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Filing date: **05/05/2015**

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

|                        |  |
|------------------------|--|
| Proceeding             | 91217589   |
| Party                  | Defendant<br>J & N Sales, LLC  |
| Correspondence Address | JAMES A POWER JR<br>POWER DEL VALLE LLP<br>233 WEST 72ND STREET<br>NEW YORK, NY 10023-2788<br>UNITED STATES<br>jp@powerdel.com, james_power@verizon.net  |
| Submission             | Motion to Compel Discovery   |
| Filer's Name           | James A. Power Jr  |
| Filer's e-mail         | jp@powerdel.com  |
| Signature              | /jpower/   |
| Date                   | 05/05/2015   |
| Attachments            | Motion Compel Int.pdf(54583 bytes )<br>Power Decl.pdf(31633 bytes )<br>Exh A.pdf(1227695 bytes )<br>Exh B.pdf(37002 bytes )<br>Exh C.pdf(32623 bytes )<br>Exh D.pdf(42358 bytes )<br>Exh E.pdf(62754 bytes )<br>Exh F.pdf(27752 bytes )<br>Exh G.pdf(1095778 bytes )<br>Exh H.pdf(190246 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 MOTION TO COMPEL**

Applicant J & N Sales, LLC moves the Board for entry of an order, pursuant to 37 CFR 1.120(e), compelling Opposer to answer Applicant’s set of 21 interrogatories (Power Decl. ¶ 2, Exhibit A) and to comply with the document requests served upon it January 22, 2015.

On February 17, 2015, Opposer requested an extension of 30 days in which to respond to Applicant’s interrogatories and document requests to permit its newly retained co-counsel to become familiar with this proceeding. Power Decl. ¶ 3, Exhibit B. Applicant granted Opposer’s Request but resisted Opposer’s insistence that no other dates be extended and others permitted to lapse. *Id.*; Paper No. 6 (2/19/15).

On March 27, 2015, however, Opposer served a general objection to Applicant’s interrogatories, purporting that they exceeded the numerical limitation of 75 provided in Rule 2.120(d). Power Decl. ¶ 4, Exhibit C. While Opposer provided no support for its objection, it is understood that Opposer relies upon the position expressed in its counsel’s prior letter, to the extent it can be understood, parsing just one of Applicant’s interrogatories into one-hundred eighty-two (182) purported subparts (Power Decl. ¶ 5, Exhibit D):

With regard to the interrogatories served by your client, it is our view that they far exceed the limit of seventy-five set forth in Trademark Rule 2.120(d)(1). As an example, Interrogatory 3, in and of itself, exceeds that limit. That interrogatory asks for the identification of each person who participated in the (1)

design, (2) selection, (3) placement, and/or (4) content of (5-8) advertisements, (9-12) labels, (13-16) packaging, (17-20) social media or (21-24) other uses by Opposer of a trademark comprised of the word “rhythm” in connection with the (25-41) marketing, (42-58) advertising, (59-75) promotion or (76-91) sale of wearing apparel, and (92-182) identify each document concerning each subject.

That is, Opposer purports to find 182 subparts in an interrogatory comprising 51 words.

By letter dated April 7, 2015 (Power Decl. ¶ 6, Exhibit E), Applicant’s counsel informed Opposer that its objection was not warranted and did not, on its face, appear to have been asserted in good faith. It seemed unnecessary to have explained that each of Applicant’s interrogatories was directed to a single subject and was deliberately drafted comprehensively by listing, as clarification and to avoid lawyerly circumvention, to expressly include a concrete range of items falling within the subject addressed, just so nothing important is disingenuously omitted. Interrogatory 3, for example, asks for the identification of persons who “*participated*” (e.g., design, selection, placement, content creation) in all “*uses*” (e.g., advertisements, labels, packaging, social media) by Opposer of its Rhythm marks “in connection with” (e.g., marketing, advertising, promotion, sale) of wearing apparel and related documents.<sup>1</sup> This interrogatory, as each of Applicant’s remaining interrogatories, asks but one question: Identify the persons involved in uses by Opposer of its Rhythm marks in connection with wearing apparel. At most, each request for the identification of documents comprises one more. Taking into account the interrogatories that ask for the identification of documents in addition to something else would expand Applicant’s 21 interrogatories to no more than 38, including subparts.

Notwithstanding Applicant’s thorough, extrinsic construction of its interrogatories for the benefit of Opposer, Opposer’s sole and final response was:

We have your letter of April 7. Like your interrogatories, your letter rambles on and on rather than come to the point.

