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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	Opposition/Response to Motion
Filer's Name	James A. Power Jr
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Attachments	Opposition Compel.pdf(65215 bytes) Power Decl Opp Compel.pdf(31129 bytes) Exh A1.pdf(93245 bytes) Exh A2.pdf(146137 bytes) Exh A3.pdf(129794 bytes) Exh A4.pdf(700940 bytes) Exh A5.pdf(44036 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 OPPOSITION TO OPPOSER’S MOTION TO COMPEL

Applicant J & N Sales, LLC submits this memorandum and declaration in opposition to opposer’s motion to compel disclosures in response to discovery that opposer served over fifteen months ago, on November 14, 2014, and apparently resolved over a year ago, as well as more recent requests to which applicant timely objected on November 9, 2015 and sought to resolve by a letter to which opposer reacted after a day by this motion rather than respond.

Applicant responded to opposer’s counsel’s January 14, 2016 letter (Opposer Exhibit 5) by letters of January 25 (Opposer Exhibit 6) and January 27, 2016 (Power Decl. ¶ 2, Exhibit A1), explaining applicant’s objections to opposer’s discovery requests as well as seeking further support and explanation of what was sought by opposer. Rather than respond to applicant’s letters, opposer prepared and filed an opposition to applicant’s motion to compel, followed by this motion, ON THE VERY NEXT DAY. Opposer, apparently having decided at least by January 26 (Opposer Exhibit 7) to bring this motion regardless of applicant’s efforts to resolve it, and having made no further attempts to resolve its concerns, including any response to date to applicant’s January 25 and 27 letters, plainly failed to comply with its good faith obligations of Rule 2.120(e)(1) prior to filing its motion. Its motion should, therefore, be denied. Opposer’s motion, unlike applicant’s that was denied on this basis, did not follow an unequivocal stance but, rather, interrupted an ongoing exchange ending with applicant’s recent letter.

Discourse between counsel regarding opposer's 2014 discovery requests ended nearly a year ago with applicant's counsel's letter of March 9, 2015 (Power Decl. ¶ 3, Exhibit A2), to which opposer did not respond. While a motion to compel does not necessarily have to be filed during the discovery period, it should certainly be filed within a reasonable time after service of the response believed to be inadequate. TBMP 523.03. Applicant served its responses to opposer's November 11, 2014 document requests on December 31, 2014 (Opposer Exhibit 12). Opposer followed with a January 21, 2015 letter, to which applicant responded on January 30, 2015 (Exhibit A3), and a February 20, 2015 letter to which applicant responded with the March 9 letter (Exhibit A2). It is difficult to see how opposer can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved. Either way, it is much too late in the game, unfairly burdening this proceeding, to now try to revive such long abandoned complaints.

Moreover, opposer filed its motion while this case was suspended and open only to papers germane to applicant's pending motion to compel, in direct contravention of 37 CFR § 2.120(e)(2) and the Board's extant suspension order:

When a party files a motion for an order to compel . . . discovery, the case will be suspended by the Board with respect to all matters not germane to the motion. After the motion is filed and served, no party should file any paper that is not germane to the motion, except as otherwise specified in the Board's suspension order.

Accord, TBMP 523.01. No exception was specified in the Board's January 12, 2016 Suspension Order (Paper #29). Opposer's motion was thus filed contrary to the code and rule. While opposer's motion papers were nonetheless accepted "in the interest of judicial economy" (February 5, 2016, Paper #34), the problem remains that applicant was denied the protection of the rule, unduly burdened with responding to opposer's motion while still briefing its pending

motion, as will the Board, being distracted by opposer's motion from addressing applicant's prior pending motion which has no issues in common with opposer's motion. If there was any discretion to consider opposer's motion filed in contravention of Rule 2.120(e)(2), it should now be clear that opposer's belated motion to revive long abandoned discovery issues and to compel responses to more recent discovery that cut-off applicant's efforts to resolve them, equitably weigh against exercising any such discretion.

