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

Proceeding	91157248
Party	Plaintiff TOP TOBACCO LP
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

TOP TOBACCO, L.P.,	)	**Opposition Nos. 91157248**
	)	**91157250**
Opposer-Petitioner,	)	
	)	
v.	)	**Cancellation No. 92043186**
	)	
NORTH ATLANTIC OPERATING CO., INC.	)	**Consolidated as Proceeding**
	)	**No. 91157248**
Applicant-Respondent.	)	

REPLY BRIEF IN SUPPORT OF OPPOSER'S MOTION FOR ENTRY OF THE SANCTION OF DEFAULT AND DEFAULT JUDGMENT

NAOC's Response in Opposition to Top Tobacco's Motion for Sanctions ("Response") lacks any credible argument as to why default should not be entered. Instead, the Response tellingly relies almost exclusively upon factual distortions and irrelevant complaints about Top Tobacco's conduct. Indeed, throughout this proceeding NAOC has engaged in a pattern of vexatious conduct designed to frustrate Top Tobacco's prosecution of its case. Its conduct has resulted in two Orders compelling production and an Order sanctioning NAOC. For the reasons set forth more fully below, NAOC's most recent tactics to thwart discovery on top of its pattern of discovery abuses warrants the sanction of default judgment.

I. NAOC'S FAILURE TO PRODUCE A KNOWLEDGEABLE 30(b)(6) WITNESS IS INDICATIVE OF NAOC'S UNREQUITED PATTERN OF CONDUCT AND WARRANTS FURTHER SANCTIONS

NAOC's 30(b)(6) witness, Mr. Thomas Helms, III, was woefully unknowledgeable of and unable to answer basic questions about at least 10 of the 15 categories listed in the Notice. NAOC failed to undertake the basic preparation necessary for Mr. Helms to testify on the designated topics. In fact, Mr. Helms admitted that his only preparation consisted of reviewing the Notice of Deposition, a conversation with counsel that lasted less than two hours, and

"Googl[ing] a picture of [Top Tobacco's] Classic Canadian [product] to see what it looked like. That's it." (See Select Pages of the Helms Deposition Transcript ("Helms Dep.") at p. 15, lns. 24-25, Exhibit A.) He did not review any documents other than the Notice of Deposition or speak to anyone else at NAOC or its affiliates or anyone else outside of NAOC. (Helms Dep. p. 17, lns. 4-5; p. 19, lns. 14-25, Exhibit A.)

A. Mr. Helms' Employment History Is Irrelevant

Despite his lack of preparation and utter failure to testify on the designated topics, NAOC argues that Mr. Helms "was a proper 30(b)(6) designee" because he was a "top level corporate executive" and because he has worked at NAOC for 10 years in various functions. (Response at p. 7) First, to call Mr. Helms a "top level executive" strains credulity. Mr. Helms is a "director of trade marketing" who reports to a Vice President. Terming him a junior executive would be a stretch and to call him a "top level executive" is incredible. But, more problematic than Mr. Helms's relatively junior status within Applicant's organization is the fact that he was simply unprepared to answer questions on the designated topics. A party tendering a Rule 30(b)(6) witness "has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are 'known or reasonably available' to the corporation." *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D.Fla. 1995). Moreover, the corporation must adequately prepare witnesses to address the matters identified in the notice. *Starlight International, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kansas 1999)("If the designated persons "do not possess the personal knowledge of the matters set out in the deposition notice, the entity is obligated to prepare the designees so that they may give knowledgeable and binding answers for the organization"). NAOC willfully failed to meet this obligation by designating an unknowledgeable witness and then by failing to prepare him.

B. Mr. Dobbins' Testimony Did Not Cure These Deficiencies

Apparently conceding that Mr. Helms was unknowledgeable of the categories for which he was designated, NAOC attempts to excuse his failures by claiming that the testimony of a prior deponent, Mr. James Dobbins, made up for the Mr. Helms' shortcomings. This is simply untrue. First, Mr. Dobbins did not provide answers to the same basic questions that Mr. Helms was unable to answer. In fact, Mr. Dobbins repeatedly claimed to lack knowledge on many of the same questions that Mr. Helms was unable to answer. For example, Mr. Dobbins was unable to testify as to the selection and clearance of the subject marks because that occurred before his employment with NAOC. (Ex. B, select pages from the deposition of James Dobbins "Dobbins Dep." p. 150, lines 7-19, p. 108, lines 4-13). Similarly, he was generally unknowledgeable about the development of NAOC's products bearing the subject marks, including when such products were first sold, whether a particular competitive product was targeted by NAOC during the development of its products, and whether NAOC was aware of Top Tobacco's CLASSIC CANADIAN Mark prior to its selection of the subject marks. (Ex. B, Dobbins Dep. p. 262, lns. 15-21; p. 264, lns. 7-20; and, p. 287, lns. 6-9). Second, Mr. Dobbins was testifying based on his own knowledge, and, therefore, could not answer questions based on the collective knowledge of NAOC, and Top Tobacco's counsel did not ask him questions that were clearly outside of his area of knowledge. Third, because Mr. Dobbins was deposed prior to Mr. Helms, Top Tobacco could not go back in time to ask Mr. Dobbins about the numerous topics on which Mr. Helms faltered.

C. Top Tobacco's Notice of the 30(b)(6) Deposition Was Timely Served And Proper In Scope

Outrageously, NAOC also attacks Top Tobacco's 30(b)(6) Notice stating that it was received "just two days prior to the deposition of Mr. Helms," that it was overly broad, and,

"since counsel for NAOC only received Mr. Helms' [Notice of] deposition on the Saturday prior to the deposition, counsel for NAOC objected to the notice on the record during the deposition." (Response at p. 8) This is simply untrue and this level of distortion should not be countenanced by the Board. Top Tobacco first served its 30(b)(6) Notice on July 20, 2005—over three years prior to the deposition of Mr. Helms. (Ex. C, July 20, 2005 Notice of Deposition) Then, on December 17, 2008—more than a month prior to the deposition of Mr. Helms—Top Tobacco served an amended 30(b)(6) Notice which was identical to the Notice served in 2005, except for the addition of one category. (Ex. D, December 17, 2008 Notice of Deposition) On January 31, 2009, Top Tobacco served another Amended Notice that was identical to the December 17, 2008 Notice, with the exception that the date of the deposition had been changed to reflect the date that had been agreed to by the parties. (Ex. E, January 31, 2008 Notice of Deposition) Thus, NAOC did not receive the Notice "two days" before the deposition of Mr. Helms as it asserted in its Response. In fact, it had over three years to review 14 of the 15 categories in the Amended Notice and over a month to review the one additional topic. NAOC cannot seriously believe that its characterization of events is anything but a blatant misrepresentation.

Despite the falsity of NAOC's statements regarding its receipt of the Notice, NAOC does concede that it failed to object to 30(b)(6) Deposition Notice prior to the deposition. It is well established that an objection to a notice of a discovery deposition that is not promptly served in writing on the party giving the notice is waived. TBMP §40.08(a); Fed. R. Civ. P. 32(d)(1). Thus, NAOC has waived any objections that it had to the breadth of the 30(b)(6) categories by failing to make timely objections and serve them in writing.

However, even if NAOC had timely objected, its objections would have been unwarranted because the topics and questions that Mr. Helms was unable to answer were central

to the material issues of this proceeding and well within the scope of discoverable subject matter. For example, Mr. Helms was unable to answer basic questions as to NAOC's corporate structure (Helms Dep., p. 52 lns. 5-20, Exhibit A), the existence of any licenses for the subject marks (Helms Dep., p. 52 lns. 5-20, Exhibit A), an approximate sales volume for products bearing the subject marks (Helms Dep., p. 147, ln 19 – p. 148, ln. 9, Exhibit A), whether Top Tobacco's CLASSIC CANADIAN Mark had been discussed prior to NAOC's selection of the subject marks (Helms Dep., p. 193, lns. 18-21, Exhibit A), and when NAOC first became aware of Top Tobacco's CLASSIC CANADIAN Mark (Ex. A, Helms Dep., p. 207, ln. 20 – p. 209, ln. 11). These questions are merely exemplary of Mr. Helm's lack of knowledge on basic topics that are at the heart of this matter.

D. The Egregious Nature of Mr. Helms' Inability to Provide Testimony Warrants Sanctions

In all, Mr. Helms was wholly unknowledgeable about at least 10 of the 15 categories noticed, categories Nos. 1, 3, 4, 5, 7-10, and 12-14, and his failure to provide meaningful answers amounts to a failure to appear with respect to those categories. *Starlight International*, 186 F.R.D. at 639; quoting *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996)("Producing an unprepared witness is tantamount to a failure to appear at a deposition.") As a result of NAOC's failure to provide a knowledgeable witness on these categories Top Tobacco has been prejudiced because it was unable to elicit any meaningful witness testimony regarding these categories.

NAOC attempts to excuse Mr. Helms' unpreparedness and lack of knowledge by characterizing the questions that Mr. Helms was unable to answer as seeking "specific detailed data that he could not reasonably be expected to provide from memory." (Response at p. 10) That characterization is absurd. Top Tobacco's questions pertaining to the existence of any

licenses for the subject marks (Helms Dep., p. 52 lns. 5-20, Exhibit A), an approximate sales volume for products bearing the subject marks (Helms Dep., p. 147, ln. 19 – p. 148, ln. 9, Exhibit A), whether Top Tobacco's CLASSIC AMERICAN BLEND Mark had been discussed prior to NAOC's selection of the subject marks (Helms Dep., p. 193, lns. 18-21, Exhibit A), and when NAOC first became aware of Top Tobacco's CLASSIC AMERICAN BLEND Mark, do not require specific detailed data but instead only require general knowledge. These questions are of an entirely different character than the type of minutia at issue in the cases cited by Applicant, which involved questions requiring a deponent to recall 63 loan numbers in *Fago v. M&T Mortgage Corp.*, 235 F.R.D. 11 (D.D.C. 2006), and questions requiring a deponent to perform calculations on detailed data without referring to a database in which the data was contained in *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2006 U.S.Dist. LEXIS 58970 (N.D.Cal. Aug. 10, 2006).

NAOC tellingly does not provide a single example of a question asked by Top Tobacco that requires "specific detailed data." The only question that NAOC identifies as being purportedly drawn to "specific detailed data" is a question posed to Mr. Helms regarding the corporate structure of NAOC and its related companies. But even this example—hand-picked by NAOC—does not require "specific detailed data." Instead, Top Tobacco's counsel was merely asking Mr. Helms to explain the relationship of highly-related companies, each of which is involved in some aspect (such as research, marketing, distribution, etc.) of the lifecycle of the products bearing the subject marks. Certainly, the nature and relationship of the entities that manufacture, advertise and distribute the products bearing the subject marks is a matter on which Mr. Helms should have been able to testify, especially considering that it was explicitly listed in

the Notice of Deposition. Moreover, one would expect a so-called "top level corporate executive" to be able to describe the company's general operating structure.

