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

Proceeding	91217589
Party	Defendant J & N Sales, LLC
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Attachments	Motion Reconsider Reply.pdf(43658 bytes) Welch ltr to 151016.pdf(1926120 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

_____)	
RHYTHM HOLDING LIMITED,)	Opposition No. 91-217589
)	
Opposer,)	
)	In the Matter of:
v.)	
)	Application No. 86/050,581
J & N SALES, LLC,)	
)	Mark: RHYTHM IN BLUES
Applicant.)	
_____)	

Attorney Ref. 256.612

APPLICANT’S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Applicant J & N Sales, LLC submits this informational reply in support of its motion for reconsideration of the August 29, 2015 interlocutory order in this proceeding.

Applicant did respond to counsel’s October 5, 2015 letter in a response annexed hereto. That October 15 response pointed out that, notwithstanding some further limitation of the disputed issues, opposer has yet to provide sworn interrogatory answers and continues to rely on unsupported objections, including a disclaimer of any knowledge possessed by its predecessor affiliates, a compliant that applicant’s interrogatory no. 7 is “incomprehensible” without explanation, an unreasonable limitation of its responses exclusively to the knowledge of its counsel, and a failure to specify the documents upon which it purportedly relies, pursuant to FED.R.CIV.P. 33(d)(1), in lieu of written answers to interrogatories.

Perhaps even more troubling is that the documents opposer alleges it produced to applicant were not in fact produced but, rather, uploaded to a cloud server that grudges intermittent access to applicant and yields downloadable files that become corrupted before they can be put to use. Applicant raised these concerns with opposer in prior e-mails, which were addressed, and again in the annexed response to which opposer has not replied.

Opposer declines to address the merits applicant's motion, *viz.*, that opposer's new objections did not moot applicant's motion to compel answers to its interrogatories or require a new motion to compel the same answers, and that applicant exhausted its efforts to resolve opposer's disputes before resorting to motion practice: opposer "will not respond" regarding the facts at issue, and rests on an unembellished "lack of merit." (Contrary to its certificate of service, opposer did not e-mail its papers to applicant's counsel.) Instead, opposer redirects its focus to the parties' continued inability to resolve the dispute among themselves. While counsel's resolution of these issues remain preferable, opposer has failed to demonstrate that the fault lies with applicant's insistence rather than with opposer's recalcitrance.

Applicant did not move to compel before opposer made clear its final position. Rule 2.120(e)(1) requires only that a movant fail in its good faith efforts to resolve a discovery dispute prior to moving to compel; it does not permit the objecting party, as opposer has done here, to stonewall until a motion is made, then seek to circumvent the motion by its belated efforts, shifting blame to the movant. While the continuation of efforts to resolve a discovery dispute pending decision on a motion is not only admirable but expected, the objecting party's critique of them does not provide a ground for denying the motion.

Applicant looks forward to receiving a reply to its annexed response letter, reasonably construing applicant's requests, producing specific documents in response to the remaining requests for which sample production is not appropriate, and signed interrogatory answers.

Respectfully submitted,

New York, New York
October 30, 2015

/jpower/
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Certificate of Service

I hereby certify that, on October 30, 2015, a copy of the foregoing Reply was served upon opposer's counsel of record by first class mail, postage prepaid, in an envelope addressed to:

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October 16, 2015

0256.612

John L. Welch, Esq.
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Re: RHYTHM IN BLUES Opposition 91-217589

Dear Mr. Welch:

Thank you for your October 5, 2015 letter regarding outstanding disputes as to opposer's objections to applicant's discovery. Your letter, however, does little, if anything, to advance our discussion regarding opposer's belated May 22, 2015 objections to applicant's January 22, 2015 interrogatories.

Your objection to interrogatories 1, 2 and 4 is expressly grounded on the claim that your client has no information regarding opposer's adoption or approval of its RHYTHM marks because it had "purchased" Registration No. 3,610,417 from a "predecessor in interested [*sic.*]." In response, I pointed out to you on June 11, 2015 that opposer was assigned the ITU application for that registration from a related company of common ownership and, therefore, that your objection was specious at best. The assignment appears to be nothing more than a tax focused or structural transfer of those rights from opposer's operating entity to the Samoan holding company, Rhythm Holding Ltd., that is the current registrant and named opposer. The mark was not used in commerce until after its assignment to opposer. At the same time, I pointed out that your objection ignored opposer's Registrations No. 3,884,199 and 3,890,579, the latter similarly having issued to a related entity owned by the principals of opposer and the former having issued to opposer on its own application.

You repeat and confirm that advice in your October 5 letter yet offer no explanation why opposer would not have information regarding its acquisition of these trademark rights and attendant due diligence, let alone why information in the possession of its sister companies is not in opposer's possession, custody or control. The discovery sought, including searches, opinions, communications concerning due diligence prior to opposer's adoption of the marks and persons having such knowledge, may be relevant to assessing the strength of opposer's mark in the industry and absence of likelihood of confusion with applicant's mark.

While a truly unnecessary explanation of the meaning of interrogatory 7 was provided to you with an invitation to you to identify what else you might still be unable to comprehend, it seems you have yet to invest any real effort in reading and responding to it. If your objection depends upon what you deem to be a creative turn in the meaning of one or more words of the interrogatory or the application of an unconventional perception, please advise us of the details, as this objection is not as transparent as some of your other efforts have been. Only then can we address and resolve what otherwise appears to be mere recalcitrance.

John L. Welch, Esq.
October 16, 2015
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Opposer, in maintaining its objection to applicant's interrogatory no. 10, continues to ignore that the interrogatory seeks *opposer's* first *and subsequent* awareness of applicant's mark and seek information beyond counsel's initial watch report.

Similarly, opposer adds nothing in support of its objection to interrogatory no. 16, which seeks the identities of persons who participated in, reviewed or directed opposer's registration of its marks or are knowledgeable thereof. Opposer's identification merely of its counsel is unresponsive. "Application" is used here in its broad, common meaning as a process for seeking a result, *viz.*, here, the protection and registration of the marks that opposer asserts in this proceeding, and not merely the piece of paper initially submitted to the Trademark Office. So the interrogatory is not to be unreasonably construed to be so narrow as to seek only the public record papers themselves or the identity of those who may have "reviewed" them.

Opposer's interrogatory answers remain unsigned. I would suggest we resolve the objections discussed above, after which opposer would supplement its answers, including any identification or denial of the existence of documents, in a signed, acknowledged response as required by FED.R.CIV.P. 33(b)(3) and (5).

Because none of opposer's responses to applicant's interrogatories either identify a document or complies with FED.R.CIV.P. 33(d)(1), your comment in respect of applicant's first document request is wholly insufficient. Please identify the documents or point to where they are produced.

While in your letter you represent that the documents sought by applicant in several requests (*e.g.*, 2 and 3) "have been produced" or that "there are none" (*e.g.*, 13 and 18), as to requests no. 11, 12, 15 and 22, you merely advise applicant to "see" some documents produced. Please confirm whether all documents sought in each of these four requests have been produced.

You Dropbox link to documents 2446-2891 (regarding applicant's requests no. 3, 10, 11 and 14 in your letter) is no longer operative and the documents downloaded previously from that link cannot be opened. Please restore or provide a repaired link with uncorrupted documents.

Very truly yours,



James A. Power Jr

c: William E. Maguire, Esq.