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

Proceeding	91224990
Party	Plaintiff Scandinavian Tobacco Group Eersel B.V. and General Cigar Co. Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Serial No. 86602243
to register: INSPIRADA
Filed: April 19, 2015
Published: September 22, 2015

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GENERAL CIGAR COMPANY,	:	
INC. and	:	
	:	
SCANDINAVIAN TOBACCO	:	
GROUP EERSEL, BV,	:	
	:	Opposition No. 91224990
Opposers,	:	
	:	
v.	:	
	:	
DAVID CASTRO,	:	
	:	
Applicant.	:	
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OPPOSERS’ OPPOSITION TO APPLICANT’S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP § 503, Opposers General Cigar Company Inc. (“GCC”) and Scandinavian Tobacco group Eersel BV (“STGBV”) (collectively “Opposers”) hereby oppose the Motion to Dismiss (“Motion”) filed by Applicant David Castro (“Applicant”). For the reasons specified below, Applicant’s Motion should be denied. Opposers submit herewith a First Amended Notice of Opposition, (“FAOPP”) pursuant to TBMP § 503.03.

I. INTRODUCTION

This is a case about an insider in the cigar business, and customer of Opposer GCC, who, upon information and belief, armed with knowledge of Opposers’ plans to launch their internationally-lauded MACANUDO INSPIRADO brand in the United States, rushed to the

United States Patent and Trademark Office to be the first to file his trademark application for the confusingly similar INSPIRADA mark on identical goods. Applicant filed his application on an intent-to-use basis and, upon information and belief, has made no use of the mark nor invested any money in the brand. Applicant's efforts amount to nothing more than a shakedown of a large international corporation who made open and public overtures that it intended to bring its MACANUDO INSPIRADO branded products to the United States—precisely the type of behavior that TTAB precedent prohibits.

Applicant's Motion is puzzling in that the only substantive attack that it lodges against Opposers' Notice of Opposition ("Opposition") is based on some sort of "famous mark" theory which is not set forth anywhere in the Opposition. The Motion ignores the three actual grounds for the Opposition: (1) bad faith; (2) priority based on steps preparatory to use in commerce/analogous use; and (3) false association. For this reason alone, Applicant's Motion should be denied. The FAOPP further alleges a fourth ground, lack of a bona fide intent to use the mark, because after the Opposition was filed, communications from Applicant indicated that applicant has no plans for the mark, and instead wishes to shake down Opposers for \$100,000.

Moreover, to the contrary, the facts asserted in the Opposition, and now the FAOPP, if taken as true as they must be for purposes of this Motion, clearly state a claim for the denial of the registration of Applicant's INSPIRADA mark.

II. SUMMARY OF FACTS

Opposer GCC is a Delaware company with a principal place of business in Glen Allen, Virginia. Opposer STGBV is a Dutch corporation with a principal place of business in the

Netherlands. STGBV and GCC are sister companies, owned by the same parent company, Scandinavian Tobacco Group A/S (“STG”). (Opp’n ¶ 2; FAOPP ¶ 3.) Opposers own the MACANUDO INSPIRADO brand for use in connection with cigars and have used it globally and since 2014 in the United States via steps preparatory to use in commerce, resulting in widespread recognition among consumers of cigars worldwide. (See Opp’n ¶¶ 2, 6, 7, 10; FAOPP at ¶¶ 1-9.) This broad recognition of the MACANUDO INSPIRADO brand is evidenced, *inter alia*, by it being featured in cigar industry publications such as Cigar Magazine, Cigar World, and www.halfwheel.com, which are circulated in the United States and abroad, (Opp’n ¶ 11; FAOPP ¶ 14,) and by its introduction at trade shows prior to Applicant’s filing date. (Opp’n ¶ 6; FAOPP ¶¶ 7, 8.)

