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Filing date: **10/28/2010**

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

Proceeding	92051638
Party	Defendant Hugh Lord and Linda Lord
Correspondence Address	Ashlyn J. Lembree UNH School of Law IP & Transaction Clinic Concord, NH 03301 UNITED STATES ipclinic@law.unh.edu
Submission	Motion for Summary Judgment
Filer's Name	Ashlyn J. Lembree, Esq.
Filer's e-mail	Ashlyn.Lembree@law.unh.edu, jayme.selinger@law.unh.edu
Signature	/Ashlyn J. Lembree, Esq./
Date	10/28/2010
Attachments	Respondents Mot for Summary Judgment 10-28-10.pdf ( 2 pages )(262628 bytes ) Memo in Support of Resp M4SJ 10-28-10.pdf ( 8 pages )(1417243 bytes ) Exh A to Memo iso M4SJ - R2A - 10-28-10.pdf ( 6 pages )(621226 bytes ) Exh B to Memo iso M4SJ - Interrog 10-28-10.pdf ( 14 pages )(1843179 bytes )

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

Napco, Inc.	)	
	)	
Petitioner	)	
	)	
v.	)	Cancellation No. 92051638
	)	
	)	Registration No. 3,198,902
Hugh Lord and	)	Mark: PAPALATTE
Linda Lord	)	Reg. Date: Jan. 16, 2007
	)	
Respondents	)	

**RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

Hugh Lord and Linda Lord (“Respondents”), the owners of Registration No. 3,198,902, respectfully request that the Board enter judgment in favor of Respondents based on one or more of the following reasons: the Board’s lack of jurisdiction because the matter is non-justiciable and Petitioner’s laches, and/or Petitioner’s acquiescence.

In support of thereof, Respondents refer the Board to Respondent’s memorandum in support of this motion for summary judgment, filed herewith.

WHEREFORE, the Respondents pray that the Board

- A. enter judgment in favor of Respondents, dismissing the petition; and,
- B. for such further orders as this Board may deem equitable and just.

Respectfully submitted,  
HUGH LORD and LINDA LORD,  
By and Through Their Attorneys,

Dated: October 28, 2010



Ashlyn J. Lembree, Esq.  
University of New Hampshire School of Law  
Intellectual Property & Transaction Clinic  
2 White Street  
Concord, NH 03301  
Tel.: 603-225-3350

**Certificate of Service**

I hereby certify that the foregoing document was served upon Petitioner this 28th day of October, 2010 by delivering the same to Counsel for the Petitioner electronically to his email address, [joseph.schmidt@huschblackwell.com](mailto:joseph.schmidt@huschblackwell.com), which electronic service was agreed upon at the Discovery Conference, with a further courtesy copy of the foregoing document being mailed to Counsel for the Petitioner by mailing a copy of the same to him via first-class mail, postage pre-paid, to Joseph F. Schmidt, Husch Blackwell Sanders Welsh & Katz, 120 S. Riverside Plaza, Suite 2200, Chicago, IL 60606.



Ashlyn J. Lembree, Esq.  
University of New Hampshire School of Law  
Intellectual Property & Transaction Clinic

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

Napco, Inc.	)	
	)	
Petitioner	)	
	)	
v.	)	Cancellation No. 92051638
	)	
	)	Registration No. 3,198,902
Hugh Lord and	)	Mark: PAPALATTE
Linda Lord	)	Reg. Date: Jan. 16, 2007
	)	
Respondents	)	

**MEMORANDUM IN SUPPORT OF  
RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

Hugh Lord and Linda Lord (“Respondents” or “Registrants”), the owners of Registration No. 3,198,902, state in support of their motion for summary judgment that this cancellation proceeding should be dismissed based on one or more of the following reasons: the Board’s lack of jurisdiction because the matter is non-justiciable and Petitioner’s laches, and/or Petitioner’s acquiescence.