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<sup>1</sup> Applicant seeks the identification of all documents sought in discovery so that those withheld on the basis of privilege or exemption are properly identified to facilitate a challenge to the claim. The identification of documents that are produced may be accomplished pursuant to FED.R.CIV.P. 33(d) by producing and relating them to the interrogatory to which they respond.

again insisting that Applicant “pare down” the scope of its interrogatories and risk creating a loophole that Opposer would exploit to its advantage. Power Decl. ¶ 7, Exhibit F. The focus or potential effect of Opposer’s objection is to trim back the legitimate scope of each of Applicant’s interrogatories under the guise of calculating “subparts” and objecting to their number, and is improper. On the contrary, it is not the place Opposer’s counsel to rewrite Applicant’s interrogatories but, rather, to see that they are reasonably construed and answered. It takes no imagination or effort to read in counsel’s reply its projection that Opposer is “determined to try to make this simple proceeding – . . . in which priority is not an issue – as complicated as possible” as a means of impeding Applicant’s discovery in this opposition. *Id.*

Each of applicant’s interrogatories asks only one question (or, at most, two where the identities of documents are also sought), is limited to a single issue, event or matter, and does not include a follow-up question requiring a separate answer. This is not a case of a party seeking to compact more than 75 questions into its 21 interrogatories, let alone 182 in each.

Applicant’s document requests and Opposer’s objections are annexed as Exhibits G and H (Power Decl. ¶ 8). Opposer’s objections, to the extent they were not based solely upon Opposer’s general objection as to the number of Applicant’s interrogatories (Request No. 1), fail to state any more than that they seek documents that are “irrelevant,” with no reason or explanation (Requests No. 3, 6-11, 20, 22 – producing “summary” or “representative” documents that Opposer may deem “relevant”; Requests No. 12-15, 18, 19 – producing no documents). Such objections of irrelevance, without more, are ineffective to preserve any rights to withhold documents or challenge admission of evidence. *Medtronic, Inc. v. Pacesetter Systems, Inc.*, 222 USPQ 80, 83 (TTAB 1984) (party must articulate objections to interrogatories with particularity); See, Jarvey, M.L., *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913 (2013) (<http://students.law.drake.edu/lawReview/docs/lrVol61-3-jarvey.pdf>) and the many cases cited therein.

Opposer's response that it will produce only "representative" documents to Applicant's Request No. 5 for all documents that support the allegations made in the Notice of Opposition is also insufficient. Applicant is entitled to all documents supporting Opposer's claims. Opposer should be precluded from relying upon any document in support of its claims that has not been produced to Applicant.

For the foregoing reasons, it is respectfully submitted that Opposer be compelled to answer Applicant's interrogatories and that the discovery period and all remaining scheduling dates be extended until 30 days from the Board's order. Alternatively, Applicant seeks leave to propound these interrogatories upon Opposer, in the unlikely event they might they be found to comprise more than 75 subparts, or to amend its interrogatories as may be required by the Board, and that the discovery period and all remaining scheduling dates be extended until 30 days from Opposer's response to Applicant's amended interrogatories. It is further submitted that Opposer be compelled to produce the documents sought in Applicant's requests as detailed in this motion and that Opposer be precluded from relying upon any document or thing not produced in response to Applicant's requests.

Respectfully submitted,

New York, New York  
May 5, 2015

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

Certificate of Service

I hereby certify that, on May 5, 2015, a copies of the foregoing Motion to Compel and Declaration in Support with Exhibits A through H were served upon Opposer's counsel of record by first class mail, postage prepaid, in an envelope addressed to:

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

/jpower/  
James A. Power Jr



5. Opposer's initial letter purporting to find 182 subparts in Applicant's Interrogatory No. 3 is annexed as Exhibit D.

6. By letter dated April 7, 2015 (Exhibit E), Applicant's counsel made a good faith effort to resolve Opposer's objections by construing Applicant's interrogatories to require only one or two answers each and explaining the rationale therefor.

7. Opposer's counsel responded to counsel's April 7 letter by his e-mail annexed as Exhibit F.

8. On January 22, 2015, Applicant served upon Opposer the document requests annexed as Exhibit G. Opposer's objections are annexed as Exhibit H. Applicant's counsel sought to resolve these issues by his letter annexed as Exhibit E.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

May 5, 2015

/jpower/  
James A. Power Jr



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.

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

An interrogatory requesting the identification of a document means a request to identify (i) the type of document, (ii) general subject matter, (iii) date of the document, (iv) author(s) of the document, (v) addressees, (vi) recipient(s), and (vii) the location and identity of the person having possession of the document. In response to any such interrogatory, the documents may be produced and identified in association therewith pursuant to FED.R.CIV.P. 33(d) to the extent they provide the information sought thereby. Any documents withheld on the basis of privilege shall be identified in response to an interrogatory described in this paragraph.

