

Oral Hearing Held:
June 6, 2006

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Decision mailed:
November 7, 2006
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Altadis U.S.A. Inc.
v.
Bacardi & Co. Ltd.

Opposition No. 91161729 to application Serial No. 78180797
filed on November 1, 2002

Charles W. Grimes and Susan M. Schlesinger of Grimes & Battersby,
LLP for Altadis U.S.A. Inc.

Janice W. Housey of Roberts, Mlotkowski & Hobbes, P.C. for
Bacardi & Co. Ltd.

Before Hohein, Drost and Zervas, Administrative Trademark Judges.
Opinion by Hohein, Administrative Trademark Judge:

Bacardi & Co. Ltd. has filed an application to register the mark "CAZADORES" in standard character form for, *inter alia*, "non-electric lighters not of precious metal, matches, [and] non-precious metal ashtrays" in International Class 34.¹

Altadis U.S.A. Inc. has opposed registration, alleging in its notice of opposition that opposer "is a major U.S. cigar

¹ Ser. No. 78180797, filed on November 1, 2002, which is based on an allegation of a bona fide intention to use such mark in commerce. Although the application also seeks registration of the mark for goods in seven other classes, the opposition is directed only to the goods in International Class 34 as set forth above. The application states that "[t]he foreign wording in the mark translates into English as light infantry."

manufacturer that engages in the manufacture, distribution and sale of cigars"; that "[o]pposer, as well as third parties, use the term CAZADORES as a size designation in interstate commerce in connection with the sale and distribution of cigars"; that "[o]pposer's use of the CAZADORES term as well as the use by third parties predates not only the filing of Applicant's trademark application but also ... any use of the designation that Applicant has made in connection with goods in International Class 34"; that "[o]pposer's and third parties' use of the CAZADORES term as a size designation for cigars is well known and, as a result of Opposer's and third parties' use of the CAZADORES term as a size designation in connection with cigars, the term is recognized by consumers and the trade as identifying a size of cigars"; that "[a]pplicant's products in International Class 34 (i.e., 'lighters,' 'matches['] and 'ashtrays') are closely related to Opposer's products and ... will travel and be promoted through the same channels of trade for sale to, and use by, the same class of purchasers"; that "[a]pplicant's proposed use of the term CAZADORES in connection with goods in International Class 34 is likely to cause confusion, mistake or deception as to the source of origin of Applicant's products in that the public, the trade and others are likely to believe that Applicant's products are provided by, sponsored by, licensed by, affiliated with or in some other way legitimately connected to Opposer and/or its products"; and that "[a]pplicant's proposed registration of the term CAZADORES as a trademark for goods in International Class 34 will interfere with Opposer's (and third

parties') right to use the term CAZADORES as a size designation for their cigars."

Applicant, in its answer, has denied the essential allegations of the notice of opposition.

The record consists of the pleadings; the file of applicant's involved application; a notice of reliance, filed by opposer as its case-in-chief, on various printed and other published articles and advertisements;² and a notice of reliance, filed by applicant as its case-in-chief, on certain third-party registrations, published articles, advertisements and trademark application file histories.³ Briefs have been filed and both

² Opposer states therein that the "evidence is being offered by Opposer to show third[-]party use and use by Opposer of the word 'cazadores' as a descriptive term to refer to the shape and size of a cigar." Applicant, in its brief, "objects to Opposer's Notice of Reliance on the basis that the types of internet print-outs proffered by Opposer are not self-authenticating and[,] therefore, not admissible under a notice of reliance," citing *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998). However, as opposer correctly points out in its reply brief, "not all of Opposer's evidence is from the Internet" alone. In particular, opposer accurately points out that its "Exhibit C ... consists of copies of printed advertisements," while its "[E]xhibits A and B ... consist of electronic equivalents of articles published in a printed publication" and its "[E]xhibit D consists of a printout of a case from LEXIS" which also is available in printed form. Likewise, it is clear that the portions of opposer's Exhibit E which consist of an article and an advertisement from the website for Cigar Aficionado magazine are additionally available in printed form. Accordingly, inasmuch as the published sources thereof were subject to verification by applicant, such printouts are admissible and applicant's objection thereto is overruled. TBMP §704.08 (2d ed. rev. 2004). However, since the remaining evidence submitted as opposer's Exhibit E consists solely of printouts from various websites, including that of opposer, applicant is correct that such evidence is not proper subject matter for a notice of reliance and its objection thereto is sustained. See, e.g., *Plyboo America Inc. v. Smith & Fong Co.*, 1633, 1634 n.3 (TTAB 1999) [printout of website page is not proper subject matter for a notice of reliance under Trademark Rule 2.122(e)]; *Raccioppi v. Apogee Inc.*, supra at 1370; and TBMP §704.08 (2d ed. rev. 2004). We hasten to add, nonetheless, that even if such evidence were to be considered, it would make no difference in the result.