Regarding opposer's failure to attempt in good faith to resolve the issues raised in its motion, it fails to disclose that the "five separate occasions" on which it purportedly sought in good faith to schedule a telephone conference (Motion at 3) began with a Sunday e-mail and continued, unnecessarily on a daily basis, until applicant's counsel tentatively agreed to a date and time. Power Decl. ¶ 5, Exhibit A4). It soon became clear, however, that a telephone conference would merely have enabled opposer's counsel to continue his rash incivility toward applicant's counsel, rather than discussing the issues on rational terms, which clearly would have been counterproductive. *Id.*, ¶ 6, Exhibit A5. ¹

Opposer's Admission Requests

Applicant's positions with respect to its responses to opposer's admission requests are set out in its letter to counsel e-mailed January 25, 2016 (Opposer Exhibit 6), to which opposer did not respond but, rather filed its motion to compel two days thereafter. The sixty-six (66) admission requests served by opposer, in that vast number and substance, as well as its

¹ Applicant's counsel postponed the telephone conference on the heels of advice from opposer's counsel that a focus of his agenda would be his characterization of applicant's co-pending motion as "**bogus**" (Reply Decl. ¶ 3, Exhibit L), repeated in his opposition to applicant's motion at p.6 along with characterizations of his adversary's positions as "**gibberish**" and "**nonsensical**." Prior to that advice, opposer's counsel had habitually framed the discussion in terms of "**gibberish**" (in his January 14 letter, Exhibit 5 to opposer's copending motion to compel), and requests merely objected to as "**incomprehensible**." And in his e-mail annexed as Exhibit F to applicant's first motion to compel, "like your interrogatories, **your letter rambles on and on** rather than come to the point." A conversation of that ilk would have done nothing to advance the issues and was better left to applicant's January 7 letter and those that followed (Opposer's Exhibit 6; Reply Decl. ¶ 4, Exhibit M), to which opposer has not responded.

interrogatories seeking an explanation of each that is denied, are unduly burdensome in view of the limited scope of this proceeding to which opposer has often referred (e.g., on page 4 of its opposition to applicant's motion). They are overlapping, repetitive, unnecessary to opposer's case, and otherwise objectionable as set out in applicant's response (Opposer Exhibit 8).

FED.R.CIV.P. 36 permits a party to request its adversary to admit matters, within the scope of rule 26(b)(1), related to "facts, the application of law to fact, or opinions about either." Requests calling for speculation about hypothetical matters are, therefore, improper. The matters sought to be admitted must be relevant and material to the case.

Requests that Are Improper for Absence of Factual Foundation

Requests 3-14 cannot be answered because goods of the type listed in those registrations may or may not be sold to particular classes of customers or in particular channels of trade, depending upon the circumstances under which those unidentified sales may have been made. Those requests therefore require applicant to hypothesize as to a response and are improper matters for admission under FED.R.CIV.P. 36. The same applies to the expense, impulse, care and deliberation regarding actual goods and circumstances not identified in requests 16-17.

Requests 42-44 are also hypothetical insofar as no actual consumers, clothing items or relevant circumstances are identified so any admission or denial thereof would be meaningless, though it is understood that opposer would attempt to unfairly attribute meaning to them in this proceeding.

Requests 62, 64 and 66 ask whether opposer's registrations are "valid and subsisting," terms which applicant does not deem to be legal characterizations of trademark registrations. In any event, applicant would deny these requests independent of its objections.

Matters Immaterial and Not Calculated to Lead the Discovery of Admissible Evidence

Requests 18-23, regarding what goods applicant may or may not actually sell, do not seek the admission of matters material to this action as, opposer has itself recognized, this proceeding is limited in scope to applicant's listing of goods, regardless of what is actually sold, its color, or how it is sold, including any contention as to descriptiveness. See, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000): "Proceedings before the Board are concerned with registrability and not use of a [contested] mark."

Requests 37 and 38 may turn on the intended meaning of "adopting" the mark and, thus, are unduly vague even were applicant to waive opposer's objection. While "adopting" a mark can readily be understood in the broader context of an interrogatory or document request, when only information is sought, it poses a problem in the context of an admission request when the fact to be admitted is not clear. Applicant conducted a trademark search prior to deciding to use and using its mark RHYTHM IN BLUES in commerce. A copy of that search has been produced. Applicant was not aware of opposer's RHYTHM mark prior to conducting that search.

Opposer was asked to point applicant to the documents or other sources of the statements to which opposer refers in requests 46-54.

Requests that Are Vague and Indefinite, Not Relevant, Or Without Factual Foundation

Requests 33-36 cannot be answered because goods of the type listed in those registrations and applications may or may not be identical or related, depending upon the nature of those unspecified goods. The requests therefore require applicant to hypothesize as to a response and are improper matters for admission under FED.R.CIV.P. 36. Insofar as they may refer to goods applicant may actually sell, they do not seek the admission of matters material to this action as this proceeding is limited in scope to applicant's listing of goods.

