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

Proceeding	92057182
Party	Defendant Pasquale Rotella and Insomniac Holdings, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration Nos. 3,777,422 and 4,090,760
Marks: ELECTRIC DAISY CARNIVAL; EDC
Issued: April 20, 2010; January 24, 2012

Stephen R. Enos. Petitioner, v. Pasquale Rotella and Insomniac Holdings, LLC, Respondents.	)	Cancellation No. 92057182

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REPLY IN SUPPORT OF INSOMNIAC HOLDINGS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND SUPPLEMENTAL AND AMENDED WRITTEN DISCOVERY RESPONSES

Stephen Enos' opposition to Insomniac Holdings' second motion to compel is pure gamesmanship. Enos cannot deny that he agreed to produce responsive documents to Insomniac Holdings. He also does not deny that he is withholding responsive documents, including the questionnaire he used to prepare Ron Dedmon's declaration, among others. Nor does he even attempt to defend his deficient, contradictory and unresponsive interrogatory answers.

Lacking any good faith basis to oppose the motion, he tries to distract the Board by complaining that four months of meeting-and-conferring is insufficient; he distorts the discovery

record and raises new meritless objections that he has waived in any event; and he complains about discovery requests that are not even before the Board. He also protests that the case is taking too long, ignoring the fact that he has caused every delay in this case by repeatedly concealing and withholding evidence. Indeed, he does not deny that he caused months of delay earlier in discovery by deliberately deceiving the Board and Insomniac Holdings about the location of his declarants.

The simple fact is that Enos knows he cannot win at trial. Among other things, his claims are doomed because he abandoned any rights he may have once owned in the ELECTRIC DAISY CARNIVAL mark years before Pasquale Rotella began using the mark. His story about an oral license is a *post hoc* fiction that will not withstand scrutiny once the case reaches trial. So his only strategy is to play games, conceal evidence and try to prolong discovery for as long as he can in the hope that Insomniac Holdings will pay him to go away before the case reaches trial. Neither Insomniac Holdings nor the Board should be forced to tolerate such sharp tactics, and the Board should grant Insomniac Holdings' motion in full without further delay.

A. The Board Should Grant Insomniac Holdings' Motion because Enos Concedes Every Substantive Point Raised in the Motion.

Enos' opposition does not deny a single substantive point raised in Insomniac Holdings' motion. The following facts are more than sufficient for the Board to grant the motion in full:

- Enos indisputably agreed to produce documents responsive to all of the document requests at issue in this motion but has never produced a single document to Insomniac Holdings.
- Enos does not dispute that he is withholding responsive documents, including without limitation the questionnaire he collected from his declarant Ron Dedmon and the written communications he claims to have had with thirty other people that supposedly refer or related to his supposed oral license to Rotella.

- Enos does not dispute that the interrogatory answers discussed in the motion are deficient, contradictory and non-responsive.

Insomniac Holdings is entitled to an order compelling Mr. Enos to cure the deficiencies identified in its moving papers, all of which are undisputed. The Board need go no further to grant the motion in full and compel Enos to comply with his discovery obligations.

B. Enos' Arguments in Opposition to the Motion are both Meritless and Disingenuous.

Realizing that he cannot dispute the merits of Insomniac Holdings' motion, Enos bases his entire opposition on disingenuous accusations about "discovery abuse." Indeed, his opposition amounts to nothing more than an argument that he should not be required to produce any documents or correct his undeniably deficient written responses because he is unhappy about other discovery requests that are not even before the Board. His argument is frivolous on its face, but is also based on gross mischaracterizations of the record that must be corrected before Insomniac Holdings addresses the other aspects of his arguments.

Enos' complaints about being "whipsawed" and otherwise "abused" by the respondents are groundless. At the outset of discovery, Enos and Pasquale Rotella (then the sole respondent) exchanged initial sets of interrogatories and document requests, and Enos served his responses on or about September 4, 2013. (Dkt. No. 25, Declaration of Christopher Varas ("Varas Decl."), Exs. 4, 5.) Those are the only discovery requests Rotella served, and they are not at issue in this motion.

