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02-07-2003
U.S. Patent & TMOfo/TM Mail Rcpt Dt. #7C

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

PIONEER KABUSHIKI KAISHA dba)
PIONEER CORPORATION,)

Opposer,)

vs.)

NISSEI SANGYO AMERICA, LTD.)

Applicant.)

_____)

Opposition No.: 125,458
Mark: SUPERSCAN ELITE
Serial No.: 76/208230
Published: March 19, 2002

**OPPOSER'S REPLY BRIEF IN RESPONSE
TO OPPOSITION TO MOTION TO COMPEL**

Assistant Commissioner For Trademarks
Box TTAB-No Fee
2900 Crystal Drive
Arlington, Virginia 22202-3513

1 1991) (reply brief allowed by Board on motion to dismiss where
2 opposition alleged new constructive use argument); *DataNational*
3 *Corp. v. BellSouth Corp.*, 18 USPQ2d 1862 (TTAB 1991) (reply brief
4 considered by Board in summary judgment motion). Thus, the Board
5 is urged to consider Opposer's reply brief based upon the
6 allegations made in Applicant's opposition to the motion to
7 compel.

8 II.

9 ARGUMENT

10 OPPOSER, AS RECENTLY AS JANUARY 20, 2003 DISCOVERED IMPORTANT
11 INFORMATION BEARING ON THE DISPOSITION OF THIS MOTION TO COMPEL

12 In Applicant's brief in opposition to this motion to compel,
13 Applicant stated that this motion is moot because it no longer has
14 the requested documents or information. (Applicant's Reply Brief,
15 p. 2). Applicant further stated that it had performed an
16 investigation and determined that the information sought had
17 purportedly been divested to Hitachi America, Ltd., including
18 "personnel and all of the records of the prior business relating
19 to computer monitors." (Applicant's Reply Brief, p. 2).

20 On January 20, 2003, counsel for Pioneer, Robert James
21 Skousen, received a letter from William McGrath, counsel for HHTA.
22 Mr. McGrath stated in that letter that HHTA had found some
23 documents and also received a shipment of documents possibly
24 relating to SuperScan and SuperScan Elite monitors by Nissei
25 Sangyo America, Ltd., HHTA's predecessor in interest. Mr. McGrath
26 also acknowledged that there are approximately 400 boxes of
27 information. *Skousen Decl. Ex. "A"*.

28 Based on this letter, it is clear that the circumstances have
changed dramatically since HHTA filed its opposition to the motion

1 to compel further responses to written discovery on November 14,
2 2003. Further, it is now clear that the motion to compel is not
3 moot based on these findings by HHTA.

4 On January 24, 2003, at the request of Mr. McGrath, counsel
5 for Pioneer sent an additional letter outlining the reasons why
6 the written interrogatory and demand for production responses
7 needed to be supplemented. Pioneer did so in an effort to
8 informally resolve these outstanding discovery issues in this
9 matter. *Skousen Decl. Ex. B.*

10 On January 27, 2003, counsel for Pioneer received a letter
11 from Mr. McGrath stating that he would review the initial
12 responses and determine if any supplements were necessary.
13 *Skousen Decl. Ex. C.* As of the submission of this reply brief,
14 counsel for Pioneer has not received a written response or
15 supplemental responses to the either the written interrogatories
16 or the demand for production.

17 **III.**

18 **CONCLUSION**

19 Based on the foregoing facts, arguments, and points of law,
20 Opposer Pioneer respectfully urges the Board to accept and
21 consider the contents of this reply brief. The circumstances
22 regarding the outstanding discovery in this case have changed such
23 that documents in the possession and control of HHTA have now
24 become available. For these reasons, Pioneer submits that this
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1 motion is not moot and that the Board should grant this motion and
2 order Applicant to provide further responses to the requested
3 discovery.

