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

Proceeding	92043152
Party	Defendant SANTANA'S GRILL, INC. SANTANA'S GRILL, INC. 2067 Cecelia Terrace San Diego, CA 92110
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Submission	Motion for Sanctions
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Date	01/10/2007
Attachments	Registrant's Rule 11 Motion.pdf (7 pages)(192618 bytes) Dec of MAS Opp Mt Reopen.pdf (12 pages)(283248 bytes)

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SANTANA'S GRILL, INC.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ARTURO SANTANA GALLEGO, Petitioner, v. SANTANA'S GRILL, INC., Registrant.	Cancellation Nos. 92043152 (Consolidated) 92043160 92043175 I hereby certify that this Motion for Sanctions is being filed electronically with the Trademark Trial and Appeal Board Electronic Filing System. 1-10-07 Date Michael A. Sandstrum

REGISTRANT'S MOTION FOR SANCTIONS UNDER RULE 11

Registrant, SANTANA'S GRILL, INC., hereby submits this Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure and 37 CFR § 10.18. This Motion for Sanctions is respectfully submitted concurrently with Registrant's Opposition to Petitioner's Motion to Re-Open the Testimonial Dates and Reply to Petitioner's Opposition to Registrant's Motion for Default Judgment on grounds that Petitioner has made false statements and mischaracterizations

of the record to the Board in its moving/opposition papers filed December 21, 2006.

I. RELEVANT STANDARD

Petitioner's Motion for Sanctions is governed by Federal Rules of Civil Procedure, Rule 11, and incorporated by the Trademark Trial and Appeals Board under 37 C.F.R. § 10.18. Rule 11 and section 10.18 provide that any "false, fictitious or fraudulent statements or representations" contained within any papers filed with the Patent and Trademark Office shall be subject to penalties. Such penalties include holding certain facts to have been established, returning papers, precluding a party from filing a paper or presenting or contesting an issue, imposing a monetary sanction, requiring a terminal disclaimer for the period of the delay, or terminating the proceedings in the Patent and Trademark Office. 37 C.F.R. § 10.18(c).

Petitioner's moving/opposition papers filed with the Board on December 21, 2006 and signed by Petitioner's counsel of record, Cris Armenta, contain many blatant misrepresentations and mischaracterizations of the record prompting the instant Motion for Sanctions under section 10.18.

1. Petitioner Misrepresents The Terms Of Monetary Deductions Threatened By Registrant

Petitioner's papers state that "Registrant began to threaten *and imposed* monetary penalties of $5,000.00 *per day*, for each day that the settlement agreement was not signed, despite the fact that it had not yet been translated." [Petitioner's Motion to Re-Open, page 3, para. 2, lines 22-23]. This is a mischaracterization of what was actually communicated to

Petitioner in writing. Admittedly, as a result of Petitioner's continuous delay and failure to communicate and respond to Registrant's counsel numerous communications regarding the status of signatures to the Settlement Agreement, Registrant did advise Petitioner that it would deduct $5,000.00 from the agreed upon settlement amount if signatures were not forthcoming, however, no such penalties were actually imposed. The written settlement agreement was never modified or even requested to be modified by Registrant to reflect a monetary penalty and no such indication was ever communicated to Petitioner. **Furthermore, Registrant never threatened a *daily* monetary penalty.** Registrant gave Petitioner a deadline in which to submit signatures to Registrant and advised Petitioner that for every *week* the signatures were delayed, $5,000.00 would be deducted from the settlement. [Sandstrum Decl. at ¶ 11, Exh. B].

Furthermore, the statement above seems to suggest that Registrant attempted to seek to obtain signatures to the Settlement Agreement prior to its being translated from English to Spanish. Registrant had no such intention and there is no evidence to support such an inference. On October 27, 2006, Petitioner informed Registrant that although her clients were agreeable to the material terms of the Settlement Agreement, the same would need to be translated from English to Spanish for the benefit of her clients. [Sandstrum Decl. at ¶ 8]. Registrant had no objection to this request. Additionally, on November 2, 2006, Registrant emailed Petitioner a revised Settlement Agreement which **reflected that the agreement was to be transcribed and that the translated version was to be attached as Exhibit A to the agreement.** The revised agreement was emailed to Petitioner so that Petitioner could have an updated copy of the Settlement Agreement for transcription. [Sandstrum Decl. at ¶ 9]. However, from November 2, 2006 through November 13, 2006, Petitioner refused to respond to Registrants repeated requests for a status on translation issues and execution of the agreement -- **Registrant's counsel was**

being ignored. With Registrants impending testimony period set to open and having heard nothing from Petitioner with regards to the Settlement Agreement, on November 13, 2006, Registrant advised Petitioner that if signatures were not received by November 15, 2006, then $5,000.00 would be deducted from the settlement amount to be paid to Petitioner for every *week* that the signatures were delayed. [Sandstrum Decl. at ¶ 11, Exh. B].