**Facts**

Respondents, Hugh and Linda Lord, have a federal registration for the trademark PAPALATTE (U.S. PTO Reg. No. 3198902), which was filed on March 28, 2006. Under the PAPALATTE mark, Papalatte sells coffee and chocolate. On June 4, 2008, Petitioner, Napco, applied for a federal registration for the PAPA PODS mark for "filters filled with ground coffee" on an intent-to-use basis as U.S. PTO Serial No. 77490740 (the “1B Application”). Napco is the owner of the federally registered trademarks PAPANICHOLAS, PAPA NICKS’S and PAPA

POINTS used in connection with the sale of coffee and services relating to coffee (Napco's Registered Marks).

Petitioner has admitted that its asserted damage (i.e. the *standing* requirement of 15 U.S.C. § 1064) is based on the fact that the PAPALATTE registration was cited in a § 2(d) rejection of Petitioner's 1B Application. *See* Exhibit A, Req. to Admit No. 13 (Respondents' Requests to Admit, to which Respondents hereby state Petitioner failed to respond). Petitioner filed the 1B Application at issue on June 04, 2008 as an intent-to-use, which was after Registrant's date of first use, August 21, 2003. Petitioner has not asserted that it has standing based on Petitioner's Registered Marks.

Petitioner has admitted that its asserted *grounds* for this proceeding is an alleged likelihood of confusion between the PAPALATTE mark on the one hand and Napco's Registered Marks on the other hand. Exhibit A, Req. to Admit No. 14. Petitioner has not asserted that there is a likelihood of confusion between Petitioner's 1B Application and the PAPALATTE mark.

All of Napco's Registered Marks list in their registrations dates of first use preceding Registrants' date of first use, and all of Napco's Registered Marks were registered by the time the Registrants' application was published for opposition (publication occurred on October 31, 2006). Registrants have been in a state of continuous business operation in interstate commerce for coffee and chocolate since at least March 1, 2006. *See* Exhibit B (Registrants' Responses to Interrogatories), Interrogatory Responses Nos. 1, 2, 6, 7, and 9 (Response No. 9 is redacted as being confidential). Petitioners knew of the PAPALATTE mark at least as early as September of 2007 as a result of a trademark clearance search. Exhibit A, Req. to Admit No. 1. At no point during Registrants' business operations until the filing date of the Petition to Cancel did

Petitioner challenge Registrant's Mark. Exhibit A, Req. to Admit No. 4. During that time, Registrants expanded their business relying on the use of the PAPALATTE mark, which expansion included within it the use of the www.papalatte.com web site, Facebook, brochures, flyers, price sheets, and sales at the wholesale and retail levels. *See* Exhibit B, Interrogatory Response Nos. 6, 7, and 9.

### Argument

#### **I. Applicable Legal Standard**

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 4 USPQ2d 1793 (Fed. Cir. 1987). When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely-disputed facts that must be resolved at trial.

#### **II. Petitioner has failed to plead sufficient facts to establish standing which are founded on an injury causally connected to the grounds of the petition; consequently, this matter is non-justiciable and should be dismissed.**

The Petitioner must establish (a) standing to maintain the proceedings, and (b) a valid statutory ground for denial of the registration. *See Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (CCPA 1982). Standing at the pleading stage is reviewed by determining whether petitioner has alleged facts, which if later proven, would establish that petitioner has a

real interest in the proceeding. The facts so pled must be sufficient to show a personal interest in the outcome of the case beyond that of the general public. *See Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed.Cir. 1987); *International Order of Job's Daughters v. Lindeburg and Company*, 727 F.2d 1087, 220 USPQ 1017 (Fed.Cir. 1984); *Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (CCPA 1982). Failure to plead facts which give rise to standing renders the case non-justiciable, and the case should be dismissed.

The Petition to Cancel rests its allegation of standing upon potential future damage to Petitioner's use of the PAPA PODS mark and potential prevention of its obtaining a registration for the PAPA PODS mark, yet does not allege priority of use (nor could it) nor likelihood of confusion between the Respondents' registered mark and the PAPA PODS mark. However, Petitioner admits that its grounds for this Petition to Cancel is likelihood of confusion between Registrant's PAPALATTE mark on the one hand and Petitioner's PAPANICHOLAS, PAPA POINTS, and PAPA NICK's trademarks on the other hand, and not its PAPA PODS mark. *See* Exhibit A (Request for Admission, Request Nos. 13 and 14, to which Respondents hereby state Petitioner's did not respond). Consequently, Petitioner has failed to allege injury sufficient to establish its standing to maintain the Petition to Cancel.