4 DATED: February 5, 2003

5 SKOUSEN & SKOUSEN
6 A Professional Corporation

7
8 By: 
9 Robert James Skousen

10 Skousen & Skousen
11 A Professional Corporation
12 12400 Wilshire Blvd., Suite 900
13 Los Angeles, CA 90025-1060
14 Telephone: 310-277-0444
15 Facsimile: 310-782-9579

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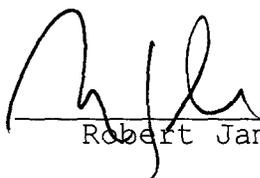
Skousen & Skousen.

B. January 24, 2003 letter from Robert James Skousen to William McGrath.

C. January 27, 2003 letter from William McGrath to Robert James Skousen.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 5th day of February 2003.



Robert James Skousen

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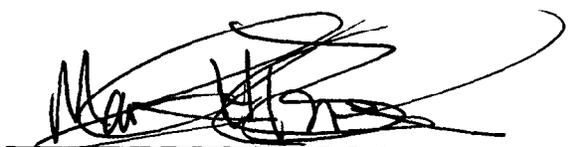
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Mark H. Bush

CERTIFICATE OF MAILING BY FIRST CLASS MAIL

I hereby certify that the foregoing OPPOSER'S REPLY BRIEF IN RESPONSE TO OPPOSITION TO MOTION TO COMPEL is being deposited with the United States Postal Service, first class postage prepaid, in an envelope addressed to William T. McGrath, Esq., Davis, Mannix & McGrath, 125 South Wacker Drive, Suite 1700, Chicago, Illinois 60606.


Mark H. Bush

DAVIS, MANNIX & McGRATH

ATTORNEYS AT LAW

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(312) 332-3033

WILLIAM T. McGRATH
(312) 332-4748

January 20, 2003

FAX (312) 332-6376
WMcGRATH@DMMLAW.COM

Via Fax - 310/782-9579
and U.S. Mail

Robert James Skousen
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12400 Wilshire Boulevard
Suite 900
Los Angeles, CA 90025-1060



02-07-2003

U.S. Patent & TMOtc/TM Mail Ropt Dt. #7C

Re: Pioneer Corp. v. Hitachi High
Technologies America, Inc.
Opposition No. 125,458

Dear Mr. Skousen:

As I mentioned to you in our telephone conversation on January 15, 2003, I am not available for the deposition of Hitachi America Limited on January 30, 2003. I would be available the following day or any day the following week. I understand that you will contact Mr. Turner to try to arrange a mutually agreeable alternative date for the deposition.

To clarify concerning the existence of documents which may be responsive to some of your document production requests, Hitachi High Technologies America, Inc. has found some documents and has received a shipment of documents which may relate to sales of Superscan and Superscan Elite monitors by Nissei Sangyo America, Ltd. To the best of my knowledge there are approximately 400 storage boxes, some of which may be totally unrelated to sales information.

Your January 15, 2003 letter states that our responses to certain interrogatories and document requests were incorrect. I would appreciate it if you would identify which interrogatories and document requests are incorrect and why you think they are incorrect. If the responses are incorrect and if the requests are not objectionable, we will supplement our prior answers.

Very truly yours,

DAVIS, MANNIX & McGRATH

William T. McGrath

WTM:ph

cc: S. Snoke

DAVIS, MANNIX & MCGRATH

ATTORNEYS AND COUNSELORS
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FACSIMILE TRANSMITTAL SHEET

January 20, 2003

To: Robert James Skousen Fax No.: 310/782-9579
Re: Pioneer Corp. v. Hitachi High
Technologies America, Inc.
Opposition No. 125,458
From: William T. McGrath
Sender's Direct No.: (312) 332-4748

COMMENTS:

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02-07-2003

U.S. Patent & TMOfr/TM Mail Rcpt Dt. #7C

January 24, 2003

Via Facsimile (312) 332-6376 & U.S. Mail

William T. McGrath, Esq.
Davis, Mannix & McGrath
125 South Wacker Drive, Suite 1700
Chicago, Illinois 60606-4402

RE: Pioneer Corp. v. Hitachi High Technologies America, Inc.
Opposition Number 125,458
Production of Documents and Interrogatories

Dear Mr. McGrath:

I am receipt of your letter dated January 20, 2003 regarding the 400 storage boxes of documents recently received by your client. In light of your statement during our January 15, 2003 telephone conversation and considering the storage boxes you mentioned in yesterday's letter, it seems clear that certain interrogatory and document production responses are now inaccurate. I will detail the reasons for these deficiencies below.

