

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

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AMERICAN HONDA MOTOR CO., INC., :

Opposer, :

v. :

Opposition No. 121,151

121,151

TBC CORPORATION, :

Applicant. :

-----X



08-16-2004

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OPPOSER'S REPLY BRIEF

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August 12, 2004

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I. THE CANADIAN SETTLEMENT DOES NOT ESTOP HONDA FROM MAINTAINING THIS OPPOSITION

The Settlement between and among Honda, Honda Canada, TBC and TBC Brands (Paulson Ex. 9) is not determinative of the present opposition because: (1) TBC's Canadian registration is for "automobile tires" (*Id.*, ¶ 1) while here TBC seeks to register SHADOW for "tires," which, of course, comprehends motorcycle tires; (2) TBC and TBC Brands have undertaken not to adopt, use or seek to register "in Canada, any mark consisting of or incorporating the word SHADOW, in association with motorcycles . . ." (*Id.*, ¶ 4); (3) there is no evidence of marketing channels or conditions for motorcycles (or tires) in Canada;¹ and (4) "The concept of territoriality is basic to trademark law; trademark rights exist in each country solely according to that country's statutory scheme." *Person's Co. Ltd. v. Christman*, 900 F.2d 1565, 1568-69, 14 U.S.P.Q. 2d 1477, 1479 (Fed. Cir. 1990).² None of the authorities cited by TBC (Br. pp. 10-11) involves extraterritorial application of the "estoppel."

¹ There is reason to believe they might differ considerably. Canada is generally North of the United States (other than Alaska), relatively sparsely populated, and considerably colder and snowier, while motorcycles are two-wheel vehicles without an enclosed driver's compartment. Motorcycling in Canada is surely a more rugged activity than it is in the United States. The relatively sparse population and vast areas might dictate differences in customer's needs, product usage and distribution channels for tires in general. In short, without considerably more evidence than appears in this record, there is no way to determine the comparability of the pertinent markets in the two jurisdictions.

² See also *Fuji Photo v. Shinohara Shoji*, 754 F.2d 591, 599-600, 225 U.S.P.Q. 540, 546 (5th Cir. 1985).

The concept of territoriality is basic to trademark law; trademark rights exist in each country solely according to that country's statutory scheme. *Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541, 544 . . . (1927). "It is well settled that foreign use is ineffectual to create trademark rights in the United States." *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1270 n. 4, 181 U.S.P.Q. 545, 547 n. 4 (2d Cir, 1974). . . . It is equally well settled that "when trade-mark rights within the United States are being litigated in an American court, the decisions of foreign courts concerning the respective trade-mark rights of the parties are irrelevant and inadmissible." *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 639, 109 U.S.P.Q. 438, 441-42 (2d Cir.), *cert. denied*, 332 U.S. 871, . . . (1956) These cases are perfectly good law; despite the absence of comparable authority from this Circuit, their reasoning, and general principles of trademark law, compel the conclusion that it was error to admit evidence of the parties' foreign trademark practices.

Id.

II. THE FACT TBC MAY NOT PRESENTLY DISTRIBUTE MOTORCYCLE TIRES IS ALMOST IRRELEVANT

TBC's testimony and brief go to considerable lengths to establish that TBC does not distribute motorcycle tires, presumably for the purpose of showing that its tires and Honda's motorcycles are not related products. However –

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 943, 16 U.S.P.Q. 2d 1783, 1787 (Fed. Cir. 1990) (and cases cited therein). *See also J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 U.S.P.Q. 2d 1889, 1892 (Fed. Cir. 1991) (“Determination of registrability is made on the basis of the description of the goods in the application.”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 U.S.P.Q. 2d 1001, 1004 (Fed. Cir. 2002) (“This ‘relatedness of the goods’ factor compares the goods and services in the applicant’s application with the goods and services in the opposer’s registration.”); *Id.* at 1268, 62 U.S.P.Q. 2d at 1005 (“[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”). The “identification of goods set forth in the application” is “tires.”³

³ While the issue is likelihood of confusion, one of the *duPont* factors to consider is actual confusion. The fact that TBC has not, yet anyway, distributed motorcycle tires might have a bearing on the lack of evidence of actual confusion, which TBC argues is “especially probative that confusion is likely” (Br. p. 20). The point is that if TBC obtains the registration it seeks, it will have a *prima facie* right to sell SHADOW motorcycle tires.

