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

Proceeding	92055558
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Date	06/16/2015
Attachments	Petitioner's Motion to Strike.pdf(703099 bytes)

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

ECONOMY RENT-A-CAR, INC. Petitioner, **v.** **EMMANOUIL KOKOLOGIANNIS AND SONS, SOCIETE ANONYME OF TRADE, HOTELS AND TOURISM S.A.** Respondent.	**Cancellation No. 92055558** **Registration No. 3256667**

PETITIONER'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S NOTICE OF RELIANCE

On May 26, 2015, Respondent Emmanouil Kokologiannis And Sons, Societe Anonyme Of Trade Hotels And Tourism S.A. filed its Notice of Reliance ("NOR") in the above-styled Cancellation proceeding. Petitioner Petitioner Economy Rent-A-Car, Inc. hereby moves the Trademark Trial and Appeal Board ("TTAB") to strike the following Exhibits recited in Respondent's aforesaid NOR: Exhibit Nos. 12, 13, 14, 15, 16, 17, 18, 21, 24, 25, 26, 27, 28, 29, 30, 36, 37, 41, 42(in part), and 43(in part).

This motion to strike is based on what Petitioner perceives to be procedural defects in Respondent's Notice of Reliance. Petitioner reserves its right to subsequently raise substantive objections to Respondent's evidence in Petitioner's Trial Brief.

Argument

Respondent seeks to introduce into evidence documents that are neither from "public records" nor amount to "printed publications" within the meaning of 37 CFR §2.122(e). The introduction of evidence through a notice of reliance under that rule is intended to facilitate the introduction of publications for what they show on their face subject to the safeguard that the party against whom they offered may corroborate or refute the authenticity of the evidence. The basis for the rule is that a party may readily become familiar with the materials that are in libraries or in general circulation. The burden of establishing such public availability is placed on the proponent of the proffered evidence. *Glamorene Products Corp. v. Earl Grissmer Company, Inc.,* 203 U.S.P.Q. 1090, 1092 (TTAB, 1979). Secondly, Respondent has improperly included within its relied-upon Admissions, responses that are not, in fact, "admissions." The inclusion on non-admissions is not proper under Trademark Rule 2.120(j)(3)(i). Finally, Respondent has not adequately stated the basis for the "relevance" of a number of its Exhibits introduced by way of the Notice of Reliance.

Analysis of Petitioner's aforesaid objections, as applied to the specific Exhibits that were included within Respondent's Notice of Reliance, is set forth below.

(Respondent's NOR Exhibits 13, 14 and 15)

Respondent seeks to introduce into evidence documents allegedly setting forth historical information (such as "prior trademark use" or similar "archived information")

from various third party websites, such as WhoIs, Internet Archive WayBack Machine, Who.Godaddy, Domaintools.Com, Whsk.Com and Google. None of those "archived" documents are "self-authenticating" and none of those documents have been authenticated through the testimony of any competent witnesses. Thus, the documents that are subject to this motion are being introduced by Respondent's to show how something purportedly appeared *in the past* based on a *subsequently-printed* document (as opposed to being offered to show how a webpage looked at the time it was printed). Respondent's attempt to introduce prior, archive evidence is simply not authorized under *Safer Inc. v. OMS Investments, Inc.*, 94 U.S.P.Q.2d 1031 (TTAB, 2010).

In considering the authentication of Internet web pages from sites that purportedly show how a web page previously appeared on a date other than the stated print-out date, federal courts have consistently required independent authentication under the Federal Rules of Evidence. See, *Specht v. Google, Inc.*, 758 F. Supp. 2d 570, 580 (N.D. Ill. 2010) (holding that screenshots from the Internet Archive are properly authenticated by a knowledgeable employee of the Internet Archive); *Audi AG v. Shokan Coachworks, Inc.*, 592 F. Supp. 2d 246, 278 (N.D.N.Y. 2008) (stating that search results from the Internet Archive may only be authenticated by a knowledgeable employee of the website); *St. Luke's Cataract and Laser Institute, P.A. v. Sanderson*, Case No. 8:06-cv-223-T-MSS, 2006 U.S. Dist. LEXIS 28873, *6 (M.D. Fla. May 12, 2006) (stating that, to authenticate printouts from the Internet Archive, "Plaintiff must provide the Court with a statement or affidavit from an Internet Archive representative with *personal knowledge* of the contents of the Internet Archive website."). The Patent and Trademark Office is believed to follow the same evidentiary rule as articulated by

the federal courts. See, for example, *Standard Innovation Corp. v. Lelo, Inc, Patent Owner,* 2015 WL 1906730,*5, Case No. IPR2014-00148 (Pat. Tr. & App. Bd., April 23, 2015) (copy attached as Petitioner's Exhibit A) in which the Board cited *St. Luke's Cataract & Laser Inst., supra,* in holding that Fed. R. Evid. 901 required the proponent of evidence such as archived websites to produce a statement or affidavit from someone with knowledge of the website when seeking to authenticate the information from the website itself. Accord, *U.S. v. Bansal,* 663 F.3d 634, 667 (3rd Cir. 2011) (requiring supporting testimony to authenticate a website obtained from the Wayback Machine).

(Respondent's NOR Exhibits 26, 27, 28, 29 and 30)

With regard to the Google "photographic evidence" (Exhibits 28, 29 and 30), Petitioner believes that such evidence is completely beyond the TTAB's ruling in *Safer.* Such photographs are not "self-authenticating" under any evidentiary rule. When those photographic documents were marked during the deposition of Alejandro Muniz (Muniz Dep. Exhibits 31 through 33 and introduced in Respondent's NOR as Exhibits 28, 29 and 30), Petitioner timely and properly objected to their introduction into evidence. See Petitioner's Exhibit B submitted herewith. That very same evidentiary shortcoming or flaw also exists in connection with NOR Exhibits 26 and 27. No foundation for the introduction of such photographic evidence was attempted by Respondent, even after Petitioner promptly raised its objection to such evidence on that basis.

(Respondent's NOR Exhibits 36, 37 and 41)

With regard to Respondent's NOR Exhibits 36 and 41, those documents were apparently obtained from the Wikepedia website and amount to hearsay in view of the

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