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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92043340
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IN THE U.S. PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

A.V. BRANDS, INC. (by assignment), Petitioner, vs. SPIRITS INTERNATIONAL, N.V., Respondent and Registrant.	Cancellation No. 92043340 Registration No. 1,487,042 Mark: RUSSKAYA

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INTRODUCTION

As detailed more fully below, this cancellation proceeding is just one front in the highly politicized worldwide attack on the trademark rights in highly successful vodka brands owned by Spirits International N.V. and its successor (collectively "Respondent"). These brands, including STOLICHNAYA, MOSCOVSKAYA, and the RUSSKAYA brand at issue in this proceeding, are among the world's best known and best selling vodka brands. It is therefore not surprising that others, including the Russian Federation, Petitioner's Russian state-owned business partner and now Petitioner, have tried to grab these brands, in courts, trademark offices and other tribunals around the world, for their own use and exploitation.

Respondent is the owner of U.S. Registration No. 1,487,042 for the mark RUSSKAYA for vodka, as well as registrations for that mark in more than eighty-five other countries. Respondent has never ceased use of the RUSSKAYA mark in the U.S. with an intent not to resume use. Instead, Respondent has been under siege, vigorously defending ownership of its portfolio of vodka trademarks in litigation throughout the world. Due to the orchestrated global attack on Respondent's ownership of its vodka trademarks and the concomitant drain on Respondent's resources, Respondent made a prudent business decision. It decided to devote its attention to maintaining the existing markets for its vodka products and defer the substantial investment required to re-launch brands such as RUSSKAYA in the U.S. until the uncertainty created by the litigation dissipated and Respondent could devote the necessary attention and resources to succeed in that endeavor. It has never wavered in its resolve to use the RUSSKAYA mark in the U.S.

The factual record is large and dense. Before the Board reviews it, it may wish to focus on the threshold procedural issue of Petitioner's standing, addressed in Point I of the Argument below. According to the Motion to Substitute Petitioner filed on February 15, 2008, the current Petitioner A.V. Brands, Inc. ("A.V. Brands" or "Petitioner") purports to have acquired its rights in the intent-to-use applications to register the RUSSKAYA mark from the original Petitioner, A.V. Imports, Inc. ("A.V. Imports"), by assignment dated April 9, 2007. However, that assignment is not part of the record, nor are any other facts concerning A.V. Brands. Further, assignments of intent-to-use applications are only valid in limited circumstances not proven by Petitioner here. Accordingly, this proceeding is vulnerable to dismissal due to Petitioner's lack of standing, and the Board need never reach the merits of Petitioner's grounds for cancellation.

DESCRIPTION OF THE RECORD

Respondent submits this brief in accordance with Rule 2.128(b) of the Trademark Rules of Practice, 37 C.F.R. § 2.128(b), and T.B.M.P. § 801.03. Respondent accepts Petitioner's description of the record as outlined in Petitioner's Trial Brief (hereinafter "Pet. Br."), but notes that the record also contains A.V. Imports' Second Notice of Reliance, including Exhibit Q, and A.V. Imports' Third Notice of Reliance, including Exhibit R. Notably, neither Petitioner nor A.V. Imports has introduced any testimony from any witness with first hand knowledge of the facts at issue.

STATEMENT OF THE ISSUES

(1) Whether Petitioner has carried its burden of proving its standing, as the purported assignee of an intent-to-use application for the RUSSKAYA mark filed by A.V. Imports, in the absence of any evidence of record concerning either Petitioner or the assignments.

(2) Whether Petitioner has carried its heavy burden of proving that Respondent has abandoned its U.S. rights in the registered RUSSKAYA mark, one of the premier brands in Respondent's international vodka portfolio, based upon a three year period of nonuse in the U.S., in light of (i) the worldwide legal attack on Respondent's chain of title to its valuable vodka trademarks; (ii) Respondent's continuing negotiations with its U.S. distributor concerning a re-launch of the RUSSKAYA brand in the U.S. when the timing is right; (iii) preparatory steps to do so; and (iv) the substantial resources Respondent has devoted to defending its trademark rights.

STATEMENT OF FACTS

I. The Parties and an Undisclosed Real Party in Interest

This cancellation proceeding is simply one campaign in the global assault on Respondent's valuable vodka trademarks, spearheaded by the Russian Federation.

A. Respondent Spirits International, N.V. (now known as Spirits International, B.V.)

At the time this proceeding was instituted, Spirits International, N.V. ("SPI NV"), had owned, since effectively January 1, 2001, the RUSSKAYA mark and the registration at issue (U.S. Reg. No. 1,487,042). See Finkelstein Ex. 1, Exs. B-C. In 2007, during the pendency of this proceeding, SPI NV converted from a public limited liability company into a private limited company, Spirits International, B.V. ("SPI BV").[1]

Respondent owns hundreds of vodka trademarks worldwide for its famous vodka brands, STOLICHNAYA, MOSKOVSKAYA, RUSSKAYA and many others. Oliynik 8:11-12:12, Ex. 1, Addenda 1 and 2; Tsyplakov 8:16-22. Respondent licenses those marks to its related companies, such as SPI Spirits (Cyprus) Limited ("SPI Cyprus"), which distribute Russian vodka products under Respondent's trademarks around the world. Oliynik 5:3-8:2; Gusev 4:15-5:17. SPI Group SA ("SPI Group") is the majority shareholder of both Respondent and SPI Cyprus. Gusev 4:3-5:7. All of the related companies that form the SPI Group, including Respondent, and their predecessors are hereinafter collectively referred to as "SPI."

SPI's primary business is the production and sale of various spirits, including its extensive vodka portfolio. Id. at 7:3-23. SPI's famous vodka brands, and its international

[1] The conversion documents were recorded with the USPTO at Reel 3599, Frame 0672 on August 13, 2007. Petitioner has not amended its Petition to Cancel or taken other action to reflect that SPI BV is the current owner of the registration at issue. See T.B.M.P. § 512.

portfolio of trademark registrations protecting them, are discussed more fully in Point II of this Statement of Facts below.

B. Petitioner A.V. Brands, Inc.

A.V. Brands, as purported assignee of A.V. Imports, filed a Motion to Substitute A.V. Brands as the named Petitioner in this proceeding on February 15, 2008, on the ground that A.V. Brands is now allegedly the owner by assignment of U.S. Trademark App. Serial Nos. 76/573,600 and 78/658,066 for the marks RUSSKAYA and RUSSKAYA RUSSIAN VODKA & Design, respectively, for use in connection with vodka. Those applications were filed by A.V. Imports on an intent-to-use basis under Section 1(b) of the Lanham Act. Resp. First Not. of Rel. Ex. 2-3.

REDACTED

C. Federal Treasury Enterprise Sojuzplodoimport

In 2001, the Russian Federation established Federal Treasury Enterprise Sojuzplodoimport, also known in Russian as FKP Sojuzplodoimport (collectively referred to

[2] Resp. First Not. of Rel. Exs. 19-21 depict the complementary trade dress used on STOLICHNAYA vodka in the U.S.

as "FTE"). Tsyplakov 18:7-19:3 and Ex. 1, ¶ 15. FTE is a Russian state-owned company created to manage the Russian vodka trademark registrations that were seized from SPI in Russia, and to try to recover other trademarks owned by SPI outside Russia for the purported benefit of the Russian Federation. Id. at 18:7-19:3 and Ex. 1, ¶ 15.

REDACTED

On March 23, 2005, FTE applied for a U.S. registration of the RUSSKAYA trademark in its own name under U.S. Trademark App. Ser. No. 78/593,639. Id. at Ex. 4.

REDACTED

REDACTED

FTE and SPI are not strangers to each other. As discussed more fully in Point IV of this Statement of Facts, in addition to managing the Russian vodka trademark registrations that were seized from SPI, FTE has challenged SPI's rights to its vodka trademarks in litigation in such places as the U.S., Australia, Austria, Brazil, the Netherlands, France, Azerbaijan, Armenia, Chile, Romania, Hungary, Bulgaria, the Slovak Republic, Serbia, Czech Republic, Venezuela, Jordan, Thailand, Uruguay, Poland and other countries. Tsyplakov 8:23-46:7, Ex. 1, ¶¶ 31-38 and Exs. J-M; Oliynik 16:17-17:6.

II. SPI's International Trademark Portfolio and Famous Vodka Brands

SPI owns a portfolio consisting of hundreds of trademark registrations, in various countries around the world, for its popular vodka products (collectively, the "Vodka Marks"). Tsyplakov 8:16-22; Oliynik 8:11-11:12, Oliynik Ex. 1, Addenda 1 and 2. The famous brands STOLICHNAYA, RUSSKAYA and MOSKOVSKAYA are among these registered Vodka Marks. Tsyplakov 8:16-22. These three brands have been consistently ranked among the top distilled spirits brands in the world. Resp. First Not. of Rel. Ex. 40.[3] For example:

- In 2000, 2002 and 2003, *Impact* magazine ranked STOLICHNAYA, MOSKOVSKAYA, and RUSSKAYA among the top ten distilled spirits

[3] Discovery closed in this proceeding on April 15, 2005, so the documentary record is not current with respect to media coverage and the like.

brands worldwide based on total volume of sales. Resp. First Not. of Rel. Ex. 40 at SPIG00028-29; SPIG00035-00037; SPIG00052-00053.

- During the same time period, *Drinks International* magazine ranked RUSSKAYA as the fourth largest regional brand of distilled spirits and ranked STOLICHNAYA, MOSKOVSKAYA, and RUSSKAYA in the top ten of the world's largest selling spirits brands. Id. at Ex. 40 at SPIG00054-00063; SPIG00043-00051.
- In 1998, *Impact International* magazine ranked STOLICHNAYA, MOSKOVSKAYA, and RUSSKAYA as the number 1, 2, and 3 vodka brands worldwide. Id. at Ex. 40 at SPIG00032-00033.
- The record contains numerous articles that testify to the worldwide fame and notoriety of Respondent's RUSSKAYA brand. See Id. at Ex. 40.

