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Paper 66
Entered: 19 September 2008

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4 UNITED STATES PATENT AND TRADEMARK OFFICE
5 BOARD OF PATENT APPEALS AND INTERFERENCES
6

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8 Patent Interference 105,617 McK
9 Technology Center 1700
10

11
12 **INTELLECTUAL CONCEPTS, LLC,**
13 (Inventor: Gregory James Caton)
14

15 Application 10/782,405,
16 Junior Party,
17

18 v.
19

20 **ZANNIER, INC.,**
21 (Inventor: Paul D. Manos)
22

23 Patent 7,264,847 B2,
24 Senior Party,
25

26
27 *Before: FRED E. McKELVEY, Senior Administrative Patent Judge, and*
28 *RICHARD E. SCHAFER and JAMES T. MOORE, Administrative Patent*
29 *Judges.*
30

31 *McKELVEY, Senior Administrative Patent Judge*

32 **MEMORANDUM OPINION and ORDER**
33 **Decision denying Intellectual Concepts Motion 7**
34

35 **A. Background**

36 Intellectual Concepts Miscellaneous Motion 7 (Paper 62) seeks a
37 ruling *in limine* on the admissibility of (1) prior testimony of Gregory James

1 Caton given in a civil action in a state court in Louisiana and (2) a Caton
2 affidavit (Ex 2086) submitted in connection with Intellectual Concepts, LLC
3 Motion for Judgment 2 (Paper 59).

4 Intellectual Concepts was not authorized to file a motion seeking a
5 ruling *in limine* on the admissibility of prior testimony of Gregory James
6 Caton given in a civil action in a state court in Louisiana. A single judge has
7 dismissed Intellectual Concepts Motion 7 as to the prior testimony.
8 Paper 63.

9 The first issue before us is whether the Caton affidavit (Ex 2086) is
10 admissible without cross-examination in the United States. A second issue
11 is whether cross-examination of Caton should be authorized to take place in
12 Ecuador.

13 **B. Intellectual Concepts statement of facts**

14 Intellectual Concepts Motion 7 is accompanied by a Statement of
15 Material Facts. See Paper 62, page 11 (Appendix 2). The Statement of
16 Facts is as follows:

17 1. Mr. Caton believes that he has a well-founded fear of arrest
18 upon returning to the United States.

19 2. Mr. Caton believes that he has a medical problem that makes
20 it inadvisable for him to travel in an airplane at 30,000 ft an[d] that he
21 would, therefore, have a likelihood of being subjected to physical harm if he
22 were to travel to the United States. Ex 2103 and Ex 2104.

23 3. Mr. Caton's statements are supported by the Affidavit of
24 Kenneth Michael Wright. Ex 2015.

25 4. Intellectual Concepts has secured a statement as to the laws
26 concernign [sic-concerning] false testimony and perjury in Ecuador.

27 Ex. 2106.

1 5. Intellectual Concepts has made two proposals for the taking
2 of cross examination testimony of Mr. Caton in Ecuador. Ex 2106.

3 The statement of facts is an invitation to the Board to search the
4 exhibits and determine the real facts. We caution Intellectual Concepts that
5 the statement of facts is a significant part of a motion because (1) it permits
6 an opponent to admit or deny each fact and (2) it tells the Board what a
7 party's "story" is in connection with a motion. The statement of facts also
8 provides a convenient format for an opponent to admit or deny facts. Any
9 future motion by Intellectual Concepts which fails to set out a statement of
10 facts, which if believed, would not make out a *prima facie* case may result in
11 denial of the motion.

12 **C. Findings of fact**

13 Gregory James Caton resides in Ecuador.

14 A Caton declaration is relied upon by Intellectual Concepts in
15 connection with its Motion 2.

16 Motion 2 alleges that Caton is the sole inventor of the subject matter
17 of the count—meaning that Caton conceived the invention without any input
18 from Paul D. Manos.

19 In filing the declaration, Caton states that he will not come to the
20 United States for cross-examination.

21 According to Intellectual Concepts, there are two reasons why
22 Gregory James Caton will not appear in the United States for cross-
23 examination:

24 (1) Caton says that if he comes to the United States he will be
25 arrested and

26 (2) Caton says he suffers from a medical condition which is
27 said to preclude his flying in airplanes above 30,000 feet.