³ Applicant states in such notice that the "evidence is being offered by Applicant to show that 1) many cigar size, shape and vitola

opposer and applicant were represented by counsel at the oral hearing held in this case.

The issues to be determined are, preliminarily, whether the notice of opposition states any claim upon which relief can be granted and, if such were to be so, whether the evidence of record establishes opposer's entitlement to the requested relief by a preponderance of the evidence.

Opposer, correctly noting in its initial brief that it has "filed its Notice of Opposition only as against Applicant's trademark application in International Class 34," further asserts in such brief that it "has alleged as grounds for its opposition that Applicant's mark is merely descriptive pursuant to Section 2(e)(1) of the Lanham Act." Opposer also asserts therein that, "[a]lternatively, ... [it] has alleged as grounds for its opposition a likelihood of confusion pursuant to Section 2(d) of the Lanham Act." Applicant, however, contends in its brief that "[t]he sole issue in this proceeding is whether," as alleged in

designations are also trademarks, including trademarks used on smokers' articles; and 2) it is common for spirits and beer companies to use their trademarks on smokers' articles." Although the evidence relied upon by applicant includes certain website pages, including printouts from opposer's website, which are not proper subject matter for a notice of reliance since there is no indication that such evidence is merely the electronic equivalent of printed publications, opposer has not only raised no objection thereto but, in its initial brief, has treated the evidence as forming part of the record herein. Specifically, opposer states that the evidence submitted by applicant with its notice of reliance consists of "pages from the Internet, copies of third[-]party trademark registrations and two file histories." In view thereof, the website pages included with applicant's notice of reliance are deemed to have been stipulated into the record pursuant to Trademark Rule 2.123(b) for what they show on their face. See, e.g., Plyboo America Inc. v. Smith & Fong Co., supra; and TBMP §704.08 (2d ed. rev. 2004). We hasten to note, however, that even if such evidence were not considered as part of the record, it would make no difference in the result.

the notice of opposition, "there is a likelihood of confusion between Opposer's use of 'cazadores' as a cigar [size] designation and Applicant's use of CAZADORES as a trademark for smokers' articles." Nonetheless, applicant has also briefed the issue of whether such term is merely descriptive, although it insists that it "does not believe that Opposer has properly pled an opposition based upon 'mere descriptiveness' in that Opposer's Notice of Opposition did not include any claim that Applicant's CAZADORES [mark] was merely descriptive."

A careful reading of the notice of opposition reveals that while opposer has sufficiently pleaded its standing, at least with respect to a possible claim of mere descriptiveness, it has not pleaded that the term "CAZADORES," which opposer alleges that it and third parties have previously used as a size designation for cigars, is merely descriptive of applicant's non-electric lighters not of precious metal, matches and non-precious metal ashtrays in International Class 34, nor has opposer alternatively pleaded that applicant's use of the term "CAZADORES" as a mark for such goods is likely to cause confusion with any prior proprietary right by opposer in that term as a mark for cigars.