III. The History of SPI's U.S. RUSSKAYA Registration

Petitioner does not challenge Respondent's chain of title to the RUSSKAYA registration at issue. It relies instead on an abandonment theory. Nevertheless, because the history of the registration helps to provide necessary context and to explain the relevance of related litigation over Respondent's trademark portfolio, it is summarized below.

Under the government of the former Soviet Union, the vodka industry was state-run and all trademarks were owned by state entities. Tsyplakov 15:5-18 and Ex. 1, ¶ 2. RUSSKAYA, STOLICHNAYA and other Russian vodka marks were registered in the U.S.S.R. and internationally in the name of VVO Sojuzplodoimport ("VVO"), a state-owned company engaged in the export of vodka and other agricultural products. Id. at 15:5-16:16 and Ex. 1, ¶ 3.

VVO filed an application to register the RUSSKAYA mark with the U.S. Patent and Trademark Office ("USPTO") in 1986, and obtained a U.S. registration for the RUSSKAYA mark in 1988. Resp. Notice of Reliance Ex. 1; Finkelstein 44:19-45:15 and Ex. 16, p. 7. Under an October 3, 1986 appointment letter, VVO appointed Pepsi-Cola International, Limited, a wholly-owned subsidiary of PepsiCo, Inc. ("PepsiCo"), to be the exclusive brand agent and authorized importer of RUSSKAYA vodka. Finkelstein 44:19-45:15 and Ex. 16, p. 7. PepsiCo had previously partnered with VVO to establish the STOLICHNAYA brand in the U.S. and was interested in launching a second vodka brand in the U.S. in order to grow the Russian vodka business. Id.

In mid-1990, and as part of the economic reform program known as *perestroika*, the Soviet government authorized the transformation of state-owned enterprises into private companies. Tsyplakov 10:5-11:22, 15:5-18 and Ex. 1, ¶ 4. In September 1990, VVO was privatized into the joint-stock company VAO Sojuzplodoimport ("VAO"). Id. at 10:5-11:22, 16:3-18 and Ex. 1, ¶ 5. VAO succeeded VVO in the ownership of VVO's entire portfolio of Vodka Marks, including the STOLICHNAYA and RUSSKAYA marks. Id. at 10:5-11:22 and Ex. 1, ¶ 6.[4] (The Russian Federation contends that this transfer was not valid, and has challenged SPI's chain of title to the Vodka Marks in actions and proceedings, first in Russia and now around the world. See Point IV, below.)

The Soviet Union was dissolved in December 1991 Id. at 10:5-11:22 and Ex. 1, ¶ 7. In September 1992, VAO assigned the Vodka Marks, including the RUSSKAYA mark, to its

[4] Curiously, in August 1991, the U.S.S.R. Patent Office (Gospatent) annulled the Soviet STOLICHNAYA and RUSSKAYA registrations on the ground that those names had become generic in the Soviet Union. Tsyplakov 10:5-11:22, 12:7-23 and Ex. 1, ¶ 16 and Ex. A. Four months later, the Soviet Union was dissolved. VAO, as the successor to VVO, challenged Gospatent's decision, and, in May 1994, the Russian Patent Office (Rospatent) annulled Gospatent's decision and reinstated VAO's rights in the vodka trademarks. Tsyplakov 10:5-11:22, 15:5-18 and Ex. 1, ¶¶ 16-17 and Ex. B.

U.S. distributor, PepsiCo. Id. at 10:5-11:22, 16:19-23 and Ex. 1, ¶ 8; Finkelstein 28:21-31:10 and Ex. 3. Pursuant to the assignment agreements, VAO retained a reversionary interest in the Vodka Marks. Tsyplakov 10:5-11:22, 15:5-18 and Ex. 1, ¶ 8; Finkelstein 28:21-31:10 and Ex. 3.

From September 1993 through January 1999, PepsiCo vigorously defended a petition to cancel the RUSSKAYA registration in the U.S., filed by The Frank Pesce International Group, Limited. Finkelstein 57:9-20 and Exs. 4-31. In January 1999, the matter was ultimately settled in PepsiCo's favor and the petition to cancel was dismissed with prejudice. Id. at 56:14-57:2 and Ex. 31. As Petitioner concedes, "[t]he RUSSKAYA mark was used by PepsiCo during the pendency of the cancellation proceedings...." Pet. Br. 4; Finkelstein 15:10-17, 18:11-19:17 and Ex. 1.

While those cancellation proceedings were pending, in 1996, VAO changed its name to VZAO Sojuzplodoimport ("VZAO") to reflect its change of legal form to a closed joint-stock company. Tsyplakov 10:5-11:22, 15:5-18 and Ex. 1, ¶ 9. Two years later, in January 1998, VZAO sold its interest in the Vodka Marks, including its reversionary interests in the RUSSKAYA mark in the U.S., to ZAO Sojuzplodoimport ("ZAO"), a Russian joint-stock company incorporated in October 1997. Id. at 10:5-11:22, 15:5-18 and Ex. 1, ¶ 10. In April 1999, ZAO sold all of its rights in the Vodka Marks to SPI, and SPI continued to supply PepsiCo with the vodka sold under those marks in the U.S. Id. at 10:5-11:22, 15:5-17:16 and Ex. 1, ¶¶ 11-12; Oliynik 8:4-9:4 and Ex. 1.

On May 10, 2001, PepsiCo executed a deed of assignment assigning all of its rights in the RUSSKAYA mark in the U.S. to SPI. Tsyplakov 16:24-17:3; Oliynik 11:7-22; Finkelstein 15:10-17, 20:3-23 and Ex. 1, ¶ 5 and Ex. B. The assignment was recorded with

the USPTO in March 2002. Finkelstein 15:10-17, 20:24-21:21 and Ex. 1, ¶ 6 and Ex. C. As a result of these transactions, SPI now owns all rights to the RUSSKAYA mark in the U.S.

IV. Worldwide Litigation Surrounding the Vodka Marks

The dispute surrounding the Vodka Marks since the collapse of the U.S.S.R. "has been eventful, to say the least, with the fight over rights to the [STOLICHNAYA] mark extending well beyond the borders of the Russian Federation." Pavel Arievich & Julian Gyngell, Shaken and Stirred: The Adventures of a Soviet Vodka Brand, World Trademark Review, at 5-8 (May/June 2008).

The Russian government, often acting through FTE, began waging a worldwide attack on SPI's ownership of its valuable trademark portfolio shortly after SPI's acquisition of the Vodka Marks in 1999.[5] According to Mikhail Tsyplakov, who oversees the legal activities of SPI, the Russian government's relentless campaign to "re-nationalize" (without compensation) the Vodka Marks, including RUSSKAYA and STOLICHNAYA, has spawned litigation or administrative proceedings in approximately twenty countries. Tsyplakov 10:5-11:22, 40:14-45:11 and Ex. 1, ¶ 13. This has created "extreme uncertainty and lack of stability in respect of the issue of validity of ownership of SPI group in respect of those valuable assets." Id. at 10:5-11:22; 12:24-13:9 and Ex. 1, ¶ 13.

Even those challenges that do not directly involve the RUSSKAYA mark place SPI's rights in the RUSSKAYA mark at risk because they rest on the theory that SPI is not the legal successor to the initial owner of the marks, VVO, and that VVO was not properly

[5] The Board may take judicial notice of the fact that the Russian Federation is just one of the territories that was part of the former U.S.S.R. T.B.M.P § 704(a) and Fed. R. Evid. 201. After the U.S.S.R. dissolved, other territories also made plays for SPI's famous vodka marks. Financial Matters, Inc. v. Pepsico, Inc., 806 F. Supp. 480, 482-483, n. 4 (S.D.N.Y. 1992) (Republic of North Ossetia claimed rights to STOLICHNAYA mark amid "volatile" situation in former U.S.S.R.).

privatized. Id. at 23:8-24:4, 24:18-2:11; 35:4-24; 45:15-46:15. As Mr. Tsyplakov explains: "so … if our opponents are successful in proving these – the validity of these challenges in respect of our other trademarks they could be equally successful in proving the validity of such challenge in respect of the RUSSKAYA trademarks." Id. at 46:5-10. SPI's chain of title to all of the Vodka Marks former owned by VVO (including the RUSSKAYA registration at issue) starts with the same link: VVO's transformation into VAO during the waning days of the Soviet Union.

Mr. Tsyplakov provided an overview of the worldwide litigation mounted by the Russian Federation and FTE concerning SPI's ownership of the Vodka Marks, country by country.

A. Russian Proceedings

As previously noted (p. 10, n. 4), the U.S.S.R. Patent Office, and later the Russian Patent Office, issued rulings on the validity of the Soviet and Russian registrations for STOLICHNAYA and RUSSKAYA on genericness grounds. They have gone back and forth on this issue. By and large, the Russian government has fared quite well in the Russian proceedings against SPI – far better than in other jurisdictions that recognize due process.

In February 2000, at the request of the Deputy General Prosecutor of the Russian Federation, Rospatent reversed its May 1994 decision and reinstated the Gospatent decision of August 1991 that had annulled the Russian registrations of the Vodka Marks. Tsyplakov 10:5-11:22 and Ex. 1, ¶ 19 and Ex. C. In June and August 2000, however, a Russian court annulled the 1991 Gospatent and 2000 Rospatent decisions, reinstating ZAO's Russian registrations of the Vodka Marks. Id. at 10:5-11:22 and Ex. 1, ¶ 19 and Exs. D-E.

In the meantime, on March 13, 2000, Acting President Vladimir Putin issued an executive order to the Chairman of the Russian Federation Government, the General Prosecutor, the Minister of External Affairs, the Minister of State Property and the Minister of Taxes and Charges instructing them to take measures aimed at restoring and protecting the Russian state's rights to intellectual property related to vodka production. Id. at 10:5-11:22 and Ex. 1, ¶ 20 and Ex. F. Consequently, in November 2000, the Deputy General Prosecutor of the Russian Federation filed suit in a Russian court seeking to invalidate a provision in the articles of association of VZAO (which by then had been renamed OAO Plodovaya Company ("OAO")) that declared that VZAO was the legal successor to VVO. Id. at 10:5-11:22 and Ex. 1, ¶ 21. The court granted that relief in December 2000, but the ruling was vacated by an appellate court in February 2001. Id. at 10:5-11:22 and Ex. 1, ¶¶ 22-23 and Exs. G-H. Although the Russian government did not further appeal the appellate court's ruling, the Deputy General Prosecutor later brought the case for review to the High Arbitrazh Court, the highest commercial court of the Russian Federation, "by way of supervision" (or "protest"). Id. at 10:5-11:22 and Ex. 1, ¶¶ 24-25.