The words “more prominently” render request no. 40 vague and indefinite. The request does not seek the admission of matters material to this action as this proceeding is limited in scope to applicant’s listing of goods.

Requests no. 56-58 and 60, regarding the nature goods that may or may not actually sold by applicant, do not seek the admission of matters material to this action as this proceeding is limited in scope to applicant’s listing of goods. In any event, applicant would deny these requests independent of its objections.

Requests no. 59 and 60 cannot be answered because they require applicant to hypothesize as to customers “familiar” with opposer’s mark and what such unidentified customers might believe as to unidentified goods. The request does not seek the admission of matters material to this action as this proceeding is limited in scope to applicant’s listing of goods. In any event, applicant would deny those requests independent of its objections.

Opposer’s Second Set of Interrogatories

Opposer’s first set of eighteen numbered interrogatory paragraphs (Opposer Exhibit 11) were comprised of at least 60 subparts (nos. 2 and 7, twenty subparts in each of nos. 2 and 7 corresponding to each of the goods listed in the application; and two subparts in each of nos. 2, 8 and 9 corresponding to each question therein). Opposer’s second set of interrogatories are comprised of at least sixty-three subparts, one corresponding to each admission request denied in whole or in part. Those 123 interrogatories exceed the limit by 48.

Opposer’s Second Set of Document Requests

Opposer, in its counsel’s letter (Exhibit 5, pp. 2-3), characterizes applicant’s objections to these requests in a single paragraph as “gibberish.” Counsel was advised to be responsibly more precise and objective in identifying opposer’s genuine concerns, if any (Exhibit 6, p. 3).

Opposer’s requests and applicant’s responses are governed by FED.R.CIV.P 34; they are not interrogatories. Applicant’s documents were produced, organized in folders as they are kept in the ordinary course of business. Documents supporting the matters identified in

requests no. 36-38 include public documents in the records of the Trademark Office, documents produced in this proceeding as well as documents yet to be produced by opposer in response to applicant's outstanding requests. Opposer's requests do not seek disclosure of information but, rather, a specification of which documents applicant attends to rely at trial, which is governed by pretrial disclosure rules and the schedule in this proceeding.

Conclusion

For the foregoing reasons, it is respectfully submitted that opposer's motion to compel be denied.

New York, New York
February 18, 2016

Respectfully submitted,

/jpower/
James A. Power Jr
POWER DEL VALLE LLP
233 West 72nd Street
New York, New York 10023
212-877-0100
jp@powerdel.com

Certificate of Service

I hereby certify that, on February 18, 2016, a copy of the foregoing Opposition to Opposer's Motion to Compel 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

POWER DEL VALLE LLP
COUNSELLORS AT LAW
233 WEST 72 STREET
NEW YORK, NEW YORK 10023

JAMES A. POWER JR. ◊
MARGUERITE DEL VALLE
◊ also admitted California

TELEPHONE 212-877-0100
FACSIMILE 212-580-0325
jp@powerdel.com

January 27, 2016

0256.612

john.welch@wolfgreenfield.com

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

Re: RHYTHM IN BLUES - Opposition 91-217589

Dear Mr. Welch:

I write in response to your January 14, 2016 letter regarding applicant's objections to opposer's November 11, 2014 discovery. Applicant objected to that discovery on December 31, 2014. The last applicant heard from opposer as to any issues it may have had with applicant's responses was by your letter of February 20, 2015, briefly referring to the points made in a January 21, 2015 letter from your co-counsel, to which we had responded by letter of January 30, 2015. I replied to your letter on March 9, 2015 and received nothing further from you.

It thus has been over a year since applicant responded to opposer's initial discovery. I don't see how you can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved.

In any event, your new and renewed arguments regarding opposer's interrogatories 2 and 10 and requests 2 and 3 are without support. While a factor in determining likelihood of confusion is, indeed, actual confusion, I am aware of no theory of likelihood of actual confusion. Whether applicant filed under section 1(a) or 1(b), the scope of this proceeding is limited to the listing of goods in the opposed application and asserted registrations, and opposer's use of its mark. If you have any support for your position, please supply it. Regarding your remaining comments, please advise where and when the statements to which you refer regarding production were made. It may be that the documents already have been produced.

We look forward to your settlement response.

