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

Proceeding	91225576
Party	Plaintiff Cards Against Humanity, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

CARDS AGAINST HUMANITY, LLC,

Opposer,

- *against* -

VAMPIRE SQUID CARDS, LLC,

Applicant.

Opposition No.: 91225576

**OPPOSER CARDS AGAINST HUMANITY, LLC'S RESPONSE
TO STATEMENT OF OBJECTIONS TO EXPERT REPORT OF JON G. RYGH**

Opposer Cards Against Humanity, LLC (“Opposer”), through its undersigned counsel, hereby responds to applicant Vampire Squid Cards, LLC’s (“Applicant”) Statement of Objections dated June 8, 2018 (55 TTABVUE) (“SOO”) concerning the Expert Report of Jon G. Rygh dated September 6, 2016 (the “Expert Report”), which was filed on November 27, 2017 as Exhibit 1 to the Testimony Declaration of Jon G. Rygh (35 TTABVUE 5-7).

The admissibility of expert testimony is governed by Fed. R. Evid. 702, which states that if “specialized knowledge” will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto under certain circumstances. The rule does not specify any particular means for qualifying an expert, requiring only that the witness possess the “knowledge, skill, experience, training, or education” necessary to “assist” the trier of fact. *See* Fed. R. Evid. 702. *See also* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (the proper inquiry is whether the proposed expert possesses “a reliable basis in the knowledge and experience of [the relevant] discipline”).

In this case, Applicant objects to and moves to strike the Expert Report: (i) in its entirety, on the grounds that Mr. Rygh’s opinion “is not helpful” to the Board (*see* SOO at 1); and/or (ii) insofar as it references parody, on the grounds that Mr. Rygh “has no specialized knowledge” on this issue (*id.* at 2). For the reasons explained below, Opposer responds that the Expert Report is admissible and relevant to demonstrate the commercial impression and messaging that the parties’ brands are likely to symbolize and create in the minds of the consumer public.

I. MR. RYGH’S OPINIONS SET FORTH IN THE EXPERT REPORT WILL ASSIST THE BOARD IN UNDERSTANDING THE ISSUES IN THIS PROCEEDING

The Expert Report is admissible because it will assist the Board in understanding certain issues in this proceeding, including, but not limited to, the commercial impressions and messaging conveyed to the consuming public upon encountering the names and branding associated with the parties’ games in the marketplace.

Contrary to Applicant’s Statement of Objections, the Expert Report does not opine on the ultimate conclusion of likelihood of confusion or otherwise “seek[] to usurp the role of the Board” in this proceeding. *See* SOO at p. 1. Rather, Mr. Rygh offers his opinion, based on the specialized knowledge he has gained through years of experience in the branding industry, concerning the commercial impressions created by the parties’ marks. The fact that Mr. Rygh opines only on the similarity of the marks and the claimed parody, without consideration of the many other relevant likelihood of confusion factors, underscores the fact that his opinion is not intended to supplant the Board’s determination of a likelihood of confusion. Furthermore, neither Mr. Rygh’s purported “reli[ance] on less evidence than the Board has before it” (*id.* at p. 2) nor his failure to “undertake[] any quantitative analysis” (*id.*) renders the Expert Report inadmissible. Indeed, the initial perception of someone charged with assessing how consumers interpret and internalize

brands and branding is particularly appropriate with a product that is relatively inexpensive and as to which the average consumer does little investigation herself before purchase.

Although Mr. Rygh's expert testimony is not dispositive of the ultimate issues in a case, it certainly is admissible and probative of factual matters within the expert's area of expertise. *See Plyboo Am., Inc. v. Smith & Fong Co.*, 51 U.S.P.Q.2d 1633, 1641 (T.T.A.B. 1999). Indeed, challenges to an expert's opinions "go to the weight of the evidence rather than to its admissibility," and once admitted, the Board has broad discretion in weighing its probative value. *Yamaha In'tl Corp. v. Hoshino Gakki Co.*, 6 U.S.P.Q.2d 1001, 1009 (Fed. Cir. 1988) (upholding the Board's decision to admit expert testimony). *See also Duramax Marine, LLC v. R.W. Fernstrum & Co.*, 80 U.S.P.Q.2d 1780, 2006 WL 2263820, at *18 n. 25 (T.T.A.B. Aug. 4, 2006) (precedential) (citing *Yamaha*, 6 U.S.P.Q.2d at 1009 for the proposition that Board had broad discretion in weighing expert testimony). Accordingly, the Board may properly consider the expert opinion of Mr. Jon G. Rygh contained in the Expert Report.

II. MR. RYGH IS QUALIFIED TO PROVIDE EXPERT TESTIMONY ON THE TOPICS SET FORTH IN THE EXPERT REPORT, INCLUDING PARODY

Mr. Rygh is qualified to provide expert testimony on the topics set forth in the Expert Report, including with respect to the issue of parody. As detailed in the Expert Report and accompanying *curriculum vitae* (35 TTABVUE 8-10), Mr. Rygh possesses a formal education and twenty-plus years of professional experience in the branding and marketing industry. Mr. Rygh regularly assists companies with "branding challenges, ranging from messaging, logo identity to overall look and feel." Expert Report at 1. Applicant did not identify any bases during the deposition that it can cite as grounds for Mr. Rygh's lack of qualifications on the topics on which he opines.

CERTIFICATE OF SERVICE

I, Marissa B. Lewis, hereby certify that a true and complete copy of the foregoing Opposer Cards Against Humanity, LLC Response to Applicant's Statement of Objections to the Expert Report of Jon G. Rygh has been served on counsel of record for Applicant Vampire Squid Cards, LLC by emailing said copy on June 25, 2018 to the following:

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