

ESTTA Tracking number: **ESTTA694826**

Filing date: **09/09/2015**

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

Proceeding	92060308
Party	Defendant Corcamore, LLC
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Attachments	Sprout_TTAB_Reply_MoStrike_09_09_2015.pdf(22080 bytes)

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

SFM, LLC

~vs.

Corcamore LLC,

Petitioner,

Respondent.

Cancellation no. 92060308

ELECTRONICALLY FILED

REPLY ON MOTION TO STRIKE PETITIONER'S NON-GERMANE FILINGS

THE CAUSATIVE CIRCUMSTANCES. Petitioner's baseless averments of fact, then petitioner's non-germane filings, are the root cause of the current motion practice. That petitioner's baseless averments and non-germane filings are the cause should not be obscured by a smokescreen of irrelevancies.

If after petitioner was informed privately, then given notice procedurally, of the baselessness of specific averments, had then petitioner "appropriately corrected" or withdrawn those baseless averments, then subsequent motion practice to challenge those, and petitioner's non-germane filings to obscure its mispleaded averments would all have been avoided. Rule 11(c)(2), FED. R. CIV. PROC. One stroke of petitioner's pen that withdrew or "appropriately corrected" the baseless averments should be of record. Instead, petitioner persisted, which provoked a motion against the baseless averments, followed with petitioner's non-germane filings.

The procedural rules serve to protect a small independent business with five years of goodwill built up in its well-established trademark for "vending services," against a publicly-traded grocery company and a large law firm who would coercively take this

respondent's trademark. In petitioner's view, it is OK to plead baseless averments that are key to their case, but they act hurt and disadvantaged when the smaller business and its solo practitioner call out the baseless averments and wholly non-germane assertions.

Rule 11 serves the goal of exposing baseless allegations, especially those key to the claim petitioner pleaded. That motion may resolve those, or discovery, or summary judgment will take care of those. Regardless, baseless allegations are not bolstered by petitioner's non-germane filings about a private invitation to consider compromise.

Petitioner's counsel might look up the RUBICON before twisting it vexatiously. Reaching the Rubicon, refers to a decision point whether to proceed or to compromise. When Caesar was about to cross the Rubicon, he chose to "let the die be cast."¹ Here, when petitioner refused to withdraw or "appropriately" amend out its baseless assertions, then petitioner chose motion practice over sound pleading practice.

Petitioner's Hair-Splitting FRE 408 Arguments are Unsound and Non-Germane.

A fundamental flaw in petitioner's argument for its non-germane insertion of settlement offers is that it supports a *carte blanche* practice of any motion being opposed with disclosure of compromise negotiations, as well as, a view that any opposition disclosing settlement discussions is "germane" to any pending motion.

Petitioner may split hairs in reading the rules, evidentiary and professional, but opposing motions with compromise negotiations and non-germane tirades never should be a permitted practice.

¹ Rawson, Elizabeth. "Caesar: Civil War and Dictatorship" chapter in "The Last Age of the Roman Republic," pp. 146–43 (Cambridge University Press, 1992).

Also, FRE 408 and the professional practice rules disregard whether the settlement communication was marked “confidential” or not. *Zurich Am. Ins. Co. v. Watts Indus.*, 417 F.3d 682, 689 (7th Cir. 2005). "In deciding whether Rule 408 should be applied to exclude evidence, courts must consider the spirit and purpose of the rule and decide whether the need for the settlement evidence outweighs the potentially chilling effect on future settlement negotiations." *Id.* Moreover, courts have “interpreted ‘compromise negotiations’ to refer to a state of mind ...[and] ask if the speaker was seeking to reach a compromise, then exclude the statement if it was germane to that purpose.” 23 Charles A. Wright & Kenneth W. Graham, FEDERAL PRACTICE AND PROCEDURE: Evidence, § 5307, at pg. 233 (1980).

Petitioner's citation to *U.S v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994), a criminal conviction for tax evasion, where a prior settlement rebutted a defense, is a case that really has nothing to do with this TTAB case. Actually *Hauert* reads FRE 408 contrary to the wide-open approach of petitioner's counsel here. *Hauert* observes that FRE 408 "generally proscribe[es]" use (*i.e.*, proscribes the non-germane use) of "statements made in compromise negotiations," but it allows a narrow exception not to exclude "any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," when additionally such "evidence is offered for another purpose." Here, the settlement invitation to petitioner contains no "evidence otherwise discoverable," *viz.* no relevant or probative evidence is embedded in or to be gleaned from the settlement letter that petitioner's counsel decided to toss into the public record.

An example here, more appropriate to the rule 408 exception as read in *Hauert*, will be discovery of the settlement terms that petitioner SFM had to accept to make its

prior suit in California 'go away' after the Judge there had heard the evidence and had rejected SFM's unprovable, pleaded assertions. (See, petitioner's argument about that California settlement at *Dkt.* # 16, pgs. 2 & 9-10). Those settlement terms likely contain facts and "evidence otherwise discoverable," which are relevant to assertions pleaded here by petitioner. What petitioner recently filed here in connection with the challenge to petitioner's baseless averments was entirely *non-germane* and *non-evidential*.

In conclusion, petitioner made non-germane filings in *Dkts.* # 22 & 25. The TTAB rule and Order that prohibit non-germane filings should be enforced. Moreover, petitioner's non-germane filings of non-evidential matter dealing exclusively with compromise negotiations is proscribed by FRE 408, plus by "the spirit and purpose of the rule." *Zurich, supra*. Instances of misleading and non-germane filings by petitioner were addressed privately first, and when left unresolved, addressed by motion practice.

The matter of petitioner's baseless averments of ownership and/or operation of vending machines will be dealt with here and now, or it will continue to be challenged.

Date: 9 Sept. 2015

Respectfully submitted,

~s~*Charles L. Thomason*
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, I personally deposited in the U.S. mail, postage prepaid, a complete copy of the reply of respondent on motion to strike, addressed to:

Nicole M. Murray, Esq.
QUARLES & BRADY LLP
300 N LASALLE ST, SUITE 4000
CHICAGO, IL 60654

I certify that the foregoing statements made by me are true.

Date: 9 Sept. 2015

~s~Charles L. Thomason

Charles L. Thomason