Very truly yours,



James A. Power Jr

c: William E. Maguire, Esq.

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March 9, 2015

0256.612

John L. Welch, Esq.
Lando & Anastasi
One Main Street
Cambridge, MA 02142

Re: RHYTHM IN BLUES Opposition 91-217589

Dear Mr. Welch:

We granted, at your request, a 30-day extension of the original time, which had not yet arrived, in which opposer must respond to applicant's interrogatories and document requests, on the ground that you had just entered an appearance as co-counsel to the attorney who had commenced this opposition proceeding and needed the time to familiarize yourself with the case sufficiently to participate in the preparation of opposer's discovery responses.

Instead, the next day, you replied to my January 30, 2015 letter responding to your co-counsel's concerns regarding applicant's discovery responses in a manner that suggested you did not carefully read applicant's discovery responses or my detailed letter responding to his concerns and may not even have looked at applicant's document production.

Applicant's documents were produced as kept in the ordinary course of business, are identifiable on their face, and were labeled and listed on the searchable compact disk with a view toward opposer's use in this proceeding. Neither applicant nor its counsel has drawn a correspondence between each document produced and opposer's requests. My January 30 letter invited your co-counsel to point specifically to any document or file that he purportedly could not identify or appreciate the nature thereof without burdening applicant to construct a superfluous, global map specifying applicant's or its counsel's views as to how each document produced might correspond to one or more of opposer's 35 requests. He has not responded to that and your recent letter ignored it, which accomplished nothing to further our ability to address any genuine concerns you might have.

The potential significance to opposer's case of any document produced by applicant and how it may be responsive to opposer's discovery requests must be assessed for opposer's purposes by its own counsel. We stand ready, however, to address any specific inquiries you may relate to us regarding a deficiency which prevents you from appreciating the nature of applicant's disclosures. So please send them along at your earliest convenience.

Applicant's written responses individually address each of opposer's requests and make clear on their face which of opposer's requests are objectionable, to which of those applicant has responded by producing documents "without waiving" the asserted objection, and those in response to which produced documents amounted to "none." Again, only if you or your co-counsel can direct our attention to a specific response that is believed to fall short of your expectations in that respect can we accommodate you.

John L. Welch, Esq.
March 9, 2015
Page 2

Counsel are, therefore, invited to address any remaining concerns specifically regarding the nature of a document produced or response submitted by applicant so that a genuine, good faith effort to resolve opposer's concerns at least can be alleged prior to involving the Board in any discovery dispute. Based on what has been expressed so far, I am not confident that any genuine dispute has been raised or that, without specifically addressing or even acknowledging the substance of my previous letter, that can be done. Nor do I believe that intervention would be necessary once you have made that genuine effort.

Regarding opposer's contentions as to the scope of discovery, it should be appreciated that, just as the mark applied for and the goods and services recited in the application govern the likelihood of confusion determination in a section 2(d) refusal, *see, e.g.*, TMEP 1207.01 (a)(iii) and cases cited therein, so the inquiry of likelihood of confusion in an opposition is controlled by the mark, goods and services identified within the opposed application. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000).

Opposer's allegations of harm in these proceedings arise from potential registration of applicant's mark. There is no issue of priority or other claim that would bring applicant's sales or advertising expenditures into play in this proceeding. Since receiving your letter, I have made the effort to read the cases cited in the subparagraphs of TBMP 414 upon which you rely, and find that each case where discovery or evidence extrinsic to the opposed registration was deemed relevant involved the sales of an opposer or petitioner alleging standing due to potential harm to its business, a claim of abandonment or priority, rebuttal, geographic descriptiveness, or some other matter to be addressed outside of the challenged application or registration. Notwithstanding, we have made an effort to disclose examples of how the mark is used, samples of the goods, a directory of web sites, and much other information that should satisfy opposer's curiosity while avoiding a genuine dispute. You would appreciate this after a close reading of applicant's responses and my letter to Mr. Maguire.

