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

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| Proceeding | 91204861 |
| Party | Plaintiff Red Bull GmbH |
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| Date | 08/16/2013 |
| Attachments | ANDALE Oppos-91204861 & 91210860-Reply to Mtn to Consolidate.pdf(47900 bytes) |

**CERTIFICATE OF ELECTRONIC FILING AND
STANDBY AUTHORIZATION TO CHARGE DEPOSIT ACCOUNT**

I hereby certify that Opposer's Motion to Consolidate Proceedings is being filed with the TTAB via ESTTA on the date set forth below.

Date: August 16, 2013

/Leah Z. Halpert/
Leah Z. Halpert

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

IN THE MATTER OF Application Serial Nos. **85/334,836** for the trademark **ANDALE! ENERGY DRINK & Design** (Class 32), **85/646,316** for the trademark **ANDALE! & Design** (Class 32), and **85/646,359** for the trademark **ANDALE! & Design** (Class 32).

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|-------------------------------------|---|--|
| RED BULL GMBH, |) | Opposition No.: 91-204,861 |
| |) | Mark: ANDALE! ENERGY DRINK |
| Opposer, |) | & Design |
| |) | Serial No.: 85/334,836 |
| v. |) | |
| |) | Opposition No.: 91-210,860 |
| JEAN PIERRE BIANE, and |) | Marks: ANDALE! & Design (#85/646,316) |
| ANDALE ENERGY DRINK CO., LLC |) | ANDALE! & Design (#85/646,359) |
| |) | Serial Nos.: 85/646,316 |
| Applicant. |) | 85/646,359 |
| |) | |

OPPOSER'S REPLY IN SUPPORT OF THE MOTION TO CONSOLIDATE

Opposer, RED BULL GMBH ("Opposer" or "Red Bull") submits this reply brief in support of its Motion to Consolidate Proceedings ("Motion to Consolidate"). Please note that this reply brief is being filed concurrently in Opposition No. 91-204,861 ("First Opposition") and Opposition No. 91-210,860 ("Second Opposition").

Applicant's opposition to the Motion to Consolidate ("Applicant's Opposition") is riddled with incorrect statements, many of which have no bearing to the issue at hand and serve solely to obfuscate the issue – that consolidation will benefit both parties and save the Board considerable time and resources. Applicant is incorrect that the Motion to Consolidate is not germane to the recently filed Motion for Summary Judgment ("MSJ") in the First Opposition, or that the MSJ will be dispositive of said proceeding. Additionally, Applicant is incorrect that consolidating the proceedings will directly interfere with and unreasonably delay the resolution

of the MSJ. In fact consolidating proceedings streamlines them such that both parties are greatly benefitted and the cases can proceed more quickly and efficiently. Lastly, Applicant's argument about the prior filed (and granted) motions to strike affirmative defenses is not only wholly irrelevant, but also incorrect in regard to their purpose. The Board granted the meritorious motions, and in doing so made the discovery process more efficient for both parties (and the Board) by eliminating Applicant's irrelevant and legally insufficient affirmative defenses.

In addition to the arguments below and those put forth in Opposer's Motion to Consolidate, Opposer respectfully requests that Opposition Nos. 91-204,861 and 91-210,860 be consolidated as it does not prejudice either party and would save both time and resources on the part of the Board – as well as the parties – to be able to resolve these two nearly identical oppositions at the same time.

A. The Motion to Consolidate is Germane to the MSJ

Applicant's initial argument in Applicant's Opposition is that the Board should deny the Motion to Consolidate because Applicant filed an MSJ in the First Opposition prior to the filing of the Motion to Consolidate. According to the rules, once a potentially dispositive motion, such as a motion for summary judgment, is filed, the Board suspends the proceedings with respect to all matters not germane to the motion, and any non-germane paper or motion filed that after a summary judgment motion will be disregarded. TBMP § 528.03. Of course, Applicant is incorrect in its assumption that the Motion to Consolidate is not germane to the MSJ (in addition to being incorrect that the MSJ is even potentially dispositive of the First Opposition, as discussed below). As argued in the Motion to Consolidate, both oppositions are nearly identical. Proceeding with the MSJ in one matter and continuing through discovery in the other matter would be redundant, especially in light of the fact that Opposer requires some of the same discovery to even respond to the MSJ (as seen by the fact that Opposer's response to the MSJ was a Motion for Necessary Discovery), and Opposer would conduct the same discovery in both