In this regard, the predecessor to our primary reviewing court, in vacating and remanding a decision of this Board, stressed in *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-44 (CCPA 1981), that (footnotes omitted; italics in original):

One who opposes on the ground that
registration should be refused as proscribed

by section 2(e)(1) alleges use of, or the right to use, a descriptive term in his business and is trying to prevent a claim of exclusive ownership of that term, asserting a privilege which he holds in common with all others, including the applicant, to the free use of the language. Any use by opposer, whether begun prior or subsequent to applicant's, and whether in a descriptive context or in the manner of a mark, may be sufficient to defeat the applicant's claim that the term is distinctive of its goods or has become distinctive thereof within the meaning of section 2(f) of the Lanham Act. Section 2(e)(1) is thus concerned with the prevention of harassment, based on a registration, under which an exclusive right could be claimed in a term which does not identify source. DeWalt, Inc. v. Magna Power Tool Corp., 48 CCPA 909, 289 F.2d 656, 129 USPQ 275 (1961); Astra Pharmaceutical Inc. v. Pharmation, S.A., 52 CCPA 1334, 345 F.2d 189, 145 USPQ 461 (1965) (Rich, J., concurring).

One who opposes registration to an applicant under section 2(d) is attempting to protect his individual rights, as the owner of some means of identifying the source of his goods, by preventing registration of a mark so similar to that which he asserts identifies source that concurrent use of the two is likely to cause confusion and thus foil the function of his means of identification. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); American Throwing Co. v. Famous Bathrobe Co., 45 CCPA 737, 250 F.2d 377, 116 USPQ 156 (1957); Armour & Co. v. Organon, ... [44 CCPA 1010, 1017, 245 F.2d 495, 500, 114 USPQ 334, 338 (1957) (Rich, J., concurring)]. In this situation, the opposer must prove he has proprietary rights in the term he relies upon to demonstrate likelihood of confusion as to source, whether by ownership of a registration, prior use of a technical "trademark," prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity.

That the linked concepts of "damage" and "grounds" vary with each asserted statutory basis for unregistrability, and are wholly different with respect to sections 2(d) and

2(e)(1), is a point the board did not make manifest by its opinion. The board stated ... that prior use of a term *in a descriptive sense* is sufficient to successfully oppose registration of an otherwise registrable mark provided (1) there is a likelihood that consumers will confuse the two and thus the source of the goods to which they are applied, or (2) that a registration would frustrate the opposer's right to use the term in a descriptive sense unhindered and free from harassment.

Absent a requirement in the first part of the board's test that the user of that term demonstrate that it identifies source and a requirement in the second part that what applicant seeks to register is a descriptive term (or its equivalent), the statement is statutorily untenable. The cases cited by the board in support of this hybrid rule are inapposite. Parts (1) and (2) of the above test are mutually exclusive considerations and the misjudgment of the board in formulating that statement was to combine, respectively, sections 2(d) and 2(e)(1) into one measure of registrability.

It is clear that use of a term in a descriptive sense is sufficient to impart standing to oppose federal registration of a descriptive "word, name, symbol, or device" as a trademark; yet it is equally clear that if an opposer's alleged means of trade designation is not distinctive--does not identify source--then there is no basis upon which to compare such a thing with the applicant's mark to determine whether confusion as to source is likely.

Here, in light of the above, the allegations in the notice of opposition that, in particular, "[o]pposer, as well as third parties, use the term CAZADORES as a size designation in interstate commerce in connection with the sale and distribution of cigars" and that "[o]pposer's and third parties' use of the CAZADORES term as a size designation for cigars is well known and, as a result of Opposer's and third parties' use of the

CAZADORES term as a size designation in connection with cigars, the term is recognized by consumers and the trade as identifying a size of cigars," are sufficient to allege a real interest by opposer in using the term "CAZADORES" descriptively and, if proven, would establish that opposer has standing to bring this proceeding on the ground that the term is merely descriptive of applicant's goods. See, e.g., Consolidated Foods Corp. v. Big Red, Inc., 226 USPQ 829, 831 (TTAB 1985). Opposer, however, has not pleaded a claim that the term "CAZADORES" is merely descriptive of applicant's goods but has instead alleged only the non-actionable contention that "[a]pplicant's proposed registration of the term CAZADORES as a trademark for goods in International Class 34 will interfere with Opposer's (and third parties') right to use the term CAZADORES as a size designation for their cigars." While, in the alternative, opposer has also pleaded that "[a]pplicant's products in International Class 34 (i.e., 'lighters,' 'matches[' and 'ashtrays') are closely related to Opposer's products and ... will travel and be promoted through the same channels of trade for sale to, and use by, the same class of purchasers" and that "[a]pplicant's proposed use of the term CAZADORES in connection with goods in International Class 34 is likely to cause confusion, mistake or deception as to the source of origin of Applicant's products in that the public, the trade and others are likely to believe that Applicant's products are provided by, sponsored by, licensed by, affiliated with or in some other way legitimately connected to Opposer and/or its products," such allegations fail to state a claim of

