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

Proceeding	92050333
Party	Defendant TROPICANA PRODUCTS, INC.
Correspondence Address	TROPICANA PRODUCTS, INC. 1001 13TH AVENUE EAST BRADENTON, FL 34208 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Patricia S. Smart
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Date	01/26/2009
Attachments	MtnToDismiss.pdf (3 pages)(19477 bytes)

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

REMINGTON HEALTH PRODUCTS, L.L.C.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92050333
)	
TROPICANA PRODUCTS, INC.,)	
)	
Registrant.)	

**REGISTRANT’S MOTION TO DISMISS
PETITIONER’S ABANDONMENT CLAIM**

I. STATEMENT

This proceeding involves a petition to cancel registrant’s DRINKABLE FRUIT registration. The Petition For Cancellation alleges (1) that the mark is likely to cause confusion with petitioner’s DRINKABLES mark that is the subject of Registration No. 2,552,892, Paragraph 6, and (2) that petitioner believes registrant has abandoned its mark, Paragraph 7.

Registrant moves to dismiss petitioner’s abandonment claim and strike Paragraph 7 of the Petition.

II. ARGUMENT

As discussed below, petitioner’s abandonment allegations, which are found in Paragraph 7 of the Petition For Cancellation, fail to state a claim for which relief can be granted. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, petitioner’s abandonment claim should be dismissed and Paragraph 7 stricken.

Paragraph 7 of the Petition sets forth all of petitioner’s claims concerning abandonment in this proceeding:

Upon information and belief, Remington believes that Registrant has abandoned Registrant's Mark; therefore, U.S. Registration No. 2,319,909 should be cancelled pursuant to 15 U.S.C. § 1092.

Petitioner's statement that it believes registrant has abandoned its mark is insufficient to state a claim for abandonment.

In order to set forth a cause of action to cancel the registration of a mark on the grounds of abandonment, petitioner must allege ultimate facts relating to the alleged abandonment. *Otto International, Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007). The facts alleged must set forth a *prima facie* claim of abandonment by a pleading of at least three consecutive years of non-use or must set forth facts that show a period of non-use of less than three years coupled with an intent not to resume. *Otto International*; Section 45 of the Trademark Act. Remington's allegation that it believes registrant has abandoned its mark is insufficient. *Id.*

In accordance with the foregoing, petitioner's abandonment claim should be dismissed and Paragraph 7 of the Petition should be stricken.

SMART & BOSTJANCICH

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CERTIFICATE OF SERVICE

I, Patricia S. Smart, an attorney for registrant, hereby certify that a copy of the foregoing
REGISTRANT'S MOTION TO DISMISS PETITIONER'S ABANDONMENT CLAIM is being
served upon:

Robert M. Chiaviello, Jr.
Fulbright & Jaworski, L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, TX 75201

this 26th day of January, 2009, by first class mail, postage prepaid.

/ P S Smart /