NAOC's failure to provide a knowledgeable witness is egregious due both to the scope of his lack of knowledge (at least 10 of 15 deposition topics) and the fact that he was unable to provide testimony on basic matters that are highly relevant to this proceeding. NAOC cites *Zappia Middle East Construction Co. v. Abu Dhabi*, 195 U.S. Dist. LEXIS 17187 (S.D.N.Y. Nov. 17, 1995) for the proposition that "in order for the Court to impose sanctions, the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas." The *Zappia* Court denied sanctions because the designated deponents "render[ed] testimony concerning the subject areas of their designations." *Id.* at *27. In *Zappia*, the Court contrasted the situation in that case with the facts in *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y. 1991), in which the court granted sanctions because the deponent lacked knowledge about two out of four designated areas and provided misleading testimony about a third. The facts here are much more comparable to those in *Turner* in that Mr. Helms failed to provide basic testimony concerning at least 10 of 15 material topics. Accordingly, sanctions are warranted.

II. NAOC'S WITHHOLDING OF RESPONSIVE DOCUMENTS ALSO WARRANTS SANCTIONS

NAOC's withholding and ultimate production of documents just prior to the depositions of Mr. Dobbins and NAOC also merits sanctions. NAOC offered to produce the withheld documents for delivery to Top Tobacco's counsel's hotel the day before depositions were to commence. The documents consisted of (i) over 250 pages of print-outs from the TARR website of third-party trademark registrations and applications for products that fall outside of the roll-your-own tobacco market; (ii) samples of third-party products and packaging, and print-outs of

third-party websites for products outside of the roll-your-own tobacco market; (iii) point-of-sale displays for NAOC's products; and (iv) a document purporting to identify NAOC's document retention policy. NAOC has admitted that some of these documents had been sitting in its counsel's offices for some time. In its August 13, 2007 Order granting in part Top Tobacco's Motion to Compel, the Board advised that "if proper discoverable matter is withheld from the requesting party, then the responding party will be precluded from relying on such information and from adducing testimony with regard thereto during its testimony period. *See Shoe Factory Supplies Co. v. Thermal Engineering Company*, 207 U.S.P.Q. 517 (T.T.A.B. 1980)." Thus, NAOC withheld these documents despite a prior explicit warning from the Board that such conduct would be sanctioned.

A. NAOC's Document Production Occurred After Discovery Closed

Discovery was scheduled to close on January 10, 2009, and the parties agreed to seek an extension solely to complete the Depositions that had been noticed by Top Tobacco prior to the close of discovery. Indeed, Top Tobacco's counsel sent a letter to NAOC's counsel memorializing the agreement, stating "the agreed upon extension is therefore for the parties to conclude the noticed depositions (and any follow up items of discovery that may result therefrom)," which was confirmed by NAOC's counsel. (Ex. F, December 30, 2008 letter to H. Jensen and Ex. G, December 30, 2008 e-mail to A. McShane). Thus, discovery was closed with respect to any matters other than the depositions, including NAOC's attempted document production.

In its Response, NAOC disingenuously states that Top Tobacco "has misrepresented the date that discovery was set to close" because "there was no agreement limiting the exchange of documents to the deadline of January 10, 2009" and "[h]ad Top truly sought to preclude the exchange of documents after January 10, 2009, it should have discussed that matter with counsel

for NAOC and expressly set forth such a restriction in its letter confirming the agreement extending discovery." (Response at pp. 2-3). Any "misrepresentation" is NAOC's, not Top Tobacco's. Top Tobacco's counsel did make it clear that the extension of discovery would be limited to concluding its depositions of NAOC's witnesses by its letter stating that "the agreed upon extension is therefore for the parties to conclude the noticed depositions (and any follow up items of discovery that may result therefrom)." (See Exhibits F and G) In fact, Top Tobacco only agreed to extend discovery in order to accommodate the schedules of NAOC's employees and counsel, who purportedly were unavailable for the depositions prior to the scheduled close of discovery. Both the letter memorializing the parties' agreement and the facts giving rise to the agreement prove that discovery was extended solely to permit Top Tobacco to take the depositions, and NAOC's attempts to recharacterize that agreement are wholly-unsupported.

B. NAOC Offered To Produce The Documents to Top Tobacco's Counsel For Delivery Only One Day Before The Depositions

NAOC's characterization of the timing and content of its document production in its Response is also disingenuous. NAOC's counsel first informed Top Tobacco that it had documents to produce on Friday, January 30, 2009. NAOC's counsel offered to send the documents for "Monday delivery" to the office of Top Tobacco's counsel in Chicago—which would not have even arrived prior to Top Tobacco's counsel's Monday flight to New York for the depositions—or to give the documents to Top Tobacco's counsel when he arrived at the depositions. (Ex. H, January 30, 2009 e-mail to L. Eulgen) Thus, NAOC did not offer its "document production to Top as early as Friday, January 30, 2009" as asserted in its Response. The earliest that Top Tobacco's counsel could have received the documents was the evening of Monday, February 3, 2009, which was the evening before the deposition of Mr. Dobbins, and which left no time to fairly review the documents prior to the deposition.

NAOC's counsel also asserts that she offered to "delay the deposition several hours or even a day to allow counsel for Top adequate time to review" the documents. This is simply untrue. While NAOC attempted to tender the documents to Top Tobacco's counsel at the start of the depositions, no such offer to delay the depositions a day or more was made, and the deposition transcript cited by NAOC in support of this proposition reflects no such offer. Furthermore, even had NAOC's counsel offered to delay the deposition several hours or a day, such a delay would not have cured the late production because Top Tobacco's counsel still would have been robbed of the opportunity to take depositions of any of the third parties identified in the production or to investigate any of those third parties.

Top Tobacco's intentional withholding of documents and offer to produce them the day before depositions cannot be considered timely. If such behavior is tolerated, it will become normal procedure to dump documents on opposing counsel just prior to depositions or after discovery has closed, as NAOC did here.

C. NAOC Lacks Any Excuse For Withholding The Documents

Regarding the TARR print-outs produced by NAOC, NAOC attempts to excuse its untimely production with a variety of scattershot arguments that range from untrue to irrelevant including: (i) a false claim that the Top Tobacco was already aware of the parties identified in the document, (ii) a claim that the documents were work product, and (iii) an argument that Top Tobacco's timely document production somehow excuses NAOC's untimely production of documents. We address each of these in turn.

NAOC's claim that Top Tobacco was already aware of the third parties identified in the TARR print-outs is not true. While <u>some</u> of those parties that may have been identified in a trademark search report conducted in 1992 that Top Tobacco produced, many if not most of the third party registrations identified in NAOC's TARR printouts are for marks that were applied

for after 1992, and therefore they are not identified in Top Tobacco's search report. NAOC's claim that the documents were "merely reprints of the previously produced registrations and applications" is also untrue. Top Tobacco is not aware of any previously produced registrations and applications that it has received from NAOC and, notably, NAOC's Response brief fails to identify any such previously produced documents by Bates number.

NAOC's claim that the TTAR print-outs were "work product," and that NAOC therefore had no obligation to produce them, is also wholly unfounded. First, it is well established that "a party's awareness of third-party use and/or registration of the same or similar marks for the same or closely related goods or services as an involved mark, is discoverable to the extent that the responding party has actual knowledge thereof and that the information appears to be reasonably calculated to lead to the discovery of admissible evidence." TBMP §414(9). Here, Top Tobacco had explicitly requested such documents in Request No. 25 of its First Set of Requests for the Production of Documents and Things, which requested "all documents that relate to use by any third-party of any mark comprised of the terms 'CLASSIC' 'AMERICAN' or 'BLEND'" and, therefore, such documents could not have been withheld as privileged. Second, even if those documents were privileged, NAOC could not have withheld the documents from production as privileged because, in response to the Board's Order compelling NAOC to produce a privilege log, NAOC stated unequivocally to Top Tobacco and the Board that it had no privileged documents. (Ex. I, Reply in Opposition to Renewed Motion for Entry of the Sanction of Default and Default Judgment, p. 3).

NAOC's complaints about Top Tobacco's document production are irrelevant to the issues presented by the present Motion. The fact that NAOC included such complaints only highlights the absence of a legitimate excuse for its own discovery failures. Nevertheless, to the

extent that NAOC's complaints merit any response, it is worth noting and undisputable that Top Tobacco completed its document production during the discovery period, that it did not withhold any documents and that throughout this proceeding it has complied with its discovery obligations. Unlike NAOC, Top Tobacco has not been ordered by the Board to produce documents or sanctioned by the Board for prior discovery abuses.

Regarding the samples of packaging and point-of-sale displays withheld by NAOC, NAOC argues that "Top Tobacco was ostensibly previously aware" of them because they are "publicly available." This statement is ridiculous and in no way excuses NAOC's withholding of these materials. Making its withholding of these documents even more egregious, NAOC admits that "the packaging, point of sale materials and other documents" were in its counsel's offices for some time and fails to provide any explanation as to why these documents were not produced earlier.

D. NAOC's Withholding Of The Documents Is Highly Prejudicial

The content of the documents makes NAOC's withholding of them highly prejudicial to Top Tobacco. Despite the Response's misrepresentation of the content of the documents that NAOC produced, the production consisted in principal of (i) over 250 pages of print-outs from the TARR website of third-party trademark registrations and applications for products that fall outside of the roll-your-own tobacco market; (ii) samples of third-party products and packaging and print-outs of third-party websites for products outside of the roll-your-own tobacco market; (iii) point-of-sale displays for NAOC's products; and (iv) a document purportedly showing NAOC's document retention policy. Many of these documents, such as the TARR print-outs, samples of third-party products and packaging, and print-outs of third party websites are presumably documents that NAOC intends to use to attack the strength of Top Tobacco's registered mark, and NAOC's production of these documents after discovery has closed has

completely and indisputably prejudiced Top Tobacco's ability to take discovery on these materials.

The egregious nature of NAOC's conduct is compounded by the fact that the Board has already sanctioned NAOC once in this proceeding for discovery abuses. See November 24, 2008 Order. Moreover, it is apparent from NAOC's counsel's January 30, 2009 email, which describes a portion of the production as "some point of purchase I found in a box which I don't know if [a former attorney at NAOC's counsel's firm] produced to you," that NAOC's counsel had in its possession many of the documents long prior to its production thereof. Top Tobacco respectfully submits that such conduct should neither be encouraged nor tolerated.

III. DEFAULT IS NECESSARY TO CURB NAOC'S VEXATIOUS CONDUCT

In view of the ongoing, repeated discovery abuses and violations of the Board's Order, it is clear that no sanction short of the entry of judgment will be effective to curb NAOC's abuse. NAOC cites *MWH Ltd. V. Simex, Aussenhandelsgesellschaft Savelsberg KG,* 59 U.S.P.Q.2d 1477 (T.T.A.B. 2000) for the proposition that sanctions are appropriate where a party has engaged in a vexatious pattern of disregarding orders of the Board. We agree with this principle and find *MWH* to be instructive here. In *MWH,* the Board issued default judgment against a party who failed to serve discovery responses despite two orders from the Board compelling the party to do so and who had sought multiple extensions, thereby delaying the proceeding. The party then belatedly served discovery responses and supplemental responses that were lacking in content and internally inconsistent. The Board reasoned that the party's "willful disregard of the Board's orders," and evasive responses "demonstrated that the party's intent to continue to delay [the] proceeding by setting up obstacles to [the other party's] receipt of clearly relevant information" and granted judgment against the offending party. *Id.* at 1478-79.