priority of use and likelihood of confusion inasmuch as opposer has failed to include an alternative pleading that it has prior (*i.e.*, equal or superior) proprietary rights in the term "CAZADORES." Rather, as noted previously, opposer has solely pleaded that it has the right, which it shares with third parties, to use such term descriptively as a size designation for cigars. See, e.g., *Antillian Cigar Corp. v. Benedit Cigar Corp.*, 218 USPQ 187, 188-89 (TTAB 1983). The notice of opposition accordingly fails to state any claim upon which relief can be granted and therefore, on this basis alone, must be dismissed.

Nonetheless, even though it is clear that applicant has neither expressly nor implicitly consented thereto, if the pleadings herein were to be deemed to be amended, pursuant to Fed. R. Civ. P. 15(b), as made applicable by Trademark Rule 2.116(a), so as to set forth proper claims of both mere descriptiveness and, in the alternative, priority of use and likelihood of confusion, the evidence of record fails to establish opposer's entitlement to relief on either ground by a preponderance of the evidence.⁴ Turning first to the issue of mere descriptiveness, opposer in its initial brief recites the following as a "STATEMENT OF FACTS":

[Opposer] Altadis manufactures,
distributes and sells a wide variety of

⁴ While both parties have endeavored to utilize the requirement of Trademark Rule 2.122(e) that a notice of reliance must "indicate generally the relevance of the material being offered" as a substitute for testimony from a witness having first-hand knowledge of the asserted relevance of the exhibits, it is pointed out that the evidence is admissible only for what it shows on its face and not for the truth of the matters set forth therein. TBMP §704.08 (2d ed. rev. 2004).

cigars including PRIMO DEL REY, H. UPMANN, MONTECRISTO and DUTCH MASTERS cigars. (Altadis Not. Of Rel., Exh. E). In offering its cigars, Altadis utilizes the term "cazadores" as well as other terms such as "lonsdale" and "robusto" as size descriptions for its cigars. (*Id.*)

The use of terms to indicate the size of a cigar is a common practice within the cigar industry. (App. Not. Of Rel., Exh. E). Moreover, the terms are used consistently throughout the cigar industry to describe size such that the term "cazadores" is representative of cigars that are between 6 1/16 to 6 3/8 inches in length with a ring gauge of 43 to 45. (*Id.* Exhs. C, E) Further, consumers of cigars recognize the significance of the name designations. (Altadis Not. Of Rel., Exh. B).

The use of the term "cazadores" as a size designation for cigars slightly over six inches in length and with an average ring gauge of 44 has been around for decades. (Altadis Not. Of Rel., Exh. A). In the United States, the term has been used since at least as early as 1921. (*Id.*, Exh. D). Use of the term "cazadores" continued to gain popularity in the 1960s when Cuban cigar manufacturers started coming to the United States to manufacture cigars. (*Id.*, Exh. A).

However, as applicant essentially points out in its brief, there is no evidence which is properly of record which serves to substantiate opposer's factual assertions, as set forth respectively in the notice of opposition and its initial brief, that opposer "is a major U.S. cigar manufacturer that engages in the manufacture, distribution and sale of cigars" and that it "manufactures, distributes and sells a wide variety of cigars." Specifically, as previously noted herein, and aside from their hearsay nature, the Internet excerpts from opposer's website which form part of Exhibit E to its notice of reliance are inadmissible since they are not self-authenticating and thus are

not proper subject matter for a notice of reliance.⁵ Moreover, as stated in TBMP §704.06(b) (2d ed. rev. 2004):

Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest.

