UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

Mailed: December 4, 2015

Opposition No. 91217589

Rhythm Holding Limited

v.

J & N Sales, LLC

Andrew P. Baxley, Interlocutory Attorney:

In the above-captioned proceeding, Rhythm Holding Limited ("Opposer") opposed registration of J & N Sales, LLC's ("Applicant") application to register the mark RHYTHM IN BLUES in standard character form for "Coats; Denim jackets; Denims; Gloves; Hats; Head wear; Hooded sweatshirts; Jackets; Jeans; Knit tops; Mittens; Pants; Rain wear; Scarves; Shirts; Shorts; Sweat shirts; Sweaters; T-shirts; Woven tops" in International Class 25[1] on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), with Opposer's registered mark RHYTHM in standard character form for "backpacks, day packs" in International Class 18 and "clothing, namely, shirts, t-shirts, shorts; headgear, namely, hats, caps" in International Class 25[2] and "Clothing, namely, footwear,

[1] Application Serial No. 86050581, filed August 28, 2013 based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

[2] Such goods are identified in pleaded Registration No. 3610417, issued April 21, 2009. Section 8 affidavit accepted, Section 15 affidavit acknowledged.

athletic footwear, slippers, casual footwear, sandals; bathing suits and trunks, beachwear, swimwear, beach and bathing coverups, bermuda shorts, pants, polo shirts, slacks, sweatshirts, tank tops, tops, trousers, knit shirts, caps; sleepwear, namely, nightshirts, boxer shorts, undershirts" in International Class 25.[3]

On May 5, 2015, Applicant filed a motion to compel discovery.[4] In that motion, Applicant asked, among other things, that "Opposer be compelled to answer Applicant's interrogatories" and "to produce the documents sought in Applicant's requests as detailed in this motion." After Opposer served answers to Applicant's interrogatories concurrently with its brief in response to the motion to compel, the Board, in an August 28, 2015 order, determined that the motion to compel was moot with regard to the interrogatories. The Board further determined that, inasmuch as the record determined that the parties had made only a single exchange of correspondence with regard to the documents requests at issue in the motion to compel, that Appilcant had failed to make a good faith effort to resolve the parties' discovery dispute prior to seeking Board intervention. To the extent that Applicant alleged in its reply brief deficiencies in Opposer's interrogatory responses, the Board found that Applicant did not make a good faith effort to resolve the parties' dispute with regard to those responses and that those allegations should have been raised in a new motion after Applicant made a good faith effort to resolve the parties' discovery dispute.

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[3] Such goods are identified in pleaded Registration No. 3884199, issued November 30, 2010.

[4] In discovery responses served March 27, 2015, Opposer generally objected to Applicant's interrogatories on the ground that they exceeded the limit of seventy-five for Board proceedings. *See* Trademark Rule 2.120(d)(1).

On September 28, 2015, Applicant filed a request for reconsideration of the August 28, 2015 order.[5] In particular, Applicant contends that Opposer's interrogatory responses did not make the motion to compel moot with regard to its interrogatories and that it made a sufficient good faith effort to resolve the parties' discovery dispute. In particular, Applicant contends that certain interrogatory responses were deficient and that, in view of Opposer's attorney e-mail response to Applicant's attorney's letter in which Opposer's attorney stood by Opposer's objections, Applicant should not have been required to do more prior to filing the motion to compel. Applicant further contends that it "is required to file but one motion to compel an answer to an interrogatory." Applicant otherwise argues alleged deficiencies in Opposer's discovery responses.

The premise underlying a request for reconsideration under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board committed error in an order it issued. Such a motion may not properly be used to introduce new arguments and additional evidence, nor should it be devoted simply to a reargument of the points already presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that, based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change. *See* TBMP § 518 (2015).

Applicant has failed to persuade the Board that the August 28, 2015 order was in error. In particular, Applicant's assertions that the motion to compel is not moot

[5] Concurrently with the request for reconsideration, Applicant filed a petition to the director.

with regard to its interrogatories and that it "is required to file but one motion to compel an answer to an interrogatory" are unpersuasive.

The motion to compel with regard to Applicant's interrogatories was based on an assertion that Opposer's general objection that Applicant had served an excessive number of interrogatories was unwarranted. Contrary to Applicant's apparent belief, such motion is not a catch-all means of seeking relief for any alleged deficiency in Opposer's interrogatory responses that did not exist at the time the initial motion was filed.

In that motion, Applicant requested specific relief with regard to its interrogatories, i.e., that Opposer be required answer its interrogatories. Because Opposer effectively withdrew that general objection by serving substantive interrogatory responses concurrently with its brief in response, the Board correctly determined that the motion to compel was moot with regard to the interrogatories. Based on the foregoing, Applicant has failed to persuade the Board that it erred in determining that the motion to compel is indeed moot with regard to the interrogatories.