An interrogatory requesting the identification of a person means a request to state the person's full name, current or last known place of residence and employment, with title, business affiliation and address, and a statement as to any relationship, past or present, of such person with Opposer, and the inclusive dates thereof.

#### Interrogatories

1. Identify each person who participated in the consideration, deliberation, selection, adoption and/or approval by Opposer a word or phrase comprising the word "rhythm" as a trademark for the marketing and sale of wearing apparel, and identify each document concerning such participation and the nature and extent thereof.

2. Identify each document concerning consideration by Opposer of the use or registration of any phrase comprising the word "rhythm" as a trademark for wearing apparel.

3. Identify each person who participated in the design, selection, placement, and/or content of advertisements, labels, packaging, social media or other uses by Opposer of a trademark comprised of the word "rhythm" in connection with the marketing, advertising, promotion or sale of wearing apparel, and identify each document concerning each subject.

4. Identify each person who participated in, reviewed, directed, solicited or was aware of any search or opinion concerning Opposer's use or registration of a trademark comprising the word "rhythm" in connection with the marketing and sale of wearing apparel, and identify each document concerning such search or opinion.

5. Identify and describe each garment or item of wearing apparel in connection with which Opposer has used a trademark comprising the word "rhythm" and, for each garment or item for each trademark, state the dates during which each garment or item was sold.

6. Identify each store, web site, vendor or other retail establishment at or on which garments or items of wearing apparel originating with Opposer have been sold or offered for sale in connection with a trademark comprising the word "rhythm."

7. Identify each document concerning, by demographics, behavior, lifestyle, interests, price point, income, geographic location, or other characteristic or category deemed by Opposer to affect purchasing behavior of consumers that purchase or that Opposer has intended or expected to purchase garments or items of wearing apparel originating with Opposer and sold in connection with a trademark comprising the word "rhythm."

8. State the value and volume of Opposer's annual sales of each garment or item of wearing apparel sold by Opposer in connection with a trademark comprising the word "rhythm," the identity of each customer to whom each value and volume of sale was made, and identify each document concerning such trade channels.

9. State the suggested and actual retail price of each garment or item of wearing apparel sold or marketed by Opposer since January 1, 2014 in connection with a trademark comprising the word "rhythm," and identify each document concerning such prices.

10. Identify the persons most knowledgeable regarding Opposer's first and subsequent awareness of Applicant's trademark RHYTHM IN BLUES or application to register that mark and identify each document concerning such awareness.

11. Identify each incident of or statement, comment or inquiry concerning, confusion or a cross-reference in the trade or by a consumer between any use by another of a mark, designation or phrase comprising the word "rhythm" including, but not limited to, Applicant's RHYTHM IN BLUES trademark, and any trademark of Opposer comprising the word "rhythm" or product of Opposer marketed, advertised, labeled, or sold in connection with such a mark, including any return to Opposer of a product not originating with Opposer, identify each person having knowledge of or who participated in, and each document concerning, each such matter.

12. Identify each person having knowledge of the events and circumstances under which Opposer has objected or considered objecting to the use or registration by another of a mark comprising the word "rhythm" and identify each document concerning each objection. The documents to be identified in response to this interrogatory include but are not limited to correspondence between Opposer or its counsel and the person or entity to whom the objection was directed or its counsel, internal e-mails, documents or notes of Opposer, pleadings, papers, discovery requests and responses in any legal proceeding and any correspondence therein, and any public or private comment.

13. Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning its use or registration of a trademark comprising the word "rhythm" and identify each document concerning such matters.

14. Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning likelihood of confusion between a trademark used by Opposer comprising the word "rhythm" and the mark of another comprising the word "rhythm" and identify each document concerning such matters.

15. Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning use or registration by another of a trademark comprising the word "rhythm" and identify each document concerning such matters.

16. Identify each person who participated in, reviewed, directed, or was familiar with Opposer's applications to register a trademark comprising the word "rhythm" and identify each document concerning such applications.

17. Identify each person or entity to which Opposer has granted any right or permission to use a trademark of Opposer comprising the word "rhythm" and identify each document concerning such rights and permissions.

18. Identify the media through which Opposer has advertised and promoted goods in connection with a trademark comprising the word "rhythm" and identify each document concerning the content and extent of such advertising and promotion.

19. Identify each use or registration by another of a mark or trade designation comprising the word "rhythm" in connection with wearing apparel known to Opposer and identify each document concerning such use or registration.

20. Identify each trade show in which Opposer showed goods bearing a mark comprising the word "rhythm" and each document concerning the presentation of such goods.

21. Identify each person who participated in the preparation of, or supplied information for, Opposer's answers to these interrogatories and indicate the specific responses or portions thereof to which each person contributed.