1 "Affidavit" of Gregory James Caton

2 In support of its motion, Intellectual Concepts relies on an "affidavit"
3 of Gregory James Caton. Ex 2104.

4 Caton currently resides in Guayaquil, Ecuador. Ex 2104, page 2:5-6
5 and page 3:12-13.

6 Guayaquil, Ecuador is located essentially at sea level.

7 Caton's "apprehension of arrest" if he returns to the United States is
8 said to "make it impossible for me to return to the United States." Ex 2104,
9 page 3:14-15.

10 Why would Caton be apprehensive of being arrested if he came to the
11 United States for cross-examination?

12 While Intellectual Concepts has "sort of" told us about Caton's
13 criminal history, at no point does Intellectual Concept Motion 7 give a
14 sufficient and clear statement of that criminal history.

15 Accordingly, we have obtained a copy of a Department of Justice
16 News Release dated 24 August 2004. The news release is reproduced
17 below:

18 *Gregory Caton Sentenced for*
19 *Selling Unapproved New Drugs*

20 **Department of Justice News Release**
21 **August 24, 2004**

22
23 GREGORY JAMES CATON, age 48, from Lake Charles,
24 Louisiana, was sentenced today to 33 months imprisonment to
25 be followed by 3 years supervised release by United States
26 District Judge Tucker Melançon [of the Western District of
27 Louisiana], announced United States Attorney Donald W.
28 Washington. CATON pled guilty to a Bill of Information in
29 May 2004, charging him with (1) one count of devising a
30 scheme and artifice to defraud numerous victims and utilizing a

1 commercial interstate carrier to carry out the scheme and
2 artifice to defraud; (2) one count of introduction of unapproved
3 new drugs (Cansema Tonic III and H3O) into interstate
4 commerce; and (3) forfeiture of assets. By pleading guilty to
5 count three, CATON agreed to forfeit any property acquired as
6 the result of his criminal violations.

7 From 1999 to 2003, CATON and his employees utilized an
8 internet site named Alpha Omega Labs to take direct orders for
9 unapproved new drugs represented to have some medicinal
10 qualities. The chemical substances were not approved for sale
11 by the U.S. Food and Drug Administration. In order to legally
12 market a drug in interstate commerce, the drug's manufacturer
13 is required to comply with all applicable provisions of the
14 Federal Food, Drug, and Cosmetic Act in order to ensure that
15 the products sold are safe for humans and effective for their
16 intended uses. By taking orders for these unapproved new
17 drugs and causing them to be delivered by interstate
18 commercial carriers, CATON was introducing unapproved new
19 drugs into interstate commerce.

20 As a result of the scheme, CATON received approximately
21 \$950,000. On at least two occasions known to the United
22 States, the items shipped by the defendant and utilized by
23 victims resulted in bodily injury and harm to the victim.
24 CATON shipped Cansema Tonic III and H3O via interstate
25 commerce. Cansema Tonic III was intended for use in the cure,
26 mitigation, treatment, or prevention of cancer. H3O was
27 intended for use in the cure, mitigation, treatment, or prevention
28 of athlete's foot, cuts and burns, eczema, fingernail fungus,
29 chronic gas, gastroenteritis, gingivitis and periodontal disease,
30 halitosis, herpes sores, ophthalmia, psoriasis, sore throat, strep
31 throat, and wounds. Neither drug was recognized as safe and
32 effective by qualified experts for their intended uses and
33 CATON had no approved marketing or investigational
34 applications for the drugs on file.

35 In order to facilitate the scheme, CATON and/or his wife
36 purchased buildings at two locations and a residence in Lake
37 Charles, Louisiana. The properties were purchased and/or paid

1 for with funds derived from the scheme and are subject to
2 forfeiture pursuant to law.

3 Alpha Omega Labs was operated from the offices of Lumen
4 Food Corporation located in Lake Charles, Louisiana.

5 Sentencing in federal court is governed by the United States
6 Sentencing Guidelines established by the United States
7 Congress and the United States Sentencing Commission.
8 Under U.S. Sentencing Guidelines, actual sentences are based
9 upon a formula that takes into account the severity and
10 characteristics of the offense, and a defendant's criminal
11 history, if any. Parole has been abolished in the federal system.

12 The investigation was conducted by the U.S. Food and Drug
13 Administration, Office of Criminal Investigations, New Orleans
14 Resident Office and was prosecuted by Assistant United States
15 Attorney Larry J. Regan.

16 For further information, please contact United States Attorney
17 Donald W. Washington at 337-262-6618 or First Assistant U.S.
18 Attorney Bill Flanagan at 318-676-3600.

19 We have considered the news release only to the extent that it reports
20 the views of the Department of Justice in connection with Caton's criminal
21 activity.

