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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Slaska Wytwornia Wodek Gatunkowtch "Polmos" SA  
v.  
Stawski Distributing Co., Inc.

Cancellation No. 92044806

Ryszard Malinowski and Pawel Lejman for Slaska Wytwornia  
Wodek Gatunkowtch "Polmos" SA.

Robert S. Beiser and Alain Villeneuve of Vedder Price for  
Stawski Distributing Co., Inc.

Before Quinn, Hairston and Walsh, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Slaska Wytwornia Wodek Gatunkowtch "Polmos" SA  
("petitioner") filed a petition to cancel Stawski  
Distributing Co., Inc.'s ("respondent") Registration No.  
1856907 of the mark ZYTNIA for "liquor."<sup>1</sup> As grounds for  
the petition, petitioner alleged that for many years it has  
been involved in the manufacture and sale of vodka; that its  
application to register the mark EXTRA ZYTNIA VODKA and  
design for vodka was refused registration on the basis of

<sup>1</sup> Registration No. 1856907, issued October 4, 1994; renewed.

respondent's registration; that the term "zytnia" is Polish for "rye," but when asked by the Office, respondent failed to disclose this fact; and that as a result of this willful failure, respondent's registration was obtained by fraud. Petitioner also alleged that the term "zytnia" is merely descriptive for vodka. As additional grounds, in view of respondent's failure to advise the Office that it was only an importer and had no lawful right of ownership of the mark, the registration was obtained by fraud. Finally, petitioner alleges that respondent claimed a date of first use that respondent had no right to claim.<sup>2</sup>

Respondent, in its answer, denied the allegations in the petition. Respondent also set forth defenses, including that the petition is barred by laches and waiver.

#### **EVIDENTIARY OBJECTIONS**

Before turning to the substantive merits of the petition, we direct our attention to the numerous evidentiary disputes between the parties. Respondent filed, on November 13, 2009, a series of motions to strike certain testimony and/or evidence filed by petitioner.

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<sup>2</sup> The exhibits attached to the petition are not of record. As provided by Trademark Rule 2.122(c), an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony. See TBMP §317 (2d ed. rev. 2004). *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545, 1547 n.6 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

We begin with the most significant objection raised by respondent, namely its motion to strike material sought to be introduced by way of petitioner's notice of reliance filed on October 30, 2009 during the rebuttal testimony period.<sup>3</sup> More specifically, respondent moved to strike, on the basis of improper rebuttal, the affidavit of Eliza K. Hall, and related exhibits comprising dictionary excerpts. Petitioner seeks to introduce explanatory and grammatical evidence found in Polish/English dictionaries relating to the translation of the term "zytnia" that, according to petitioner, rebuts respondent's testimony.

Firstly, to the extent that Ms. Hall's affidavit is submitted in lieu of testimony, the affidavit is improper. By written agreement of the parties, the testimony of a witness may be submitted in the form of an affidavit by such witness. Trademark Rule 2.123(a). Here, there is no such agreement and, thus, the Hall affidavit does not form part of the record.

We add, however, that to the extent the related exhibits are self-authenticating and, therefore, proper subject matter for introduction by way of a notice of reliance, the exhibits may be introduced separate and apart

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<sup>3</sup> Respondent also moved to strike the notice as untimely filed. The motion is denied inasmuch as the notice was filed on the last day of the rebuttal testimony period. Whether or not the notice comprises impermissible rebuttal is, of course, an entirely different issue.

from the now-stricken affidavit. Dictionary entries are such proper subject matter. Accordingly, we consider the notice of reliance on the dictionary evidence to be acceptable.

Respondent's contention that the evidence constitutes improper rebuttal evidence raises a different issue. Evidence which should constitute part of petitioner's case in chief, but which is made of record during the rebuttal period, is not considered when respondent objects.

Applicant is entitled to an opportunity to rebut, during its testimony period, any testimony and evidence proffered in support of the allegations in the notice of opposition. This opportunity is foreclosed if opposer withholds the evidence until its rebuttal testimony period, **which is intended to be limited to denials, refutations or explanations of applicant's testimony and evidence.** (Emphasis added).

*General Electric Company v. Graham Magnetics Incorporated*,  
197 U.S.P.Q. 690, 692 n.5 (TTAB 1977).

