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

Proceeding	91164764
Party	Defendant The Brinkmann Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Brink's Network, Incorporated,	)	
	)	Opposition No. 91164764
Opposer,	)	
	)	Serial No. 76/483,115
v.	)	
	)	Filed: January 17, 2003
The Brinkmann Corporation,	)	
	)	Mark: BRINKMANN
Applicant.	)	
	)	Published: October 5, 2004

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**APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR  
RECONSIDERATION OF THE APRIL 2, 2007 BOARD ORDER**

**I.**

**INTRODUCTION**

Opposer, Brink's Network, Inc., has moved the Trademark Trial and Appeal Board to reconsider the Board's April 2, 2007 Order granting Applicant The Brinkmann Corporation's motion to compel and ordering Opposer to respond to Applicant's Amended First Set of Interrogatories without objection. Opposer has also requested that the Board resume these proceedings.

Pursuant to 37 C.F.R. § 2.127(a), Brinkmann responds by asking the Board to deny Opposer's motion for reconsideration. The relief sought by Opposer is unwarranted. Brinkmann joins Opposer's request to resume these proceedings and requests that the Board reset the discovery and testimony periods.

**II.**  
**FACTUAL BACKGROUND**

Applicant filed an application on January 17, 2003 for the mark BRINKMANN, Serial No. 76/483,115, in connection with a wide variety of goods, including motion sensitive home security lights and related components in International Class 9. The application was published for opposition on October 5, 2004.

Opposer filed a notice of opposition on April 1, 2005 against Applicant's Application Serial No. 76/483,115, for those goods in International Class 9, and Applicant answered the notice of opposition on May 13, 2005.

Opposer served a First Set of Interrogatories and a First Set of Requests for Production of Documents and Things on Applicant on September 6, 2005, and subsequently served a Notice of Taking Discovery Deposition on September 19, 2005.

In turn, Applicant served a First Set of Interrogatories on Opposer on September 22, 2005.

In response to Applicant's First Set of Interrogatories, Opposer served a General Objection on October 24, 2005, refusing to respond on the ground that the interrogatories, counting subparts, allegedly exceeded seventy-five (75) in number.

Opposer then filed a Motion to Compel Discovery on December 8, 2005, approximately two weeks before the discovery cut-off date of December 21, 2005, claiming that Applicant was required to produce discovery in response to the discovery requests that Opposer served in September 2005.

The Board suspended these proceedings on March 9, 2006 pending a decision on Opposer's Motion to Compel. On December 12, 2006, the Board issued an Order ruling on

Opposer's Motion and resumed these proceedings. The Board set a discovery cut-off date of February 15, 2007.

Upon resumption of these proceedings, Applicant served an Amended First Set of Interrogatories on Applicant on December 13, 2006. Applicant also produced documents to Opposer and provided Opposer with dates in January and February when Applicant's witness under FED. R. CIV. P. 30(b)(6) would be available for deposition.

Opposer served another General Objection to Applicant's Amended First Set of Interrogatories and First of Interrogatories on January 11, 2007, asserting that the total number of interrogatories in both the First Set of Interrogatories and the Amended First Set of Interrogatories exceeded seventy-five (75) in number. Without citing to any rules or regulations, Opposer also asserted that Applicant was precluded from serving discovery, because the Board's Order "did not contemplate giving Applicant a second chance at serving discovery."

Applicant served a Notice of Taking Deposition of Brink's Network under FED. R. CIV. P. 30(b)(6) on January 16, 2007, designating as matters for discussion those topics generally contained in the First Set of Interrogatories and Amended First Set of Interrogatories. The deposition was noticed for January 31, 2007.

Applicant also served a Subpoena on Opposer's trademark survey expert, R L Associates, on January 17, 2007. The subpoena requested R L Associates' production of documents under FED. R. CIV. P. 30(b)(6) on January 31, 2007 and the appearance of R L Associates in a deposition under FED. R. CIV. P. 30(b)(6) on February 14, 2007.

