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Filing date: **09/05/2010**

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

Proceeding	91191735
Party	Plaintiff Abercrombie & Fitch Trading Co.
Correspondence Address	Kelly R. McCarty Howrey LLP 2941 Fairview Park Drive, Suites 200 and 300 FALLS CHURCH, VA 22042 UNITED STATES ipdocketingwest@abercrombie.com
Submission	Motion to Compel Discovery
Filer's Name	Kelly R. McCarty
Filer's e-mail	mccartyk@howrey.com, ipdocketing@howrey.com, kaysers@howrey.com, rennem@howrey.com
Signature	/Kelly R. McCarty/
Date	09/05/2010
Attachments	A&F Motion to Compel.pdf (6 pages)(29655 bytes) A&F Motion to Compel Appendicies A-D.pdf (44 pages)(1221964 bytes)

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

Abercrombie & Fitch Trading Co.,)	
)	Opposition No. 91191735
Opposer,)	
)	Application No.: 77/117,258
v.)	
)	Application Filing Date: February 27, 2007
Kenneth Michael Cheney (U.S. Individual))	
)	
Applicant.)	
)	

**OPPOSER’S MOTION TO COMPEL DISCOVERY AND FOR DISCOVERY
SANCTIONS AND MEMORANDUM IN SUPPORT THEREOF**

I. INTRODUCTION

Pursuant to Rule 37 Fed. R. Civ. P., Rule 2.120(e) of the Trademark Rules of Practice, and Sections 411.01 and 411.04 of the Trademark Trial and Appeal Board Manual of Procedure (TBMP), Opposer moves the Trademark Trial and Appeal Board (“the Board”) to enter an order to compel and for sanctions as a result of Applicant’s failure to provide responses to Opposer’s First Request for Production of Documents and Things and Opposer’s First Set of Interrogatories to Applicant.

Opposer also requests the Board to stay proceedings pending resolution of this motion.

In accordance with Rule 2.127(a) of the Trademark Rules of Practice, this motion embodies the points and authorities in support of said motion. In accordance with Rule 2.120(e), the undersigned counsel for Opposer certifies that it has made a good faith attempt to resolve this

matter by correspondence with Applicant.¹ Finally, in accordance with TBMP § 523.02 and 37 CFR § 2.120(e), Opposer has included copies of its discovery requests at issue.

II. FACTUAL BACKGROUND

On February 27, 2007, Applicant filed Application Serial No. 77/117,258 seeking to register the Fish Sign design mark for a variety of clothing and headwear items (the “Opposed Application”). The Opposed Application was published for opposition in the *Trademark Official Gazette* on June 30, 2009. Opposer filed its Notice of Opposition on August 31, 2009. By order of the Board dated December 28, 2009, the discovery period closed on July 8, 2010.

On July 8, 2010, Opposer served by email per agreement of the parties, the following discovery requests:

- Opposer’s First Request for Production of Documents and Things to Applicant: Nos. 1-48²;
- Opposer’s First Set of Interrogatories to Applicant: Nos. 1-21³; and
- Opposer’s First Request for Admissions to Applicant: Nos. 1-34⁴.

Each discovery request document specifically stated that responses were due within thirty (30) days (i.e. by August 7, 2010). Applicant confirmed receipt of the discovery requests listed above on July 9, 2010⁵, but never responded to Opposer’s requests. Opposer advised Applicant on September 2, 2010 that it would need to file a motion to compel and requested Applicant to

¹ Opposer was hoping for a response from Applicant regarding Opposer’s discovery requests, but because of Applicant’s lack of response, Opposer files its motion to compel on Sunday, September 5, 2010 to comply with Rule 2.120(e) and TBMP Section 523.01 that require a motion to compel discovery be filed prior to the commencement of the first testimony period, which is Monday, September 6, 2010 in this case.

² A true copy of Opposer’s First Set of Requests for Production of Documents and Things to Applicant is attached hereto as **Appendix A**.

³ A true copy of Opposer’s First Set of Interrogatories to Applicant is attached hereto as **Appendix B**.

⁴ Pursuant to rule TBMP 407.03(a) if a party on which Requests for Admission have been served fails to timely respond thereto, the Requests will stand admitted; as such, the Opposer’s Requests for Admissions are presumed admitted.

⁵ A true copy of Applicant’s email confirming receipt of Opposer’s First Request for Production of Documents and Things to Applicant and Opposer’s First Set of Interrogatories to Application is attached hereto as **Appendix C**.

advise whether he intended to provide any response to the Interrogatories and Request for Production of Documents and Things. To date, Applicant has not responded to Opposer's discovery requests and has failed to produce any responsive documents. A true copy of Opposer's September 2, 2010 email to Applicant is attached hereto as **Appendix D**.

At the time Opposer served its discovery requests, it made certain to notify Applicant of his deadline to respond to Opposer's requests for discovery, yet Applicant has failed to provide timely responses. Additionally, Applicant has not provided any reasons for the delay, nor has Applicant requested an extension of time to serve his responses.

This is not the first time Applicant has ignored his obligations in this matter. While Opposer has diligently pursued this Opposition and met all statutory and Board-ordered deadlines, Applicant has not. For example, on February 8, 2010, Opposer served its initial disclosures on Applicant and when it did not receive Applicant's in return, Opposer sent a letter to Applicant on April 19, 2010 requesting same. On May 17, 2010 Applicant asked Opposer to resend an electronic copy of Opposer's initial disclosures which Opposer complied with, but Opposer has yet to receive Applicant's initial disclosures.

Further, Opposer timely served its pretrial disclosures on August 23, 2010, of which Applicant also acknowledged receipt. Clearly, Applicant is aware that this proceeding is ongoing, as illustrated by Applicant's written confirmation of Opposer's discovery requests and filings.