STGBV owns numerous international trademark registrations for the MACANUDO INSPIRADO mark. (Opp’n ¶ 1; FAOPP ¶ 1.) GCC owns registrations for MACANUDO in the United States. (FAOPP ¶ 2.) Since GCC is STG’s flagship cigar subsidiary in the United States and is responsible for marketing and distributing MACANDUO brand cigars here, the Opposers determined that GCC would file the Application Serial No. 86827304 for MACANUDO INSPIRADO for use in connection with “cigars,” which was filed in November 2015 with the United States Patent and Trademark Office. (Opp’n ¶¶ 3–5; FAOPP ¶¶ 4–5.) As a result of their connection, STGBV and GCC each have an interest in the outcome of this Opposition.

Upon information and belief, Applicant is a principal at a cigar retailer and smoking lounge located in Maryland called Davidus Cigars. (Opp’n ¶¶ 8–9.) Davidus Cigars is one of Opposers’ customers and throughout 2014 and 2015 regularly purchased cigars from Opposers. (FAOPP ¶ 12.)

At least as early as July 2014, and certainly long before Applicant filed his trademark application for INSPIRADA on April 19, 2015, which is the subject of this Opposition proceeding, Opposers publicly showed their intent to expand their internationally-acclaimed MACANUDO INSPIRADO brand into the United States by making use analogous to trademark use of the brand at major cigar events in the United States, including events in Nashville and Las Vegas. (*See* Opp'n ¶¶ 6–7; FAOPP ¶¶ 7–8.) For example, GCC prominently displayed MACANDUO INSPIRADO cigars as a “soon to be released” product at a large 2014 trade show in Las Vegas, Nevada of the International Premium Cigar & Pipe Retailers (“IPCPR”). (FAOPP ¶ 8.) These large and public trade shows coupled with the brand’s inclusion in the above-mentioned popular cigar publications, resulted in the MACANUDO INSPIRADO brand having a reputation in the United States among cigar consumers before the April 19, 2015 filing date of Applicant’s INSPIRADA mark. (*See* Opp'n ¶ 7; FAOPP ¶13.)

Upon information and belief, Applicant was aware of Opposers’ MACANUDO INSPIRADO brand of cigars through various means, including by being a customer of Opposers, by having access to the above-mentioned publications which have featured the MACANUDO INSPIRADO brand, and by otherwise being engaged as a professional in the cigar industry where the MACANUDO INSPIRADO brand is so well-recognized. (*See* Opp'n ¶¶ 11–13; FAOPP ¶¶ 10–17.) Per the IPCPR website, Applicant is also a member of IPCPR, the sponsor of the trade show where Opposers displayed the MACANUDO INSPIRADO brand in Las Vegas in 2014. (FAOPP ¶ 17.) Upon information and belief, by filing his application for the INSPIRADA mark, Applicant did so in bad faith with the intent to trade upon the reputation of MACANUDO INSPIRADO and to falsely suggest a connection to Opposers, which will damage Opposers as the registration of Applicant’s mark will pose a threat to their use and registration of

the MACANUDO INSPIRADO mark in the United States. (Opp’n ¶¶ 13–14; FAOPP ¶¶ 18–21.)

On November 24, 2015, Opposers filed the Opposition before the Trademark Trial and Appeal Board stating the following three bases as grounds for the Opposition: (1) priority (Opp’n ¶¶ 1–7); (2) bad faith (Opp’n ¶¶ 8–14); and (3) false association (Opp’n ¶¶ 15–16). On January 4, 2016, Applicant filed his Motion to Dismiss for Failure to State a Claim. Opposers are, simultaneously with the Opposition to the Motion to Dismiss, filing a First Amended Notice of Opposition (“FAOPP”), which also alleges a fourth ground, lack of bona fide intent to use the mark in commerce. (FAOPP ¶ 25.)