On January 19, 2007, Applicant and Opposer's counsel met and conferred by telephone to discuss Opposer's objection to responding to Applicant's Amended First Set of Interrogatories. Counsel for Opposer stated that Applicant's First of Interrogatories, including subparts, allegedly exceeded seventy-five (75) in number, and that Applicant should have filed a

motion to compel or contacted Opposer to “discuss” the interrogatories, rather than serving the Amended First Set of Interrogatories. Counsel for Applicant asked whether, leaving aside the issue of proper procedure, Opposer would simply consent to service of the Amended First Set of Interrogatories so that the parties could avoid the time and expense involved in another motion to compel discovery. Opposer’s counsel refused, stating that Applicant would have to file a motion to compel and obtain an order from the Board for Brink’s Network to respond.

In view of Opposer’s refusal to cooperate and provide any interrogatory responses, Applicant filed its motion to compel Opposer’s responses to Applicant’s Amended First Set of Interrogatories on February 2, 2007. Applicant also was left no choice but to cancel the deposition of Brink’s Network under FED. R. CIV. P. 30(b)(6) with the express intent of re-noticing the deposition following disposition of Applicant’s motion to compel.

Opposer was scheduled to take the deposition of Applicant under FED. R. CIV. P. 30(b)(6) in February and Applicant was scheduled to take the deposition of Opposer’s trademark survey expert R L Associates in February. Because the parties were entering into settlement discussions and because the available dates for the scheduled depositions fell outside the discovery cut-off date, the parties filed a joint motion on February 9, 2007 to extend the discovery period by thirty days from February 15, 2007 up to and including March 17, 2007. Opposer subsequently took the deposition of Applicant, but Applicant was forced to cancel the deposition of R L Associates because R L Associates refused to produce certain documents requested by Applicant in its subpoena.

The parties subsequently filed a joint motion on March 15, 2007 to suspend the proceedings while the parties continued settlement discussions.

On April 2, 2007, the Board issued an Order that acknowledged the motion for suspension and suspended proceedings for six months pending settlement discussions. The

Board's Order also granted Applicant's motion to compel and stated that upon resumption of proceedings, Opposer would "be allowed time to respond to applicant's revised first set of interrogatories, without objection."

The suspension ended October 2, 2007 but the parties have, to date, been unable to reach settlement of this proceeding. As a result, Applicant has assumed that the Board will issue an order to resume proceedings and resetting the discovery and testimony periods. However, rather than waiting for the Board to do so, Opposer has now filed a motion to resume proceedings and to request reconsideration of the Board's order that Opposer respond to Applicant's revised first set of interrogatories, without objection.<sup>1</sup> Because Opposer's request for reconsideration is unwarranted, Applicant opposes such relief.

### **III.** **DISCUSSION**

#### **A. Opposer's Motion is Unreasonable and Unwarranted**

Opposer is requesting the Board to reconsider its April 2, 2007 Order ordering Opposer to respond to Applicant's Amended First Set of Interrogatories, without objection. Specifically, Opposer alleges that it should be entitled to "interpose objections to specific interrogatories included in Applicant's Amended First Set of Interrogatories as appropriate." Opposer characterizes the Board's Order as a "severe sanction" that is only appropriate when a party has violated a previous Board Order. Opposer complains that it violated no such Order, but instead, acted reasonably by objecting to Applicant's Amended First of Interrogatories.

First, Opposer's attempt to represent its actions as reasonable is not well taken. As Applicant has previously explained in its motion to compel, Opposer could have avoided all

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<sup>1</sup> Applicant notes that Opposer did not meet and confer with Applicant before the filing of the motion for reconsideration.

of this time and expense by simply agreeing to respond to Applicant's Amended First Set of Interrogatories in the first place. Counsel for Applicant clearly explained to Opposer that the Amended First Set of Interrogatories was a replacement for the First Set and made sure that the Amended First Set did not exceed 75 in number. Counsel for Applicant urged Opposer, by telephone and written correspondence, to voluntarily accept service of the Amended First Set of Interrogatories and thereby avoid a motion to compel. Opposer, however, refused, and its unreasonable stance forced Applicant to bring its motion.