III. ARGUMENT

Applicant's non-observance of rule-imposed deadlines to respond to interrogatories and produce documents responsive to the discovery requests at issue fails to satisfy Applicant's duty to cooperate in discovery:

“A party served with a request for discovery has a duty to thoroughly search its records for all information properly sought in the request, and to provide such information to the requesting party within the time allowed for responding to the request. A responding party which, due to an incomplete search of its records, provides an incomplete response to a discovery request, may not thereafter rely at trial on information from its records which was properly sought in the discovery request but was not included in the response thereto...unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e).”

TBMP § 408.02.

Additionally, “If any party fails to answer any interrogatory, the party seeking discovery may file a motion with the Board for an order to compel an answer,” and “if any party fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery may file a motion for an order to compel production and an opportunity to inspect and copy.” TBMP § 411.01. Furthermore, the Board may impose sanctions for failure to provide discovery, such as drawing adverse inferences against an uncooperative party or prohibiting an uncooperative party from introducing designated matters in evidence. *See* TBMP § 411.04.

The Board has excluded evidence from the record where a party has failed to timely produce the evidence in response to discovery requests. *Bison Corp. v. Perfecta Chemie B.V.*, 4 USPQ2d 1718, 1720-21 (TTAB 1987) (refusing to consider exhibits introduced during testimony that were not previously produced in response to discovery requests). Applicant has made no representation that it would provide any responsive documents or responses to interrogatories.

Given Applicant’s failure to comply with Opposer’s document and interrogatory responses, Opposer requests the following remedies from the Board:

- The adverse inference should be drawn that Applicant does not have any responsive documents to the outstanding document requests at issue (specifically, Requests for Production Nos. 1-48). *See* TBMP § 411.04;

- The adverse inference should be drawn that Applicant does not have any facts to support the unanswered interrogatories at issue (specifically, Interrogatories Nos. 1-21). *See* TBMP § 411.04;
- Applicant should not be allowed to use documents or facts supporting or opposing designated claims or defenses relating to the discovery requests at issue (and specified in the first two bullet points above). *See* TBMP § 411.04; *Bison Corp.*, 4 U.S.P.Q.2D at 1720 (sustaining party’s request that untimely submitted documents requested during discovery not be considered).; and
- Applicant should be prohibited from introducing matters into evidence related to the discovery requests at issue (and specified in the first two bullet points above). *See* TBMP § 411.04; *Bison Corp.*, 4 U.S.P.Q.2D at 1720.

Furthermore, in order to avoid unfair prejudice to Opposer because of Applicant’s lack of response to discovery requests, Opposer requests that the Board suspend the discovery and testimony deadlines pending the resolution of the instant motion. 37 C.F.R. § 2.120(e); TBMP § 523.01.

IV. CONCLUSION

Opposer regrets having to burden the Board with a motion to compel directed to the matters discussed above. However, given Applicant’s failures to respond or cooperate discussed above, Opposer is left with no choice but to seek the Board’s intervention.

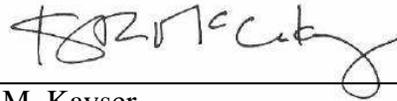
For all of the foregoing reasons, Opposer respectfully requests the Board to grant its Motion to Compel Discovery and for Discovery Sanctions.

Opposer also requests that the Board stay proceedings pending disposition of the Opposer’s Motion to Compel.

ABERCROMBIE & FITCH TRADING CO.

Dated: September 5, 2010

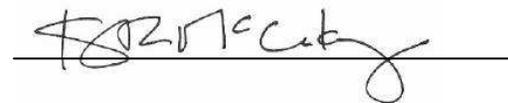
By: _____



Susan M. Kayser
Kelly R. McCarty
Howrey, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800
Fax: (202) 383-6610
Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's Motion To Compel Discovery and for Discovery Sanctions and Memorandum in Support Thereof was served on Applicant via e-mail at michael@verumsports.com per agreement of the parties this 5th day of September 2010:



APPENDIX A

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

_____)	
Abercrombie & Fitch Trading Co.,)	Opposition No. 91191735
)	
Opposer,)	Application No.: 77/117,258
)	
v.)	Date of Filing: February 27, 2007
)	
Kenneth Michael Cheney (U.S. Individual))	
)	
Applicant.)	
_____)	

**OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND
THINGS TO APPLICANT**

Opposer, Abercrombie & Fitch Trading Co., hereby requests pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, that Applicant Kenneth Michael Cheney produce for inspection and copying documents and things in response to each of the following requests. These requests for production are continuing, and any documents or things that may be discovered subsequent to production should be brought to the attention of the Opposer through a supplemental production within a reasonable time following such discovery. Documents and things should be produced at the offices for counsel for Opposer, c/o Susan Kayser, Howrey LLP, 2941 Fairview Park Drive, Falls Church, VA 22042-4522, within thirty (30) days from the date of service hereof.

DEFINITIONS

For definitions of the terms used herein, Opposer adopts and incorporates the Definitions set forth in Opposer's First Set of Interrogatories.

INSTRUCTIONS

The following instructions apply to the document requests below and should be considered as part of each request:

A. In answering these document requests, furnish all information available to you, including information in the possession of your employees, agents, attorneys, consultants, investigators for your attorneys, or information otherwise subject to your possession and/or control, and not merely information within your own personal knowledge.

B. If any material is withheld under a claim of privilege, state the nature of the privilege claimed (e.g., attorney-client communication or attorney work-product), time, place and those privy to the communication, and all facts upon which you rely to support your privileged claim.

