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

Proceeding	91165519
Party	Plaintiff Corporacion Habanos, S.A.
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Date	02/08/2008
Attachments	HC.Opp.Mot Strike.pdf (7 pages)(205189 bytes)

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

CORPORACION HABANOS, S.A.,)	
)	
Opposer,)	Opposition No. 91165519
)	
v.)	
)	
ANNCAS, INC.,)	
)	
Applicant.)	
)	

**OPPOSER’S RESPONSE TO APPLICANT’S MOTION TO STRIKE OPPOSER’S
SUPPLEMENTAL REBUTTAL NOTICE OF RELIANCE**

Opposer Corporacion Habanos, S.A. (“Opposer”), through undersigned counsel, hereby files its Response to APPLICANT’S MOTION TO STRIKE OPPOSER’S SUPPLEMENTAL REBUTTAL NOTICE OF RELIANCE, and states the following in support thereof:

1. Applicant, in the certificate of service to its Motion to Strike, states that “the foregoing was served via U.S. First Class Mail, *this ___ day of March, 2007.*” (Emphasis added). Opposer, in fact has never received Applicant’s motion by mail, and thus was never properly served with the motion, nor was any date, let alone a correct date, stated in the proof of service. Since this motion has never been served on Opposer, the motion should be denied on that basis alone. 37 C.F.R. § 2.119(a) (“Every paper filed ... must be served upon the other parties. Proof of [] service *clearly stating the date* and manner in which service was made will be accepted as prima facie proof of service.”); TBMP § 113.01-03.

2. Opposer did *receive* the motion by email on Friday, January 25, 2008. However, this does not constitute proper service. In Fall 2007, Opposer had proposed to Applicant’s counsel that the parties agree to email service, as permitted by the TTAB’s recent Rule

amendments, *see* 37 C.F.R. § 2.119(b)(6), but Applicant's counsel rejected that request. Consistent with that refusal, the motion only claims service by U.S. Mail, *on some unidentified date in March 2007*.

3. If the Board nevertheless chooses to address Applicant's motion on the merits, the motion should be denied, because Opposer has shown good cause for its filing, Applicant's claim of "prejudice" is frivolous at best, and Applicant has misstated the record.

4. Opposer's rebuttal testimony period closed on January 14, 2008. On that date, Opposer filed and served by first class mail its Rebuttal Notice of Reliance with Exhibits ("Rebuttal NOR"), in response to Applicant's Notice of Reliance ("App. NOR"), which included 61 exhibits of USPTO TESS printouts, and to the trial testimony filed by Applicant. Opposer's Rebuttal NOR, consisting of 28 Exhibits, responded to many of those USPTO TESS printouts, including by providing additional documents from the USPTO TARR and TDR databases.

5. Not a single one of these 61 Exhibits in the App NOR were produced in discovery (nor were any earlier iterations produced), despite document requests that specifically called for such documents. (Opposer reserves all rights to object to Applicant's Notice of Reliance, and these exhibits on this, and other grounds, at the appropriate time, and nothing herein in opposition to the motion to strike is a waiver of its position that the 61 exhibits are inadmissible).

6. In preparing its Rebuttal NOR, Opposer necessarily reviewed not only these over five dozen TESS printouts not produced in discovery, but also the related PTO TARR and TDR databases, as well as other documents. As previously stated by Opposer, in filing its Rebuttal NOR on January 14, 2008, to these 61 unproduced exhibits, Opposer inadvertently failed to include documents in rebuttal to *one* of these exhibits, that is, App NOR 7 (FORSECA [*sic*, FONSECA] HABANA SELECCION).