Furthermore, given the lack of a nexus between Petitioner's alleged damage or potential damage and its three registrations which pre-date the registration date for the registration sought to be cancelled, Petitioner acts as a mere interloper in its challenge to Respondent's registration. In order to prove standing, a plaintiff must establish "that there is a *causal connection* between the litigant's injury and the putatively illegal conduct of the defendant, and that this injury is likely to be redressed should the court grant the relief requested." *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1550 (Fed. Cir. 1986) (citing, *inter alia*, *Allen v. Wright*, 468 U.S. 737

(1984)) (emphasis supplied); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (also requiring “causal connection”). This causal connection must be present from the inception of a lawsuit. *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304 (Fed. Cir. 2003). The injury must be “fairly traceable” to the defendant’s alleged unlawful conduct. *Allen v. Wright*, 468 U.S. 737 (1984) (no standing found in case where black children treated discriminatorily in less-than-de-segregated school were legally injured, but did not have an injury that was “fairly traceable” to the IRS’s failure to fulfill its legal obligation to revoke preferential tax status to schools which do not effectively desegregate); *see also Raines v. Byrd*, 521 U.S. 811 (1997).

Standing is not a question of sincerity of the plaintiff, but rather a question of having the appropriate injury. In 1974, the U.S. Supreme Court stated that “the essence of standing ‘is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured.’” *Schlesinger v. Reservists Cttee to Stop the War*, 418 U.S. 208, 225-26 (1974) (quoting *Doremus v. Board of Education*, 342 U.S. 429, 435, 72 S.Ct. 394, 397, 96 L.Ed. 475 (1952)). In order to establish standing, the plaintiff must prove, *inter alia*, a nexus between the harm and the grounds. *See In re U.S. Catholic Conference*, 885 F.2d 1020, 1027-28 (2d Cir. 1989) (no standing for taxpayers holding a sincere belief against the Catholic Church’s activities and taxpayers’ claim that the government should tax the Church for electioneering).

In the present case, Petitioner’s alleged injured interest is inapposite, because Petitioner’s PAPANICHOLAS, PAPA POINTS, and PAPA NICK’s trademarks are really at stake under the grounds. Because Petitioner’s PAPA PODS mark is not and **cannot** be harmed in a legally protectable manner by a prior user and registrant, Petitioner’s PAPA PODS mark does not meet the logical nexus requirement.

**III. Petitioner waited over three and a half years since it should have known and more than two years since it admitted to knowing about the PAPALATTE mark before bringing this petition, which constitutes inexcusable delay; consequently, the petition should be dismissed for laches.**

Respondents have been using the mark PAPALATTE since August 21, 2003. The mark was registered January 16, 2007 following a lack of any notice of opposition filed against the registration. Each of Petitioner's three registrations identified in the Petition to Cancel bear dates of first use pre-dating the August 21, 2003 date of first use for PAPALATTE. Petitioner admitted that it knew of Registrant's mark at least as early as September of 2007, yet it took no action against the PAPALATTE mark until it failed to convince the examining attorney that there is no likelihood of confusion between PAPALATTE and PAPA PODS. Assuming, *arguendo*, that Petitioner intends to assert that the PAPALATTE mark is likely to be confused with any of the registrations listed as owned by Petitioner in the Petition to Cancel, Respondents assert that confusion is not inevitable and that Petitioner knew (or should have known) of Respondents' mark, which mark was in use over a significant period of time (more than six years of use and nearly three years since the registration date) and resulted in the creation of considerable, valuable goodwill in Respondents' trademark, which constituted an inexcusable delay for an undue period of time that will result in material prejudice to Respondents if the Petition to Cancel is granted.

IV. Despite having actual knowledge about the PAPALATTE mark for more than two years, Petitioner made no move to communicate with PAPALATTE prior to this Petition, allowing Registrant to grow its business under the PAPALATTE name, materially prejudicing the Registrant; consequently, the petition should be dismissed for acquiescence.