With regard to the production of documents, when there is not an objection to the production of a document other than privilege, each document so withheld should be separately identified in a privileged document list, by the party claiming the privilege, which privileged document list shall be provided to the requesting party within ten (10) calendar days following the date of the production from which the privileged document has been withheld. The privileged document list must identify each document separately, specifying for each document at least the following:

1. The date the document was created;
2. The sender(s) thereof;
3. The recipient(s), including copy recipients;
4. The general subject matter of the document;
5. The portion(s) of the document as to which privilege is claimed (e.g., one sentence, one paragraph, entire document, etc.); and
6. The basis of such privilege.

The sender(s) and recipient(s) shall be identified by position and entity (corporate or firm, etc.) with which they are employed or associated. The type of privilege claimed must also be

stated, together with the certification that all the elements of the claimed privilege have been met and not waived with respect to each document.

C. If Applicant objects to any subpart or portion of a document request or objects to providing certain material requested, state Applicant's objections and answer the unobjectionable subpart(s) of the document requests and supply the unobjectionable material requested.

D. If any of the following requests cannot be responded to in full after exercising reasonable diligence to secure the material, please so state, supply the material for those portions Applicant is able to answer and supply whatever material Applicant has concerning the portion which cannot be answered in full. If Applicant's response is qualified in any particular respect, set forth the details of such qualification.

E. Documents shall be produced as they are kept in the usual course of business. In producing the documents and writings requested herein, Applicant shall produce them in their original file folders, if any, or in lieu thereof, attach to the set of documents produced from a given file. A photographic or electrostatic duplicate shall be produced in the same sequence as they are contained or found in the original file folder. The documents produced either in the original file folder or attached to a photographic or electrostatic duplicate shall be produced in the same sequence as they are contained or found in the original file folder. The integrity and internal sequence of the requested documents within each folder shall not be disturbed.

F. Documents shall be produced in such fashion as to identify in whose possession they were located and, where applicable, the natural person in whose possession they were found, and the business address of each document's custodian(s), if any.

G. These document requests shall be continuing, so as to require proper supplemental answers if further information or documents are obtained or developed by you, your counsel, or your agents seasonably after the time that you serve answers to these requests for production.

H. Unless otherwise specified, the time frame of these requests is from 2000 to the date of your responses to these requests.

DOCUMENT REQUESTS

REQUEST NO. 1:

Documents sufficient to show any information relating or referring to the consideration, commissioning, selection, creation, drafting, editing, or adoption of the Cheney Fish Mark, including but not limited to draft designs or stitch patterns leading up to the adoption of the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 2:

All other documents or things reflecting, referring or relating to the A&F Fish Mark, including but not limited to consideration, use of, or reference to A&F's Fish Mark in developing and adopting the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 3:

Documents reflecting any and all communication with any third party referring in substance or effect to the A&F Fish Mark or the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 4:

All other documents, other than documents filed in this action or communications between Cheney and counsel for A&F, referring to or bearing A&F's Fish Mark.

RESPONSE:

REQUEST NO. 5:

Documents sufficient to show the dates of first use of the Cheney Fish Mark for each good bearing or intended to bear the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 6:

Any documents or things referring or relating to any purchase by you or on your behalf of product(s) from A&F.

RESPONSE:

REQUEST NO. 7:

Any documents reflecting any inquiry or statement by any third party about the Cheney Fish Mark, about A&F's Fish Mark, about A&F and any pocket stitching design, or about any possible connection or affiliation between you or the Cheney Fish Mark and A&F.

RESPONSE:

REQUEST NO. 8:

Documents sufficient to show any business, strategic, or marketing plans that refer or relate to products or materials bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 9:

Any and all documents or things reflecting or referring to any contemplated, draft, possible, actual or future modification or cessation of the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 10:

Documents sufficient to show any investment by Cheney in the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 11:

Documents sufficient to show the demographics (including age, gender, income, and profession) of prospective or actual consumers or end users of Cheney's products.

RESPONSE:

REQUEST NO. 12:

Documents sufficient to show Cheney's actual annual revenues from sales in each state, including, but not limited to, gross revenue, net revenue, returns, allowances, discounts, rebates, other concessions, sales revenue, licensing revenue, distributor contributions and other revenue, from the sale or licensing of products bearing the Cheney Fish Mark, from your first use to present.

RESPONSE:

REQUEST NO. 13:

Documents sufficient to show Cheney's annual marketing and promotional expenditures relating to any of its products bearing the Cheney Fish Mark, from the date of first use to the present.

RESPONSE:

REQUEST NO. 14:

Copies of any of Cheney's document retention policies, including those which relate to email or other electronic media.

RESPONSE:

REQUEST NO. 15:

Documents sufficient to show all employees, agents, contractors, partners, affiliates, third parties or other entities or individuals, paid or unpaid, who have worked for or with Cheney regarding the Cheney Fish Mark or goods bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 16:

Any and all documents relating to the degree of care exercised by consumers in purchasing or viewing apparel of the genre sold by Cheney.

RESPONSE:

REQUEST NO. 17:

A sample or accurate photograph of each style or shelf-keeping unit ("SKU") of each garment bearing the Cheney Fish Mark from your first use, to present.

RESPONSE:

REQUEST NO. 18:

All documents and tangible things identified in response to A&F's First Set of Interrogatories.

RESPONSE:

REQUEST NO. 19:

Monthly website traffic reports for your website pages that depict or refer to the Cheney Fish Mark, from January 1, 2000 to present.

RESPONSE:

REQUEST NO. 20:

Any and all documents upon which you rely for any defense against A&F's Opposition.

