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

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| Proceeding | 76293326 |
| Applicant | Prema Jyothi Light |
| Applied for Mark | SHIMMERING BALLERINAS & DANCERS |
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| Submission | Applicants Request for Remand and Amendment |
| Attachments | SHBD REQUEST FOR REMAND 03-28-13.pdf ( 14 pages )(42972 bytes ) |
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| Signature | / prema jyothi light / |
| Date | 03/28/2013 |

# In The United States Patent & Trademark Office
# For Before the Trademark Trial & Appeal Board

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| NAME OF APPLICANT: | Prema Jyothi Light |
| NAME OF TRADEMARK: | **SHIMMERING BALLERINAS & DANCERS** |
| SERIAL NUMBER: | 76293326 |
| FILING DATE OF APPLICATION: | First filed July 9, 2001<br>Later refiled July 31, 2001 |
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| DATE OF THIS REQUEST: | March 28, 2013 |
| EXAMINING ATTORNEY: | Linda Lavache, Esq., Law Office 106 |

## REQUEST FOR REMAND TO EXAMINING ATTORNEY

Applicant Prema Light hereby requests that the TTAB remand this application back to the Examining Attorney, as the Examining Attorney's issuance of a Final Action is directly in conflict with clear, time-honored provisions of the TMEP, as set forth below.

(Note: There are some differences between this document and the similar REQUEST FOR REMAND for SHIMMERING RAINFOREST.)

### 1. The Examining Attorney should have issued a <u>non-final</u> Office Action, to give Applicant Light an opportunity to respond to the Examining Attorney's reaction to New Issues, as required by TMEP § 714.03.

The Examining Attorney should have issued a <u>non-final</u> Office Action, to give Applicant Light an opportunity to respond to the New Issues which have arisen during the course of the proceedings. Failure of the Examining Attorney to issue a non-final Office Action, in response to New Issues, is in direct conflict with the clear provisions of TMEP § 714.03, which states:

> "Final action is appropriate when a clear issue has been developed between the examining attorney and the applicant, i.e., the examining attorney has previously raised all outstanding issues and the applicant has had an opportunity to respond to them."

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It is a key provision of the above-cited section of the TMEP that the applicant should be allowed to respond to all outstanding issues newly raised by the Examining Attorney.

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**2. One New Issue was the submission of a New Drawing, in Applicant's RESPONSE TO OFFICE ACTION dated 01-28-13, which depicts the color version of this Trademark, which has long been In Use in commerce. This color version has essentially the same design as the black-and-white version of the Trademark. The black calligraphy and finer print words and are in the same places in the design. This is permitted by TMEP § 807.14(e)(i).**

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The submission of the color version of her Trademark was a New Issue, and acceptance of this should have been readily granted, in accord with TMEP § 807.14(e)(i) Black-and-White Drawings, which states:

> "The amendment of a black-and-white special form drawing to one claiming a color(s) as a feature of the mark generally does not constitute a material alteration. If a mark is initially depicted in a black-and-white special form drawing in which no color is claimed, the drawing is presumed to contemplate the use of the mark in any color, **without limitation**." (*Emphasis added*.)

Yet the Examining Attorney decided that amending the Drawing to a color drawing, instead of black and-white, was a "material alteration" of the Trademark simply because the original drawing submitted was black-and-white.

On Page 2 of her Final Office Action, the Examining Attorney states, "the substitute specimen does not show use of the applied-for mark shown in the original mark drawing." However, Applicant Light IS showing the same Trademark, just in color.

The design and placement of the calligraphy and verbal elements of the two versions of the Trademark, in black-and-white and in color, are essentially the same.

As stated by TMEP § 807.14(e)(i), quoted hereinabove, the black-and-white drawing of the Trademark should be "presumed to contemplate the use of the mark in any color, without limitation."

Applicant's RESPONSE dated 01-28-13 raised a New Issue, which is that Applicant would like her Trademarks to be granted registration in color. This requires a <u>non-final</u> Office Action, to give Applicant a chance to respond to any of the Examining Attorney's objections.