In October 2001, the Presidium of the High Arbitrazh Court ruled in favor of the Russian government (the "Presidium Decision"). Id. at 10:5-11:22 and Ex. 1, ¶ 26 and Ex. I. However, OAO challenged the validity of the Presidium Decision before the European Court of Human Rights, which is not controlled by the Russian government, contending that the Decision violates due process and other fundamental rights and contains manifest errors of substantive law. Id. at 10:5-11:22 and Ex. 1, ¶¶ 27-28.

Armed with the Presidium Decision and before any decision by the European Court of Human Rights, Rospatent transferred to the Russian Federation, without any

compensation, the Russian registrations of the Vodka Marks (including the RUSSKAYA mark) that existed at the time of the transformation of VVO into VAO and annulled similar Russian registrations that had been subsequently obtained by VAO or its successors. Id. at 10:5-11:22 and Ex. 1, ¶ 29. The Russian courts have upheld Rospatent's actions. Id. at 10:5-11:22 and Ex. 1, ¶ 30.

B. The WIPO Recordation of Change of Ownership of SPI's International Registrations to FTE and Resulting Litigation to Correct It

Having secured the Russian registrations of the Vodka Marks, the Russian government, now acting through A.V. Imports' (and presumably Petitioner's) business partner FTE, turned to the "re-nationalization" of the same trademarks registered abroad. On April 9, 2003, Rospatent asked the World Intellectual Property Organization ("WIPO") to record a change of ownership of seven international trademark registrations owned by SPI, including RUSSKAYA, naming FTE as the new owner. Tsyplakov 35:25-39:15 and Ex. 3. Because WIPO performs only ministerial functions and lacks the ability to review the validity of such requests, WIPO simply complied with Rospatent's request for recordation. Id. In June 2003, WIPO recorded the change of ownership in SPI's international trademark registrations, including RUSSKAYA, and notified the national trademark offices in all the countries where those international trademarks had national trademarks. Id. at 38:3-16. As a result, FTE improperly replaced SPI as the listed owner of these trademarks. Id. at 38:8-16.

SPI notified WIPO that Rospatent's request was groundless and misleading, and SPI also addressed, with some success, the relevant offices in the affected countries regarding this erroneous change of ownership. Id. at 39:19-41:6. To date, SPI's efforts have been successful in Bosnia Herzegovina, Cuba, Czech Republic, Hungary, Kenya, Macedonia,

Sudan and Vietnam. Id. at 41:9-11. In cases where SPI was not successful in having the erroneous change of ownership expunged, SPI has initiated proceedings to restore its trademark rights, which has resulted in litigation in countries such as Bulgaria, Croatia, Slovenia, Serbia, Slovakia, Monaco and Romania. Id. at 41:13-42:16.

C. Other Foreign Litigation and Proceedings

In addition to the Russian and WIPO proceedings and related legal challenges, FTE has filed court actions against SPI challenging its ownership of various Vodka Marks in the Netherlands, Austria, Brazil, Australia and Chile.

- In May 2003, FTE filed a claim against SPI in the Netherlands challenging SPI's right to certain of the Vodka Marks and seeking, *inter alia*, the transfer of those marks to FTE. As of May, 2007, proceedings in the Rotterdam District Court were stayed while the Hague Court of Appeals considered an interlocutory appeal by SPI. Id. at 10:5-11:22, 25:12-26:1and Ex. 1, ¶ 31.
- In July 2004, FTE filed a claim against SPI in Austria claiming ownership of certain of the Vodka Marks in Austria and seeking to enjoin SPI from using those marks. The lower court dismissed FTE's claim for injunctive relief in November 2004, and the decision was affirmed on appeal. As of May 2007, the case on the merits was still pending. Id. at 10:5-11:22, 26:17-27:14 and Ex. 1, ¶ 34 and Ex. L.
- In September 2004, FTE filed a claim against SPI and other related companies in Brazil challenging SPI's ownership of certain of the Vodka Marks, seeking transfer of the registrations to an affiliate (another Russian state-owned company), cancellation of other registrations and preliminary injunctive relief.

The Brazilian courts denied preliminary relief, and there had been no judgment on the merits as of May 2007. Id. at 10:5-11:22, 27:15-29:4 and Ex. 1, ¶ 37 and Ex. M.

- In Australia, FTE intervened in an action brought by an SPI affiliate against it's Australian distributor seeking a transfer of the Australian registrations for STOLICHNAYA and MOSKOVSKAYA to itself or an affiliated state-owned company. After a number of procedural motions and an appeal, the case on the merits was pending as of May 2007. Id. at 10:5-11:22, 29:5-30:10 and Ex. 1, ¶ 38.
- In Chile, FTE filed a claim against SPI seeking the cancellation of a number of Vodka Marks owned by SPI in Chile on the grounds that SPI obtained the marks improperly. As of May 2007, the Chilean courts were considering FTE's appeal of a factual ruling and no decision had been rendered. Id. at 30:11-31:14.

Mr. Tsyplakov identified a number of other proceedings in yet more countries involving the ownership issue, some brought by FTE and some brought by SPI challenging each other's trademark applications. Legal challenges to the ownership of the Vodka Marks have been brought in at least 20 countries, many of which directly involve the RUSSKAYA trademark.[6] Id. at 41:3-44:11.

It merits reiteration that virtually all of these proceedings share a common central issue: FTE's claims that VAO did not lawfully succeed VVO, which, FTE claims, would

[6] Legal challenges to the Vodka Marks have also been lodged in countries such as Argentina, Azerbaijan, Cuba, Czech Republic, Hungary, Jordan, Kenya, Lithuania, Macedonia, Paraguay, Sudan, Thailand, Uruguay, Vietnam and Venezuela. Tsyplakov 41:3-44:11.

break SPI's chain of title to the Vodka Marks. Id. at 31:21-32:17; 45:15-46:10. This legal theory applies equally to all of the Vodka Marks and, if successful, might defeat SPI's claim of ownership of the RUSSKAYA mark in the U.S. and elsewhere. Id.

D. U.S. Proceedings

FTE brought the Russian government's attack on SPI's Vodka Marks to the U.S. when it filed suit against SPI, SPI's affiliates and SPI's distributor, Allied Domecq Spirits and Wine USA, Inc. ("Allied Domecq") in the Southern District Court of New York in October 2004. Federal Treasury Enterprise Sojuzplodoimport v. Spirits Int'l, N.V., 425 F. Supp. 2d 458 (S.D.N.Y. 2006). Tsyplakov 33:13-22 and Ex. 2. FTE claimed, among other things, ownership of the STOLICHNAYA family of marks in the U.S. based upon clouds on the chain of title to the marks. Id. at 33:13-22 and Ex. 2, p.7. Notably, FTE relied heavily on prior Russian decisions concerning SPI's chain of title. Id. at 33:13-22 and Ex. 2, p. 8.

In March 2006, the district court specifically denied FTE's claims of ownership of the STOLICHNAYA marks in the U.S. Id. at 33:13-34:15 and Ex. 2. The Court also dismissed FTE's claim of fraud notwithstanding the Russian judicial proceedings that concerned title to the marks. Id. at 33:13-22 and Ex. 2.[7] An appeal is currently pending, with oral argument upcoming before the United States Court of Appeals for the Second Circuit. Id. at 34:9-15.

Had FTE won this test case, it could have used the same legal theories against SPI's RUSSKAYA mark in the U.S. Id. at 35:5-24. Indeed, under the doctrine of collateral estoppel, it could have argued that SPI should not even be given an opportunity to relitigate

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the issue of U.S. ownership of the RUSSKAYA mark. See, e.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

* * *

In short, the legal theories first advanced by the Russian government in its own tribunals in 2000 have coursed through all of its legal challenges to SPI's rights in the Vodka Marks summarized above, and call into question SPI's ownership of the RUSSKAYA mark, whether or not that mark was directly put in issue. All of these proceedings share a central issue in common, namely the legality of VAO's succession to VVO. If the succession was improper, FTE would claim that SPI's acquisition of all of the Vodka Marks from VAO was invalid. Tsyplakov 32:13-17.

V. SPI Made a Prudent Business Decision Not To Invest Substantial Resources to Reinvigorating the RUSSKAYA Brand in the U.S. While It Was Defending Its Ownership of the Brand in Worldwide Litigation

As described above, since 2000, SPI has been engulfed in litigation challenging its ownership of the Vodka Marks. This worldwide litigation, spearheaded by the Russian Federation acting through REDACTED has forced SPI to make the business decision to:

- Devote its resources to obtaining clarification of its rights,
- Maintain its core vodka brands in its core markets, and
- Postpone the substantial investment necessary to re-launch the RUSSKAYA vodka brand in the U.S. through its new distributor.

A. The Worldwide Litigation Diverted Critical Resources.

The Russian government's worldwide assault on SPI's ownership of the Vodka Marks has made it impossible for SPI to operate in "business as usual" fashion. Responding

to this onslaught of litigation has obviously taken a huge toll on SPI's time, finances and human resources. As of March 2007, SPI had spent more than $20 million to contest the various legal and administrative disputes regarding SPI's ownership of the Vodka Trademarks, including the RUSSKAYA mark. Tsyplakov 46:11-17. SPI's ongoing legal battles have also been enormously time-consuming, diverting human resources that could otherwise have focused on rebuilding the market for RUSSKAYA vodka in the U.S. Oliynik 14:16-21; Tsyplakov 42:19-43:15.

