

Exhibity

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

In the Matter of Application Serial No. 76/299,502

Published in the Official Gazette on April 30, 2002

Mark: THE BRATZ PACK

LOVINS, INC., D/B/A FRIDAY
HARBOR SPORTSWEAR, a
Washington corporation.

Opposer,

v.

ABC INTERNATIONAL
TRADERS, INC., D/B/A MGA
ENTERTAINMENT
CORPORATION, a California
corporation

Applicant.

Opposition No. 152252

APPLICANT'S RESPONSE TO OPPOSER'S
MOTION TO SUSPEND PURSUANT TO 37
C.F.R. § 2.117

U.S. Patent & TMO/TM Mail Rcpt. Dt. #57

08-05-2002

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Applicant respectfully opposes Opposer's request that this action be suspended pending disposition of the civil action recently initiated by Opposer. Because the pending civil action will not be dispositive of the issues pending in this proceeding, suspension is inappropriate under 37 C.F.R. § 2.117.

Pursuant to 37 C.F.R. § 2.117, the Board should suspend proceedings when the parties are engaged in a civil action "which may be dispositive of the case." However, suspension does not automatically result from the initiation of concurrent civil litigation by one of the parties.

Martin Beverage Co., Inc. v. Colita Beverage Corp., 169 U.S.P.Q. 568, 570 (TTAB 1971).

Rather, suspension occurs only after the Board has "carefully reviewed the pleadings in the civil suit to determine if the outcome thereof will have a bearing on the question of the rights of the parties in the Patent Office proceeding." Id. Here, a careful review of Opposer's pleadings

demonstrates that the outcome of the civil suit will bear on rights different from those opposed in this proceeding. Therefore, the outcome of the civil suit will not be dispositive of this proceeding.

In this opposition proceeding, Opposer contests Applicant's registration of the mark BRATZ for "dolls and dolls' accessories" in International Class 28. The civil action, as evidenced in the Complaint attached to Opposer's Motion to Suspend, involves alleged infringement of Opposer's common law trademark rights for children's clothing. While the outcome of this litigation may affect Applicant's right to use the BRATZ designation on clothing, it will not affect Applicant's right to use its trademark on dolls and dolls' accessories, the rights at issue in this opposition proceeding.

Although Opposer's civil action appears at certain points to be directed to Applicant's use of its mark in connection with goods other than children's clothing, closer inspection of the facts shows that Opposer has no bona fide objection to or basis for complaint concerning Applicant's use of its mark in connection with dolls and dolls' accessories. Opposer's focus on clothing is evidenced by the co-defendants named in its complaint, four retailers of Opposer's branded clothing. Opposer's Motion for Preliminary Injunction is similarly limited, and "seeks only to enjoin Defendants' use of the mark BRATZ in association with the sale, offer for sale, or marketing of clothing." Declaration of Isaac Larian dated August __, 2002 ("Larian Decl.") (filed simultaneously with this opposition brief), at ¶ 3 and Exhibit 2 attached thereto.

Opposer did not include any toy retailers as defendants in its civil action, or seek to enjoin Applicant's use of the BRATZ mark in association with dolls and dolls' accessories, because Opposer knows that any trademark infringement claim regarding the BRATZ dolls would have no merit. As Opposer is well aware, Applicant's line of BRATZ dolls have been

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sold and offered for sale since early in 2001. Larian Decl. ¶ 4. Since that time Applicant's dolls have been heavily advertised and promoted, and have received a tremendous amount of unsolicited media attention. Larian Decl. ¶ 3 and Exhibit 1 attached thereto. In 2001, ABC's BRATZ dolls won the People's Choice Award, the most prestigious Toy Industry Award. Larian Decl. ¶ 8 and Exhibit 3 attached thereto. Also in 2001, Family Fun Magazine named the BRATZ dolls Fashion Dolls of the Year, as well as the third-best Toy of the Year. Larian Decl. ¶ 9 and Exhibit 4 attached thereto.

Since the introduction of the BRATZ dolls, Applicant has spent over \$8,500,00 in marketing, product development, and commercial advertising to promote the BRATZ dolls. Larian Decl. ¶ 5. Applicant's sales of BRATZ dolls exceeded \$24,400,000 in 2001, and \$56,900,000 in 2002 as of June, making the BRATZ dolls one of the biggest selling toys in the United States. Larian Decl. ¶ 6. According to The NPD Group, a research firm in Port Washington, NY, the BRATZ dolls have been the highest selling fashion doll for five consecutive months including June. Larian Decl. ¶ 7. Opposer has taken no action to stop the sales and promotion of Applicant's BRATZ dolls. Thus, the references to goods other than children's clothing in Opposer's complaint should be afforded little weight.

In addition, Opposer will be seriously prejudiced by any delay of this proceeding. Its mark has been in use in commerce for over a year. This Opposition proceeding was filed on November 9, 2001, and has been proceeding without significant delay. Applicant is anxious to clear the cloud on its rights by obtaining a favorable decision from the Trademark Trial and Appeal Board ("TTAB"), and Opposer has offered no reasonable justification for suspending this proceeding.

To the contrary, Opposer's motion to suspend this proceeding appears to be an attempt by Opposer to evade outstanding discovery obligations in this proceeding. Prior to filing its civil suit, Opposer had sought Applicant's consent to a ninety-day extension of the discovery deadline. Applicant reasonably agreed to a one-month extension. Thereafter, Opposer filed its civil suit and now seeks to delay this proceeding by suspension, an attempt to evade its discovery obligations for as long as possible.

For the foregoing reasons, Applicant requests that Opposer's Motion to Suspend be denied.

Dated this 5 day of August, 2002.

Respectfully submitted:

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CERTIFICATE OF MAILING

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I hereby certify that this APPLICANT’S RESPONSE TO OPPOSER’S MOTION TO SUSPEND PURSUANT TO 37 C.F.R. § 2.117 is being deposited with the U.S. Postal Service “Express Mail Post Office to Addressee” service in an envelope addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513, and with the U.S. Postal Service in a sealed envelope as first class mail with postage thereon fully prepaid addressed to Cindy L. Caditz, Christensen O’Connor Johnson Kindness PLLC, 1420 Fifth Avenue, Suite 2800, Seattle, WA 98101-2347 (Attorney for Opposer), on this 5th day of August, 2002.

Date: 8/5/02



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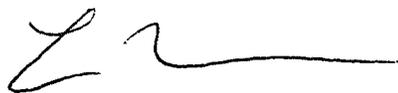
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Re: Response to Motion to Suspend, THE BRATZ PACK Opposition, Serial No. 76/299,502

To the Assistant Commissioner:

I enclose Applicant's Response to Opposer's Motion to Suspend, submitted in the opposition proceeding for the above-referenced mark. Please stamp and return the enclosed postcard to acknowledge receipt for our files.

Sincerely,



Lawrence A. Weinstein

Enclosures

cc: Carol A. Witschel, Esq.
Mr. Isaac Larian