It would seem, however, that we would benefit more under the circumstances of this case from pursuing settlement than engaging in discovery disputes and should continue that discussion. Your client's objection, based on its *RHYTHM* and *RHYTHM LIVIN'* marks, to our client's *RHYTHM IN BLUES*, is framed by a field of previously registered *RHYTHM* marks related to wearing apparel including *RHYTHM & BLUES* 3,500,104, *RHYTHM & HUES* 3,072,409, *RHYTHM TESTAMENT* 3,192,066, *STRICTLY RHYTHM* 3,752,631, *RHYTHMBRA* 4,236,202, *RHYTHM & CULTURE* 2,859,768, *RHYTHM TRIBE* 1,861,637, *GOT RHYTHM?* 3,195,339, and *RHYTHM & BOOMS* 2,831,779 (only recently cancelled Jan. 14, 2014). Since registering its marks, opposer has acquiesced in coexisting with *YOGA RHYTHM* 3,714,266, *RHYTHM ARTS* 3,900,036, *RHYTHM NATION* 85-946912 (notably opting not to oppose this mark owned by Janet Jackson), and *ALL IN ONE RHYTHM* 4,492,961. Opposer has settled opposition proceedings against *RHYTHM & RHYME* 4,198,961, *RHYTHM CHIC* 4,498,477, and *RHYTHMATHOLOGY* 4,573,172, permitting them to mature into registrations. As you can see, there is not much room here for your client's objection, regardless of disclosures.

Very truly yours,



James A. Power Jr

c: William E. Maguire, Esq.

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January 30, 2015

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maguire@artnet.net

William E. Maguire, Esq.
520 Broadway, Suite 350
Santa Monica, California 90401

Re: RHYTHM IN BLUES Opposition 91-217589

Dear Mr. Maguire:

I have received and read your letter of January 21, 2015 regarding Applicant's discovery responses in this proceeding.

At the outset, it must be said that, consistent with how applicant's objections were phrased, the basis of Opposer's standing in this proceeding is its allegation of harm attributable to Applicant's registration of the mark RHYTHM IN BLUES. Opposer is not objecting to the use, manner of use, first use, or extent of commercial use by Applicant in this proceeding. Rather, it is opposing the application of our client to register the mark, claiming an intent to use it in commerce. This proceeding before the TTAB does not provide an opportunity for your client to go on a "fishing expedition" for information it might find useful for other competitive or legal purposes or to harass or unduly burden Applicant; the issue of likelihood of confusion between marks significantly varies in scope, direction of proofs and evidentiary matters in a proceeding limited to registration of a mark versus one alleging harm from an applicant's use in commerce. The issues in this proceeding are circumscribed to the manner of use, goods and channels of trade that can be presumed from the information provided in the application. Extrinsic materials that are relevant to that are, of course, subject to discovery, and we believe we have provided such materials and exempted them from our objections. TBMP 414 is not intended to provide an exhaustive list of discoverable materials any more than a rule that each is discoverable in all cases before the Board or, in any given case from both parties with equal force. For example, actual sales in a proceeding such as this one may not be discoverable from the applicant where the harm alleged flows from registration and priority is not an issue; on the other hand, the opposer may and very likely will be alleging the strength of its mark and that registration will cause it to suffer harm to its business, in which circumstance its sales and advertising expenditures will be relevant.

Your comments concerning Applicant's responses, however, provide no grounds or insight as to why the matters sought by Opposer in discovery are relevant to this proceeding and, therefore, does little if anything in the way of a good faith effort to resolve your issues without resort to motion practice. Without your position in that regard, I will not be in a position to address all of your concerns in a meaningful way and ask that you provide further detail.

Moreover, I am familiar with the *Amazon v. Wax* opinion that you cite in your letter which, in my view, hardly supports a contention that the compact disc produced with documents conveniently in digital format is in any way a "digital dump," especially given the quantity and overt character of each document so produced. If you have a specific problem identifying what a document is without specific reference to a request of Opposer, for example, the documents entitled, "Trademark Research Report," "Press Release," "line sheets," "web shots," "tag placement," or the pictures or brochures depicting jeans and tags marked, "Rhythm in Blues," please convey it to me and I will see if there is anything I might be able to add as clarification. At this point, however, it would seem to be a meaningless and, even, misleading exercise for me to try to associate each of these readily identifiable documents with a request of Opposer, considering that the documents themselves provide enough information for Opposer to draw its own conclusions in less time, which may, in any event, differ from Applicant's.

These generally applicable points having been made, I will address below what remains to be addressed of your itemized comments in an effort to resolve them between us pending your provision of some basis for your positions regarding the responses beyond your unavailing comments merely that they are relevant.

Interrogatory 1 addresses first use in commerce, but I do not see how that might relate to anything other than priority, which I do not believe is at issue in this proceeding.

