ESTTA Tracking number: **ESTTA276643**
Filing date: **04/07/2009**

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

Proceeding	92048667
Party	Defendant Peter Baumberger
Correspondence Address	SCOTT S. HAVLICK HOLLAND & HART LLP P.O. BOX 8749 DENVER, CO 80201 UNITED STATES docket@hollandhart.com, aanderson@hollandhart.com, cshearer@hollandhart.com
Submission	Motion to Strike
Filer's Name	Annie Chu Haselfeld
Filer's e-mail	docket@hollandhart.com, aanderson@hollandhart.com, achaselfeld@hollandhart.com, cshearer@hollandhart.com
Signature	/Annie Chu Haselfeld/
Date	04/07/2009
Attachments	Motion to Strike Testimony of Morton Clayman.pdf (7 pages)(235402 bytes) Declaration of Annie Chu Haselfeld in Support of Motion to Strike Testimony of Morton Clayman.pdf (2 pages)(15078 bytes) Motion to Strike Ex. A.pdf (1 page)(41239 bytes) Motion to Strike Ex. B.pdf (2 pages)(68945 bytes) Motion to Strike Ex. C.pdf (4 pages)(124444 bytes) Motion to Strike Ex. D.pdf (1 page)(22534 bytes) Motion to Strike Ex. E.pdf (2 pages)(83689 bytes)

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

Jules Jurgensen/Rhapsody, Inc.,	)	
	)	Cancellation No: 92048667
Petitioner,	)	
	)	Registration No.: 3,181,224
v.	)	
	)	
Peter Baumberger,	)	
	)	
Respondent.	)	
	)	

MOTION TO STRIKE TESTIMONY OF MORTON CLAYMAN

I. INTRODUCTION

Eleven months after the parties submitted initial disclosures, and five months after the close of discovery in the case, Petitioner indicated for the first time that it intended to rely on the testimony of its president, Morton Clayman, in support of its Petition to Cancel. Petitioner did not identify Mr. Clayman as a witness in its Initial Disclosures. Nor did Petitioner identify Mr. Clayman as a witness in Pretrial Disclosures, as required by the Board's rules. Petitioner's failure to identify Mr. Clayman as a witness until after the close of discovery has seriously prejudiced Respondent's defense of this action, and the Board should not countenance such flagrant disregard for its rules. Therefore, pursuant to Rules 26(a) and 37(c)(1) of the Federal Rules of Civil Procedure and Rules 2.121 and 2.123 of the Trademark Rules of Practice, 37 C.F.R. § 2.121 and 2.123, Respondent Peter Baumberger ("Respondent") requests that the Board strike the testimony of the undisclosed witness, Mr. Clayman, in its entirety.

II. FACTS

On March 31, 2008, Petitioner served Initial Disclosures on Respondent, identifying several documents upon which it intended to rely on at trial. (Declaration of Annie Chu Haselfeld, ("Haselfeld Decl.") ¶ 2 and Ex. A thereto.) On June 26, 2008, Petitioner supplemented these disclosures to identify additional documents. (Haselfeld Decl., ¶ 3 and Ex. B thereto.) Neither the original nor the supplemental Initial Disclosures identified Morton Clayman as a potential witness.

Discovery closed in this case on October 4, 2008. Pursuant to the Board's scheduling order, Petitioner's Pretrial Disclosures were due February 16, 2009. Petitioner failed to serve Pretrial Disclosures or to provide any notice to Respondent at that time that it intended to call Mr. Clayman as a witness. (Haselfeld Decl., ¶ 4 and Ex. C thereto.)

On March 4, 2009, five months after the close of discovery, and for the first time during the fifteen month pendency of the action, Petitioner gave notice that it intended to take the testimony deposition of Mr. Clayman, and that it would rely on Mr. Clayman's testimony at trial. (Haselfeld Decl., ¶ 5 and Ex. D thereto.)

On March 18, 2009, Petitioner took the testimony deposition of Mr. Clayman. Respondent attended via telephone and cross-examined the witness under protest, reserving the right to object to Mr. Clayman's testimony on the ground that neither his identity as a witness nor the substance of his testimony was disclosed to Respondent as required by the Board's rules. (Haselfeld Decl., ¶ 6 and Ex. E thereto at 5.)

III. ARGUMENT

A. Petitioner Failed to Disclose the Witness's Identity in Initial Disclosures.

Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure and the Board's rules require that a party, without awaiting a discovery request, disclose the name and, if known, the address and telephone number of each individual likely to have discoverable information. 37 C.F.R. § 2.120. Moreover, parties are required to supplement these disclosures in a timely manner when they learn they are incomplete. Fed. R. Civ. P. 26(a)(1)(A); 37 C.F.R. § 2.120.