Despite alleged prior use of the three registered marks by Petitioner, Petitioner did not oppose Respondents' later-filed registration for PAPALATTE, send a cease and desist letter to Respondents or otherwise take action to interfere with Respondents' use or registration of the PAPALATTE mark during a time of the continuous operation of a business by Respondents using the PAPALATTE mark, *see* Exhibit A, Req. to Admit Nos. 1 and 4, to the prejudice of Respondents. Therefore, Petitioner apparently acquiesced to Respondents' continued use and registration of the PAPALATTE mark. *See* Exhibit B, Interrogatory Response Nos. 6, 7, and 9.

Conclusion

In conclusion, summary judgment is appropriate because Petitioner lacks standing in that Petitioner's exclusive pleaded basis for standing is its rejected 1B Application which bears no causal connection to Petitioner's asserted likelihood of confusion grounds for Petitioner's Registered Marks. Summary judgment is independently appropriate because Petitioner sat on its rights to the material prejudice to Registrant's business.

Respectfully submitted,  
HUGH LORD and LINDA LORD,  
By and Through Their Attorneys,

Dated: Oct. 28, 2010



Ashlyn J. Lembree, Esq.  
University of New Hampshire School of Law  
Intellectual Property & Transaction Clinic  
2 White Street  
Concord, NH 03301  
Tel.: 603-225-3350

**Certificate of Service**

I hereby certify that the foregoing document was served upon Petitioner this 28th day of October, 2010 by delivering the same to Counsel for the Petitioner electronically to his email address, [joseph.schmidt@huschblackwell.com](mailto:joseph.schmidt@huschblackwell.com), which electronic service was agreed upon at the Discovery Conference, with a further courtesy copy of the foregoing document being mailed to Counsel for the Petitioner by mailing a copy of the same to him via first-class mail, postage pre-paid, to Joseph F. Schmidt, Husch Blackwell Sanders Welsh & Katz, 120 S. Riverside Plaza, Suite 2200, Chicago, IL 60606.



Ashlyn J. Lembree, Esq.  
University of New Hampshire School of Law  
Intellectual Property & Transaction Clinic

# EXHIBIT A

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

Napco, Inc.	)	
	)	
Petitioner	)	TTAB Cancellation Proceeding
	)	No. 92051638
v.	)	
	)	
Hugh Lord and	)	
Linda Lord	)	
	)	
Respondents	)	
	)	

**RESPONDENT’S REQUESTS FOR ADMISSIONS**

Pursuant to Fed. R. Civ. P. 36, Trademark Trial and Appeal Board Manual of Procedure § 407.01 *et seq.*, and Trademark Rule of Practice § 2.120(a)(1) (37 U.S.C. § 2.120(a)(1)) Respondents Hugh Lord and Linda Lord respectfully request that Petitioner Napco Inc. admit the truth of the following matters. If you fail to fully respond to these Requests for Admissions within the time allowed, the matters set forth in these Requests may be deemed admitted and conclusively established for the purposes of this Cancellation Proceeding. All such admissions should be sent via certified mail to Ashlyn Lembree, Esq. at the Franklin Pierce Law Center Intellectual Property and Transaction Clinic, 2 White Street, Concord, NH 03301 or such manner or place as counsel may mutually agree.

## **REQUESTS FOR ADMISSIONS**

### **REQUEST FOR ADMISSION NO. 1**

Admit that Petitioner Napco, Inc. knew of Registrant's Trademark PAPALATTE as early as September of 2007 as a result of a trademark clearance search.

**RESPONSE:**

### **REQUEST FOR ADMISSION NO. 2**

Admit that the document attached as Exhibit A accurately represents the contents of the TDR files for Petitioner's application for PAPA PODS, application number 77/490,740, having a filing date of June 4, 2008.

**RESPONSE:**

### **REQUEST FOR ADMISSION NO. 3**

Admit that the document attached as Exhibit B accurately represents the contents of the TDR files for Petitioner's application for PAPA PODS, application number 78/369,385, having a filing date of February 17, 2004.