Similarly here, NAOC has failed to comply with two orders compelling production of its discovery responses, and NAOC has been sanctioned once already for withholding documents. Most recently, NAOC withheld documents until just prior to final depositions and intentionally produced a 30(b)(6) witness who was wholly unknowledgeable as to the majority of the categories. Thus, it is apparent that NAOC will continue its vexatious conduct designed to frustrate Top Tobacco's prosecution of its case. While Top Tobacco does not relish protracted discovery-related motion practice, it is exasperated and simply was left with no choice. If conduct such as NAOC's is tolerated without consequence, such blatant disregard for the rules of discovery will become the norm in TTAB proceedings.

WHEREFORE, Top Tobacco respectfully requests that the Board enter an Order pursuant to TBMP § 527, Fed. R. Civ. P. 37(b) and (d) and 37 CFR § 2.120(g) (i) entering default and default judgment against Applicant; (ii) sustaining these consolidated Opposition proceedings with prejudice; (iii) refusing registration of NAOC's Applications for the marks at issue in these consolidated proceedings with prejudice; and (iv) cancelling NAOC's Registration No. 2,780,643 with prejudice and granting such other relief as the Board deems appropriate.

Respectfully submitted,

Date: March 23, 2009

/Lawrence E. James, Jr./

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CERTIFICATE OF SERVICE

I, Lawrence E. James, Jr., an attorney, state that I served a copy of the foregoing Reply Brief in Support of Opposer's Motion for Entry of the Sanction of Default and Default Judgment upon the following:

Arlana S. Cohen, Esq.
Cowan, Leibowitz & Latman, PC
133 Avenue of the Americas
New York, New York 10036

via Federal Express, on this 23rd day of March, 2009.

/Lawrence E. James, Jr./
Lawrence E. James, Jr.

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

----------x

TOP TOBACCO, L.P.,

Petitioner,

-against-

OPPOSITION NO.
91157248
(as Consolidated)

NORTH ATLANTIC OPERATING CO., INC.,
(as Consolidated),

Respondent.

----------x

30(b)(6) DEPOSITION OF THOMAS HELMS, III

Wednesday, February 4, 2009

New York, New York

REPORTED BY:

Holly Hough

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say then on the record in that regard.
One, obviously, Ms. Cohen, you have a duty to prepare the witness to testify as to matters known or reasonably available to the company concerning the categories listed in Top Deposition Exhibit 16.
Likewise, let the record reflect, we have never received any objection to the categories identified in Top Deposition Exhibit 16 prior to now.
And likewise, I'd also state for the record that there was a prior notice of deposition that was served some time ago in the categories identified in that earlier notice of deposition that have not changed relative to the Amended Notice of Deposition, dated January 31, 2009 and marked as Top Deposition Exhibit 16.
MS. COHEN: Well, in response to that, I would simply state that I did not compare the old notice to the new notice and see that each word matched and do a compare or red-line on it.
All I know is I received the Amended

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Notice on January 31st, which is a Saturday, by email. And this is the earliest I could have discussed with you the Amended Notice which pertains to the witness that is sitting here, and that is when I would discuss it. I think it's the earliest as I could.
MR. EULGEN: I think the colloquy on this subject is really unproductive.
MS. COHEN: Fine.
MR. EULGEN: Those categories have not changed.
MS. COHEN: Fine.
MR. EULGEN: The onus certainly wouldn't be on me to identify for you the manner in which the categories had changed. But let's just proceed because I believe we all have an interest in getting through the subject matter, which is lengthy, in as expeditious a fashion as possible.
Q In that regard, Mr. Helms, can you let me know or explain for the benefit of the record what you did to prepare for this deposition.
A I reviewed the subject document, I spoke to counsel, and I Googled a picture of Classic

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Canadian to see what it looked like. That's it.
Q When you say you reviewed the subject document, you mean Top Deposition Exhibit 16, the Amended Notice of Deposition, correct?
A Yes.
Q And when you say you spoke to counsel, you mean Ms. Cohen, who is sitting to your right?
A Yes and --
MS. COHEN: Excuse me, were you going to say "and"?
A And Ms. Moore and Mr. Dobbins.
Q And are we talking about one conversation or a number of conversations?
A We're talking about in terms of timeframe?
Q Sure, yes.
A Whenever you all wrapped up your deposition yesterday.
Q So the only conversation that you had with counsel was a conversation that you had yesterday evening amongst yourself, Ms. Cohen and the two in-house attorneys here on behalf of NAOC?
A With the exception of the original phone call last week to be here for the deposition itself.
Q So your answer is yes, with that one

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exception?
A Yes.
Q About how long was the conversation yesterday evening, approximately?
A Two hours.
Q When did it start?
MS. COHEN: Including ordering dinner?
A Yeah, so 8:00 or 7:30 to 9:30.
Q 7:30 to 9:30 p.m. yesterday evening?
A Yes.
Q Was the purpose of that conversation to provide legal advice that might be of benefit to you in understanding how you should proceed with respect to today's deposition, or was the purpose of that conversation to impart facts to you relative to the categories identified in Top Deposition Exhibit 16?
MS. COHEN: I'm going to object to the question. And to the extent that Mr. Helms is not an attorney and I don't think it's fair to ask him to make a distinction between providing legal advice and imparting facts, to the extent that anything was discussed, it's privileged.
And I frankly am offended by any thought that we would provide facts because that's not

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what is in our job.
MR. EULGEN: Are you instructing the witness not to answer?
MS. COHEN: He can answer if he understands the difference. Does he have another choice? Did we discuss a third thing? I just wasn't sure if the question is saying one thing or the other.
MR. EULGEN: Your objection has been noted, Ms. Cohen.
MS. COHEN: Thank you.
Q You can answer.
A Can you clarify the question?
Q Your counsel has a duty to prepare you with facts known or reasonably available to you, since you are appearing as the corporate designee of NAOC.
So what I'm trying to understand is whether the purpose of the conversation last night, to your knowledge, was to provide you with facts that you then could recite on behalf of NAOC during the deposition today.
A No, no.
MS. COHEN: I wasn't sure what the preface

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of your question was. Clearly it's not my duty to provide him with facts to repeat back. Is that what you said? I disagree with that being my duties. But in any event, he's the guy to provide the facts. He's the deponent.
Q And so in addition to the conversation with counsel and the review of Top Deposition Exhibit 16, the only other aspect of your preparation was to review a photo of my client's Classic Canadian products with the assistance of Google?
A Yes.
Q Did you review any documents other than Top Deposition Exhibit 16 in anticipation of this deposition?
A No.
Q Did you speak to anyone else at the company -- and when I say the company, I mean National Tobacco or any of its affiliates -- concerning this deposition?
A No.
Q Have you spoken with anyone outside of the company, meaning National Tobacco or its affiliates, concerning this deposition?

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A No.
Q Have you let anyone know you were going to be here today?
A I was going to say, other than letting my boss know I was attending a deposition, no.
Q And who is your boss?
A Graham Purdy.
Q And what is Mr. Purdy's title?
A Vice President, Sales.
Q Do you know, is Mr. Purdy the Vice President of Sales for just National Tobacco Company or for other of its affiliates?
MS. COHEN: Do you know?
A He represents the entire product line.
Q I guess what I'm trying to find out is does Mr. Purdy work for just National Tobacco Company --
A As I understand.
Q -- or other of the companies in the National Tobacco family.
A We all work for National Tobacco. That is who our paycheck comes from. In terms of representing the other lines, NAOC, that we cover as well.

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Q Okay. And just to get this out of the way, Mr. Helms, and we will get to the entities and the family tree, if you will, in a couple minutes, but when I reference National Tobacco, you understand that I'm referencing National Tobacco Company, correct?
A Yes.
Q And when I reference NAOC, you understand that I'm referencing North Atlantic Operating Company, Inc., correct?
A Yes.
Q And when I reference NATC, you understand that I'm speaking of North Atlantic Trading Company, Inc., correct?
A Yes.
Q I'm not sure whether any other entities merit --
MS. COHEN: Discussion now?
Q -- discussion now or identifying with acronyms, but I just want to make sure we're speaking the same language with respect to those, okay?
A Yes.
Q What did your conversation with Mr. Purdy

our Zig-Zag cigarette products. And quite frankly, I don't know that they still even use that. I believe we do. I'm not sure.

Q So to your understanding, is that the entity that distributes the Zig-Zag-branded cigarettes?

A That would be the entity that the packaging would state, "Distributed by NACC" or "Manufactured by," well, not manufactured, but "Distributed by NACC."

Q That's what I'm getting at. So you're understanding would be that NACC would be identified on the packaging as distributor of Zig-Zag-branded cigarettes?

A Yes, if that's still what's on the packaging today.

Q And what about NAOC; what is your understanding of the reason that NAOC exists?

A Well, NAOC is typically designated on all of our Zig-Zag packaging, with the exception of the cigarettes.

Q So whereas NACC is the distributor, at least as far as you last knew it, of Zig-Zag-branded cigarettes, NAOC would be identified on the

packaging as the distributor of all other Zig-Zag-branded products?

A Yes.

Q Is NAOC the owner of all of the brands related to the Zig-Zag line?

MS. COHEN: Objection. You can answer if you know.

A No. Bollore owns the Zig-Zag mark, as I understand it, relative to the Zig-Zag papers and accessories, whereas NAOC or NATC, whichever entity it is, owns the Zig-Zag mark relative to Zig-Zag tobacco products.

Q And furthering the line of questioning regarding NATC and NAOC, we already talked a little bit about RBJ, but is RBJ identified on packaging as being the distributor of Stoker-branded products such as the chewing tobacco and snuff you spoke of before?

A Yes, RBJ falls in that packaging.

Q And they're the distributor?

A I don't know if it says "Distributed by" on that one.

Q Would there be another entity other than RBJ that might be the distributor?

A It could be under Stoker's, Inc. I would have to look at our products to clarify.

Q So Stoker's, Inc. is another entity within the family?

A I don't recall.

Q You said you don't recall?

A No, I don't. I'd have to look at the packaging, if it's RBJ or Stoker's or Fred Stoker's.

Q Did you look at any sort of organizational chart in anticipation of having your deposition taken today?

MS. COHEN: Objection. I don't know if there is one.

A No.

Q Did you talk to anyone at the company about what the relationship is between NATC, NACC, NAOC and any of those other entities in anticipation of the deposition today?

A No.

Q So you mentioned that NAOC is the distributor of Zig-Zag-branded tobacco.

What I'd like to understand, to the extent you are able to walk me through it, is what entities are involved in the process of obtaining tobacco all

the way to getting the product to the consumer, and again, speaking specifically of Zig-Zag-branded tobacco products. Strike that.

Are you able to explain a little bit about that process?

MS. COHEN: Which product, because you said, "Strike that." You meant just tobacco products or all tobacco products?

MR. EULGEN: Why don't we start again.

MS. COHEN: All right.

Q What I'm interested in understanding, to the extent you can explain it to me, is which entities are involved in taking the product from raw tobacco all the way to getting Zig-Zag-branded tobacco products to the consumer.

Do you have an understanding of that?

MS. COHEN: Objection. And he can answer.