Interrogatories 2 and 10 address applicant's sales and advertising expenditures, which you have not explained how are related to confusion between the mark for which applicant seeks registration for the goods described therein.

In response to request no. 1, we are merely preserving our objection and, as indicated, have produced responsive materials, which I imagine you have had an opportunity to review. It does not seem that a motion would serve a purpose here. The same applies to requests no. 4, 16, 27-30 and 34.

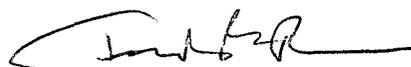
Your reference to "the mark" in request no. 6 is not at all obvious because your client is relying upon several registrations and marks as bases for its opposition. If only one, and any indication that "the mark" referred to opposer's, we would have responded accordingly.

Applicant's response to request no. 23 was a remnant from a draft intended to be served before opposer agreed to an extension of time. These materials will be produced to the extent they exist. I apologize for the oversight.

Your comment that documents sought in request no. 35 are relevant merely because they are the subject of one or more of Opposer's interrogatories expresses no substantive concern, which it seems will rely on the specific objections to Opposer's interrogatories.

Please clarify your concerns so that we can attempt to resolve any remaining issues.

Very truly yours,



James A. Power Jr

Subject: RE: Rhythm v. J&N Sales

From: "John L. Welch" <John.Welch@WolfGreenfield.com>

To: James A.Power Jr <jp@powerdel.com>

Cc: Will Maguire <paliesq@gmail.com>

Wed, 13 Jan 2016 16:02:22 +0000

You did not confirm a date and time.

Please advise.

My suggestion is Thursday, Jan. 21, at 2pm EST.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: James A.Power Jr [jp@powerdel.com]

Sent: Wednesday, January 13, 2016 10:31 AM

To: Welch, John L.

Subject: RE: Rhythm v. J&N Sales

I received you emails. Relax. You are on vacation.

It has been over a year since applicant responded to opposer's initial discovery and, frankly, I don't see how you can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long.

More importantly, I have never received a response from you to my several requests that we resume the settlement discussions had with Mr. Maguire.

While I understand that you would like to schedule a telephone call with me to discuss what we have most recently identified as opposer's remaining disclosure obligations (which we have diligently pursued and made progress albeit, from opposer, solely in response to our motions that, though avoided on dubious procedural grounds, resulted in advisory orders from the Board urging opposer's compliance), as well as applicant's objections, I think it would be worthwhile to address settlement then as well. What do you say? Please provide an agenda for our discussion or refer to previous correspondence outlining the same, if still current.

Hope you are some where warm and(/or) having a good time.

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Nothing communicated in response to an unsolicited e-mail or in the absence of a formal, written engagement may be relied upon as legal advice nor as establishing an attorney-client relationship.

Subject: RE: Rhythm v. J&N Sales

From: "John L. Welch" <John.Welch@WolfGreenfield.com>

To: James A.Power Jr <jp@powerdel.com>

Cc: Will Maguire <paliesq@gmail.com>

Wed, 13 Jan 2016 12:39:04 +0000

Third attempt.

Please let us have your response.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: Welch, John L.
Sent: Tuesday, January 12, 2016 7:35 AM
To: James A.Power Jr
Cc: Will Maguire
Subject: RE: Rhythm v. J&N Sales

Re-sending.

May we please have a response?

Thank you.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: Welch, John L.
Sent: Sunday, January 10, 2016 8:09 AM
To: James A.Power Jr
Cc: Will Maguire
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Power.

I am on vacation until January 18th.

We would like to have a telephone discussion regarding your client's discovery responses, including not only its most recent responses, but all of them. I am available on Thursday afternoon, January 21st. Please let me know whether that date is convenient.

I note that you filed a motion to compel on Friday, January 8, again without making a good faith effort to resolve the disputed issues. Apparently you acted precipitously because you were under the mistaken impression that motions to compel have to be filed before the close of discovery. That is in correct.

We will be prepared to discuss the issues involved in your motion in the same January 21st telephone discussion.

Given your client's position on opposer's discovery requests, please recognize the the purpose of the January 21st telephone conference is to satisfy the good faith requirement of the Trademark Rules preliminary to opposer's filing of any necessary motion to compel.

