ESTTA Tracking number: **ESTTA493145**

Filing date: **09/07/2012**

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

Proceeding	92054585
Party	Defendant Anna S. Dvornikova
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Filer's Name	Jeffrey E Faucette
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Signature	/Jeffrey E. Faucette/
Date	09/07/2012
Attachments	Opposition to 2nd Motion to Compel.pdf (5 pages)(540212 bytes) Westlaw_Document_18_36_05.pdf (7 pages)(148646 bytes)

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

AMBAR, INC.,

Petitioner,

v.

ANNA DVORNIKOVA,

Registrant.

Cancellation No. 92,054,585
Registration No. 4,018,246

Mark: SILICON VALLEY OPEN DOORS

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

REGISTRANT ANNA DVORNIKOVA'S OPPOSITION
TO PETITIONER'S SECOND MOTION TO COMPEL

Petitioner AMBAR, Inc. ("AMBAR") filed a motion to compel Registrant Anna Dvornikova ("Dvornikova" or "Registrant") to answer Interrogatories No. 4, 11, 26, 32 and 37 in Petitioner's Amended First Set of Interrogatories. Registrant objects these interrogatories on the ground that they seek to force Registrant to *produce* documents in lieu of *answering* questions. Federal Rule of Civil Procedure 33 does not permit this, and Petitioner has not cited to a single authority to the contrary. Instead, Petitioner has submitted twelve pages of empty rhetoric and *ad hominem* attacks on Registrant and Registrant's counsel. Petitioner has also admitted that this motion is a complete waste of the Board's time and Registrant's because Petitioner has now served new Requests for Production that are identical to these supposed interrogatories. These "interrogatories"

should have been served as Rule 34 requests in the first place, and this motion must be denied.

In support of this motion, Petitioner goes on at length about its version of the history of discovery in this case and Registrant's responses to Petitioner's first set of requests for production (which were served on Registrant on April 18, 2012). None of this is relevant to the motion to compel. The only issue for the Board is the question of whether Interrogatories No. 4, 11, 26, 32 and 37 are proper interrogatories under Rule 33. The answer to that question is no.

Registrant objects to each of these interrogatories on the ground that it is not permissible to demand production of documents in an interrogatory propounded pursuant to Rule 33. Rule 33 and TBMP 405 govern interrogatories and responses to them. By contrast, Rule 34 and TBMP 406 govern requests for production of documents and things. Fundamentally, interrogatories are questions to be answered. They cannot be used to require another party to take some action other than answering the question in writing. *Here, none of these interrogatories asks a question of Registrant*. Each of them demands that Registrant take the action of providing documents to Petitioner. These are requests for the production of documents, and they cannot be served pursuant to Rule 33.

In *Lee v. Electric Products Co.*, 37 F.R.D. 42 (N.D. Ohio 1963), the court reached this result and stated as follows "Interrogatory 7(b) inquires if a particular notice was in writing, and requests a photocopy thereof. Insofar as the request for a copy is concerned, it has consistently been held that Rule 33 is not to be utilized to obtain production of documents . . . ." *Id.* at 45 (citing *Foundry Equip. Co. v. Carl-Meyer Corp.*, 11 F.R.D. 108 (N.D. Ohio 1950)). Petitioner argues that this case is not good authority because it is a district court opinion, it is from 1963 (and allegedly cannot even be found on Westlaw) and that Rule 33 has been amended since 1963. None of these arguments undermine the authority in *Lee*.

To begin with, most decisions regarding the interpretation of the Federal Rules of Civil Procedure come in district court opinions that are reported in the Federal Rules Decision ("F.R.D.") database as was this case. It would be very unusual for an issue such as this one to get raised at the appellate level. Moreover, this is a simple and straightforward proposition, it is unlikely that anyone has bothered litigating over it. Anyone who wants the production of documents has a ready remedy available—serve a request pursuant to Rule 34 (as Registrant has now belatedly done).

With respect to Petitioner's argument regarding the age of the *Lee* case, it is true that the decision was reached in 1963, but Petitioner has failed to identify a single contrary decision in the nearly 50 years since this decision was reached.[1] Similarly, while Rule 33 has been amended on a few occasions since 1963, Petitioner does not identify any amendment that would have made the *Lee* decision come out differently in 1963. None of the amendments to Rule 33 have changed the fact that Rule 33 allows parties to ask questions of other parties while Rule 34 allows parties to demand production of documents from other parties.

Finally, the fact that Rule 33(d) provides a responding party with the *option* to identify particular business records under certain circumstances does not mean that the converse is true and that a demanding party can *require* a responding party to produce documents in response to an interrogatory.

As a last gasp tactic, Petitioner tries to change the issue by ignoring the wording of the interrogatories as propounded. The interrogatories at issue do not ask Registrant to "identify," "describe" or any other sort of *question*. They clearly and unequivocally demand that Respondent "provide" the documents (as Petitioner notes, other interrogatories in this set ask Registrant to identify documents and Registrant has not

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[1] Since Petitioner claims to have been unable to find the decision on Westlaw, a pdf of the case (received from Westlaw) is submitted with this opposition.

objected to those). The interrogatories at issue are demands for production that can only be made in requests propounded under Rule 34.

For all of the foregoing reasons, the motion to compel should be denied.

DATED: September 7, 2012.

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