

ESTTA Tracking number: **ESTTA196476**

Filing date: **03/05/2008**

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

Proceeding	91165519
Party	Plaintiff Corporacion Habanos, S.A.
Correspondence Address	David B. Goldstein Rabinowitz, Boudin, Standard, Krinsky & Lieberman 111 Broadway, 11th Floor New York, NY 10006-1901 UNITED STATES dgoldstein@rbskl.com, cobrien@rbskl.com
Submission	Motion to Strike
Filer's Name	David B. Goldstein
Filer's e-mail	dgoldstein@rbskl.com
Signature	/David B. Goldstein/
Date	03/05/2008
Attachments	HC Reply Motion to Strike NOR.pdf (4 pages)(110464 bytes)

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

<hr/>		
CORPORACION HABANOS, S.A.,)	
)	
Opposer,)	Opposition No. 91165519
)	
v.)	
)	
ANNCAS, INC.,)	
)	
Applicant.)	
<hr/>)	

**OPPOSER’S REPLY IN SUPPORT OF MOTION TO STRIKE APPLICANT’S NOTICE
OF RELIANCE AND EXHIBITS LISTED THEREIN**

Pursuant to 37 C.F.R. § 2.127, TBMP § 707.02(b)(1), Opposer Corporacion Habanos, S.A. (“Opposer”), through undersigned counsel, hereby files its within REPLY IN SUPPORT OF MOTION TO STRIKE APPLICANT’S NOTICE OF RELIANCE AND EXHIBITS LISTED THEREIN, for failure of Applicant to serve the exhibits listed in said Notice of Reliance, and for untimely filing of said exhibits, and states the following in support thereof:

1. Opposer has never received from Applicant the 61 Exhibits referenced in its Notice of Reliance. Opposer did receive from Applicant the Notice of Reliance *without* Exhibits, as stated in Opposer’s Motion to Strike, ¶ 4. Applicant’s Response, while carefully crafted, in fact confirms that the Exhibits were both late filed and not served upon Opposer.

2. In its Response to Opposer’s motion to strike, Applicant now admits that it in fact never sent by e-mail either the Notice of Reliance or the Exhibits to Opposer, contrary to the representation in its certificate of service. *See* Affidavit of Pablo Perez, ¶ 5. Applicant further admits that it mis-addressed the Exhibits to the USPTO, so that the Exhibits were not filed until 11 days after the close of Applicant’s testimony period. Applicant’s Response, ¶ 8.

3. Applicant further confirms that its certificate of service made no reference to serving the Exhibits. *See* Perez Aff. ¶ 3, referencing the certificate of service filed with the Board as Docket No. 43. That document is the Notice of Reliance, *without* exhibits, and the certificate of service refers only to the Notice of Reliance, not to the exhibits.

4. In its Response, Applicant now *appears* to claim that it served the Notice of Reliance twice, once on November 30, 2007, without the Exhibits (which Opposer received), and once on November 26, with the Exhibits, which Opposer did not receive. However, the Perez Affidavit in fact is very careful not to claim that the Exhibits were in fact served on Opposer. Thus, Mr. Perez states in ¶ 3, “On November 26, 2007, I personally prepared and placed a copy of Defendant’s *Notice of Reliance* (‘NOR’) to attorney for Opposer David Goldstein, in the United States Post Office, *as indicated in the certificate of service.*” (Emphasis added). Critically, Mr. Perez never attests that he included the Exhibits or mailed the Exhibits, although that is the central and only point in dispute, and Opposer has already acknowledged that it received the Notice of Reliance itself. Further, the certificate of service itself indicates that only the Notice, and not the exhibits, were served. Given the centrality of whether the Exhibits were served, the Affidavit’s studied silence on this critical point is dispositive.

5. The absence of proof of service of the exhibits separately precludes their consideration. Opposer’s Motion ¶ 10; *see* C.F.R. § 2.119(a). *See also* TBMP § 113.02.

6. Applicant gives no explanation why it purportedly served the Notice of Reliance *two times*, once purportedly with the Exhibits (not received) and once without the Exhibits (received).

7. Applicant seeks to excuse its failure to serve the 61 exhibits to the Notice of Reliance because copies of the 77 exhibits to the trial testimonies of William Bock and Benjamin

Gomez were provided to counsel during their testimony. First, Applicant's statement that "the exhibits to said testimonies," which totaled 77, "are the same as the attachments to the Notice of Reliance," App. Response, ¶ 2, which total 61, is simply false. Second, as explained in Opposer's Motion, ¶ 15, a party is not free to ignore the service rules because the other party may have previously received the documents (a fact the un-served party obviously cannot know without reviewing the documents in any event). Third, the exhibits annexed to the Bock and Gomez testimony were not served and filed until December 13, 2007, two weeks after Applicant's Notice of Reliance was required to be served and filed. Docket Nos. 48, 49.

8. Applicant's attempt to excuse its late filings of the exhibits fares no better. 37 C.F.R. § 2.197(b), upon which Applicant relies, is inapplicable on its face, as it only applies when "an application is abandoned, a registration is cancelled or expired, or a proceeding is dismissed, terminated, or decided with prejudice." Further, paragraph (b) applies *only* when the correspondence "is considered timely filed by being mailed or transmitted in accordance with paragraph (a)." Because the exhibits were not mailed in accordance with paragraph (a)(1)(i)(A), the documents were deemed filed on "[t]he actual date of receipt," 37 C.F.R. § 2.197(a), and thus were not "timely filed" within the meaning of paragraph (b). *See* Opposer's Motion, ¶¶ 11-13.

9. Finally, Applicant provides no explanation why it is prejudiced by the receipt of *one* exhibit three days after the close of Opposer's rebuttal period, but its failure to serve 61 exhibits on Opposer is "harmless." *See* Opposer's Motion, ¶ 14.

WHEREFORE, Opposer requests that its Motion to Strike Applicant's Notice of Reliance and Exhibits Listed Therein be granted.

Dated: New York, New York
March 5, 2008

Respectfully submitted,

/David B. Goldstein/
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
111 Broadway, 11th Floor
New York, New York 10006-1901
Tel: (212) 254-1111
Fax: (212) 674-4614
dgoldstein@rbskl.com

Attorneys for Opposer Corporation Habanos, S.A.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Opposer Corporation Habanos, S.A.'s
REPLY IN SUPPORT OF MOTION TO STRIKE APPLICANT'S NOTICE OF RELIANCE
AND EXHIBITS LISTED THEREIN was emailed to, and served upon, Applicant by mailing,
postage prepaid, first class United States mail, on March 5, 2008 to:

Jesus Sanchelima, Esq.
SANCHELIMA & ASSOCIATES, P.A.
235 S.W. Le Jeune Road
Miami, FL 33134- 1762
jesus@sanchelima.com
Counsel for Applicant Anncas, Inc.

/David B. Goldstein/
DAVID B. GOLDSTEIN