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**3. This Trademark, in color, is a Unitary Mark, which in its Entirety does convey a Unitary Commercial Impression, within the meaning of TMEP § 1213.05, so no "additional search of design codes" is needed.**

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On page 4 of her Final Refusal, the Examining Attorney states that the color Trademark contains "design elements" such as "numerous white stars and yellow rays of light" which "would have required a search of additional design codes, such as 01.01.12 (more than one star with four points) and 01.15.25 (light rays)."

However, the "stars" are actually just soft sparkles, with no set number of points, and the "light rays" are soft stripes. Applicant has maintained, throughout the years that this application has been pending, that this "flag design" for her Trademark has "stripes" in it, and that the "word art" of the finer print is like small stripes in the overall design. If any "search" was ever needed for stripe elements, it would have already been done.

Applicant has previously referred to this overall design as being a little like Old Glory, and stated that removal of the finer words would be like removing stripes from our flag. She has stated in her previous pleadings that removal of the finer print would materially alter the Trademark, and that the finer print is needed for the design, and to convey the unique and Unitary Commercial Impression of this Trademark.

According to TMEP § 1213.05,

> "A mark or portion of a mark is considered "unitary" when it creates a commercial impression separate and apart from any unregistrable component. ... If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic or otherwise, is required." Therefore, this Trademark is easy to process and approve.

The Trademark conveys a Unitary Commercial Impression. All of the elements together are the Trademark. Therefore, no search of each component is needed. The sparkles, colors and stripes, and all of the calligraphy and verbal elements, all together, create a unique commercial impression. No other Trademark has all of these things, all together.

Therefore, registration of this Trademark would be easy to process and approve.

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**4. The New Drawing in color also supports a Claim for Acquired Distinctiveness under 3. Applicant's Trademarks have been in use in color, and have Acquired Distinctiveness in use in color. Acquired Distinctiveness under U.S.C. §1052(f) was a New Issue, and the color version of this Trademark is a related, yet separate, New Issue.**

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Applicant Light is also supporting a Claim for Acquired Distinctiveness, with the color version of her Trademark, supported by a showing of its use on a qualifying Specimen, a four-page leaflet which has been in use in commerce.

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**5. The New Drawing agrees with the Trademark used on the Specimen, in accord with TMEP § 807.12, 37 C.F.R. § 2.51(a), which states: "(a) In an application under section 1(a) of the Act, the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods and/or services."**

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The Specimen, which Applicant submitted in support of her RESPONSE TO OFFICE ACTION dated 01-28-13, also has this color version of her Trademark, on the back page. The Trademark on her Specimen, which was in support of her RESPONSE TO OFFICE ACTION dated 01-28-13, was her same original Trademark design but in color, instead of black-and-white, because her Trademark has been In Use in color.

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**6. On page 3 of her Final Office Action, the Examining Attorney complains that showing the Trademark in color, and asking for correction of simple typographical errors, are material alterations of the Trademark. Yet the Correction of Typographical Errors is another New Issue.**

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Further, in her RESPONSE TO OFFICE ACTION dated 01-28-13, Applicant Light requested corrections of typographical errors.

She requested corrections of typographical errors made by USPTO typists, who typed up the literal elements of the Trademark, making no less than a total of 27 ERRORS in typing up the literal elements of the two Trademarks (4 for SHIMMERING BALLERINAS & DANCERS, and 23 for SHIMMERING RAINFOREST).

At the time Applicant first submitted her applications for these Trademarks, the Applicants were not required to type up their literal elements. This requirement was added years later. The USPTO staff, not Applicant, typed up the list of literal elements which was put up online, making a huge number of errors.

Applicant Light also requested correction of a few typos made by typists working for Applicant, which had also been inadvertently overlooked.

Correcting these typos does not at all alter the commercial impression of the Trademarks. However, the Examining Attorney, who consented to correct the large multitude of USPTO typographical errors, was reluctant to allow any corrections to Applicant's typographical errors. Why? This was unfair.

Applicant didn't previously notice the typographical errors made by the USPTO because she just assumed they had done it correctly. She also made this assumption about the typists she had hired to help her. So, this didn't come up before.

When she noticed the errors made by her typists years ago, she had her typists' errors corrected on her Trademarks in use. When she recently noticed the USPTO typing errors in the literal elements of her Trademarks, in its online representation of her Trademarks, she wanted these corrected also, and requested these. Such simple typos can easily be corrected without IN ANY WAY altering the overall commercial impression of the Trademarks. Therefore, these should be done.