B. Re-launching the RUSSKAYA Brand in the U.S. Would Have Required a Significant Investment in Uncertain Times.

While SPI is confident that its legal position is correct, it obviously cannot be completely certain of litigation results. The Russian government's attack on SPI's trademark rights has thus resulted in "extreme uncertainty and lack of stability in respect of the issue of validity of ownership of SPI in respect of those valuable assets." Tsyplakov 13:7-9. SPI therefore decided to defer making:

> "huge investments into the promotion of [the] RUSSKAYA brand which is less known than STOLICHNAYA and MOSKOVSKAYA because...although we are confident in our legal position in those disputes we, nevertheless, could not predict the court decisions on those proceedings."

Id. at 32:23-33:12; see also id. at 42:19-43:15.

SPI's decision to concentrate on its star brands was also influenced by the advice of its authorized U.S. importer and distributor Allied Domecq, which had inherited an established market for STOLICHNAYA vodka in the U.S. and was "very carefully choosing the right period of time for launching or re-launching products" such as RUSSKAYA vodka. Oliynik 14:13-15; Tsyplakov 35:13-18.

In short, while SPI fended off the attacks on its Vodka Marks around the world, SPI chose to stabilize the existing U.S. market for STOLICHNAYA vodka before re-launching the RUSSKAYA brand, which would require a substantial investment of resources that were stretched thin.

VI. SPI's Intent to Re-launch the RUSSKAYA Mark in the U.S.

As every one of SPI's witnesses testified, SPI has never intended to discontinue selling RUSSKAYA vodka in the U.S. SPI has "always intended" to resume use of the RUSSKAYA mark once the timing was right. Tsyplakov 46:18-47:16; Oliynik 13:5-13:9; Gusev 14:3-17. The RUSSKAYA brand is a very important brand for SPI. SPI considers the promotion of the RUSSKAYA brand in the U.S. market critical and "is willing to make investments in further development of this brand in the U.S." Tsyplakov 46:18-47:16.

SPI's uncontroverted testimony concerning its intent to resume use of the RUSSKAYA mark is corroborated by substantial additional evidence.

A. SPI Has Been Engaged in Ongoing Negotiations with Its Importer.

SPI's interest in resuming use of the RUSSKAYA mark in the U.S. is reflected in its continuing discussions with its U.S. importer/distributor Allied Domecq, which was acquired by Pernod Ricard USA, regarding distribution of RUSSKAYA vodka in the U.S. market. Gusev 8:18-24.

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. Oleg Gusev, SPI Cyprus's marketing director for international brands, was also personally involved in many negotiations with SPI's partners in the U.S. regarding the RUSSKAYA brand and worked on proposals for SPI's partners. Gusev 4:15-21; 8:3-17.

After SPI had achieved some victories in defending against the Russian government's efforts to capture the Vodka Marks, it increased its focus on its plan to reintroduce the RUSSKAYA brand in the U.S.

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The documentary evidence further corroborates SPI's bona fide intent to resume use of the RUSSKAYA mark in the U.S. SPI has prepared a Statement of Manufacture for RUSSKAYA vodka, which is required by the distributor to "activate the sales of the brand in the U.S." Id. at 10:20-11:12 and Ex. 1. In addition, Allied Domecq obtained a Certificate of Label Approval for RUSSKAYA vodka from the U.S. Bureau of Alcohol, Tobacco and Firearms. Id. at 11:13-21 and Ex. 2.

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B. SPI's Contract with Allied Domecq Does Not Preclude the Importation or Distribution of RUSSKAYA Vodka in the U.S.

SPI and Allied Domecq are parties to a "Trademark, Supply and Distribution Agreement" regarding the importation and distribution of vodka in the U.S. under certain of SPI's Vodka Marks (the "November 2000 Agreement"). Smith Ex. 3. While the November 2000 Agreement specifically covers STOLICHNAYA, STOLI and PRIVIET vodka, there is

nothing in this Agreement that precludes SPI and Allied Domecq from extending the Agreement, or entering a new arrangement, to cover RUSSKAYA vodka. In fact, the terms "Brands" and "Trademarks" are broadly defined in the Agreement to include "any other Vodka Product which may hereafter be commercialized in the Territory pursuant to the provisions of this Agreement" and "any other trademark which may, pursuant to this Agreement, hereafter be used in connection with the commercialization of Vodka Products in the Territory." Id.

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C. SPI's Actions Demonstrate Continued Interest and Investment in the RUSSKAYA Brand.

SPI owns global brands and an international portfolio of trademarks protecting them. As previously discussed, trade publications have ranked RUSSKAYA among the top three vodka brands and top ten spirits brands in the world in terms of volume of sales. Resp. First Notice of Rel. Ex. 40. And even when SPI's plans to re-launch the RUSSKAYA brand in the U.S. were on hold, SPI continued selling RUSSKAYA vodka in many other countries, including Austria, Belgium, Cyprus, Czech Republic, Germany, Greece, Hungary, the Netherlands, Japan, Lebanon and the United Kingdom. Oliynik 13:13-20. In 2003, *Drinks International* magazine reported sales of over 18 million cases of RUSSKAYA vodka worldwide. Resp. First Not. of Rel. Ex. 40.

SPI's continued commitment to the RUSSKAYA brand worldwide, the success of the product in global sales, and the resources SPI has devoted to defending its rights in the RUSSKAYA Mark (including its defense in this proceeding) are all inconsistent with an intent to abandon the mark.

ARGUMENT

I.

PETITIONER HAS NOT CARRIED ITS BURDEN OF PROVING ITS STANDING TO CANCEL RESPONDENT'S RUSSKAYA REGISTRATION

It is black-letter law that "[f]or a petitioner to prevail in a cancellation proceeding, it is incumbent upon that party to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration." Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024, 1026, 213 U.S.P.Q. 185, 187 (C.C.P.A. 1982). "The facts regarding standing . . . are part of a petitioner's case and must be affirmatively proved. Accordingly, [a petitioner] is not entitled to standing solely because of the allegations in its petition." Id. at 1028, 213 U.S.P.Q. at 189. Standing, like the substantive grounds, is Petitioner's burden for trial, yet Petitioner's Brief makes absolutely no attempt to affirmatively prove Petitioner's standing in the instant cancellation proceeding.

The present Petitioner (A.V. Brands) has utterly failed to satisfy this threshold requirement. Petitioner's Brief and the record are silent on this issue. Thus, the Board need not even reach the issue of abandonment, and may simply dismiss Petitioner's cancellation petition for lack of standing.

We expect Petitioner to argue, belatedly in its reply, that the record establishes (a) that A.V. Imports (Petitioner's purported predecessor-in-interest) filed U.S. Trademark Application Ser. No. 76/573,600, seeking to register the RUSSKAYA mark for use in connection with "vodka," see Pet. First Not. of Rel. Ex. O; (b) that the USPTO issued an Office Action refusing A.V. Imports' application on grounds of the mark's confusing similarity with SPI's registered RUSSKAYA mark shown in Reg. No. 1,487,042, see id. at Ex. P; (c) that, by a written assignment dated October 9, 2007, Petitioner is the successor to A.V. Imports' rights in Application Ser. No. 76/573,600; and (d) such that facts suffice to establish Petitioner's standing under, e.g., Lipton Indus., 670 F.2d at 1029, 213 U.S.P.Q. at 190 (holding that, to prove standing in an cancellation petition based on alleged abandonment, it would be sufficient that petitioner prove that it filed an application and that a rejection was made because of respondent's registration). There are, however, two fatal flaws with this argument.

First, Petitioner failed to introduce any evidence to establish the purported assignment of rights in Application Ser. No. 76/573,600 from A.V. Imports to Petitioner.[8] Although Petitioner attached an assignment document to Petitioner's February 15, 2008 Motion to Substitute Petitioner, that assignment document (the "Assignment Document") is not proper evidence; it has not been authenticated or submitted into the trial record.[9]

[8]The most Petitioner attempts in this regard is to say, in a footnote and without any citation to the record, that "A.V. Brands was transferred the assets of A.V. Imports in 2007, including the intent-to-use applications for the RUSSKAYA mark." Pet. Br. 1 n.1.

[9] The Assignment Document is dated October 9, 2007. Petitioner's rebuttal testimony period opened December 3, 2007 and closed December 17, 2007. See the Board's Scheduling Order dated October 3, 2007. Petitioner elected not to introduce the Assignment Document, or any other testimony, into evidence during its rebuttal testimony period, despite having had a full and fair opportunity to do so.

Second, the assignment of intent-to-use Application Ser. No. 76/573,600 that the Assignment Document purports to reflect violates Section 10 of the Lanham Act, 15 U.S.C. § 1060. That statutory prohibition provides that intent-to-use applications generally cannot be transferred prior to the filing of an Amendment to Allege Use or a Statement of Use:

> [N]o application to register a mark under section 1051(b) of this title shall be assignable prior to the filing of an amendment under section 1051(c) of this title to bring the application into conformity with section 1051(a) of this title or the filing of the verified statement of use under section 1051(d) of this title, except for an assignment to a successor to the business of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and existing.

15 U.S.C. § 1060(a)(1).

The record is devoid of any evidence whatsoever that Petitioner is "a successor to the business of [A.V. Imports], or portion thereof, to which the [RUSSKAYA] mark pertains." The Assignment Document does not contain such a recitation.

Consequently, on the present record, A.V. Imports' alleged assignment of rights in the RUSSKAYA mark, on which Petitioner may attempt to rely, is invalid. Furthermore, an assignment in violation of Section 10(a)(1) "is not only invalid . . . but the prohibited assignment *also voids the application* or any resulting registration." Clorox Co. v. Chemical Bank, 40 U.S.P.Q.2d 1098, 1104 (T.T.A.B. 1996).

Thus, under Clorox and on this record, Application Ser. No. 76/573,600 (as well as Application Ser. No. 78/658,055 which was also purportedly assigned) is void as of October 9, 2007. Petitioner has therefore failed to carry its burden of proving its standing, and the Board may dismiss Petitioner's petition without reaching the merits.

II.

SPI HAS NOT ABANDONED THE RUSSKAYA MARK

This case is sui generis.