January 22, 2015



James A. Power Jr  
POWER DEL VALLE LLP  
233 West 72 Street  
New York, New York 10023  
(212) 877-0100  
jp@powerdel.com  
*Attorneys for Applicant*

Subject: RE: Rhythm Holding Limited v. J&N Sales, LLC, Opposition No. 91217589

From: "John L. Welch" <JWelch@LALaw.com>

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

Thu, 19 Feb 2015 14:42:55 +0000

Okay, suppose we put everything off by thirty days, including opposer's discovery responses?

JLW

John L. Welch



One Main Street  
Cambridge, MA 02142  
Direct: +1-617-395-7072  
Main: +1-617-395-7000  
Fax: +1-617-395-7070  
Email: [Jwelch@LALaw.com](mailto:Jwelch@LALaw.com)  
[www.LALaw.com](http://www.LALaw.com)

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*Thank you.*

---

**From:** James A.Power [mailto:jp@powerdel.com]  
**Sent:** Wednesday, February 18, 2015 4:21 PM  
**To:** John L. Welch  
**Subject:** RE: Rhythm Holding Limited v. J&N Sales, LLC, Opposition No. 91217589

Well, that would still take us past the expert date and precariously close to the discovery cut-off without much time for follow-up. I would be pleased to accommodate your request, but is there really any rush to trial in this matter? Plus, it would advantage us to have some room continue the settlement discussions.

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

**From:**

"John L. Welch" <[JWelch@LALaw.com](mailto:JWelch@LALaw.com)>

**To:**

"James A.Power" <[jp@powerdel.com](mailto:jp@powerdel.com)>

**Cc:**

**Sent:**

Wed, 18 Feb 2015 20:28:00 +0000

**Subject:**

RE: Rhythm Holding Limited v. J&N Sales, LLC, Opposition No. 91217589

Hello, James.

In speaking with Will Maguire, we decided that a 15 day extension would suffice. We are not planning to have an expert anyway. Is your client agreeable to a 15-day extension, leaving the schedule unchanged?

Regards,

JLW

John L. Welch

One Main Street  
Cambridge, MA 02142  
Direct: +1-617-395-7072  
Main: +1-617-395-7000  
Fax: +1-617-395-7070  
Email: [Jwelch@LALaw.com](mailto:Jwelch@LALaw.com)  
[www.LALaw.com](http://www.LALaw.com)

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*Thank you.*

---

**From:** James A. Power [<mailto:jp@powerdel.com>]  
**Sent:** Tuesday, February 17, 2015 5:15 PM  
**To:** John L. Welch  
**Subject:** Re: Rhythm Holding Limited v. J&N Sales, LLC, Opposition No. 91217589

Welcome aboard.

Your requested extension takes us beyond the expert date and very near the close of discovery. Would you consider extending all extant dates by two months or more? That should allow us sufficient time to complete discovery and perhaps make some progress in settlement discussions.

James A. Power Jr  
Power Del Valle LLP  
233 West 72 Street  
New York, New York 10023  
212-877-0100  
fax 212-580-0325  
[jp@powerdel.com](mailto:jp@powerdel.com)  
<http://www.powerdel.com>

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

**From:**

"John L Welch" <[JWelch@LALaw.com](mailto:JWelch@LALaw.com)>

**To:** "[jp@powerdel.com](mailto:jp@powerdel.com)" <[jp@powerdel.com](mailto:jp@powerdel.com)>, "[james\\_power@verizon.net](mailto:james_power@verizon.net)" <[james\\_power@verizon.net](mailto:james_power@verizon.net)>

**Cc:**

**Sent:** Tue, 17 Feb 2015 18:22:57 +0000

**Subject:** Rhythm Holding Limited v. J&N Sales, LLC, Opposition No. 91217589

Dear Mr. Power.

I have been asked by Opposer Rhythm Holding Limited to appear as co-counsel to Mr. Maguire in this opposition proceeding. Attached is a copy of the notice of appearance that I filed today.

It appears that Opposer's responses to Applicant's discovery requests are due on or before February 26, 2015. In light of my arrival on the scene, Opposer requests a 30-day extension of time to respond to those discovery requests. Please let me know as soon as you can whether Applicant will consent to this request.

Very truly yours,

John L. Welch

John L. Welch

One Main Street  
Cambridge, MA 02142  
Direct: +1-617-395-7072  
Main: +1-617-395-7000  
Fax: +1-617-395-7070  
Email: [Jwelch@LALaw.com](mailto:Jwelch@LALaw.com)  
[www.LALaw.com](http://www.LALaw.com)

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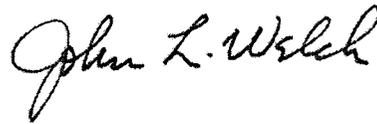
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Applicant this 27<sup>th</sup> day of March, 2015, by mailing a copy thereof via first-class mail, postage pre-paid, to James A. Power, Jr., Esq., Power Del Valle LLP, 233 West 72<sup>nd</sup> Street, New York, NY 10023.

