

**THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Lykos

Mailed: August 3, 2007

Cancellation No. 92044953

TOP TOBACCO, LP

v.

NORTH ATLANTIC OPERATING
CO., INC.

Before Walters, Cataldo and Taylor, Administrative Trademark
Judges.

By the Board:

Top Tobacco, L.P. ("petitioner") seeks to cancel the
registration of North Atlantic Operating Company, Inc.
("respondent") for the mark CLASSIC AMERICAN BLEND for
"cigarettes" in International Class 34.¹ As grounds for
cancellation, petitioner has asserted claims under Sections
1 and 2(d) of the Trademark Act. Petitioner's claim
pursuant to Section 1 reads as follows:

6. As demonstrated by the specimens submitted in
support of Respondent's registration attached
hereto as Exhibit A, Respondent uses the mark in
connection with a cigarette making kit, which

¹ Registration No. 2989935, registered on August 30, 2005,
alleging April 1, 1999 as the date of first use anywhere and in
commerce.

purportedly includes a cigarette making machine, tobacco, cigarette tubes and a cigarette box. However, Respondent obtained registration for the mark CLASSIC AMERICAN BLEND for use with "cigarettes." See copy of Registration No. 2,989,935 attached hereto as Exhibit B. Because, upon information and belief, Respondent is not using the mark in connection with the goods for which it sought registration, Registration No. 2,989,935 should be canceled on the grounds of non-use.

Respondent answered the allegations set forth above in the following manner:

6. As petitioner has made multiple statements in paragraph six to the Petition, Respondent cannot provide a blanket admission or denial of the allegations contained therein, and, therefore, denies the same.

This case comes before the Board for consideration of petitioner's motion for judgment on the pleadings.² The motion is fully briefed.³

Fed. R. Civ. P. 12(c), made applicable to Board proceedings by Trademark Rule 2.116(a), permits parties to move for judgment on the pleadings. A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be

² The Board notes that petitioner has enclosed portions of the record (i.e., the pleadings) in this proceeding as exhibits in support of its motion. Petitioner is reminded that the pleadings, by their very nature, already form part of the record in this proceeding. Accordingly, petitioner is requested to refrain from attaching portions of the record to future filings.

³ Petitioner has submitted a reply brief which the Board has exercised its discretion to consider. See Trademark Rule 2.127(a).

resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law. See *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

After carefully reviewing the parties' arguments and pleadings, the Board finds that based on the general denial asserted by respondent in paragraph 6 of its answer, petitioner is not entitled to judgment on the pleadings in its favor. However, we note that respondent admits in its responsive brief that it has not used the mark identified in its registration in connection with cigarettes. As respondent explains:

Unbeknownst to Respondent or its counsel, when the Statement of Use for the CLASSIC AMERICAN BLEND registration that is the subject of this petition was filed by Respondent's counsel, those goods upon which the mark is actually being used were accidentally deleted, leaving only "cigarettes" in the identification of goods. [footnote omitted]. After receiving the Certificate of Registration, Respondent's counsel noticed the error. In an effort to correct this error, counsel spoke with representatives from the PTO Commissioner's office, who advised counsel that it was not possible to simply reverse this mistake. Rather, Respondent would have to voluntarily cancel its registration and file a new application. However, before it could do so, Petitioner filed the instant petition. . .

Respondent's Responsive Brief, p. 2.

Clearly, these statements contradict respondent's general denial asserted in Paragraph 6 of its answer.

Because, in its responsive brief, respondent stated that it does not, in fact, use its mark in connection with the goods identified in the registration, regardless of the reason, it would appear that petitioner is entitled to judgment on its pleaded ground of non-use. Therefore, respondent is ordered to show cause within TWENTY (20) days of the mailing date of this order why judgment should not be entered against it, failing which judgment will be entered against respondent for non-use.

Proceedings are otherwise suspended.