Interrogatory Responses 4, 6, 40, 41, 42, 43, 49, and 50

Numbers 4 & 6—This interrogatory asks you to identify the date upon which Hitachi first began using the SuperScan Elite mark on televisions. The response states that the “The Applicant has not used the subject mark in connection with televisions.” Based on the representations made during the video conference, this answer is incorrect and should be amended accordingly. A supplemental response to this interrogatory necessarily implicates and requires a supplemental response to Number 6 which asks for the total number of units sold bearing the SuperScan Elite mark as requested in Number 4.

Number 40—This interrogatory response was the subject of a letter to Susan Somers Neal dated September 25, 2003 and is also the subject of our motion to compel a further response which has yet to be decided by the Board. Number 40 asked your client to state the name of all products upon which the SuperScan Elite mark appears that are not listed in the SuperScan Elite application. The response given states that the Applicant has only used the mark in connection with computer monitors. Obviously, the use of the mark in connection with televisions makes

William T. McGrath, Esq.
January 24, 2003
Page 2

this response incorrect, and on this basis alone requires supplementation.

The response further asserts an objection that the goods covered in the prior registration are not at issue in this dispute and, even though your client may rely upon the prior use, such information is not discoverable. I point out that TTAB case law is clear that a party can be compelled to provide discovery with respect to any of its marks and goods and/or services that are not involved in the proceeding so long as there is a showing of relevance. Significantly, information concerning a party's first use of its involved mark is discoverable. *See Georgia-Pacific Corp. v. Great Plains Bag Co.*, 190 U.S.P.Q. 193, (TTAB 1975) (interrogatory requesting date when cancellation petitioner's plants began producing goods bearing mark and seeking identity of all documents that petitioner will rely on to establish that any plant began such production prior to respondent's alleged first date of use seeks discoverable information).

Moreover, information regarding your client's prior registration is relevant because expansion from computer monitors into televisions, plasma displays, and flat panel displays is within the reasonable zone of expansion. This "zone of expansion" element has long been established as an important factor in likelihood of confusion analysis and is also held as important for TTAB opposition proceedings. *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (channels of trade/zone of expansion held as one of thirteen factors to be considered by the TTAB). I would also be remiss in not pointing out Ms. Neal's correspondence to us dated October 28, 2002 in which she agreed, on behalf of your client, to provide supplemental responses related to Hitachi's use of SuperScan Elite in connection with computer monitors. Accordingly, a supplemental response removing the objection to this interrogatory is in order.

Number 41—This interrogatory asked you to state the total number of units sold bearing the SuperScan Elite mark. The response to this interrogatory was exactly the same as the response to Number 40. Three items support the need for a supplemental response: (1) Based on the representations made at the video conference, the statement that SuperScan Elite has only been used on computer monitors is incorrect; it has been used on 13" televisions as well; (2) Ms. Neal's October 28, 2002 letter that the responses would be supplemented together with your opposition to our motion to compel stating that all documents rested with Hitachi America, Ltd.; and (3) your recent discovery of many boxes of information possibly relating to sales information for SuperScan and SuperScan Elite. Each of these items, together with the authority cited above, support the argument that the response to this interrogatory should be supplemented.

Number 42—This interrogatory asks you to state the total number of dollars produced by the sale of all products bearing the SuperScan Elite mark. The response to this interrogatory was exactly the same as the response to Numbers 40 and 41. The justifications listed above are applicable to this interrogatory as well. Based on the case law above, we do not believe that the specific

William T. McGrath, Esq.
January 24, 2003
Page 3

objection to this interrogatory is well taken. Moreover, due to your recent discovery of additional documents and information, a supplemental response demonstrating sales is appropriate.

Number 43—Number 43 asked for the identification of each type of advertising media used in support of SuperScan Elite. The response is exactly the same as the response to Numbers 40 and 41. As with 40 through 42, the objection asserted is inappropriate and your recent discovery of new documents and information possibly relating to SuperScan Elite warrants a supplemental response to this interrogatory.