III. AMERICAN HONDA HAS STANDING TO PURSUE THIS OPPOSITION

In the first of its issues presented (Br. p. 7), TBC raises the issue of American Honda's standing.

The "starting point" for the standing determination of an opposer is Section 13 of the Lanham Act, which provides:

Any person who believes that he would be damaged by the registration of a mark upon the principal register may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefore....

Ritchie v. Simpson, 170 F.3d 1092, 1095, 50 U.S.P.Q. 2d 1023 (Fed. Cir. 1999) (citing 15 U.S.C. § 1063).

"[I]n addition to meeting the broad requirements of § 13, an opposer must meet two judicially-created requirements in order to have standing – the opposer must have a 'real interest' in the proceedings^[4] and must have a 'reasonable' basis for his belief of damage^[5]." *Id.*

Clearly, American Honda as a subsidiary and licensee, and exclusive distributor in the United States of motorcycles bearing the trademarks, of Honda Japan (*see Gurga Test.*, p. 7, ln. 15 – p. 20, ln. 9), has an interest in the outcome of this opposition proceeding and a reasonable basis to believe it would be damaged by TBC's registration for SHADOW for tires.

⁴ The purpose of the "real interest" requirement is to prevent "mere intermeddlers" who do not raise a real controversy from bringing oppositions or cancellation proceedings in the PTO." *See also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (holding that opposer must have a legitimate personal interest – direct and personal stake – in the opposition); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 493, 2 U.S.P.Q. 2d 2021, 2024 (Fed. Cir. 1987) (finding no need for opposer to have proprietary interest in the mark); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 U.S.P.Q. 185, 189 (C.C.P.A.1982).

⁵ *William & Scott Co. v. Earl's Restaurants*, 30 U.S.P.Q. 2d 1870, 1873 n.2 (TTAB 1994) (stating licensee and distributor has standing to oppose); *J.L. Prescott Co. v. Blue Cross Laboratories*, 216 U.S.P.Q.1127, 1128 (TTAB 1982) (exclusive licensee has standing to oppose); *Revlon, Inc. v. La Maur, Inc.*, 157 U.S.P.Q. 602, 604 (TTAB 1968) (holding exclusive domestic distributor of foreign trademarked products has standing to oppose since damage may well result in terms of loss of sales).

IV. PRIORITY IS PLAINLY ESTABLISHED

Even without regard to registrations,⁶ Opposer has overwhelmingly proven use of SHADOW for motorcycles prior to the filing date of the opposed mark. American Honda is a subsidiary of Honda Japan and the sole distributor of Honda products in the United States. Gurga Test., p. 17, lns. 2-9; Gurga Test. Ex. 2 (dated August 1, 1959). Gurga Test. Ex. 4, excerpts from the Honda Motorcycle Identification Guide from 1959 through 2000, published by Honda and utilized within the company (and by the witness) and by dealers (Gurga Test. p. 23, ln. 15 – p. 24, ln. 11) illustrates SHADOW motorcycle sales the following model years:

<u>Name</u>	<u>Model Years</u>
SHADOW 500	1983-1986
SHADOW 750	1983
SHADOW	1984-1987
SHADOW 1100	1985-1990, 1992-1996
SHADOW 800	1988
SHADOW VLX	1988-1989, 1991-1997, 1999-2000
SHADOW VLX DELUXE	1993-2000
SHADOW 1100 AMERICAN CLASSIC EDITION	1995-1996
SHADOW AMERICAN CLASSIC EDITION	1997-1999
SHADOW SPIRIT 1100	1997
SHADOW AMERICAN CLASSIC EDITION 750	1998-2000
SHADOW SPIRIT	1998-2000
SHADOW AERO	1998-2000
SHADOW AMERICAN CLASSIC EDITION TOURER	1998-2000
SHADOW SABRE	2000

Gurga Test. Ex. 6 (HONDA website images of 2003 model year SHADOW motorcycle models – Gurga Test. p. 28, lns. 1-22) illustrates SHADOW VLX, SHADOW VLX Deluxe, SHADOW A.C.E. 750 Deluxe, SHADOW SPIRIT, SHADOW SPIRIT 750 and SHADOW SABRE.

⁶ American Honda may not be able to invoke the presumptions afforded by Section 7(b) to the SHADOW registrations owned by Honda Japan; but, given the licensing, subsidiary and distribution relationship between the two, the registrations are hardly irrelevant. American Honda, on the basis of its own use, has a right to oppose registration of SHADOW under Section 2(d) of the Act, and the registrations by Honda Japan are a further basis for opposition under Section 2(d).

