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

Proceeding	91165876
Party	Plaintiff House of Blues Brands Corp.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

HOUSE OF BLUES BRANDS CORP.	§	
	§	
Opposer,	§	
	§	
v.	§	Mark: IN ROCK WE TRUST
	§	
CELEBRITES PUBLISHING CORP.,	§	
	§	
Applicant.	§	Consolidated Opposition Nos. 91165876; 91165899; and 91165901

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**REPLY IN FURTHERANCE OF OPPOSER’S MOTION TO STRIKE APPLICANT’S  
NOTICE OF RELIANCE ON PRINTED PUBLICATIONS AND PORTIONS OF  
APPLICANT’S NOTICE OF RELIANCE ON THIRD-PARTY FEDERAL  
REGISTRATIONS**

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Opposer House of Blues Brands Corp. files this reply in furtherance of its motion to strike Applicant’s Notice of Reliance on Printed Publications and portions of Applicant’s Notice of Reliance on Third-Party Federal Registrations. Applicant’s response fails to overcome the fact that Applicant is impermissibly attempting to introduce responsive documents for the first time during the testimony period of this Opposition and is further attempting to introduce Internet printouts that have not been properly authenticated. Accordingly, Opposer’s motion should be granted.

*Applicant is Barred from Relying on Requested Documents it Failed to Produce*

Applicant’s attempt to introduce documents called for during discovery for the first time at trial without giving Opposer the opportunity to conduct discovery on them violates the Federal Rules of Civil Procedure and should not be permitted. The documents submitted in Applicant’s notice of reliance as Celebrities Pub. Corp. Trial Exhibits 5, 6, 19, 32 through 42, and 44 were not produced during discovery, despite being called for in Opposer’s Requests for Production, as

detailed in Opposer's Motion to Strike. *See* Document No. 26. Because the Federal Rules mandate that responsive documents not produced during discovery shall not be permitted at trial, the Board should strike these exhibits as well as the accompanying portions of Applicant's Notice of Reliance on Third-Party Federal Registrations and Applicant's Notice of Reliance on Printed Publications. *See* Fed. R. Civ. P. 37(c)(1).

Applicant's Response fails to overcome the basic rule that responsive documents not produced should be excluded from trial. Applicant's principal argument is that Opposer should have been aware that Applicant would rely on third-party registrations and Internet printouts. But the fact that these types of information are commonly introduced in Oppositions does not obviate Applicant's requirement to respond to discovery requests and to supplement those responses. If that were the case, parties to an Opposition would be able to hold back a substantial portion of requested discoverable information and disclose it for the first time during the testimony period. One of the purposes behind Rule 37(c)(1) is to prevent such sandbagging.

Applicant further responds that some of the documents it is attempting to rely on are for the purpose of rebutting documents introduced by Opposer. However, unlike Applicant, the documents introduced by Opposer were produced during discovery and were not presented for the first time during the testimony period. Therefore, Applicant had ample opportunity to produce the publications it intended to use in response to Opposer's notices of reliance prior to trial. In fact, because these documents were requested by Opposer during discovery, Applicant had a duty to do so.

Because the testimony period in an Opposition corresponds to setting a case for trial, introducing documents for the first time during the testimony period is not any less of a surprise or less harmful to Opposer as it would be to a party in a courtroom proceeding. Applicant's

actions are particularly inequitable in this case where Opposer acted in accordance with the Rules and produced all of its documents, including dictionary entries and other printed publications, during the discovery period. Therefore, Opposer requests that the Board strike Celebrities Pub. Corp. Trial Exhibits 5, 6, 19, 32 through 42, and 44 as well as the accompanying portions of Applicant's Notice of Reliance on Third-Party Federal Registrations and Applicant's Notice of Reliance on Printed Publications.

*Applicant May not Rely on Non-Authenticated Internet Sources*

Applicant cannot submit Celebrities Pub. Corp. Trial Exhibits 34, 37, 40, 42, 43, and 44 under a notice of reliance because all of these printouts are Internet-only sources that are not available in a fixed or permanent. Internet-only sources "are transitory in nature" and "may be modified or deleted at any time without notice" and, therefore, may only be introduced to the extent that they have been authenticated by testimony or otherwise. *See* Trademark Trial and Appeal Board Manual of Procedure § 704.08. Accordingly, the Board should strike these exhibits as well as the accompanying portions of Applicant's Notice of Reliance on Third-Party Federal Registrations and Applicant's Notice of Reliance on Printed Publications.

Contrary to the Board Manual of Procedure and all relevant case law, Applicant contends that an internet source can be self-authenticating if it merely "displays the website URL needed to access the publications." Applicant's Response, at 5 (Document No. 30). The case cited by Applicant for this proposition, *In re Red Bull GmbH*, is actually in accord with Opposer's position and does not reach the conclusion put forth by Applicant. 78 U.S.P.Q.2d 1375 (T.T.A.B. 2006). *Red Bull* holds that internet dictionary entries may be self-authenticating only if the entries are electronic versions of sources that are "readily verifiable and reliable, widely-available print publications" or available in a fixed CD-Rom format. *Red Bull*, 78 U.S.P.Q.2d at 1378. This interpretation is supported by the Board Manual of Procedure, which states "Internet

printouts cannot be considered the equivalent of printouts from a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified.” Trial and Appeal Board Manual of Procedure § 704.08.

Applicant also asserts that Celebrities Pub. Corp. Trial Exhibits 34, 37, 40, and 42 should be entered into evidence because they were taken from Wikipedia, an Internet-only encyclopedia that is the source of certain authenticated entries already introduced by Opposer. But Opposer’s authentication of particular Wikipedia entries does not serve to authenticate the entire Wikipedia website throughout the duration of the Opposition. The Wikipedia entries introduced by Opposer were produced during discovery and authenticated during the testimony deposition of Michele Patterson. The fact that Applicant has submitted different versions of some entries relied upon Opposer demonstrates the transient nature of the Internet and the need to properly authenticate Internet printouts.

Because Applicant’s trial exhibits 34, 37, 40, 42, 43, and 44 are true Internet sources without any versions fixed in print or otherwise that would permit Opposer to readily corroborate or refute them, they require authentication. Furthermore, it would be inequitable to waive the authentication requirement for Applicant when Opposer took the time and expense to conduct a testimony deposition of Michele Patterson solely for the purpose of introducing Internet evidence into the record. Therefore, the Board should strike these exhibits as well as the accompanying portions of Applicant’s Notice of Reliance on Third-Party Federal Registrations and Applicant’s Notice of Reliance on Printed Publications.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply In Furtherance Of Opposer's Motion To Strike Applicant's Notice Of Reliance On Printed Publications And Portions Of Applicant's Notice Of Reliance On Third-Party Federal Registrations was served on the following counsel this 20th day of August, 2007, via United Parcel Service (UPS), postage pre-paid:

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