**RESPONSE:**

### **REQUEST FOR ADMISSION NO. 4**

Admit that Petitioner's first communication with Registrant was through the letter sent by Petitioner's counsel in November of 2009, a copy of which is attached as Exhibit C.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 5**

Admit that between August 21, 2003 and the December, 2009 letter described in Request for Admission Number 4, the only communications you received relative to Respondent's PAPALATTE trademark were from the U.S. Patent and Trademark Office, namely, office actions in the PAPA PODS trademark application Serial No. 77/490,740.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 6**

Admit that Petitioner knows of no instances of actual confusion ever occurring between Napco, Inc., Petitioner's Trademarks (PAPANICHOLAS, PAPA POINTS, PAPA NICK'S, and PAPA PODS), or Petitioner's products and Registrant or Registrant's PAPALATTE mark.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 7**

Admit that Petitioner distributes its products under the Petitioner's Trademarks (PAPANICHOLAS, PAPA POINTS, PAPA NICK'S, and PAPA PODS) to only one or more of the following states: Illinois, Michigan, Minnesota, Missouri, Ohio, Pennsylvania, and Texas.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 8**

Admit that representative print labels/advertising for Petitioner's Trademark PAPANICHOLAS is as found in the attached Exhibit D.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 9**

Admit that representative print labels/advertising for Petitioner's Trademark PAPA POINTS is as found in the attached Exhibit E.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 10**

Admit that representative print labels/advertising for Petitioner's Trademark PAPA NICK'S is as found in the attached Exhibit F.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 11**

Admit that representative print labels/advertising for Petitioner's Trademark PAPA PODS is as found in the attached Exhibit G.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 12**

Admit that Petitioner's PAPA POINTS trademark refers to a service for promoting the sale of coffee through the administration of incentive award programs.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 13**

Admit that Petitioner contends that the manner it alleges it is damaged is by the citation of Registrant's PAPALATTE mark in a likelihood of confusion rejection to the pending PAPA PODS trademark application contained in an office action dated April 22, 2009.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 14**

Admit that Petitioner's grounds for this Petition to Cancel is likelihood of confusion between Registrant's PAPALATTE mark and Petitioner's PAPANICHOLAS, PAPA POINTS, and PAPA NICK'S trademarks.

**RESPONSE:**

August 28, 2010

Respectfully submitted,  
Hugh Lord and Linda Lord  
By their attorney,



Ashlyn Lembree, Esq.  
Franklin Pierce Law Center  
Intellectual Property and Transaction Clinic  
2 White Street  
Concord, NH 03301  
(603) 225-3350

# EXHIBIT B

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

Napco, Inc.	)	
<i>Petitioner</i>	)	
	)	
v.	)	Cancellation No. 92051638
	)	
Hugh Lord and Linda Lord	)	
<i>Registrants</i>	)	
	)	

**REGISTRANT'S RESPONSE TO  
PETITIONER'S FIRST SET OF INTERROGATORIES NO. 1 - 17**

Pursuant to Trademark Rule of Practice 2.120 (37 U.S.C. § 2.120) and Fed. R. Civ. P. 33(b), Hugh Lord and Linda Lord answer Petitioner's First Set of Interrogatories to Respondents Nos. 1 – 17 as follows, and incorporate said Interrogatories by reference.<sup>1</sup> Registrants assert that these responses are timely, complete, and accurate, and the grounds for all objections comport with the Trademark Rules of Practice and the Federal Rules of Civil Procedure.

**ANSWER TO INTERROGATORY NO. 1**

Whole bean coffee, chocolate, coffee mugs, hats, bags, and t-shirts.

**ANSWER TO INTERROGATORY NO. 2**

<u>Product</u>	<u>Use Anywhere</u>	<u>Interstate</u>
Whole bean coffee	August 21, 2003	March 1, 2006
Chocolate	August 21, 2003	March 1, 2006

<sup>1</sup> Petitioner's First Set of Interrogatories to Respondents Nos. 1 – 17, electronically mailed to counsel Registrant in pdf form, are attached.