RESPONSE:

REQUEST NO. 21:

Documents sufficient to show any agreement(s) between you and any person or entity, whether written or oral, referring or relating to the creation, design, printing, embroidery, manufacture, distribution, or license of products, packaging, catalogs, or sales or promotional material bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 22:

Documents sufficient to identify the distribution channels through which Cheney's products bearing the Cheney Fish Mark are sold, marketed or promoted.

RESPONSE:

REQUEST NO. 23:

Documents sufficient to show any instances, of or inquiries concerning, actual or possible confusion, mistake or deception about whether there is any affiliation or association between A&F or its products bearing the Fish Mark on the one hand, and Cheney or his products bearing the Cheney Fish Mark, on the other hand.

RESPONSE:

REQUEST NO. 24:

Documents sufficient to show any formal or informal trademark searches or investigations involving A&F's Fish Mark.

RESPONSE:

REQUEST NO. 25:

Documents sufficient to show any formal or informal market studies, surveys, polls, focus groups or other studies of Cheney's Fish Mark or the A&F Fish Mark.

RESPONSE:

REQUEST NO. 26:

If Cheney has been involved in any litigation, legal proceeding, or dispute specifically relating to the Cheney Fish Mark, or products bearing that design, other than Application No. 77/117,258, produce all documents related thereto.

RESPONSE:

REQUEST NO. 27:

Documents sufficient to show sales information for each of Cheney's products bearing the Cheney Fish Mark from 2000 to the present, including, without limitation, each product's:

- (a) total gross and net unit sales by state and year;
- (b) total gross and net dollar sales by state and year;
- (c) revenue and unit summaries by geography, customer and product;
- (d) revenue and unit summaries by month, quarter and/or year; and
- (e) production summaries.

RESPONSE:

REQUEST NO. 28:

Documents sufficient to show pricing information for each of Cheney's products bearing the Cheney Fish Mark from 2000 to the present, including, without limitation, each product's:

- (a) average unit gross retail selling price; and
- (b) average unit net retail selling price.

RESPONSE:

REQUEST NO. 29:

Documents sufficient to show profit margin information for each of Cheney's products bearing the Cheney Fish Mark from 2000 to the present, including, without limitation, each product's:

- (a) total gross and net profit margin
- (b) average gross and net profit margin per unit;
- (c) product line gross/standard margin reports;
- (d) corporate and divisional profit and loss statements;
- (e) product line profit and loss statements; and
- (f) product line contribution margin reports.

RESPONSE:

REQUEST NO. 30:

Documents sufficient to show your financial statements (audited and unaudited), financial projections or forecasts, and profit and loss statements related to sales of goods bearing the Cheney Fish Mark prepared by or on behalf of Cheney from 2000 to the present.

RESPONSE:

REQUEST NO. 31:

All documents on which you will rely to support any claim that the Cheney Fish Mark is sufficiently distinct from A&F's Fish Mark so as to obviate any likelihood of confusion or mistake as to source or origin.

RESPONSE:

REQUEST NO. 32:

All documents which indicate any similarities or differences between the Cheney Fish Mark and the A&F Fish Mark.

RESPONSE:

REQUEST NO. 33:

Documents sufficient to show the outlets that sell products bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 34:

Documents sufficient to show the annual advertising and promotional expenditures by or on behalf of Cheney relating to the promotion of goods under the Cheney Fish Mark, from the first sale of such goods to the present.

RESPONSE:

REQUEST NO. 35:

Documents sufficient to show when and through which form of media (including but not limited to, television media, broadcast radio media, print media, and electronic media transmitted over the Internet and World Wide Web) Cheney has promoted or used the Cheney Fish Mark, including drafts, sketches and mock ups of any such advertisements.

RESPONSE:

REQUEST NO. 36:

All documents evidencing, referring or relating to Cheney's first knowledge of A&F's Fish Mark.

RESPONSE:

REQUEST NO. 37:

Documents evidencing, referring or relating to Cheney's communications with A&F from 2000 through the present other than communications with A&F's outside counsel at Howrey LLP.

RESPONSE:

REQUEST NO. 38:

Documents sufficient to identify the persons responsible for the selection of the Cheney Fish Mark, trademark clearance, trademark registration, marketing, advertising, and accounting of sales and expenditures of or relating to products and materials bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 39:

Documents showing Cheney's correspondence or filings with any state or federal governmental authorities regarding registration or approval of the Cheney Fish Mark, or the products or materials bearing the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 40:

Documents evidencing, referring or relating to mock-ups, sketches, preliminary drafts, or illustrations of the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 41:

All documents evidencing, referring or relating to any work performed by outside consultants in connection with the creation, selection or adoption of the Cheney Fish Mark, including but not limited to all alternatives considered to that design from 2000 to present.

RESPONSE:

REQUEST NO. 42:

Documents sufficient to identify all web designers, web hosts, email hosts, outside marketing consultants, and outside public relations consultants employed, retained, or consulted in connection with regarding your selection, adoption, or use of the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 43:

All documents referring or relating to any searches or opinion ordered, requested, sought, or received by Cheney or his counsel relating to the availability for use and/or registrability as a trademark of the Cheney Fish Mark including, but not limited to, any search report, investigation report and/or other documents upon which such opinion was based in whole or in part.

RESPONSE:

REQUEST NO. 44:

All documents referring, or relating to any state or federal application filed by Cheney and/or its counsel to register the Cheney Fish Mark as a trademark or service mark other than Application No. 77/117,258.

RESPONSE:

REQUEST NO. 45:

All documents provided to or obtained by Cheney relating to A&F, the Fish Mark, or A&F's products branded under those marks.

RESPONSE:

REQUEST NO. 46:

All documents referring or relating to any third-party use of any name, mark, designation or design that is similar to A&F's Fish Mark, upon which Cheney intends to rely in this action.

