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

Proceeding	91162489
Party	Defendant RawVibe Entertainment, Inc. RawVibe Entertainment, Inc. 10040 Sheridan Street Suite 211 Pembroke Pines, FL 33024
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Attachments	Opposition Number 91162489-Oppotion to Motion to Reargue.pdf (7 pages)

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

Applicant: RawVibe Entertainment, Inc.
Mark: RAWVIBE
Serial No.: 78/254,486
Filed: May 27, 2003
Published: June 1, 2004
Goods: Pre-recorded audio, visual and audio-visual performances in analog and digital configurations and formats contained in analog magnetic tapes and discs, all containing music in International Class 9.

VIBE VENTURES LLC,

Opposer,

Opposition No. 91162489

v.

RAWVIBE ENTERTAINMENT, INC.,

Applicant.

**RAWVIBE ENTERTAINMENT'S OPPOSITION TO
VIBE VENTURE'S MOTION TO REARGUE**

I. INTRODUCTION.

Vibe's Motion should be denied because it is without merit. On April 26, 2005, Vibe filed a motion for enlargement of the discovery and testimony periods, representing that RawVibe had consented thereto. RawVibe established, through competent evidence, that no such agreement had been made by the parties. Now, Vibe improperly seeks to "reargue" the merits of its Motion, by attacking RawVibe's counsel and challenging the propriety of submitting an Opposition to a purportedly "consented to" motion. It is distressing that Vibe would choose to proceed in this manner. Vibe's attempt to take a "second-bite" at seeking

enlargement of the discovery and testimony periods should be denied for the following reasons: (1) the motion violates 37 C.F.R. § 2.127(b) and TBMP § 518 which preclude a party seeking reconsideration of an order from introducing additional evidence or rearguing points presented in the original motion; (2) Vibe still failed to establish that it is entitled to such an enlargement; and (3) contrary to Vibe’s unsupported assertions, Vibe has failed to establish that RawVibe ever consented to such an enlargement. Accordingly, RawVibe respectfully requests that Vibe’s motion be denied in its entirety.

II. BACKGROUND.

On October 14, 2004, the TTAB mailed to both parties the Notice of Opposition to Registration and Trial Dates. The discovery and testimony periods were set as follows:

Discovery Period to Open:	November 3, 2004
Discovery Period to Close:	May 2, 2005
30-day testimony period for party in position of plaintiff to close:	July 31, 2005
30-day testimony period for party in position of defendant to close:	September 29, 2005
Rebuttal testimony period for plaintiff to close:	November 13, 2005

On November 23, 2004, RawVibe filed its Answer to Vibe’s Opposition. Declaration of Shanée Y. Williams (“Williams Decl.”), ¶ 2. Subsequent to that filing, Vibe never made any attempt to contact RawVibe or to serve any discovery on RawVibe.¹ Id. On April 26, 2005, Jean Voutsinas, counsel for Vibe, contacted RawVibe’s counsel, by phone, requesting to extend the discovery period. Id., ¶ 3. RawVibe’s counsel requested that Vibe submit a stipulation for RawVibe’s review and approval, which Vibe agreed to do. Id., ¶¶ 4-5.² No other deadlines were

¹ Vibe served its first set of Interrogatories and Requests for Production of Documents on April 27, 2005. No other discovery has been served by Vibe in this Opposition proceeding.

² Indeed, although the parties disagree with respect to the length of the extension discussed on April 26, even the “evidence” improperly proffered by Vibe indicates that Vibe agreed to prepare a stipulation for RawVibe’s review. See Voutsinas Decl., Exh. D (instructing paralegal to prepare a stipulation).

proposed or discussed during the telephone call. Id., ¶ 4.³ Rather than comport with its agreement to draft a stipulation, however, on April 26, 2005, Vibe submitted its Motion for Enlargement of Discovery and Testimony Periods on Consent, requesting a three-month extension of the discovery and testimony periods. Id., ¶ 6. Prior to being served the Motion, RawVibe had never seen the document or the dates proposed therein. Id. Nor had the parties discussed these dates. Id.

On May 2, 2005, RawVibe's counsel requested that Vibe take immediate steps to withdraw its Motion as RawVibe had not consented to any aspect thereof. Williams Decl., ¶ 7. On May 3, 2005, Vibe indicated that it would withdraw its Motion. Id., ¶ 8. On May 4, 2005, Vibe conceded that it had never discussed the proposed dates for extension of the testimony period with RawVibe. Id., ¶ 9. Vibe never withdrew its Motion.

On May 17, 2005, Vibe's Motion was denied in its entirety. Williams Decl., ¶ 10. On June 14, 2005, Vibe purported to serve its Motion to Reargue. Id., ¶ 11. However, RawVibe did not receive Vibe's memorandum of points and authorities or supporting declaration. Id. Accordingly, on June 22, 2005, RawVibe requested that it be provided with a copy of the moving papers, and that Vibe take immediate steps to inform the TTAB that RawVibe had not been properly served. Id. Although RawVibe does not know whether Vibe informed the TTAB of the service problems, Vibe agreed to provide RawVibe with additional days to oppose the motion. Id.

