

ESTTA Tracking number: **ESTTA270801**

Filing date: **03/09/2009**

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

Proceeding	92050333
Party	Defendant TROPICANA PRODUCTS, INC.
Correspondence Address	Patricia S. Smart Smart & Bostjancich 30 West Monroe Street, Suite 800 Chicago, IL 60603 UNITED STATES pattismart@hotmail.com
Submission	Opposition/Response to Motion
Filer's Name	Patricia S. Smart
Filer's e-mail	pattismart@hotmail.com
Signature	/P S Smart/
Date	03/09/2009
Attachments	Response.FNL.pdf (16 pages)(430481 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 RESPONSE TO
PETITIONER’S MOTION TO AMEND**

In response to registrant’s motion to dismiss petitioner’s abandonment claim, petitioner seeks leave to file an Amended Petition For Cancellation. As discussed below, petitioner’s motion should be denied.

ARGUMENT

On December 3, 2008, petitioner filed by mail a Petition For Cancellation in which it alleged “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,” Petition, paragraph 7. Petitioner provided no basis for its abandonment claim and registrant moved for dismissal of same. Petitioner now seeks leave to file an amended petition in which it sets forth the following abandonment claim (Paragraph 7):

7. Upon information and belief, Registrant has failed to use Registrant’s Mark in commerce for at least three consecutive years; therefore, Registrant’s Mark should be cancelled pursuant to 15 U.S.C. § 1092. *Otto International, Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007).

In support, petitioner states that amendment should be permitted since petitioner gave notice of its claim on December 3, 2008 and that petitioner should be allowed to more fully plead that claim.

Petitioner's request for leave to amend should be denied since its amended pleading also is legally insufficient. *Trek Bicycle Corp. v. Star Trek Ltd.*, 64 USPQ2d 1540, 1541 (TTAB 2002). Petitioner nowhere alleges that registrant has discontinued use of its mark with an intent not to resume use. Instead, petitioner's amended pleading makes clear that its original allegation of abandonment was based on petitioner's mistaken belief that registrant had made no use of its mark for more than three years.

Here, the futility of the proposed amendment is shown by a review of the pleadings and the file of the registration sought to be cancelled, which automatically is of record. The registration file shows that a Section 8 Declaration Of Use and specimen were filed on February 2, 2006 and accepted, thus establishing use less than three years prior to the filing of the Petition For Cancellation. See Exhibit A. Petitioner's proposed amendment accordingly would be futile. Its motion to amend should be denied and its abandonment claim dismissed. *Trek Bicycle Corp. v. Star Trek Ltd., supra; Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories, Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987).

SMART & BOSTJANCICH

By: / P S Smart /
Patricia S. Smart
John Bostjancich
30 West Monroe Street
Suite 800
Chicago, IL 60603
(312) 857-2424

Attorneys for Registrant

CERTIFICATE OF SERVICE

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

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

this 9th day of March, 2009, by first class mail, postage prepaid.

/ P S Smart /

EXHIBIT A

Thank you for your request. Here are the latest results from the [TARR web server](#).

This page was generated by the TARR system on 2009-03-09 13:20:21 ET

Serial Number: 75255736 [Assignment Information](#) [Trademark Document Retrieval](#)

Registration Number: 2319909

Mark (words only): DRINKABLE FRUIT

Standard Character claim: No

Current Status: A cancellation proceeding has been filed at the Trademark Trial and Appeal Board and is now pending.

Date of Status: 2008-12-15

Filing Date: 1997-03-11

Transformed into a National Application: No

Registration Date: 2000-02-15

Register: Supplemental

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 830 -Post Registration

Date In Location: 2006-06-23

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. TROPICANA PRODUCTS, INC.

Address:

TROPICANA PRODUCTS, INC.
1001 13TH AVENUE EAST
BRADENTON, FL 34208
United States

Legal Entity Type: Corporation

State or Country of Incorporation:(NOT AVAILABLE)

GOODS AND/OR SERVICES

International Class: 029

Class Status: Active

processed fruits

Basis: 1(a)

First Use Date: 1998-08-15

First Use in Commerce Date: 1998-08-15

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2008-12-15 - Cancellation Instituted No. 9999999

2006-06-23 - Section 8 (6-year) accepted

2006-06-23 - Assigned To Paralegal

2006-05-15 - Case File In TICRS

2006-02-02 - Section 8 (6-year) filed

2006-02-02 - TEAS Section 8 Received

2003-06-05 - TEAS Change Of Correspondence Received

2001-10-09 - Section 7 correction issued

2000-11-20 - Response received for Post Registration action

2000-10-30 - Post Registration action mailed - Section 7

2000-03-16 - Section 7 amendment filed

2000-02-15 - Registered - Supplemental Register

1999-12-20 - APPROVED FOR REGISTRATION SUPPLEMENTAL REGISTER

1999-12-20 - Amendment to Use approved

1999-06-18 - Communication received from applicant

1998-12-28 - Non-final action mailed

1998-10-15 - Communication received from applicant

1998-11-18 - Amendment to use processing complete

1998-10-15 - Amendment to Use filed

1998-04-14 - Final refusal mailed

Latest Status Info

1998-03-04 - Communication received from applicant

1997-09-02 - Non-final action mailed

1997-08-28 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

Janet L. Silverberg

Correspondent

Patricia S. Smart

Smart & Bostjancich

30 West Monroe Street, Suite 800

Chicago, IL 60603

Phone Number: 312-569-1000

Fax Number: 312-569-3000



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US Serial No: 75255736

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Contents of File

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Mail / Create Date	Document Description	Select All	Start Download	Clear All
23-Jun-2006	Notice Of Acceptance	<input type="checkbox"/>	<input type="checkbox"/>	
08-May-2006	File Jacket	<input type="checkbox"/>	<input type="checkbox"/>	
08-May-2006	PR-Updated Reg Certificates	<input type="checkbox"/>	<input type="checkbox"/>	
08-May-2006	Specimens	<input type="checkbox"/>	<input type="checkbox"/>	
08-May-2006	Unclassified	<input type="checkbox"/>	<input type="checkbox"/>	
02-Feb-2006	PR-Section 8	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
02-Feb-2006	Specimens	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
05-Jun-2003	Change of Address	<input type="checkbox"/>	<input type="checkbox"/>	
20-Nov-2000	Response to Office Action	<input type="checkbox"/>	<input type="checkbox"/>	
15-Feb-2000	Registration Certificate	<input type="checkbox"/>	<input type="checkbox"/>	

