TTAB

TRADEMARK
Docket No. 110.2*1/R643

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

#74096229

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| RHINO LININGS, USA, INC.<br><br>Petitioner,<br><br>v.<br><br>PATRIARCH PARTNERS AGENCY SERVICES, LLC (RAPID RACK INDUSTRIES, INC.)<br><br>Respondent. | Cancellation No. 92048271<br><br>Registration No. 1,698,407<br><br>Date of Issue: June 30, 1992 |

**RESPONDENT'S OPPOSITION TO PETITIONER'S SECOND MOTION FOR SANCTIONS**

Respondent Rapid Rack Industries, Inc. ("Rapid Rack") respectfully submits its Opposition to Petitioner Rhino Linings, USA Inc.'s ("RL") Second Motion for Sanctions. Rapid Rack does not take this action lightly in view of the Board's suspension order, but seeks to protect its rights after RL's apparent violations of the suspension order. Thus, in an abundance of caution, Rapid Rack provides the following Opposition to RL's Second Motion for Sanctions.

RL's current motion comes despite the fact that Rapid Rack produced a witness in response to RL's Notice of Rule 30(b)(6) Deposition. RL's motion is based upon its own misunderstanding that the Federal Rules of Civil Procedure required Rapid Rack to produce a panel of witnesses. Rapid Rack's compliance with the Notice of Deposition does not warrant the sanctions sought by RL in its untimely second motion.

## I. INTRODUCTION

Counsel for RL uses the current motion to repeat allegations already presented to the Trademark Trial and Appeal Board ("Board"). These actions tax both the resources of the Board and the parties for no purpose at all. Further taxing resources, RL filed its second motion for



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sanctions along with its later filed leave to file a motion for summary judgment in an untimely manner given RL's filed these motion after the Board suspended the proceedings to all matters not germane to RL's September 5, 2008, Motion to Compel. RL's current conduct is another example of RL's disregard for the Board's authority and the Federal Rules of Civil Procedure.

As much as RL keeps repeating that Rapid Rack is seeking a "do-over" by filing suit against RL for its infringement of Rapid Rack's RHINO RACK mark, RL appears to have filed this motion in a belief that its multiple "do-overs" of misrepresented facts will eventuallyl convince the Board of RL's distorted version of events.

## II. BACKGROUND

Throughout the discovery phase of this proceeding, RL's actions appear to have violated the Board's orders, the Trademark Rules and the Federal Rules of Civil Procedure. Although the Board's standard protective order governed this case, RL failed to file its September 5Motion to Compel under seal although the motion contained numerous information produced by Rapid Rack and clearly designated "TRADE SECRET/COMMERCIALLY SENSITIVE." Counsel for Rapid Rack sent an email to RL's counsel resulting in RL filing an Amended Motion to Compel on September 17, 2008. Declaration of Patrick J. Ormé ("Ormé Decl.") filed herewith, Ex. A. Before RL filed its Amended Motion to Compel, the Board issued an order on September 15, 2008, requiring the parties to "not file any paper that is not germane to the motions." Order at 1. RL then filed papers not germane to its Amended Motion including Petitioner's Second Motion for Sanctions and Petitioner's Brief in Support of Petitioner's Second Motion for Sanctions on October 6, 2008, and Petitioner's Motion for Leave to File Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment October 22, 2008. Further undercutting RL's basis for filing its current motion is the fact that Rapid Rack complied with the Rule 30(b)(6) Notice.

On September 26, 2008, Rapid Rack produced a knowledgeable witness, Mr. Harry Randall Taylor, according to RL's Notice of Deposition of Rapid Rack Industries, Inc. (Rule 30(b)(6) Deposition). Ormé Decl., Ex. B. Mr. Taylor has worked for Rapid Rack for nearly twenty years in various positions including Director of Operations, R & D Manager, Engineering Manager, Customer Service Manager, Project Manager. *Id.*, Ex. C (Taylor Depo. at 6:7-7:25). Mr. Taylor's experience allowed him to competently testify to topic numbers 1, 2, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 39, or twenty-three of the forty-five topics noticed by RL. *Id.* (Taylor Depo. at 11:17-12:2).

Instead of exploring in depth the numerous topics on which Rapid Rack designated Mr. Taylor, RL's counsel spent a significant portion of the deposition pursuing questions regarding topics for which Rapid Rack did not designate Mr. Taylor. *Id.* (Taylor Depo. at 34:18-21; 35:5-37:16; 52:1-6; 57:6-16; 58:21-25; 71:4-20; 71:23-72:18; 77:20-25; 85:9-15; 88:9-14; 89:7-10; 90:13-16; and 91:1-92:16; *Id.*, Ex. D (Taylor Depo. at 48:3-49:10). Rapid Rack's counsel objected to questions outside the scope of the topics for which Mr. Taylor had been designated.

