 of the '884 Patent to this Court for construction.

6. Tonytail filed its Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction on May 2, 2008 ("Tonytail's Partial Motion to Dismiss"). A true and accurate copy of Tonytail's Partial Motion to Dismiss is attached hereto as Exhibit B.

7. In its Motion, Tonytail chose June 5, 2008 as its desired date for a hearing.

8. The day before Tonytail filed its Partial Motion to Dismiss, counsel for Conair and Rite Aid attempted to confirm – in writing – the parties agreement with respect to claims 4 and 5 of the '884 Patent. A true and accurate copy of this letter from Thomas F. Fitzpatrick to Anne-Leith Matlock dated May 1, 2008 is attached hereto as Exhibit C. Specifically, Conair and Rite Aid wrote:

> In your letter and proposal dated April 24th, you stated Tonytail's position that "the only claims in issue" with respect to the '884 patent, "are claims 4 and 5." We will rely on your representation that claims 4 and 5 are the only claims of the '884 in issue and understand that Tonytail will not later assert the remaining claims of the '884 against our clients. With that understanding we will agree to so confine our proposed terms for claim construction regarding the '884. Please let us know immediately if the above does not reflect the agreement you proposed.

See Fitzpatrick Decl., Exhibit C, *emphasis added*.

9. May 1, 2008 was the first time counsel for the parties verbally discussed an agreement regarding Conair and Rite Aid's declaratory judgment action with respect to claims 1 – 3 of the '884 Patent.

10. On May 2, 2008, Tonytail filed its Partial Motion to Dismiss mere hours after the first discussion of the topic with counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 8, 2008

/s/ Thomas F. Fitzpatrick
Thomas F. Fitzpatrick