Nonetheless, applicant in its brief has admitted that opposer has standing to oppose on the ground of mere descriptiveness by conceding that (*italics in original*): "Here, Opposer (and others) have used "cazadores" *descriptively*, as a size designation for cigars." In light of such admission, opposer properly notes in its initial brief that it "has standing to oppose Applicant's Trademark Application pursuant to Section 2(e) [(1)] because Altadis uses the word 'cazadores' in its business as a descriptive term for its good in International Class 34," citing *Remington Products, Inc. v. North American Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990); and McCarthy on Trademarks & Unfair Competition §20:11 (4th ed. 2006) ["one who makes and sells a product that could be described by the term applicant seeks to register has standing to oppose"].

The fact, however, that applicant has admitted opposer's standing does not mean that applicant has also conceded, or that opposer has otherwise proven, that the term "CAZADORES" is merely descriptive of *applicant's* goods. Contrary to the statement in opposer's initial brief, the issue is not

⁵ See footnote 2.

"whether the term 'cazadores' is merely a descriptive term pursuant to Section 2(e)[(1)] of the Lanham Act when used in connection with goods in International Class 34," which could include opposer's goods--cigars; rather, the relevant goods in International Class 34, and which opposer must prove that the term "CAZADORES" is merely descriptive thereof, are applicant's goods--"non-electric lighters not of precious metal, matches, [and] non-precious metal ashtrays." Applicant, in its brief, contends, however, that as to opposer's case-in-chief, "the documents in Opposer's Notice of Reliance tend to indicate the use of 'cazadores' for a cigar size and for no other purpose."

We find that the evidence which is considered to be of record herein at best demonstrates only that the term "CAZADORES" is a descriptive term for a cigar of a certain length and ring size. For example, as set forth in opposer's notice of reliance (emphasis added):

CA: So he came in '59 and he later opened the cigar factory El Credito. What year was that?

Carrillo: He created it in 1968.

CA: In '68 and he started making ...

Carrillo: He started making fumas and **cazadores, short filter cigars in the 44- to 46-ring gauge and different lengths.**

And that's how he started making long, Cuban-style cigars." -- Opposer's Exhibit A-- excerpt from "An Interview with Ernesto Perez-Carrillo," Cigar Aficionado magazine "[p]ublished May/June 1997";⁶

".... I regularly smoke the Jose L. Piedra brand that you mentioned in the 'Cigar Insider' portion of the February 2000 issue.

⁶ Retrieved from http://www.cigaraficionado.com/Cigar/CA_Archives/CA_Show_Article/0,2322,547,00.html.

.... I generally smoke the **Cazadores size. It's about 6 inches long with a ring gauge of about 40.**" -- Opposer's Exhibit B--excerpt from "Out of the Humidor," Cigar Aficionado magazine "[p]ublished August/September 2000";⁷

"Pete Johnson, the cigar buyer for Grand Havana Room in Beverly Hills, California, has created his own line of cigars called Tatuaje.

....
Tatuaje comes in six **sizes**: Havana **Cazadores, which measures 6 3/8 inches long by 43 ring**, Unicos (6 1/8 by 52), Especiales (7 1/2 by 38), Noellas (5 1/8 by 42), Regios (5 1/2 by 50) and Tainos (& 5/8 by 49).
...." -- Opposer's Exhibit E--excerpt from "Tattooed Cigars," Cigar Aficionado magazine website "[p]osted August 11, 2003;"⁸ and

"PADRÓN CIGARS INC.
Cigar: Jose L. Piedra
Made: Honduras and Nicaragua

....
Details: Three **sizes**: Fumas (which have a pigtail) and **Cazadores, 6 1/2 by 44**; and Expeciale, 7 1/2 by 46" -- Opposer's Exhibit E--excerpt from "R.T.D.A. Roundup: Part III," Cigar Aficionado magazine website "[p]osted August 20, 2003."⁹

Likewise, as shown by the example below from applicant's notice of reliance, the designation "CAZADORES" is a descriptive term for a cigar of a certain length and ring size (emphasis added):

"Cigar Styles and Sizes

....
HAVANA SHAPES IN ALPHABETICAL ORDER

-
● **Cazadores (6 3/8 x 44)**

....

