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Dated: 2nd November 2017

**REF: DECLARATION OF INVALIDITY NUMBER 000014234 C AGAINST EUTM No. 014027338
CLEOPATRA QUEEN**

TO: OPERATIONS DEPARTMENT – CANCELLATION DIVISION

Dear Sirs,

We refer to the application for Declaration of Invalidity made by

Melfinco Societe Anonyme S.A., Landstrasse 158, LI-9494 Schaan, Liechtenstein ("the Applicant") being represented by Militsa N.Giotis, 38, Didotou str. Athens 106 80, Greece.

Against

Worldwide Spirits Supply Inc. of Palm Chambers, 197 Main Street, P.O. Box 3174, Tortola, British Virgin Islands, ("the Respondent") being represented by Elias Marine Consultants Ltd of Platinum Crest, 18 Loizou Askani Street, CY-3110, Limassol, Cyprus, ("the Representative")

and to your communication dated 30th August 2017 enclosing the observations submitted by Mrs. Militsa N. Giotis on behalf of the Applicant in response to our findings and observations submitted on 12th April 2017, and hereby submit our response to the evidence submitted by Militsa N. Giotis to the Intellectual Property Office ("EUIPO") dated 29th July 2017.

1. Comparison of the Marks

We note from the Applicant's response that reference to the Applicant's company Melfinco Societe Anonyme is made and specifically that the company specialises for many years in the field of manufacturing and sales of cigarettes in many countries. We wish to point out however that our client's company METCO (Middle East Tobacco Co.) Limited has also been manufacturing and selling tobacco products for over 25 years in numerous countries. METCO is the owner of the Respondent, namely Worldwide Spirits Supply Inc.

Furthermore, the Applicant states that when the mark "CLEOPATRA MELFINCO" was registered the intention was to also register other combined marks for the purpose of creating "a trademark family". The Applicant's registered mark "CLEOPATRA MELFINCO" clearly indicates the origin of the mark, hence there is no similarity with the Respondent's mark in any way.

Also, the Applicant mentions that all marks show the origin of their goods i.e. the head of Queen Cleopatra depicted thereon. However, given that Cleopatra is well-known, the Applicant cannot claim that the head of Cleopatra is the element which shows that their goods have a common origin. There are various marks which contain the element of Cleopatra and the Applicant cannot claim that the element of the head of Cleopatra is only associated with their marks.

Visually, the Applicant's mark 155584 and the Respondent's mark, as stated in our previous observations, are similar only to the extent that they coincide in the word "CLEOPATRA". The word "CLEOPATRA" in the Applicant's mark is accompanied with the word "MELFINCO" which is not represented in the Respondent's mark. It must be stated again that Melfinco Societe Anonyme S.A., is the proprietor of the mark, therefore the relevant public will immediately understand that the relevant goods are coming from that specific undertaking.

With respect to the Applicant's figurative marks no. 220889, 220668 and 230629 and the Respondent's mark it is important to examine whether the signs share a significant number of letters in the same position and whether the marks are highly stylised. Taking this into account we can conclude that the visual similarity of the marks under comparison is very low. The marks differ in colour, number of words, syllables and stylisation.

The visual differences influence the **phonetic** comparison. Despite the fact that the pronunciation of the Applicant's marks and the Respondent's mark coincide in the sound of the letter sequence "Q-U-E-E-N" and "C-L-E-O-P-A-T-R-A", the pronunciation differs in the sound of the words "M-E-L-F-I-N-C-O", "S-U-P-E-R S-T-A-R", "G-O-L-D-E-N K-I-N-G", "S-M-O-K-I-N-G K-I-L-L-S", "S-M-O-K-I-N-G C-A-U-S-E-S F-A-T-A-L L-U-N-G C-A-N-C-E-R" and with the addition of a text into the Arabic language for that part of the public familiar with the language.