Since May 10, 2001, when PepsiCo assigned the registration at issue back to SPI, SPI has been fighting for its very survival. The Russian government has used (or more accurately misused) its formidable power and resources to wage war against SPI over SPI's ownership of its international trademark portfolio. As of May 2007, SPI had spent more than $20 million defending litigation around the globe. Tsyplakov 46:11-17.

This proceeding is just one battle in that war.

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The Board should categorically reject Petitioner's and FTE's attempt to strip SPI of its U.S. trademark based on a three year period of excusable nonuse, occasioned by FTE's own massive litigation campaign against SPI.

A. Petitioner Has Not Carried its Heavy Burden of Proving Abandonment

Petitioner has failed to carry its heavy burden of proving abandonment of the RUSSKAYA mark. A registered trademark enjoys a presumption of validity, 15 U.S.C. § 1057(b), and, in a cancellation proceeding, the petitioner must prove its case by a

preponderance of the evidence. Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 1023 (Fed. Cir. 1989). Here, Petitioner has not even bothered to prove its standing, let alone abandonment.

Because a finding of an abandonment results in an involuntary forfeiture of rights, a petitioner in a cancellation proceeding before the Board faces a "heavy burden" to establish abandonment, and abandonment must be strictly proved. See, e.g., Lipton Indus., 670 F.2d at 1031, 213 U.S.P.Q. at 191; 7-11 Sales, Inc. v. Perma, S.A., 225 U.S.P.Q. 170, 171 (T.T.A.B. 1984). Federal courts agree that parties asserting abandonment face a "stringent," "heavy," or "strict burden of proof." See, e.g., Moore Bus. Forms, Inc. v. Ryu, 960 F.2d 486, 489, 22 U.S.P.Q. 1773 (5th Cir. 1992) ("stringent standard of proof"); Seidelmann Yachts, Inc. v. Pace Yacht Corp., 14 U.S.P.Q.2d 1497, 1501 (D. Md. 1989) ("both nonuse and intent not to resume use must be strictly proved").

Although nonuse of a mark for three consecutive years gives rise to a prima facie case of abandonment, 15 U.S.C. § 1127, a registrant may rebut such a presumption by putting forth (i) evidence of an intent to resume use of the mark, *or* (ii) evidence of excusable nonuse negating the presumptive intent to abandon. Rivard v. Linville, 133 F.3d 1446, 1449, 45 U.S.P.Q.2d 1374, 1376 (Fed. Cir. 1998). Moreover, the ultimate burden of persuasion to prove abandonment remains on the party seeking cancellation even if a statutory prima facie case of abandonment has been established. On-Line Careline, Inc. v. America Online Inc., 229 F.3d 1080, 1087, U.S.P.Q.2d 1471, 1476 (Fed. Cir. 2000); see also Cervceceria Centroamericana, 892 F.2d at 1023, 13 U.S.P.Q.2d at 1309. Accordingly, Petitioner cannot simply rely on proof of nonuse to establish abandonment, especially in the face of SPI's uncontroverted evidence of excusable nonuse and an intent to resume use.

B. SPI Has Not Discontinued Use of the RUSSKAYA Mark With An Intention Not To Resume Use

Petitioner argues that SPI abandoned its RUSSKAYA mark because it did not use the RUSSKAYA mark for a period of at least three years prior to May 19, 2004, the filing date of the Petition for Cancellation. Pet. Br. 16. SPI submits that it is no coincidence that Petitioner filed this proceeding almost exactly three years after PepsiCo reassigned the registration to SPI on May 10, 2001.[10] It, and FTE, were lying in wait.

The presumption of abandonment under 15 U.S.C. § 1127 is rebutted by evidence of the registrant's intent to resume use "in the reasonably foreseeable future" or valid reasons for nonuse. Burgess v. Gilman, 78 U.S.P.Q.2d 1773, 1777 (D. Nev. 2006) (quoting Emergency One, Inc. v. Am. FireEagle Ltd., 228 F.3d 531, 535-37, 56 U.S.P.Q.2d 1343, 1346 (4th Cir. 2000)). Indeed, it is well-established that a registrant can rebut the prima facie case upon a showing of "reasonable grounds for the suspension and plans to resume use in the reasonably foreseeable future when the conditions requiring suspension abate." Silverman v. CBS, Inc., 870 F.2d 40, 47, 9 U.S.P.Q.2d 1778, 1783 (2d Cir. 1989) (citing Star-Kist Foods, Inc. v. P.J. Rhodes & Co., 769 F.2d 1393, 227 U.S.P.Q. 44 (9th Cir. 1985), Chandon Champagne Corp. v. San Marino Wine Corp., 335 F.2d 531, 535, 142 U.S.P.Q. 239, 242 (2d Cir. 1964), Continental Distilling Corp. v. Old Charter Distillery Co., 188 F.2d 614, 619-20, 87 U.S. P.Q. 365, 369-70 (D.C. Cir. 1950)). In the instant case, SPI had obvious grounds to delay the re-launch of RUSSKAYA vodka in the U.S. with its new

[10] In its Motion for Summary Judgment, filed May 11, 2005, Petitioner made a half-hearted argument that the RUSSKAYA mark was abandoned while it was owned by PepsiCo, although Petitioner had not sought discovery from PepsiCo or cited any evidence that PepsiCo discontinued use of the RUSSKAYA mark. Petitioner no longer presses this argument in its Brief, conceding the mark was in use by PepsiCo. Pet. Br. 4. Petitioner has therefore waived this argument. See, e.g., Chester L. Krause v. Krause Publ'ns, Inc., 76 U.S.P.Q.2d 1904 n. 2 (T.T.A.B. 2005).

distributor Allied Domecq until such time as the cloud hanging over its title to its ownership of its vodka portfolio, including the RUSSKAYA mark, lifted and SPI could devote is resources to doing business under those marks rather than doing battle with FTE over them.

1. SPI's Nonuse Is Excused by the Legal Assault on Its Rights to the Vodka Marks.

"To prove excusable nonuse, the registrant must produce evidence showing that, under his particular circumstances, his activities are those that a reasonable businessman, who had a bona fide intent to use the mark in U.S. commerce, would have undertaken." Rivard, 133 F.3d at 1449, 45 U.S.P.Q.2d 1374 at 1376. SPI's nonuse of the RUSSKAYA mark is excusable due to the worldwide assault on SPI's rights to the Vodka Marks, the resulting drain on SPI's resources, and the attendant uncertainties concerning the re-launch of the RUSSKAYA brand. SPI "has overcome the presumption that its nonuse was coupled with an 'intent not to resume use'" because its nonuse was excusable. Emmpresa Cubana del Tabaco v. Culbro Corp., 213 F.R.D. 151, 157 (S.D.N.Y. 2003) (quoting Imperial Tobacco, Ltd. v. Philip Morris, Inc., 899 F.2d 1575, 1581, 14 U.S.P.Q.2d 1390 (Fed. Cir. 1990)).

Courts have found excusable nonuse in many other cases where a registrant's ability to use the mark at issue has been hampered by governmental forces beyond the registrant's control. See Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 174 U.S.P.Q. 80, 87 (S.D.N.Y. 1972) ("Trademark rights are not destroyed by temporary suspension of the business to which they are appurtenant due to causes beyond the control of their owner ...."); see also Chandon Champagne, 335 F.2d at 535, 142 U.S.P.Q. at 242 (wartime withdrawal from American market not abandonment of the mark); Cuban Cigar Brands N.V. v. Upmann Int'l, Inc., 457 F. Supp. 1090, 1101, 199 U.S.P.Q. 193, 202 (S.D.N.Y. 1978) ("the fact that

plaintiff was intervened by the Cuban Government and thus prevented from exporting [its goods] to this country until recently does not constitute abandonment of the mark").

Courts have also found excusable nonuse in cases where the mark owner did not exploit the mark to its full potential based on a legitimate business decision to wait until pending litigation concerning the mark has been resolved. See, e.g., Zelinski v. Columbia 300, Inc., 335 F.3d 633, 639, 67 U.S.P.Q.2d 1446, 1449 (7th Cir. 2003) (lingering patent infringement suit could excuse nonuse of mark and rebut presumption of abandonment despite frivolity of the suit); Carter-Wallace, Inc. v. Procter & Gamble Co., 434 F.2d 794, 803-804, 167 U.S.P.Q. 713, 720 (9th Cir. 1970); New England Duplicating Co. v. Mendes, 190 F.2d 415, 418, 90 U.S.P.Q. 151 (1st Cir. 1951) (decision to suspend use of a mark for eight years during litigation about the mark's ownership was not abandonment). In this unique case, both lines of authority apply.

a. *The Board Has Acknowledged That the Worldwide Litigation Surrounding the Vodka Marks Could Support a Finding of Excusable Nonuse in this Case.*

In denying Petitioner's earlier motion for summary judgment, the Board has already acknowledged that, as a matter of law, the legal or financial risks that SPI faces by using the RUSSKAYA mark in view of the worldwide litigation can support a finding of excusable nonuse. In A.V. Imports, Inc. v. Spirits International, N.V., Canc. No. 92043340, 2005 WL 2366791 at *3 (T.T.A.B. September 19, 2005), the Board found

> "factual issues as to what extent, if any, litigation outside the U.S. regarding other related Russian vodka marks, and litigation in the U.S. involving other related Russian vodka marks, might indicate significant legal and/or financial risk in undertaking use of the RUSSKAYA mark in the U.S. A factual finding that such risks exist could support a finding of excusable nonuse."

The unrefuted evidence now of record shows that SPI faced serious legal and financial risks in devoting its resources to resuming use of the RUSSKAYA brand in the U.S. The Russian government's well orchestrated worldwide litigation campaign has created a cloud on SPI's ownership of the Vodka Marks and drained SPI's limited resources. Because vodka production and distribution is the "core activity" of SPI, the lack of certainty regarding its ownership of the Vodka Marks, including the RUSSKAYA mark in the U.S., jeopardized SPI's business. Tsyplakov 13:14-21.