Coffee mugs	April 1 or 2, 2006	April 1 or 2, 2006
Hats	April 1 or 2, 2006	April 1 or 2, 2006
Bags	April 1 or 2, 2006	April 1 or 2, 2006
T-Shirts	April 1 or 2, 2006	April 1 or 2, 2006

**ANSWER TO INTERROGATORY NO. 3**

- (a) Hugh Lord or Linda Lord
- (b) Review of a Comprehensive Trademark Search Report purchased from Legalzoom.com.
- (c) Comprehensive Trademark Search Report prepared by Legalzoom.com.

**ANSWER TO INTERROGATORY NO. 4**

- (a) In 2003, Hugh Lord installed an espresso bar in his home and began making his own coffee for his friends and family. When his son, Tom, would come over for coffee, he would ask "Is Papa Latte up and running?" referring to Mr. Lord's espresso machine. We proceeded to use the name to register on the web site coffeegeek.com and for the publication of articles/information about coffee. Thus, the name was both conceived and selected.
- (b) We selected the mark for its commercial appeal and sentimental value to their family.
- (c) Hugh, Linda and Tom Lord were the only persons involved in the selection of the mark.
- (d) We considered adopting the mark as early as 2003.

**ANSWER TO INTERROGATORY NO. 5**

(a) Hugh Lord and Linda Lord, no title, both of equal levels of knowledge throughout the referenced time, both residing at 14930 West Dynamite Boulevard, Surprise, AZ 85387.

(b) Hugh Lord and Linda Lord, no title, both of equal levels of knowledge throughout the referenced time, both residing at 14930 West Dynamite Boulevard, Surprise, AZ 85387.

**ANSWER TO INTERROGATORY NO. 6**

We sell, distribute, advertise or otherwise market or promote our products through the Internet (including through their website, [www.papalatte.com](http://www.papalatte.com), and on Facebook), by word of mouth, and at the wholesale level (through brochures, price sheets, and business cards). Our products, however, are sold also at retail stores (PAPALATTE products are sold in stores with labels bearing the name "Papalatte").

**ANSWER TO INTERROGATORY NO. 7**

See Answer to Interrogatory No. 6.

**ANSWER TO INTERROGATORY NO. 8**

Respondents object to the Interrogatory to the extent that it requests the disclosure of proprietary marketing data and strategic market information, disclosure of which would cause irreparable injury to Respondents.

ANSWER TO INTERROGATORY NO. 9

2003	\$	[REDACTED]
2004	\$	[REDACTED]
2005	\$	[REDACTED]
2006	\$	[REDACTED]
2007	\$	[REDACTED]
2008	\$	[REDACTED]
2009	Approximately \$	[REDACTED]

ANSWER TO INTERROGATORY NO. 10

Registrants object to the Interrogatory to the extent that it is overly broad and the assembly of information responsive to such Interrogatory would require an overly burdensome search for information that is of little or no benefit with respect to the issues or controversies in this action, such that the value of producing the requested information would be far outweighed by the burden of identifying such information.

ANSWER TO INTERROGATORY NO. 11

Excluding this action, none.

ANSWER TO INTERROGATORY NO. 12

We are not aware of any instances of confusion, likelihood of confusion, mistake or deception that refers or relates to our and/or Petitioner's trademarks.

ANSWER TO INTERROGATORY NO. 13

We have not licensed or otherwise authorized any third party to use the mark "Papalatte."

**ANSWER TO INTERROGATORY NO. 14**

See our answers to interrogatories and responses to requests to produce made this day.

See also our Answer and Registration Certificate.

Registrants reserve the right to supplement this answer as new facts and documents come to light, including, but not limited to, documents produced by Petitioner in its discovery responses.

**ANSWER TO INTERROGATORY NO. 15**

(a) Yes.

(b) We ordered a search from Legalzoom.com on or about March 24, 2006.