2. Petitioner Misrepresents That Petitioner Founded The Group Of Restaurants At Issue In These Cancellation Proceedings

In Petitioner's papers, Petitioner states: "Registrant's son and wife, surreptitiously registered a trademark for the *group of restaurants that Petitioner founded*, and have attempted to block family members and Petitioner's associate from utilizing the family name." [Petitioner's Motion to Re-Open at page 3, para. 1, lines 5-7]. Petitioner misstates that Petitioner founded the *group* of restaurants that were registered for trademark by Registrant.

There are three service marks at issue in these cancellation proceedings, including: Registration No. 2631458 for "SANTANA'S MEXICAN FOOD...ES MUY BEUNO"; Registration No. 2682978 for "SANTANA'S MEXICAN FOOD...ES MUY BUENO HOME OF THE FAMOUS CALIFORNIA BURRITO" *and design*; and Registration No. 2634976 for "SANTANA'S MEXICAN GRILL". Registrant filed an Application for registration of the these three service marks on December 5, 2001. By December 5, 2001, Registrant owned and operated three (3) restaurants in San Diego County bearing one or more of the three registered service marks. Only one of the these three restaurants wholly owned and operated by Registrant was founded by Petitioner. Based on information and belief, Registrant admits that the first restaurant to bear the Santana mark in San Diego County was located at 1480 Rosecrans Street,

San Diego, CA. Registrant does not deny that this restaurant was founded by Petitioner (later acquired by Registrant with Petitioner, along with the mark and goodwill). However, to allege that Petitioner founded the *group of restaurants* that were registered for trademark is a mischaracterization of fact.

3. Petitioner Falsely Asserts That Registrant Disclaimed Knowing Of The Existence Of Her Own Father In Law

Petitioner also states in his moving/opposition papers that: "Registrant signed a declaration in which she disclaimed knowing of the existence of her own father in law and the fact that he founded the restaurant chain long before Registrant owned any restaurants at all." [Petitioner's Motion to Re-Open at page 3, para. 1, lines 7-9]. This statement is a blatant mischaracterization of fact. Registrant ardently denies that any declaration disclaiming the existence of her own father-in-law was ever made and any such assertion to the contrary is a clear mischaracterization of the record. Presumably, this statement is derived from the standard declaration which Claudia Vallarta Santana submitted in registering the at issue service marks. The declaration contains the following standard language:

> "to the best of my knowledge and belief, no other person, firm, corporation or association *has the right to use the mark* in commerce either in the identical form or in such near resemblance thereto as to be likely, when used on or in connection with the goods or services of any other person, to cause confusion or to cause mistake, or to deceive..."

The above declaration states only that Registrant did not believe that any other party had the *right* to use the mark. To deduce from this language that Registrant disclaimed knowing of the existence of her father-in-law is a clear misrepresentation of the record entirely unsupported by the evidence.

4. Petitioner Falsely Asserts That The Threatened Monetary Penalty Derailed the Settlement

Petitioner falsely asserts that the threat of monetary penalty derailed the settlement. In review of the totality of the circumstances, including all the emails and moving papers, there really is no other conclusion that Petitioner is only using the threat of a monetary penalty - which was never enforced - as a means to back out of the settlement, and avoid a dismissal of these proceedings. Registrant's counsel never received any communication from Petitioner's counsel that the threat of a monetary penalty was going to derail the settlement - instead only signatures were promised to be received by November 22, 2006.

