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

Proceeding	92056269
Party	Defendant The Clean Plate Club, Inc.
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Attachments	Response to Motion to Strike (1-27-14) Uptown Dining.pdf(218173 bytes)

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

In the matter of Registration No. 4,121,825

Filed: Aug. 19, 2011

Date Issued: Apr. 03, 2012

)	
BL RESTAURANT OPERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92056269
)	
UPTOWN DINING GROUP I, INC. f/k/a THE)	
CLEAN PLATE CLUB, INC.,)	
)	
Registrant.)	

Registrant’s Response to Petitioner’s Motion to Strike

Registrant Uptown Dining Group I, Inc. (“Registrant”), in response to Petitioner BL Restaurant Operation, LLC’s (“Petitioner”) Motion to Strike Registrant’s Notice of Reliance in part (“Motion to Strike”) states as follows:

I. INTRODUCTION

Petitioner’s Motion to Strike questions the probative value of certain exhibits introduced by means of Registrant’s First Notice of Reliance. Such a determination is premature. However, should the Board choose to delve into the substantive issues raised by Petitioner’s Motion at this stage, it will find that the cited evidence is absolutely relevant to key issues in this proceeding.

II. ARGUMENT

Registrant's Notice of Reliance is procedurally proper

An adverse party may object on procedural grounds to a notice of reliance, in whole or in part, by means of a motion to strike. TBMP § 532 and 707.02(b)(2). Substantive objections are more properly raised in the party's brief on the case, and the Board will generally defer until final deliberations any evidentiary objection that would require it to look beyond the face of the notice of reliance. *Id.* and TBMP § 707.02(b)(3).

Printed publications, such as the ones attached as Exhibits 7-17 to Registrant's Notice of Reliance, may be introduced pursuant to 37 CFR § 2.122(e). Among other procedural requirements, the notice which accompanies these publications must "indicate generally the relevance of the material being offered. *Id.* Though the statement of relevance should be more precise than simply claiming a connection to "likelihood of confusion," see *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1025 (TTAB 2011) (suggesting that, e.g., a particular *du Pont* factor should be indicated), a general statement of the material's relevance will usually suffice. See *Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789, 1793 (TTAB 2009); *Blue Man Productions Inc. v. Tarmann*, 75 USPQ2d 1811, 1813 (TTAB 2005).

Petitioner's motion acknowledges that Registrant's Notice of Reliance provides various statements as to the general relevance of Exhibits 7-17. Its objections are instead to the accuracy of those statements, i.e. whether Exhibits 7-17 are genuinely relevant to the indicated issues. This is merely an objection to the probative value of the evidence and not a proper basis to strike a notice of reliance.

In any case, however, an examination of these exhibits shows that they are, on their face, relevant to the issues indicated.

Exhibits 7-10 and 16-17 are relevant to the meaning of phrases used therein

Registrant's Notice of Reliance indicates that Exhibits 7-10 are relevant to the meaning of the phrase "eat well" and that Exhibits 16-17 are relevant to the meaning of the phrase "eat, drink and be happy." This is relevant because a major factor bearing on likelihood of confusion is "the similarity or dissimilarity of the marks in their entireties as to [. . .] connotation, and commercial impression." *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973).

Petitioner objects that, because the publications cited are not "dictionaries or encyclopedias" and do not contain "linguistic opinions," they are on their face irrelevant to the meaning of these phrases.

Publicly available documents are admissible for what they show on their face: in this case, how a particular term is used. *See Harjo v. Pro-Football Inc.*, 50 USPQ2d 1705, 1721 n.50 (TTAB 1999) (newspaper excerpts considered as evidence of "the manner in which the term is used therein and of the fact that the public has been exposed to the articles and may be aware of the information contained therein"). Unlike dictionaries or "linguistic opinions"—which at best provide secondary evidence for the meaning of a phrase—publications showing the manner in which a phrase is used are direct evidence of the meaning or connotation of a phrase. *See, e.g. Muscarello v. United States*, 524 U.S. 125, 129 (1998) (Breyer, J.) (citing passages from the King James Bible, *Robinson Crusoe* and *Moby Dick* as evidence of the meaning of the word "carry").

The central premise of Petitioner's notice of cancellation is that consumers are likely to confuse one restaurant which exhorts its patrons to "Eat well. Drink well. Be happy." with another whose slogan is "EAT·DRINK·BE HAPPY." It is far from irrelevant, then, that a magazine featuring articles on nutrition is called *EatingWell*, that an NGO posting articles about fighting obesity is called EatWellGlobal or that the U.K. National Health Services calls its version of the food pyramid the "Eatwell Plate." Nor is it irrelevant what kind of festive wall hangings carry the expression "eat, drink and be happy" or what sort of website Internet users will encounter when they navigate to eatdrinkbehappy.com.