A party who fails to identify a witness in its initial disclosures may not call that witness to testify at trial unless the failure was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1). The sanction of exclusion is automatic and mandatory unless the offending party can show that its violation was either justified or harmless. *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003); *Tronknya v. Cleveland Chiropractic Clinic*, 280 F.3d 1200 (8th Cir. 2002) (holding that there was no substantial justification for the failure to disclose witnesses, the failure to disclose was not harmless, and the district court did not abuse its discretion in excluding all testimony of witnesses which were not included in the party's disclosures or supplements); *Sears, Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 18 n.7 (1st Cir. 1997) (striking the affidavit of a witness whose identity was not disclosed at the outset of litigation was well within the district court's discretion).

Here, Petitioner failed to identify Mr. Clayman in its Initial Disclosures or in any subsequent supplement. In fact, Petitioner did not disclose Mr. Clayman's identity or its intention to call him as a witness until after the close of discovery. Consequently,

Petitioner's inadequate disclosure is far from harmless, because Respondent had no opportunity to seek discovery of Mr. Clayman or adjust its strategy of the defense of this action. Allowing Mr. Clayman's testimony at this point would severely prejudice Respondent's defense of this case, and is exactly the kind of inequitable trial tactic Federal Rules 26 and 37 are intended to prevent. Therefore, the Board should strike Mr. Clayman's testimony in its entirety.

B. Petitioner Also Failed to Identify Mr. Clayman in Pretrial Disclosures.

Not only did Petitioner fail to provide notice of Mr. Clayman as a potential witness in Initial Disclosures, Petitioner also failed to provide notice in Pretrial Disclosures that it would rely on his testimony. Trademark Rule 2.121(e) requires that a party disclose:

> the name, and if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises, general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or if neither a party nor related to a party, occupation and job title, a general summary or list of subjects on which the witness is expected to testify . . .

According to the Board's scheduling order of December 18, 2008, Petitioner's Pretrial Disclosures were due February 16, 2009. Petitioner failed to serve Pretrial Disclosures on Respondent.[1] Respondent only learned of Petitioner's intent to call Mr. Clayman when it received notice of his testimony deposition on or about March 4, 2009. (Haselfeld Decl., ¶ 5 and Ex. D thereto.)

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[1] However, on March 11, 2009, Petitioner submitted a list of several documents it had produced which Respondent construed as a sort of Pretrial Disclosure. (Haselfeld Decl., ¶ 4 and Ex. C thereto.)

The appropriate sanction where a party calls a witness not included on a pretrial witness list is to exclude the testimony of that witness. *Spray-Rite ServiceCorp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982) (district court did not abuse its discretion in excluding the testimony of a witness not included on a pretrial witness list); *Reno Air Racing Assoc. v. McCord*, 452 F.3d 1126, 1140 (9th Cir. 2006) ("trial by surprise is no longer countenanced" and it was not an abuse of discretion to exclude testimony from witnesses who were not listed in the pretrial witness list); *Proveris Scientific Corp. v. Innovasystems, Inc.*, 536 F.3d 1256 (Fed. Cir. 2008) (expert witness testimony was properly excluded because the expert report was not submitted); *Saudi v. Northrup Grumman Corp.*, 427 F.3d 271, 278 (4th Cir. 2005) ("A party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case.")

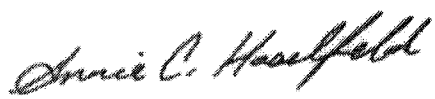
Pursuant to the Board's rules, where a witness is not disclosed in Pretrial Disclosures, the Board may strike the testimony of the witness in its entirety depending upon an evaluation of relevant circumstances. 37 C.F.R. § 2.123. Here, relevant circumstances counsel in favor of excluding Mr. Clayman's testimony. Petitioner failed to identify Mr. Clayman in its Initial Disclosures, failed to supplement its Initial Disclosures to identify Mr. Clayman, failed to identify Mr. Clayman in any Pretrial Disclosure, and identified Mr. Clayman as a potential witness for the first time months after the close of discovery. As a result of Petitioner's conduct, Respondent's defense of this case has been seriously prejudiced as it has been deprived of the opportunity to conduct further discovery into information possessed by Mr. Clayman or to adjust its

strategy in response to his designation as a witness. Based on these circumstances, the Board should strike the testimony of Mr. Clayman in its entirety.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Board grant its Motion to Strike Testimony of Morton Clayman in its entirety. In the event that the Board denies this Motion, Respondent respectfully requests that its deadline for submitting Pretrial Disclosures be reset at thirty days after the date of the Board's order denying the Motion and that all other trial dates, including the close of Respondent's testimony period, be reset accordingly.