Conceptually, the addition in the Applicant's marks of the words "MELFINCO", "SUPER STAR SMOKING KILLS MELFINCO", "GOLDEN KING MELFINCO SMOKING KILLS" and "SMOKING

CAUSES FATAL LUNG CANCER” at the end, which do not have counterparts in the Respondent’s mark, render the marks conceptually similar to a low degree.

2. Comparison of the good and services

The Applicant states in the response that the mark “QUEEN CLEOPATRA” is identical to the Respondent’s mark. However, it is not identical due to the simple fact that, unlike the Applicant’s mark, “CLEOPATRA” is at the beginning of the Respondent’s mark followed by “QUEEN”. Therefore, the marks cannot be considered as identical.

Furthermore, the Applicant states that the element of the side looked Cleopatra is the one that characterises the mark. However, as mentioned before this element is used by other trademark proprietors and cannot be claimed to be the element that only represents the Respondent’s marks.

Moreover, the Applicant mentions that the difference in colours does not lead to the avoidance of confusion between the marks. However, given that coloured marks and black and white marks are no longer considered the same, such detail must be taken in to consideration when comparing the said marks. As a result of the addition of the colour to the Applicant’s marks the Respondent’s mark is not similar or identical to the Applicant’s marks.

The fact that the Applicant’s marks “CLEOPATRA MELFINCO”, “CLEOPATRA SUPER STAR MELFINCO”, “CLEOPATRA GOLDEN KING MELFINCO” all contain “Melfinco” at the end clearly indicates the origin of the goods. The origin can be defined by the addition of “Melfinco” as opposed to the origin deriving from the use of the word “Cleopatra”, which the Applicant claims. What better way to associate marks with a specific origin/undertaking than by adding the company name and, therefore, avoiding any similarity with other marks.

3. Likelihood of confusion

Furthermore, we repeat our assertion in our reply of 27th April 2017, that tobacco products are relatively cheap-mass produced articles, and smokers are considered particularly careful and selective as to the brand of cigarettes they smoke, resulting in a higher degree of brand loyalty and attention is assumed where tobacco products are involved (judgment of 30/03/2016, R1805/2015-2 Golden Grape/Golden Gate et al. para 60.

The Applicant states that because the Applicant’s marks and the Respondent’s mark are conceptually similar, given the use of the word “Cleopatra” and the meaning thereof, there is a likelihood of confusion. However, we wish to reiterate that the meaning of “Cleopatra” stands in no relation to the actual goods and services and therefore the consumers will not consider the marks as being similar as a result of the use of this word element. Also, and as mentioned above, the word “Cleopatra” is used by other trademark proprietors, which have also been registered, without causing confusion with other marks, and which co exist peacefully.

4. Distinctiveness of the Earlier Trade Marks

The European Court of Justice (the "Court") in its judgments of 29/09/1998, C-39/97, Canon, and EU: C: 1998:442, §18 and §24 held that:

"...marks with a highly distinctive character, either per se or because of the reputation they possess on a market, enjoy broader protection than marks with a less distinctive character."

"...the distinctive character of the earlier trademarks, and in particular its reputation, must be taken into account when determining whether the similarity between the goods or services covered by the two trademarks is sufficient to give rise to the likelihood of confusion."

In light of the above, the Applicant failed for a second time to provide evidence proving that the marks are in use or have acquired reputation on a national or international level for the registered goods, nor has evidence been provided that the Applicant's marks are associated with the Applicant. We strongly assert that any such proof and evidence as may exist should have been provided by the Applicant given that the Respondent's mark has been registered two years now and has been in use since, during which time customers have become accustomed to the mark and product.

Declaring the trademark invalid at this point in time will already have a huge impact on the Respondent and result in consequential losses for the Respondent.

5. Global Assessment and other arguments

For the purposes of the global assessment of the likelihood of confusion, we reiterate that the average consumer of the goods concerned is deemed to be reasonably well informed, and reasonably observant and circumspect. Furthermore, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26).