⁷ Retrieved from http://www.cigaraficionado.com/Cigar/CA_Archives/CA_Show_Article/0,2322,1129,00.html.

⁸ Printed from http://www.cigaraficionado.com/Cigar/CA_Daily_News/0,2342,843,00.html.

⁹ Printed from http://www.cigaraficionado.com/Cigar/CA_Daily_News/0,2342,850,00.html.

The first dimension is the length of the cigar in inches. The second is the ring gauge or the cigar or the diameter of the cigar measured in 64ths of an inch." --
Applicant's Exhibit E--excerpt from "Cigar Education" article, "[c]opyright ©1999 Orinoco Cigars International, LLC."¹⁰

Significantly, however there is no evidence of record as to whether the term "CAZADORES" has *any descriptive significance with respect to smokers' articles* such as lighters, matches and ashtrays.

Opposer, nonetheless, asserts in its initial brief that applicant is not entitled to registration of the term "CAZADORES" as a mark for lighters, matches and ashtrays simply because, as a descriptive term for cigars, "[t]he registration of the descriptive term will interfere with Altadis' prior rights to use the term without fear of harassment." Specifically, according to opposer (*italics in original*):

If Applicant is allowed to register CAZADORES as a mark, Applicant will be able to interfere with the rights of Altadis and other third party cigar manufacturers to use the "cazadores" size designation in connection with their cigars. Where registration of a mark would threaten or cause damage to the prior user of a descriptive word, such word should not be registered as a mark. See *DeWalt, Inc. v. Magna Power Tool Corp.*, 129 U.S.P.Q. 275, 281 (C.C.P.A. 1961) (sustaining opposition and barring registration of descriptive phrase "power shop" because the Court "agree[d] with opposer that registration would be a threat to it and its customers, would make harassment possible, and would be in derogation of opposer's established rights").

¹⁰ Printed from <http://www.orinococigars.com/education/>.

Applicant, in its brief in response, properly "notes that even if CAZADORES is descriptive for a cigar size, it is a preposterous leap that the term should be deemed to be descriptive for Applicant's lighters, matches and ashtrays" and that opposer "has neither alleged nor proven that 'cazadores' is descriptive of smokers' articles." With respect to what we view as perhaps opposer's somewhat exaggerated fear of harassment by applicant,¹¹ including a loss of the right to use the term "CAZADORES" descriptively as a cigar size indicator, if applicant obtains the registration which it seeks, we further observe that opposer's reliance on *DeWalt, supra*, is misplaced inasmuch as such case involved a term ("POWER SHOP") which was descriptive of each of the parties' goods (woodworking saws and multiple-purpose power tools), which in essence functioned as the same basic product (power woodworking saws).¹² Opposer's fear of harassment,

¹¹ Specifically, opposer further contends in its initial brief that:

Inasmuch as "cazadores" is a descriptive term for a cigar size or type, such term should not be allowed to be registered as a mark in International Class 34. Registration of this mark in such fashion will harm Altadis as well as other third parties who have a legitimate and necessary reason for the use of such term in connection with their respective cigar products. Altadis and others in the cigar industry will be foreclosed from using the "cazadores" descriptive term. They will be exposed to the possibility that Applicant could assert its registered trademark rights against those in the cigar industry that make descriptive use of the "cazadores" term. Moreover, where "cazadores" has been a descriptive term in the cigar industry in the United States for almost one hundred years, Altadis and other third party cigar manufacturers should not now be precluded from use of this cigar size indicator.

¹² *DeWalt, Inc. v. Magna Power Tool Corp.*, supra at 129 USPQ 279 ("[w]e deem the goods of the parties before us to be identical so far as trademark law is concerned. If 'power shop' is an apt term to describe opposer's goods, then it is just as descriptive of applicant's goods"].

in this instance, is misplaced since the respective goods of the parties, namely, opposer's cigars and applicant's lighters, matches and ashtrays, are plainly not the same products, notwithstanding that they are obviously complementary goods in that smoking materials and smokers' articles are typically used together, and there is no proof whatsoever that the term "CAZADORES," while descriptive of a size designation for cigars, is descriptive in any manner of lighters, matches and ashtrays for cigars or other smoking materials. Allowance of the registration which applicant seeks thus would not empower applicant to harass opposer and others who utilize the term "CAZADORES" descriptively as a size designation for cigars. Accordingly, in view of the lack of any evidence with respect to whether the term "CAZADORES" is descriptive of smokers' articles such as lighters, matches and ashtrays, opposer's claim of mere descriptiveness with respect thereto fails.