In the face of a truly staggering legal attack by the Russian Federation, SPI made a sensible business decision to focus on well-established brands such as STOLICHNAYA in the U.S. and to defer making huge investments in reinvigorating the RUSSKAYA brand. From a business standpoint, it would certainly be difficult for SPI to justify allocating a significant amount of money and resources required to re-launch the RUSSKAYA brand in the U.S., at a time when it was spending tens of millions of dollars to protect its core asset – its portfolio of vodka marks – and facing the risk that FTE could reap the benefits of SPI's substantial investment in rebuilding the brand should SPI ultimately lose on the ownership issue.

SPI's ongoing legal battles have been extraordinarily expensive and time-consuming. Tsyplakov 46:11-17. They have also drained human resources that might otherwise have been directed toward the re-launch of the RUSSKAYA brands in the U.S. Oliynik 14:8-15:10. There was no guarantee that SPI could succeed in re-launching the RUSSKAYA brand in the U.S. during this difficult period. Its new U.S. distributor concluded that the time was not right to try to re-introduce RUSSKAYA to the U.S. market. Id. at 14:8-15.

In sum, the evidence shows that there were legitimate, informed business reasons for the interruption in SPI's use of the RUSSKAYA mark in the U.S. The culmination of worldwide litigation, the potential vulnerability of SPI's ownership of the RUSSKAYA mark, its U.S. distributor's reluctance to re-launch the brand until the market was ripe, and the extraordinary expenses associated with the litigation and with re-launching the RUSSKAYA brand made SPI's decision to delay the re-launch "that [which] a reasonable businessman, who had a bona fide intent to use the mark in U.S. commerce, would have undertaken." Rivard, 133 F.3d at 1449, 45 U.S.P.Q.2d at 1376.

In its brief, Petitioner takes a myopic view of the worldwide litigation and argues that because not all of the legal challenges place the RUSSKAYA mark directly at issue, SPI's decision not to re-launch RUSSKAYA in the U.S. could not reasonably be informed by the worldwide litigation concerning the Vodka Marks collectively. Petitioner ignores the basic point that the ultimate issue in the worldwide litigation is not the ownership of any of the individual Vodka Marks, but the legality of VVO's transfer of ownership of the Vodka Marks collectively to VAO, and thus the validity of *all* subsequent transfers. Given the fame and popularity of the STOLICHNAYA brand, it is entirely understandable that FTE focused many of its legal maneuvers on the marks associated with that brand. But SPI was legitimately concerned that if FTE were to succeed in obtaining a definitive ruling that the underlying transfer was invalid, FTE would not stop with STOLICHNAYA.

REDACTED

Petitioner next argues that because some of the litigation surrounding the Vodka Marks was initiated after Petitioner filed its Petition for Cancellation, the Board should

disregard it entirely. Pet. Br. 11-12. The Russian government's attacks on the Vodka Marks date back to 2000, well before this proceeding was commenced. SPI has long been on notice of the Russian Federation's determination to try to procure SPI's Vodka Marks through all available means. The proceedings filed by FTE post-2004 are simply outgrowths of the Russian government's earlier actions. They have confirmed SPI's reasonable apprehension of an ongoing drain on its resources, uncertainty over its ownership of the Vodka Marks generally and the RUSSKAYA mark specifically, and FTE's intention to mount a full frontal assault on SPI's U.S. trademark rights.

REDACTED

SPI clearly had a legitimate and reasonable basis to believe that FTE would make a grab for the RUSSKAYA mark in the U.S., just as it was making a grab for that mark and others in litigation throughout the world.

b. *There is No Territorial Limitation on the "Litigation Excuse."*

Petitioner's argument that the "litigation excuse" does not apply to foreign litigation, Pet. Br. 20, may have some superficial appeal but has no basis in law or public policy. While it is true that trademark rights are territorial, and that the status of a party's trademark rights abroad do not affect trademark rights in the U.S., see, e.g., Vanity Fair Mills, Inc. v T. Eaton Co., 234 F.2d. 633, 639, 109 U.S.P.Q. 438 (2d Cir. 1956), it simply does not follow that

litigation abroad cannot inform a reasonable business decision regarding a mark's use in the U.S., for two reasons.

First, SPI has not delayed the re-launch of the RUSSKAYA brand because it may be adjudged not to own a foreign mark. Rather, SPI has delayed the re-launch because the same legal theories that were tested abroad (and ultimately in the U.S.) applied to SPI's ownership of the RUSSKAYA mark in the U.S. as well. SPI has not claimed that the outcome of a specific piece of foreign litigation justifies its nonuse. Instead, it is the uncertain culmination of the worldwide legal proceedings and the interim drain on SPI's resources that made SPI's decision to refrain from using the RUSSKAYA mark a prudent business decision.

Second, cases that discuss the "litigation excuse" do not require that the litigation issue revolve around the registrant's U.S. trademark ownership. See, e.g., Penthouse Int'l, Ltd. v. Dyn Elecs., Inc., 196 U.S.P.Q. 251, 256 (T.T.A.B. 1977) (concern over potential trademark infringement claim); Zelinski, 335 F.3d at 639, 67 U.S.P.Q.2d at 1449 (patent infringement litigation). In other words, it is not the existence of a lawsuit concerning the mark at issue per se that negates a presumption of abandonment. Instead, courts look at the effect of litigation on the mark owner's business decisions regarding the commercial exploitation of its mark. See, e.g., Zelinski, 335 F.3d at 639, 67 U.S.P.Q.2d at 1449 (lingering patent infringement suit could justify company's nonuse of mark despite frivolity of the suit); Carter-Wallace, 434 F.2d at 803-04, 167 U.S.P.Q. at 720 (defendant "proffered legitimate business reasons" for decision to restrict use of mark).

This case involves a very unique set of circumstances – the Russian government's vodka "re-nationalization" campaign in the wake of the collapse of the former Soviet Union – that has garnered significant international attention. Owners of international trademark

portfolios certainly do not routinely fend off world-wide challenges to their core marks from powerful governments bent on undoing the effects of a previously sanctioned privatization. Surely, the litigation risk here more than justified SPI's business decision.

c. *SPI's Excusable Nonuse has Nothing to Do with SPI's Own Transactions.*

SPI has *never* alleged that the transfer of the RUSSKAYA mark to PepsiCo by VAO in the early 1990's was in any way "circumspect," nor has SPI alleged that its concerns were based on a "possible defect in the title to its own trademark." Pet. Br. 20. This is a gross mischaracterization of SPI's contentions. SPI is confident that the commercial transactions between its predecessors-in-interest were valid and that SPI is the true owner of the RUSSKAYA mark. What concerns SPI is not its own transactions but the cloud on its title created by the Russian government's relentless assault on SPI's rights.

Likewise, PepsiCo's earlier dispute with Frank Pesce was completely unrelated to the present worldwide litigation over SPI's chain of title and so did not "obviate any uncertainty regarding ownership of the mark." Pet. Br. 20. The outcome of that proceeding only extinguished a claim that the mark was abandoned during the period of time PepsiCo owned it, an argument Petitioner has not preserved for trial.

2. SPI Never Had an Intent Not To Resume Use of the RUSSKAYA Mark

SPI has always had an intent to resume use of the RUSSKAYA mark once the cloud of uncertainty surrounding SPI's rights to the Vodka Marks, including the RUSSKAYA mark, was eliminated and the market was ripe for a re-launch of the RUSSKAYA brand in the U.S.

To overcome a presumption of abandonment after a period of nonuse, SPI "need show only an intention to resume use 'within the reasonably foreseeable future.'" Emmpresa Cubana del Tabaco v. Culbro Corp., 399 F.3d at 468 n. 2 (2d Cir. 2005). Just as an "[i]ntent not to resume use may be inferred from circumstances," 15 U.S.C. § 1127, an intent to resume use may also be inferred. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 149, 82 U.S.P.Q.2d 1414, 1421-22 (2d Cir. 2007). Courts have held that that while "hard evidence of concrete plans to resume use of the mark would certainly carry the burden," courts should "not foreclose the possibility that other circumstances" might also support a finding of intent to resume use. Id. at 149, 82 U.S.P.Q.2d at 1422.

The uncontroverted testimony establishes that SPI was engaged in ongoing negotiations with its U.S. distributor regarding reintroducing the RUSSKAYA brand in the U.S. during the period of alleged abandonment. If SPI intended to abandon the mark in the U.S., why would it engage in such negotiations? There is nothing in SPI's current contract with Allied Domecq that prevents them from agreeing to import and distribute RUSSKAYA vodka in the U.S. While Petitioner makes much ado about the lack of physical documentation available to substantiate these negotiations, Pet. Br. 23, it is operating on the unproven assumption that verbal communications between business partners operating in different countries and speaking different languages are typically reduced to writing. More importantly, Petitioner has come forward with no evidence whatsoever that these negotiations did not, in fact, take place.

Despite Petitioner's argument, Pet. Br. 26, there also is nothing inconsistent between SPI's continued negotiations with its distributor about the RUSSKAYA brand and SPI's prudent business decision to delay the actual re-launch of the brand until after the uncertainty

created by the worldwide litigation abated. SPI's continuing negotiations in preparation of a re-launch demonstrate SPI's commitment to the RUSSKAYA brand and planning for the future. These types of negotiations cost little in terms of resources or risk compared to what would be required to implement a full-scale re-launch of a dormant brand.

SPI and Allied Domecq have also taken concrete steps to prepare for the reintroduction of the RUSSKAYA brand in the U.S. Allied Domecq has actually imported SPI's RUSSKAYA vodka pursuant to the November 2000 Agreement, which Petitioner claims precludes the importation of RUSSKAYA Vodka, and SPI has prepared a Statement of Manufacture for RUSSKAYA vodka, which is required by the distributor in order to sell the vodka in the U.S. Allied Domecq has obtained a Certificate of Label Approval for RUSSKAYA vodka from the U.S. Bureau of Alcohol, Tobacco and Firearms. All of this evidence corroborates SPI's intent to resume use of the RUSSKAYA mark and constitutes far more than a "bare assertion" of plans to resume use. See ITC v. Punchgini, Inc., 74 U.S.P.Q.2d 1239, 1247 (S.D.N.Y. 2005).

3. SPI's Intent is Corroborated by SPI's Continued Use and Investment in the RUSSKAYA Mark

As the uncontroverted evidence has shown, SPI always has been committed to the RUSSKAYA brand, both in the U.S. and abroad.