A handwritten signature in black ink that reads "John L. Welch". The signature is written in a cursive style with a large initial "J" and "W".

---

John L. Welch

February 20, 2015  
via email and post

James A. Power, Jr.  
Power Del Valle LLP  
233 West 72<sup>nd</sup> Street  
New York, NY 10023

Re: Opposition No. 91217589

Dear Mr. Power:

CONTENT RE UNRELATED TOPIC REDACTED

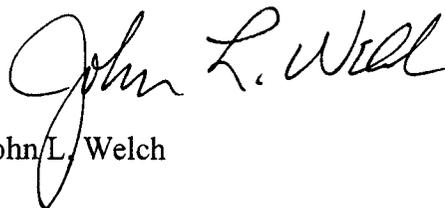
With regard to the interrogatories served by your client, it is our view that they far exceed the limit of seventy-five set forth in Trademark Rule 2.120(d)(1). As an example, Interrogatory No. 3, in and of itself, exceeds the limit. That interrogatory asks for the identification of each person who participated in the (1) design, (2) selection, (3) placement, and/or (4) content of (5-8) advertisements, (9-12) labels, (13-16) packaging, (17-20) social media or (21-24) other uses by Opposer of a trademark comprised of the word “rhythm” in connection with the (25 -41) marketing, (42-58), advertising, (59-75) promotion or (76-91) sale of wearing apparel, and (92-182) identify each document concerning each subject. We suggest that you review these

James A. Power, Jr.  
Power Del Valle LLP  
February 20, 2015  
Page 2

interrogatories and pare them down to a reasonable and acceptable number. Otherwise Opposer may simply object to the entire set.

We look forward to your response.

Very truly yours,

A handwritten signature in black ink that reads "John L. Welch". The signature is written in a cursive style with a large, looping initial "J".

John L. Welch

JLW/jw  
cc: William E. Maguire, Esq.

JLW

**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

April 7, 2015

0256.612

*jwelch@lalaw.com*

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

Re: RHYTHM IN BLUES Opposition 91-217589

Dear Mr. Welch:

We received your March 27, 2015 responses wherein you continue the circumvention of applicant's interrogatories and document requests outstanding since January 22, 2015.

While the TTAB rules, if not only accepted TBMP protocol, do seem to permit the privilege of ignoring every interrogatory propounded by an adversary on the purported ground that they exceed a numerical limit, a foundation of it rules and protocol is that counsel act in good faith, particularly in discovery.

Your previous explanation that applicant's interrogatory no. 3 alone exceeded that limit by amounting to 182 separate interrogatories deserved little serious consideration when you made it. It looks no better now as the presumptive ground for your formal objection entered under a TTAB caption. The words of applicant's interrogatories that you have disingenuously parceled out as forming separate interrogatories, realistically, set out a comprehensive description of what constitutes the breadth of the interrogatory, and not a separate interrogatory for each word; *viz.* each interrogatory demands but a single answer. Under your analysis, each word of applicant's interrogatories could constitute a separate interrogatory, which is no more credible than the position you have taken. I did not think that needed to be explained to you, and still do not. Nonetheless, to satisfy the requirement that I engage your proffered positions to the extent one can engage them, I do so now.

You could, had you been so inclined to cooperate, easily have read applicant's four-line interrogatory no. 3, to which instead you objected as comprising 182 interrogatories, as asking for the identities of persons involved in opposer's use of its rhythm marks in connection with wearing apparel, relying upon each word you employed as a multiplier in your objection instead to construe the scope of that request to include the items listed. Honestly, we did not anticipate having the opportunity to observe such a desperate search for interrogatory subparts and, so, listed several examples of opposer's use of its mark in an effort to be *inclusive*, appreciating that must be done to avoid the disingenuous lawyer's efforts to ignore specifics that reasonably fall within its scope. The skill of converting a solution into a problem no matter which course is followed might counsel one to double the interrogatories, though I doubt that the inconsistency of objecting to both in the same response would dissuade. If you are concerned that reference to "each subject" requires a separate answer identifying those documents, it does not.

Had I permitted my analysis to follow a similar course, opposer's interrogatory no. 17, for example, could have been deemed to have multiple subparts: trademark search (1), service mark search (2), conducted by applicant (4) or for applicant (8), in connection with selection (16), adoption (32), and/or use (64) of the mark, as well as interrogatory no. 10: expenditures for advertising (1), and promotion (2), of the goods identified (40) in the subject application and advertised (potentially 80) or sold (potentially 160) under the mark, though I must say that the process of merely demonstrating this point felt quite unnatural.