A National Tobacco serves as the sales and marketing arm, for that matter, I believe maybe the manufacturing arm, for NAOC. So the people at National Tobacco work to help procure the components of the product, the tobacco, packaging and whatnot, and manufacture it there, or at least coordinate them in production, and warehouse it and, through

And I'm just going to state an objection to that product, that number, to the extent that you had an entire day to discuss any legal agreements with the general counsel of the company, and you did so yesterday, I think, for some time.

So I maybe should have said that I might as well have designated James for agreements. If he knows about agreements, he can speak about them, and to the extent that agreements is not overbroad, since every sale is an agreement.

Q Is NAOC or any of its affiliates party to any written contracts that pertain to use of the term "Classic American Blend"?

A I don't think I understand the question.

MS. COHEN: Objection as to form. You're limiting it to an agreement about the term?

Q Has NAOC or any of its affiliates entered into any written agreement whereby a third-party would be permitted to use "Classic American Blend" on their products?

A Again, as Counsel said, I think that would be something Legal would answer, but I've never

heard of that.

Q But you didn't prepare, in anticipation of being here today, to respond to any questions of that nature?

A That would be a legal, looks like a legal issue.

Q So I'm saying, you didn't prepare, in anticipation of being here today, to respond to any questions of that nature?

A Other than the response I gave you.

Q Other than responding that it's your belief that that would be better suited to Legal?

A That I have never heard of any third-party use of Classic American Blend for their products.

Q And just to put a fine point on it, you're not aware of any agreement whereby NAOC or any of its affiliates would have allowed any third-party to use "Classic American Blend" on their products?

A I am not aware of such.

Q Did you speak to anyone at the company in anticipation of being here today concerning whether any such agreements exist?

A No.

Q Did you review any files in anticipation

of being here today that might identify for you whether any such agreements exist?

A I did not go through the company's entire file system.

Q But in particular, you didn't go through any files relevant to this question, correct?

A Well, I mean, if I looked at number 1, I basically have to go through every file that's ever been produced by our company.

Q I'm not asking about number 1, I'm asking about number 9.

A You are. You are asking about number 9. But when I look at number 1, you'd have to go through every company file in there, so that's inclusive of 2 through 15.

Q But again, I just want to --

A No, I did not go through any documents. I've never heard of Zig-Zag or Classic American Blend ever being agreed upon to be used elsewhere in any of our meetings.

MR. EULGEN: I have no further questions.

MS. COHEN: Let me just ask a couple questions.

THE WITNESS: Let me use the restroom, if

you don't mind.

(A brief recess was taken.)

EXAMINATION BY MS. COHEN:

Q You were just talking now about the fact that -- I'm going to paraphrase -- but there were some topics that you would just know about and that to find an agreement, let's say, as to whatever topic we were talking about, whether there is an agreement regarding Classic American Blend would entail looking through every file in the company to know if it was in there or not; is that correct? Am I paraphrasing you correctly?

MR. EULGEN: Object on the basis of foundation and that I don't think that that was very clear.

MS. COHEN: Okay.

Q Am I kind of paraphrasing you correctly?

A No. The way I was trying to communicate here is when you read number 1 --

Q That one we know about.

A Basically it's any and all information.

Q Correct.

A So once you do that, everything else is inclusive. And then that becomes very difficult to

individual basis to wholesalers?
MS. COHEN: Objection as to form.
Q You can answer.
A I believe our list is somewhere around $6, but I don't remember the exact number. Actually, maybe even closer to $7, I don't know.
Q Do you have an understanding then of what the retail price of those products would typically be in terms of the range?
A Of the Zig-Zag cans?
Q Right.
A Somewhere from probably $11.99 to $19.99. I guess it really is relative to what state you're in or what tax bracket or what the state excise tax is.
Q And in terms of those list prices to wholesalers, do you typically discount those based on who the wholesaler is or based on the volume you do with them?
A No.
Q So do most wholesalers pay that list price?
A Yeah.
Q Do you know, Mr. Helms, what the wholesale

list price is for Zig-Zag cigarette tubes at the present?
A I believe they're around $2.50 or $3 a carton.
Q And are there 200 in a carton?
A Yes.
Q And what is the typical retail price for a carton then on those products?
A I have seen them anywhere from $3 to $6 or $7.
Q And are those subject to tax?
A Yes.
Q So the same logic, if you will, applies that depending on the state in which the products are being sold, the retail price can vary widely depending on the tax rate?
A Yes.
Q Do you know what the sales volume was in 2008 for products bearing the wording "Classic American Blend"? We can take them one by one.
Pouches?
A Not off the top of my head.
Q Cans?
A Uh-uh.

MS. COHEN: Can you approximate, or not at all?
A Cans, pouches, no, I wouldn't.
Q Did you review any documents in anticipation of the deposition today that would identify for you the sales volume of products bearing the wording "Classic American Blend"?
A No.
Q I'd now like to turn to category number 5 identified on Top Deposition Exhibit 16.
Could you take a look at that, Mr. Helms, and confirm for me that you are prepared to testify regarding all information known or reasonably available to NAOC regarding the subject matter identified in category 5.
A Okay.
MS. COHEN: And let me just state for the record, I also believe that number 5 is overly broad. And I also want to state that the purpose of the 30(b)(6) is to have the best person with knowledge, and that would be Mr. Helms or Jim Murray, but equal knowledge.
MR. EULGEN: I actually think, Ms. Cohen, that is a gross mischaracterization of the

rules, of Rule 30(b)(6), and your obligation under Rule 30(b)(6).
MS. COHEN: Best knowledge. It's not the person with the best knowledge?
MR. EULGEN: Again, we can handle this outside of the context of the deposition, but I think the obligations to prepare a witness under Rule 30(b)(6) are different than what you suggest.
MS. COHEN: I didn't mean to state anything about the obligations of preparation. I am just stating in terms of finding a person who has the best knowledge of the topic. I didn't get into preparation.
MR. EULGEN: I don't really think your testimony --
MS. COHEN: I don't think I need to discuss my preparation with you.
MR. EULGEN: Right. And I don't think that your testimony on the record is relevant at all.
MS. COHEN: Okay.
MR. EULGEN: But I'm going to continue with the witness.

MS. COHEN: Okay.
Q Was NAOC aware of my client's Classic Canadian product at the time that it began to use "Classic American Blend" on its products?
A I can say that I wasn't aware of Canadian Classic.
Q Did you talk to anyone at NAOC regarding whether anyone else had any knowledge of my client's Classic Canadian products at the time that "Classic American Blend" began to be used?
A One, I wouldn't have asked about it if I didn't know about it. But two, I mean, I've never seen the product in the market.
Q But you didn't ask anyone at the company about that in anticipation of the deposition today, did you?
A Ask anybody about what?
Q Whether they were aware of my client's Classic Canadian products at the time that NAOC began to use "Classic American Blend".
A At that time it would have been Clifford Ray and myself.
Q What I'm asking, I'm sorry to interrupt you, I just want to make sure you're getting my

question.
A Okay.
Q I'm asking whether, in anticipation of being here today and rendering testimony in this proceeding, you talked to anyone at the company about whether they were aware of my client's Classic Canadian products back when the company first started using Classic American Blend.
A I don't think there's anybody to even talk to who's still here. But no, no, the answer is no.
Q Was your dad with the company at the time?
A Yes. He was the only one or one of the few.
Q Are there other current officers of NAOC or its affiliates that were with NAOC, NATC, National Tobacco or any of their affiliates back in 1999?
A No, I don't believe so.
Q No one other than Thomas Helms, Jr.?
A Yeah, yes.
Q Is there anyone on the board of directors of NAOC or National Tobacco now who was either an employee, officer or director of National Tobacco NAOC or its affiliates back in 1999?

A Anybody on the board that's been on there since 1999?
MS. COHEN: No, whether they had some other job in '99.
Q Whom either would have been on the board in 1999 or whom would have been an officer or even an employee back in 1999.
MS. COHEN: Right.
A Not that I know of.
Q You don't know either way?
A No, not that I know of.
Q Do you know if anyone at the company raised a concern or question regarding a possible conflict between use of "Classic Canadian" on products by my client and the use of "Classic American Blend" by NAOC?
MS. COHEN: Objection as to form.
A Based on it's, I mean, I've never seen the product in the seven or eight states that I, excuse me, five or six states that I called on. And I have never seen it anywhere else in the U.S. where I have covered.
Q For this question, I'm really not asking about your knowledge. While your knowledge, if you

have knowledge or if you have knowledge of a concern that was raised, I'd like to know of it.
But what I am asking is if anyone at the company, back at the time that "Classic American Blend" first began to be used, raised a concern or question regarding a potential conflict with my client's Classic Canadian brand.
MS. COHEN: Product or brand?
MR. EULGEN: Brand.
MS. COHEN: And now he changed it to brand. Do you understand the question? He changed the question.
A Mr. Eulgen, I don't believe, other than outside of let's say this issue here or whatever it is that Classic Canadian has ever been talked about within our company. I truly can say that.
Q Did you do any inquiry to determine whether it had ever been discussed in anticipation of being here today?
A As we talked about, no, but it would have been Mr. Ray or Mr. Myself -- or myself, and Cliff no longer works with us.
MS. COHEN: I'm sorry, off the record.
(Discussion off the record.)

Classic Canadian.
Q But again, that wasn't a response to the question I asked. And if it would be helpful, I could have the question read back.
But I believe what I asked is, in anticipation of being here today, did you talk with anyone else at the company regarding whether the company had received any inquiries or other communications of the nature identified in category 12.
A No.
MS. COHEN: But just to be sure, I think he was answering. And you said did you ever conduct an inquiry. And I think he was answering, I plugged it into the computer last year. He wasn't limiting it to prior to coming here.
MR. EULGEN: Fine. I was asking prior to coming here, so I think we achieved an understanding in that regard.
Q And now I'd like to turn to category 13 in Top Deposition Exhibit 16.
Mr. Helms, are you prepared to testify regarding any and all information known or

reasonably available to NAOC and its affiliates regarding the subject matter identified in category 13?
A Yes.
Q When did NAOC and its affiliates become aware of my client's Classic Canadian product?
MS. COHEN: Objection as to form. If you can answer.
A Probably with regard to this issue right here.
Q You don't know specifically when NAOC or its affiliates became aware of my client's Classic Canadian products?
A Like I said, I've never seen it out in the field. It was never talked about. I've never seen a product sample --
Q Right, but --
A -- in our Field Sales Department.
Q Right, but you're here though not to represent just the knowledge of Thomas Helms, III but the knowledge of NAOC.
So what I'm asking is, do you know when NAOC first became aware of my client's Classic Canadian products?