In the present case, the Applicant's mark 155584 and the Respondent's mark are similar to the extent that they coincide in the letter sequence "C-L-E-O-P-A-T-R-A". The Applicant's mark is accompanied with the word "MELFINCO" which is not represented in Respondent's mark. As previously stated, Melfinco Societe Anonyme S.A., is the proprietor of the mark, therefore, the relevant public will immediately understand that the relevant goods are coming from that specific undertaking.

The representation of the Applicant's marks 220889, 220668 and 230629 is highly stylised. It is comprised of bright colours, different fonts, pictures and additional words, whereas, the representation of the Respondent's mark is much simpler, not stylised, black and white and additional words, consisting only the words "CLEOPATRA QUEEN". Furthermore, the Applicant's marks 220889 and 220668 are also accompanied with the word "MELFINCO", therefore, once again the relevant public will understand that the relevant goods are coming from Melfinco Societe Anonyme S.A.

Given that consumers of tobacco products are considered to have a high level of attention on the products and the brands than on other type of products, and are loyal to the brands

they purchase, we can conclude that there is no possibility of likelihood of confusion on their part with respect to the products they want to buy (03/07/2013, T-205/12, *LIBERTE American blend*, EU:T:2013:341, §23; 18/05/2011, T-207/08. *Kiowa*, EU:T:2002: 140, § 31; see also 16/07/2015, R 1860/2014-1, *DIAMOND CUT (fig)/DIAMONDS (fig.)*, §17; 13/01/2016, R 310/2015-2 –*bio (fig.)/BRIO (fig.) et al.*, §88; 02/03/2016, R 2979/2014-5, *PETERFIELD/ CHESTERFIELD et al.*, §17).

Furthermore, the Applicant has not provided evidence showing the use of the Applicant's marks or that they have acquired national or international reputation. Also the applicant failed to demonstrate competition between the marks as no documentary proof of use was submitted. Unless proven to the contrary, no competition between the Applicant's marks and the Respondent's mark exist.

Another very important factor to take into consideration is the fact the Respondent's mark has been registered as a EUTM for the past two years during which time the Respondent has manufactured and sold the brand and the relevant public has become aware of the brand, and during which time **the Applicant's marks and the Respondent's mark co-existed peacefully.**

In accordance with Rule 37 (iv) of the Commission Regulation EC 2868-95, an application to the Office for revocation or for a declaration of invalidity pursuant to Article 56 shall contain an indication of the facts, evidence and arguments presented in support of the grounds for the application for revocation or for a declaration of invalidity. However, the Applicant has not submitted any facts, evidence or arguments in support of the fact that the Applicant's marks have gained reputation in the respective Member States. The Applicant has only provided extracts from WIPO showing the details of the registered marks, which is not proof supporting the grounds for the application in relation to the acquired reputation. **Due to the fact that declaring the Respondent's mark invalid at this point in time will have serious consequences we ask EUIPO to obtain from the Applicant sufficient proof of use of the marks.**

Rule 39 (3) of the Commission Regulation EC 2868-95 further states that *"If the Office finds that the application does not comply with Rule 37, it shall invite the applicant to remedy the deficiencies found within such period as it may specify. If the deficiencies are not remedied before expiry of the time limit, the Office shall reject the application as inadmissible."*

Rule 40 (5) of the Commission Regulation EC 2868-95 further supports the above by stating that in the case of an application for revocation based on Article 51 (1) (a) of the Regulation, the Office shall invite the proprietor to furnish proof of genuine use of the mark within a specified period. If the proof is not provided within the time limit set, the Community trade mark shall be revoked. Rule 40 (6) further goes on to say that if the applicant has to furnish proof of use the Office shall invite the applicant to furnish proof of genuine use of the mark, within such period as it may specify. If the proof is not provided within the time limit set, the application for declaration of invalidity shall be rejected.

6. Conclusion

In the light of the above, we conclude once again that the Respondent's mark and the Applicant's marks are able to co-exist peacefully, like they have for the past two years, thus rendering the Invalidity ineffective.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'N. Perrot', enclosed within a hand-drawn oval shape.

Nadja Perrot

For and on behalf of the Respondent.