The pleaded claim to which the disputed evidence pertains is that respondent is guilty of fraud for its failure to provide the Office with an accurate translation of the word "zytnia" which, according to petitioner, means "rye." Petitioner, during its case in chief, introduced testimony and evidence on this issue. Respondent then took testimony and introduced other evidence, including

dictionary excerpts. On rebuttal, petitioner took testimony and introduced other evidence to rebut respondent's record.

We view the dictionary evidence as constituting permissible rebuttal to the points made by respondent. Accordingly, respondent's motion to strike is granted with respect to Ms. Hall's affidavit, and denied as to the dictionary evidence.

Respondent also moved to strike items 7, 8 and 9 listed in petitioner's November 28, 2008 notice of reliance. The documents are a contract and trademark assignments. Such documents are not proper subject matter for introduction by way of a notice of reliance. However, the documents were otherwise properly made of record as exhibits to testimony; moreover, respondent otherwise has treated all of these documents as if properly of record and, in one instance, respondent even relied upon the very same document in its own notice of reliance (the contract is listed as item 21 in respondent's notice of reliance). Accordingly, respondent's motions to strike these documents are denied, and we have considered these documents to be stipulated into the record.

Respondent moved to strike item 10 listed in petitioner's notice of reliance, filed November 28, 2008, namely, foreign registrations it owns. Respondent objects to the evidence to the extent petitioner relies on the registrations as evidence of use, registrability or

ownership of the mark in the United States. The foreign registrations are official records and comprise, therefore, proper subject matter for a notice of reliance.

Accordingly, the motion to strike is denied, and we have considered this evidence for whatever probative value it merits. We hasten to add, however, that, as pointed out by respondent, a foreign registration is not evidence of the use, registrability, or ownership of the subject mark in this country. Moreover, petitioner's right to object to registration of respondent's mark in the United States is independent of whatever foreign trademark rights petitioner may have. *Bureau National Interprofessionnel Du Cognac v. International Better Drinks Corp.*, 6 USPQ2d 1610, 1618 (TTAB 1988).

Respondent moved to strike the exhibit attached to petitioner's main brief, and filed a separate motion to strike the exhibits attached to petitioner's reply brief. Exhibits and other evidentiary materials attached to a party's brief can be given no consideration unless they were properly made of record during the time for taking testimony. See, e.g., *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 748 n.5 (TTAB 1986). Accordingly, all of the materials attached to petitioner's main brief on the case

and reply brief are stricken, and have not been considered in our determination of the issues on the merits.<sup>4</sup>

Further, inasmuch as the exhibits have been stricken, we are compelled to make an additional observation related thereto. Not surprisingly, petitioner made several statements in its briefs based on the now-excluded evidence. Factual statements made in a party's brief can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value; thus, to the extent that petitioner's statements are based on excluded evidence, we have given the statements no consideration. See TBMP §704.06(b) (2d ed. rev. 2004). *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1462 n.5 (TTAB 1992).

Further, respondent moved to strike certain other portions of petitioner's main brief, including the statement of facts and characterization of the issues. Suffice it to say that we have considered petitioner's main brief in its entirety, keeping in mind, as just noted, that statements in a brief have no evidentiary value, and factual statements, without supporting evidence properly made of record, are not given any value.

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<sup>4</sup> Even if considered, we would reach the same conclusions on petitioner's fraud claims.

**THE RECORD**

After the rulings on the motions to strike, the record consists of the pleadings; the file of the involved registration; trial testimony, with related exhibits, taken by each party; and excerpts of printed publications and official records made of record by the parties' notices of reliance. Both parties filed briefs.

**BURDEN OF PROOF**

The present proceeding is governed by the principles set forth by our primary reviewing court and its predecessor. Petitioner, as the party seeking cancellation, must prove its claim for relief by a preponderance of the evidence. *Department of Justice, FBI v. Calspan Corp.*, 578 F.2d 295, 198 USPQ 147, 151 (CCPA 1978).

**STANDING**

The party petitioning to cancel a federally registered trademark must plead and prove that it has standing and that there is a valid ground for the cancellation of the registration. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998) ("Section 14 has been interpreted as requiring a cancellation petitioner to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not



entitled under law to maintain the registration") (internal quotation marks omitted).

Respondent does not contest petitioner's standing. In any event, petitioner, by way of its testimony and other evidence, has established, through its business of producing vodka and alleged claimed ownership and use of EXTRA ZYTANIA, that it has standing to bring the petition for cancellation grounded on fraud.