III. ARGUMENT

A. Standard for Motion to Dismiss for Failure to State a Claim

To succeed against Applicant’s Motion, Opposers need only allege sufficient facts which, if proven, would allow the Board to draw a reasonable inference that: (1) the Opposers have standing to maintain the proceeding, and (2) a valid ground exists for opposing the INSPIRADA mark. *See Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 U.S.P.Q.2d 1025, 2015 WL 5721653, at *2 (T.T.A.B. Sept. 11, 2015). An Opposer’s pleading must merely allege “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face . . . enough to raise a right to relief about the speculative level.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 668, 678 (2009) (quoting *Bell At. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Importantly, each of Opposers’ allegations must be accepted as true, and the Opposition must be construed in the light

most favorable to Opposers. *See Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993).

B. The Opposition Properly Pleads Standing

In order to meet the Board’s liberal standing requirement, Opposers need only show that they have a “real interest,” *i.e.*, a personal stake, in the outcome of the proceeding, and a “reasonable” basis for their belief of damage. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 U.S.P.Q.2d 1023, 1026 (Fed. Cir. 1999). The Federal Circuit has stated that the public interest is served in “broadly interpreting the class of persons Congress intended to be allowed to institute cancellation¹ proceedings.” *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030, 213 U.S.P.Q. 185 (C.C.P.A. 1982). Even a party with no direct proprietary ownership interest in a trademark can have standing to oppose if it meets the requirement of having a real commercial interest and is not merely an intermeddler. *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 U.S.P.Q.2d 2021, 2024 (Fed. Cir. 1987). For example, a parent corporation can have standing to oppose based on use by a wholly owned subsidiary. *Universal Oil Prods. Co. v. Rexall Drug & Chem. Co.*, 59 C.C.P.A. 1120, 463 F.2d 1122, 1123, 174 U.S.P.Q. 458 (1972) (“As the parent corporation of a wholly owned subsidiary, appellant can reasonably believe that damage to the subsidiary will naturally lead to financial injury to itself. . . . We conclude that appellant has a real interest in this proceeding and therefore standing to institute and maintain it.”). As the Board has noted, “[p]roof of standing in a Board opposition is a low threshold, intended only to ensure that the plaintiff has a real interest in the matter, and is

¹ Standing to cancel is based on the same general criteria as standing to oppose, therefore, the Federal Circuit’s broad interpretation of standing applies in this Opposition proceeding. *See Ritchie v. Simpson*, 170 F.3d 1092, 1095 n.2, 50 U.S.P.Q.2d 1023, n.2 (Fed. Cir. 1999).

not a mere intermeddler.” *Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 U.S.P.Q.2d 1112, n.8, 2009 WL 691309 (T.T.A.B. June 29, 2009).

Here, the allegations in the Opposition make clear that Opposers each have a real interest in the outcome of the proceeding and have a reasonable belief that they will be damaged if Applicant’s INSPIRADA mark is allowed to register.

First, STGBV’s interests far-exceed those of a mere intermeddler. This is true regardless of the fact that STGBV is not the named owner of the MACANUDO INSPIRADO United States trademark application. Specifically, the factual allegations presented in the Opposition show that STGBV has significant international trademark rights in the MACANUDO INSPIRADO mark (Opp’n ¶ 1; FAOPP ¶1,) that GCC owns the rights in the MACANUDO marks in the United States (FAOPP ¶ 2,) that STGBV and GCC are jointly owned by their parent company, STG (Opp’n ¶ 2; FAOPP ¶ 3,) and that because of its interest in the MACANUDO INSPIRADO mark, STGBV reasonably believes that it will be damaged if Applicant’s INSPIRADA mark is allowed to register (Opp’n ¶ 14; FAOPP ¶ 21).

Second, GCC is the owner of the MACANUDO INSPIRADO U.S. trademark application and U.S. trademark registrations for MACANUDO. (FAOPP ¶ 2.) Moreover, GCC prominently displayed MACANUDO INSPIRADO cigars as a “soon to be released” product at the large IPCPR trade show in Las Vegas, Nevada, in 2014. (FAOPP ¶ 8.) Therefore, GCC also undoubtedly has standing to bring this claim against Applicant as it has alleged that Applicant’s registration of the INSPIRADA mark is likely to create a false association between Applicant and Opposers, thereby damaging GCC. (Opp’n ¶ 14; FAOPP ¶ 21.)

