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

Proceeding	92050296
Party	Plaintiff Altadis U.S.A. Inc.
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Attachments	Stipulated Motion and Exh. A 060611.pdf ( 10 pages )(736667 bytes )

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

In the Matter of Registration No. 3,233,835  
Issued on April 24, 2007

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Altadis U.S.A. Inc.,	:	
	:	
Petitioner,	:	
v.	:	Cancellation No.: 92050296
	:	
Wentworth E. Miller,	:	
	:	
Registrant.	:	
-----X	:	

**STIPULATED MOTION FOR VACATUR OF JUDGMENT,  
ENTRY OF AMENDMENT TO THE IDENTIFICATION OF GOODS IN  
U.S. FEDERAL TRADEMARK REGISTRATION NO. 3,233,835,  
REINSTATEMENT OF U.S. FEDERAL TRADEMARK REGISTRATION NO. 3,233,835,  
AS AMENDED, AND DISMISSAL OF CANCELLATION NO. 92050296**

Registrant, Wentworth E. Miller (“Miller”), *pro se*, and Petitioner, Altadis U.S.A. Inc. (“Altadis”), by and through the undersigned counsel, respectfully submit this stipulated motion, pursuant to 37 C.F.R. §2.127 and Rule 60(b)(6) of the Federal Rules of Civil Procedure.

The parties jointly move the Trademark Trial and Appeal Board (the “Board”) for an Order:

i) vacating the nonprecedential Orders of the Board dated March 9, 2010 and July 8, 2010 granting cancellation of U.S. Federal Trademark Registration No. 3,233,835; ii) entering an amendment to the identification of goods in U.S. Federal Trademark Registration No. 3,233,835 by deleting the word “cigar” so the identification of goods reads as follows: “cylindrical tube with removable caps at one or both ends for enclosing and extinguishing by oxygen deprivation a lighted cigarette or similar smokable product”; iii) reinstating U.S. Federal Trademark Registration No. 3,233,835, as amended;

and iv) dismissing Cancellation No. 92050296 upon the amendment and reinstatement of U.S. Federal Trademark Registration No. 3,233,835.

By Order dated of the United States Court of Appeals for the Federal Circuit (the “Federal Circuit”) the appeal of Cancellation No. 92050296 has been remanded to the Board so that the Board could consider this Stipulated Motion. A copy of the Federal Circuit’s Order is attached to this Stipulated Motion as Exhibit A.

### **Factual Background and Procedural History**

On April 24, 2007, a trademark registration issued for the CIGARETTESAVER trademark for “cylindrical tube with removable caps at one or both ends for enclosing and extinguishing by oxygen deprivation a lighted cigarette, cigar, or similar smokable product” in Class 34 to Miller. The registration was given U.S. Federal Trademark Registration No. 3,233,835.

On December 5, 2008, Altadis filed a Petition for Cancellation seeking to cancel U.S. Federal Trademark Registration No. 3,233,835. (Dkt. No. 1). Altadis filed the Petition on behalf of itself, as the exclusive licensee of the CIGAR SAVOR trademark, and on behalf of its wholly-owned subsidiary, Max Rohr, Inc. (“Max Rohr”). (*Id.*). Max Rohr is the owner of the CIGAR SAVOR trademark and U.S. Federal Trademark Registration No. 2,414,999 for CIGAR SAVOR for “smoker's articles, namely, tubes not of precious metal for extinguishing and storing cigars; cigar canisters not of precious metal; lighters; ashtrays not of precious metal; cigar humidors; cigar trimmers; cigar punches; and cigar cutters” in Class 34. (*Id.*)

On September 28, 2009, Altadis filed a Motion for Summary Judgment. (Dkt. No. 15). The Board issued an Order granting Altadis' Motion for Summary Judgment on March 9, 2010. (Dkt. No. 24). Miller subsequently filed a Request for Reconsideration of the Board's Order on April 9, 2010. (Dkt. No. 25). The Board denied the Request for Reconsideration and upheld its March 9, 2010 decision in an Order dated July 28, 2010. (Dkt. No. 27).