Gurga Test. Ex. 7 tracks sales of various SHADOW model motorcycles from 1983 through 2002 (with some preliminary 2003 sales included) in terms of units sold and dollar volume. Gurga Test. Ex. 7 was prepared from business records maintained by the Market Information and Technology operation for which the witness is responsible. Gurga Test. p. 7, lns. 23-25; p.8, lns. 10-21; p. 32, ln. 5 – p. 35, ln. 1.

Gurga Test. Ex. 9 illustrates print advertising for SHADOW motorcycles from 1983 to 2000 (Gurga Test. p. 37, ln. 19 – p.38, ln. 6), while Gurga Test. Ex. 10 illustrates advertising mats for SHADOW models distributed to Honda motorcycle dealers (Gurga Test. p. 38, ln. 14 – p. 39, ln. 12).

Whatever shortcomings there may be in Honda's case, priority of use is not one of them.

V. SHADOW IS A TRADEMARK USED FOR SEVERAL MOTORCYCLE MODELS

The facts that DODGE RAM is registered for trucks and vans,⁷ LINCOLN CONTINENTAL is registered for motor cars,⁸ and a CHEVROLET CORVETTE design is registered for automobiles⁹ does not diminish the stature of DaimlerChrysler's DODGE, Ford's LINCOLN or General Motors' CHEVROLET trademarks. One mark may function as a part of others. Indeed, it is not uncommon in everyday life; consider: **EVERREADY** ENERGIZER batteries, **MR. CLEAN** MAGIC ERASER household cleaner, **TEAM CHEERIOS** breakfast cereal and **PEPSI BLUE** soda. That is the fundamental flaw of TBC's effort to identify numerous Honda SHADOW marks as separate and unconnected, then argue that "tacking" is not appropriate (Br. pp. 9-10). As illustrated in Point IV, Honda has employed more than a dozen

⁷ Registration No. 1,169,189.

⁸ Registration No. 591,602.

⁹ Registration No. 648,147.

SHADOW marks, all of which begin with SHADOW. A look at Gurga Test. Ex. 6 demonstrates that SHADOW appears by itself on the fuel tanks of the SHADOW VLX, SHADOW VLX DELUXE, SHADOW A.C.E. 750 DELUXE and SHADOW SPIRIT. It appears beneath the seat of the SHADOW SABRE in a manner sufficient to make a separate commercial impression.¹⁰

The advertisements in Gurga Test. Ex. 9 illustrate several similar uses of SHADOW over the years on the motorcycles photographed for those advertisements. Any of these motorcycles is sufficient as a specimen to show trademark use of SHADOW for a motorcycle.

... [I]t is settled that a product label can bear more than one trademark without diminishing the identifying function of each portion. The salient question is whether the designation in question, as used, will be recognized in and of itself as an indication of origin for this particular product. That is, does this component or designation create a commercial impression separate and apart from the other material appearing on the label?

Proctor & Gamble Co. v. Keystone Automotive Warehouse, Inc., 191 U.S.P.Q. 468, 474 (TTAB 1976). “For purposes of registration under the Lanham Act, there is no statutory limitation on the number of trademarks one may use on a single label to identify and distinguish a particular product.” 1 McCarthy on Trademarks § 7:6 (4th ed., Rel. # 28, 12/2003).

Plainly, SHADOW is a mark, and has been used for more than two decades on various models of Honda motorcycles.¹¹

¹⁰ A look at the motorcycle/cruisers section of the Honda website, www.honda.com, reveals that the pattern continues for the 2005 models – SHADOW appears separately on the gas tanks of the SHADOW SPIRIT, SHADOW AERO, SHADOW VLX and SHADOW VLX DELUXE.