7. On Thursday, January 17, 2008, three days later, in reviewing the filed Rebuttal NOR, undersigned became aware that Opposer had not filed documents in rebuttal to App NOR 7. On that date, Opposer filed TARR, TDR and other publicly available documents in response to App NOR 7, and explained its request for late filing. *See* Opposer's Supplemental Rebuttal Notice of Reliance, and Request For Late Filing ("Supp NOR"). Opposer served the document by mail on that date, and also emailed the document at 3:10 pm on January 17 to Applicant's counsel. *See* Exhibit A, hereto. Thus, Applicant received the Supp NOR at about the same time (or even before) it would have received Opposer's Rebuttal NOR, which was mailed three days earlier from New York to Miami. (Notably, the TTAB rules provide for an additional *five* (5) days for responses to documents served by mail, 37 C.F.R. § 2.119(c); TBMP § 113.05).

8. In light of the above facts, including the need to review dozens of documents in response to 61 documents not produced in discovery, Opposer has established good cause for its three day late filing of one Rebuttal Exhibit.

9. In its motion, Applicant's counsel acknowledges that he received a mailed copy of the Supp NOR on Tuesday, January 22, 2008, the first business day after the three-day weekend (January 21 was a National Holiday), and two business days after mailing. Notably, he does not state that he *first* received the document by mail on that date. Instead, counsel conveniently omits the fact that the document was also emailed to him five days earlier, on January 17.

10. Applicant's counsel's claim that it received the Supp NOR "eight days after it had been filed," is simply false. Whether or not he read it, he in fact received it by email on the same day it was filed, and by his own admission received a copy by mail five calendar days, and two business days, later.

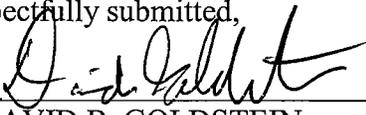
11. Applicant's claim of "prejudice" is nothing short of frivolous. It received the Supp NOR, addressing *one* of Applicant's 61 Exhibits, about the same time it would have received the mailed Rebuttal NOR, addressing 28 of Applicant's 61 Exhibits. Even considering only the service copy, the Supp NOR was received at most two or three business days after the Rebuttal NOR. Moreover, Applicant has 90 days from January 14, 2008 until its brief on the merits is due. To the extent that Applicant needs more than 87 days to digest and respond to this one additional exhibit, Opposer would agree to extend Applicant's time to file its brief.

12. Applicant chose to submit 61 exhibits that had not been produced in discovery, which consisted solely of TESS reports, without any TARR, TDR or other documents. Relying solely on these incomplete filings, Applicant made numerous inaccurate and misleading assertions in its Notice of Reliance. Opposer diligently analyzed these documents, the TARR and TDR databases, and other documents, bringing to the Board's attention a more complete and accurate record. Applicant's claim of "prejudice" in this situation by the filing of one rebuttal exhibit is not only meritless, but incredible.

WHEREFORE, Opposer requests that Applicant's unserved motion to strike be denied.

Dated: New York, New York
February 8, 2008

Respectfully submitted,



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Attorneys for Opposer Corporation Habanos, S.A.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Opposer Corporacion Habanos, S.A.'s
RESPONSE TO APPLICANT'S MOTION TO STRIKE OPPOSER'S SUPPLEMENTAL
REBUTTAL NOTICE OF RELIANCE was emailed to, and served upon, Applicant by mailing,
postage prepaid, first class United States mail, on February 8, 2008 to:

Jesus Sanchelima, Esq.
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Counsel for Applicant Anncas, Inc.



DAVID B. GOLDSTEIN

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CORPORACION HABANOS, S.A.,)	
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Opposer,)	Opposition No. 91165519
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**EXHIBIT A TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO
STRIKE OPPOSER'S SUPPLEMENTAL REBUTTAL NOTICE OF RELIANCE**

David Goldstein

From: David Goldstein
Sent: Thursday, January 17, 2008 3:10 PM
To: jesus@sanchelima.com
Subject: HAVANA CLUB, Opp. 91165519
Attachments: Supp Rebuttal NOR HC.pdf

Dear Jay: Attached please find a document filed with the TTAB today in the Havana Club matter.

David B. Goldstein
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