**LACHES and WAIVER**

It has been held that where a proceeding is based on fraud, equitable defenses such as laches and the like are not applicable. *Aquion Partners L.P. v. Envirogard Products Ltd.*, 43 USPQ2d 1371, 1374 at n.9 (TTAB 1997); and *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1313 (TTAB 1989) and cases cited thereat. The equitable defenses do not apply because it is in the public interest to remove registrations from the register when they were fraudulently obtained. Thus, in accordance with established case law, the equitable defenses of laches and waiver are unavailable in this proceeding that is grounded solely on fraud. Accordingly, no consideration has been given to these defenses.<sup>5</sup>

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<sup>5</sup> As part of its laches defense, respondent alleges that petitioner is barred by laches from bringing the present petition because petitioner's alleged predecessor in interest, Agros Holdings, S.A., filed a petition to cancel respondent's registration in 1999. Respondent asserts that the fraud claims now leveled against the same registration were ripe in 1999, yet the predecessor did not raise them. To the extent that

**FRAUD**

During the course of this proceeding, the law surrounding the ground of fraud has evolved. The Federal Circuit, in reviewing the Board's recent case law in this regard, has set forth a high standard in proving a fraud claim. In the recently decided case of *In re Bose Corp.*, 530 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), the Federal Circuit reiterated the requirements for proving fraud:

A third party may petition to cancel a registered trademark on the ground that the "registration was obtained fraudulently." 15 U.S.C. §1064(3). "Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material misrepresentations of fact in connection with his application." *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986). A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *W.D. Byron & Sons, Inc. v. Stein Bros. Mfg. Co.*, 377 F.2d 1001, 1004 (CCPA 1967). Indeed, "the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981).

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respondent also suggests that the prior litigation has preclusive effect on the present proceeding, the petition was dismissed *without prejudice* pursuant to the parties' stipulation. Thus, the dismissal without prejudice does not bar petitioner from bringing the present cancellation proceeding.

Accordingly, in order to prove fraud, a plaintiff must show that a statement was false, the falsity was intentional, and that the false statements were material to obtaining or maintaining a registration. Moreover, fraud must be proven to the hilt with clear and convincing evidence.

So as to be clear, proof of intent to deceive is required to establish fraud. "Thus, we hold that a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO."

Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis. Of course, "because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and substantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Star Scientific Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008). When drawing an inference of intent, "the involved conduct, viewed in light of all the evidence... must indicate sufficient culpability to require a finding of intent to deceive." *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 876 (Fed. Cir. 1988) (*en banc*).

*Id.* at 1941.

With these guidelines in mind, we now turn to consider each of petitioner's fraud claims.

At the outset, we want to point out that the record is devoid of any direct evidence dating back to the filing of the underlying application upon which the fraud claims are based. That is to say, not one of the three witnesses has testified about the filing events in 1992, nor could they have done so, given that they were either unaware of the filing and/or were not employed by respondent at the time. Thus, to prove respondent's intent to deceive, petitioner has been forced to rely on indirect and circumstantial evidence.

**DATE OF FIRST USE**

The involved registration issued with a date of first use anywhere of 1860, and a date of first use in commerce of June 1962. These were the dates alleged in the underlying application. Shortly after petitioner filed for cancellation, respondent filed an amendment to "correct the clearly erroneous date of use from 1860 to June 1962." (Brief, p. 15). On February 13, 2007, the Office issued a correction.<sup>6</sup>

If a mark was in use at the time an application is filed, a claim of first use, even if false, is not fraud. *See Western Worldwide Enterprises Group Inc. v. Qinqdao*

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<sup>6</sup> It would appear, however, that the registration still sets forth an incorrect date of first use of February 1962, rather than June 1962 as respondent requested. Respondent promptly should seek correction.

*Brewery*, 17 USPQ2d 1137, 1141 (TTAB 1990) ("The Board repeatedly has held that the fact that a party has set forth an erroneous date of first use does not constitute fraud unless, inter alia, there was no valid use of the mark until after the filing of the [Section 1(a)] application."); and *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 76 (TTAB 1983) ("The Examining Attorney gives no consideration to alleged dates of first use in determining whether conflicting marks should be published for opposition."). Respondent does not allege that the registered mark was not in use at the time of filing; and there is no evidence that the registered mark was not in use prior to the filing of the underlying application. The fact that the first use was made by a predecessor in interest is irrelevant to this issue. Thus, because petitioner has not challenged the fact that respondent used the registered mark prior to the filing date of the underlying application, petitioner's claim of fraud based on an allegedly false date of first use is untenable.

