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

Proceeding	92062923
Party	Plaintiff Topiclear, Inc.
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Attachments	Reply to Objection.pdf(1822230 bytes )

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

TOPICLEAR Inc.,	]	
	]	
Petitioner,	]	Cancellation No. 92062923
	]	
v.	]	Registration No. 4,818,656
	]	
K & N DISTRIBUTORS,	]	
	]	
Registrant.	]	
	]	

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**BRIEF IN RESPONSE TO REGISTRANT’S OPPOSITION TO**  
**PETITIONER’S MOTION TO COMPEL**  
**(Interrogatory Answers)**

The registrant appears to have totally disregarded the requirements of the TTAB and the Federal Rules of Civil Procedure once again in the filing of its Opposition to Petitioner’s Motion to Compel.

Petitioner’s Motion to Compel was served electronically on counsel for the Registrant and was received by the TTAB on June 22, 2016. The present Opposition to this Motion was filed electronically to the TTAB on July 12, 2016 and was apparently only served on counsel for the Petitioner

by first class mail. The time for the filing of such a response is clearly specified as fifteen days after electronic service as set forth in 37 C.F.R. §2.127(a) and TBMP §502.02(b). In this case the filing was made five days late and should not be accepted.

The original Interrogatory Answers were improperly signed by counsel and not an officer or other knowledgeable party under oath as required by FRCP §33(b)(3) and TBMP §405.04(b). In Registrant's Opposition to the Motion to Compel, additional Interrogatory Answers were submitted, again without the required oath as proscribed by the laws and procedures of the Trademark Trial and Appeal Board.

For the reasons as noted above, Registrant's Opposition should be treated as *Ne Recipiatur* and given no consideration by the Board.

Regarding the substantive merits of the Opposition, Registrant has modified its previous answers to the Interrogatories by now raising objections to the same as being beyond the scope of discoverable information and not relevant to the action or reasonably calculated to lead to the discovery of admissible evidence.

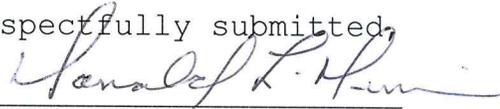
The Interrogatory questions involved clearly are within the permissible scope as defined by the law. They relate to Registrant's use of its mark, statements made on its packaging, and identification of other companies or entities that appear on its packaging.

The mere fact that Registrant in its Opposition to Petitioner's Motion, now concedes priority to Petitioner, does not exclude the requirement to respond to these inquiries. Additional information obtained through these Interrogatories could well lead to the filing of additional allegations in an amended Petition to include such issues as fraud in procurement of the registration, non-use of Registrant's mark in commerce and possible ownership of the mark by other parties and not Registrant, and non-compliance with government labeling requirements among others. It is indeed possible that such information could eventually lead to the challenged registration being held as void *ab initio*.

Information concerning lines of commerce and areas of distribution are relevant since it may have a bearing on the issue of likelihood of confusion. *Miller & Fink Corp. v. Servicemaster Hospital Corp.* 184 USPQ 495 (TTAB 1975); *J.B. Williams Co. v. Pepsodent GmbH* 188 USPQ 577 (TTAB 1975).

In view of the comments above, Petitioner's Motion to Compel Registrant to respond to the Interrogatories as put without objection is solicited.

Respectfully submitted,



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July 13, 2016

### **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was served by e-mail this 13<sup>th</sup> day of July 2016 on counsel for the Registrant, Matthew H. Swyers, at mswyers@thetrademarkcompany.com.



Donald L. Dennison