¹¹ At Br. pp. 15-16, TBC argues that SHADOW “has been used on many other goods.” Initially, it refers to Gurga Exhibits 19, 20, 23, 24, 25 and 26. As to the alleged “Shadow Cruiser Truck Campers,” “Shadow trailers,” “Shadow motorsports trailers” and “Shadow vehicle shift knobs,” the record reflects that Mr. Gurga was asked if he was familiar with the product. When he said no, he was shown an unauthenticated exhibit and asked if it refreshed his recollection. Gurga Test. p. 111, ln. 10 – p. 115, ln. 8. When he said no, TBC counsel moved on. *Id.* That is hardly proof of third-party use. So TBC argues “No objections, as to form, authenticity or foundation, were made . . . to these Exhibits, and thus, all such are waived.” (Br. p. 16, fn. 12.) That is patently incorrect. “Objections to testimony depositions are not waived for failure to make them during or before the taking of the deposition, provided that the ground for objection is not one that might have been obviated or removed if presented at that time.” TBMP § 707.03(a). Because Honda’s objection to the authenticity of or foundation for the exhibits as proof

VI. ADMISSIONS AGAINST INTEREST ARE NOT RED HERRINGS

Having been caught asserting a position in another contemporaneous opposition contrary to its position in this case, TBC now argues that its pleading “is not an estoppel.” Honda never said that it was. It is merely an admission against interest as is stated in Honda’s Opening Brief. It is, however, somewhat more than the blanket assertion of an ultimate “conclusion of law.”

In opposing registration of INDIAN SPIRIT for motorcycles on the basis of its own ownership of GRAN ESPRIT, GRAND SPIRIT and WILD SPIRIT for tires, TBC alleged the following factual matters: (1) “The opposed mark [INDIAN SPIRIT] is a colorable imitation of . . . Opposer’s prior and aforesaid SPIRIT marks” – Opp. Not. Rel. Ex. 1, ¶ 6; (2) “The goods set forth in the application opposed herein [motorcycles] identical and/or similar and/or related to [*sic*], the goods in connection with which TBC uses Opposer’s SPIRIT marks” – *Id.*, ¶ 7; (3) “the goods set forth in the opposed application [motorcycles] are and/or will be sold through the same and/or similar channels of trade . . . in . . . which TBC’s products [tires] are marketed and sold” – *Id.*, ¶ 7; and (4) “the goods set forth in the opposed application [motorcycles] are and/or will be sold . . . to the same general class of purchasers . . . to which TBC’s products are marketed and/or sold” – *Id.*, ¶ 7. The latter two are alleged “on information and belief.”

of use of what they purported to depict could not have been obviated or removed at the time, the objection is not waived. If necessary, Honda asserts the hearsay, authenticity and foundation objections at this time. Frankly, we believe they are better viewed as Honda viewed them at the time – as records of failed efforts to establish facts through an adverse witness, to which there is no need to object (and no basis to claim that certain facts were established). To be sure, TBC had some limited success in this effort. Mr. Gurga thought that “Dodge Shadow” “sound[ed] familiar” but he “know[s] nothing about” it. Mr. Gurga admitted having heard of the Rolls-Royce Silver Shadow automobile, but did not endorse the exhibit TBC showed him.

TBC also refers to copies of a number of registrations of SHADOW. Whatever they may show, they are misplaced in an argument that SHADOW “has been used on many other goods,” because “third-party registrations are not evidence of use of the involved marks to the extent that the public is necessarily aware of them.” *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 U.S.P.Q. 2d 1404, 1406 (TTAB 1988).

TBC also refers to statements made by Honda’s counsel in response to four office actions (Br. p. 5 & n. 3). Since these registrations and responses relate to collateral goods, they have no bearing on the issues presented here.

These are not consistent with the facts TBC is alleging in this proceeding. TBC is not estopped to argue otherwise in this proceeding, as it does, but the admissions against interest are a factor affecting the credibility of TBC's arguments here.

VII. TBC'S OBJECTIONS TO HONDA EXHIBITS

A list of objections to many of Honda's exhibits follows the signature page of TBC's brief. We gather TBC is asserting them, cryptic as they are (unexplained citations by number to various sections of the Federal Rules of Evidence), as objections to the admission of the designated exhibits. Following the signature page of this brief, we answer each objection.

VIII. CONCLUSION

For the reasons set forth above, and in Opposer's opening brief, the Opposition should be sustained.

