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

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| Proceeding no. | 91264695 |
| Party | Defendant<br>Agroindustrias Tres Generaciones SAC, Carmen Gonzales, Maria Consuelo Gonzales, Maria del Pilar Gonzales, Teresa Gonzales, Maria Cecilia Gonzales and Luis Antonio Gonzales |
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Case: JAV-001T

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN RE SERIAL NO. 88/704,375**

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| 114 Kenmare Associates, LLC,<br><br>Opposer,<br><br>vs.<br><br>Agroindustrias Tres Generaciones SAC, Carmen Gonzales, Maria Consuelo Gonzales, Maria del Pilar Gonzales, Teresa Gonzales, Maria Cecilia Gonzales, Luis Antonio Gonzales,<br><br>Applicants. | ) | Opposition No.: 91264695 |

**APPLICANTS' OPPOSITION TO OPPOSER'S MOTION TO STRIKE THE DECLARATION OF RYAN BOLTON**

Applicants Agroindustrias Tres Generaciones SAC, Carmen Gonzales, Maria Consuelo Gonzales, Maria del Pilar Gonzales, Teresa Gonzales, Maria Cecilia Gonzales, Luis Antonio Gonzales, (hereinafter collectively "Applicants") oppose the Motion to Strike the Declaration of Ryan Bolton as follows:

## I. INTRODUCTION

Opposer seeks to exclude Ryan Bolton's testimony primarily on the grounds that Applicants did not previously serve an expert witness disclosure for him. However, Applicants rely on Mr. Bolton as a *fact witness* and ***not*** as an expert in their opposition to Opposer's Motion for Summary Judgment and in their Cross-motion for Summary

Judgment. Applicants cite Mr. Bolton's declaration as factual evidence that pisco and tequila consumers are knowledgeable and deliberative about the products they purchase and the brands under which such products are offered. These facts are clearly relevant under the fourth factor of *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357 (C.C.P.A. 1973) and admissible to show the conditions under which consumers purchase pisco and tequila tends to be sophisticated and careful, not impulsive. Applicants are not proffering nor does Mr. Bolton purport to be "an expert on pisco or tequila specifically." As such, Opposer's arguments regarding the untimely service of expert disclosures, failure to serve a written report, and absence of any motion for leave to present the testimony of Mr. Bolton as an expert are completely unavailing. Furthermore, since Mr. Bolton is not an expert under Fed. R. Evid. 702 but is rather a fact witness under Fed. R. Evid. 701, he not need be qualified as an "expert" and *Daubert* is inapplicable. Even though Mr. Bolton's declaration does not constitute expert testimony, under the circumstances the Board should find the timing of its disclosure to be substantially justified and/or harmless.

## II. APPLICANTS RELY ON MR. BOLTON AS A FACT WITNESS, NOT AS AN EXPERT

Contrary to Opposer's false assertions, Applicants are not offering expert opinion testimony through Mr. Bolton. In their Opposition/Cross-Motion to Summary Judgment, Applicants rely on Mr. Bolton's declaration to factually show that pisco and tequila customers are sophisticated about the products they purchase and the brands under which such products are offered. Tellingly, other than perhaps final ¶19 to the Bolton Declaration, Opposer's Motion to Strike does not, and cannot, identify any opinions of an "expert" nature.

Fed. R. Evid. 701 specifically requires that lay opinions be "rationally based on the witness' perception, (b) helpful to clearly understanding the witness' testimony or to determining a fact at issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Bass Pro Trademarks LLC v. Sportsman's Warehouse Inc Bass Inc.*, 89 USPQ2d 1844, 1861 (TTAB 2008) (Fed. R. Evid. 701). The fact that a witness may have expert qualifications does not necessarily indicate that he is testifying as an expert in a proceeding. A person with expert witness qualifications may testify as a fact witness. *B&B Hardware, Inc. v. Sealtite Building Fasteners*, Opp. No. 91155687, 2007 WL 2698310, at *4 (T.T.A.B. Aug. 28, 2007) (the testimony of a professor of marketing at Pepperdine was considered fact testimony).

Lay opinion rests on ordinary reasoning and **not** on the application of a specialized methodology. To determine whether a lay opinion is admissible, the trier of fact "must determine whether the witness could fairly draw the inferences by applying *everyday reasoning* to the facts the witness knows in the case and the witness's experience base." (emphasis added.) Anne Bowen Poulin, Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule, 39 Pepp. L. Rev. Iss. 3 (2013), p. 570. Furthermore, lay opinions are based on facts observed by the witness and within their personal knowledge. Id. at 571. In contrast, with an expert opinion, the trier of fact must scrutinize the witness's claim of reliability by evaluating the specialized methodology employed, the sufficiency of the basis, and the application of the methodology. *Id*. at 570. Also, unlike lay testimony an expert witness can base an opinion on information that is neither within their personal knowledge nor observed by them. *Id*. at 571. "Only

the application of a reliable methodology-a proven analytical approach beyond mere everyday reasoning-qualifies an opinion as expert rather than lay." *Id*. at 570.