Pursuant to a telephone conference between counsel for the Petitioner and counsel for the Registrants on this day, this Comprehensive Trademark Search Report is being copied and will be forwarded. Registrants object to the request to list all marks, applications, and registration uncovered in the search, as it would be unduly burdensome to retype the contents of an approximately 800-page report for which counsel for the Petitioner has already authorized copying expenses. Consequently, Registrants refer Petitioners to said Comprehensive Trademark Search Report for the answer to this aspect of this Interrogatory.

ANSWER TO INTERROGATORY NO. 16

Registrants object to this Interrogatory at this time under the work product doctrine, but intend to supplement this interrogatory answer as such intentions are no longer considered work product.

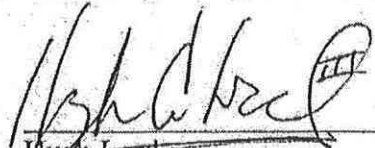
ANSWER TO INTERROGATORY NO. 17

Respondents Hugh and Linda Lord were the only individuals who provided factual information, documents, or things in response to these interrogatories.

State of Arizona  
County of Maricopa, SS.

The foregoing answers are true and correct to the best of my knowledge, information, and belief.

Date: 4/2/10

  
\_\_\_\_\_  
Hugh Lord

State of Arizona  
County of Maricopa, SS.


The foregoing answers are true and correct to the best of my knowledge, information, and belief.

Date: 4/2/10

  
\_\_\_\_\_  
Linda Lord

Respectfully submitted,  
Hugh Lord and Linda Lord  
By their attorney,

April 3, 2010



Ashlyn Lembree, Esquire  
Franklin Pierce Law Center  
Intellectual Property and Transaction Clinic  
2 White Street  
Concord, NH 03301  
(603) 225-3350

CERTIFICATE OF SERVICE

I certify that on this date the foregoing Responses to Interrogatories have been forwarded by first class mail, postage prepaid, to the Petitioner, Napco, Inc., through its attorney, Joseph Schmidt, Esq., at the following address:

Joseph Schmidt, Esq.  
Husch Blackwell Sanders LLP  
120 South Riverside Plaza  
Suite 2200  
Chicago, IL 60606

Date: April 3, 2010



Ashlyn J. Lembree, Esquire

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

Napco, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 92051638
	)	
Hugh Lord and	)	
Linda Lord,	)	
	)	
Respondents	)	

**PETITIONER'S FIRST SET OF  
INTERROGATORIES TO RESPONDENTS NOS. 1-17**

Pursuant to Rule 2.120(d) of the Trademark Rules of Practice and Rule 33 of the Federal Rules of Civil Procedure, Petitioner requests that Respondents answer each and every Interrogatory set forth below.

**INTERROGATORY NO. 1**

State by its common commercial name, each product manufactured, offered for sale, sold or distributed by Respondents in connection with which the mark PAPALATTE has been used.

**INTERROGATORY NO. 2**

State the date of first use by Respondents of the mark PAPALATTE in connection with each product identified in response to Interrogatory No. 1 in (a) intrastate commerce, and (b) interstate commerce.

**INTERROGATORY NO. 3**

State the earliest date that Respondents first had knowledge of or became aware of Petitioner's name and mark PAPANICHOLAS, and also state:

- (a) the identity of the person having such first knowledge;
- (b) the circumstances of such first knowledge; and
- (c) the identity of all documents which relate to Respondents' first knowledge of Petitioner's mark and name PAPANICHOLAS.

**INTERROGATORY NO. 4**

With respect to Respondents' mark PAPALATTE, state:

- (a) how the mark was conceived and selected;
- (b) the reasons for selecting the mark;
- (c) the names of the persons involved in the selection of the mark; and
- (d) the earliest date that Respondents considered adopting the mark PAPALATTE.

**INTERROGATORY NO. 5**

State the name, title, and address of those persons employed by or associated with Respondents who were and are most knowledgeable about:

- (a) selling and marketing products in connection with which Respondents' mark PAPALATTE is used, from the date of first use to the present, and indicate the specific time periods during which each such person was most knowledgeable;
- (b) the promotion and advertising of products in connection with which Respondents' mark PAPALATTE is used, from the date of first use to the present, indicating specific time periods during which each such person was most knowledgeable.