Dated: August 12, 2004

Respectfully submitted,

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HONDA'S RESPONSE TO OBJECTIONS TO GURGA TESTIMONY EXHIBITS

Exhibit 2

Gurga Test. Ex. 2 is the exclusive distribution agreement between Honda Motor Co., Ltd. and American Honda Motor Co. TBC objects to the introduction of this exhibit on the grounds that Mr. Gurga does not have personal knowledge about the agreement pursuant to FRE 602. Contrary to TBC's assertion, Mr. Gurga has shown firsthand knowledge of the subject matter of his testimony. Specifically, a foundation was laid which demonstrates that Mr. Gurga was familiar with Ex. 2 and its continued effect and subject matter. Gurga Test. p. 17, lns. 2-25. TBC further objects to this exhibit on the grounds of hearsay pursuant to FRE 802. This document is admissible as a business record pursuant to Rule 803(7) through Mr. Gurga, whose role at American Honda is to coordinate current and future plans for Honda products – the essence of the agreement. *Id.* at p. 10, ln. 25 – p. 11, ln. 5. Furthermore, this document is admissible since it affects an interest in property pursuant to Rule 803(15). Mr. Gurga testified that the document relates to property (Honda products), relates to the purpose of the document (exclusive distribution) and is consistent with the current arrangement between Honda Motor Co. and American Honda. *Id.*

Exhibit 3

Gurga Test. Ex. 3 is the trademark agreement between Honda Motor Co., Ltd. and American Honda Motor Co. TBC objects to the introduction of this exhibit on the grounds that Mr. Gurga does not have personal knowledge about the agreement pursuant to FRE 602. Contrary to TBC's assertion, Mr. Gurga has shown firsthand knowledge of the subject matter of his testimony. Specifically, a foundation was laid which demonstrates that Mr. Gurga was familiar with Ex. 3 and its continued effect and subject matter. Gurga Test. p. 18, ln. 1 – p. 19, ln. 15. TBC further objects to this exhibit on the grounds of hearsay pursuant to FRE 802. This document is admissible as a business record pursuant to Rule 803(7) through Mr. Gurga, whose role at American Honda is to coordinate current and future plans for Honda products – the essence of the agreement. *Id.* at p. 10, ln. 25 – p. 11, ln. 5. TBC further objects to this exhibit on the grounds that it is not an original pursuant to FRE 1002. However, since the terms of the writing are not directly in issue in this proceeding, the original is not required. The writing is offered to corroborate the testimony of Mr. Gurga regarding the relationship between Honda Motor Co. and American Honda.

Exhibit 4

Gurga Test. Ex. 4 is a copy of selected pages from the Honda Motorcycle Identification Guide. TBC objects to the introduction of this exhibit on the grounds that it is not an original writing pursuant to FRE 1002. Honda's counsel agreed to submit a complete copy of the Honda Motorcycle Identification Guide as Ex. 4-A, which was produced as HON 003253 – HON 003794. Gurga p. 20, ln. 20 – p. 25, ln. 5. However, the Honda Motorcycle Identification Guide is a 524-page soft-cover book that has photos, model years, color listings, selected technical information and Vehicle Identification Number ranges for every Honda Motorcycle, Scooter, Moped, ATC, FL and ATV sold in the United States by American Honda from 1959

through 2000. This comprehensive book, is available to the public through any Honda Dealer at a suggested retail price of \$28.95 or can be ordered from Helm Inc. at (888) 292-5393 or their Web site: www.helminc.com. Opposer can submit a complete original book at the Board's request as Ex. 4-A.

Exhibit 5

Honda does not rely upon Exhibit 5 for present purposes.

Exhibit 7

Gurga Test. Ex. 7 is sales information for Honda's SHADOW line of motorcycles. TBC objects to the introduction of this exhibit pursuant to FRE 402, 602, 802 and 1006. First, there is no basis for TBC's objection pursuant to FRE 402. The number of SHADOW models made and sold in the United States is clearly relevant since it relates to the very essence of the opposition proceeding – the priority of and prevalence in the market of Honda's SHADOW line of motorcycles. Gurga p. 32, ln. 5 – p. 35, ln. 1. Second, TBC's objection pursuant to FRE 602 is similarly without merit. Mr. Gurga has shown firsthand knowledge of the subject matter of his testimony relating to this Exhibit. Specifically, Mr. Gurga was familiar with Ex. 7 as individuals within his department at Honda under his ultimate supervision and control generated it. *Id.*; *see also id.* p. 23, ln. 23 – p. 9, ln. 9. Third, TBC objects to this exhibit on the grounds of hearsay pursuant to FRE 802. This document is admissible as a business record pursuant to Rule 803(7) through Mr. Gurga, who oversees the individuals at Honda that generate reports of this sales information. *Id.* Finally, TBC further objects to this exhibit pursuant to FRE 1006. Exhibit 7 is a summary of records relating to sales of Honda's SHADOW line of motorcycles. *Id.* As a quick perusal of Exhibit 7 will show, tens of thousands of SHADOW units have been sold between 1983 and 2003. Thus, it is clearly inconvenient for the Board to examine sales receipts for that many motorcycles.