cases in regard to the claim not included in the MSJ. Additionally, as discussed further below, it is reasonable to assume that since both oppositions are nearly identical, Applicant could and would make the exact same arguments in an MSJ in the Second Opposition – something that can be avoided if the proceedings are consolidated as Applicant is not precluded from amending its MSJ to include the marks of the Second Opposition. Lastly, even if the MSJ is resolved in Applicant’s favor – which Opposer believes is highly unlikely given the significant number of material issues of genuine fact still present in the case – the second claim of false suggestion of a connection still persists (and is identical in both proceedings). Opposer’s Motion to Consolidate is distinctly germane at this point in order to eliminate redundancy in discovery and to greatly reduce the time and resources spent by the Board on resolving both the MSJ and the matters as a whole.

B. The MSJ is not Potentially Dispositive of the First Opposition.

Applicant goes on to argue that its MSJ filed in the First Opposition is potentially dispositive of the proceeding, and as such the case should be suspended by the Board and the Motion to Consolidate not taken into consideration. However, this is not the case. The MSJ – which is currently awaiting ruling by the Board on Opposer’s as of yet unopposed Request for Necessary Discovery – relates only to one of the two claims made in the opposition. Even if Applicant prevails on the MSJ¹, the second basis for the opposition of false suggestion of a connection under is still be present. As such, summary judgment in Applicant’s favor will not make this Motion to Consolidate moot as it is not dispositive of the First Opposition. The same identical parties, substantially similar and identical witnesses, substantially similar marks at issue and mark asserted by Opposer, and identical allegations will still be present in both cases. As

¹ Opposer has not yet had the opportunity to oppose Applicant’s MSJ due to the need for necessary discovery (and Opposer’s pending motion in that regard). However, Opposer does not, in any way, concede to any of Applicant’s positions in the MSJ and strongly believes there are material issues of genuine fact in this matter.

such, consolidation is warranted and will benefit both the Board and the parties in these matters by making the overall process more efficient.

C. Consolidating the Proceedings will Not Interfere with or Further Delay the Resolution of the MSJ in the First Opposition.

Applicant further argues – again incorrectly – that consolidating the proceedings at this point will directly interfere with and unreasonably delay resolution of the MSJ filed in the First Opposition. As its only support, Applicant indicates that resetting the dates for the consolidated matter will necessarily give Opposer more than the “normal 30-days to respond”. Again, this is simply not true. First, Opposer has already timely responded to the MSJ with its Motion for Necessary Discovery – a fact of which Applicant was aware since Opposer’s response was filed prior to Applicant’s Opposition to the Motion to Consolidate (and Opposer was immediately duly served with a courtesy copy via email per the stipulation made during the Second Opposition’s discovery conference with Board participation). The fact that Opposer requires a discovery deposition to adequately respond to the MSJ necessarily forces the resolution of the MSJ to be somewhat delayed in order to allow time for the motion to be ruled upon and such discovery to be conducted. Consolidating the two oppositions will not further delay the resolution of the MSJ beyond what is already necessary.

Additionally, any resetting of the dates can be tailored to put the discovery and trial schedule in line with the later filed opposition (per usual Board practice), and not interfere with the current, pending MSJ schedule (again, which is currently “suspended” pending the motion for necessary discovery). Ultimately, Applicant’s assertions are incorrect that the already delayed resolution of the MSJ² would be even further delayed by consolidating the proceedings –

² The MSJ is necessary delayed by Applicant’s own doing. The only support for the MSJ is a declaration by Applicant attesting to “facts” and “legal conclusions” that are wholly within Applicant’s own knowledge. As such, Opposer necessarily needs to conduct discovery in the form of a deposition to ascertain the facts and circumstances surrounding these assertions in order to adequately respond to the MSJ.

a consolidation would not have any effect on the resolution of the MSJ at this point and would, in fact, prevent time consuming duplicative discovery and briefing in the future.