22 Caton was found guilty and sentenced in the Western District of
23 Louisiana.

24 Caton, apparently not satisfied with his sentence, took an appeal to the
25 U.S. Court of Appeals for the Fifth Circuit. According to the Fifth Circuit,
26 Caton was convicted of mail fraud and introduction of unapproved new
27 drugs into interstate commerce. *United States v. Caton*, 201 Fed. Appx. 213,
28 214 (5th Cir. Sept. 25, 2006). The Fifth Circuit declined to set aside Caton's
29 sentence. A petition for certiorari was denied. *Caton v. United States*,
30 127 S. Ct. 1386 (Feb. 26, 2007).

1 Presumably after serving the 33 month sentence (minus any "good
2 behavior" time credited to Caton), on 5 June 2006 Caton began serving "a
3 three year period of supervised release ..." Ex 2104, page 3:17.

4 Based on the record, we take it that Caton moved to Ecuador after his
5 release from incarceration.

6 We gather from the Caton "affidavit" that Caton was required from
7 time to time to return to the United States as a condition of his "supervised
8 release."

9 Caton attempted to convince the Western District of Louisiana for a
10 "suspension" of supervised release, apparently so he could permanently
11 relocate to Ecuador. Ex 2104, page 4:1-2.

12 According to Caton, the Western District of Louisiana set a hearing
13 date of 25 October 2007 to take up the request for "suspension." Ex 2104,
14 page 4:6-7.

15 But about that time, a medical problem said to have first come to light
16 "around April, 2004" "began to remanifest itself." Ex 2104, page 4:8-9.

17 Apart from Caton's self-serving statement, there is no independent
18 corroboration of any April 2004 medical problem.

19 According to Caton, however, in 2004 (on some unspecified date) he
20 was admitted to the hospital (not identified) because he was complaining (to
21 whom is not identified) of sharp pains in the right side in the area of the liver
22 and right kidney. Ex 2014, page 4, 9-11.

23 In October of 2007, about the time of the hearing date in the Western
24 District of Louisiana, Caton tells us that his current physician (identified as
25 Dr. Carlos Julio Tobar, M.D.) is said to have identified Caton's condition as
26 "chronic kidney infection, or nephritis." Ex 2104, page 4:12-13.

1 The Reporte Medico and the Medical Report are dated 15 October
2 2007.

3 Also included in the exhibit is an "Examen de Orina." No translation
4 of the Examen de Orina appears in the record. One member of the panel is
5 fluent in Spanish. However, business in the USPTO is conducted in
6 English. 37 C.F.R. § 41.154(b). Moreover, our decisions are made on the
7 English language record. *Cf. Fromson v. Anitec Printing Plates, Inc.*, 132
8 F.3d 1437, 1448 (Fed. Cir. 1997) (C.J. Mayer, concurring). Other members
9 of the panel, the opponent and reviewing court judges may or may not be
10 fluent in other languages, including Spanish.

11 We understand "orina" to mean urine. *Collins Spanish English*
12 *English Spanish Dictionary*, ISBN 0-00-470295-6, page 519 (3d ed. 1993).

13 "Examen de Orina" means "Urinalysis Report."

14 With respect to "proteinas" (proteins), the Examen de Orina indicates
15 "Negativo" (negative). With respect to blood content (sangre), the Examen
16 de Orina reports 250 eri/uL, although we are not told what "eri/uL" means.

17 "Affidavit" of Kenneth Michael Wright

18 Intellectual Concepts relies on an "affidavit" of Kenneth Michael
19 Wright. Ex 2105.

20 The "affidavit" is dated 5 September 2008.

21 Wright tells us that he was been asked to explain what he has learned
22 about Caton. Ex 2105, page 3/6. The "affidavit" does not have page or line
23 numbers. We refer to the "fax" page numbers at the top of pages of the
24 exhibit.

25 According to Wright, Caton began commuting to Ecuador after his
26 "release to probation in 2006." Ex 2015, page 4/6.

1 Further according to Wright, Caton "engaged counsel to file to have
2 the remainder of his probation ... terminated." Ex 2015, page 4/6.

3 At some point Caton called Wright (presumably from Ecuador) to
4 advise Wright that a doctor had advised Caton not to fly. Ex 2015, page 5/6.

5 Wright is said to have told Caton that Caton technically was in
6 violation of his probation. Ex 2105, page 5/6.

7 According to Wright, Caton told Wright that "he could not afford to
8 be arrested, since he had sold all his businesses and property here
9 [presumably Louisiana] and had completely moved to Ecuador, and
10 established a business there." Ex 2105, page 5/6.