Very truly yours,

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

Subject: RE: Rhythm v. J&N Sales
From: James A. Power Jr <jp@powerdel.com>
To: John L. Welch <John.Welch@WolfGreenfield.com>
Tue, 19 Jan 2016 12:07:37 -0500

Dear Mr. Welch:

Unfortunately, I will not be available to join in a conference call with you this Thursday, notwithstanding your kind remarks below. In the meantime, as promised, I will respond to your recent letter in writing this week, clarifying applicant's objections and seeking support for opposer's requests, in an effort to bring the two sides closer together. I would encourage your written reply to the same ends.

Thank you for seeing the error in my message below. Indeed, I was referring to opposer's 2014 discovery.

I find it difficult to understand how the Board's suspension of the filing of papers not germane to applicant's motions in any way hindered opposer's non-existent efforts over the past year to resolve between counsel any that might remain of its early disputes regarding applicant's objections. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved.

Your advice that opposer has no plans to disclose, in response to long outstanding discovery requests and a more recent letter merely advising that your client may have overlooked some important categories and documents in its disclosures, may be yet another example of opposer's inability to cooperate in discovery until applicant moves to compel, whereupon opposer swiftly abandons its positions. If that is to be the case, you might advise your client to disclose those matters directly, as the Board has already recognized their ready availability (which is why I encouraged you to read applicant's motion now, rather than solely in opposing it again on procedural grounds), thus obviating the Board's consideration once again of what will become another of opposer's transient objections.

Thank you again for your letter, to which I look forward to responding shortly. We also look forward to your settlement proposal and substantive response to our January 7 letter.

Regards,

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
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jp@powerdel.com
<http://www.powerdel.com>

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----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "James A.Power Jr" <jp@powerdel.com>
Cc: "Will Maguire" <paliesq@gmail.com>
Sent: Fri, 15 Jan 2016 21:02:10 +0000
Subject: RE: Rhythm v. J&N Sales

Mr. Power:

I will call you at 2pm on Thursday, November (sic. January) 21st. Mr. Maguire will also be on the call. We note your reference to "last year's" recent discovery, as well as to the "applicant's (sic) 2014 discovery," but we also note your failure to appreciate the unwarranted delays that resulted from your two previous untimely motions to compel and the resultant suspensions of the proceeding.

As to your third untimely motion to compel, we will be opposing that motion on the now-familiar ground of your failure to make a good faith effort to resolve the issues raised. Surely you won't argue that a letter sent on January 7th is a sufficient good faith effort to resolve the issues raised in a motion filed the next day. In addition, opposer will be filing a motion for sanctions based upon your repeated flouting of the Trademark Rules in this regard.

My letter was obviously not intended to respond to your bogus motion. Our response will be filed at the appropriate time. We cannot understand why you say that opposer has no objections to your discovery demands, as you now characterize and re-cast them. Therefore, don't expect that we will be producing any documents before the conference on Thursday. We note your typically snide comment that you "trust" that we have read your motion. If you want to discuss your motion in this context, we will listen on Thursday.

And by the way, I am enjoying my vacation. I trust you have read my letter thoroughly and are enjoying preparing proper responses.

JLW

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: James A.Power Jr [jp@powerdel.com]
Sent: Thursday, January 14, 2016 5:28 PM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Welch:

Thank you for your response and letter outlining opposer's first attempt to resolve applicant's objections to applicant's 2014 discovery in nearly a year and identifying issues with respect to last year's more recent discovery. I will read these and respond, hopefully in ways that will advance the discourse.

While you had said that you would like to discuss the issues raised in applicant's discovery motion as well, I did not see that addressed in your letter. Please address that at your earliest convenience, as you have identified no issues with producing the documents sought -- I am aware of no legal objections having been asserted by opposer. I would, therefore, expect that you could provide a schedule for production, or even produce them by the time of our conference. I trust you have read applicant's motion.

In the meantime, let's pencil in your proposed date and time and each try to make some progress as it approaches so that the time can be utilized productively.

Please do not regard me as having ignored you. I responded to the first of your three daily e-mails within two business days of having received it. Your interim e-mails were unnecessary, and your subsequent merely expressed unwarranted dissatisfaction with my response to your first.

Please try to enjoy the remainder of your vacation.

Regards,

James A. Power Jr
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212-877-0100
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----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "James A. Power Jr" <jp@powerdel.com>
Cc: "Will Maguire" <paliesq@gmail.com>
Sent: Thu, 14 Jan 2016 15:07:27 +0000
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Power:

Please see the attached letter.

We look forward to your response regarding a time and date for the telephone conference.

Very truly yours,

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285