RL's counsel, Mr. Dowdy, insisted that Rapid Rack produce a panel of witnesses so that Mr. Dowdy could depose all of them at the *same time*. RL's counsel insisted that "I've done those kind of depositions before where there's several people sitting there." Ormé Decl., Ex. C (Taylor Depo. at 13:8-10). With respect to a panel, Mr. Dowdy stated "I don't care how many people show up." *Id.* (Taylor Depo. at 17:24-25). Mr. Dowdy requested "[t]hey all be sworn in and they all ask -- whenever I've done it in the past, you swear in all three witnesses at once, they sit wherever they sit around the table and then when you ask a question the appropriate designee answers it." *Id.* (Taylor Depo. at 19:24-20:3). Mr. Dowdy justified a need for a panel of deposition witnesses because "I may ask a question about any of the topics because the topics are

interrelated" thus requiring "one or more 30(b)(6) designees to testify as to all the topics." *Id.* (Taylor Depo. at 16:13-17).

Even though RL insisted on a panel of witnesses, Rapid Rack offered witnesses at other times for other topics. Rapid Rack reasonably expected the Mr. Taylor's deposition to take an entire day given the large number of topics for which Rapid Rack offered Mr. Taylor. *Id.* (Taylor Depo. at 12:18-25, 18:5-20). RL's, however, never responded or accepted Rapid Rack's offer of another Rule 30(b)(6) witness. Ormé Decl., ¶ 6.

## III. ARGUMENT

### A. RL's Motion Is Untimely and Wastes the Board's and Parties' Resources

RL's continues to flaunt the Board's authority by filing papers in disregard of the Board's September 15, 2008 Order requiring the parties "not file any paper which is not germane to the motions" filed by RL on September 5, 2008.[1] Instead of adhering to the Order, RL filed the current motion and on October 22, 2008, filed a Motion for Leave to File Motion [*sic*] Summary Judgment and Brief in Support of Motion for Summary Judgment. Both this motion and subsequent motion illustrate RL's disregard for this Board's authority to control its own docket. *Carrini Inc. v. Carla Carini S.R.L.*, 57 U.S.P.Q.2d 1067, 1071 (TTAB 2000). This behavior is similar to RL's violation of the Board's standing protective order by failing to file under seal documents produced by Rapid Rack and designated "Trade Secret/Commercially Sensitive." All of RL's filings after its first amended motion should therefore be disregarded. *See OMS Investments, Inc. v. Messina*, Opp. No. 32,182, 2003 WL 21213271, at n.2 (TTAB 2003)

[1] Rapid Rack filed two motions after the September 15, 2008 Order germane to the order itself - namely, Rapid Rack's Motion for Stay of Proceedings and Motion to Extend Time to Respond. Both of these motions relate to RL's September 5, 2008 and September 17, 2008 amended motions.

(disregarding summary judgment motions filed after and in violation of a suspension order). "As a result of [RL]'s improper filing[s], the Board ha[s] to process the improper motion[s], [Rapid Rack] ha[s] to take the time and effort to respond to the improper motion[s], and the Board ha[s] to process [Rapid Rack]'s response, all of which [are] a waste of time and effort . . . ." *Id.*

RL further disregarded the suspension order because its current motion relies upon other filings not related to the motion resulting in the Board's suspension order. Because RL's current and subsequent motions violate this Board's order, the Board should disregard the current and subsequent motions. *See Farah v. Topiclear Beauty Prods., Inc.*, Opp. No. 151,334, 2003 WL 22022077, at n.3 (TTAB 2003) (disregarding motions filed in violation of Board's suspension order).

Alternatively, if the Board considers RL's current motion, RL's motion should be denied because Rapid Rack complied with the requirements of Federal Rule of Civil Procedure 30(b)(6).

**B. <u>RL Failed to Seek the Required Alternate Remedies to A Perceived Discovery Dispute</u>**

The Trademark Rules and Procedures provide several mechanisms whereby a party dissatisfied with deposition testimony may seek to remedy the perceived slight. These include "applying, under 35 U.S.C. § 24, to the Federal district court, in the jurisdiction where the deposition is being taken" and "fil[ing] a motion with the Board for an order to compel a designation, or attendance at a deposition, or an answer." TBMP § 411.03. If RL was not satisfied with Rapid Rack's Rule 30(b)(6) deponent, it could have taken any of these actions.[2]

[2] That RL's counsel may not have understood the rules under which the deposition occurred is evidenced by both the Court Reporter's and Rapid Rack's counsel explaination to RL's counsel of the requirements regarding depositions in the Central District of California. Ormé Decl., Ex. C (Taylor Depo. at 94:18-95:5).

Instead, RL chose to bypass all these available avenues and file a motion for sanctions.