In the reply brief, Applicant raised entirely new arguments about alleged deficiencies in specific interrogatory responses that were served after the filing of the motion to compel, apparently without having made any effort to discuss these alleged deficiencies with Opposer. Applicant also sought new relief, i.e, that

Opposer be precluded from relying upon its pleaded registrations herein.[6] Opposer, as the nonmovant, is prohibited from filing a surreply brief in which it responds to these new arguments and requested relief.[7] *See* Trademark Rule 2.127(a). Because basic fairness dictates that Opposer must be allowed to respond to the new arguments and requested relief, the Board correctly determined that such arguments and requested relief should be brought in a new motion to compel after Applicant has made a good faith effort to resolve the parties' discovery dispute. *Cf. Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1035 (TTAB 2010) (arguments raised for the first time in a reply brief on the case may be considered untimely, and therefore waived).

Regarding the document requests at issue in the motion to compel, the Board notes that Applicant's effort to resolve the parties' discovery dispute with regard thereto consisted of an April 7, 2015 letter from Applicant's attorney and a single e-mail from Opposer's attorney. A review of Applicant's attorney's letter indicates that only the final four paragraphs of that letter deal with Opposer's responses and

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[6] Such relief is in the nature of a sanction, which is inappropriate at this time because (1) Opposer has responded to discovery, and (2) the Board has not granted a motion to compel. *See* Trademark Rules 2.120(g)(1) and (2); TBMP §§ 527.01(a) and (b).

[7] The present situation is distinguished from *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536 (TTAB 2007). In *Fair Indigo*, the Board determined that the filing of an amended notice of opposition in response to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) did not render the motion moot and decided the motion to dismiss based on the amended notice of opposition. Notwithstanding the filing of the amended pleading, the issued remained whether or not Opposer had stated a claim upon which relief can be granted. In this case, Applicant alleged that the general objection was inappropriate in the main brief in support of the motion and then shifted its position in the reply brief to argue that specific objections were inappropriate. *Compare* TBMP §§ 405.03 (numerical limit on interrogatories) and 414 (discoverability of various matters in Board proceedings). Applicant's change of arguments is essentially moving the goalposts.

objections to document requests and that it discusses those responses and objections in general terms. Although Opposer's attorney stood by Opposer's objections in response thereto, that response did not relieve Applicant of a duty to make a greater effort prior to seeking Board intervention. For example, Applicant could have responded to Opposer's attorney by (1) seeking to convene a telephone conference during which the parties could discuss each of the discovery requests at issue in its reply brief, or (2) sending a more thoroughly prepared letter in which it cited to specific authority that supported its belief that it was entitled to documents responsive to each of its documents requests. As the Board stated in August 28, 2015 order,

> [t]he Board expects parties to adhere to the requirements of *Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666, 667 (TTAB 1986), prior to seeking Board intervention[. I].e.,
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> > where the parties disagree as to the propriety of certain requests for discovery, they are under an obligation to get together and attempt in good faith to resolve their differences and to present to the Board for resolution only those remaining requests for discovery, if any, upon which they have been unable, despite their best efforts, to reach an agreement.

Accordingly, in view of the scant effort by Applicant to resolve the parties' discovery dispute, the Board remains of the opinion that Applicant failed to make a sufficient good faith effort to resolve the parties' discovery dispute regarding its document requests prior to seeking Board intervention. Based on the foregoing, Applicant's request for reconsideration is denied. The August 29, 2015 order stands.

Nonetheless, the Board notes the revised interrogatory responses that Opposer, on November 3, 2015, served upon Applicant and filed with the Board. A cursory

review of those responses indicates that they are signed by Opposer's managing director, but were not made under oath, as required by Federal Rule of Civil Procedure 33(b)(3).[8] *See* TBMP § 405.05(b). In addition, in response to interrogatory nos. 5, 6, 8, 9, 12, 14, 15, 18, and 19, Opposer directs Appilcant to unspecified documents that it produced in discovery. However, Opposer has not complied with Federal Rule of Civil Procedure 33(d)(1) by specifying in detail the business records that it produced from which answers to these interrogatories can be obtained. In addition, Opposer has not made any showing that providing written responses to these interrogatories would impose a significant burden on Opposer and that Applicant will not left with any greater burden than Opposer when searching through and inspecting the records. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555 (TTAB 2000). Opposer is reminded that it has an ongoing duty to supplement and/or correct its discovery responses as necessary.[9] *See* Fed. R. Civ. P. 26(e).

Proceedings herein are suspended pending disposition of Applicant's petition to the Director. This suspension does not relieve Opposer of its duty to supplement and/or correct its discovery responses while proceedings are suspended.

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[8] Opposer in response to interrogatory no. 1 refers to "pleaded Registration No. 2094048." Such registration is mentioned nowhere in the notice of opposition and is therefore unpleaded.

[9] Board records indicate that Opposer has commenced fifteen oppositions and cancellations against different parties who seek to register or have registered marks containing variations on the word RHYTHM. http://ttabvueint.uspto.gov/ttabvue/v?pnam=Rhythm%20Holding%20Limited%20%20. As such, Opposer should have information necessary to respond to interrogatories regarding its pleaded RHYTHM mark already prepared.