Petitioner makes much ado about the fact that SPI has continued to enjoy strong sales of RUSSKAYA vodka in those markets in which RUSSKAYA vodka was popular before the Russian government began its campaign to "re-nationalize" the Vodka Marks. Pet. Br. 27. Petitioner, however, ignores the critical difference between the risks and rewards of maintaining a healthy and profitable market for RUSSKAYA vodka and revitalizing a

dormant market for the product. It would have been self-defeating for SPI to withdraw RUSSKAYA from its key markets during this time, just as it would be imprudent for SPI make the investment required to re-launch the brand in the U.S. at a time when SPI needed to fund multi-million dollar legal costs.

SPI's strong sales in other jurisdictions only confirm that SPI had no reason to abandon this famous, globally successful mark in the U.S. The RUSSKAYA mark signifies one of the world's best-selling vodka brands, and is obviously highly valued by others. In today's increasingly flat world of global brands, and in the alcoholic beverage industry where global brands are common, see, e.g., Resp. First Not. of Rel. Ex. 40 at SPIG 00045-46, SPI's continued use and exploitation of the RUSSKAYA mark in other territories belies an intent to abandon it in the U.S.

Through the course of this cancellation proceeding – from discovery through taking testimony abroad – SPI has shown its commitment to the RUSSKAYA brand. See, e.g., Oliynik 17:10-23; Gusev 14:7-17; Tsyplakov 46:22-47:16. The Board has found that a party's "vigorous efforts" to defend a mark in a Board proceeding can help rebut a presumption of abandonment. See, e.g., Penthouse, 196 U.S.P.Q. at 257.

In sum, SPI's history of behavior, from the early part of this decade to the present, is entirely consistent with that of a mark owner who has an intent to resume use of a highly valued mark.

4. Petitioner Has Offered No Affirmative Proof of SPI's Intent Not To Resume Use of the RUSSKAYA Mark

Although Petitioner bears the ultimate burden of proving abandonment, Petitioner has not introduced any evidence that SPI lacked an intent to resume use of the RUSSKAYA

mark. Abandonment is a question of fact, and "[d]etermining intent or valid reasons for nonuse requires a factual determination." Burgess, 78 U.S.P.Q.2d at 1777 (citing Star-Kist Foods, 769 F.2d at 1396); see also Stock Pot Rest., Inc. v. Stockpot, Inc., 737 F.2d 1576, 1579, 222 U.S.P.Q. 665, 667 (Fed. Cir. 1984). Thus, once SPI offered evidence of its intent to resume use of the RUSSKAYA mark, any inference of abandonment must be based on Petitioner's proof of a contrary intent.

On this score, Petitioner did not take any testimony from any witness other than its counsel's paralegal. Petitioner did not initiate any discovery or testimony from third parties. Petitioner did not cross-examine any of SPI's multiple witnesses about the effect of the worldwide litigation on the RUSSKAYA mark, the reasons SPI refrained from using the RUSSKAYA mark, or SPI's intent to resume use of the RUSSKAYA mark.

Having proffered no evidence of SPI's actual intent to abandon its valuable mark, Petitioner has not carried its heavy burden of proving abandonment, even if the Board reaches that issue.

EVIDENTIARY ISSUES

I. Respondent's Response to Petitioner's "Objections"

In its Brief, Petitioner claims that A.V. Imports objected to the testimony of three of Respondent's witnesses – Alexey Oliynik (New Projects Manager, SPI Group SA); Oleg Gusev (Marketing Director International Brands, SPI Spirits Cyprus Ltd.), and Mikhail Tsyplakov (Head of the Legal Department, SPI IPCIS) – on the grounds that "these individuals were not identified as persons with knowledge." Pet. Br. 4.[11] Petitioner,

[11]Petitioner has waived any other evidentiary objections it might have asserted because it failed to raise them in its Brief. *See* T.B.M.P. § 707.04 and cases cited therein. Even if such a procedure were a recognized means of

however, has provided no further basis for this objection, and Petitioner's Brief does not identify when or how this objection was initially lodged.

Should the Board nevertheless consider Petitioner's unpreserved objection, it is without merit. In fact,

- Respondent disclosed Messrs. Oliynik and Gusev as "individuals having knowledge about Respondent's attempts to re-launch RUSSKAYA vodka in the U.S." in its Supplemental Answers and Objections to Petitioner's First Set of Interrogatories. See Interrogatory Nos. 3 and 5, served October 31, 2005, and made of record as Exhibit R to Pet. Third Not. of Rel.; see also Declaration of Lisa Pearson, attached hereto as Exhibit 1 ("Pearson Decl."), ¶ 5.
- Mr. Tsyplakov assumed his current position after the close of the discovery period, replacing Andrey Skurikhin (who had been previously identified by Respondent as the witness most knowledgeable about the worldwide litigation involving Respondent's vodka marks). Pet. First Not. of Rel. Ex. H.
- In correspondence dated January 15, 2007, Respondent informed A.V. Imports' then counsel, Andrew Aitken, of this change and advised Mr. Aitken that he should consider that correspondence to constitute a supplementation to Respondent's previous discovery responses. Pearson Decl. ¶¶ 2-3 and Ex. A.
- Soon thereafter, Mr. Aitken consented to the introduction of testimony of Mr. Tsyplakov, and Respondent proceeded with the expensive and time-consuming process of taking a deposition upon written questions. Id. at ¶ 4 and Ex. B.

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preserving objections in Board proceedings (which it is not). Petitioner also failed to submit any separate motion in limine seeking to exclude such evidence.

Because Respondent disclosed these individuals as persons with knowledge, Petitioner's objection is groundless and should be overruled.

II. Respondent's Objections

Respondent raised timely objections to materials submitted by A.V. Imports in its First and Second Notices of Reliance on December 8, 2006, by serving and filing such objections with the Board on December 27, 2006. The introduction of evidence in Board proceedings is governed by the Federal Rules of Evidence and relevant provisions of Title 37 of the Code of Federal Regulations. 37 C.F.R. § 2.122(a). Respondent hereby preserves the following objections, and requests that they be granted.

A. Objections to Exhibits A, B, and C to A.V. Imports' First Notice of Reliance

Respondent objected to Exhibits A, B and C to A.V. Imports' First Notice of Reliance on grounds that the documents contained in those exhibits are improperly identified. A.V. Imports' First Notice of Reliance identified these documents as copies of a trademark application, trademark registration, and trademark assignment of VOA Sojuzplodoimport when, in fact, the documents clearly reference V/O Sojuzplodoimport, not VOA Sojuzplodoimport. Because neither Petitioner nor A.V. Imports has done anything to cure this improper identification, Respondent maintains this objection, and requests that the Board not consider such Exhibits.

B. Objections to Exhibit F to A.V. Imports' First Notice of Reliance

Respondent also objected to Exhibit F to A.V. Imports' First Notice of Reliance, which were purported to be "official records" in the form of search results from the COLA (Certification of Label Approval) registry and COLAs for RUSSKAYA, on grounds of lack

of foundation and relevance. A.V. Imports failed to lay a foundation for the page of search results as it did not establish the authenticity of these purported copies pursuant to 37 C.F.R. § 2.122(e). Similarly, A.V. Imports has provided no evidence to authenticate the documents bearing production numbers SPIG 00004, SPIG 00005, SPIG 00006, SPIG 00007, SPIG 00008, SPIG 00017, and SPIG 00019, nor has A.V. Imports established the relevance of this particular selection of documents. In fact, the COLAs that A.V. Imports submitted are not comprehensive and do not contain other COLAs for RUSSKAYA. For purposes of supplementing this Exhibit if the Board elects to consider it, Respondent has submitted additional COLAs for RUSSKAYA vodka, bearing production numbers SPIG 00002, SPIG 00018, SPIG 00019, SPIG 00541, SPIG 00542, SPIG 00543, SPIG 00544, SPIG 00545, SPIG 000546, SPIG 00547, SPIG 00548, SPIG 00549, SPIG 00550, SPIG 00709, and SPIG 03870. Because neither Petitioner nor A.V. Imports has done anything to lay a foundation for these documents or establish the relevance of the particular selection of documents since Respondent's original objections, Respondent maintains these objections.

C. Objection to Exhibit J to A.V. Imports' First Notice of Reliance

Respondent objected to Exhibit J to A.V. Imports' First Notice of Reliance, which are purported to be "official records" in the form of search results for RUSSKAYA label approvals from COLA Online, on grounds of lack of foundation. A.V. Imports failed to lay a foundation for the page of search results as it did not establish the authenticity of these purported copies pursuant to 37 C.F.R. § 2.122(e). Because neither Petitioner nor A.V. Imports has done anything to lay a foundation for this document since Respondent's original objection, Respondent maintains this objection.

D. Objection to Exhibit M to A.V. Imports' First Notice of Reliance

Respondent objected to Exhibit M to A.V. Imports' First Notice of Reliance, which purports to be Respondent's Memorandum in Response to Petitioner's Motion for Summary Judgment, on grounds of lack of relevance. "Evidence which is not relevant is not admissible," Fed. R. Evid. 402, and to be "relevant," the evidence must have a "tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. A.V. Imports claimed that Exhibit M allegedly contains unspecified statements against Respondent's interest regarding use of the RUSSKAYA mark in the U.S. Legal argument of counsel, however, is not relevant because it does not make the existence of the fact, *i.e.* the use of the RUSSKAYA mark, more or less probable than it would be without the evidence. Because legal argument in a brief is not substantive evidence and cannot be relied on as such, Respondent maintains its objection to the introduction of Exhibit M into evidence.