The petition for cancellation grounded on fraud based on an erroneous date of first use is denied.

**OWNERSHIP**

Petitioner asserts that only an owner of a trademark may file an application to register it, and that petitioner, not respondent, is the rightful owner of the mark. More

specifically, petitioner argues that it, as the producer of the vodka, is the owner of the mark, and that respondent is only an importer and distributor of petitioner's vodka.

Respondent counters by contending that because petitioner is estopped from challenging the fifteen year-old registration on ownership grounds, petitioner is left with basing its challenge on the ground of fraud. Respondent contends that the proofs fall far short of proving any fraud on the part of respondent.

We are compelled to note, at the outset of our consideration of this claim, that the evidentiary record regarding ownership is hardly a model of clarity. The bulk of petitioner's case comprises a deposition upon written questions. This testimony, at least in our minds, is confusing, and raises almost as many questions as it answers.

At the time the present petition was filed, respondent's registration was almost eleven years old. Under Section 14(3) of the Trademark Act, 15 U.S.C. §1064(3), a registration existing for over five years may be cancelled only on the specific grounds enumerated therein, none of which involves ownership of the registered mark. *Treadwell's Drifters Inv. v. Marshak*, 18 USPQ2d 1318, 1320 (TTAB 1990). Petitioner has couched the ownership question, however, in the context of fraud. That is, petitioner

claims that respondent fraudulently obtained the registration by asserting that it was the owner of the mark when, in point of fact, petitioner owned the mark. Because petitioner has alleged and attempted to establish a willful withholding of ownership information by respondent when it prosecuted the underlying application that matured into the involved registration, the ownership question may be addressed, *but only in the context of fraud*. Cf. *Stocker v. General Conference Corporation of Seventh-Day Adventists*, 39 USPQ2d 1385, 1391 at n.9 (TTAB 1996).

Petitioner took the deposition upon written questions of its chief of production, Jadwiga Dembinska. Respondent took the oral deposition of its general manager, Robert Kociecki.

The underlying facts largely are not in dispute, but rather the legal consequences resulting therefrom. Respondent or its predecessor in interest has been importing vodka since 1960; during the period 2000-2009, total sales under the mark amount to \$3.75 million; and its current annual sales in the United States total approximately \$400,000-\$600,000. Respondent has acted as the exclusive importer and distributor of the vodka produced under the ZYTNIA mark. (Dembinska dep., pp. 34-35). Petitioner, located in Poland, produces the ZYTNIA brand vodka according to the recipe provided by respondent. (Kociecki dep., p.

17). The label on the bottles of vodka sold by respondent indicate petitioner as the distillery and that the vodka is "Produced for and Imported by [respondent]." (Kociecki, ex. no. 3). When Ms. Dembinska learned of respondent's registration in the 1999-2000 time period (that is, six years after issuance), she "got nervous, got surprised." (Dembinska dep., p. 44). The petition for cancellation was not filed until August 2005.

The parties entered into a contract in 2005 (petitioner's notice of reliance, 11/28/08).<sup>7</sup> The purpose of the contract "is to set forth terms and conditions of the delivery of the alcoholic beverages manufactured by [petitioner] to [respondent]...under the conditions of exclusivity, for the market of the United States of America (U.S.), hereinafter called the American market." (Paragraph 1). The contract indicates that the vodka "will be manufactured using technologies and recipes developed and utilized by the manufacturer with the exception of the 'Stawski' vodka, which will be manufactured according to the recipe provided by the importer." (Paragraph 2).<sup>8</sup> The

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<sup>7</sup> As indicated by Mr. Kociecki, the contract references the date November 29, 2005, but the date is crossed out. No additional information about the date of the contract appears in the record. Moreover, although a translation of the contract is in the record, it is not a certified translation. However, respondent essentially does not dispute the accuracy of the translation.