Exhibits 11 and 12 are relevant for what they show on their face

Similarly, Exhibit 11 (incorrectly labeled Exhibit 12 in the attachments to the Notice of Reliance) and Exhibit 12 (incorrectly labeled Exhibit 11) are excerpts from two books, both titled *Eat Well*.

Petitioner objects that these exhibits are introduced to prove the truth of the matter asserted. This is incorrect. Registrant's Notice of Reliance does not indicate that this evidence is relevant to prove, for example, that "the food you eat is used to produce new body cells" (Exhibit 12). Instead, the Notice states that these books are relevant for what they show on their face: that two books named *Eat Well* are about healthy eating.

These exhibits are properly introduced under 37 CFR § 2.122(e) since the Notice of Reliance includes "information sufficient to identify the source and the date of publication" and was "accompanied [. . .] by a copy of the relevant portion thereof," which in this case included the title pages, copyright pages and pages cited (page 4 in both cases) of both books. If Petitioner feels that the remaining pages of these books would be helpful to the Board's interpretation of this evidence, the ISBN number and Library of Congress information is included on the

copyright page of both exhibits, and Registrant has no objection to the complete books being introduced during Petitioner's rebuttal period.

Exhibit 13 is relevant to show the connotations of Petitioner's Mark

Registrant's Notice of Reliance cites the King James Bible for a 400-year-old instance of the use of the ubiquitous English saying "eat, drink and be merry."

Petitioner's objection that this citation "assumes facts not in evidence, i.e., that Petitioner's mark is derived from a specific source" begs the question. Exhibit 13 is relevant for what it shows on its face: that the Bible (a book "available to the general public" if ever there was one) uses the phrase "eat, drink and be merry." That this is the origin of the colloquialism "eat, drink and be merry" and that consumers would understand "eat drink be happy" as a variation on this nearly-identical phrase are perfectly reasonable inferences for the Board to draw, without the need for introduction of further evidence.

Exhibits 14-17 are relevant to show the frequency with which "eat, drink and be merry" is used

Registrant's Notice of Reliance indicates that the websites and magazine excerpts attached as Exhibits 14-17 are relevant, among other things, to show the frequency with which variations on "eat, drink and be merry" are used. This is relevant, among other things, to the strength/distinctiveness of Petitioner's Mark. *See Polaroid v. Polarad*, 287 F.2d 492, 495 (2nd Cir. 1961).

Petitioner objects that these uses of the phrase are irrelevant because they are not accompanied by "evidence of the frequency in which these websites are viewed." However, the probative impact of these exhibits is cumulative. Regardless of what the weekly circulation of THE NEW YORKER magazine is (though, surely, its "general circulation" is not in serious dispute), the fact that "eat, drink and be merry" has been the punch line of 5 different cartoons

between 1960 and 2001 is clearly evidence of the “frequency” that this phrase appears within its pages. It is the frequency with which these words are used together—not the frequency with which any one instance of the phrase is viewed—that demonstrates that “eat drink and be happy” is a standard English expression rather than an arbitrary combination of words invented by Petitioner.

Exhibit 14 bears special mention, since ordinarily Internet search results, while admissible, may be of limited probative value. *Miller v. Miller*, 105 USPQ2d 1615, 1617-18 (TTAB 2012). However, unlike text search results, which often fail to demonstrate the context in which the linked-to webpages use the search terms, the image search results in Exhibit 14 are relevant for what they show on their face: that on December 5, 2013, a query for eat+drink+be+merry on Google Image Search would return hundreds of images of signs, napkins, plates, posters, banners, advertisements, invitations and cards bearing stylized representations of the exact words “eat, drink and be merry” in that order and largely by themselves. Again, this is relevant to the “frequency” of this expression, not because any one of these items has been seen a particular number of times, but because there are so many items.

III. CONCLUSION

Petitioner’s Motion to Strike is untimely, since its objections are entirely substantive. However, when the Board does weigh this evidence in the context of the parties’ trial briefs, it should consider this evidence as bearing upon the weakness of Petitioner’s mark and the important differences in connotation and commercial impression between its mark and Registrant’s.

DATED: January 25, 2013

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that she served a copy of the foregoing documents on all attorneys of record by delivering copies of the same via electronic mail

/Chris McElwain/

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