MS. COHEN: Objection as to form. I think he was trying to answer that.
A Yeah. It's hard, it's somewhat hard to talk of the collective knowledge of NAOC when many people who were at NAOC are longer here. So what their knowledge was, I don't know.
Q But wouldn't you agree with me it's also hard to testify on behalf of NAOC when you didn't talk to anyone else at the company in anticipation of being or reviewing the files in anticipation of being here, correct?
MS. COHEN: Objection. You don't need to look at files.
A As I understand it, we submitted, I'm sure, all the files that you had requested. So anything that you want to review, you can certainly put in front of me.
Q Right. But I'm just saying --
A I would not try to remember 10 years' worth of files. I wouldn't even attempt to do that. No way.
Q I understand.
A There's no way.
Q I understand. I'm just --

A And interview all the people that would require to be interviewed to answer and be the spokesperson on any and every ounce of information that the company --
Q Right. I'm just saying, you didn't review any of the filings that were produced in anticipation of being here today?
A I did not review any of the files produced in anticipation of being here today, but I'd be glad to go over any file that you'd like to.
Q Do you know one way or another whether anyone else at NAOC is aware of my client's Classic Canadian products? Again, I'm just asking whether you know one way or the other.
A Well, two things I could probably, if I thought about it more, we have always had competitive product shelves or closet, whatnot, and I never recall seeing that product either in the past and certainly not present.
And the only time that I recall seeing or discussing this would have been with Mr. Berry when we were talking about cigarette tobaccos. And that wasn't too long ago, some of the obscure ones that we've never seen, which included Classic Canadian,

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individual basis to wholesalers?
MS. COHEN: Objection as to form.
Q You can answer.
A I believe our list is somewhere around $6, but I don't remember the exact number. Actually, maybe even closer to $7, I don't know.
Q Do you have an understanding then of what the retail price of those products would typically be in terms of the range?
A Of the Zig-Zag cans?
Q Right.
A Somewhere from probably $11.99 to $19.99. I guess it really is relative to what state you're in or what tax bracket or what the state excise tax is.
Q And in terms of those list prices to wholesalers, do you typically discount those based on who the wholesaler is or based on the volume you do with them?
A No.
Q So do most wholesalers pay that list price?
A Yeah.
Q Do you know, Mr. Helms, what the wholesale

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list price is for Zig-Zag cigarette tubes at the present?
A I believe they're around $2.50 or $3 a carton.
Q And are there 200 in a carton?
A Yes.
Q And what is the typical retail price for a carton then on those products?
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A Yes.
Q So the same logic, if you will, applies that depending on the state in which the products are being sold, the retail price can vary widely depending on the tax rate?
A Yes.
Q Do you know what the sales volume was in 2008 for products bearing the wording "Classic American Blend"? We can take them one by one.
Pouches?
A Not off the top of my head.
Q Cans?
A Uh-uh.

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MS. COHEN: Can you approximate, or not at all?
A Cans, pouches, no, I wouldn't.
Q Did you review any documents in anticipation of the deposition today that would identify for you the sales volume of products bearing the wording "Classic American Blend"?
A No.
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A Okay.
MS. COHEN: And let me just state for the record, I also believe that number 5 is overly broad. And I also want to state that the purpose of the 30(b)(6) is to have the best person with knowledge, and that would be Mr. Helms or Jim Murray, but equal knowledge.
MR. EULGEN: I actually think, Ms. Cohen, that is a gross mischaracterization of the

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rules, of Rule 30(b)(6), and your obligation under Rule 30(b)(6).
MS. COHEN: Best knowledge. It's not the person with the best knowledge?
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MS. COHEN: I didn't mean to state anything about the obligations of preparation. I am just stating in terms of finding a person who has the best knowledge of the topic. I didn't get into preparation.
MR. EULGEN: I don't really think your testimony --
MS. COHEN: I don't think I need to discuss my preparation with you.
MR. EULGEN: Right. And I don't think that your testimony on the record is relevant at all.
MS. COHEN: Okay.
MR. EULGEN: But I'm going to continue with the witness.

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Classic Canadian.
Q But again, that wasn't a response to the question I asked. And if it would be helpful, I could have the question read back.
But I believe what I asked is, in anticipation of being here today, did you talk with anyone else at the company regarding whether the company had received any inquiries or other communications of the nature identified in category 12.
A No.
MS. COHEN: But just to be sure, I think he was answering. And you said did you ever conduct an inquiry. And I think he was answering, I plugged it into the computer last year. He wasn't limiting it to prior to coming here.
MR. EULGEN: Fine. I was asking prior to coming here, so I think we achieved an understanding in that regard.
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reasonably available to NAOC and its affiliates regarding the subject matter identified in category 13?
A Yes.
Q When did NAOC and its affiliates become aware of my client's Classic Canadian product?
MS. COHEN: Objection as to form. If you can answer.
A Probably with regard to this issue right here.
Q You don't know specifically when NAOC or its affiliates became aware of my client's Classic Canadian products?
A Like I said, I've never seen it out in the field. It was never talked about. I've never seen a product sample --
Q Right, but --
A -- in our Field Sales Department.
Q Right, but you're here though not to represent just the knowledge of Thomas Helms, III but the knowledge of NAOC.
So what I'm asking is, do you know when NAOC first became aware of my client's Classic Canadian products?

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MS. COHEN: Objection as to form. I think he was trying to answer that.
A Yeah. It's hard, it's somewhat hard to talk of the collective knowledge of NAOC when many people who were at NAOC are longer here. So what their knowledge was, I don't know.
Q But wouldn't you agree with me it's also hard to testify on behalf of NAOC when you didn't talk to anyone else at the company in anticipation of being or reviewing the files in anticipation of being here, correct?
MS. COHEN: Objection. You don't need to look at files.
A As I understand it, we submitted, I'm sure, all the files that you had requested. So anything that you want to review, you can certainly put in front of me.
Q Right. But I'm just saying --
A I would not try to remember 10 years' worth of files. I wouldn't even attempt to do that. No way.
Q I understand.
A There's no way.
Q I understand. I'm just --

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A And interview all the people that would require to be interviewed to answer and be the spokesperson on any and every ounce of information that the company --
Q Right. I'm just saying, you didn't review any of the filings that were produced in anticipation of being here today?
A I did not review any of the files produced in anticipation of being here today, but I'd be glad to go over any file that you'd like to.
Q Do you know one way or another whether anyone else at NAOC is aware of my client's Classic Canadian products? Again, I'm just asking whether you know one way or the other.
A Well, two things I could probably, if I thought about it more, we have always had competitive product shelves or closet, whatnot, and I never recall seeing that product either in the past and certainly not present.
And the only time that I recall seeing or discussing this would have been with Mr. Berry when we were talking about cigarette tobaccos. And that wasn't too long ago, some of the obscure ones that we've never seen, which included Classic Canadian,

EXHIBIT B

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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TOP TOBACCO, L.P.,

Petitioner,

-against-

OPPOSITION NO. 91157248
(as Consolidated)

NORTH ATLANTIC OPERATING CO., INC.,

Respondent.

----------x

DEPOSITION OF JAMES DOBBINS, ESQ.

Tuesday, February 3, 2009

New York, New York

REPORTED BY:

Holly Hough

February 3, 2009
9:55 a.m.

Deposition of JAMES DOBBINS, ESQ., taken by Petitioner, pursuant to Agreement and Amended Notice, at the offices of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799, before Holly Hough, a Shorthand Reporter and Notary Public within and for the State of New York.

APPEARANCES

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Attorneys for Respondent(s)
201 North Street, PO Box 588
Dresden, Tennessee 38225
BY: LeANNE MOORE, ESQ.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto, that the filing, sealing and certification of the within deposition shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the times of the trial;

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed before any Notary Public with the same force and effect as if signed and sworn to before this court.

JAMES DOBBINS, ESQ.,
stating his business address as North Atlantic Tobacco Company, Inc., 3029 W. Muhammad Ali Boulevard, PO Box 32980, Louisville, Kentucky 40232-2980, having been duly sworn by a notary public (Holly Hough), was examined and testified as follows:

EXAMINATION BY MR. EULGEN:

Q Good morning, Mr. Dobbins. My name is Lee Eulgen from Neal, Gerber & Eisenberg in Chicago. We are counsel to Top Tobacco in this proceeding, which I'm sure you understand.

A Yes.

Q Could you state your name for the record.

A James W. Dobbins.

Q And I presume you have been deposed before?

A No, I have not.

MS. COHEN: Sorry to interrupt. I do think I want to discuss a housekeeping issue or two. And since you're moving along so quickly, I don't know when would be a good time to interrupt for them. So it's up to you, now or after you're done with your initial --

Dobbins 106

Q Was the legal clearance process for Zig-Zag Classic American Blend still ongoing when you joined the company in 1999?
A Legal clearance process?
MS. COHEN: I don't know.
A I'm afraid I don't even understand what that means.
Q When I speak about a legal clearance process, I'm talking about the process you just described whereby, at least now, as you described it, the business folks would come to you with a proposed brand and you would do an initial round of thinking, if you will, about it, you would ask Ms. Moore to do an initial round of thinking and she may also do a scan of U.S. PTO records, and ultimately that may culminate with outside counsel.
Is that the process that took place with respect to Zig-Zag Classic American Blend?
A Well, Ms. Moore wasn't with the company then.
MS. COHEN: Right, so I don't know what you mean currently.
A I was on my own back then.
MS. COHEN: Right.

Dobbins 107

A When I arrived at the company, Zig-Zag Classic American Blend had been decided on. I'm not sure that answers the question, but it might clarify the facts a little bit.
Q And was the decision to adopt Classic American Blend alone after you joined the company?
A And when you say adopt, you mean register?
Q Use and register.
A Use and register?
Q Correct.
MS. COHEN: It's two different --
A I think it was used, just by definition Zig-Zag Classic American.
Q I just want to make sure we're not talking past each other because --
A I think we need to clarify where we are.
Q -- because as I understand your prior testimony to be was that there was a clearance process for Zig-Zag Classic American Blend, which I now understand predated your time at the company, but that subsequent to the clearance process for Zig-Zag Classic American Blend, there was a clearance process for Classic American Blend; do I have that right?

Dobbins 108

A No.
Q How do I have that wrong?
A I didn't testify as to how they came to Zig-Zag Classic American Blend, who they reviewed that with or what. So I have no knowledge of that.
MS. COHEN: I think when you talked about first and second.
A I inherited Classic American Blend. And then subsequent to that, as I looked at it, and we said this is how we're going market, we should probably register this, and then there would have been a clearance process on the registration side.
Q And what would the clearance process on the registration side be?
A It would have been similar to what I described with the absence of Ms. Moore.
Q And so at that time would you have gone through that process both with respect to Zig-Zag Classic American Blend, which you have testified you inherited, so to speak, and Classic American Blend?
A Yes.
Q And do you recall being involved in that process?
A Yes.

Dobbins 109

Q So again, just so we understand one another, you recall being involved in a process whereby the goal was to ascertain the registerability of Zig-Zag Classic American Blend and Classic American Blend?
MS. COHEN: As opposed to availability for some other reason, is that what you're saying, only?
MR. EULGEN: I didn't say only or not.
Q I'm just asking, among the goals of the clearance process, I'm asking whether you were involved in the clearance process for the purpose of ascertaining the registerability of Zig-Zag Classic American Blend and Classic American Blend?
A Yes.
Q Do you recall approximately when that occurred?
A Well, it would have been two different timeframes.
Q Describe for me --
A We talking, we're mixing the two as if they occurred simultaneously. They did not.
Q That's what I want to understand. So please describe --

Dobbins 150

Q I'm asking whether you recall who was involved in the decision to make trademark filings as to either Classic American Blend or Zig-Zag Classic American Blend.

MS. COHEN: The question is only do you recall. I'm just trying to --

A Okay.

MR. EULGEN: You don't have to make a statement, Ms. Cohen, as to every question. I mean, it's almost like I'm getting two answers, one is that's your opinion and one is the witness's.

