Mailed:
February 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Corporacion Habanos, S.A.

v.

Guantanamera Cigars Company

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Opposition No. 91152248 to application
Serial No. 76256068 filed on May 14, 2001

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David B. Goldstein of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C. for Corporacion Habanos, S.A.

Frank Herrera of Frank Herrera, P.A. for Guantanamera Cigars Company.

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Before Hairston, Zervas and Cataldo, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

In a separate decision, we have decided the merits of opposer's Trademark Act Section 2(e)(3), 15 U.S.C. § 1052(e)(3), claim asserted in this case. In this order, we rule on the numerous objections made by each party to the other's evidence submitted by notice of reliance. We have opted to issue a separate order because of the large number of evidentiary objections.

Opposer's Evidentiary Objections

We rule as follows on opposer's objections to applicant's exhibits submitted with applicant's notice of reliance.[1]

a. Exhibit 1. After opposer submitted portions of Mr. Montagne's discovery deposition with its notice of reliance, applicant submitted Mr. Montagne's entire discovery deposition. Applicant did not indicate why in fairness the entire deposition should be considered so that opposer's submission would not be misleading. See Trademark Rule 2.120(j)(4), 37 C.F.R. §2.120(j)(4). Applicant also did not submit any of the exhibits to Mr. Montagne's discovery deposition. In order to correct any misimpressions created by the portions of Mr. Montagne's testimony submitted by opposer, such as with respect to any meaning of the term "guantanamera" not favorable to opposer, and because opposer submitted many of the deposition exhibits with its notice of reliance, we exercise our discretion as permitted by Trademark Rule 2.120(j)(4) and consider Mr. Montagne's entire discovery deposition. Opposer's objection is overruled.

b. Exhibit 2. Opposer's objection to applicant's submission of less than the entire file history of the application involved in this proceeding is overruled; the file history of applicant's application is automatically of record pursuant to Trademark Rule 2.122(b), 37 C.F.R. §2.122(b).

c. Exhibits 6, 7, 8, 13, 25, 32, 38 and 40. Opposer's objections to various Internet printouts are sustained because such printouts may not be authenticated through the notice of reliance procedure. Applicant has not authenticated them through the testimony of a person who can properly authenticate and identify the materials. See TBMP § 704.08 (2d ed. rev. 2004); *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1302 n.3 (TTAB 2004).

[1] We have not received a response from applicant regarding the objections made by opposer to applicant's evidence. Thus, while we have not treated opposer's objections as conceded, we have ruled on opposer's objections without the benefit of any arguments by applicant on the propriety of opposer's objections.

d. Exhibit 9. Opposer's objection to applicant's submission of applicant's supplemental responses to opposer's first set of interrogatories is sustained; except under one limited circumstance which is inapplicable here, a party may not introduce its own responses to discovery requests by a notice of reliance. Trademark Rule 2.120(j)(5), 37 C.F.R. § 2.120(j)(5).

e. Exhibits 10 and 34. Opposer's objection to both exhibits is sustained because applicant has not provided a translation of these exhibits which are in Spanish. Opposer's objection to Exhibit 34 is also sustained because it comprises a brochure, and there is no evidence that the brochure is available to the general public in libraries or of general circulation among members of the public. Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e); *Daggett & Ramsdell, Inc. v. Procter & Gamble Co.*, 275 F.2d 955, 125 USPQ 236, 238 (CCPA 1960).

f. Opposer's objection on the grounds of relevance to (a) certain third-party registrations from the Office's TESS database submitted as Exhibits 11, 12, 16, 35 and 36, and (b) pages from an English language dictionary to show that "guantanamera" is not in the dictionary, submitted as Exhibit 33, are overruled. We have given, however, appropriate weight to the registrations and the dictionary pages in our deliberations.

g. Exhibit 28. Opposer's objection to copies of photographs of applicant's goods is sustained; the Trademark Rules do not allow for the introduction of such evidence pursuant to a notice of reliance.

h. Exhibits 37 and 39. Opposer's objection is sustained; these exhibits consist of two declarations which were submitted with the summary judgment motions. Evidence submitted in connection with a summary judgment motion is of record only for purposes of that motion. To be considered at final hearing, the evidence must be properly introduced during the appropriate testimony period. See TBMP § 528.05(a) (2d ed. rev. 2004). Further, although Trademark Rule 2.123(b), 37 C.F.R. § 2.123(b), provides in relevant part that "[b]y written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or

witnesses," no stipulation has been submitted to allow opposer to submit the testimony of its witnesses by affidavit or declaration.

Applicant's Evidentiary Objections

We rule as follows on applicant's objections to thirty-two of opposer's exhibits submitted with opposer's notice of reliance:

a. Objections to evidence based on relevancy are overruled; unless the evidence is subject to another objection which we have sustained, we have given the evidence appropriate weight in our deliberations.

b. Objections regarding evidence for which applicant has waived any objection based on authentication in the stipulation filed on September 25, 2006 are overruled because of applicant's waiver.

c. Objections based on hearsay are overruled because opposer's exhibits have not been offered for the truth of the matters contained therein, or because applicant has not explained the basis for its objection.

d. Objections to the extent that documents come from the Wikipedia website are overruled. See *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1475-1476 (TTAB 1999) (providing that the weight given to information retrieved from the Internet must be carefully evaluated because the source is often unknown); *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007) ("the Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information"). We have given the Wikipedia documents the weight they are due.

e. Objections regarding evidence submitted with opposer's notice of reliance which is duplicative of evidence submitted as an exhibit to a testimony deposition or which is in the record by operation of the Trademark Rules are overruled.

Additionally, applicant's objections to the following exhibits are overruled: (a) Exhibit 9, opposer's application for the mark GUANTANAMERA, because applicant has relied on it in arguing that a translation of the term was not needed in applicant's application; (b) Exhibit 10, because it is also an exhibit to Mr. Morejon's deposition; (c) Exhibit 11, online entries from *The Columbia Gazetteer* (other than the entry regarding Pete Seeger, which is discussed below), because *The Columbia Gazetteer* is a standard reference work; (d) Exhibit 20, a definition from a Spanish language dictionary, because a corrected copy of the entire exhibit has been filed with applicant's consent and the corrected copy contains an English translation; (e) Exhibit 18, because opposer indeed has included a statement identifying the document in its notice of reliance in accordance with Trademark Rule 2.122(e); and (f) Exhibits 21 and 22 because the exhibits are from a Spanish language dictionary and opposer's claims involve the meaning of a Spanish word.

The following objections are sustained:

a. Applicant's objection to (a) Exhibit 28, a document from reference.com showing an entry for "Guantanamo," and (b) the second document in Exhibit 38 entitled "Mambo Kings" from wikipedia.org, because web pages are not self-authenticating and opposer has not contended these documents are subject to the stipulation between the parties regarding authentication.

b. Applicant's objections to Exhibits 4 and 8, because opposer has not provided a statement indicating the

relevance of the exhibit as required by Trademark Rule 2.122(e).

c. Applicant's objection to the entry from the online version of *The Columbia Encyclopedia* for "Pete Seeger," one of five entries from *The Columbia Gazetteer* or *The Columbia Encyclopedia* submitted as a part of Exhibit 11, because opposer did not list this document in its notice of reliance. Trademark Rule 2.122(e). We do, however, take judicial notice of this entry for "Pete Seeger." See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

In addition, we do not consider opposer's notice of reliance exhibit 43, which applicant has not objected to; the notice of reliance procedure does not extend to such evidence (a dvd containing an excerpt of the song entitled "Guantanamera" sung by Pete Seeger and excerpts from two movies.)

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