Enos moved to join Insomniac Holdings as a separate respondent on November 4, 2013. (Dkt. No. 5.) In his motion, Enos described the discovery that he and Rotella had exchanged as "minimal." (*See* Dkt. No. 5, p. 2.) Enos also emphasized that he was seeking to add Insomniac Holdings early in the case and "at a time when [it] can participate in pre-trial discovery. If requested, Petitioner will not object to an extension of time for pre-trial discovery necessitated by the addition of the new party." (*Id.* at p. 3.) The Board granted that motion on January 7, 2014. (Dkt.

No. 8.) Contrary to Enos' accusation that he has been "whipsawed", Insomniac Holdings is the only party that has served any discovery on Mr. Enos since it was added as a party.

Insomniac Holdings served Enos with the interrogatories and document requests at issue in this motion on April 22, 2014 (first set of interrogatories and first set of document requests) and on July 22, 2014 (second set of interrogatories). (Motion, pp. 5-6.) No other discovery requests are before the Board at this time.

Shortly before filing its motion, Insomniac Holdings served Enos with its third set of interrogatories, its second set of requests for production of documents and its first set of requests for admissions.[1] Enos alludes to those requests throughout his opposition but they are not before the Board and have nothing to do with this motion. To the extent Enos' opposition refers to or relies on those requests, the Board should reject his arguments because they are not relevant to his failure to serve proper written responses or his refusal to produce the responsive documents he is withholding.

1. Insomniac Holdings Met and Conferred in Good Faith with Enos for Months Prior to Filing its Motion.

Enos' claim that Insomniac Holdings filed its motion without sufficiently meeting and conferring has no merit. Insomniac Holdings met and conferred with Enos repeatedly, including in its highly-detailed letter of July 3, 2014, several telephone conversations and Insomniac Holdings' further substantive email on October 14, 2014. (*See* the previously filed Declaration of Christopher Varas (the "Varas Decl."), ¶ 13, Exs. 10, 14.) Throughout this extended four-month process Enos did not argue the merits of the points Insomniac Holdings raised. To the contrary, he agreed to serve documents and supplemental responses (and agreed to multiple extensions of the case deadlines to accommodate his delay in complying), but never did. (*See id.* at Exs. 11, 15.) The only recourse a

[1] Motion practice may be required with respect to those requests because Enos "answered" them by copying and pasting the same boilerplate two-sentence response to every single request. The parties have exchanged meet-and-confer letters regarding those responses. Insomniac Holdings will – as it has throughout this case – try in good faith to resolve the dispute before filing what would be its third discovery motion.

requesting party has under such circumstances is to file a motion to compel. Indeed, if Insomniac Holdings had not filed its motion it would have forfeited its right to challenge Enos' failure to comply with his discovery obligations. *See* TBMP § 523.04 ("If a party that served a request for discovery receives a response thereto which it believes to be inadequate, but fails to file a motion to challenge the sufficiency of the response, it may not thereafter be heard to complain about the sufficiency thereof.").

Notably, Enos does not claim that there are any specific issues in the motion about which the parties did not meet and confer. To the contrary, Enos completely ignores every point raised in Insomniac Holdings' motion. This is further proof that there is no substantive disagreement between the parties that would have required further discussions or delay. Indeed, given the fact that Enos deceived Insomniac Holdings about the locations of his declarants during the parties' conferences leading up to Insomniac Holdings' first motion to compel (and then deceived the Board when Insomniac Holdings finally moved to compel), there can be no doubt that Insomniac Holdings went above and beyond what was required by indulging Enos' empty promises of compliance for as long as it did before filing its motion.

Finally, Enos' complaint that the parties have not met and conferred about the outstanding discovery requests that are not currently before the Board is frivolous. Nothing in the rules or the case law requires a party to meet and confer about discovery responses other than those raised in its motion. To the contrary, 37 C.F.R. § 2.120(e)(1) is explicit that the parties must attempt to resolve "the issues presented in the motion" prior to filing. Insomniac Holdings has more than satisfied its meet-and-confer obligations.

2. Enos' Arguments About Excessive Discovery are Meritless and have been Waived in any Event.

Enos devotes the bulk of his opposition to complaining about the amount of written discovery that has been served on him. His complaints and arguments on this point are meritless.