In fact, at no time prior to the Motion to Re-Open did Petitioner represent to Registrant that the monetary deduction would impede settlement efforts but instead continued to promise signatures. Even after the deduction was communicated to Petitioner, **Petitioner continued to confirm that signatures were forthcoming.** [Sandstrum Decl. at ¶ 12]. If the imposition of a monetary deduction was a concern, why didn't Petitioner express this concern to Registrant and why did Petitioner continue to promise to execute the agreement? Petitioner's statement regarding the monetary penalty is a red herring and simply an excuse to latch onto in the hope that the Board does not dismiss the case and reopens Petitioner's Trial testimonial period.

II. CONCLUSION

Based on the foregoing, it is respectfully requested that the Board impose sanctions against Petitioner under Federal Rules of Civil Procedure, Rule 11, in the form of striking Petitioner's Motion to Re-Open and/or Opposition to Registrant's Motion for Default Judgment. in its entirety. 37 C.F.R. § 10.18(c).

Alternatively, it is requested that the Board impose sanctions under Rule 11 by striking those factual contentions of Petitioner's Motion to Re-Open, as outlined above, which are falsely asserted and completely lacking of any evidentiary basis. *Id.*

Registrant also respectfully requests monetary sanctions for the reasonable attorneys and costs incurred in brining this Motion for Sanctions and Opposition to Motion to ReOpen necessitated by Petitioner's misrepresentations and mischaracterizations of fact. 37 C.F.R. § 10.18(c)(4).

Dated: January 10, 2007

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Michael A. Sandstrum
Attorneys for Registrant
SANTANA'S GRILL, INC.

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Attorney for Registrant
SANTANA'S GRILL, INC.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ARTURO SANTANA GALLEGO, Petitioner, v. SANTANA'S GRILL, INC., Registrant.	Cancellation Nos. 92043152 (Consolidated) 92043160 92043175 I hereby certify that this Declaration of Michael A. Sandstrum, and the accompanying attachments, concurrently filed with Registrant's Opposition to Petitioner's Motion to Re-Open and Motion for Sanctions is being filed electronically with the Trademark Trial and Appeal Board Electronic Filing System. 1-10-07 Date Michael A. Sandstrum

I, MICHAEL A. SANDSTRUM, HEREBY DECLARE THE FOLLOWING:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California and am a partner in the law firm of Bremer Whyte Brown & O'Meara, attorneys of record for Registrant, SANTANA'S GRILL, INC., in the above-entitled cancellation proceedings. As such I have personal knowledge of the facts stated herein and if called upon as

a witness I could and would competently testify to the below facts which are personally known to me.

2. In preparation for the initial trial testimony periods set to commence in September 2006, Registrant and Registrant's counsel spent significant time and money exploring various legal theories and defenses in this matter based upon an extensive review of the court records, written discovery and document production undertaken by *both* parties in this case, review of depositions, prior motions and declarations of the parties, and client meetings in order to adequately prepare for anticipated trial testimony and evidence in support of a final brief.

3. As part of Registrant's efforts to prepare for the trial testimony periods, Registrant made efforts in early September 2006 to coordinate and schedule the testimony of Petitioner and various other witnesses for its testimony period in November 2006. (Attached hereto as Exhibit A are true and correct copies of emails from me to counsel for Petitioner, Cris Armenta, dated September 7, 2006, September 11, 2006, September 21, 2006 and September 22, 2006 regarding the scheduling of depositions).

4. On September 22, 2006, Petitioner made a written settlement offer to Registrant through its counsel of record, Cris Armenta. The basic terms of the settlement offer included the payment of certain monies to Petitioner in exchange for Registrant's exclusive right to use Registrant's registered service marks which are the subject of these proceedings, including exclusive right to use of the "Santana" name, and a dismissal of the pending action, among other terms. Registrant's payment of settlement monies to Petitioner was to assist Petitioner in changing signage, and other items bearing Registrant's service marks.

5. In an effort to prevent prejudice to the Petitioner while the settlement agreement was being negotiated, **Registrant proposed** a two-week extension of Petitioner's then pending testimony period which was set to close on September 30, 2006.

6. After not receiving a draft settlement agreement from Petitioner's counsel, on October 12, 2006, I emailed a copy of Registrant's draft Settlement Agreement and Mutual Release to Ms. Armenta.

7. On October 19, 2006, I sent a follow-up email to Petitioner's counsel, Ms. Armenta, requesting her and her clients' approval of the Settlement Agreement emailed on October 12, 2006, noting that time is of the essence with Registrant's impending trial testimony period set to open the following month. I also sent follow-up emails to Petitioner's counsel, Ms. Armenta on my blackberry regarding the status of Ms. Armenta's client signatures to the written settlement agreement.