Opposer states that Applicants offer Ryan Bolton's declaration in order to provide an expert opinion. This is false. At p. 7 of their brief, Opposer refers to the Bolton declaration as a "spitball opinion by sales representatives with, comparatively, limited consumer experience." This is hardly how one would characterize testimony if they maintained it was given by an "expert" under Fed. R. Evid. 702.

In fact, Mr. Bolton is a clear example of a lay witness who happens to have unique experience in the spirits industry. Importantly, he does not draw on any broad field of research, collective knowledge, or specialized method of analysis. To the contrary, the opinions at ¶¶12-18 of the Bolton Declaration are based on Mr. Bolton's perceptions/observations and *everyday reasoning* drawn from his interactions and personal experience over time with pisco and tequila consumers as a spirits buyer and sales representative. The Board need only decide whether Mr. Bolton's particular experience base with these consumers permits him to form a rationally-based opinion as to whether the conditions under which they purchase pisco and tequila tends to be sophisticated and careful, or impulsive.

The Bolton Declaration at ¶¶1-8 lays the foundation for Mr. Bolton's personal knowledge of pisco, tequila, and other spirits products, as well as his opportunity to observe and know the conditions under which tequila and pisco consumers make their purchase decisions. *Spivey v. Robertson*, 197 F.3d 772 (5th Cir. 1999); *Spurlock v. Fox*, No. 3:09—cv—0756, 2010 U.S. Dist. LEXIS 100366, 2010 WL 3807167, *12-13 (M.D. Tenn. Sept. 23, 2010) ("lay opinion regarding a third party's state of mind is admissible if

the witness has personal knowledge of the matter forming the basis of the witness's opinion and is rationally based on his own perception"); *Newport Elecs. v. Newport Corp*., 157 F. Supp. 2d 202, 209 (D. Conn. 2001). The evidence establishes that as a lay witness, Mr. Bolton's experience base spans over a *ten-year period* during which he has assisted *dozens* of consumers *daily* with their spirits purchase decisions. Bolton Dec., ¶¶5-8.

Under Fed. R. Evid. 701, Applicants should be permitted to rely upon the opinions set forth in ¶¶12-18 of the Bolton Declaration because they are (1) rationally supported by a more than sufficient experience base, (2) helpful to a clearer understanding of the fourth *DuPont* factor regarding the factual issue of the conditions under which consumers purchase pisco and tequila, level of sophistication of a typical consumer, and (3) based on inferences fairly drawn by Mr. Bolton from his *everyday observation of consumers he personally observed* in the spirits industry. Mr. Bolton's declaration sets forth facts about how pisco and tequila are separately shelved from each other (¶9), how typical pisco buyers are specifically looking for pisco (¶12), how pisco buyers often have prior experience with the spirit and are aware of its uniqueness, cultural heritage, and place of origin (¶¶13-14, 18), how spirits consumers typically know that Pisco is derived from grapes while tequila/mezcal are derived from blue agave (¶¶17-18), how typical tequila buyers are specifically looking for tequila (¶16), how tequila buyers are aware of cultural heritage and place of origin (¶17), and that both pisco and tequila consumers take care in the products they purchase and the brands of those products (¶¶15,17).

The case is readily distinguishable from the case cited by Opposer, *Monster Energy Co*, No. 91205893, 2014 WL 11030996, at #3. There, the offering party sought to use the testimony of an expert to authenticate the results of a "secondary meaning" or "acquired distinctiveness" survey. The expert also offered opinions that went well beyond that of a fact witness about the level of secondary meaning attributable to a mark based on the survey results. Clearly, the methodology presented by that survey and opinions regarding survey results fell within the scope of Fed. R. Evid. 702 governing expert testimony.

Because Mr. Bolton's testimony is fact witness testimony, Opposer's objection on the grounds that Opposer did not submit an expert witness disclosure is inapposite. For this same reason, Mr. Bolton need not be qualified as an "expert" under Fed. R. Evid. 702, and the *Daubert* holding is therefore inapplicable[1]. The motion should be denied[2].

## III. MR. BOLTON'S TESTIMONY IS NOT PREJUDICIAL TO OPPOSER

As discussed above, Mr. Bolton's declaration constitutes testimony of a lay person, not an expert. But even under the factors the Board has considered to determine

[1] The cases cited by Opposer at p. 12 of their brief address expert testimony as to "consumer perceptions" (*Kohler Co. v. Honda Giken Kogy k.k*., 125 USPQ2d 1468 (TTAB 2017); *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc*., 107 USPQ2d 1750, 1756-57 (TTAB 2013). However, the Bolton Declaration speaks to "consumer sophistication" under the fourth *DuPont* factor, not "consumer perception".

