ESTTA Tracking number: **ESTTA268347**
Filing date: **02/24/2009**

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

Proceeding	92048989
Party	Plaintiff Top Tobacco, LP
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Date	02/24/2009
Attachments	Petitioner's Reply.pdf (3 pages)(106505 bytes)

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

TOP TOBACCO, L.P.,	)	
	)	
Petitioner,	)	
v.	)	Consolidated Cancellation No. 92048989
	)	
VAN NELLE TABAK NEDERLAND BV,	)	
	)	
Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE RESPONDENT'S MOTION TO COMPEL AS UNTIMELY

Contrary to Respondent's assertion, and notwithstanding Respondent's irrelevant reference to different proceedings involving different parties and different marks, Respondent's motion to compel cannot not be seriously considered to be germane to the issues raised in Top Tobacco, L.P.'s, earlier filed motion to compel. Top Tobacco's motion to compel addresses Respondent's refusal to provide discovery of Respondent's use and abandonment prior to February 6, 2003 of the marks embraced by the registrations at issue in this proceeding. The facts pertaining to those issues bear directly on Respondent's good faith intent to use the marks of registrations. Respondent's late-filed motion to compel is directed to Top Tobacco's plans to use the mark. So, Respondent argues that its motion is germane to Top Tobacco's motion because both require a determination of the issues involved in this proceeding. Of course, every motion requires a determination of the issues involved in a proceeding. Thus, under Respondent's reasoning, any motion in a proceeding would be germane to any other motion. That, of course, is preposterous and would undermine the purpose of the suspension orders issued under Rule 2.120(e) of the Trademark Rules of Practice.

In reality, Respondent filed its motion in an effort to "muddy" the waters[1] and not because it has any bearing on Top Tobacco's earlier filed motion to compel. The motions raise different issues and seek documents and information from different parties at different times. Even Respondent, in its response, is unable to identify any way in which the Board's resolution of fact or law in Top Tobacco's motion would assist or inform the Board's resolution of Respondent's motion. Respondent's motion is simply not germane to Top Tobacco's motion and should be stricken.

Nevertheless, if the Board denies Top's motion to strike, Top reserves its right to respond to Respondent's motion to compel and address its numerous inaccuracies and misstatements.

February 24, 2009

Respectfully submitted,

/Michael G. Kelber/
One of the Attorneys for Petitioner,
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[1] Respondent's motion contains numerous inaccuracies and misstatements. For example, it makes much of Top Tobacco's production of proposed product packaging, incorrectly assuming and arguing it is packaging on currently available product. Mot. at 11-12. Contrary to Respondent's claims, the proposed packaging supports Top's statements that: (1) it intends to advertise, offer and sell tobacco, cigarette papers and other related products under the mark; and (2) it has not yet used the ROUTE 66 mark in commerce. Further, contrary to Respondent's assertion, because the packaging is merely proposed, it is entirely appropriate that the proposed packaging is designated "confidential." Moreover, Respondent argues that "[a]bandonment being in the nature of a forfeiture must be strictly proved." Mot. at 4. The Federal Circuit and the Board have long-held that abandonment need only be proved by a preponderance of the evidence. *See, e.g., Cerveceria Centroamericana, S.A., v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989) (preponderance standard applies to abandonment claims); *Parfums Natutee Ltd. v. Am. Int'l Indus.*, 22 USPQ2d 1306, 1310 n.7 (TTAB 1992) ("no basis for higher burden of proof in cancellation proceedings for abandonment").

CERTIFICATE OF SERVICE

I, Hillary A. Mann, an attorney, state that I caused a copy of the foregoing, Petitioner's Reply in Support of its Motion to Strike Respondent's Motion to Compel as Untimely to be served upon:

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via U.S. Mail on this February 24, 2009.

/Hillary A. Mann/
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NGEDOCS: 1607017.1