Number 49—This interrogatory asked for the total number of computer monitors sold bearing the SuperScan Elite mark. Once again, the response is exactly the same as numbers 40 through 43. Considering your recent discovery of documents, this interrogatory can certainly be answered with a more substantive response. Moreover, your office's statement in opposition to our motion to compel that no information was available have since been proven wrong. A supplemental response, therefore, is in order.

Number 50—This interrogatory asked for the total number of televisions sold bearing the SuperScan Elite mark. The response is exactly the same as numbers 40 through 43 and 49. Considering your recent discovery of documents, this interrogatory can certainly be answered with a more substantive response. Moreover, the statements made during the video conference that SuperScan Elite has been used on 13" televisions also supports a supplemental answer to this interrogatory.

Production Demand Categories 1, 14, 15, 16 and 17

Number 1—This production category asked for sample packaging (or photos, prototypes, etc.) of the use of SuperScan Elite on televisions. Based upon the representations made during the video conference, together with the discovery several hundred boxes of documents, this written should be supplemented together with a production of documents responsive thereto.

Number 14—This production category requested any and all documents (packaging, photos, prototypes, etc.) of Hitachi's use of SuperScan Elite on computer monitors. The written response included the same objection as the objection in response to interrogatories 40 through 43 and 50. In light of your client's recent discovery of documents pertaining to Hitachi's use of SuperScan Elite on computer monitors, this production demand category should be supplemented with a written response and an accompanying document production. Moreover, the assertion in your opposition to our motion to compel that no documents were under your client's control has now proven to be inaccurate.

To the extent you intend to rely on the objection asserted in the original written response,

William T. McGrath, Esq.
January 24, 2003
Page 4

Federal Rules of Civil Procedure and Trademark Trials and Appeals Board (TTAB) case law allow for wide latitude in discovery. Specifically, Rule 26(b)(1) states, in pertinent part:

Parties may obtain discovery regarding *any matter*, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense...The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis Added.]

Fed. R. Civ. P. 26(b)(1). Although an objection has been asserted with respect to relevance and admissibility of any information having to do with your prior SuperScan Elite registration, TTAB case law is clear that a party can be compelled to provide discovery with respect to those of its marks and goods and/or services which are not involved in the proceeding so long as there is a showing of relevance. See *TBC Corp. v. Grand Prix, Ltd.*, 16 U.S.P.Q.2d 1399 (TTAB 1990); *Johnston Pump/General Valve Inc. v. Chromalloy Am. Corp.*, 10 U.S.P.Q.2d 1671 (TTAB 1988); *Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147 (TTAB 1985).

It is clear, then, that information regarding your client's prior registration is relevant because expansion from computer monitors into televisions, plasma displays, and flat panel displays is within the reasonable zone of expansion. *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (channels of trade/zone of expansion held as one of thirteen factors to be considered by the TTAB). Your written response should, therefore, be supplemented together with a corresponding document production.

Number 15—Category 15 asked you to produce documents evidencing sales totals for all products upon which the SuperScan Elite mark appears. Your response states that the mark has only been used on computer monitors and then asserts the same objection as the objection stated in category 14. In light of your client's recent discovery of documents pertaining to Hitachi's use of SuperScan Elite on computer monitors, this production demand category should be supplemented with a written response and an accompanying document production. Moreover, the assertion in your opposition to our motion to compel that no documents were under your client's control has now proven to be inaccurate. These documents should, therefore, be produced.

Number 16—This production category asked for all documents evidencing the number of units sold bearing the SuperScan Elite mark. Your response states that the mark has only been used on computer monitors and then asserts the same objection as the objection stated in categories 14 and 15. In light of your client's recent discovery of documents pertaining to Hitachi's use of SuperScan Elite on computer monitors, this production demand category should be supplemented with a written response and a corresponding document production. These documents should,

William T. McGrath, Esq.
January 24, 2003
Page 5

therefore, be produced.