<sup>8</sup> Although the contract identifies petitioner as the "Supplier" and respondent as the "Importer," the "Manufacturer" is not identified. It is assumed that this may be a translation issue inasmuch as no "Manufacturer" signed the document. Further,



referenced vodka includes respondent's "Prawdziwa Zytnia Stawski" vodka. (Kociecki dep., p. 17). The contract also provides the following curious provision: "[Respondent] promises not to introduce to the American market any alcoholic beverages manufactured in Poland or abroad whose name includes the word 'żytnia,' or 'zytnia' [rye] in any form. In the event [respondent] violates the obligation, [respondent] will pay [petitioner] the agreed fine of USD150,000 for each documented case." (Paragraph 4). Ms. Dembinska testified that, apart from this contract, there is no written agreement between the parties regarding ownership of the mark ZYTNIA. (Dembinska dep., p. 41). Also of record is an unexecuted document covering the transfer of rights to the mark ZYTNIA. (Kociecki dep., ex. no. 8). This document refers to the 2005 contract in paragraph 2, stating that the document is "coming out of the understanding from the contract dated 27<sup>th</sup> of September 2005, the agreement to transfer the trademark and the right to the trademark." However, the parties apparently did not come to an agreement regarding compensation, and so respondent never signed the document. (Kociecki dep., pp. 18-19). Accordingly, neither the mark nor the registration was transferred to petitioner. The parties have "continued

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given the parties' responsibilities as otherwise outlined in the document, it appears that "manufacturer" of the vodka is meant to refer to petitioner.

to attempt to resolve the issue of trademark ownership," but they have not reached any resolution. (Kociecki dep., pp. 19-20). To this day, petitioner and respondent apparently still do business with one another as they have done for many years.

Ownership of a trademark in the United States as between a foreign manufacturer and an exclusive United States distributor is largely a matter of agreement between them. In the present situation, the record does not include any agreement between the parties that clearly defines ownership of the mark ZYTNIA in the United States. In the absence of an agreement determining ownership, it is a rebuttable presumption that the manufacturer of the goods is the owner of the trademark. See *Global Maschinen GmbH Banking Systems, Inc.*, 227 USPQ 862 (TTAB 1985). See generally, McCarthy on Trademarks and Unfair Competition, §§16:48 and 29:8 (4<sup>th</sup> ed. 2010).

There apparently was no written agreement of record between the parties covering ownership at the time respondent filed its underlying application. (Dembinska dep., pp. 41-42). Further, no witness has testified as to ownership dating back to the filing, and respondent's state of mind at that time. Moreover, certain facts arguably rebut the presumption that petitioner owned the mark in the United States, but most certainly such facts make a finding

of fraud untenable. As indicated above, vodka is made according to respondent's recipe; presumably, respondent is the one exercising control over the nature and quality of the ZYTNIA vodka. The labels reflect as much when they indicate "Produced for and imported by [respondent]." Further, it is respondent that advertises and markets the ZYTNIA vodka in the United States. Thus, to the extent that consumer perception may be relevant to ownership, it is likely that the public believes that respondent is responsible for the vodka sold under the mark ZYTNIA.<sup>9</sup>

Given these facts, it is unreasonable to infer that respondent filed the application with intent to deceive the Office as to ownership. Even if we were to find that petitioner were the owner of the mark, cancellation on the ground of ownership is not permissible inasmuch as the petition was filed long after the five-year anniversary date of the registration. And, on the ground of fraud, the record falls short of proving fraud "to the hilt" with "clear and convincing evidence." To find otherwise would require us to speculate, surmise or infer on the question of

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<sup>9</sup> Respondent's ownership of foreign registrations of the mark EXTRA ZYTNIA for vodka is irrelevant to the fraud issue. Cf. *Person's Co. Ltd. v. Christman*, 900 F.2d 1565, 14 USPQ2d 1477 (Fed. Cir. 1990).

respondent's intent to deceive, which we are prohibited from doing.<sup>10</sup>

The fraud claim based on ownership is denied.

**Translation of "zytnia"**

Petitioner contends that the registration must be cancelled because respondent failed to disclose to the Office that the term "zytnia" means "rye" in English, and this withholding of information was made with intent to deceive. Respondent responds by arguing that the evidence falls short of establishing an exact translation and that, in any event, fraud has not been shown.