Respectfully submitted,



Dated: April 7, 2009

Andrea Anderson
Annie Chu Haselfeld
Holland & Hart LLP
One Boulder Plaza
1800 Broadway, Suite 300
Boulder, CO 80302

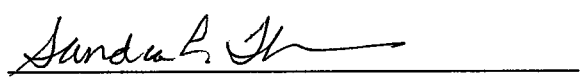
ATTORNEYS FOR RESPONDENT
PETER BAUMBERGER

CERTIFICATE OF SERVICE

The undersigned certifies that the attached **MOTION TO STRIKE TESTIMONY OF MORTON CLAYMAN** was served on the below-identified counsel for Petitioner on April 7, 2009 by the means indicated below

- ☒ U.S. Mail, postage prepaid
- ☒ Email
- ☐ Hand Delivery

Stuart E. Beck
THE BECK LAW FIRM
1500 Walnut Street, Suite 700
Philadelphia, PA 19102-3504
BeckPatent@aol.com



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

Jules Jurgensen/Rhapsody, Inc.,	)	
	)	Cancellation No: 92048667
Petitioner,	)	
	)	Registration No.: 3,181,224
v.	)	
	)	
Peter Baumberger,	)	
	)	
Respondent.	)	
	)	

DECLARATION OF ANNIE CHU HASELFELD IN SUPPORT OF
MOTION TO STRIKE TESTIMONY OF MORTON CLAYMAN

I, Annie Chu Haselfeld, declare as follows:

1. I am an attorney for Holland & Hart LLP, and I am one of the attorneys of record for Respondent Peter Baumberger in this proceeding. I make this declaration based on personal knowledge.

2. On March 31, 2008, Petitioner served Initial Disclosures on Respondent. Attached hereto as Exhibit A is a true and correct copy of Petitioner's Initial Disclosures dated March 31, 2008.

3. On June 26, 2008, Petitioner served Supplemental Initial Disclosures on Respondent. Attached hereto as Exhibit B is a true and correct copy of Petitioner's supplement to its Initial Disclosures dated June 26, 2008.

4. On March 11, 2009, Petitioner served a list of documents it has produced on Respondent. Attached hereto as Exhibit C is a true and correct copy of documents which Respondent construed as Pretrial Disclosures dated March 11, 2009.

5. On March 4, 2009, Petitioner served a Notice of Testimony Deposition of Morton Clayman on Respondent. Attached hereto as Exhibit D is a true and correct copy of Petitioner's Notice of Testimony Deposition of Morton Clayman dated March 4, 2009.

6. On March 18, 2009, Petitioner took the testimony deposition of Morton Clayman. Attached hereto as Exhibit E is a true and correct copy of deposition transcript excerpts from Morton Clayman's deposition dated March 18, 2009.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 7th day of April, 2009.

Annie Chu Haselfeld

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RECEIVED
APR - 4 2008
Holland & Hart LLP

LAW OFFICES
THE BECK LAW FIRM
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1429 WALNUT STREET
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UNITED STATES OF AMERICA
Tel: (215) 568-6000
Fax: (215) 568-0403
Email: BeckPatent@aol.com

STUART E. BECK, P.C.

D. BRUCE HANES
OF COUNSEL

March 31, 2008

Andrea Anderson, Esquire
Holland & Hart
One Boulder
1800 Broadway, Suite 300
Boulder, CO
80302

Re: Jules Jurgensen/Rhapsody, Inc.
v. Peter Baumberger;
Cancellation No. 92048667; 622-005

Dear Ms. Anderson:

This is in reference to our telephone conference this afternoon.

In connection with the requirements of Patent Office Rule 120, and Federal Rule 26, we both will continue our collection of information, documents and things as required by these Rules.

Further, we agree to explore with our respective clients the possible terms for a settlement of this matter along the lines that we discussed.

Finally, I gratefully acknowledge your consent to Jules Jurgensen/Rhapsody, Inc. filing an amended Notice Of Opposition that includes its registration No. 3,118,852 for JULES JÜRGENSEN. It occurred to me during the drafting of the Amended Notice of Opposition that reference should be made to the client's cancelled registration for URBAN JÜRGENSEN, which I am doing. I trust that you have no objection.