### C. Rapid Rack Met Its Obligations Under Rule 30(b)(6)

A corporation served a notice of deposition under Rule 30(b)(6) must produce witnesses knowledgeable on the topics contained in the notice. Rule 30(b)(6) also requires an organization "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf." The organization "may set out the matters on which each person designated will testify." Fed. R. Civ. P. 30(b)(6). RL attempts to attach further obligations upon Rapid Rack under Rule 30(b)(6) by reliance upon a case from outside the Central District of California and the Ninth Circuit, where the deposition occurred, that is not binding on any court in the Ninth Circuit. Pet.'s Mot. at 16 (relying upon *U.S. ex rel Fago v. M & T Mortg. Corp.*, 235 F.R.D. 11 (D.D.C. 2006)). As another District of Colombia case noted, the obligations are "this Court's standard in *U.S. ex rel Fago*," not the Central District of California's standard. *Banks v. Office of the Senate Sergeant-At-Arms*, 241 F.R.D. 370, 374 (D.D.C. 2007).

Scant case law exists in the Ninth Circuit regarding duties imposed on a Rule 30(b)(6) deponent other than what exists in the rule itself. *EEOC v. Boeing Co.*, No. CV 05-3034-PHX-FJM, 2007 U.S. Dist. LEXIS 29107, at *3 (D. Ariz. April 17, 2007). As the *Boeing* court noted, "when a live witness is produced for a Rule 30(b)(6) deposition, that witness satisfies the producing party's Rule 30(b)(6) duty so long as the witness can answer questions for which he or she was designated as the person most knowledgeable." *Id.* (citations omitted). Further, "a live witness deponent for a discrete set of topics need not review or prepare to answer questions regarding matters outside of his area of expertise." *Id.* at * 5.

Rapid Rack provided a Rule 30(b)(6) witness, Mr. Taylor, and properly designated him as knowledgeable and prepared to testify regarding over half the forty-five topics included in RL's notice of deposition.[3] Rapid Rack also offered up additional witnesses prepared to testify to

[3] RL's argument that Rapid Rack's counsel improperly objected lacks legal support. "Counsel may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the

the remaining topics. Ormé Decl., Ex. C (Taylor Depo. at 17:12-14, 24:4-11). Rapid Rack thus met its obligations because Mr. Taylor answered question relating to topics for which he had been designated. That RL's counsel chose to question Mr. Taylor on topics for which he had not been designated does not mean Rapid Rack did not meet its duties.

Rapid Rack had no way of knowing that RL's counsel would only ask cursory questions related to topics for which Mr. Taylor had been designated. Further Rapid Rack could not know that the minimal questioning would result in a deposition of about three hours. *Id.* (Taylor Depo. Cover Page) (indicating start and stop times of deposition). That RL spent barely three hours questioning the witness is consistent with RL's desire to avoid the truth that Rapid Rack has not abandoned use of the RHINO RACK mark.

**1. Mr. Taylor's Nearly 20 Years of Employment with Rapid Rack Required Minimal Preparation for the Rule 30(b)(6) Deposition**

Mr. Taylor, began his employment with Rapid Rack in 1989. Ormé Decl., Ex. C (Taylor Depo. at 7:1-14). During the next nearly twenty years, Mr. Taylor held various positions within Rapid Rack including Director of Operations, R & D Manager, Engineering Manager, Customer Service Manager, Project Manager. With knowledge acquired during his nearly twenty years with Rapid Rack, Mr. Taylor did not need extensive preparation for the deposition. RL cannot seriously contend that Mr. Taylor did not possess the knowledge required to testify on behalf of Rapid Rack for the designated topics given Mr. Taylor's extensive knowledge and RL's cursory questioning of Mr. Taylor during the deposition.

**2. Panel of Witnesses Are Not Appropriate**

A panel of witnesses is not required to be produced under Rule 30(b)(6). Instead, a corporate party can "designate one or more officers, directors, or managing agents, or designate

designating party." *Detoy v. City & County of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000).

other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." Fed. R. Civ. P. 30(b)(6). Although RL insisted that Rapid Rack produce a panel of witnesses during the deposition and continues put forth this proposition its motion, nothing in Rule 30(b)(6) requires a deposition occur where no one knows what topic the deposing attorney believes the questions fits within, the witnesses are not sure who should answer the question and the court reporter attempts to record testimony from multiple deponents.

RL's additional argument that RL required a panel of witnesses because Rule 30(d)(1) limits a Rule 30(b)(6) deposition to a single 7 hour day lacks any basis. "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Fed. R. Civ. P. 30(b)(6), Advisory Comm. Notes (2000). Rapid Rack complied with its obligations and produced a knowledgeable corporate deponent. Nothing supports RL's contention that Rapid Rack need do more. RL cannot provide any legal support for its assertion, contrary to the Federal Rules, that Rapid Rack should have produced all Rule 30(b)(6) designees on a single day.