Ms. Dembinska (for petitioner) testified that "zytnia" is "a commonly known word in Polish," and that a picture of rye grain appears on labels for respondent's vodka because the vodka is made from rye. (Dembinska dep., pp. 45-46). Also made of record by petitioner is a dictionary page (all in Polish with no English translation) showing listings for "żytni" and "żytniówka," but no listing for either "zytnia" or "zytnia." Petitioner states that "żytni" is the masculine form of the word, while "zytnia" is the feminine

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<sup>10</sup> Jan Jaszewski, owner of J & B Brands, Co., testified that his company attempted to import vodka produced by petitioner under the mark ZYTANIA. Respondent filed a civil action, and successfully enjoined this third-party's use. (Civil Action No. 05 C 3726 in the United States District Court for the Northern District of Illinois, Eastern Division). Pursuant to a stipulated order dated July 6, 2005, this third party ceased importing the vodka, and any remaining inventory was to be shipped back to Poland. (Jaszewski dep., pp. 30-39; ex. no. JJ-1).

form, and it submitted dictionary evidence in support thereof.

Mr. Kociecki (for respondent) stated that he is fluent in Polish and that "there is no meaning for that word [zytnia]." (Kociecki dep., p. 7). The Wielki Słownik Polsko-Angielski The Great Polish-English Dictionary (1982) does not include a listing of "zytnia," but there is a listing of "żytni: *adj* rye \_\_\_ (bread etc.)." As pointed out by Mr. Kociecki, there is also a listing of "żytniów" meaning "vodka distilled from rye." (Kociecki dep., ex. no. 1). The on-line dictionary Wydawnictwo Naukowe PWN ([www.so.pwn.pl](http://www.so.pwn.pl)) does not include a listing of "zytnia" or any similar word (with or without an overdot above the letter "z"). (Kociecki dep., ex. no. 2).

Petitioner took the rebuttal testimony of Jan Jaszewski, founder and president of J & B Brands, Co., a distributor of petitioner's alcohol. In his rebuttal testimony, he testified that Polish is his native language and that "zytnia" is associated with "things made of rye." (Jaszewski dep., p. 11). Mr. Jaszewski also stated that if a Polish person claimed that the word "zytnia" had no meaning, then "I would think he has poor knowledge"; and that, in Polish, "zytnia wodka" and "zytniowka" are different ways of saying the same thing, namely "rye vodka."

Notwithstanding this testimony, accompanying Mr. Jaszewski's deposition is a press release issued in English, dated July 25, 1999, regarding the distribution of trademarks in Poland after privatization of the liquor industry. The press release indicates that "there is no Polish word 'zytnia.'" (Jaszewski dep., ex. no. 9).

The record falls short of showing that respondent is guilty of fraud. In the words of respondent, "Petitioner would have this Board believe ZYTANIA is equal to the nonexistent żytnia, which in turn equals zytni, which in turn means the same thing as żytniów|ka (i.e., a vodka distilled from rye)." (Brief, p. 27).

There is inconsistent testimony and competing evidence regarding the translation, if any, of "zytnia" from Polish to English. The present record does not adequately address the importance, if any, of use of an overdot with the letter "z," or the significance of whether or not a Polish word ends in "i" or "a." Further, while the dictionary evidence pertaining to grammar (specifically, the gender of Polish words) raises some questions about the translation, it does not overcome the other dictionary evidence. If nothing else, the record shows that there is no precise translation of the term. Moreover, and more significantly, the record is devoid of any direct evidence of respondent's intent to deceive the Office by withholding any purported translation

of ZYTNIA. Further, given the discrepancy in the testimony and evidence regarding a translation, the record hardly merits drawing an inference regarding respondent's intent. Thus, we find that petitioner has not met its burden to prove to the hilt with clear and convincing evidence that petitioner willfully withheld information regarding the meaning of "zytnia" from the PTO with intent to deceive.

The fraud claim based on the nondisclosure of any meaning of ZYTNIA is denied.

#### **CONCLUSION**

We have carefully considered all of the properly introduced evidence pertaining to the fraud claims, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We conclude that petitioner's proofs fall short of establishing that respondent knowingly made any false, material representations with intent to deceive the PTO. Petitioner's testimony and evidence are far from clear and convincing, and any inferences drawn from this lesser evidence do not satisfy the deceptive intent requirement. Lastly, to the extent that any of petitioner's case casts doubt on the fraud issue, that doubt must be resolved against petitioner as the charging party.

Cancellation No. 92044806

**DECISION**

The petition for cancellation is denied.