RESPONSE:

REQUEST NO. 47:

Documents sufficient to identify all trade shows, conventions, or expositions Cheney has attended, or intends to attend, during which he has promoted or intends to promote any products or services under the Cheney Fish Mark.

RESPONSE:

REQUEST NO. 48:

To the extent not otherwise produced in response to the foregoing document requests, copies of any communications received or sent by Cheney, including those through its website, that refers or relates to A&F.

RESPONSE:

July 8, 2010

Abercrombie & Fitch Trading Co.

By: Susan M. Kayser/SMR

Susan M. Kayser
Caroline C. Smith
Attorneys for Applicant
Howrey LLP
2941 Fairview Park Drive
Falls Church, VA 22042-4522
202.783.0800

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's First Request for Production of Documents and Things to Applicant was served on Applicant via e-mail at michael@verumsports.com per agreement of the parties and a courtesy copy has also been sent via federal express to the address shown below this 8th day of July 2010:

Kenneth Michael Cheney
1830 Hollyview Drive
San Ramon, CA 94582

A handwritten signature in cursive script, reading "Michelle Renee", is written over a horizontal line.

APPENDIX B

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

Abercrombie & Fitch Trading Co.,)	
)	Opposition No. 91191735
Opposer,)	
)	Application No.: 77/117,258
v.)	
)	Date of Filing: February 27, 2007
Kenneth Michael Cheney (U.S. Individual))	
)	
Applicant.)	

OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT

Opposer, Abercrombie & Fitch Trading Co., requests that Applicant Kenneth Michael Cheney, serve upon Opposer, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and Rules 2.116 and 2.120(d) of the Trademark Rules of Practice, sworn answers to the interrogatories set forth below. These interrogatories are continuing, and any information that may be discovered subsequent to the service of the answers should be brought to the attention of the Opposer through supplemental answers within a reasonable time following such discovery. For the convenience of the Board and the parties, Opposer requests that each interrogatory be quoted in full immediately preceding the response. Sworn answers to these interrogatories should be served upon Opposer, c/o Susan Kayser, Howrey LLP, 2941 Fairview Park Drive, Falls Church, VA 22042-4522, within thirty (30) days from the date of service hereof.

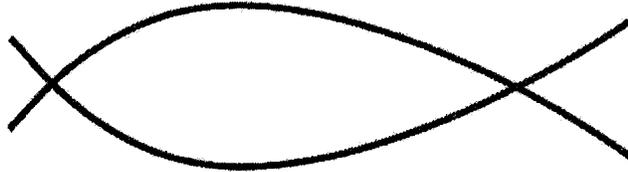
DEFINITIONS

As used herein, and in Opposer's First Request for Production and Requests for Admission, the following terms shall have the meaning set forth below:

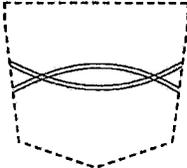
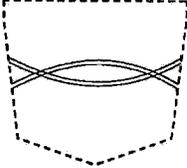
A. The terms “Applicant,” “Cheney,” “you,” and “your” shall mean Applicant Kenneth Michael Cheney, and any of his past or present business entities, partners, trustees, employees, affiliates, agents, representatives and attorneys.

B. The terms “Opposer” and “A&F” shall collectively refer to Abercrombie & Fitch Co., Hollister Co., and Abercrombie & Fitch Trading Co., and shall include, individually or collectively, any and all of their past and present officers, directors, partners, trustees, employees, corporate parents, subsidiaries, affiliates, agents, representatives and attorneys.

C. The term “Cheney Fish Mark,” shall mean the mark that is the subject of U.S. Trademark Application No. 77/117,258 and pictured below, and which Cheney uses on his products.



D. The term “Fish Mark” or “A&F Fish Mark” shall mean the mark that is the subject of U.S. Trademark Registration No. 3,135,750 and U.S. Registration No. 2,626,917, as pictured below.

REGISTRATION NO.	MARK
U.S. Reg. No. 2,626,917	
U.S. Reg. No. 3,135,750	

G. The term “Documents” is used in its customary broad sense to mean all non-identical copies of all hard-copy documents or electronically stored information within the scope of Fed. R. Civ. P. 34, including and any and all miscellaneous files and/or file fragments, regardless of the media on which they reside and regardless of whether said electronic data consists in an active file, deleted file or file fragment including, without limitation, information stored on any electronic network, hard drives, shared drives, electronic workspaces, PDAs, Personal Storage Tables (.pst’s), back-up servers, databases, intranets or other electronic means; communications of any nature including e-mails and all information referencing or relating to such messages anywhere on the computer system, text messages, online or office based instant messages, internal company communications, memoranda, notes, letters, agreements, reports or summaries; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants or counsel; brochures, pamphlets, advertisements, trade letters, press releases; drafts of documents and revisions of drafts of documents including all metadata; photographs; charts; and all mechanical and electronic sound recordings or transcripts thereof, in the possession and/or control of you or your employees or agents, or known to you to exist, and shall include all non-identical copies of documents by whatever means made and whether or not

claimed to be privileged or otherwise excludable from discovery. By way of illustration only and not by way of limitation, any document bearing on any sheet or side thereof any marks, including, but not limited to, initials, stamped indicia, comment or notation of any character and not a part of the original text or any reproduction thereof, is to be considered a separate document. In the case of documents produced in electronic form, identify the device on which the document was created and/or maintained and the program through which the document can be read or accessed.

H. The terms "Person" and "Party" shall include any natural person, individuals, corporations, sole proprietorships, associations, partnerships, agencies and any other type of organization or entity.

I. The term "Communication" shall mean the transmittal of information in the form of facts, ideas, inquiries or otherwise.

J. The term "Identify" when used in reference to a date shall mean to state the day, month and year on which an event took place.