C. The Opposition Pleads Facts Sufficient to State a Claim

Applicant's Motion completely ignores Opposers' three distinct grounds for their Opposition. For this reason alone, his Motion should be denied as irrelevant and moot. Nowhere in their Opposition do Opposers allege anything resembling the so-called "famous mark" exception. To the contrary, Opposers assert four grounds for their Opposition with factual allegations sufficient to state a claim for each: (1) priority based on steps preparatory to trademark use in the United States; (2) bad faith on Applicant's part in applying for the INSPIRADA mark; (3) false association; and, now, (4) lack of bona fide intent.

1. The Opposition Pleads Facts Supporting Analogous Trademark Use.

In addition to actual use in commerce of a trademark, the TTAB recognizes that "use analogous to trademark use" can be sufficient to establish priority of a mark for purposes of an opposition proceeding. The TTAB has defined "use analogous to trademark use" as:

non-technical use of a trademark in connection with the promotion or sale of a product under circumstances which do not provide a basis for an application to register, usually because the statutory requirement for use on or in connection with the sale of goods in commerce has not been met. Although never considered an appropriate basis for an application to register, such use has *consistently* been held sufficient use to establish priority rights as against subsequent users of the same or similar marks.

Shalom Children's Wear, Inc. v. In-Wear A/S, 26 U.S.P.Q.2d 1516, 1519 (T.T.A.B. 1993)

(emphasis added).

Examples of analogous trademark use sufficient to establish priority in an opposition proceeding include: regular business contacts, use of the mark in advertising of various forms

(including advertising brochures, catalogues, and newspaper ads), marketing the trademarked product before it is ready to be sold, putting the mark on a sample displayed at a trade show, and using the mark in press releases and trade publications. *See e.g., Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 20 (D.C. Cir. 2008) (“An opposer may rely on myriad forms of activity besides sales themselves, including, among others, regular business contacts, after-sales services, advertising of various forms, and marketing. . . . Even marketing of a trademarked product before the product is ready for sale has the potential to defeat a rival’s registration.”); *Diebold, Inc. v. Multra-Guard, Inc.*, 189 U.S.P.Q. 119 (T.T.A.B. 1975) (use in advertising and promotion sufficient); *Macalester v. Groveland Community Council*, No. 9204998, 2010 WL 1233875, at *3 (T.T.A.B. Mar. 23, 2010) (finding that a fundraising letter, followed by newsletters, a flyer, and a newspaper article were sufficient to establish priority in a mark).

For example, in *Jimlar Corp. v. Army & Air Force Exchange Service*, the TTAB found that the opposer, who displayed a product sample where the mark at issue was prominently affixed at an industry trade show constituted use analogous to trademark use upon which opposer could rely to show priority over the applicant. The TTAB noted that “[s]uch use, which in essence is a form of advertising for the product, is plainly an open and public use of the [trademark].” *Jimlar Corp.*, 24 U.S.P.Q.2d 1216 (T.T.A.B. 1992).

In this case, the Opposition pleads that prior to Applicant’s filing date of April 19, 2015: (1) the MACANUDO INSPIRADO brand was featured in cigar industry publications (Opp’n ¶ 11; FAOPP ¶14); (2) “Opposers took steps preparatory to use in commerce extending the brand MACANUDO INSPIRADO into the United States market by introducing the brand at cigar

events” (Opp’n ¶ 6) and prominently featured the MACANUDO INSPIRADO brand, *inter alia*, at the IPCPR trade show in Las Vegas, Nevada, prior to Applicant’s filing date (FAOPP ¶¶ 7–8); and (3) “Opposers’ MACANUDO INSPIRADO brand had a reputation in the United States among cigar consumers and professionals in the industry” (Opp’n ¶ 7; FAOPP ¶ 9). These cigar trade shows are just the type of events that Applicant might also routinely attend. Indeed, Davidus Cigars is a member of IPCPR, and is likely to have attended this show. (FAOPP ¶17.)