On page 4 of her Final Action, the Examining Attorney claims that Applicant is "changing the spelling of fanciful terms (e.g., changing CELESTINA to CELESTIALINA)."

At least she is acknowledging that all of the words in finer print ARE FANCIFUL TERMS! Thank you!

But, CELESTINA to CELESTIALINA is just a simple typographical error correction. This is in the finer print, so this correction does not in any way alter the overall commercial impression of the larger Trademark.

On page 4 of her Final Action, the Examining Attorney complains about Applicant's request to delete an entry which was inadvertently duplicated by one of Applicant's typists.

The fanciful character LACEY, THE CASCADES OF LACE BALLERINA was accidentally typed twice, in two entries, by one of Applicant's typists. Her typist typed LACEY LACERINA, THE CASCADES OF LACE BALLERINA, and also, LACEY LACERINA, THE CASCADES OF LACE BALLERINA & DANCER. So, Applicant kept the second version, deleting one "THE" so that the entry would fit into the designated space, as LACEY LACERINA, CASCADES OF LACE BALLERINA & DANCER. The overall Trademark is for BALLERINAS & DANCERS, so this is reasonable. This is a requested correction of a simple typographical error. This does not in any way change or damage the overall commercial impression of the Trademark.

The requested correction of typographical errors for DESTINA, THE INTERNATIONAL PEACE BALLERINA to BALLERINA & DANCER is a simple one, which fits into the designated space. This does not in any way change or damage the overall commercial impression of the Trademark. The typist for Applicant inadvertently left off the word DIPLOMATIC, so Applicant asked that it be added back in. However, adding & DANCER to BALLERINA so the entry reads BALLERINA & DANCER is certainly a reasonable request.

LIMINOSA to LUMINOSA is a simple one-letter typographical correction which would not alter the overall commercial impression of the Trademark, so this is a reasonable request. If you look at the Trademark itself, there is a blank space after LIMINOSA where the trailer to her name should have gone. It just got left off. This is why Applicant wanted it added back in.

Actually, NONE of the requested typographical corrections would alter the overall commercial impression of the Trademark!

Applicant is negotiable on her requests for typographical corrections, so much of this could probably be handled by a phone call with the Examining Attorney. Applicant's current email address is at the bottom of this document. She is willing to give her phone number to the Examining Attorney. Applicant is also available for a telephone appointment, where she could set up a mutually convenient time to confer with the Examining Attorney by phone.

But, Applicant believes that the Examining Attorney should be willing to agree to simple typographical corrections. The Examining Attorney is willing to correct the numerous typographical errors by USPTO typists. The USPTO made 27 clear typographical errors in typing up the literal elements for Applicant's two Trademarks combined. Typographical errors happen.

On pages 4 to 5 of her Final Office Action, the Examining Attorney states, "The examining attorney thanks the applicant for bringing these typographical errors to the Office's attention. The examining attorney has made corrections pursuant to the list of "USPTO Typographical Errors" supplied by applicant, after comparing applicant's proposed corrections with the literal elements shown in the original mark drawing."

So, the Examining Attorney should also be willing to allow corrections of at least some of the typographical errors made by typists for the Applicant.

On page 4 of her Final Action, the Examining Attorney states, "such changes significantly alter the appearance, sound and connotation of the mark. In addition, these proposed changes would require an additional search because applicant has added new terms and/or changed the spelling of old terms."

However, the Trademark is not a "sound mark", so the sound of the mark is not at issue. Corrections of typographical errors in the fine print do not in any way change the overall visual commercial impression, or visual impression, of the Trademark. These do not in any way change "the connotation" of the Trademark, which remains the same.

None of the verbal corrections requested by Applicant would require any "additional searches" of names due to spelling or word changes, because no searches have ever been done on the terms in finer print anyway. The previous Examining Attorney, Paul Gast, told Applicant over the phone that the thought of looking up all those terms "gave him heartburn", so he wasn't about to do it.

The Examining Attorney stated, on page 4 of her Final Office Action, that "the addition of any element that would require a further search will constitute a material alteration," but this does not apply to this case, as no searches were done on the fine print anyway, so there are no searches to "undo" or "change".