8. Finally, on October 27, 2006 and again on October 31, 2006, Ms. Armenta sent written correspondence confirming that the proposed written Settlement Agreement and Mutual Release prepared by Registrant was acceptable to Petitioner. Ms. Armenta confirmed that the agreement would have to be translated from English to Spanish for the benefit of her clients.

9. In confirming Petitioner's acceptance of the proposed written Settlement Agreement and Release, on November 2, 2006, Registrant sent an updated copy of the Settlement Agreement to Petitioner for transcription from English to Spanish. The revised Settlement Agreement reflected

nominal additions, such as that a transcribed copy of the agreement would be attached as Exhibit A. As I recall, no material changes were ever made to the Settlement Agreement.

10. With no response from Petitioner to my email dated November 2, 2006, I sent additional emails to Petitioner requesting immediate execution of the mutually agreed upon written Settlement Agreement and Mutual Release.

11. With Registrant's approaching testimony period, on November 13, 2006, Registrant sent written correspondence to Petitioner demanding that Petitioner's signatures to the Agreement be received by Registrant no later than November 15, 2006. As so much time had passed, promises made and broken by Petitioner, and because the delay was negatively impacting Registrant, Registrant further notified Petitioner that if signatures were not received by November 15, 2006, Registrant would deduct $5,000.00 from the agreed upon monetary payment to be paid to Petitioner for every week that the signatures were not received -- not every day as misrepresented by Petitioner in his Motion to Re-Open and Opposition papers. (Attached hereto as Exhibit B is a true and correct copy of the email from me to Cris Armenta dated November 13, 2006).

12. On November 14, 2006, Ms. Armenta assured me that Petitioner's signatures to the written Settlement Agreement would be received by Registrant on November 20, 2006. Then again on November 17, 2006, Ms. Armenta confirmed that Petitioner's signatures were forthcoming. Further reassurance that the signatures would be delivered to Registrant was provided by Ms. Armenta on November 20, 2006.

13. A no point in time did I express to Petitioner that a settlement of this matter would not reunite the family.

14. At no point in time prior to the filing of Petitioner's Motion to Re-Open/Opposition to Motion for Default Judgment (December 22, 2006), did Petitioner communicate to Registrant any concern or impediment to settlement caused by the asserted monetary penalty, transcription issues, or alleged indications by Registrant that settlement would not reunite the family.

15. Registrant and Registrant's counsel spent considerable time, money and expense in preparing for the Trial Testimony periods just prior to Petitioner's settlement offer in September 2006. With Petitioner's continued promises that the written Settlement Agreement prepared by Registrant was acceptable and that signatures to the same would be forthcoming, the time spent by Registrant and Registrant's counsel in preparing for the Trial Testimony periods several months ago has been largely lost. As a result, in the event that the instant motion is denied, Registrant and Registrant's counsel will be required to expend substantial additional time, attorneys' fees and expenses to re-prepare (gear up) for the Trial Testimonial period. If the Motion for Default Judgment is denied, these fees and costs should be paid by Petitioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 10, 2007

By: _____
Michael A. Sandstrum

EXHIBIT "A"

From: Mike Sandstrum
Sent: Thursday, September 07, 2006 1:17 PM
To: 'cris@armenta.com'
Subject: Meet & Confer Mtg -- Gallego v. Santana's Grill, Inc.: Our File No. 1174.272

Importance: High

Are you available next week to discuss scheduling, stipulated facts, witnesses, etc. I am available on Tuesday/Wednesday of next week (preferably Wednesday). Also, what's the status of the mediation which was tentatively set for 9-18? We would like to split the fees for a neutral interpreter to be present, please advise if that is acceptable. My month is filling up, hence, I would like to get the scheduling issues and locations resolved asap.

Also, what the status of Mr. Gallego, when can he be available for oral testimony? Please advise asap. I will have time tomorrow to discuss the case for about 30 minutes, between meetings and deposition. Are going to take the oral testimony of our clients, Pedro Santana, Arturo Santana Lee, Arturo Castaneda? If not, can you make them available for oral testimony in November? Please let me know asap.

I look forward to hearing from you.