The exception for multiple marks should be treated as an example of how the breadth of an interrogatory does not multiply it. Your omission solely of the plural reference to opposer's marks as a subpart multiple in your assessment of interrogatory no. 3 is instructive as to your reading of TBMP 405.03(b) as narrowly as you read 404: a discrete list of what you can and cannot get away with, rather than guidance intended to inform your independent analysis.

In the end, each of applicant's interrogatories asks only one question (or two where the identities of persons and documents are sought), is limited to a single issue, event or matter, and does not include a follow-up question requiring a separate answer.

Having received no comments regarding the other interrogatories, we can only assume that your objection to them is based on your claim that no. 3 alone exceeded the limit. While we are not inviting your efforts to demonstrate an ability to find over 180 subparts in each of applicant's remaining interrogatories, applicant is entitled to receive answers to them this week, reasonably construed as we demonstrated with regard to interrogatory no. 3.

Your objections to applicant's document requests, merely that each is "overly broad," "burdensome," seeks documents that are "irrelevant," and/or is "not likely to lead to the discovery of admissible evidence," are wholly insufficient as devoid of particularization. Mere labeling as Irrelevant is not a complete objection and is ineffective without particularization. Any objections to these interrogatories are, therefore, deemed to have been waived. Moreover this absence of any objection particular enough to justify the withholding of any document sought thereby exacerbates your representations that, whatever the scope of your objections may be, opposer will produce only "representative samples." Such response is particularly troubling when interposed in response to applicant's request no. 25 seeking documents supporting your client's allegations made in the notice of opposition.

A request to produce all documents related to a designated subject that is material and relevant to the proceedings and, therefore, is at least calculated to lead to the discovery of admissible evidence, is not independently objectionable merely because "all" such relevant documents are sought. Your objection can be supported only by the unlikely position that disclosure of only *some* relevant documents sought might satisfy your client's obligations to fully comply with these requests.

If there was something about "officers, directors, principals, employees" or anything else in applicant's definition of "opposer" that you did not understand or found to be too inclusive, you should have identified exactly what it was and your reasons therefor. Otherwise, your objection, as were those addressed above, appears to be nothing more than recalcitrance designed to impede applicant's defense of the meritless claims your client asserts in this proceeding.

John L. Welch, Esq.  
April 7, 2015  
Page 3

Having been granted an additional 30 days in which to comply with applicant's discovery requests, it is more than disappointing that opposer has not produced one document to date. We will expect production of all responsive documents along with your interrogatory answers by the end of this week.

Very truly yours,

James A. Power Jr

c: William E. Maguire, Esq.

Subject: RE: Rhythm in Blues

From: "John L. Welch" <JWelch@LALaw.com>

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

Cc: "'maguire@artnet.net'" <maguire@artnet.net>

Thu, 9 Apr 2015 17:21:14 +0000

Dear. Mr. Powers:

We have your letter of April 7th. Like your interrogatories, your letter rambles on and on rather than come to the point. May we remind you that we invited you to pare down the interrogatories to a reasonable scope, but you have declined to do so? It is apparent that you are determined to try to make this simple proceeding – involving legally identical goods and highly similar marks, and in which priority is not an issue – as complicated as possible, perhaps in the hope that Opposer, out of sheer exasperation, will capitulate. That is not going to happen.

We again invite you to reduce applicant's interrogatories to a reasonable number, and then opposer will appropriately respond.

With regard to document production, we are in the process of gathering documents and preparing them for production. A first batch (production nos. 0001-0550) is available for your download at this dropbox link:

<https://www.dropbox.com/s/b9jbzk15r8vczd5/RHYTHM%200001-0550.pdf?dl=0>

I will be in California next week and will be meeting with Mr. Maguire to finish the gathering of documents.

As to Opposer's objections to Applicant's document requests, we note your assertion that you consider Opposer's objections to be "waived." Opposer does not consider them waived, and it stands by its objections

Very truly yours,

JLW

John L. Welch



One Main Street  
Cambridge, MA 02142  
Direct: +1-617-395-7072  
Main: +1-617-395-7000  
Fax: +1-617-395-7070  
Email: Jwelch@LALaw.com  
[www.LALaw.com](http://www.LALaw.com)

*Confidentiality Note: This e-mail message and any attachments may contain confidential or privileged information. If you are not the intended recipient, please notify me immediately by replying to this message. Please destroy all copies of this message and any attachments.*

*Thank you.*

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

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.              | ) |                            |
| _____                   | ) |                            |

**APPLICANT'S REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

Applicant J & N Sales LLC hereby requests that Opposer Rhythm Holding Ltd. produce to Applicant for inspection and copying, pursuant to FED.R.CIV.P. 34, the following documents and things.