When a Trademark conveys a Unitary Commercial Impression, the individual elements do not need to be searched. According to TMEP § 1213.05, quoted hereinabove, "If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element,

whether descriptive, generic or otherwise, is required." You wouldn't have to do searches on all the terms.

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**7. Proposed amendments to a Drawing constitute New Issues, according to TMEP § 714.05(a), which requires non-final Office Actions with a six-month response clause.**

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The Examining Attorney said, in her Final Action, that she thought that correction of typos constituted a material alteration to the drawing of the Trademark. However, TMEP § 714.05(a) states:

> "If the applicant submits an amendment that is not offered in response to a refusal or requirement, and the amendment is not acceptable, the examining attorney generally must issue a new nonfinal action with a six-month response clause, addressing the issues raised by the amendment and continuing all other refusals and requirements. The following are examples of amendments that would require a new nonfinal action: (1) Amendments to the drawing, unless the examining attorney had previously required that the drawing be amended or the amendment is acceptable and does not raise other issues."

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**8. Any new proposed amendments to a Drawing must each be considered on its own merits. Such amendments are individual, and cannot be all lumped together, especially if they are separated by long distances of time.**

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On page 3 of her Final Action, the Examining Attorney stated that "the proposed amended drawing submitted on January 28, 2013 does not create a new issue because the acceptability of proposed amendments to the drawing was already at issue."

Applicant respectfully disagrees. Each proposed amendment to a drawing has to be considered separately, on its own merit. Rejection of earlier proposed amendments to the drawing has absolutely nothing to do with the new Drawing submitted on 01-28-13. This is a completely different proposed Drawing.

This is not the radial version of the Drawing. This is new Drawing with the same design as the original Drawing, but in color, with some background colors. It also supports the Claim of Acquired Distinctiveness. It is different from other proposed Amendments to the Drawing, and is therefore clearly a New Issue.

Again, if the Examining Attorney was responding to a New Issue, she should have issued a non-final Office Action, giving Applicant a chance to respond to her views on this. In the light of TMEP § 714.03, quoted hereinabove, it is an error to fail to issue a non-final Office Action with a six-month response time, for any New Issues, to give an Applicant a chance to respond to any objections of an Examining Attorney.

## 9. The Specimen submitted for this Trademark is definitely NOT A PRINTER'S PROOF!

On page 2 of her Final Action, the Examining Attorney states, "the substitute specimen appears to be a printer's proof of a leaflet, as shown by the printer's lines and the notation "[Center Spread (below)]." These are NOT printer's lines.

This rectangle, with inner boxes, was created specifically by Applicant for this TEAS Specimen filing, to show all 4 pages and their relationship to one another, on one page. This is absolutely NOT a printer's proof. Applicant prints her own publications and has <u>no need of printer's proofs</u>.

Applicant submitted the four-page leaflet on one page in order to be sure that the four pages were all kept together for the TEAS filing. This is due to past repeated flagrant mishandling of her paperwork by staff members at the USPTO.

Distressingly, the past handling of Applicant's paperwork by the USPTO seems to have been flagrantly dishonest on numerous occasions. USPTO staff has claimed that attachments were not attached, when they were verifiably attaches, as supported by "screen captures" taken at every stage of the TEAS and TTAB electronic submission processes. Someone on the USPTO staff has "ditched" entire attachments, and apparently "lost" boxes of paper specimens. How could this happen? They have also apparently deliberately done bad reproductions of documents and specimens for the online files.

So, Applicant Light wanted to be sure that all four pages of her leaflets were kept together so that none of them got "lost". This is why she decided to put all four pages together into a single document. She is used to printing publications, so placing them "4 up" seems normal to her.

However, these portrayals of her leaflets are **<u>NOT</u>** "printer's proofs". There is nothing she has ever read, on the USPTO website, that tells the Applicants not to put pages together into one document, or not to place several pages on a single page.

This was an attempt to weld all four pages of each leaflet together onto one page for the online TEAS filings.

Also, the middle two pages of each leaflet are a centerfold, meaning that the two pages together have a combined measurement of 11x17, though the leaflet, in distribution, is 8.5x11 in size.