Very truly yours,

THE BECK LAW FIRM

By: _____
Stuart E. Beck

cc: Jules Jergensen/Rhapsody, Inc.;

An Intellectual Property Law Firm

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THE BECK LAW FIRM
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1429 WALNUT STREET
PHILADELPHIA, PENNSYLVANIA 19102
UNITED STATES OF AMERICA
Tel: (215) 568-6000
Fax: (215) 568-0403
Email: BeckPatent@aol.com

RECEIVED
JUN 30 2008
Holland & Hart LLP

STUART E. BECK, P.C.

D. BRUCE HANES
OF COUNSEL

June 26, 2008

Andrea Anderson, Esquire
Holland & Hart
One Boulder
1800 Broadway, Suite 300
Boulder, CO
80302

Re: Jules Jurgensen/Rhapsody, Inc.
v. Peter Baumberger;
Cancellation No. 92048667; 622-005

Dear Ms. Anderson:

Enclosed are the materials listed on the attachment to this letter. They are being sent to you in further compliance with the continuing requirements of Patent Office Rule 120, and Federal Rule 26.

Not withstanding the submission of the enclosed materials, we will continue our collection of information, documents and things as required by the Rules.

I have not heard from you since our telephone conference in April. Therefore, I doubt that your client is interested in settling this matter and I am moving forward in the high likelihood that it will go to hearing before the TTAB.

Very truly yours,

THE BECK LAW FIRM

By: _____
Stuart E. Beck

cc: Jules Jergensen/Rhapsody, Inc.

ATTACHMENT

P-0001 Multi-page brochure entitled: THE JULES JURGENSEN STORY.

P-0002 Multi-page report of sales of URBAN JERGENSEN brand watches by Jules Jergensen/Rhapsody, Inc.; from 11-08-99 to 01-30-07 with customer names covered.

P-0003 Sales invoice of URBAN JERGENSEN brand watches by Jules Jergensen/Rhapsody, Inc.;from 03-26-08 with customer name covered.

P-0004 One page brochure promoting JULES JERGENSEN and URBAN JÜRGENSEN watches.

P-0005 Undated photograph of URBAN JÜRGENSEN wrist watch and watch strap.

P-0006 Photograph dated 11-29-07 of the president of Jules Jergensen/Rhapsody, Inc. in the company's offices in front of a bust of Urban Jurgensen.

P-0007 Photograph dated 11-29-07 of a bust of Urban Jurgensen in the offices Jules Jergensen/Rhapsody, Inc.

P-008 Eight page catalogue entitled THE HOUSE OF JÜRGENSEN - URBAN JÜRGENSEN

P-009 Photograph dated 11-29-07 of a bust of a portrait of Urban Jurgensen in the offices Jules Jergensen/ Rhapsody, Inc.

P-010 Thirty one page catalogue entitled Jules Jergensen Since 1740 - 2008

RECEIVED
MAR 13 2009
Holland & Hart LLP

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1500 WALNUT STREET
PHILADELPHIA, PENNSYLVANIA 19102-3504
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Fax: (215) 568-0403
Email: BeckPatent@aol.com

STUART E. BECK, P.C.

March 11, 2009

Via FedEx: 7964 2049 3923

Andrea Anderson, Esquire
Holland & Hart
One Boulder
1800 Broadway, Suite 300
Boulder, CO
80302

Re: Jules Jurgensen/Rhapsody, Inc.
v. Peter Baumberger;
Cancellation No. 92048667; 622-005

Dear Ms. Anderson:

This is an update to my letter of July 26, 2008.

You already have Petitioner's documents P-0001 through P-0010 which were included with my letter of July 26, 2008.

Accompanying this letter are Petitioner's documents P-0011 through P-0026.

The attachment to this letter identifies all of Petitioner's documents that have been produced to date, although only documents P-0011 through P-0026 are enclosed.

Very truly yours,

THE BECK LAW FIRM

By: _____
Stuart E. Beck

cc: Jules Jergensen/Rhapsody, Inc.

P-0011 Forty page Stock Purchase Agreement dated 07-25-74 between Downe Communications, Inc., a Delaware corporation, and Jules Jurgensen Corp., a New York corporation on the one hand and Rhapsody, Inc. a Pennsylvania corporation on the other hand.

P-0012 Assignment of Trademark Registration dated 07-25-74 relating to an assignment of registration 285,956 dated August 11, 1931 for JULES JURGENSEN from Jules Jurgensen Corp., a New York corporation to Rhapsody, Inc. a Pennsylvania corporation.

P-0013 JULES JURGENSEN - US Trademark Registration 0,285,956, Registered August 11, 1931, expired. Two pages.

