UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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DUNN

Mailed: May 29, 2014

Cancellation No. 92056269

BL Restaurant Operations, LLC

v.

The Clean Plate Club, Inc.

Elizabeth A. Dunn, Attorney:

This case comes up on petitioner's motion to strike respondent's notice of reliance. The motion is contested.

The petition to cancel asserts likelihood of confusion between petitioner's pleaded registration for the mark EAT DRINK BE HAPPY (stylized) for "restaurant and bar services" and applicant's registration for the mark EAT WELL. DRINK WELL. BE HAPPY. (standard characters) for "restaurant and bar services." On January 6, 2013, pursuant to the extended trial dates approved by the Board, respondent filed a notice of reliance with accompanying discovery responses (Exhibit Nos. 1-6) and printed publications (Exhibit Nos. 7-17).

With respect to the printed publications, the notice of reliance states that the documents were pages publicly available on the Internet, and then

more specifically describes the 17 attached documents and their relevance. Six documents (Nos. 7-12) are described as "relevant to show the meaning of the phrase 'Eat Well'"; one (No. 13) is described as "relevant to show the origin and meaning of the common English idiom 'Eat, drink and be merry' from which Petitioner's Mark is derived"; one (No. 14) is described as "relevant to establish the frequency with which consumers are likely to encounter the English idiom 'Eat, drink and be merry.'"; one (No. 15) is described as "relevant to establish the frequency with which consumers are likely to encounter the English idiom 'Eat, drink and be merry.'"; and two (Nos. 16-17) are described as "relevant to establish the meaning of the phrase 'eat, drink and be happy' and the frequency with which consumers are likely to encounter this phrase." ; and one (No. 17) is described as "relevant to establish the frequency with which consumers are likely to encounter the English idiom 'Eat, drink and be merry.'"

Trademark Rule 2.122(e) provides, in pertinent part:

> Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding … if the publication … is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered. The notice shall specify the printed publication (including information sufficient to identify the source and the date of the publication) … and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by … the printed publication or a copy of the relevant portion thereof.

A motion to strike a notice of reliance is appropriate if the notice of reliance fails to comply with the procedural requirements of the rule. *Corporacion Habanos SA v. Guantanamera Cigars Co.*, 102 USPQ2d 1085, 1093 (TTAB 2012) (objection that relevance of evidence not identified waived where raised for first time with brief because procedural deficiency could have been cured if objection had been raised seasonably). In support of its motion to strike, petitioner asserts that the notice of reliance fails to indicate the relevance of the material offered. As set forth above, this is plainly not the case. Petitioner's contention - that the documents are not online dictionaries or encyclopedias; fail to explain the subject phrases; assume facts not in evidence; and fail to state the frequency with which subject websites are viewed - does not dispute that the relevance of the documents was indicated, but disputes whether the documents prove the point for which they are submitted. Arguments regarding the probative weight to be accorded documents are reserved for trial briefs. Inasmuch as Internet documents may be submitted under a notice of reliance, and the notice itself complies with the requirements of Trademark Rule 2.122(e), petitioner's motion to strike is DENIED.

Dates remain as set by the Board's December 6, 2013 order.