Further, the issues presented in the MSJ are exactly the same as might be presented in an MSJ filed for the Second Opposition in regard to the claim of priority and likelihood of confusion. As stated in the Motion to Consolidate, both oppositions are based on identical claims against nearly identical marks, and Opposer relies upon the same prior registration. As the exact same issue arises in both cases, it is reasonable to assume Applicant would file a substantially similar MSJ in each matter. By consolidating, Applicant can avoid filing a second, nearly identical MSJ, as there is nothing that precludes Applicant from simply amending the already filed MSJ to incorporate the marks of the Second Opposition. While a slight delay due to the amendment may be incurred, the MSJ resolution is already being upheld by the fact that Opposer requires further discovery to even properly respond. Ultimately, the minimal delay associated with amending the MSJ to consolidate the two matters would be far less than expending the time and resources to file and fully brief a second, identical MSJ, and could be completed while the parties await decision on Opposer's motion for necessary discovery. Additionally, in this situation, the deposition of Mr. Jean Pierre Biane (requested as needed to adequately oppose the MSJ) would discuss the necessary issues for both oppositions and would eliminate the need to re-depose him at a later date on the exact same issues. This would not only benefit Opposer, but would also greatly benefit Applicant in that neither party would not need schedule and hold a second identical deposition. Again, consolidation will streamline these matters and make the entire process more efficient for both the Board and both parties.

D. Applicant will not be Prejudiced by a Consolidation, but rather Benefitted.

Applicant argues that consolidation of the two oppositions will greatly prejudice Applicant. However, as explained above, consolidation actually benefits Applicant, whereas maintaining the oppositions as wholly separate matters puts greater burden on Applicant (as well

as Opposer and the Board). By consolidating, the identical issues from both oppositions will be dealt with together, effectively eliminating the need to do identical and redundant depositions and discovery requests, such that both the Board and the parties can save considerable time and resources. For example, as Opposer has already requested a necessary deposition of Applicant in order to respond to the MSJ, consolidation can, again, ensure that Applicant is only deposed once on these particular matters, rather than multiple times. Moreover, the Board will ultimately be able to determine the merits of the cases simultaneously (or whether there exists a genuine issue of material fact, in the case of the MSJ), rather than needing to review the same record of evidence twice.

E. Opposer’s Purpose in Filing the Two Granted Motions to Strike was to Streamline Discovery for Both Parties and Make the Proceedings more Efficient.

Applicant’s final unsubstantiated argument that Opposer filed two motions to strike in this matter is irrelevant and not well taken as it is simply designed to prejudice the Board against Opposer. The motions to strike were not, in any way, made in order to delay the proceedings, but rather to clarify the issues and eliminate the many irrelevant and legally insufficient “affirmative defenses” put forth by Applicant, before the parties expended time and resources on them in discovery. Matter in a pleading is not stricken unless it clearly has no bearing on the issues of the case. *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999); TBMP § 506.01. Clearly Opposer’s motions to strike were not merely delay tactics, and did assist in narrowing the issues for discovery, as the Board granted both motions to strike as meritorious.³

³ For the first motion to strike, the Board granted Opposer’s motion in part (in relation to all of the actual affirmative defenses) and denied the motion in part (in regard to what was considered to be mere amplifications). For the second motion to strike, the Board granted Opposer’s motion in full.

CONCLUSION

Based on the above as well as the arguments in Opposer's Motion to Consolidate, Opposer respectfully requests that the Board issue an order granting this Motion to Consolidate Proceedings, wherein the consolidated schedule is consistent with the more recently instituted Second Opposition. Further, Opposer requests that the parties be allowed to stipulate that Applicant may amend the MSJ filed in the First Opposition to include the opposed marks from the Second Opposition, and that the consolidated briefing schedule for the MSJ be maintained as it currently stands.

Respectfully submitted,
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Dated: August 16, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S REPLY IN SUPPORT OF THE MOTION TO CONSOLIDATE** is being served on August 16, 2013, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Counsel at their Correspondent address given on the TARR website, with courtesy copy being served via email to Paulo@patelalmeida.com and alex@patelalmeida.com:

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