

## UNITED STATES: PETITIONER'S FRAUD CLAIMS NOT PROVEN "TO THE HILT"

In a case involving allegations of fraud, the Trademark Trial and Appeal Board (TTAB), ruling that the petitioner had failed to prove its claims of fraud "to the hilt with clear and convincing evidence" dismissed a petition to cancel a registrations. *Slaska Wytwornia Wodek Gatunkowtch "Polmos" SA v. Stawski Distributing Co., Inc.*, Cancellation No. 92044806, (July 27, 2010) [not precedential].

Slaska Wytwornia Wodek Gatunkowtch "Polmos" SA filed a petition to cancel the registration of Stawski Distributing Co. for the trademark ZYTANIA, for use with "liquor." The petitioner alleged fraud in that (1) the respondent, with intent to deceive, failed to disclose to the U.S. Patent and Trademark Office (USPTO) that ZYTANIA means "rye" in Polish; (2) the respondent was only an importer and did not own the mark; and (3) the respondent claimed a date of first use that it had no right to claim. The TTAB stated that to prove fraud, the petitioner had to show that "a statement was false, the falsity was intentional, and that the false statements were material to obtaining or maintaining a registration."

With respect to the translation of "ZYTANIA", the TTAB held that the record fell short of showing that the Respondent committed fraud. There was inconsistent testimony and competing evidence regarding the translation, and the record showed that there was no "precise translation" of the term. Thus, Petitioner failed to meet its burden to "prove to the hilt with clear and convincing evidence" that information was willfully withheld with the intent to deceive the PTO.

With respect to ownership, the petitioner argued that only a mark's owner could file an application for the mark. The petitioner asserted that as the producer of the vodka, it was the lawful owner of the mark, not the respondent in its capacity as only an importer and distributor of petitioner's vodka. The TTAB, noting that the evidence of record regarding ownership was "hardly a model of clarity", determined that because the registration was well over five years old, the ownership issue would be addressed only in the context of fraud.

As the record did not contain any agreement that delineated ownership, the presumption was that the manufacturer of the goods wa the owner of the mark. However, the TTAB found that there were certain facts which rebutted this presumption. In the Board's words, those facts made a "finding of fraud untenable" and it would be "unreasonable to infer that respondent filed the application with intent to deceive the (USPTO)."

Finally, with respect to the date of first use, the TTAB held that if a mark is in use at the time an application is filed, a claim of first use, even if false, is not fraudulent. As the petitioner did not allege that the mark was not in use at the time the application was filed, the TTAB held that there was no fraud.

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