K. The term "Third Party" shall mean any person other than Applicant and Opposer.

L. The terms "And" and "Or" shall mean either disjunctively or conjunctively as necessary to bring within the scope of the request all documents which might otherwise be construed to be outside its scope.

M. The terms "All" and "Each" shall mean all and each.

N. The term "Any" should be understood in either its most or its least inclusive sense as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside its scope.

O. The terms "Advertisement," "Advertising," "Marketing" and "Promotion" shall include, without limitation, any media and means used to promote goods and services.

P. The term "Date" shall mean the exact day, month and year, if ascertainable, or if not, the best approximation, including the relationship to other events.

Q. The terms “Relating,” “Referring,” “Referencing,” “Reflecting,” or “Concerning” shall each mean concerning, relating to, referring, referencing, reflecting, describing, evidencing or constituting.

R. As used herein, the singular shall always include the plural and the present tense shall always include the past tense, and vice-versa as necessary in order to bring within the scope of the request all documents which might otherwise be construed to be outside its scope.

S. The term “Action” shall mean the Opposition in *Abercrombie & Fitch Trading Co. v. Kenneth Michael Cheney*.

INSTRUCTIONS

The following instructions apply to the interrogatories below and should be considered as part of each interrogatory:

A. When an interrogatory asks you to “identify” or for “identification” of a natural person, provide the following information, to the extent known, with respect to the person:

1. The person’s full name;
2. Present and/or last known (designating which) home address or principal place of business;
3. Present and/or last known (designating which) residence and business telephone number;
4. Present and/or last known (designating which) title, position or business affiliation;
5. Present or last known (designating which) affiliation with Applicant, if any; and
6. In the case of a present or past employee, officer or director or agent of Applicant, also state the person’s period of employment or affiliation with Applicant, and his or her present or last known position during his or her affiliation with Applicant.

Once a person has been identified in compliance with the paragraph, only the name of that person needs to be listed in response to later discovery requesting the identification of the person.

B. When an interrogatory asks you to “identify” or for “identification” of a person other than a natural person, provide the following information, to the extent known, with respect to the person:

1. The full and official name of the business entity;
2. Present and/or last known (designating which) principal place of business;
3. Present and/or last known (designating which) business telephone number;
4. State of incorporation, if any; and
5. Present or last known (designating which) affiliation with Applicant, if any.

C. When an interrogatory asks you to “identify” a document, such identification should describe the document sufficiently so that it can be specifically requested under Fed. R. Civ. P. 34 and should include, without limitation, the following information, to the extent known, with respect to the document:

1. The type of document (e.g., memo, telecopy, e-mail);
2. The title and general subject matter of the document;
3. The date of the document;
4. The names and addresses of the authors, addressees and recipients of the document;
5. The location of the document;
6. The identity of the person who has possession or control of the document;

7. Whether the document once was, but is no longer, in your possession, custody, or control, state what disposition was made of it and the reason for such disposition; and
8. Whether the document has been destroyed, and if so, (a) the date of its destruction, (b) the reason for its destruction, (c) the identity of the persons who destroyed it, and (d) any retention policy directing its destruction.

Applicant may, in lieu of such identification, produce the document itself, identifying the individual file keeper and marked with the number of the interrogatory to which it is responsive, for inspection and copying by A&F at the time Applicant serves its answers to these interrogatories. Once a document has been identified in compliance with this paragraph, only the title or other abbreviated, clear identifier of the document needs to be listed in response to later discovery requesting the identification of the document.

D. When an interrogatory asks you to “identify” a communication, such identification shall state the date, the communicator, the recipient of the communication, the nature of the communication, place(s) of the transmission of information, mode of transmission (e.g., face-to-face or telephone discussion or email exchange), individuals privy to the transmission and what each person stated.

E. When an interrogatory asks you to “identify” a thing, including but limited to products or physical things, such identification shall state a complete description of the thing, including its common designation, its composition, its physical description, its product identification number and any other distinguishing characteristics.

F. In answering these interrogatories, furnish all information available to you, including information in the possession of your employees, agents, attorneys, consultants, investigators for your attorneys, or information otherwise subject to your possession and/or control, and not merely information within your own personal knowledge.

G. If any information is withheld under a claim of privilege, state the nature of the privilege claimed (e.g., attorney-client communication or attorney work-product), time, place and those privy to the communication, and all facts upon which you rely to support your privileged claim.

With regard to the production of documents, when there is not an objection to the production of a document other than privilege, each document so withheld should be separately identified in a privileged document list, by the party claiming the privilege, which privileged document list shall be provided to the requesting party within ten (10) calendar days following the date of the production from which the privileged document has been withheld. The privileged document list must identify each document separately, specifying for each document at least the following:

1. The date the document was created;
2. The sender(s) thereof;
3. The recipient(s), including copy recipients;
4. The general subject matter of the document;
5. The portion(s) of the document as to which privilege is claimed (e.g., one sentence, one paragraph, entire document, etc.); and
6. The basis of such privilege.

The sender(s) and recipient(s) shall be identified by position and entity (corporate or firm, etc.) with which they are employed or associated. The type of privilege claimed must also be stated, together with the certification that all the elements of the claimed privilege have been met and not waived with respect to each document.

H. If Applicant objects to any subpart or portion of an interrogatory or objects to providing certain information requested, state Applicant's objections and answer the unobjectionable subpart(s) of the interrogatories and supply the unobjectionable information requested.

I. If any of the following interrogatories cannot be responded to in full after exercising reasonable diligence to secure the information, please so state, supply the information for those portions Applicant is able to answer and supply whatever information Applicant has concerning the portion which cannot be answered in full. If Applicant's response is qualified in any particular respect, set forth the details of such qualification.