P-0014 JULES JURGENSEN - US Trademark Application 76/133,266, Filed August 31,2000, abandoned. One page.

P-0015 JULES JURGENSEN - US Trademark Registration 3,118,852, Registered July 25, 2006. Two pages.

P-0016 URBAN JURGENSEN - US Trademark Registration 2,153,240, Registered April 28, 1998, cancelled. One page.

P-0017 URBAN JURGENSEN - US Trademark Application 76/685,220, Filed December 26, 2007. Two pages.

P-0018 URBAN JURGENSEN - US Trademark Registration 3,181,224, Registered December 5, 2006. Two pages.

P-0019 Ten page opinion from The Trademark Trial and Appeal Board dated 12 AUG 97 in Cancellation No. 21,824; Jules Jurgensen/Rhapsody, Inc. v. Fabrica Di Oroloqi Sindaco S.A., Orologi "Jaguar" (Fabrique d'Horologerie Sindaco S.A., Montres "Jaguar") (Uhrenfabrik Sindaco A.G., "Jaguar" Uhren) and Peter Baumberger.

P-0020 Two pages; docket entries for Cancellation No. 21,824.

P-0021 Twelve page (including front and back covers) JULES JURGENSEN catalogue; undated.

P-0022 Thirty six page (including front and back covers) JULES JURGENSEN catalogue; dated 2005.

P-0023 Sixteen page (including front and back covers) JULES JURGENSEN catalogue; dated 2006.

P-0024 Thirty six page (including front and back covers) JULES JURGENSEN catalogue; dated 2007.

P-0025 Thirty two page (including front and back covers) JULES JURGENSEN catalogue; dated 2008.

P-0026 Thirty two page (including front and back covers) JULES JURGENSEN catalogue; dated 2009.

* * * *

ATTACHMENT

P-0001 Multi-page brochure entitled: THE JULES JURGENSEN STORY.

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P-0010 Thirty one page catalogue entitled Jules Jergensen Since 1740 - 2008

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

JULES JURGENSEN/RHAPSODY, INC.	:	
	:	Cancellation No. 92-048,667
Petitioner	:	
	:	Registration No. 3,181,224
	:	
v.	:	Mark: URBAN JÜRGENSEN
	:	
	:	
PETER BAUMBERGER	:	
	:	
Respondent	:	

NOTICE OF TESTIMONY DEPOSITION

Andrea Anderson, Esquire
Holland & Hart
One Boulder
1800 Broadway, Suite 300
Boulder, CO 80302

PLEASE TAKE NOTICE that on Wednesday, March 18, 2009, Petitioner, Jules Jurgensen/Rhapsody, Inc., will take the testimony deposition upon oral examination of Morton Clayman at the offices of Jules Jurgensen/Rhapsody, Inc., 101 West City Line Avenue, Bala Cynwyd, PA 19004 at 10:00AM before an officer authorized to administer oaths.

The deposition shall continue from day to day until completed.

You are invited to attend and cross-examine.

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

JULES JURGENSEN / RHAPSODY, INC.,	:	CANCELLATION NO. 92-048667
Petitioner,	:	
- vs -	:	REGISTRATION NO. 3181224
PETER BAUMBERGER,	:	
Respondent.	:	

- - - - - - - - - - - -

- - -

Trial deposition of MORTON CLAYMAN, taken at the offices of Jules Jurgensen, 101 West City Avenue, Bala Cynwyd, Pennsylvania, on Wednesday, March 18, 2009, commencing at 9:54 a.m., before EMILIE S. POSNAN, Professional Reporter-Notary Public, there being present.

- - -

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1 MORTON CLAYMAN, after having been
2 first duly sworn, was examined and testified
3 as follows:
4 MR. BECK: We have agreed that
5 Mr. Clayman is going to sign the deposition
6 and that all objections are going to be made
7 during the course of the deposition. Is
8 there anything else we have to cover?
9 MS. ANDERSON: I just need to put
10 one thing on the record. We are attending
11 and cross-examining at this testimony
12 deposition under protest. Mr. Clayman
13 wasn't listed in the petitioner's initial
14 disclosures or pretrial disclosures as a
15 witness that would be testifying in this
16 matter. So we're going to go ahead and run
17 the deposition like we ordinarily would, and
18 then any issues about that we'll take up
19 with the Board afterwards, but I did just
20 need to get that on the record.
21 MR. BECK: My name is Stuart Beck
22 and I'm the attorney for Jules Jurgensen /
23 Rhapsody, Inc., the petitioner, in this
24 legal proceeding. This is a cancellation