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PRECEDENT OF THE TTAB

Mailed: January 15, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*Lockstock Publications, Inc. d/b/a Cigar Snob Magazine*

*v.*

*J. Thomas Investments, Inc. and Jeffrey Thomas Gomez*

Cancellation No. 92057753

Frank Herrera of H New Media Law for Lockstock Publications, Inc. d/b/a Cigar Snob Magazine.

J. Thomas Investments, Inc. and Jeffrey Thomas Gomez, *pro se*.

Before Adlin, Masiello and Hightower, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

J. Thomas Investments, Inc. and Jeffrey Thomas Gomez (“Respondents”) co-own a registration for the mark THE \$NOB, in standard characters, for “Multimedia publishing of books, magazines, journals, software, games, music, and electronic publications” (the “Registration”).<sup>1</sup> In its petition for cancellation, Lockstock Publications, Inc. d/b/a Cigar Snob Magazine (“Petitioner”) alleges prior use of

<sup>1</sup> Registration No. 3668139, issued August 18, 2009 from an application filed June 8, 2007, based on alleged first use dates of June 7, 2005.

CIGAR SNOB for “a leading cigar lifestyle magazine,” and that its application to register the mark (which was not made of record) was ultimately “rejected” under Section 2(d) of the Act based on Respondents’ involved Registration. As grounds for cancellation, Petitioner alleges: (1) fraud, in that Respondents knew that the substitute specimen filed in connection with their underlying application “was not in use in commerce as of June 7, 2005, or the filing date June 8, 2007;”<sup>2</sup> and (2) that use of Respondents’ mark would be likely to cause confusion with Petitioner’s mark. Respondents deny the salient substantive allegations in the petition for cancellation and assert several affirmative defenses which they did not pursue at trial and which are accordingly waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. American Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

### **The Record**

The record consists of the pleadings, the file of the involved Registration, and Petitioner’s notice of reliance on: its discovery deposition of co-Respondent Jeffrey Thomas Gomez; printed publications, specifically portions of what appear to be issues of Cigar Snob magazine and The \$nob magazine, and the “Media Kit” for The \$nob magazine; Respondents’ initial disclosures; and the file history for the involved

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<sup>2</sup> The issue is not whether Respondents were using their mark as of its claimed date of first use, but rather whether Respondents were using the mark as of the underlying application’s filing date. *Georgia-Southern Oil Inc. v. Richardson*, 16 USPQ2d 1723, 1726-27 (TTAB 1990).

Registration. 18-23 TTABVue.<sup>3</sup> Neither party took any testimony. Respondents did not introduce any evidence, and only Petitioner filed a trial brief.

### The Probative Value of Petitioner's Evidence

While Petitioner alleges that it has common law rights arising out of its alleged prior use of CIGAR SNOB for magazines, its purported proof of this alleged fact was introduced by notice of reliance alone, unaccompanied by any testimonial or other evidence. Specifically, Petitioner relies on what appear to be the cover pages and mastheads of several 2006-2007 issues of CIGAR SNOB magazine, such as the following:



<sup>3</sup> Citations to the record reference TTABVue, the Board's online docketing system. Specifically, the number preceding "TTABVue" corresponds to the docket entry number(s), and any number(s) following "TTABVue" refer to the page number(s) of the docket entry where the cited materials appear.

The problem is that printed publications introduced through notice of reliance alone are not competent to establish the truth of the matters asserted therein. We consider unexplained, unauthenticated printed publications such as these only for what they show on their face. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010) (“... the documents have little probative value. They are admissible only to show what has been printed, not the truth of what has been printed.”); *Research in Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1929 (TTAB 2009). On their face, the copies of what appear to be portions of certain editions of CIGAR SNOB magazine are insufficient to establish that Petitioner controlled the nature and quality of the magazines; where and when they were distributed, if ever; that anyone purchased or was exposed to the magazines or the CIGAR SNOB mark; or any other fact supporting a finding that Petitioner owns or used the mark CIGAR SNOB for magazines. As we stated more than 40 years ago:

Otis has made of record a copy of an article that appeared in the June 1951 issue of “Modern Materials Handling” magazine dealing with the activities of its predecessor, The Moto Truc Company and its president in the material handling field to show that the mark “MOTO TRUC” as early as twenty-three years ago had already won considerable recognition. This article is manifestly incompetent per se to establish what Otis attributed to it, and, moreover, it cannot be relied on for the truth of the matter contained therein.

*Otis Elevator Co. v. Echlin Manufacturing Co.*, 187 USPQ 310, 313 n.4 (TTAB 1975). *See also City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1672 (TTAB 2013); *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007) (“Printed publications made of record by notice of

reliance ... are admissible and probative only for what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters.”); *Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267, 1270 n.5 (TTAB 1989), *aff’d*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990); *Logicon, Inc. v. Logisticon, Inc.*, 205 USPQ 767, 768 n.6 (TTAB 1980); *Food Producers, Inc. v. Swift & Co.*, 194 USPQ 299, 301 n.2 (TTAB 1977) (“The probative value of the publications has been confined in our consideration of petitioner’s record to what they show on their face rather than for the truth of the matter contained therein since there is no opportunity to ascertain the source and/or basis for the information or for respondent to confront and cross-examine the individual or individuals responsible therefor.”); TBMP § 704.08 (2015).

