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

In the Matter of Opposition No. 91159871

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MARIO DIAZ,	)
	)
Opposer,	)
	)
v.	)
	)
SERVICIOS DE FRAQUICIA PARDO'S SAC.	)
	)
	)
Applicant,	

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VERIFIED EMERGENCY MOTION
FOR LEAVE TO TAKE ORAL DEPOSITION
FOR USE IN OPPOSING MOTION FOR SUMMARY JUDGMENT

The Opposer, Mario Diaz, through undersigned counsel, respectfully moves, pursuant to Rule 56(f), Fed. R. Civ. P., 37 C.F.R.§ 2.127(e)(1), and TBMP §528.06, for leave to take discovery in the form of an oral deposition in order to respond to Applicant's Motion for Summary Judgment. This Motion is made on an emergency basis in order to obtain a ruling and take discovery within the stipulated time to respond to Applicant' motion, February 28, 2005. In support of this Motion, Opposer states the following:

1. Applicant, in support of its motion for summary judgment, filed the affidavit of Arnold Wu, General Manager and Director of Applicant. Mr. Wu testifies in his affidavit in a broad and vague fashion regarding Applicant's "exploratory efforts to expand into the United States" and the actions taken in furtherance thereof. See Wu Affidavit, Attachment A to Applicant's Motion for Summary Judgment, at par. 9.

2. Opposer submits that the Applicant's utter lack of use of the trademark in the United States since the date of its filing with the United States Patent and Trademark Office is a genuine issue of material fact in this case which may defeat summary judgment. Opposer

submits that the Pan American Treaty does not create greater rights for applicant than if it were a U.S. Company registering a trademark with the trademark office, and as such use of the trademark is relevant and material. To this date, Opposer believes that Applicant has not used in commerce in the United States the trademark it claims. Although Mr. Wu states that Applicant has explored expanding into the United States, Opposer submits that a deposition of Mr. Wu will reveal facts showing a lack of such intent, and certainly a lack of any effort or action on Applicant's part to use the trademark in the United States, contrary to the statement of "exploratory efforts" in Wu's affidavit. Such testimony will impeach Wu's affidavit and establish genuine issue of material fact for trial.

3. This information is uniquely within the province of Applicant. Mr. Wu is the general manager and director of Applicant and as such is the person who will have the most knowledge of Applicant's efforts, or lack thereof, to use the trademark in the United States. Opposer cannot obtain an affidavit from anyone who will have personal knowledge of Applicant's actions, lack of actions, plans, lack of plans, intent, or lack of intent, to use the trademark in the United States. Any such witness would be an employee of Applicant, located in Peru. Mr. Wu's testimony is vital for Opposer to respond to Applicant's motion for summary judgment.

4. Opposer requests that it be permitted to take the oral deposition of Mr. Wu as opposed to a deposition on written questions as normally provided. See, 37 C.F.R. § 2.124. Pursuant to 37 C.F.R. §2.123(a)(2) the Board may allow the taking of an oral deposition of a foreign party. Opposer submits that it be permitted to take the oral telephonic deposition of Mr. Wu. Such a deposition will be convenient to the parties as it will not be necessary for counsel to travel to Peru; in addition, an oral deposition by telephone will allow sufficient inquiry to be made of the witness based upon answers given therein without the necessity of submitting follow up written questions over long distances. This will permit the deposition to be taken in one short

morning or afternoon convenient to the parties and allow Opposer to quickly obtain the discovery it needs to respond to Applicant's motion for summary judgment.

5. Opposer's counsel submits the verification below so that the contents of this motion may be treated as a Rule 56 (f) Fed.R.Civ.P. affidavit.

WHEREFORE, Opposer Mario Diaz respectfully submits that this motion be granted, and that leave be given to take the oral telephonic deposition of Arnold Wu, general manager and director of Applicant.

Respectfully submitted,

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By: _____
Edward M. Joffe
Florida Bar No. 314242
Robert J. Becerra
Florida Bar No. 0856282

VERIFICATION

I declare, verify or state under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Executed on 1-28-05

_____
ROBERT J. BECERRA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express on January 28, 2005, upon:

Cynthia C. Henderson
J. Paul Fulbright
Fulbright & Jaworski, L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004

ROBERT J. BECERRA

CERTIFICATE OF MAILING

I HEREBY CERTIFY that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed and Via Federal Express to: Assistant Commissioner for Trademarks, US Patent and Trademark Office, Madison East, Concourse Level, RM. C55, 600 Dulaney Street, Alexandria, VA 22314.

Date of Deposit: January 28, 2005

Name of Applicant, Assignee,
or Registered Representative: Robert J. Becerra

Signature: _____

Date of Signature: January 28, 2005

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SANDLER & TRAVIS
TRADE ADVISORY SERVICES
DETROIT • PORTLAND • OTTAWA • PHOENIX

TTAB

January 26, 2005

VIA U.S. MAIL and FEDERAL EXPRESS

Assistant Commissioner for Trademarks
US Patent and Trademark Office
Madison East, Concourse Level, Rm. C55
600 Dulaney Street
Alexandria, VA 22314

RE: Pardo's Chicken, Inc. v. Servicios de Franquicia Pardo's SAC and Pardo's Chicken Corp.
CASE NO. 03-020220 CA (24)
Our File No. 018997.10000

Dear Sir or Madam:

We are enclosing one original and two copies in this action, for filing of Opposer, Mario Diaz's Verified Motion for Leave to Take Oral Deposition for use in Opposing Motion for Summary Judgment.

Please return one copy stamped filed in the self-addressed, stamped envelope provided for your convenience.

Sincerely,

SANDLER, TRAVIS & ROSENBERG, P.A.

By: Emily Rodríguez
Emily Rodríguez, Legal Assistant

/er
Enclosures
cc: Counsel of Record (via Federal Express)

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01-31-2005
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