Thanks

Michael Sandstrum, Esq.
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Thank you.

From: Mike Sandstrum
Sent: Monday, September 11, 2006 5:52 PM
To: 'cris@crisarmenta.com'
Subject: TTAB matter - Santana Arturo Gallego v. Santana's Grill, Inc.: Our File No. 1174.272

Importance: High

I have been trying to get in touch with you for sometime regarding scheduling, witnesses, stipulated facts, etc. for your trial testimonial period. I have not heard back. Please call me tomorrow and let me know your intentions, who you will be calling as witnesses, scheduling, etc. I would like to clear my schedule accordingly. Will you be taking the oral testimony of Petitioner, Arturo Santana Lee, Pedro Santana Lee and Mr. Arturo Castaneda? Also, will you agree to split the costs of an interpreter for mediation, and will your clients being present for mediation?? I have also not heard back from you whether you will abide by the prior stipulation to produce Mr. Santana Gallego for oral testimony. Please immediately advise.

As you know, mediation in this matter is set for September 18, 2006, at Mr. Keats office, time to be determined.

In any event, please call me to discuss.

Thanks

Michael Sandstrum, Esq.
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Thank you.

From: Mike Sandstrum
Sent: Thursday, September 21, 2006 8:28 AM
To: 'cris@crisarmenta.com'
Subject: TTAB Proceeding - Petitioner's Trial Testimonial Period

Importance: High

It was a pleasure meeting with you and George. Per our conversation, I understand that you intend to call various witnesses next week, and that you will provide me with at least five days notice for each witness called. I assume that you will give notice in compliance with rules, including 703.01(d); 37 CFR § 2.123(c), etc. As you can appreciate, I will have no alternative to assert the proper objections if I am not provided with the five days/reasonable notice.

Please let me know if you have any questions.

Thanks

Michael Sandstrum, Esq.
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Thank you.

From: Mike Sandstrum
Sent: Friday, September 22, 2006 10:49 AM
To: 'cris@crisarmenta.com'
Subject: Trial issues -- Gallego v. Santana's Grill: Our File No. 1174.272

Importance: High

Good News -- my email is up and running. FYI: I will be in the office until 12:30 today, and then in client meetings.

I hope you understand my position regarding notice. I am entitled to have sufficient opportunity to prepare for my examination of your witnesses and arrange my scheduling, etc., and it is necessary to know (formally) who is being called, when and where. I do not see my request as unreasonable in any respect, I am only asking what the rules require. Please provide formal notice in compliance with the rules. You would have to agree that requesting five days notice is not unreasonable, and at the mediation on Monday, I specifically asked that you provide me with the Notice asap.

As to the stipulations identified in your email, I simply do not have the authority to stipulate to the same.

As of this date, I would request that your witnesses be presented on Wednesday through Friday, with notice today by Noon as to who, when and where, etc – which is minimal notice at best. I can only assume that you are going to ask me for more than three days notice during my client's testimonial period. Please email and fax your notices.

Also, per your email yesterday, you indicated that you are only calling Mr. Gallego and Arturo Santana Lee, is this still the case? Will you make Mr. Castaneda and Pedro available during my clients' trial testimonial period?

Thanks

Michael Sandstrum, Esq.
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EXHIBIT "B"

From: Mike Sandstrum
Sent: Monday, November 13, 2006 1:15 PM
To: 'Cris Armenta'
Subject: Status - Santana's Grill v. Arturo Santana Lee et. al. & TTAB Proceedings: Our File No. 1174.272

Importance: High
Dear Cris:

Please let me know the status of obtaining your client signatures to the settlement agreement. Although I trust that you are using your best efforts, it has been over six weeks since the tentative settlement was in place. Consequently, my client's business/plans are being impacted. As such, please forward your client signatures to the Agreement by THIS WEDNESDAY NOV 15TH, 2006 @ 5:00 PM the end of this week, close of business. If all signatures are not timely forthcoming, $5,000.00 will be deducted from the total payment of $60,000.00 (monies to reimburse for the name change) for every week that the agreement goes unsigned. We will also need to begin my client's testimonial period in December, if we do not receive all of your client signatures.

If you have any questions, please let me know.

Thanks,

Michael Sandstrum, Esq.
Partner
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20320 S.W. Birch St. 2nd Floor
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