E. Objection to Exhibit N to A.V. Imports' First Notice of Reliance

Respondent also objected to Exhibit N to A.V. Imports' First Notice of Reliance, which purports to be the Board's order denying Petitioner's Motion for Summary Judgment, on grounds of lack of relevance. A.V. Imports claimed that this order is allegedly relevant because, A.V. Imports asserted, the Board found, at that time, that a *prima facie* case of abandonment had been established and that there was no dispute regarding the nonuse of the RUSSKAYA mark for a certain period. However, the Board denied A.V. Imports' motion for summary judgment *in toto*. Thus, the Board's comments – made at a different time, on a different record, and with the case in a different procedural posture – are not relevant at this point, are not transformed into substantive evidence on this score, and do not relieve

Petitioner from its burden of proving to the Board, by competent evidence, each element of its abandonment claim. For these reasons, Respondent maintains its objection to the introduction of Exhibit N as substantive evidence.

F. Objection to Exhibit Q to A.V. Imports' First and Second Notices of Reliance

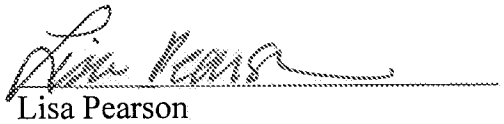
Respondent objected to Exhibit Q to A.V. Imports' First and Second Notice of Reliance on grounds of lack of foundation. A.V. Imports attempted to introduce a document that was produced by Respondent in response to certain interrogatories, but has not properly authenticated the document and has failed to conform to 37 C.F.R. § 2.120(j)(3)(i). Although documents provided in lieu of an interrogatory answer are admissible by notice of reliance, see, e.g., Miles Labs., Inc. v. Naturally Vitamin Supplements, Inc., 1 U.S.P.Q.2d 1445, 1447 n.9 (T.T.A.B. 1986), the notice of reliance must specify and *be accompanied by* the interrogatory to which each document was provided in lieu of an answer. See M-Tek, Inc. v. CVP Sys., Inc., 17 U.S.P.Q. 2d 1070, 1073 (T.T.A.B. 1990). A.V. Imports did not submit the interrogatories to which this document pertains in its First or Second Notice of Reliance; therefore, the document is not properly in evidence and should not be considered by the Board. Because neither Petitioner nor A.V. Imports has done anything to correct this deficiency since Respondent's original objection, Respondent maintains this objection.

CONCLUSION

The Petition for Cancellation should be denied.

Dated: May 15, 2008

Respectfully submitted,



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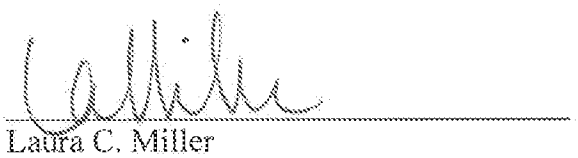
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing **RESPONDENT'S TRIAL BRIEF** upon counsel of record by causing a copy thereof to be deposited with the U.S. Postal Service, addressed as follows:

John P. Shannon
Merek, Blackmon and Voorhees, LLC
673 South Washington Street
Alexandria, VA 22314

This the 15th day of May, 2008.



Laura C. Miller
Attorney for Respondent

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EXHIBIT 1

TO RESPONDENT'S TRIAL BRIEF

A.V. Brands, Inc. (by assignment) v. Spirits International, N.V.
Cancellation No. 92043340

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

A.V. Brands, Inc. (by assignment). Petitioner, v. Spirits International, N.V., Respondent and Registrant.	Cancellation No.: 92043340 Registration No. 1,487,042 Mark: RUSSKAYA

DECLARATION OF LISA PEARSON ON EVIDENTIARY OBJECTION RAISED BY PETITIONER

I, Lisa Pearson, hereby declare as follows:

1. I am a member of the bar of the state of New York and a partner in the law firm Kilpatrick Stockton LLP, attorneys for Spirits International, N.V. ("Respondent"). I submit this declaration based on my personal knowledge to address an evidentiary issue raised in Petitioner's Trial Brief.

2. Discovery in the above-captioned cancellation proceeding closed on April 15, 2005. At that time, the Petitioner in this proceeding was A.V. Imports, Inc. ("AV Imports"), represented by Andrew Aitken, an attorney with the law firm Venable LLP. Mr. Aitken remains counsel of record for A.V. Imports in this proceeding.

3. On January 15, 2007, I sent an e-mail message to Mr. Aitken, in which I informed him that Mikhail Tsyplakov had recently assumed responsibility for Respondent's intellectual property matters. A true and correct copy of that e-mail message is attached hereto as Exhibit A. As I informed Mr. Aitken, Mr. Tsyplakov replaced Andrei Skurikhin as

the witness who was currently most knowledgeable about the worldwide litigation surrounding Respondent's vodka trademarks. *See* Ex. A. I also informed Mr. Aitken that Respondent may call Mr. Tsyplakov to testify although Mr. Tsyplakov was not identified as a potential witness in Respondent's discovery responses because Mr. Tsyplakov assumed his position after the close of the discovery period. *See id.* I requested that Mr. Aitken consider the January 15, 2007 e-mail as supplementation of Respondent's discovery responses and to advise me if A.V. Imports had any objection to our taking Mr. Tsyplakov's testimony under these circumstances. *See id.*

4. On or about January 19, 2007, I had a telephone conference with Mr. Aitken in which Mr. Aitken consented to, among other things, the introduction of testimony of Mr. Tsyplakov. I confirmed the contents of this conversation in an e-mail message to Mr. Aitken on January 19, 2007. A true and correct copy of that e-mail message is attached hereto as Exhibit B. We then proceeded with the very expensive and time-consuming process of securing this witness's testimony through a deposition on written questions conducted in London, due to Mr. Aitken's objection to conducting such depositions in Switzerland.

5. I heard nothing more from A.V. Imports , A.V. Brands, Inc., or Mr. Aitken regarding any objection to the taking of Mr. Tsyplakov's testimony until the issue was raised in Petitioner's Trial Brief.

6. Mr. Alexey Oliynik and Mr. Oleg Goussev were disclosed as individuals with knowledge of Respondent's plans to re-launch the RUSSKAYA brand in the United States in Respondent's Supplemental Answers and Objections to Petitioner's First Set of Interrogatories, which were served on October 31, 2005. A.V. Imports did not object to the

introduction of testimony by Mr. Goussev at any point in time prior to the passing reference in Petitioner's Trial Brief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: New York, New York
May 13, 2008

Lisa Pearson

EXHIBIT A

DECLARATION OF LISA PEARSON ON EVIDENTIARY OBJECTION RAISED BY PETITIONER

From: Pearson, Lisa
Sent: Monday, January 15, 2007 11:25 AM
To: 'Aitken, Andrew C.'
Subject: A.V. Imports v. Spirits International

Dear Andrew:

Per my telephone message, I am sending this e-mail to address some housekeeping issues with respect to our upcoming testimonial depositions.

First, I am planning to notice the deposition of William Finkelstein, the former Vice President and Intellectual Property Counsel of PepsiCo Inc. He is currently in private practice in Santa Monica, California. I think this is a relatively straightforward deposition that we can do telephonically. Is this acceptable to you?

Second, because the SPI witnesses are all located outside the US, we are planning to take their depositions on written questions as provided in Rule 2.124 of the Trademark Rules of Practice. The witnesses reside in Russia, Cyprus and Switzerland. We have taken a preliminary look into locating people who are qualified to administer oaths and transcribe testimony in those jurisdictions, and learned that there is no analogue to our court reporters. We believe the most efficient way to proceed would be to send a US court reporter to Geneva to administer the oath under US law, read the questions, and transcribe the testimony; we would have all three witnesses give their testimony there. As I read the rules, we can so stipulate under Rule 2.123(b). I genuinely believe this is the best way to get clean, usable transcripts. Will you so agree? (We may also be able to streamline this process by stipulating to put in the direct testimony by way of affidavit; we can discuss this and any other ideas you may have for simplifying this somewhat cumbersome procedure when we next speak.)

Third, my client has advised me that as of October 2006, Mikhail Tsyplakov has assumed responsibility for intellectual property matters of the SPI Group worldwide, including the world-wide legal disputes concerning its portfolio of Russian vodka marks. He holds the titles of Head of the Legal Department of Closed Joint Stock Company (ZAO) SPI IP CIS and Adviser to the General Director on Legal Matters to Closed Joint Stock Company (ZAO) Soyuzplodoimport. He therefore appears to be the witness who is currently most knowledgeable about the worldwide litigation that was addressed in the declaration of Andrei Skurikhin submitted in opposition to A.V. Imports' summary judgment motion, and we may well wish to call him as a witness on this topic instead of calling Mr. Skurikhin. As Mr. Tsyplakov only assumed his current position recently, he was not identified as a potential witness in our discovery responses. Accordingly, please consider this e-mail a supplementation of our discovery responses and advise us whether you have any objection to our taking Mr. Tsyplakov's testimony under the circumstances.

I would appreciate it if you could give me a call today or tomorrow to discuss these points.

Thank you.
Lisa

<http://www.kilpatrickstockton.com/>

Lisa Pearson
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31 West 52nd Street
14th Floor

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f 212 775 8825
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EXHIBIT B

DECLARATION OF LISA PEARSON ON EVIDENTIARY OBJECTION RAISED BY PETITIONER

From: Aitken, Andrew C. [mailto:ACAitken@Venable.com]
Sent: Friday, January 19, 2007 5:13 PM
To: Pearson, Lisa
Subject: Re: A.V. Imports v. Spirits International

I will stipulate to your proposal to send a US reporter to Geneva to administer an oath and record testimony.

Andy

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

----- Original Message -----
From: Pearson, Lisa <lpearson@kilpatrickstockton.com>
To: Aitken, Andrew C.
Sent: Fri Jan 19 13:32:53 2007
Subject: RE: A.V. Imports v. Spirits International

Dear Andy:
Further to our telephone conversation, I am writing to confirm that you have consented to a telephonic deposition of Bill Finkelstein as well as our introducing the testimony of Mikhail Tsyplakov. Please advise whether you have any objection to item 2 below or would like to propose an alternative approach to the depositions on written questions. As I will be traveling next week, I would like to try to nail this down today. Thanks. Lisa

<http://www.kilpatrickstockton.com/>

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Kilpatrick Stockton LLP

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From: Pearson, Lisa
Sent: Monday, January 15, 2007 11:25 AM
To: 'Aitken, Andrew C.'
Subject: A.V. Imports v. Spirits International

Dear Andrew:
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Thank you.
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