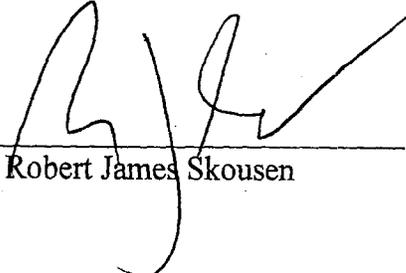
Number 17—This category requested all documents evidencing the amount of money spent in advertising in support of the SuperScan Elite mark. Once again, your response states that the mark has only been used on computer monitors and then asserts the same objection as the objection stated in categories 14, 15, and 16. In light of your client's recent discovery of documents pertaining to Hitachi's use of SuperScan Elite on computer monitors, this production demand category should be supplemented with a written response and an accompanying document production. Moreover, the assertion in your opposition to our motion to compel that no documents were under your client's control has now proven to be inaccurate. These documents should, therefore, be produced.

In reviewing the interrogatories and document production, I noticed that several of the items requested might be considered confidential documents by your client. My client has also expressed some concern, going forward, with respect to revealing certain confidential information with respect to sales and advertising information. To that end, my office is preparing a stipulated protective for the purpose of addressing our clients' mutual concerns. If you have any questions or comments, please do not hesitate to contact me directly.

Very Truly Yours,

SKOUSEN & SKOUSEN
A Professional Corporation

By:


Robert James Skousen

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FACSIMILE TRANSMITTAL

DATE: January 24, 2003
TO: Bill McGrath, Esq.
Davis, Mannix, & McGrath
FAX NO: (312) 332-4748
FROM: Skousen & Skousen
RE: Pioneer Corp. v. Nissei Sangyo America, Ltd.

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DAVIS, MANNIX & McGRATH
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WILLIAM T. McGRATH
(312) 332-4748

January 27, 2003

FAX (312) 332-6376
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Via Fax - 310/782-9579
and U.S. Mail

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02-07-2003

U.S. Patent & TMO/ct/TM Mail Rpt Dt. #7C

Re: Pioneer Corp. v. Hitachi High
Technologies America, Inc.
Opposition No. 125,458

Dear Mr. Skousen:

I have received your letter dated January 24, 2003 regarding document production and interrogatories. I will review our responses to determine whether any revisions are necessary. However, I do want to bring to your attention right away a misunderstanding on your part. No one for Hitachi made the statement during the video conference that "Superscan Elite" has been used on 13" televisions. Only the mark "Superscan" has been used on 13" televisions. As I have previously indicated to you, "Superscan Elite" has not yet been used on televisions.

Also, please let me know if the protective order I faxed to you on January 23, 2003 is acceptable.

Very truly yours,

DAVIS, MANNIX & McGRATH

William T. McGrath

WTM:ph

cc: S. Snoke

DAVIS, MANNIX & MCGRATH

ATTORNEYS AND COUNSELORS
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FACSIMILE TRANSMITTAL SHEET

January 27, 2003

To: Robert James Skousen Fax No.: 310/782-9579
Re: Pioneer Corp. v. Hitachi High
Technologies America, Inc.
Opposition No. 125,458
From: William T. McGrath
Sender's Direct No.: (312) 332-4748

COMMENTS: See enclosed letter.

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02-07-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #70

February 5, 2003

Commissioner For Trademarks
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Arlington, Virginia 22202-3513

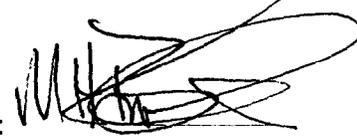
RE: Pioneer Corp. v. Nissei Sangyo America, Ltd.
Opposition No. 125,458
Submission of Reply Brief

Dear Sir or Madam:

I am enclosing the following documents: (1) Opposer's Reply Brief In Response To Opposition To Motion To Compel; and (2) A stamped postcard for confirmation of receipt of this correspondence. If you have any questions or comments, please do not hesitate to contact me directly.

Very Truly Yours,

SKOUSEN & SKOUSEN
A Professional Corporation

By: 
Mark H. Bush
Law Clerk

02/05/03 13:00:00

DD