Exhibit 9

Gurga Test. Ex. 9 is composed of Honda motorcycle print advertisements ranging from 1983 until 2000. TBC objects to the introduction of this exhibit on the grounds that Mr. Gurga does not have personal knowledge about these advertisements pursuant to FRE 602. Contrary to TBC's assertion, Mr. Gurga has shown firsthand knowledge of the subject matter of his testimony. Specifically, Mr. Gurga is familiar with the type of advertising engaged in by Honda and his role at Honda is to coordinate the current and future plans for Honda products, including advertising of Honda products. Gurga p. 35, lns. 2-25; p. 37, ln. 19 – p. 38, ln. 6.

Exhibit 11

Gurga Test. Ex. 11 is a copy of a Honda dealer radio advertisement. TBC objects to the introduction of this exhibit on the grounds that Mr. Gurga does not have personal knowledge about this advertisement pursuant to FRE 602. Contrary to TBC's assertion, Mr. Gurga has shown firsthand knowledge of the subject matter of his testimony. Specifically, Mr. Gurga is familiar with the type of advertising engaged in by Honda and his role at Honda is to coordinate

the current and future plans for Honda products, including advertising of Honda products. Gurga p. 35, lns. 2-25; p. 37, ln. 19 – p. 38, ln. 6; p. 39, ln. 13 – p. 40, ln. 4. TBC further objects to this Exhibit as hearsay pursuant to FRE 802. The document is not offered for the truth of what it says. Moreover, this document is admissible as a business record pursuant to Rule 803(7) through Mr. Gurga, who reviews copies of such advertising. Gurga p. 35, lns. 2-25; p. 39, ln. 13 – p. 40, ln. 4.

Exhibit 12

Gurga Test. Ex. 12 is a document generated by Mr. Gurga's department at Honda relating to the approximate number of SHADOW units in operation. Gurga p. 44, ln. 11 – p. 45, ln. 13. TBC objects to this exhibit pursuant to FRE 602, 802 and 1006. As stated above, Mr. Gurga has personal knowledge regarding the information in this exhibit as someone in his department under his ultimate supervision and control prepared it so FRE 602 is a meritless objection. Gurga p. 77, lns. 6-14. Similarly, TBC's objection pursuant to FRE 802 is without merit. This document is admissible as a business record pursuant to Rule 803(7) through Mr. Gurga, whose department collects and relies on such information. Finally, TBC objects to this exhibit pursuant to FRE 1006. *Id.*; *see also id.* p. 44, ln. 11 – p. 45, ln. 13. Since Honda has sold tens of thousands of SHADOW units between 1983 and 2003 (*see* Gurga Test. Ex. 4), it is clearly inconvenient for the Board to examine sales receipts for that many motorcycles.

CERTIFICATE OF SERVICE

I am employed in the County of New York. My business address is Fish & Richardson P.C., 45 Rockefeller Plaza, Suite 2800, and New York, New York 10111. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for delivery by First Class Mail.

On August 12, 2004, I caused a copy of the following documents:

OPPOSER'S REPLY BRIEF

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

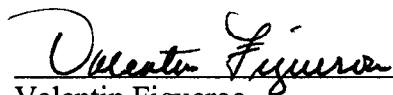
Matthew J. Cuccias, Esq.
Marsha Gentner, Esq.
Jacobson Holman PLLC
400 Seventh Street, NW
Washington, DC 20004

Attorney for Applicant

X	MAIL:	Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business.
	PERSONAL:	Such envelope was delivered by hand to the offices of the addressee.
	FACSIMILE:	Such document was faxed to the facsimile transmission machine with the facsimile machine number stated above. Upon completion of the transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error.
	FEDERAL EXPRESS:	Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express.
	EXPRESS MAIL:	Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by the United States Postal Service.
	OVERNIGHT DELIVERY:	Such correspondence was given on the same day in the ordinary course of business to an authorized courier or a driver authorized by that courier to receive documents.

I declare that I am employed in the office of Fish & Richardson P.C. at whose direction the service was made.

I declare under penalty of perjury that the above is true and correct. Executed on August 12, 2004, at New York, New York.



Valentin Figueroa