### **Standing**

Although Petitioner failed to make its pleaded application of record, Respondents admitted, in their answer to the petition for cancellation, “that an application was filed by Petitioner on December 9, 2008 for registering ‘cigar snob’ as a trademark,” thus establishing Petitioner’s filing of this application as a fact. Answer ¶ 10; *Tiffany and Company v. Columbia Industries, Inc.*, 455 F.2d 582, 173 USPQ 6, 8 (CCPA 1972). While Respondents did not also admit that Petitioner’s application was refused based on their involved Registration, “evidence of such a refusal is not a requirement to establish standing. Rather, it is sufficient if the circumstances are such that it would be reasonable for a petitioner to believe that

the existence of the respondent's registration would damage him, *e.g.* ... that the presence on the register of the respondent's mark may hinder the petitioner in using or registering his mark." *Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010). *See also, Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("We regard the desire for a registration with its attendant statutory advantages as a legitimate commercial interest."). Accordingly, Petitioner has established its standing.

### **Priority**

Petitioner, the alleged prior user, bears the burden of proving its claim of priority by a preponderance of the evidence. *West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994); *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1105-06 (TTAB 2007). Respondents' admission concerning Petitioner's apparently abandoned application is of no help to Petitioner with respect to its claim of priority, however, because the application, even if still alive, would only prove that the application was filed; it could not prove any facts alleged therein, such as the alleged date of first use. *Lasek & Miller Associates v. Rubin et al.*, 201 USPQ 831, 833 n.3 (TTAB 1978); *St. Louis Janitor Supply Co. v. Abso-Clean Chemical Co.*, 196 USPQ 778, 780 n.4 (TTAB 1977). Respondents, by contrast, are entitled to rely on the filing date of the application which matured into their involved Registration, June 8, 2007. *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1140

(TTAB 2013) (“for when an application or registration is of record, the party may rely on the filing date of the application for registration, *i.e.*, its constructive use date”); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”).

Respondents have not admitted that Petitioner made use of CIGAR SNOB prior to the filing date of the involved Registration, and as indicated Petitioner’s evidence does not on its face establish Petitioner’s use of the CIGAR SNOB mark. Accordingly, Petitioner has not met its burden of proving priority, and its likelihood of confusion claim therefore fails.

### **Fraud**

“Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with its application *with intent to deceive the USPTO.*” *Nationstar Mortgage LLC v. Ahmad*, 112 USPQ2d 1361, 1365 (TTAB 2014) (citing *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009)) (emphasis added). Here, Petitioner has not presented any evidence, direct, indirect or circumstantial, let alone the requisite “clear and convincing” evidence, *In re Bose*, 91 USPQ2d at 1939, that Respondents made false statements with the requisite intent to deceive the USPTO. *See also DaimlerChrysler Corp. v. American Motors Corp.*, 94 USPQ2d 1086, 1090 (“It is clear that under the holding of *Bose* that intent must be separately proved ....”). In fact, Mr. Gomez testified during his discovery deposition that he believed he was

using the involved mark THE \$NOB for magazines and other products prior to the Registration's filing date. 19 TTABVue 12-20, 111-115, 118, 135. Whether this belief was accurate or reasonable is not relevant to the fraud inquiry. *Id.* at 1942 ("We do not need to resolve the issue of the reasonableness as it is not part of the analysis.")<sup>4</sup> See also *Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon)*, 43 USPQ2d 1440, 1444 (TTAB 1997), *aff'd*, 152 F.3d 942 (Fed. Cir. 1998) (quoting *Kemin Industries, Inc. v. Watkins Products, Inc.*, 192 USPQ 327 (TTAB 1976)) and *American Security Bank v. American Security and Trust Co.*, 571 F.2d 564, 197 USPQ 65, 67 (CCPA 1978) ("Appellant misreads the cited statute and rules. They require the statement of *beliefs* about exclusive rights, not their actual possession. Appellant has produced no evidence impugning appellee's beliefs."). Accordingly, Petitioner's fraud claim also fails.

**Decision:** The petition for cancellation is dismissed.<sup>5</sup>

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<sup>4</sup> Even if Petitioner was correct that Respondents *should have known* that they were not using the mark on some of the goods identified in the Registration, that, without more, does not reflect an intent to deceive much less prove such an intent "to the hilt" as required by *Bose*. 91 USPQ2d at 1939-41.

<sup>5</sup> Respondent's failure to introduce any evidence does not entitle Petitioner to the requested "default" judgment. *Dura Corp. v. Mead Specialties Co., Inc.*, 152, USPQ 513, 515 (TTAB 1966) ("Certainly, an applicant is under no obligation to take testimony if he is of the opinion that an opposer has not made out a case for the relief sought.").