So if you'd refrain from doing that, I'd appreciate it. If you have a objection to make, make it for the record. You're just here to make a record or to instruct your client not to answer.

A So the question is do I recall who was involved on either or both of these. And the answer would be, those being Zig-Zag's American Blend and Classic American Blend, the answer would be, I do not have a specific recollection of any of the conversations. I could try to guess.

Q I'm talking about who was there. I was

Dobbins 151

asking who was involved.

A I can say probably who was involved, but I mean, I don't sitting here today have a firm recollection.

Q Who probably was involved?

A It would have been myself, someone from Marketing, and at the time Tom wouldn't have been in the decision, he would have been informed of the decision. Probably myself and marketing.

Q Wouldn't it have been Clifford Ray at the time in Marketing?

A It could have been Cliff, it could have been Jim Murray, Tommy may have been involved, Tom Helms, III, he may have. I don't know.

Q And have all those individuals, Mur ray, Ray and Tom, III been Director of Marketing at one time or another for National Tobacco?

A They have executive-level marketing people at our company. I don't kow that Cliff or Jim ever was a director.

Q Again, without getting into issues of privilege, and we may have already gotten the answer to this question, I just want to understand your recollection as to your role in the decision to seek

Dobbins 152

to register Classic American Blend and/or Zig-Zag Classic American Blend.

MS. COHEN: Objection.

A I think we're going to get into paradigm problems again, but I'll try the best I can because you think about it differently than I think about it.

Q I'm just asking about your involvement in the decision to seek to register Zig-Zag Classic American Blend and Classic American Blend.

A And what was my role in that?

Q Yes.

A I was the General Counsel. And we would discuss the business, the importance of doing that, relevant business importance of doing that, of registering versus just having it on the brand, on the product.

And I would have discussed it with outside counsel and directed them as to what the business decision was, which was to go forward with an application.

Q And was Ms. Moore with the company during that timeframe?

A She was not.

Dobbins 153

Q So were you the sole in-house counsel during that timeframe?

A I was the sole in-house counsel during that timeframe.

MR. EULGEN: I'm going to tender to the court reporter what I'd ask to be marked as Top Deposition Exhibit 2 and then hand it to the witness. I'm giving a copy to Ms. Cohen as well.

(Top Exhibit 2, United States Patent and Trademark Office document, marked for identification, as of this date.)

Q Do you recognize Top Deposition Exhibit 2?

A Not at all.

Q Do you know what Top Deposition Exhibit 2 is, based on your review of it?

MS. COHEN: Well, I don't know if he's reviewed it yet.

A I'm looking, I mean, at the cover page.

Q It's actually a collective exhibit, so what I'd really like to speak about first is the first document, and we will go back from there.

A I'm just wondering if there is any sort of supporting documentation that I might have signed or

Dobbins 262

no. Okay?
Q That's exactly what I was getting at.
A Yes. I think that that was coincident more than anything else.
MS. COHEN: Coincidence or coincident?
THE WITNESS: Coincidental. I won't agree with anything anybody says.
Q So the Master Settlement Agreement basically just created a market opportunity for a product that either was already under development or was already out?
MS. COHEN: Objection as to form.
A Probably.
Q Do you know when Classic American Blend brand of products were first sold?
A I do not have the first date of sale in my memory.
Q Do you know how long their development took?
A I do not know.
Q Have Zig-Zag Classic American Blend Classic American Blend products been successful?
MS. COHEN: Objection as to form.
A Define successful.

Dobbins 263

Q How would you define that in terms of --
A I don't have a definition of successful in terms of market launches.
Q Have Classic American Blend products been consistently profitable for National Tobacco and its affiliates?
A I believe they have been, yes, mostly.
Q When you say mostly, what were you thinking of that hasn't been profitable?
A I think there may have been times that the pricing lagged the MSA obligation, but I don't really remember. If there was, it was a short-lived time.
Q And what happened when the pricing lagged the MSA obligation?
A We would not make as much money.
Q Because why?
A Because the pricing would be less than the cost plus the MSA obligation.
Q And you have to pay an MSA obligation with respect to the Classic American Blend-branded products?
A Yes.
Q Do you know if Zig-Zag Classic American

Dobbins 264

Blend or Classic American Blend were design to compete with particular brands?
MS. COHEN: Objection as to form.
A Was it designed to compete with? Explain how you mean compete with.
Q Do you know if there are particular brands that National Tobacco and its affiliates were targeting when they developed Zig-Zag Classic American Blend and Classic American Blend?
A I'll preface the answer with what I said before, which was this was developed before I arrived at the company. So if there were conversations along those lines, I was not privy to them.
I have heard nothing since then to tell me specifically that this line was designed to compete with that product or, you know, generally speaking, the product is designed to compete with all products, from cigarettes on down.
Q But specifically with tier-four cigarettes?
A No.
Q If you could take a look at Top Deposition Exhibit 9 and turn to page 0383.

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A On what?
Q 0383, it's toward the back. Go ahead and skip to the back.
A Got it. This is presuming, I believe a different document, okay. This is the first page, and a buy-down survey, okay.
Q What is a buy-down survey?
A Apparently it's a document. Let me read the memo and see if I can anything on it.
MS. COHEN: If you want him to. He doesn't know, but he can read.
A I have a cc down here, so apparently I got this sometime.
MS. COHEN: And again, if any of that should have been attorneys' eyes only, let me know, to the extent it matters.
A This is pretty stale stuff.
MS. COHEN: This is basically, I think I may have --
A Some what we have here is a memo from Jim to various people, copying various people, talking about a Bugler Wholesale Buy-Down Program. What do you want me to look at, spreadsheets?
Q I'm actually just really wondering what

Dobbins 286

Exhibit 11.

Are you aware of any actual confusion, either consumer confusion or confusion in the trade, as between NAOC's Classic American Blend mark and Top's Classic Canadian mark?

A Am I aware of confusion at what level, any level?

Q Yes.

A I am aware of no confusion by anybody of that on those brands.

Q When did you first learn of my client's Classic Canadian mark?

MR. EULGEN: And rather than you guys, Ms. Cohen and Mr. Dobbins --

MS. COHEN: I would not answer them. He was talking out loud.

A Okay. I'm uncertain as to whether that's going to get into privileged information. So I'll guess I'll defer answer. Maybe you guys can talk about.

MR. EULGEN: Are you instructing your client not to respond? I'm asking simply of the timing --

MS. COHEN: Okay.

Dobbins 287

MR. EULGEN: -- at which --

MS. COHEN: Okay, so the date is just the date, if you know when. When was the question.

A Okay.

Q I'm asking when you first learned of my client's Classic Canadian mark.

MS. COHEN: Right.

A I don't know. I just don't know.

Q Is it your belief that it would have been as a part of participation in this proceeding?

A That is possibly correct.

Q But you don't know either way?

A I don't know.

MR. EULGEN: I'd like to hand to the court reporter a document to be marked as Top Deposition Exhibit 12, which is titled Applicant's Response to Opposer's First Set of Interrogatories. I'll give a copy to Ms. Cohen, as well.

(Top Exhibit 12, Applicant's Response to Opposer's First Set of Interrogatories, marked for identification, as of this date.)

MS. COHEN: Thanks.

Q Mr. Dobbins, are you familiar with Top

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Deposition Exhibit 12?

MS. COHEN: Objection as to form.

A Am I familiar with it? I've seen it, yes. This is what I was looking at yesterday.

Q Can you turn to the second-to-the-last page of Top Deposition Exhibit 12.

A What number is that?

Q It's not numbered.

A It's not numbered? I have numbers on them.

MS. COHEN: Except for the last two pages.

A That one is the one that's not numbered, okay, fine. Yes, I've got it.

Q Do you see your signature on that page?

A I see my signature, yes.

Q Does your signature indicate that you reviewed Top Deposition Exhibit 12 and were asserting that you're informed and believe that the matters stated in it are true and on that ground allege that the matters stated in it are true?

A Do you want me to read it to you?

Q No.

A You want me to read it to you, okay. It says, "I, the undersigned, declare as follows: I am

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the Senior Vice President of North Atlantic Operating Company, Inc., a Delaware corporation. I have read the foregoing, Applicant's Response to Opposer's First Set of Interrogatories. I am informed and believe that the matters stated in it are true and on that ground allege that the matters stated in it are true."

Do you want me to read any more or are we good there?

Q And you signed it because you were attesting to the truth of what was stated in what you just read?

A I signed so that I could declare as follows, I can read it to you one more time.

MS. COHEN: Exactly.

A The court reporter's going to shoot me, but I can try to read it again.

Q No, I don't need you to read it again, Mr. Dobbins. What I want you to do is simply to confirm that the reason you signed is because you are confirming the truth of everything stated on the page.

A I guess you do want me to read it again. "I the undersigned --"

EXHIBIT C

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

TOP TOBACCO, L.P.,	)	Opposition Nos. 91157250
	)	91157248
Opposer/Petitioner,	)	
	)	and
v.	)	
	)	Cancellation No. 92043186
	)	
NORTH ATLANTIC OPERATING CO., INC.,	)	
	)	**Consolidated as**
Applicant/Registrant.	)	**Proceeding No. 91157248**

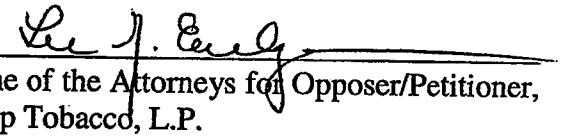
NOTICE OF DEPOSITION

To: Mark J. Speciner, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036

PLEASE TAKE NOTICE THAT Opposer/Petitioner Top Tobacco, L.P., by and through its attorneys, and pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, will take the oral deposition of North Atlantic Operating Co, Inc., regarding the matters set forth in the attached Appendix A at the offices of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York, before a duly-qualified notary public or other person authorized by law to record depositions, beginning Thursday, August 25, 2005 at 9:30 a.m., and continuing thereafter until completed.

Respectfully submitted,

Dated: July 19, 2005



One of the Attorneys for Opposer/Petitioner,
Top Tobacco, L.P.

Antony J. McShane
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Sarah E. Smith
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Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Appendix A

Pursuant to Fed. R. Civ. P. 30(b)(6), North Atlantic Operating Co, Inc. ("Applicant/Registrant") is required to designate one or more officers, directors or managing agents or other such persons who consent to testify on its behalf with respect to the matters set forth below. The person(s) so designated shall testify as to the matters known or reasonably available with respect to the following:

1. Any and all information known or reasonably available to Applicant/Registrant regarding its affiliated and/or controlled businesses, companies, licensors, licensees and other entities.

2. Any and all information known or reasonably available to Applicant/Registrant regarding every designation comprised in whole or in part of the phrase "CLASSIC AMERICAN BLEND" or any other term that is visually or phonetically similar thereto (collectively, the "CLASSIC AMERICAN BLEND Marks"), used or owned at any time by Applicant/Registrant as well as the goods and/or services used therewith, and the inclusive dates of use thereof.

3. Any and all information known or reasonably available to Applicant/Registrant regarding each transaction by which it is claimed that any rights or license in or to the CLASSIC AMERICAN BLEND Marks have passed to or from Applicant/Registrant.