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NOTE: Within any e-mail, please include your telephone number so we can talk to you

directly, if necessary. Also, include the relevant serial number or registration number, if existing.

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Declaration of Use of Mark in Commerce Under Section 8

The table below presents the data as entered.

Input Field	Entered
REGISTRATION NUMBER	2319909
REGISTRATION DATE	02/15/2000
SERIAL NUMBER	75255736
MARK SECTION	
MARK	DRINKABLE FRUIT
OWNER SECTION (no change)	
ATTORNEY SECTION	
NAME	Janet L. Silverberg
FIRM NAME	Pepsico Beverages & Foods
INTERNAL ADDRESS	Ste. 11-10
STREET	555 W. Monroe Street
CITY	Chicago
STATE	Illinois
ZIP/POSTAL CODE	60661
COUNTRY	United States
PHONE	312-821-1408
FAX	312-821-1316
EMAIL	Janet_Silverberg@quakeroats.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
OTHER APPOINTED ATTORNEY(S)	Karen A. Hunter
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	029
KEEP EXISTING GOODS AND/OR	

SERVICES	YES
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT7\IMAGEOUT7\752\557\75255736\xml1\S0 80002.JPG
SPECIMEN DESCRIPTION	8 oz. bottle of TROPICANA Fruit Wise fruit puree
PAYMENT SECTION	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	100
TOTAL AMOUNT	100
SIGNATURE SECTION	
SIGNATURE	/janet silverberg/
SIGNATORY NAME	Janet Silverberg
SIGNATORY DATE	02/02/2006
SIGNATORY POSITION	Attorney for Applicant
PAYMENT METHOD	DA
FILING INFORMATION	
SUBMIT DATE	Thu Feb 02 16:13:47 EST 2006
TEAS STAMP	USPTO/SECT08-20413611610- 20060202161347285511-2319 909-2005397254e897ece9c54 7619312c15c-DA-309-200602 02161106289096

**Declaration of Use of Mark in Commerce Under Section 8
To the Commissioner for Trademarks:**

REGISTRATION NUMBER: 2319909
REGISTRATION DATE: 02/15/2000

MARK: DRINKABLE FRUIT

The owner, TROPICANA PRODUCTS, INC., residing at 1001 13TH AVENUE EAST, BRADENTON, FL US 34208, is using the mark in commerce on or in connection with the goods and /or services as follows:

For International Class 029, the owner is using or is using through a related company or licensee the mark in commerce on or in connection with all the goods/services listed in the existing registration.

The owner is submitting one specimen for each class showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services , consisting of a(n) 8 oz. bottle of TROPICANA Fruit Wise fruit puree.

[Specimen-1](#)

The registrant hereby appoints Janet L. Silverberg and Karen A. Hunter of Pepsico Beverages & Foods, Ste. 11-10, 555 W. Monroe Street, Chicago, Illinois United States 60661 to submit this Declaration of Use of Mark in Commerce Under Section 8 on behalf of the registrant.

A fee payment in the amount of \$100 will be submitted with the form, representing payment for 1 class(es), plus any additional grace period fee, if necessary.

Declaration

The owner is using or is using through a related company or licensee the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Signature: /janet silverberg/ Date: 02/02/2006

Signatory's Name: Janet Silverberg

Signatory's Position: Attorney for Applicant

Mailing Address:

Pepsico Beverages & Foods

Ste. 11-10

555 W. Monroe Street

Chicago, Illinois 60661

RAM Sale Number: 309

RAM Accounting Date: 02/03/2006

Serial Number: 75255736

Internet Transmission Date: Thu Feb 02 16:13:47 EST 2006
TEAS Stamp: USPTO/SECT08-20413611610-200602021613472
85511-2319909-2005397254e897ece9c5476193
12c15c-DA-309-20060202161106289096

BEST BY JUN 30 05 08-24



Tropicana.

Fruit
Wise.

BASKET OF BERRIES™

DRINKABLE FRUIT®
Naturally Flavored JUICE/PUREE
with Other Natural Flavors



8 FL OZ (240mL)

ROUTING SHEET TO POST REGISTRATION (PRU)

Registration Number: 2319909



Serial Number: 75255736



RAM Sale Number: 309

RAM Accounting Date: 20060203

Total Fees: \$100

Note: Process in accordance with Post Registration Standard Operating Procedure (SOP)

<u>Transaction</u>	<u>Fee Code</u>	<u>Transaction Date</u>	<u>Fee per Class</u>	<u>Number of Classes</u>	<u>Total Fee</u>
§8 affidavit	7205	20060202	\$100	1	\$100

Physical Location: 900 - FILE REPOSITORY (FRANCONIA)

Lost Case Flag: False

In TICRS (AM-FLG-IN-TICRS): False

Transaction Date: 20060202



BEST BY JUN 30 05 08-24



Tropicana.

Fruit
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BASKET OF BERRIES™

DRINKABLE FRUIT®
Naturally Flavored JUICE/PUREE
with Other Natural Flavors



8 FL OZ (240mL)