11 "Affidavit" of Xavier Rosales-Kuri, J.D.

12 Intellectual Concepts relies on an "affidavit" of Xavier Rosales-Kuri.
13 Ex 2106.

14 Rosales-Kuri is an attorney in Ecuador. Ex 2106, page 2:1-4.

15 Rosales-Kuri asserts that false testimony and perjury are punishable
16 under the laws of Ecuador. Ex 2106, page 2:9-10.

17 Rosales-Kuri has provided an unverified translation of what he says
18 are two articles of the criminal code of Ecuador (Ex 2106, page 2:12 through
19 page 3:3):

20 Art. 354.- False testimony will be punishable if the
21 informant being either an authority or any private individual,
22 has declared, confessed or informed to any government
23 authority, in an untruthful manner; and perjury when made
24 under oath.

25 The above mentioned will apply except in case of
26 confession or signed declaration of the accused party in a

1 criminal trial, as well as with reports from authorities when
2 such may bring criminal responsibility thereto.

3 Art. 355.- False testimony will be punished with one to
4 three years of prison; and perjury, with medium-term
5 imprisonment of three to six years.

6 Rosales-Kuri goes on to say that "for these provision to take effect," a
7 procedure is available whereby upon a "U.S. Judge's order" and a lot of other
8 rigmarole a deposition might be taken before a "court clerk." "Conditions
9 such as these" would "trigger the false testimony and perjury provisions" of
10 Arts. 354 and 355 of the criminal code of Ecuador.

11 Original Spanish language versions of Arts. 354 and 355 have not
12 been supplied. Accordingly, there is no way for Zannier to verify the
13 accuracy of the translation of those two articles. Moreover, based on the
14 unverified translation we have been given, it is not altogether clear what
15 behavior is "unlawful."

16 Rosales-Kuri proffers a second alternative.

17 According to Rosales-Kuri, a videotaped deposition can be conducted
18 and the transcript can be signed by a "notary who is judicially appointed."
19 The notary apparently "would serve only to verify the identity of the person
20 signing the [deposition?] transcript." Ex 2106, page 3:11-15.

21 **D. Analysis**

22 Admissibility of the evidence

23 The evidence presented is insufficient to justify granting any relief.

24 Most of the evidence is not admissible even without an objection from
25 an opponent.

26 Without sufficient evidence to support its case, the case for granting
27 relief to Intellectual Concepts evaporates.

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1. The Caton "affidavit"

The Caton "affidavit" is not admissible because it does not contain a statement that Caton will make himself available in the United States for cross-examination. Paper 1, pages 10-11; STANDING ORDER, ¶ 157.2 (Paper 2, page 52).

We surmise that Caton's response to an objection to admissibility would be that the whole point is that Caton "cannot" come back to the United States. Accepting for the moment an allegation that Caton "cannot" come back to the United States, we are not at all confident that a prosecution for perjury would, or could, take place in Ecuador. We have not been favored with Spanish language versions of the criminal code of Ecuador or a verified translation of the relevant articles of the criminal code of Ecuador. Intellectual Concepts has failed to establish as a matter of fact that an extradition treaty exists between Ecuador and the United States with respect to perjury for testimony given in Ecuador to be used in an administrative (as opposed to judicial) proceeding in the United States. Likewise, Intellectual Concepts has failed to convince us that a violation of 18 U.S.C. § 1001 is a matter for which Ecuador would extradite a resident of Ecuador to the United States for criminal prosecution.

2. The Medical Report

The Medical Report is not admissible because Intellectual Concepts has not established that it is authentic. Moreover, the information contained in the Medical Report is hearsay.

3. The Rosales-Kuri "affidavit"

The Rosales-Kuri "affidavit" is not admissible because it does not contain a statement that Rosales-Kuri will appear in the United States for cross-examination. Paper 1, pages 10-11.

1 In addition, to the extent it purports to translate the criminal code of
2 Ecuador, it was not accompanied by Spanish language versions of that code
3 or a verified translation into English of the code. As noted earlier, failure to
4 provide a Spanish language version of the code complicates any attempt by
5 Zannier to independently verify the accuracy of the Rosales-Kuri translation.

6 4. The Wright "affidavit"

7 There are statements in the Wright "affidavit" which purport to "pass
8 on" what Caton told Wright. To the extent that Intellectual Concepts relies
9 on hearsay statements by Caton to Wright to establish the truth of those
10 statements, the Wright "affidavit" is hearsay.