Turning next to opposer's alternative claim of priority of use and likelihood of confusion, opposer asserts in its initial brief that:

Applicant's use of CAZADORES as a mark in International Class 34 is likely to cause confusion with Altadis' CAZADORES mark. Assuming arguendo that CAZADORES qualifies as a trademark, Altadis has prior rights in the use of CAZADORES as a trademark in connection with its products in International Class 34. Inasmuch as Altadis has prior rights in CAZADORES as a mark, Applicant should not be allowed to register CAZADORES as a mark in International Class 34 pursuant to Section 2(d) of the Lanham Act.

In particular, as to its assertion of "prior rights" in the use of the term "CAZADORES" if such use "qualifies as a trademark,"

opposer merely refers in its initial brief to Exhibit E of its notice of reliance, stating simply that:

Altadis uses CAZADORES in connection with its goods. (Altadis Not. of Rel., Exh. E). Accordingly, Altadis has proprietary rights in CAZADORES and a likelihood of confusion analysis is justified.

The sole portion of such exhibit which, however, even arguably shows use of the term "CAZADORES" by opposer consists of Internet excerpts from opposer's website and which, aside from their hearsay nature, are in any event not considered part of the record herein in light of applicant's well taken objection thereto.¹³ Furthermore, even if such excerpts were to be considered, on their face they demonstrate only that, as of the "5/25/2005" date on the printed copies thereof, opposer, "Altadis U.S.A., Inc.," was advertising on its website "Primo del Rey Maduro Cigars" under three different "Frontmark[s]," including "Cazadores Maduro," the "Size" of which is listed as "44 x 6 1/16". Therefore, even if the "Frontmark" use shown therein were to be considered trademark use (or use analogous thereto) of the term "CAZADORES" rather than merely as a descriptive size designation for opposer's "Primo del Rey Maduro Cigars," the May 25, 2005 date indicated thereon is plainly subsequent to the earliest date upon which applicant, in the absence of any testimony or other proof that it has commenced use of its mark, is entitled to rely in this proceeding, namely, the November 1, 2002 filing date of its involved intent-to-use application. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d

¹³ See footnote 2.

906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); Zirco Corp. v. American Tel. & Tel. Co., 21 USPQ2d 1542, 1544 (TTAB 1991); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975).

In the absence, therefore, of proof that opposer has priority of use, it cannot prevail in this proceeding irrespective of whether contemporaneous use of the designation "CAZADORES" as a trademark by opposer for cigars and by applicant with respect to non-electric lighters not of precious metal, matches, and non-precious metal ashtrays would be likely to cause confusion as to the source or sponsorship thereof. In fact, as applicant accurately points out in its brief, "[o]pposer has failed to prove any proprietary rights in 'cazadores'" and, instead, as applicant concedes, the record establishes at best only that "[o]pposer (and others have used 'cazadores' *descriptively*, as a size designation for cigars" (*italics in original*)). Such use, as shown by the record, is the antithesis of use as a prior, proprietary mark by opposer. Applicant, in view thereof, correctly concludes that absent proof of prior proprietary rights by opposer in the term "CAZADORES":

There is no "origin-indicating" quality. Thus, there can be no confusion since consumers do not see any use by Opposer as being indicative of origin. Opposer has no valid mark and there is no likelihood of confusion.

Accordingly, given the lack of proof of priority of use by opposer as the party bearing the burden of proof in this

proceeding,¹⁴ a claim of priority of use and likelihood of confusion must fail.

Decision: The opposition is dismissed.

¹⁴ See, e.g., Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); Champagne Louis Roederer S.A. v. Delicato Vineyards, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988); Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982); and Clinton Detergent Co. v. Proctor & Gamble Co., 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962).