Second, Opposer attempts to mischaracterize the Board's April 2, 2007 Order. The Board's Order ordered Opposer to respond to Applicant's amended interrogatories "without objection." Opposer states that "[s]anctions of the type imposed by the Board in its April 2, 2007 Order certainly are appropriate where the Board has entered an order related to discovery and that order has been violated by the sanctioned party[,] but that Opposer has violated no such previous order. For some reason, Opposer assumes that the Board issued its April 2, 2007 Order pursuant to 37 C.F.R. § 2.120(g), which calls for those sanctions outlined in FED. R. CIV. P. 37(b)(2), when a party fails to comply with an order of the Board related to discovery. Such sanctions include an order refusing to allow the disobedient party to support or oppose designated claims or defenses, an order striking out pleadings or parts thereof, or an order dismissing the action or proceeding entirely or in part thereof. *See* FED. R. CIV. P. 37(b)(2).

However, the Board's April 2, 2007 Order does *not* lay out a "severe sanction" to Opposer. Instead, the Board's Order followed general Board procedure and ordered Opposer to respond to Applicant's amended interrogatories without objection. It did not issue any orders related to sanctions under FED. R. CIV. P. 37(b)(2). The two cases that Opposer cites are both inapposite. Nobelle.com LLC v. Qwest Communications Int'l Inc., 66 USPQ2d 1300 (TTAB 2003), involved a motion for discovery sanctions to preclude respondent from submitting trial

evidence as a sanction for failure to comply with discovery obligations. It did not involve an order from the Board to respond to interrogatories without objection. The second case cited by Oposer, Int'l Race of Champions, Inc. v. Horne et al., 2001 WL 1402597 (TTAB Nov. 6, 2001), involved an opposer who specifically requested "appropriate sanctions," including those presumably under FED. R. CIV. P. 37(b)(2), for failure to comply with discovery obligations. Again, it did not involve an order from the Board to respond to interrogatories without objection.

Instead, the applicable case here is the Board's decision in No Fear, Inc. v. Ruede D. Rule, 54 U.S.P.Q.2d 1551 (TTAB 2000). Like the present proceeding, No Fear involved a motion to compel discovery responses and a Board Order ordering the non-moving party to provide discovery responses "without objection." The Board held that the non-moving party had forfeited its right to object to a discovery request on its merits, including objections to a request as overly broad, unduly vague and ambiguous, burdensome and oppressive, as seeking non-discoverable information on expert witnesses, or as not calculated to lead to the discovery of admissible evidence. *See No Fear*, 54 U.S.P.Q.2d at 1554.

Opposer should not be allowed to duck its discovery obligations and further delay these proceedings by objecting to specific interrogatories on their merits. Furthermore, a protective order has already been entered in this proceeding, so Oposer has no grounds for refusing to respond based on claims of confidentiality either. Applicant's motion to compel expressly requested that the Board grant Applicant's motion to compel and direct Oposer to serve substantive responses to Applicant's First Set of Interrogatories. The Board properly granted Applicant's motion, and Applicant deserves substantive responses to its interrogatories, without objection.

Accordingly, Applicant respectfully requests that the Board deny Oposer's motion for reconsideration.

**B. Applicant Does Not Object to Resumption of These Proceedings**

Applicant does not object to resumption of these proceedings. The Board's April 2, 2007 Order stated that these proceedings were suspended for six months pending settlement discussions between the parties, subject to the right of either party to request resumption at any time. The Board's Order also stated that in the event proceedings are resumed, discovery will be reset. To date, the parties have been unable to settle this matter. Accordingly, Applicant joins in Opposer's request to resume these proceedings and reset discovery and testimony periods.

**IV.  
CONCLUSION**

For all the reasons stated herein, Defendant respectfully requests that the Court deny Opposer's motion for reconsideration. Brinkmann joins Opposer's request to resume proceedings and requests that the Board reset the discovery and testimony periods.

November 12, 2007

Respectfully submitted,

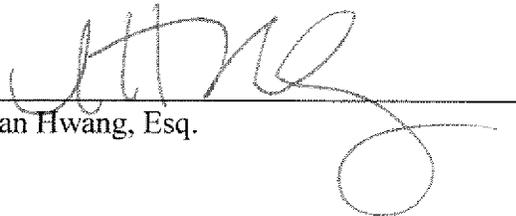
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR RECONSIDERATION upon Alan S. Cooper, counsel for Opposer, at Howrey Simon Arnold & White LLP, 1299 Pennsylvania Ave., N.W., Washington, D.C. 20004, via first class mail, postage prepaid, on November 12, 2007.

  
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Susan Hwang, Esq.