11 The merits

12 Assuming the evidence is admissible, Intellectual Concepts has failed
13 to make out a case for relief.

14 1. Fear of arrest

15 Caton says he cannot come back to the United States for cross-
16 examination because he might be arrested. A short answer is "so what?"

17 Caton was convicted of criminal activity in the United States. He was
18 sentenced to 33 months in prison. We do not know whether the 33 months
19 was shorted based on "good behavior." After release, Caton was on
20 supervised release. Based on our understanding of the record, Caton is in
21 "violation" of the terms of his supervised release. We will assume, without
22 deciding, that a person violating the terms of supervised release is subject to
23 arrest.

24 The interference involves a "civil matter." Intellectual Concepts, the
25 junior party, seeks relief in this interference. As junior party, it has the
26 burden of proof. If Intellectual Concepts needs Caton's testimony to make
27 out its case, then it must obtain that testimony in the manner required by the

1 rules. The rules require cross-examination in the United States. It is true
2 that testimony may be authorized in a foreign country. *Cf. Bronshtein v.*
3 *Roser*, 61 USPQ2d 1742 (Bd. Pat. App. & Int. 2001) (involving testimony in
4 England). In this case, where Intellectual Concepts has utterly failed to
5 establish that perjury in Ecuador is (1) is a crime when the testimony is
6 given for use in a United States Executive Branch administrative tribunal
7 and (2) would be an extraditable offense to the United States, we decline to
8 exercise our discretion to authorize testimony in Ecuador.

9 The fact that Caton might be arrested upon return to the United States
10 is a side show. If the testimony is needed and Caton has a sufficient interest
11 in this civil matter, then he needs to come to the United States to testify.
12 Caton's choice to avoid arrest to forego testifying in a "civil matter" is a
13 choice he is free to make. If Intellectual Concepts cannot "force" Caton to
14 come to the United States, then it will have to make out its case without
15 Caton's testimony.

16 2. Medical condition

17 We decline, even if admissible, to give much, if any, weight to the
18 "medical condition" "evidence."

19 If the Medical Report is to be believed, then we note that it is dated
20 15 October 2007. That is eleven months ago. There is no evidence that the
21 medical condition identified in the October 2007 Medical Report has not
22 been cured or how long it normally takes to cure the condition. The Medical
23 Report does not identify precise nature of the "nephritic syndrome." Nor are
24 we told how a diagnosis of "nephritic syndrome" is consistent with a
25 "negative" "protein analysis." Likewise, we are not told the significance of a
26 250 eri/uL blood in a urine sample (nor are we told what "eri/uL" means).

1 What we do learn from the Medical Report, is that Caton needed to be
2 under "specialized medical care" for two weeks—starting presumably on
3 15 October 2007. The two weeks have come and gone. There is no credible
4 evidence in the Medical Report that would corroborate Caton's allegation
5 that he is not to fly in airplanes above 30,000 feet. Certainly Dr. Garcia does
6 not say so in the Medical Report.

7 We characterize the "story" we have been told by Intellectual
8 Concepts as somewhat "fishy." We do not believe the story. In any event,
9 we decline to credit the story thereby dooming Intellectual Concepts'
10 medical condition argument. We cannot find that Caton currently is unable
11 to travel due to a medical condition. Nor, has Intellectual Concepts
12 indicated why Caton could not fly below 30,000 feet or whether Caton can
13 fly above 30,000 for short periods of time (Ecuador to Panama City; Panama
14 City to Guatemala City; and Guatemala City to Miami).

15 This case stands in stark contrast to that involving Dr. Lee in
16 *Bronshtein v. Roser*, 61 USPQ2d 1742 (Bd. Pat. App. & Int. 2001), where
17 convincing evidence of a medical condition was presented to the Board and
18 where the opponent consented to cross-examination in England. The
19 difference in the evidence we were given in *Bronshtein* and the "evidence"
20 we were given in this case shows why an exercise of discretion sometimes
21 results in a "yes" and other times results in a "no."

22 **E. Order**

23 Upon consideration of Intellectual Concepts Motion 7, and for the
24 reasons given, it is

25 **ORDERED** that the motion is denied, unless (1) within **one (1)**
26 **week** of the date of this Memorandum Opinion and Order, Intellectual
27 Concepts files a paper with the Board indicating that Caton will appear in

- 1 the United States for cross-examination and (2) Caton timely appears in the
- 2 United States for cross-examination.

1 105,617
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3
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