4. Any and all information known or reasonably available to Applicant/Registrant regarding all products and services marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks including: the geographic scope of such use; the price at which each product or service is sold; the annual volume of sales of the product or service in both dollars and units; the unit sizes in which the product is sold; the class

of purchasers of the product or service; the channels of trade by which the product reaches the ultimate user of such goods or services; and all types of stores or forums in which the products or services are or have been offered or sold.

5. Any and all information known or reasonably available to Applicant/Registrant regarding the means by which each of its products and services marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks is or has been advertised or promoted, as well as the annual expenditures for each.

6. Any and all information known or reasonably available to Applicant/Registrant regarding each package or label designer, advertising agency, market research expert or consultant who has performed services in connection with products or services promoted or sold in association with the CLASSIC AMERICAN BLEND Marks.

7. Any and all information known or reasonably available to Applicant/Registrant regarding any press or publicity release concerning any product or service promoted in association with the CLASSIC AMERICAN BLEND Marks.

8. Any and all information known or reasonably available to Applicant/Registrant regarding agreements to which Applicant/Registrant has been or is a party which refer or relate in any way to the CLASSIC AMERICAN BLEND Marks (including all amendments and modifications thereto).

9. Any and all information known or reasonably available to Applicant/Registrant regarding the reason(s) for its adoption of one or more of the CLASSIC AMERICAN BLEND Marks for each product and service marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks as well as the procedure followed by Applicant/Registrant in its decision to adopt the CLASSIC AMERICAN BLEND Marks for

each such product and service, including but not limited to any trademark search reports commissioned by Applicant/Registrant.

10. Any and all information known or reasonably available to Applicant/Registrant regarding each poll, survey, consumer study or market research effort initiated by or on behalf of Applicant/Registrant relating in any way to the CLASSIC AMERICAN BLEND Marks, or to the packaging, labeling or advertising of each product marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks.

11. Any and all information known or reasonably available to Applicant/Registrant regarding any mail, inquiries, complaints, requests for refunds, orders, checks, or other communications which in any manner were intended for Opposer/Petitioner, which relate to any goods or services marketed, distributed or sold by Opposer/Petitioner or any of its affiliates, or which in any way tend to indicate an association or connection between Opposer/Petitioner and Applicant/Registrant.

12. Any and all information known or reasonably available to Applicant/Registrant regarding goods or services marketed, distributed or sold by Opposer/Petitioner under its CLASSIC CANADIAN mark.

13. Any and all information known or reasonably available to Applicant/Registrant concerning future plans for the marketing, promotion, or distribution of any products that are currently or may in the future be distributed, sold, or offered for sale under the CLASSIC AMERICAN BLEND Marks.

14. Any and all discovery responses and documents produced by Applicant/Registrant in this matter.

CERTIFICATE OF SERVICE

I, Lee J. Eulgen, an attorney, state that I served a copy of the foregoing Notice of Deposition upon:

Mark J. Speciner, Esq.
Cowan Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036-6799

via First Class U.S. Mail, postage prepaid, on this 20th day of July, 2005.

Lee J. Eulgen

EXHIBIT D

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

TOP TOBACCO, L.P.,	)	Opposition Nos. 91157250
	)	91157248
Opposer/Petitioner,	)	
	)	and
v.	)	
	)	Cancellation No. 92043186
	)	
NORTH ATLANTIC OPERATING CO., INC.,	)	
	)	**Consolidated as**
Applicant/Registrant.	)	**Proceeding No. 91157248**

NOTICE OF DEPOSITION

To: Arlana S. Cohen, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036

PLEASE TAKE NOTICE THAT Opposer/Petitioner Top Tobacco, L.P., by and through its attorneys, and pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, will take the oral deposition of North Atlantic Operating Co, Inc., regarding the matters set forth in the attached Appendix A at the offices of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York, before a duly-qualified notary public or other person authorized by law to record depositions, beginning Wednesday, January 7, 2009 at 9:00 a.m., and continuing thereafter until completed.

Respectfully submitted,

Dated: December 17th, 2008

One of the Attorneys for Opposer/Petitioner,
Top Tobacco, L.P.

Antony J. McShane
Lee J. Eulgen
Sarah E. Smith
Lawrence E. James, Jr.
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Appendix A

Pursuant to Fed. R. Civ. P. 30(b)(6), North Atlantic Operating Co, Inc. ("Applicant/Registrant") is required to designate one or more officers, directors or managing agents or other such persons who consent to testify on its behalf with respect to the matters set forth below. The person(s) so designated shall testify as to the matters known or reasonably available with respect to the following:

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2. Any and all information known or reasonably available to Applicant/Registrant regarding every designation comprised in whole or in part of the phrase "CLASSIC AMERICAN BLEND" or any other term that is visually or phonetically similar thereto (collectively, the "CLASSIC AMERICAN BLEND Marks"), used or owned at any time by Applicant/Registrant as well as the goods and/or services used therewith, and the inclusive dates of use thereof.

3. Any and all information known or reasonably available to Applicant/Registrant regarding each transaction by which it is claimed that any rights or license in or to the CLASSIC AMERICAN BLEND Marks have passed to or from Applicant/Registrant.

4. Any and all information known or reasonably available to Applicant/Registrant regarding all products and services marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks including: the geographic scope of such use; the price at which each product or service is sold; the annual volume of sales of the product or service in both dollars and units; the unit sizes in which the product is sold; the class

of purchasers of the product or service; the channels of trade by which the product reaches the ultimate user of such goods or services; and all types of stores or forums in which the products or services are or have been offered or sold.

5. Any and all information known or reasonably available to Applicant/Registrant regarding the means by which each of its products and services marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks is or has been advertised or promoted, as well as the annual expenditures for each.

6. Any and all information known or reasonably available to Applicant/Registrant regarding each package or label designer, advertising agency, market research expert or consultant who has performed services in connection with products or services promoted or sold in association with the CLASSIC AMERICAN BLEND Marks.

7. Any and all information known or reasonably available to Applicant/Registrant regarding Applicant/Registrant's creation, adoption or selection of the CLASSIC AMERICAN BLEND Marks.

8. Any and all information known or reasonably available to Applicant/Registrant regarding any press or publicity release concerning any product or service promoted in association with the CLASSIC AMERICAN BLEND Marks.

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Marks for each product and service marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks as well as the procedure followed by Applicant/Registrant in its decision to adopt the CLASSIC AMERICAN BLEND Marks for each such product and service, including but not limited to any trademark search reports commissioned by Applicant/Registrant.

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15. Any and all discovery responses and documents produced by Applicant/Registrant in this matter.

CERTIFICATE OF SERVICE

I, Lawrence E. James, Jr., an attorney, state that I served a copy of the foregoing Notice of Deposition upon:

Arlana S. Cohen, Esq.
Cowan Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036-6799

via First Class U.S. Mail, postage prepaid, on this 17th day of December, 2008.

Lawrence E. James, Jr.

EXHIBIT E

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

TOP TOBACCO, L.P.,	)	Opposition Nos. 91157250
	)	91157248
Opposer/Petitioner,	)	
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v.	)	
	)	Cancellation No. 92043186
	)	
NORTH ATLANTIC OPERATING CO., INC.,	)	
	)	**Consolidated as**
Applicant/Registrant.	)	**Proceeding No. 91157248**

AMENDED NOTICE OF DEPOSITION

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Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036

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Respectfully submitted,

Dated: January 31, 2009

One of the Attorneys for Opposer/Petitioner,
Top Tobacco, L.P.

Antony J. McShane
Lee J. Eulgen
Sarah E. Smith
Lawrence E. James, Jr.
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Two North LaSalle Street
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Appendix A

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of purchasers of the product or service; the channels of trade by which the product reaches the ultimate user of such goods or services; and all types of stores or forums in which the products or services are or have been offered or sold.

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6. Any and all information known or reasonably available to Applicant/Registrant regarding each package or label designer, advertising agency, market research expert or consultant who has performed services in connection with products or services promoted or sold in association with the CLASSIC AMERICAN BLEND Marks.

7. Any and all information known or reasonably available to Applicant/Registrant regarding Applicant/Registrant's creation, adoption or selection of the CLASSIC AMERICAN BLEND Marks.

8. Any and all information known or reasonably available to Applicant/Registrant regarding any press or publicity release concerning any product or service promoted in association with the CLASSIC AMERICAN BLEND Marks.

9. Any and all information known or reasonably available to Applicant/Registrant regarding agreements to which Applicant/Registrant has been or is a party which refer or relate in any way to the CLASSIC AMERICAN BLEND Marks (including all amendments and modifications thereto).

10. Any and all information known or reasonably available to Applicant/Registrant regarding the reason(s) for its adoption of one or more of the CLASSIC AMERICAN BLEND

Marks for each product and service marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks as well as the procedure followed by Applicant/Registrant in its decision to adopt the CLASSIC AMERICAN BLEND Marks for each such product and service, including but not limited to any trademark search reports commissioned by Applicant/Registrant.

11. Any and all information known or reasonably available to Applicant/Registrant regarding each poll, survey, consumer study or market research effort initiated by or on behalf of Applicant/Registrant relating in any way to the CLASSIC AMERICAN BLEND Marks, or to the packaging, labeling or advertising of each product marketed, distributed, sold, or offered for sale under or in connection with the CLASSIC AMERICAN BLEND Marks.

12. Any and all information known or reasonably available to Applicant/Registrant regarding any mail, inquiries, complaints, requests for refunds, orders, checks, or other communications which in any manner were intended for Opposer/Petitioner, which relate to any goods or services marketed, distributed or sold by Opposer/Petitioner or any of its affiliates, or which in any way tend to indicate an association or connection between Opposer/Petitioner and Applicant/Registrant.

13. Any and all information known or reasonably available to Applicant/Registrant regarding goods or services marketed, distributed or sold by Opposer/Petitioner under its CLASSIC CANADIAN mark.

14. Any and all information known or reasonably available to Applicant/Registrant concerning future plans for the marketing, promotion, or distribution of any products that are currently or may in the future be distributed, sold, or offered for sale under the CLASSIC AMERICAN BLEND Marks.

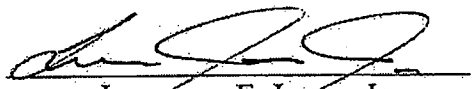
15. Any and all discovery responses and documents produced by Applicant/Registrant in this matter.

CERTIFICATE OF SERVICE

I, Lawrence E. James, Jr., an attorney, state that I served a copy of the foregoing Amended Notice of Deposition upon:

Arlana S. Cohen, Esq.
Cowan Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036-6799

via First Class U.S. Mail, postage prepaid, on this 31st day of January, 2009.



Lawrence E. James, Jr.

EXHIBIT F

NEAL ▪ GERBER ▪ EISENBERG

Antony J. McShane
Attorney at Law

Tel 312.269.8486
Fax 312.578.2808
amcshane@ngelaw.com

December 30, 2008

VIA FACSIMILE AND EMAIL

Heather L. Jensen, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036

Re: Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.
Opp. Nos. 91157248 and 91157250, Cancellation No. 92043186

Dear Heather:

I write to confirm the agreement we reached today regarding an extension of the discovery period in the above-matter.