Enos does not deny that his interrogatory responses are deficient, unresponsive and contradictory. He also does not deny that he is withholding and concealing responsive information including but not limited to contact information for more than thirty purported witnesses (just as he concealed the contact information for his declarants earlier in the case). Rather, Enos urges the Board not to order him to correct his deficient interrogatory answers on the grounds that Insomniac Holdings has served him with more than 75 interrogatories. That argument has no merit.

First and foremost, Enos has waived this argument because Enos served (insufficient) answers to all of the interrogatories rather than serving a general objection as required by 37 C.F.R. §2.120(d)(1) ("If a party upon which interrogatories have been served believes that the number of interrogatories exceeds the limitation specified in this paragraph, and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number."). Moreover, Enos did not raise this objection at any time during the four-month meet-and-confer process that preceded this motion. Moreover still, the objection is meritless notwithstanding the fact that it has been waived. Including subparts, Insomniac Holdings' first and second sets of interrogatories to Enos comprised a total of thirty-eight interrogatories – far below the statutory limit of 75.[2] (*See* Varas Decl. Exs. 6, 12.) Enos' refusal to serve proper interrogatory responses is improper, and Insomniac Holdings is entitled to the relief it requested in its motion.

[2] To the extent Enos attempts to combine the interrogatories served on him by Insomniac Holdings with those Rotella served before Insomniac Holdings was added as a party, his argument fails under the plain language of 37 C.F.R. § 2.120(d) which states: "The total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five, counting subparts[.]" (emphasis added).

Enos' argument that the Board should deny relief as to the document requests is frivolous. Enos opposes this part of the motion on the grounds that he has been served with an "excessive" number of document requests. Leaving aside the facts that: 1) only thirty-four document requests are at issue in the motion; and 2) there is no statutory limit on the number of document requests a party may serve, Enos' opposition is frivolous because he already agreed to produce the documents Insomniac Holdings is seeking to compel. Moreover, Enos does not deny that he is withholding responsive documents including (but not necessarily limited to) the Ron Dedmon questionnaire and the responsive written communications he claims to have had with thirty other people.

Enos also has an absolute obligation to serve written responses that disclose whether or not he has documents responsive to each request. 37 C.F.R. § 2.116(a); *No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1555 (T.T.A.B. 2000). His complaints about additional requests that are not even before the Board do not excuse him from complying with this fundamental obligation.

There is nothing ambiguous about the record with respect to the document requests. Insomniac Holdings served Enos with thirty-four document requests. Enos agreed to produce documents responsive to all of those requests but months later he continues to withhold all of his responsive documents.[3] He also refuses to supplement his responses to identify those requests (if any) for which he has no responsive documents. Insomniac Holdings is entitled to all of the relief it requested in its motion, including but not limited to an order compelling Enos to produce all responsive documents and serve proper responses stating with respect to each request that he has produced all responsive documents to Insomniac Holdings or that he has none.

Finally, Enos' perfunctory argument that the discovery Insomniac Holdings seeks to compel is "duplicative" has no merit. Enos does not identify the supposedly duplicative requests in his

[3] Enos claims that he "complied" with Insomniac Holdings' request that he produce to its counsel the documents he produced to Pasquale Rotella's counsel before Insomniac Holdings was added to the case. (Opp., 11.) That is not true. As set forth in Insomniac Holdings' moving papers, Enos agreed to produce those documents directly to Insomniac Holdings but subsequently refused to do so. (*See* Varas Decl., Exs. 9, 15.)

opposition.[4] And more to the point he never directs the Board to a single written response or document that satisfies his discovery obligations with respect to any of the requests raised in the motion. Enos cannot evade his discovery obligations by baldly asserting without any basis or explanation that some unspecified number of Insomniac Holdings' discovery requests are "duplicative" of other unspecified requests, particularly when he does not deny that he is withholding responsive documents and information.

3. Enos' Ancillary Attacks on Pasquale Rotella and Insomniac Holdings are both Disingenuous and Irrelevant.

In addition to his meritless accusations about discovery, Enos fills his opposition with hyperbolic attacks on Pasquale Rotella and Insomniac Holdings. Like the rest of Enos' opposition, these attacks are also disingenuous, and are nothing more than an attempt to distract the Board from his tactic of withholding and concealing evidence to prolong discovery and delay his inevitable loss at trial. Enos' ancillary attacks and attempts at character assassination deserve no credit, and have nothing to do with the issues at hand.