[2] Furthermore, under TBMP § 533.03, a motion to strike should not be granted on the basis of substantive objections at this stage of the proceeding. Objections to the competency, relevance or materiality of testimony should not be considered until final hearing, TBMP § 707.03(c). *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1047 (TTAB 2017) (following well-established Board policy of generally not striking testimony on the basis of substantive objections, and instead considering the objections when evaluating the probative value of the testimony at final hearing, Board overruled objections to declaration based on hearsay, lack of personal knowledge, and irrelevance, and that it is opinion testimony from a nonexpert.) Opposer's objections to the Bolton Declaration are in significant part based on "substance".

whether the failure to disclose an expert witness is substantially justified or harmless, Applicants prevail.

First, with respect to the element of "surprise", in its moving papers Opposer offered the Sanders declaration for the proposition that the "LA ESQUINA Mark has come to signify goods and services originated with Opposer and to symbolize goodwill belonging to Opposer" (¶18); "the goods for which Applicants seek to register their TRES ESQUINAS mark, namely "Liquor distilled; Pisco," are overlapping with Opposer's goods (¶24); Applicants' goods are available in the same trade channels and *likely to be marketed to the same consumers* as Opposer, namely, those goods related to dining, including alcoholic beverages (¶25); and "I believe that it is likely the public would believe that Applicant's TRES ESQUINAS goods relating to alcoholic beverages originates with Opposer and/or is associated with the LA ESQUINA Brand." (¶26). Based on the foregoing statements by Opposer's witness in support of their motion for summary judgment, Opposer's put at issue the sophistication of consumers who may purchase Applicants' goods and Opposer's goods. Apart from the fact that Mr. Bolton did not testify as an expert and therefore the expert witness disclosure requirements are inapplicable, Opposer should not be "surprised" that Applicants' would counter the Sanders Declaration with lay testimony about the sophistication of consumers who purchase the parties' goods or services.

Second, Applicants will make Mr. Bolton available for deposition during the testimony period at which time Opposer can cross-examine him. As such, any alleged surprise can be readily cured.

Third, the extent to which allowing the testimony would disrupt trial also weighs in favor of Applicants. Here, neither party's testimony period has begun. Accordingly, trial would not be disrupted.

Fourth, the importance of the evidence also weights in Applicants' favor. As discussed above, Mr. Bolton's declaration speaks to the fourth *DuPont* factor for assessing likelihood of confusion regarding the conditions under which consumers purchase pisco and tequila, level of sophistication of a typical consumer.

Fifth, Mr. Bolton's declaration was presented as a response to arguments and evidence first presented by Opposer in their motion for summary judgment regarding consumer confusion.

## IV. TESTIMONY ON ULTIMATE ISSUES OF LIKELIHOOD OF CONFUSION IN PARTIES' DECLARATIONS

Paragraph 26 of the Sanders Declaration offered by Opposer speaks to the ultimate legal question presented in this proceeding regarding the alleged likelihood of confusion of Applicants' TRES ESQUINAS Mark and Opposer's LA ESQUINA Mark. Mr. Sanders is clearly not qualified nor does he have the qualifications or knowledge to offering the conclusory opinion that "I believe that it is likely the public would believe that Applicant's TRES ESQUINAS goods relating to alcoholic beverages originates with Opposer and/or is associated with the LA ESQUINA Brand." Sanders Dec., ¶26. Obviously, Mr. Sanders is also inherently biased.

Paragraph 19 of the Bolton Declaration states "[t]herefore, it is unlikely spirits customers at the time of purchase would confuse Tres Esquinas Pisco with La Esquina

Tequila as being from the same source, or that Tres Esquinas Pisco originates with or is otherwise associated with La Esquina."

If the Board believes that ¶19 of the Bolton Declaration speaks to the ultimate issue of likelihood of confusion, whose determination is the sole province of the Board, Applicants submit that ¶26 of the Sanders Declaration should likewise be stricken and given no consideration for the same reason as well as being unhelpful and prejudicial to the trier of fact under either Fed. R. Evidence 701 or 702.

## V. CONCLUSION

Applicants rely on Mr. Bolton as a fact witness, not as an expert. For this reason, the grounds on which Opposer seeks to strike his testimony are inapplicable and Opposer's Motion to Strike should be denied. Notwithstanding, should the Board decide to strike ¶19 of the Bolton Declaration, it should also strike ¶26 of the Sanders Declaration for the reasons discussed above.

VEGH IP LEGAL

Dated: January 10, 2022

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## CERTIFICATE OF SERVICE

I, Stephen Z. Vegh, certify that a true and correct copy of APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO STRIKE THE DECLARATION OF RYAN BOLTON has been served on the following counsel of record via electronic mail on January 10, 2022.

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