III. ANALYSIS.

A. Vibe's Motion To Reargue Should Also Be Denied Because It Is Baseless.

Vibe's Motion to reargue should be denied because it is brought without substantial justification, and in flagrant violation of 37 C.F.R. § 2.127(b) and TBMP § 518. Specifically, Vibe's motion is unjustified because RawVibe has already established that it never consented to

³ Indeed, Vibe's counsel concedes this very point. See Voutsinas Decl., ¶ 7.

Vibe's motion to enlarge in the first place.⁴ Further, TBMP § 518 provides that Vibe's motion for reconsideration pursuant to 37 C.F.R. § 2.127(b) must demonstrate that, based on the facts before the TTAB and prevailing authorities, the TTAB erred in making its decision denying Vibe's Motion for Enlargement. See TBMP § 518. In making this showing, Vibe is expressly precluded from introducing additional evidence or rearguing the points presented in its original motion. Id. However, that is precisely what Vibe is doing by bringing this motion. As Vibe has not satisfied the standards for seeking reconsideration of the TTAB's May 17, 2005 Order, Vibe's motion must be denied.

B. Vibe's Motion For Enlargement Was Properly Denied Because RawVibe Had Not Consented Thereto.

Assuming, *arguendo*, that the TTAB substantively considers Vibe's motion for reargument, Vibe's motion for enlargement of the discovery and testimony periods was properly denied. As established by the record before the TTAB in connection with the motion, RawVibe had not consented to the request for enlargement. Rather, RawVibe requested that Vibe send a stipulation concerning its proposal to extend the discovery and testimony periods. Williams Decl., ¶¶ 4-5. This request was made in part so that RawVibe's counsel could consult its calendar, and also so that RawVibe's counsel could provide something tangible to its client for consideration of Vibe's request. Id. However, RawVibe never received the promised stipulation. Accordingly, Vibe's motion "on consent" was wholly improper, and was appropriately denied.

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⁴ Moreover, it is not customary practice to file any document in a judicial or administrative proceeding representing that the content therein has been consented to by the non-submitting party, when the non-submitting party is has not been afforded an opportunity to review the document and indeed confirm its consent, or indicate the absence of consent, to the information contained therein.

C. Vibe's Motion Was Properly Denied Because Vibe Failed To Satisfy The Standards For Enlargement Of Discovery And Testimony Periods

Vibe's Motion was properly denied because Vibe failed to establish good cause for an extension of time. Pursuant to 37 C.F.R. § 2.116(a), the Trademark Trial and Appeal Board ("TTAB") is authorized to consider motions to extend time under Rule 6(b) of the Federal Rules of Civil Procedure. See TBMP § 509.01. "A motion to extend time must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient." Id., § 509.01(a) (citing Fairline Boats plc v. New Howmar Boats Corp., 59 U.S.P.Q.2d 1479, 1480 (TTAB 2000) (denying motion to extend time where vague reference to possibility of settlement failed to demonstrate expectation that proceedings would not continue during settlement discussions)). "A party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefore." TBMP § 509.01(a) (citing Luemme, Inc. v. D.B. Plus, Inc., 53 U.S.P.Q.2d 1758, 1760-61 (TTAB 1999) (finding lack of diligence of moving party that waited until last day of discovery period to serve discovery)). Vibe's Motion was denied because it failed to meet these requisite standards for extension of any deadlines previously set for this Opposition proceeding.

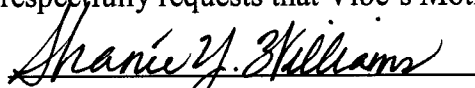
As established by RawVibe in its Opposition to Vibe's Motion, Vibe waited until April 27, 2005 – just **three business days** before the close of the discovery period – to serve its first set of discovery on RawVibe. Thus, Vibe failed to satisfy the Luemme, Inc. standard for diligence. Further, RawVibe established that Vibe failed to show any facts establishing good cause for extension of any time periods. Particularly, RawVibe established that Vibe's conclusory reference (unsupported by any competent evidence) to the parties' purported settlement discussions did not provide sufficient grounds for extension of time periods set by the TTAB. See Instruments SA, Inc. v. ASI Instruments, Inc., 53 U.S.P.Q.2d 1925, 1927 (TTAB 1999).

Vibe's assertion that RawVibe agreed to provide a settlement proposal is incorrect. Indeed, during the April 26, 2005 discussion, RawVibe informed Vibe that it had considered a potential settlement option. Williams Decl., ¶ 12. However, RawVibe also informed Vibe it would vigorously pursue registration of the RawVibe mark. Id. RawVibe asked Vibe to make a settlement proposal, and to this date, no such proposals have been made by Vibe.

IV. CONCLUSION.

For the foregoing reasons, RawVibe respectfully requests that Vibe's Motion be denied.

Dated: July 8, 2005

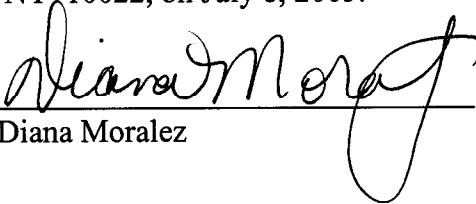


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Opposition to Vibe's Motion for Enlargement of Discovery and Testimony Periods On Consent has been duly served by mailing such copy first class, postage prepaid, to Edward H. Rosenthal, Esq., Frankfurt Kurnit Klein & Selz, PC, 488 Madison Avenue, New York, NY 10022, on July 8, 2005.


Diana Moralez