J. Unless otherwise specified, the time frame of these requests is from 2000 to the date of your responses to these interrogatories.

INTERROGATORIES

INTERROGATORY NO. 1:

State all facts and describe the details regarding Cheney's first awareness of A&F's Fish Mark, including the date of such first awareness, an identification of the persons most knowledgeable thereof, and of all materials referring or relating to Cheney's first awareness, and a description of any actions taken in response to that awareness.

RESPONSE:

INTERROGATORY NO. 2:

Identify with specificity any and all third party uses of a fish-shaped mark used on or in connection with apparel that you contend is similar to A&F's Fish Mark, including for each, the scope and extent of such use, as well as any or all other facts and documents that support your contention that such use is similar to the Fish Mark.

RESPONSE:

INTERROGATORY NO. 3:

If you contend that A&F's Fish Mark either lacks secondary meaning or does not function as a trademark, specify in detail all facts and cite all documents that support such contention.

RESPONSE:

INTERROGATORY NO. 4:

Describe in detail each and every similarity and difference between Cheney's Fish Mark and A&F's Fish Mark.

RESPONSE:

INTERROGATORY NO. 5:

Identify each and every communication you have had with any third party referring in substance or effect to the A&F Fish Mark.

RESPONSE:

INTERROGATORY NO. 6:

Identify all persons or entities (including third parties) who were involved in the creation of the Cheney Fish Mark, including but not limited to those who developed, commissioned,

conceived, designed, drafted, or edited the product stitching design that resulted in the Cheney Fish Mark including for each person a description of their role or involvement, and an indication where any sketches, drafts, mock-ups, templates of the Cheney Fish Mark were developed, and are or were located or stored.

RESPONSE:

INTERROGATORY NO. 7:

State the date on which the Cheney Fish Mark was conceived, created, selected and designed.

RESPONSE:

INTERROGATORY NO. 8:

Identify persons with knowledge regarding the contemplated, proposed, actual or planned sales, and marketing or promotion of products bearing the Cheney Fish Mark.

RESPONSE:

INTERROGATORY NO. 9:

Identify by a) year and by b) state, from Cheney's earliest use to present, Cheney's gross and net unit and dollar sales for each product bearing the Cheney Fish Mark.

RESPONSE:

INTERROGATORY NO. 10:

Identify all trade shows, events, websites by URL, retail or wholesale stores, and other outlets through which Cheney has marketed, promoted, or sold, or intends to market, promote, or sell, products bearing the Cheney Fish Mark.

RESPONSE:

INTERROGATORY NO. 11:

Identify the demographic group or groups (age, gender, income) of consumers who purchase or who are likely to purchase Cheney's products bearing the Cheney Fish Mark.

RESPONSE:

INTERROGATORY NO. 12:

Identify every third party involved in the manufacture, design, distribution, or creation the Cheney Fish Mark.

RESPONSE:

INTERROGATORY NO. 13:

Describe any and each instance when a person commented on the similarity between the Cheney Fish Mark and A&F's Fish Mark, or inquired whether there is any association or connection between them, or otherwise made a statement about any belief that A&F's products come from Cheney, or that apparel bearing Cheney's Fish Mark comes from A&F, and identify the comment, inquiry, statement, or act, the person who made it, the date it as made, and all persons knowledgeable thereof.

RESPONSE:

INTERROGATORY NO. 14:

Identify and describe any and all ways, including all channels of trade, that goods bearing the Cheney Fish Mark are marketed or offered for sale.

RESPONSE:

INTERROGATORY NO. 15:

Identify and describe any and all goods upon which the Cheney Fish Mark has been used or is intended to be used in connection with. For each such good, provide a) dates of first use or intended first use, and b) if good is no longer manufactured or sold, end dates.

RESPONSE:

INTERROGATORY NO. 16:

Identify the retail price for which each good bearing the Cheney Fish Mark (identified in the prior Interrogatory) has been sold or offered for sale.

RESPONSE:

INTERROGATORY NO. 17:

Identify all facts which support your first affirmative defense to A&F's Opposition that "Applicant's mark and Opposer's marks are not confusingly similar".

RESPONSE:

INTERROGATORY NO. 18:

Identify all facts which support your second affirmative defense to A&F's Opposition that "Opposer has not suffered nor is likely to suffer any injury or harm to its business or property by reason of registration of Applicant's mark in connection with the goods listed in the application".

RESPONSE:

INTERROGATORY NO. 19:

Identify any and all additional affirmative defenses you intend to rely on to A&F's Opposition.

RESPONSE:

INTERROGATORY NO. 20:

Identify all facts which support each additional affirmative defense you intend to rely on to A&F's Opposition.

RESPONSE:

INTERROGATORY NO. 21:

Identify any individuals or business entities who have assisted in the sale, promotion, marketing, manufacture, distribution, design or other duty relating to the Cheney Fish Mark or goods bearing the Cheney Fish Mark.

RESPONSE:

By 
Susan M. Kayser
Caroline C. Smith
Howrey LLP
2941 Fairview Park Drive
Falls Church, VA 22042-4522
202.783.0800

Dated: July 8, 2010

Counsel for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's First Set Of Interrogatories To Applicant was served on Applicant via e-mail at michael@verumsports.com per agreement of the parties and a courtesy copy has also been sent via federal express to the address shown below this 8th day of July 2010:

Kenneth Michael Cheney
1830 Hollyview Drive
San Ramon, CA 94582



APPENDIX C

Renne, Michelle

From: michael@verumsports.com
Sent: Friday, July 09, 2010 1:29 PM
To: Renne, Michelle
Cc: Kayser, Susan; Smith, Caroline; McCarty, Kelly
Subject: Re: VERUM Sports/Abercrombie

Received.....thank you.