Instructions and Definitions

These requests shall be deemed to be continuing, and Opposer shall promptly serve upon Applicant, in the form of supplemental responses, any information requested herein that becomes known to Opposer following its initial answers.

"Applicant" as used in these requests includes the named applicant, its officers, directors, principals, employees, attorneys and agents.

"Opposer" as used in these requests includes the named opposer, its officers, directors, principals, employees, attorneys, agents, stores, and all related companies including parents, subsidiaries and affiliates.

The term "documents" is used in these requests in its customary, broad sense as defined in Fed.R.Civ.P. 34(a)(1) and includes, without limitation, all types of materials and recorded information, including but not limited to: papers, letters, notes, labels, memoranda, reports, notebooks, transcripts, statements, diaries, log sheets, minutes, drawings, photographs, periodicals, bulletins, notices, digital or analog audio or visual recordings, drafts of

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

1. All documents requested to be identified in Applicant's interrogatories.
2. All documents referenced or identified in Opposer's initial disclosure.
3. All documents concerning any use of a mark comprising "rhythm" by a third party in connection with the advertising or sale of wearing apparel.
4. All documents concerning or supporting Opposer's allegation that there is a likelihood of confusion between Applicant's use or registration of the mark RHYTHM IN BLUES and Opposer's use of a mark comprising "rhythm."
5. All documents concerning Opposer's marketing and sale of wearing apparel in connection with a trademark comprising the word "rhythm."

6. A sample or image of each product marketed or sold by Opposer in connection with a trademark or trade designation comprising wearing apparel, labeled and/or in its packaging in each form in which it has been marketed or sold by Opposer.

7. A sample or image of each label, tag, package, wrapper, box, container, sign, advertisement, display, catalog, promotion, product, display, writing, card, manual, brochure, sales sheet, trade announcement, web page, current or archived, or other form of marketing, promotion, advertisement or description of Opposer's products displaying, bearing or containing a mark comprising the word "rhythm."

8. A copy each video, television commercial, radio advertisement, social media, interactive or animated web page, multimedia or other content promoting, displaying, advertising or offering for sale goods of Opposer in connection with a trademark comprising the word "rhythm."

9. All documents concerning advertising and promotional expenditures by Opposer concerning goods offered for sale in connection with a trademark comprising the word "rhythm."

10. All documents concerning Opposer's awareness of Applicant's adoption, application to register, and/or use of the mark RHYTHM IN BLUES.

11. All documents concerning communications from Opposer objecting to use by another of a word, phrase, symbol, trademark or trade designation comprising the word "rhythm."

12. All documents concerning the style and design of products sold by Opposer in connection with a trademark comprising the word "rhythm."

13. All documents concerning assessment, monitoring and/or analysis of the market, branding, supply, demand, consumer preference or behavior regarding the genre of wearing apparel sold by Opposer in connection with a trademark comprising the word "rhythm."

14. All documents concerning Opposer's awareness of any use by another of a word, phrase, symbol, trademark or trade designation comprising the word "rhythm."

15. All documents concerning consumer, trade or public recognition of a word or phrase comprising the word “rhythm” as a source of or trademark for wearing apparel.

16. All documents concerning any incident in which a person expressed, implied, suggested or exhibited confusion, mistake, or uncertainty regarding source or sponsorship of goods offered by Opposer or Applicant in connection with a trademark comprising the word “rhythm” or regarding any affiliation between them.

17. All documents concerning any incident in which a person expressed, implied, suggested or exhibited confusion, mistake, or uncertainty regarding source or sponsorship of goods offered in connection with a trademark, symbol or designation comprising the word “rhythm” by Opposer and another or regarding any affiliation between them.

18. All documents concerning any modification of, or rebranding or expansion of a product or line of products offered for sale in connection with, a trademark of Opposer comprising the word “rhythm.”

19. All documents concerning communications between Opposer and its customers, advertising or public relations agents, show organizers or the trade concerning use, reputation, presentation, commercial impression, or display of a trademark comprising the word “rhythm.”

20. All documents concerning the types, classes, geographic identity, demographics, perceptions, habits, or purchasing behavior of consumers who purchase or who are understood or targeted to purchase from Opposer goods offered for sale or to be marketed in connection with a trademark comprising the word “rhythm.”

21. All documents concerning communications from customers of Opposer or consumers of Opposer’s goods offered for sale in connection with a trademark comprising the word “rhythm.”