Miller subsequently filed a Notice of Appeal with the Federal Circuit on September 24, 2010. During the pendency of the appeal, the parties reached a settlement of the dispute between them. In order to initiate the implementation of the terms of the parties' settlement agreement, the parties first filed their "Joint Motion to Remand Cancellation No. 902050296 to the Trademark Trial and Appeal Board" with the Federal Circuit. In the Joint Motion, the parties requested that the Federal Circuit remand the case to the Board so that the Board could consider this Stipulated Motion. As noted above and as shown on the attached Exhibit A, the Federal Circuit granted the parties' Joint Motion. Accordingly, the parties are now respectfully requesting that the Board consider and grant this Stipulated Motion to further implement the parties' settlement terms.

### **Discussion**

Rule 60(b) of the Federal Rules of Civil Procedure governs relief from a judgment or order. Specifically, Rule 60(b)(6) provides as follows:

*Grounds for relief from a Final Judgment, Order or Proceeding.  
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ...*

*(6) any other reason that justifies relief. Fed. R. Civ. P. 60(b)(6).*

Such Rule is made applicable to final judgments of the Board pursuant to 37 C.F.R. § 2.116(a).

See TBMP §544. Determination of whether a motion made under Rule 60(b) of the Federal Rules of Civil Procedure is proper is within the sound discretion of the Board. *Id.* Further, the prior Orders of the Board in this matter are nonprecedential. Accordingly, to vacate such Orders does not have any effect on the public interest for the preservation of precedents. See *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149, 151 (2d Cir. 1998) (explaining that “vacatur is usually not justified because the social value in preserving precedents is not outweighed by equitable considerations” but finding that in certain circumstances vacatur is warranted).

Moreover, as is the case here, “the parties are agreed that the circumstances warrant the vacating or setting aside of a final judgment.” TBMP §544. In such situations, “[t]he Board ordinarily will grant a consented request for relief from judgment.” *Id.* Accordingly, the parties are filing this Stipulated Motion pursuant to TBMP §544.

The relief requested in this motion is justified to give effect to the parties’ settlement of the issues between them related to the registration and use of their respective CIGAR SAVOR and CIGARETTESAVER trademarks. As part of the terms of the settlement reached between the parties, the parties have agreed to jointly request the following relief from the Board: i) vacatur of the Board’s Orders dated March 9, 2010 and July 28, 2010; ii) entry of an amendment to the identification of goods in U.S. Federal Trademark Registration No. 3,233,835; iii) reinstatement of U.S. Federal Trademark Registration No. 3,233,835, as amended; and iv) dismissal of Cancellation No. 902050296 upon amendment and reinstatement of U.S. Federal Trademark Registration No. 3,233,835.

With respect to the parties' request for entry of an amendment to the identification of goods in U.S. Federal Trademark Registration No. 3,233,835, the parties request that the word "cigar" be deleted from the identification of goods. The resulting identification of goods would then be as follows: "cylindrical tube with removable caps at one or both ends for enclosing and extinguishing by oxygen deprivation a lighted cigarette or similar smokable product." Since such amendment would act to narrow the scope of goods, the parties' request is proper. *See* 37 C.F.R. § 2.173(e) (explaining that an amendment to the identification of goods in a registration will be permitted if it is a restriction to the identification of goods). Further, the proposed limitation on the identification of goods in U.S. Federal Trademark Registration No. 3,233,835 should help to alleviate the possibility of a likelihood of confusion between the respective marks of the parties.

The parties respectfully submit that the foregoing reasons justify vacatur of the Board's nonprecedential Orders; amendment and reinstatement of U.S. Federal Trademark Registration No. 3,233,835 and dismissal of Cancellation No. 92030296 pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

### **Conclusion**

Based on the forgoing, the parties jointly request that the Board grant this Stipulated Motion and order the following relief:

- i) Vacatur of the Board's Orders dated March 9, 2010 and July 8, 2010;
- ii) Entry of an amendment to the identification of goods in U.S. Federal Trademark Registration No. 3,233,835 to delete the word "cigar" with the resultant identification of goods to read as follows: "cylindrical tube with removable caps at one or both ends for enclosing and extinguishing by oxygen deprivation a lighted cigarette or similar smokable product";