Reducing the all the pages so that they fit on one 8.5x11 pages makes the leaflet easier to reproduce for the online records, without mess-ups, and easy to print out on normal paper for review.

This also reduces the chances that staff at the USPTO will skew the pages, or get them out of order. Applicant wanted to make it clear that the Trademark, In Use, appears on the back pages of the leaflets.

Also, Applicant had to remain within the very small file size permitted for TEAS filings. An 11x17 color page would have been too big a file size to send via TEAS. She had to reduce it to a much smaller size to comply with TEAS filing requirements.

Hopefully, this explanation clarifies the format which Applicant used for the Specimens. Applicant could easily supply the Examining Attorney with the leaflet in a different format, if this is desired or necessary.

But, the Specimens are actual leaflets which are in use in commerce.

Any questions about this could be cleared up by a simple phone call.

The Examining Attorney's speculation that the Specimen leaflets might be "printer's proofs" was an incorrect guess. Applicant was just trying to file all of the pages for each leaflet together as a single page, for the reasons hereinabove stated.

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**10. The use of the Trademarks on these leaflets clearly shows that the Trademarks do function as Trademarks on the Specimens. This should be clear.**

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The Examining Attorney also states, on page 2 of her Final Office Action, that consumers are unlikely to view the entire Trademark as a Trademark.

However, the entire Trademark is bounded by a black box, with a unique design and an overall commercial impression, and the whole thing is referred to in the paragraph below the Trademark, as a Trademark.

The consumers do view the entire Trademark as a Trademark. The entire Trademark does clearly function as a Trademark, with a uniform, unique, unitary, and easily recognizable commercial impression, as a Source Indicator for Applicant's goods.

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**11. In contradistinction to the views expressed by the Examining Attorney on page 2 of her Final Office Action, the TMEP § 1212.05, now provides for a showing of Acquired Distinctiveness based on just five years use up to the date the claim is made, even if the application was filed earlier.**

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The Examining Attorney stated, on page 2 of her Final Office Action, that the Specimen's copyright date was 2004, instead of being dated prior to the original submission date of the original application in 2001.

Applicant would like to call the Examining Attorney's attention to the newer provisions of TMEP § 1212.05, which states:

> "The Trademark Act previously required that the relevant five-year period precede the filing date of the application. The Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988), revised §2(f) of the Act to provide for a prima facie showing of acquired distinctiveness based on five years' use running up to the date the claim is made. Under the revised provision, any five-year claim submitted on or after November 16, 1989, is subject to the new time period. This applies even if the application was filed prior to that date."

Applicant Light did explain this on page 7 of her RESPONSE TO OFFICE ACTION dated 01-28-13.

Specimens submitted in support of any claim of Acquired Distinctiveness are supposed to be based on "five years use running up to the date the claim is made", "even if the application was filed prior to that date." Applicant's claim of Acquired Distinctiveness was made in 2009; this is why she sent in a Specimen dated in 2004.

Applicant has Specimens with earlier copyright dates, but these are not "on point" in support of this claim of Acquired Distinctiveness.

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**12. On page 2 of her Final Office Action, the Examining Attorney states that "this amended version of the "mark" is used on the back cover of a leaflet similar to the manner in which the applied-for mark is used on other specimens already in the record." However, Applicant respectfully disagrees.**

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This Specimen shows the Trademark, In Use, on the back cover of the publications, with a welcoming explanatory message to the consumers of Applicant's goods. This is in harmony with time-honored publishing traditions in the usage of Trademarks on publications. Thousands of publishers place their Trademarks on the back covers of their publications. Consumers know to look for Trademarks there, and they do view what they see there as a Trademark, especially if this is pointed out to them by the publisher.

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**13. If TTAB judges try to view recent documents for this case on the USPTO's TSDR online, they will encounter a shockingly bad job, on the part of USPTO employees, in uploading and "converting" Applicant's documents and images.**

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Some flagrantly bad misconduct on the part of some USPTO employees has taken place with this. This needs to be corrected so that the Examining Attorney and TTAB judges can properly read the documents, and properly evaluate the images of the Drawing Pages and Specimens. Applicant requests an immediate investigation into this misconduct.

