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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
Correspondence Address	JAMES A POWER JR POWER DEL VALLE LLP 233 WEST 72ND STREET NEW YORK, NY 10023-2788 UNITED STATES jp@powerdel.com, james_power@verizon.net
Submission	Response to Board Order/Inquiry
Filer's Name	James A. Power Jr
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Date	01/19/2016
Attachments	Request Clarif.pdf(45574 bytes) Adm+DocReq2 s.pdf(2146044 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 REQUEST FOR CLARIFICATION OF BOARD ORDER

Applicant J & N Sales, LLC hereby requests that the Board clarify its order of January 12, 2016 (Paper No. 29). In that order, the Board suspended this proceeding pending disposition of applicant’s motion to compel disclosures from opposer (Paper No. 28).

Applicant’s motion to compel was filed on January 8, 2016, the last day of the discovery period in this proceeding, and was served by first class mail. On that same day, applicant served upon opposer, by mail, “Applicant’s Requests for Admission” and Applicant’s Second Set of Requests for Production of Documents and Things,” copies of which are submitted herewith.

The Board’s January 12 order states that “[n]either the filing of the motion to compel nor this suspension order tolls the time for parties to respond to any outstanding discovery requests which had been served prior to the filing of the motion to compel. . . .”

Since applicant’s above-identified discovery demands were served on the same day as the filing of applicant’s motion to compel, applicant believes that clarification of the Board’s order with respect to the due date for opposer’s responses would be helpful to the parties.

Recently, the Board (Paper No. 20, October 10, 2015) adopted opposer’s view in this proceeding that, insofar as the Board in *3PMC, LLC v. Huggins*, 115 USPQ2d 1488, 1489

(TTAB 2015) held that two papers filed with the TTAB on the same day were considered to be filed “at the same instant” because “a day is an indivisible period of time for purposes of the situation presented here” (Paper No. 17), opposer’s discovery demands, served the same day as the motion that resulted in that previous suspension (Paper No. 16¹), that opposer’s discovery demands were *not* served *after* the filing of the motion for reconsideration and, therefore, that applicant’s responses to opposer’s discovery had *not* been tolled by the suspension order.²

In sum, pursuant to the law of the case established by the Board’s October 10, 2015 order (Paper No. 20), it is respectfully submitted that the time for opposer to respond to applicant’s January 8, 2016 discovery demands has not been tolled and that the Board clarify its January 12, 2016 order consistent therewith.

Respectfully submitted,

New York, New York
January 19, 2016

/jpower/
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¹ “Neither the filing of the request for reconsideration nor this suspension order tolls the time for parties to respond to any outstanding discovery requests which had been served prior to the filing of the request for reconsideration.”

² While the Board, in its October 10, 2015 clarification order, expressed an intent to amend its prior October 2, 2015 suspension order to conform to opposer’s request, it cannot be derived from the clarification order how the prior order might have been amended. In any event, the result was that discovery served on the same day that a motion resulting in suspension of this proceeding was filed is not tolled by a suspension directive as the Board issued on January 12. Further, because the Board’s October 10 decision and rationale were adopted from opposer’s request for clarification, there can be no surprise to opposer that its time for responding to applicant’s outstanding discovery has not been tolled. Opposer should be granted no further extension beyond the time permitted by the rules.

Certificate of Service

I hereby certify that, on January 19, 2016, a copy of the foregoing Request for Clarification was served upon opposer's counsel of record by first class mail, postage prepaid, in an envelope addressed to:

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211

/jpower/
James A. Power Jr

6. Opposer has not used in commerce a mark combining RHYTHM with BLUE or with BLUES.
7. Opposer has not used in commerce a mark comprised of BLUE or of BLUES
8. The documents produced by opposer in response to applicant's second set of document requests are genuine, true, and correct copies of authentic documents.
9. The documents produced by opposer in response to applicant's second set of document requests were obtained or reproduced from opposer's or its custodians' files.
10. The documents produced by opposer in this proceeding are genuine, true, and correct copies of authentic documents.
11. The documents produced by opposer in this proceeding were obtained or reproduced from opposer's or its custodians' files.
12. Opposer targets the marketing of its goods to the active youth apparel consumer of surf apparel, skateboard apparel, snowboard apparel and related streetwear.
13. Opposer does not target the marketing of its apparel to the "missy" style consumer.
14. Opposer does not market its apparel to the "missy" style consumer.
15. Opposer does not target the marketing of its goods to women who shop in retail outlets that do not feature active youth apparel.
16. Opposer does not market its apparel to women who shop in retail outlets that do not feature active youth apparel.
17. Opposer does not permit the sale of its apparel in retail outlets that do not feature active youth apparel.
18. Opposer does not sell or permit the sale of its apparel on the Internet.
19. The apparel sold by opposer is marketed to the active youth apparel consumer whose purchase decision is influenced by the active youth lifestyle image of the apparel.
20. The apparel sold by opposer is marketed to the active youth apparel consumer

who exercises care in purchasing apparel the image of which portrays an active youth lifestyle.

21. The consumers of opposer's apparel are more sophisticated than the average apparel shopper.

22. The consumers of opposer's apparel are well acquainted with opposer's RHYTHM brand.

23. The consumers of opposer's apparel purchase are influenced substantially by brand image.

24. Opposer's apparel is distributed through channels of trade defined by the active youth apparel consumer of surf apparel, skateboard apparel, snowboard apparel and related streetwear.

25. Opposer's apparel is distributed through channels of trade defined more narrowly than the general apparel market.

26. Opposer has settled disputes with other parties regarding their use or registration of marks comprising the word RHYTHM in connection with the sale of apparel, permitting registration and/or continued use of those marks.

27. Opposer has permitted other parties' use or registration of marks comprising the word RHYTHM in connection with the sale of apparel by accepting limitations on the channels of trade in which their apparel is distributed.

January 8, 2016



James A. Power Jr
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New York, New York 10023
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Attorneys for Respondent

Certificate of Service

I hereby certify that, on January 8, 2016, a copy of the foregoing Requests for Admission was served upon opposer's attorney of record by first class mail, postage prepaid, in an envelope addressed to:

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211


James A. Power Jr

any of the above, attachments to or enclosures with any of the above, computer disks and memory, e-mail, compact disks, voice mail files, electronic backups, removable storage device files, audio and video tapes, and any other form of written, printed, reproduced, or recorded material. Any translation of a document, or copy of a document having thereon or affixed thereto any alterations, notes, comments or other additional material which is not included in the original or other copies of such document shall be deemed a separate document for purposes of its identification and production.

Opposer shall respond to any request for documents that exist in an electronic form by identifying the electronic formats in which each document is stored and by producing, along with paper copies thereof, the documents in their native or other electronic file format sufficient to enable respondent to read and search the files.

The term "documents" as used in these requests also includes physical and tangible things, including merchandise, labels, samples, photographs and signs.

The documents and things requested herein shall be produced by Opposer at the office of Applicant's counsel within 30 days of their service upon Opposer.

Requests

27. All documents concerning opposer's limitation on the sale and distribution of its apparel including, but not limited to, the types of retail outlets and style of apparel sold therein, including communications with customers regarding or enforcing such limitations or restrictions.

28. All documents concerning notices to opposer's customers regarding limitations of the sale and/or distribution of opposer's apparel and/or channels of trade in which it is sold or distributed.

29. Opposer's lists of designated retail outlets in which it permits its apparel to be sold and all documents concerning the criteria for and/or compilation of such lists.

January 8, 2016



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