The Opposition thus clearly and specifically pleads facts which fall well within the scope of the types of presale activities contemplated by the case law as establishing priority via steps preparatory to use. These allegations, which if assumed to be true as is required here, and viewed in the light most favorable to Opposers, refute the Motion’s threadbare argument that Opposers have not alleged priority.

The Motion completely ignores the fact that the Opposition pleads steps preparatory to use as a basis for Opposers’ priority, and instead simply claims that because the Applicant filed first, he wins. Therefore, Applicant’s argument regarding priority should be disregarded and in any event Opposers have sufficiently pled priority.

2. The Opposition Sets Forth Facts To Support that Applicant Filed his Application in Bad Faith

Again, Applicant’s Motion misunderstands the second ground for the Opposition. The Opposition does not plead that MACANUDO INSPIRADO is famous *per se*. Rather, the Opposition sets forth facts to support the claim that Applicant, a professional in the cigar industry who held, upon information and belief, *personal knowledge* of Opposers’ mark and their intent to expand into the United States market, and rushed into the United States Patent and

Trademark Office to file a similar mark with the idea of extracting a large monetary sum out of Opposers. This is precisely the type of bad faith that the case law prohibits.

There is consistent TTAB case law setting forth a standard of bad faith where an applicant's use of a mark is a "nominal one made solely to block a prior foreign user's planned expansion into the United States." *Person's Co. v. Christman*, 10 U.S.P.Q.2d 1634 (T.T.A.B. 1989). For example, in *Mastic Inc. v. Mastic Corp.*, the TTAB found that because of the applicant's knowledge of (a) opposer's claim to the mark at issue in Canada, Australia and other areas, and (b) opposer's intent to eventually market its product in the U.S., the "applicant [had] embarked on a course of action designed to preclude opposer from entering the U.S. market." Ultimately, the TTAB determined that the applicant's first use was nothing more than a sham transaction designed to block the opposer and held that the applicant did not have priority over opposer. *Mastic*, 230 U.S.P.Q. 699, 1986 WL 83610, at *4 (T.T.A.B. Apr. 30, 1986). *See also Caesar's World, Inc. v. Milanian*, 247 F. Supp. 2d 1171, 1184–85, 1206 (D. Nev. 2003) (striking down an intent-to-use filing as bad faith when applicant filed the ITU shortly after opposer's announcement to build venue of the same name).

Here, the Opposition sets forth facts to support Applicant's bad faith filing of his application for the INSPIRADA mark based on personal knowledge of Opposers' MACANUDO INSPIRADO mark and their intent to expand the brand into the United States. First, Applicant has made the equivalent of a mere nominal use by filing an intent-to-use application for INSPIRADA and, upon information and belief, not having yet actually used or invested capital into building the brand. (FAOPP ¶ 20.) Second, the Opposition sets forth several facts supporting Opposers' position that Applicant's filing was simply a tactical move to block

Opposers from using their internationally-recognized brand in the United States, including: (1) the mark's renown in the industry (Opp'n ¶ 10; FAOPP ¶ 13); (2) the fact that the MACANUDO INSPIRADO mark is often covered in industry publications that Applicant reads (Opp'n ¶¶ 11–12; FAOPP ¶¶ 13–15); and (3) that the MACANUDO INSPIRADO brand was showcased, including at the IPCPR trade show, one of the nation's largest cigar events, prior to Applicant's filing date (FAOPP ¶ 8) and that Applicant is a member of IPCPR, the sponsor of that trade show (FAOPP ¶ 17).²

Therefore, the Opposition pleads sufficient facts to set forth a cause of action for bad faith. Applicant's actions amount to a shakedown of a corporate senior user, attempting to extract a payment by holding Opposers' planned expansion of the MACANUDO INSPIRADO brand into the United States hostage. Opposers have asserted sufficient facts in their Opposition to succeed against Applicant's Motion.