**INTERROGATORY NO. 6**

Identify the channels of trade in which Respondents' products have been, currently are, or will be sold, distributed, advertised or otherwise marketed or promoted in connection with the mark PAPALATTE.

**INTERROGATORY NO. 7**

Identify and explain all methods of advertising and all types of media used to advertise and promote the products in connection with which Respondents use the mark PAPALATTE.

**INTERROGATORY NO. 8**

State the annual advertising and promotion costs of Respondents attributable to products sold or distributed under Respondents' mark PAPALATTE, for each year from the date of first use to date.

**INTERROGATORY NO. 9**

State the gross annual dollar sales of products sold or distributed under Respondents' mark PAPALATTE, for each year from the date of first use to date.

**INTERROGATORY NO. 10**

Identify all third party uses of marks or names which include the term "PAPA", or any phonetically similar term, of which Respondents are aware, including the date and circumstances under which Respondents first learned of each such use, the nature and extent of Respondents' knowledge of each such third party use, and all documents referring or relating thereto.

**INTERROGATORY NO. 11**

Identify by name and address each person or entity with whom Respondents have communicated or had contact, either orally or in writing, wherein Respondents have either asserted or received a claim of rights relating to Respondents' mark PAPALATTE, and with respect to each such communication or contact, fully explain all details including the current status or disposition of the claim, the date of such communication, the identity of the persons involved in such communication, the means of communication and the substance of such communications, and identify all documents which relate or refer thereto, including, but not limited to, all agreements.

**INTERROGATORY NO. 12**

Identify and describe each instance of confusion, likelihood of confusion, mistake or deception of which Respondents are aware which relates or refers to Respondents' and/or Petitioner's respective marks, which are the subject of this proceeding.

**INTERROGATORY NO. 13**

Identify all persons or entities licensed or otherwise authorized by Respondent to use Respondents' mark PAPALATTE, and for each such person or entity, identify:

- (a) each product or service for which the mark has been or is currently being used pursuant to Respondents' license or authorization;
- (b) the relevant time periods of each such use; and
- (c) the geographic areas (by state) of each such use.

**INTERROGATORY NO. 14**

Specify all facts and identify all documents upon which Respondents intend to rely in this proceeding.

**INTERROGATORY NO. 15**

(a) State whether Respondents conducted or caused to be conducted a search of PAPALATTE, or the terms "PAPA" and/or "LATTE" either alone or in combination with other words, terms or designs.

(b) If the answer to subsection (a) is affirmative, identify each such search by the date the search was conducted and the names of the person who requested and performed the search, the identity of all documents relating to the search, and all marks, applications, and registrations uncovered in the search.

**INTERROGATORY NO. 16**


Identify each and every witness, including expert witnesses, upon whose testimony Respondents intend to rely, refer to or offer into evidence in this matter, and with respect to each such person, identify:

- (a) whether that person will testify as an expert or fact witness;
- (b) the subject matter about which each such witness is expected to testify;
- (c) the identity of all documents and things upon which each witness will rely, refer to, or testify about; and
- (d) if an expert witness, the expert's qualifications, the substance of the facts and opinions about which the expert is expected to testify, and summarize the grounds for the expert's opinions.

**INTERROGATORY NO. 17**

Identify each person (other than Respondents' counsel) who provided factual information, documents, or things responsive to these Interrogatories and Petitioner's First Set of Requests for Production of Documents Nos. 1-17, and indicate the Interrogatories and Document Requests as to which each such person provided responsive information, documents, and things.

Dated: March 3, 2010

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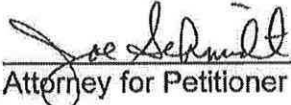
Attorneys for Petitioner  
Napco, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petitioner's First Set of Interrogatories to Respondents Nos. 1-17 was served on Respondents at the following address:

Ashlyn J. Lembree, Esq.  
Intellectual Property and Transactional Clinic  
Franklin Pierce Law Center  
2 White Street  
Concord, New Hampshire 03301  
Email: alembree@piercelaw.edu

via first class mail, postage prepaid, and via email this 3<sup>rd</sup> day of March, 2010.

  
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Attorney for Petitioner