Applicant Light has taken great care in preparing her documents and images. The documents are not prepared on a typewriter. All are done on state-of-the-art computers with excellent software. The word documents all have type that is crisp, dark and easily readable. The image documents, done in Photoshop, have perfect color, and the verbal elements are all easily readable. The jpgs and pdfs are done in state-of-the-art Adobe Acrobat. The quality of documents on Applicant's end is excellent, and these have been properly uploaded into TEAS.

But, there appears to have been some deliberate, malicious interference with Applicant's documents on the part of an employee or employees at the USPTO, on your end. Applicant requests an immediate investigation into this misconduct. Please determine who was on duty when these truly botched-up "conversions" of these documents were done.

Why would anyone do this? Perhaps they are friends with some of the people who have been wrongfully plagiarizing Applicant Light's creative works. You don't know what is going on with people's personal lives. But, they are not supposed to commit shocking breach of trust on the job. The United States Patent & Trademark Office is supposed to be better than this.

Specifically, the word documents as they appear in TSDR have been maladjusted so that the type appears light, broken up and almost unreadable. Someone has deliberately maladjusted the documents. This is true, most recently, of Applicant's RESPONSE TO OFFICE ACTION & PETITION TO REVIVE.

Applicant's images have been badly interfered with. The images, of the Drawing Pages and Specimens, for both SHIMMERING BALLERINAS & DANCERS, and SHIMMERING RAINFOREST, have been maladjusted by someone so that they are fuzzy, the color is glaringly overexposed, and the "conversions" of the Specimens have been so badly tinkered with, by your employees, that the words on the Specimens are completely illegible.

For SHIMMERING BALLERINAS, the Specimen was uploaded by your employees and "converted" into TSDR <u>three times</u> on February 06, 2013. There is no reason for them to do this three times. The Specimen was only sent by Applicant once. The images are fuzzy and have been deliberately maladjusted by someone until the type is illegible.

Whoever has placed these into TSDR three times may be planning to delete two and leave the worst. One "upload/conversion" of the Specimen is totally messed up in every way – bizarre color, and pages chopped off on the sides, with the right side of the page on the left, and the left side of the page on the right. On the other two "upload/conversions", the color is a little better, but overexposed until the words on the specimens are completely illegible.

The images, as sent by Applicant, are crisp and readable, and the color is perfect. The pdfs sent by Applicant are not at all fuzzy, overexposed, or illegible.

If either the Examining Attorney or the TTAB judges are viewing these images to make evaluations for this case, it would be impossible to properly evaluate the Drawing Pages or Specimens, from the extremely botched up quality of these "converted" pdfs and jpgs.

Someone on the USPTO staff has completely wrecked Applicant's images, probably to try to "throw" the cases. This is breach of trust on the job. This is in need of immediate supervisory attention. The TTAB judges need to be aware of this, and hopefully make a phone call to a supervisor. Ideally, a specific person should be assigned to this who can be held accountable for the quality of the "converted" images, which need to be redone.

These have to be completely redone so that the words on the Specimens and Drawing Pages are readable. Applicant can resend the images, but if the same people handle them, the people will deliberately wreck the images again. This should be grounds for dismissal.

The Examining Attorney and TTAB Judges need to be able to read the words on the Specimens, especially the back pages of the Specimens. What can be done to correct this problem on your end? Thank you for kindly looking into this.

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## 14. Conclusions.

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It is Applicant's view that a non-final Office Action should have been issued, in response to the New Issues raised in Applicant's RESPONSE TO OFFICE ACTION dated 01-28-13, for the reasons hereinabove stated, so that Applicant has an opportunity to respond to any of the Examining Attorney's objections and observations.

As you can see, there are still some unresolved New Issues which need to be resolved by the Examining Attorney and the Applicant, to a greater degree of finish, before the cases can properly go to the TTAB judges for their full review.

**WHEREFORE**, for the reasons cited hereinabove, and in accord with TMEP § 714.03, Applicant Light respectfully requests a Remand of her Trademark applications, for both SHIMMERING BALLERINAS & DANCERS and SHIMMERING RAINFOREST, from the TTAAB back to the Examining Attorney, for non-final Office Actions with a six-month response clause.

Dated: March 28, 2013

Respectfully submitted,

*/ Prema Jyothi Light /*

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