22. All documents concerning Applicant, its trademark RHYTHM IN BLUES, or goods advertised or offered for sale, or Applicant’s marketing, advertising or promotion of its goods offered for sale, in connection with that mark.

23. All documents concerning any authorization, license or grant from Opposer concerning a mark comprised of the word "rhythm."

24. All documents concerning significance or commercial impression of a mark used by Opposer comprising the word "rhythm."

25. All documents which support the allegations made in Opposer's Notice of Opposition in this proceeding.

26. All documents upon which Opposer intends to rely at trial.

January 22, 2015



James A. Power Jr  
POWER DEL VALLE LLP  
233 West 72 Street  
New York, New York 10023  
(212) 877-0100  
jp@powerdel.com  
*Attorneys for Respondent*

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

|                         |   |                |
|-------------------------|---|----------------|
| _____                   | ) |                |
| RHYTHM HOLDING LIMITED, | ) |                |
|                         | ) |                |
| Opposer,                | ) |                |
|                         | ) |                |
| v.                      | ) | Opposition No. |
|                         | ) | 91217589       |
| J & N SALES, LLC,       | ) |                |
|                         | ) |                |
| Applicant.              | ) |                |
| _____                   | ) |                |

OPPOSER’S RESPONSES TO APPLICANT’S  
REQUEST FOR PRODUCTION OF DOCUMENTS ANT THINGS

Opposer responds as follows to Applicant’s “First Set of Request for Production.”

OBJECTIONS

1. Opposer objects to Applicant’s Instructions and Definitions to the extent they seek to impose upon Opposer any obligation or duty different from or beyond those imposed by the Federal Rules of Civil Procedure and/or the Trademark Rules of Practice.
2. Opposer objects to these requests to the extent they call for documents shielded from discovery by the attorney-client privilege, the work product exemption, or any other applicable privilege or exemption.
3. Opposer objects to the Instructions and Definitions to the extent that they seek to impose upon Opposer unduly burdensome and onerous requirements in responding to these requests.

4. Opposer objects to each request that calls for “all” documents regarding a particular topic, to the extent that such a request is overly-broad and burdensome.

5. Opposer objects to the definition of the word “Opposer” on the ground that it is overly-broad and, in part, incomprehensible.

6. Opposer’s responses are made without waiving or intending to waive any objections as to relevancy, privilege, or admissibility at any hearing or at the trial in this or any other action or proceeding, on any ground. A partial response to any request that has been objected to, in whole or in part, is not intended to be a waiver of this or any other objection.

#### RESPONSES

1. No response required.

2. Opposer will produce documents referred to in its initial disclosures.

3. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

4. See the goods of each party and see the marks displayed on the goods.

5. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

6. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are

not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

7. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

8. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

9. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce summary documents.

10. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

11. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

12. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

13. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

14. Opposer objects to this request on the ground that it is overly broad and burdensome.

15. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

16. To the extent this request is understood, none.

17. None.

18. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

19. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

20. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

21. Opposer objects to this request on the ground that it is overly broad and burdensome, and furthermore seeks documents that are irrelevant to this proceeding, and are not likely to lead to the discovery of admissible evidence.

22. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents exist, are relevant to this proceeding, and are not exempt from discovery by the attorney-client privilege, the work product exemption, or some other privilege or exemption, Opposer will produce representative documents.

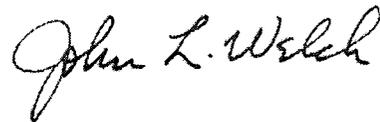
23. None.

24. To the extent this request is understood, none.

25. Opposer objects to this request on the ground that it is overly broad and burdensome. To the extent such documents are not publicly available or are in Applicant's possession, representative documents will be produced.

26. Opposer objects to this request on the ground that it is overly broad and burdensome. Opposer has made no decision as to the documents upon which it will rely at trial. At the appropriate time, Opposer will comply with the TTAB's pre-trial disclosure rules in this regard.

RHYTHM HOLDING LIMITED

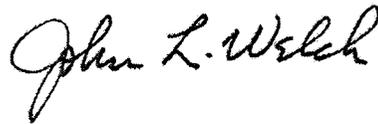


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John L. Welch  
Lando & Anastasi, LLP  
One Main Street, 11<sup>th</sup> Floor  
Cambridge, MA 02142  
617-395-7000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Applicant this 27th day of March, 2015, by mailing a copy thereof via first-class mail, postage pre-paid, to James A. Power, Jr., Esq., Power Del Valle LLP, 233 West 72<sup>nd</sup> Street, New York, NY 10023.

A handwritten signature in black ink that reads "John L. Welch". The signature is written in a cursive style with a large initial "J".

---

John L. Welch