**D. <u>RL Seeks Inappropriate Relief</u>**

Sanctions are only appropriate where "a party, or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) . . . to testify on behalf of a party, fails to attend the party's . . . discovery deposition . . . and such party or the party's attorney or other authorized representative informs the party seeking discovery that no response will be made thereto . . . ." 37 C.F.R. § 2.120(g)(2). Nothing of the kind occurred here.

Counsel for Rapid Rack produced a witness as agreed to by the parties for a Rule 30(b)(6) deposition. With regard to the remaining twenty-two topics, Rapid Rack offered other witnesses. Instead of meeting and conferring regarding when to take the other Rule 30(b)(6)

depositions, RL's counsel chose to file the current motion. Ormé Decl., ¶ 6.

Although Rapid Rack produced a Rule 30(b)(6) deponent and offered up further witnesses, RL seeks a plethora of sanctions. Pet.'s Mot. at 1-2 (seeking preclusion of evidence, default and striking Rapid Rack's Answer and two motions). RL argues various sanctions are warranted based on alleged conduct leading up to the Rule 30(b)(6) deposition. Pet.'s Mot. at 13-14. Such relief is not appropriate given RL's failure to seek further Rule 30(b)(6) testimony offered by Rapid Rack and Rapid Rack's good faith efforts in providing discovery.

The facts of this case do not warranted sanctions. When a responding party "does not unequivocally refuse to provide the requested information, we believe that it would be unduly harsh to impose the preclusion sanction under Federal Rule 37(c)(1)." *Vignette Corp. v. Marino*, 77 U.S.P.Q. 2d 1408, 2005 TTAB LEXIS 516, at *10 (TTAB 2005). Because Rapid Rack has provided discovery responses and offered additional Rule 30(b)(6) witnesses and has not refused to provide such discovery, no sanction at all is justified. Further, the Board generally disfavors motions to strike. TBMP § 506.01; *see Bondurant v. A.B. Dick Co.*, Opp. No. 91124367, 2006 WL 2645996 (TTAB 2006) (denying motion to strike affirmative defenses) (citation omitted).

Especially troubling is RL's reliance upon faulty case law and issues outside of its Amended Motion to Compel to support entry of judgment against Rapid Rack. RL cites to *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970), when in fact that case involves the failure of a specific deponent to appear for a deposition under Rule 36(b)(1), *not* Rule 30(b)(6). *Id.* at 1126. Here, Rapid Rack appeared for the deposition, but RL failed to ask questions as to all the topics for which the deponent had been designated and also failed to respond to Rapid Rack's offer of another Rule 30(b)(6) witness. Similarly, other cases relied upon by RL involve flagrant bad faith not in evidence here. In *National Hockey League v. Metropolitan Hockey*

*Club*, 427 U.S. 639, 643 (1976), "flagrant bad faith" and "callous disregard of their responsibilities" for failure to respond to interrogatories for seventeen months warranted harsh sanctions. Rapid Rack and RL jointly suspended the proceedings and obligations to respond to discovery while the parties conducted settlement negotiations. The *joint* agreement resulted in a gap between RL's serving the discovery responses and Rapid Rack's respones. Similar to the *National Hockey League* case, *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990), also involved a party's flagrant disregard of discovery obligations and thus in not applicable here because Rapid Rack responded to RL's discovery requests[4] and provide a Rule 30(b)(6) deponent.

Because RL offers no factual or legally sound basis for any type of sanctions, the Board should deny all of RL's different requests for sanctions.

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[4] *See* Respondent's Opposition to Petitioner's Amended Motion to Compel Discovery Responses, Motion to Deem Requests for Admissions Admitted and Motion for Sanctions and Respondent's Opposition to Petitioner's Motion to Extend the Discovery Deadline to Allow Petitioner to Conduct Follow-Up Discovery.

## IV. CONCLUSION

Rapid Rack continues to meet its discovery obligations in this matter. RL's failures to adhere to the Trademark Rules and Procedures along with its disregard of this Board's authority and orders and the Federal Rules of Civil Procedure require dismissal of its Second Motion for Sanctions.

Respectfully submitted,

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Date 10-27-08

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**CERTIFICATE OF TRANSMISSION AND SERVICE**

I certify that on October 27, 2008, the foregoing **RESPONDENT'S OPPOSITION TO PETITIONER'S SECOND MOTION FOR SANCTIONS** is being electronically filed with the Trademark Trial and Appeal Board addressed as follows:

Trademark Trial and Appeal Board
P.O. Box 1451
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It is further certified that on October 27, 2008, the foregoing **RESPONDENT'S OPPOSITION TO PETITIONER'S SECOND MOTION FOR SANCTIONS** is being served by mailing a copy thereof by first-class mail addressed to:

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