Michael

-----Original Message-----

From: Renne, Michelle [mailto:RenneM@howrey.com]
Sent: Thursday, July 8, 2010 05:31 PM
To: michael@verumsports.com
Cc: 'Kayser, Susan', 'Smith, Caroline', 'Renne, Michelle', 'McCarty, Kelly'
Subject: VERUM Sports/Abercrombie
Importance: High

PLEASE CONFIRM RECEIPT BY RETURN E-MAIL

Re: U.S. Trademark Opposition No. 91191735
Application No.: 77/117,258
Trademark: Fish Design Mark
Applicant: Kenneth Michael Cheney
Howrey Ref: 00863.0691.000000

Dear Mr. Cheney:

On behalf of Susan Kayser, please see the attached discovery requests:

1. Opposer's First Set of Interrogatories to Applicant;
2. Opposer's First Request for Production of Documents and Things to Applicant; and
3. Opposer's First Request for Admissions to Applicant.

As a courtesy, we are also sending copies via FedEx to:

Kenneth Michael Cheney
1830 Hollyview Drive
San Ramon, CA 94582

If you would like additional courtesy copies sent to a different address please let us know.

Sincerely,

H. Michelle Renne
IP Specialist for Susan M. Kayser, Esq.
Paralegals

HOWREY LLP
1299 Pennsylvania Ave NW
Washington, DC 20004-2402
Direct: +1 202.383.7257 begin_of_the_skype_highlighting +1 202.383.7257 end_of_the_skype_highlighting
IP Fax: +1 202.383.7195
RenneM@howrey.com
www.howrey.com

Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles Madrid
Munich New York Northern Virginia Paris Salt Lake City San Francisco Taipei **Washington DC**

9/3/2010

Susan M. Kayser
Partner

HOWREY LLP

1299 Pennsylvania Ave NW
Washington, DC 20004-2402

Direct: +1 202.383.7454 begin_of_the_skype_highlighting +1 202.383.7454 end_of_the_skype_highlighting

Fax: +1 202.318.8644

KayserS@howrey.com

www.howrey.com

Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles Madrid
Munich New York Northern Virginia Paris Salt Lake City San Francisco Taipei **Washington DC**

APPENDIX D

Renne, Michelle

From: Kayser, Susan
Sent: Thursday, September 02, 2010 5:09 PM
To: 'michael@verumsports.com'
Cc: McCarty, Kelly; Renne, Michelle
Subject: URGENT - VERUM Sports/Abercrombie [Howrey Ref: 00863.0691.000000]
Importance: High
Attachments: 01 - Opposer_s 1st Set of Interrogatories to Applicant (08-JUL-2010).pdf; 02 - Opposer_s 1st Request for Production of Documents and Things to Applicant (08-JUL-2010).pdf

PLEASE CONFIRM RECEIPT BY RETURN E-MAIL

Re: U.S. Trademark Opposition No. 91191735
Application No.: 77/117,258
Trademark: Fish Design Mark
Applicant: Kenneth Michael Cheney
Howrey Ref: 00863.0691.000000

Dear Mr. Cheney:

On July 8, 2010, we served the following discovery requests on you via email per agreement on behalf of our client Abercrombie & Fitch Trading Co.:

1. Opposer's First Set of Interrogatories to Applicant;
2. Opposer's First Request for Production of Documents and Things to Applicant; and
3. Opposer's First Request for Admissions to Applicant.

We note on July 9, 2010, you confirmed receipt of the same (see prior emails below).

As stated in each discovery request and pursuant to rule TBMP 403.03 your responses were due within 30-days (e.g. by August 7, 2010). To date, we have not received any responses or documents from you.

Pursuant to rule TBMP 407.03(a) if a party on which requests for admission have been served fails to timely respond thereto, the requests will stand admitted; as such, the Opposer's Requests for Admissions are presumed admitted.

If you intend to provide responses to the Interrogatories and Request for Production of Documents and Things (attached), please advise immediately. Since the responses were due nearly a month ago, we will need to proceed with filing a Motion to Compel your responses to the Interrogatories and Request for Production of Documents and Things. Pursuant to Rule 2.120(e) of The Trademark Rules of Practice, we are sending you this e-mail to make a good faith attempt to resolve this matter prior to filing a motion to compel.

Sincerely,

Susan M. Kayser
Partner

HOWREY LLP
1299 Pennsylvania Ave NW
Washington, DC 20004-2402
Direct: +1 202.383.7454
Fax: +1 202.318.8644
KayserS@howrey.com
www.howrey.com

9/3/2010

Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles Madrid
Munich New York Northern Virginia Paris Salt Lake City San Francisco Taipei **Washington DC**

From: michael@verumsports.com [mailto:michael@verumsports.com]
Sent: Friday, July 09, 2010 1:29 PM
To: Renne, Michelle
Cc: Kayser, Susan; Smith, Caroline; McCarty, Kelly
Subject: Re: VERUM Sports/Abercrombie

Received.....thank you.

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-----Original Message-----

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Subject: VERUM Sports/Abercrombie
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Application No.: 77/117,258
Trademark: Fish Design Mark
Applicant: Kenneth Michael Cheney
Howrey Ref: 00863.0691.000000

Dear Mr. Cheney:

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H. Michelle Renne
IP Specialist for Susan M. Kayser, Esq.
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Susan M. Kayser

9/3/2010

Partner

HOWREY LLP

1299 Pennsylvania Ave NW
Washington, DC 20004-2402

Direct: +1 202.383.7454 begin_of_the_skype_highlighting +1 202.383.7454 end_of_the_skype_highlighting

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