3. The Opposition pleads facts to Support False Association or Sponsorship

Finally, the Opposition sets forth facts sufficient to allege a case of false association. Because MACANUDO INSPIRADO is well known in the cigar world, including in the United States as a result of publicity in industry publications, consumers of cigars will assume a connection between Applicant's mark and Opposers. (Opp'n ¶¶ 10–12, 15–16; FAOPP ¶¶ 14–16.) As Professor McCarthy notes:

² The reason that Opposer did not file for the whole mark MACANUDO INSPIRADA to block Opposers was presumably that GCC already owns registrations for MACANUDO marks in the United States. FAOPP ¶ 2.)

The elements of a prima facie case for an injunction under the trademark prong of § 43(a) as amended in 1989 can be summarized as follows. Under § 43(a)(1)(A), plaintiff must plead and prove that defendant:

1. Uses a
 - A. Designation or
 - B. False designation of origin;
2. In interstate commerce;
3. And in connection with goods or services;
4. When the designation is likely to cause confusion, mistake, or deception as to
 - A. The affiliation, connection, or association of defendant with another person, or
 - B. As to the origin, sponsorship, or approval of defendant's goods, services, or commercial activities by another person;
5. And plaintiff has been or is likely to be damaged by these acts.

J. Thomas McCarthy, *5 McCarthy on Trademarks and Unfair Competition* § 27.13 (4th Ed. 2015).

Moreover, the Opposition and FAOPP set facts to support that Applicant intended to copy Opposer's mark. (*See, e.g.*, FAOPP ¶¶ 8, 17, 20.) Where a Defendant intends to trade on the reputation of the Plaintiff, this is evidence of, or even a presumption, of secondary meaning. *See, e.g.* J. Thomas McCarthy, *2 McCarthy on Trademarks and Unfair Competition* § 15.38 (4th Ed. 2015) and cases cited. The facts set forth in the Opposition support a claim of likelihood of confusion as to association or sponsorship should Applicant be allowed to register and use his mark. If Applicant's INSPIRADA mark is allowed to register (which means that Applicant makes a *bona fide* use of the mark in interstate commerce in connection with cigars), Opposers, as prior owners of the MACANUDO INSPIRADO mark for cigars, will be damaged by Applicant's use of the INSPIRADA mark as it likely to cause confusion, mistake, or deception as to, *inter alia*, the association of Applicant with Opposers. (*See* Opp'n ¶¶ 6–7, 15–16.) For this reason alone, Applicant's Motion should be denied.

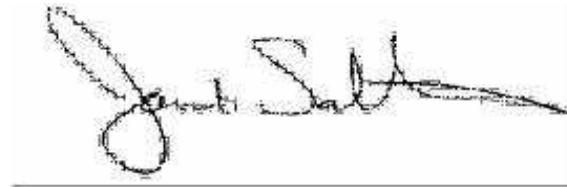
IV. CONCLUSION

For the foregoing reasons, Opposers have shown that Applicant's Motion fails because it focuses exclusively on a legal theory not asserted anywhere in the Opposition. Moreover, the Opposition properly alleges facts sufficient to support Opposers' standing and all four substantive grounds for the Opposition. Therefore, Opposers respectfully request that the Motion to Dismiss be DENIED.

Dated: January 11, 2016

Respectfully Submitted,

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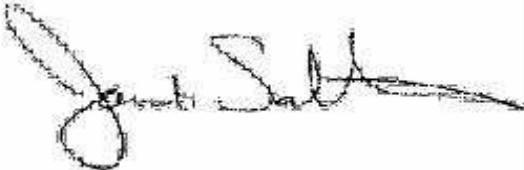
Applicant.
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Opposition No. 91224990

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposition to Motion to Dismiss to be served by email, per agreement, on Applicant's counsel this 11th day of January, 2016 to the following address:

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