We agreed to stipulate an extension of the discovery period for 45 days to and including February 20, 2009, based upon the following understandings:

(i) Messrs. Dobbins and Murray, and North Atlantic Operating Co., Inc.'s Rule 30(b)(6) designee(s), will be made available for depositions during the week of February 2, 2009, though we understand that Ms. Cohen is in the process of confirming the specific dates. If for some reason they are not available during that week, we have your representation (and Ms. Cohen's) that they will be made available as soon thereafter as is possible;

(ii) you have confirmed that Clifford Ray is no longer employed by or associated with NAOC or any of its affiliates, is not represented by your firm, and that we are free to contact him directly; and

(iii) NAOC will not be serving any deposition notices in this matter, and the agreed upon extension is therefore for the parties to conclude the noticed depositions (and any follow up items of discovery that may result therefrom).

If your understanding of our agreement is inconsistent with the foregoing in any way, please let me know immediately. Otherwise, we will forward a proposed Stipulation and Amended Depositions Notices early next week. Once that Stipulation is filed, we can jointly turn our attention to Ms. Cohen's suggestion that the parties seek to agree upon stipulations related to the Polaroid factors that may narrow the area of dispute in the case.

I realize that this is not a matter to which you have been previously assigned, so we appreciate your efforts in connection with the foregoing.

Very truly yours,

Antony J. McShane

AJM:lam

cc: Arlana S. Cohen, Esq.
Lee J. Eulgen, Esq.

Miller, Leeann

From: Miller, Leeann on behalf of McShane, Antony J.
Sent: Tuesday, December 30, 2008 1:09 PM
To: hlj@cll.com
Subject: Top Tobacco v. NAOC, Consolidated Opposition No. 91157248
Attachments: Letter Heather Jensen.pdf

Antony J. McShane
NEAL ▪ GERBER ▪ EISENBERG

Neal, Gerber & Eisenberg LLP
Two North LaSalle Street ▪ Suite 2200
Chicago IL ▪ 60602-3801
312.269.8486 direct
312.578.2708 fax
amcshane@ngelaw.com ▪ www.ngelaw.com

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(312) 269-8000
www.ngelaw.com

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NUMBER OF PAGES WITH COVER PAGE:

DATE: December 30, 2008 **TIME:** 1:11 PM **C/M NO.:** 016471.0701

FROM: Antony J. McShane **PHONE:** (312) 269-8486 **FAX:** (312) 578-2808

TO:

NAME:	FAX NO.:	PHONE NO.:
Heather L. Jensen, Esq. Cowan, Liebowitz & Latman, P.C.	212-575-0671	212-790-9293

MESSAGE:

EXHIBIT G

From: McShane, Antony J.
Sent: Tuesday, December 30, 2008 3:19 PM
To: Jensen, Heather
Cc: Eulgen, Lee J.
Subject: RE: Top Tobacco v. NAOC, Consolidated Opposition No. 91157248

Heather:

Thanks for your email confirming our agreement. We will file the consented request electronically by the end of next week.

Tony McShane
Neal Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 2200
Chicago, Illinois 60602-3801
312.269.8486
312.578.2808 (f)
amcshane@ngelaw.com
www.ngelaw.com

From: Jensen, Heather [mailto:HLJ@cll.com]
Sent: Tuesday, December 30, 2008 1:23 PM
To: McShane, Antony J.
Subject: RE: Top Tobacco v. NAOC, Consolidated Opposition No. 91157248

Dear Antony:

Thank you for your letter. The understanding you lay out is correct. However, in order to make sure that the Board agreed to extend the discovery period before its current end date, please confirm that you will be filing the consented request for an additional 45 days of discovery electronically by early next week.

Sincerely,
Heather Jensen

From: Miller, Leeann [mailto:lmiller@ngelaw.com] **On Behalf Of** McShane, Antony J.
Sent: Tuesday, December 30, 2008 2:09 PM

To: Jensen, Heather
Subject: Top Tobacco v. NAOC, Consolidated Opposition No. 91157248

Antony J. McShane
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amcshane@ngelaw.com ▪ www.ngelaw.com

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EXHIBIT H

From: Cohen, Arlana S. [mailto:ASC@cll.com]
Sent: Friday, January 30, 2009 9:58 AM
To: Eulgen, Lee J.
Subject: top

I have some stuff to produce to you. Mostly printouts from PTO and some point of purchase I found in a box which I don't know if Mark produced to you...Do you want us to fedex for Monday delivery to you, or give to you when you get here?

Arlana S. Cohen, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
ph: (212) 790-9237
fax: (212) 575-0671
e-mail: asc@cll.com
Secretary: LaToya R. Middleton
e-mail: lrm@cll.com

EXHIBIT I

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

TOP TOBACCO, L.P.,

Opposer-Petitioner,

v.

NORTH ATLANTIC OPERATING CO., INC.,

Applicant-Respondent.

Opposition Nos. 91157248
91157250

Cancellation No. 92043186

Consolidated Proceeding No. 91157248

REPLY IN OPPOSITION TO RENEWED MOTION FOR ENTRY OF THE SANCTION OF DEFAULT AND DEFAULT JUDGMENT

Applicant-Respondent North Atlantic Operating Co., Inc. ("NAOC") hereby respectfully submits its reply to Opposer-Petitioner Top Tobacco L.P.'s ("Top") Renewed Motion for the Entry of the Sanction of Default and Default Judgment:

Top has renewed its motion for sanctions on the basis of language in the Board's July 25, 2008 order (the "July Order") that "if it has not already fully complied with the Board's prior order [of August 13, 2007], defendant is ordered to provide full and complete responses to the outstanding discovery requests noted above ten (10) days from the mailing date of this order, failing which plaintiff may file a renewed motion for sanctions." Top has misleadingly failed to point out the first clause of this statement in its present motion, however, since NAOC has already fully complied with the Board's order of August 13, 2007 (the "August Order"), it was not required to provide any further information within 10 days of the Board's July 25, 2008 order and Top's renewed motion for sanctions is inappropriate.

Applicant Has Complied with the Board's August Order

In its August 13, 2007 order, the Board required NAOC to provide the following information to Top:

- With respect to Interrogatory No. 9, whether the document NAOC previously provided in response was confidential or privileged and whether Applicant had any further information or documents responsive to the interrogatory
- With respect to Interrogatory No. 21, further detail regarding the person most knowledgeable with respect to polls, surveys, consumer study or market research.
- With respect to Document Request No. 9, all documents that identify the persons most knowledgeable concerning the date of first use of CLASSIC AMERICAN BLEND
- A privilege log "where appropriate" if NAOC is invoking a claim of privilege

In its letters to Top's counsel dated October 19, 2007, October 29, 2007 and December 14, 2007, copies of which were attached to Top's present motion, NAOC provided the following information:

- A list of trade shows in which NAOC participated from 2001 through proposed participation in 2008, designating said list "confidential attorneys' eyes only," in complete response to Interrogatory No. 9.
- The names and contact information for the persons most knowledgeable about Interrogatory No. 21 and Document Request No. 9.
- The statement that a review of all documents produced by NAOC to its counsel did not reveal any documents being withheld as privileged and thus no privilege log was necessary.

The information which NAOC has provided since the Board's August Order has sufficiently satisfied the requirements of that order. Top now possesses all of the information which it sought to the extent it was within NAOC's ability to provide. Top's only outstanding complaints are that (1) Top's counsel does not believe NAOC's statement that none of its produced documents are privileged, (2) NAOC did not sufficiently restrict the information it provided in response to Interrogatory No. 9 to trade shows featuring the CLASSIC AMERICAN BLEND mark and (3) NAOC has failed to further verify its responses.

With respect to Top's first complaint, in response to the Board's August Order requesting a privilege log if appropriate, NAOC has clearly answered that none of the documents it has produced may be classified as privileged and thus the order for a privilege log is moot. Top attacks this statement by alleging that such a statement is incredible or NAOC has violated its obligation to provide all documents in its possession, custody or control but Top's mere suspicion is insufficient to counter NAOC's response that it has produced what has been requested and nothing which has been produced may be labeled as privileged. Thus, Top's base assertion does not alter the fact that NAOC has complied with the Board's August Order.

Furthermore, with respect to Top's second complaint, NAOC has provided the information requested by Interrogatory No. 9 to the best of its ability. Although Top insists that it be given a list of just the trade shows that featured the CLASSIC AMERICAN BLEND mark, NAOC's records merely list the trade shows in which it participated but do not further specify what marks were featured at which shows, a fact which is clearly seen by the records provided by NAOC's counsel with its December 14, 2007 letter. NAOC can not provide information

which it does not possess and it has given Top the information which it does possess. Thus, NAOC has again complied with the Board's August Order with respect to this point.

Finally, with respect to Top's third complaint, NAOC believes that its original verification for its interrogatory responses covered the ministerial names, addresses and lists it provided in further clarification of its original responses. However, in the interest of resolving the present discovery dispute, NAOC is attaching formal Supplemental Responses to Interrogatories and Requests for Production of Documents which contain the verification Top seeks for the same information NAOC has previously supplied.

NAOC Has Not Willfully Evaded the Board's Orders

As NAOC has previously argued, by Top's own statements, a party must show willful evasion before a sanction of default judgment may be imposed. See *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 USPQ 99 (TTAB 1977); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000). However, in the present case, NAOC has done its best to comply with Top's discovery demands. In its July Order, the Board found that since NAOC was unaware of the Board's August Order, the imposition of sanctions would be inappropriate, thus recognizing that NAOC did not willfully violate its August Order. Indeed, as soon as NAOC was made aware of the August Order, it immediately informed Top it would provide the requested information and began to compile that information. NAOC then subsequently did supply Top with the information it sought in a timely manner, namely by October 2007. When Top requested further clarification with respect to that information, NAOC did its best to comply and provided the further clarification by December 2007, as seen from the exhibits to Top's own motion. In this manner, NAOC fully complied with the requirements of the Board's August 2007 order.

NAOC complied with the Board's August Order through its letters of October and December 2007 and thus did not need to take further action with respect to the Board's July Order. The Board's July Order explicitly states that NAOC should comply with the August Order within 10 days only "if it has not already fully complied," and so the Board contemplated its order may have already been moot. NAOC did not willfully violate the Board's July Order but rather took care of its responsibility under the August Order faster than the Board could issue its July Order. Since NAOC provided Top with all of the information it sought, and has now taken the extra step of providing Top with the verifications it unnecessarily demanded, NAOC simply can not be found to have willfully violated the Board's orders and thus a finding of sanctions is grossly inappropriate.

CONCLUSION

For the foregoing reasons, NAOC respectfully submits that Top's renewed motion for the entry of sanction of default and default judgment should be denied in its entirety.

Dated: New York, New York
September 16, 2008

COWAN, LIEBOWITZ & LATMAN, P.C.

By: /Heather L. Jensen/
Arlana S. Cohen
Heather L. Jensen
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2008, I placed a true and correct copy of the foregoing Reply in Opposition to Renewed Motion for Entry of the Sanction of Default and Default Judgment in the United States mail, postage prepaid, addressed to:

Lawrence E. James, Jr., Esq.
Neal, Gerber & Eisenberg, LLP
Two North LaSalle Street
Suite 2300
Chicago, IL 60602-3801

/Heather L. Jensen/
Heather L. Jensen