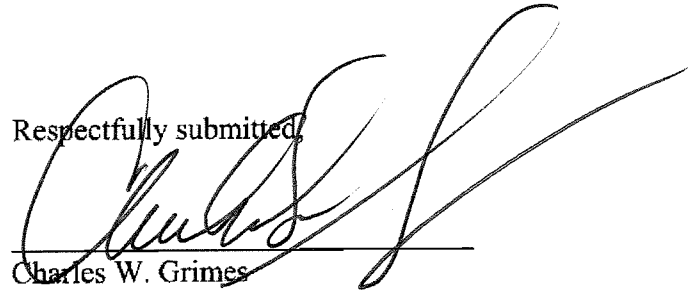
iii) Reinstatement of U.S. Federal Trademark Registration No. 3,233,835, as amended;

and

iv) Dismissal of Cancellation No. 92050296.

Dated: 2/15/11

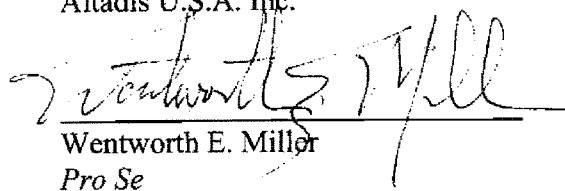
Respectfully submitted,



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Dated: 2/11/11

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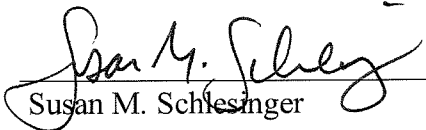
**CERTIFICATE OF SERVICE AND FILING**

The undersigned hereby certifies that a copy of the foregoing Stipulated Motion for Vacatur of Judgment, Entry of Amendment to the Identification of Goods in U.S. Federal Trademark Registration No. 3,233,825, Reinstatement of U.S. Federal Trademark Registration No. 3,233,825, As Amended, and Dismissal of Cancellation No. 3,233,835 was served on the Registrant/Correspondent of Record on the date indicated below by depositing the same with U.S.P.S. First Class Mail, postage prepaid to:

Wentworth E. Miller  
823 Chestnut Street  
Coraopolis, PA 15108

and further certifies that the aforementioned Stipulated Motion was filed with the Trademark Trial and Appeal Board on the date indicated below online through the ESTTA system of the United States Patent and Trademark Office.

Dated: 6/6/11

  
\_\_\_\_\_  
Susan M. Schlesinger



# **EXHIBIT A**

NOTE: This order is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**WENTWORTH E. MILLER,**  
*Appellant,*

v.

**ALTADIS U.S.A. INC.,**  
*Appellee.*

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2011-1051  
(Cancellation No. 92050296)

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Appeal from the United States Patent and Trademark  
Office, Trademark Trial and Appeal Board.

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**ON MOTION**

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Before GAJARSA, MAYER, and PROST, *Circuit Judges.*  
GAJARSA, *Circuit Judge.*

**ORDER**

The parties jointly move to remand this case to the  
Trademark Trial and Appeal Board, due to settlement.

The parties state that they have settled the case and  
move to remand so that the Board can consider a motion  
to vacate its judgment and take other actions. We grant

the motion to the extent that we remand for the limited purpose of the Board's consideration of the parties' motions. *Ohio Willow Wood Co. v. Thermo-Ply, Inc.*, 629 F.3d 1374, 1375 (Fed. Cir. 2011). We retain jurisdiction so that any of the parties may seek appellate review by notifying the clerk of the court within thirty days of entry of the Board's decision on remand. The appeal is held in abeyance pending the resolution of the motions by the Board. The parties should promptly inform this court of the Board's ruling on the motion and should propose how they believe the appeals should proceed in light of the Board's ruling.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion to remand is granted to the limited extent explained above. The court retains jurisdiction over the appeal at this time.

FOR THE COURT

MAY 26 2011

Date

/s/ Jan Horbaly

Jan Horbaly

Clerk

cc: Wentworth E. Miller  
Charles W. Grimes, Esq.

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**FILED**  
**U.S. COURT OF APPEALS FOR**  
**THE FEDERAL CIRCUIT**

**MAY 26 2011**

**JAN HORBALY**  
**CLERK**