4. Enos' Request for a Mandated Discovery Conference in Lieu of an Order Compelling Discovery is Frivolous.

Enos concludes his opposition by suggesting that instead of ordering him to serve proper discovery responses and to produce the documents he agreed to produce months ago, the Board should order the parties to a multi-day "discovery conference" and in the interim bar Insomniac Holdings from moving to compel Enos to comply with his discovery obligations without first seeking permission. There is no validity to this thinly-veiled attempt at still more delay. As to the discovery requests that are currently before the Board, it is undisputed that Enos has not complied with his obligations. His written responses are insufficient and he agreed to produce documents but has not done so. He put off this motion for months with empty promises of compliance that he never

[4] Insomniac Holdings explained why the boilerplate "duplicative" objections Enos raised in a few of his written responses are meritless. Enos does not dispute Insomniac Holdings' argument in his Opposition.

intended to keep, and does not dispute a single substantive point that Insomniac Holdings has raised. There is nothing left to discuss. As to the requests that are not before the Board, there is no basis for the Board to order anything. Insomniac Holdings has begun the meet-and-confer process required by the rules and will seek relief from the Board if necessary, following the procedures set forth in the Code of Federal Regulations and the TBMP. Enos' improper request that the Board require Insomniac Holdings to obtain permission to file a motion to compel is frivolous. Enos cites *Avia Grp. Int'l Inc.*, 25 U.S.P.Q.2d 1625 (P.T.O. Nov. 10, 1992), referring to an order that was imposed as a sanction on a party whose conduct had been "dilatory and lacking in good faith." *Id.* at *3. The only party whose conduct has been dilatory and lacking in good faith in this proceeding is Enos. His request for a further "discovery conference" in lieu of an order compelling him to comply with his discovery obligations is just another tactic intended to prevent Insomniac Holdings from obtaining the evidence to which it is entitled.

Further to this point, Insomniac Holdings must emphasize that Enos has consistently exploited every non-compulsory discovery mechanism to delay this proceeding and withhold evidence. First he delayed discovery by forcing Insomniac Holdings to meet-and-confer and then file a motion to compel him to supplement his initial disclosures with contact information for his declarants. When the Board eschewed formal briefing and convened an informal telephone conference on that motion Enos misrepresented the facts to the Board, falsely claiming that he did not know where his declarants could be found. Not knowing that Enos' statements were false, the Board understandably accepted his representations. Insomniac Holdings therefore had no choice but to locate Enos' declarants, including a wild goose chase that led to Insomniac Holdings arranging for a video deposition in Florida of a witness who not only lives in Southern California, but whom Enos has visited at the witness' home almost every week for years. Enos also delayed this motion for months by promising to produce documents and serve supplemental responses when he had no

intention of doing so. On this record, Enos' suggestion that the Board should deny Insomniac Holdings relief and instead order yet another conference he can exploit is particularly inappropriate.

5. The Board Should Extend the Case Deadlines as Requested in Insomniac Holdings' Motion.

Finally, Enos has no basis to attack Insomniac Holdings for requesting that the Board re-set the case deadlines. Enos' attack is particularly improper because Insomniac Holdings agreed to give Enos an extra month to prepare his opposition, provided he consented to the deadlines being re-set (which is common in motions to compel before the Board in any event). (*See* Dkt. No. 28.) Enos then engaged in further gamesmanship by concealing that condition from the Board in his "consent" motion for the extension (which as previously noted he served on Insomniac Holdings after 5 p.m. on a Friday evening with a note that it would be filed "immediately"). On this record, the fact that Enos availed himself of the conditional extension Insomniac Holdings had offered bars him from objecting to the case deadlines being re-set. Moreover, the additional time will be necessary for Insomniac Holdings to follow up on the substantial amount of evidence that Enos repeatedly promised in the months leading up to this motion but has never produced.

For these reasons Insomniac Holdings respectfully requests that the Board enter an order granting all of the relief Insomniac Holdings requested in its moving papers.

DATED: January 28, 2015

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on January 28, 2015, a true and complete copy of the foregoing **REPLY IN SUPPORT OF INSOMNIAC HOLDINGS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND SUPPLEMENTAL AND AMENDED WRITTEN DISCOVERY RESPONSES** has been served on:

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DATED: January 28, 2015