

ESTTA Tracking number: **ESTTA375288**

Filing date: **10/26/2010**

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 1299 PENNSYLVANIA AVENUE NW WASHINGTON, DC 20004 UNITED STATES ipdocketingwest@abercrombie.com
Submission	Reply in Support of Motion
Filer's Name	Susan M. Kayser
Filer's e-mail	IPDocketing@howrey.com, KayserS@howrey.com, McCartyK@howrey.com, RenneM@howrey.com
Signature	/susan m. kayser/
Date	10/26/2010
Attachments	Motion for Leave to File Reply ISO MTC.pdf (3 pages)(14043 bytes) Reply ISO Motion to Compel.pdf (5 pages)(21337 bytes) Exhibit A.pdf (1 page)(227027 bytes) Exhibit B.pdf (3 pages)(437021 bytes) Exhibit C.pdf (4 pages)(438367 bytes)

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

Abercrombie & Fitch Trading Co.,)	
)	
Opposer,)	Opposition No. 91191735
)	
v.)	
)	
Kenneth Michael Cheney (U.S. Individual))	
)	
Applicant.)	
)	

OPPOSER’S MOTION FOR LEAVE TO FILE REPLY

Opposer requests leave to file this Reply. While the consideration of reply briefs is discretionary on the part of the Board, Opposer submits that its Reply is appropriate in this matter because it will assist the Board in clarifying the issues. *See Seculus Da Amazonia S/A v. Toyota Jidosha Kabushiki Kaisha*, 66 U.S.P.Q. 2d 1154, 1156 n.4 (TTAB 2001) (Board considered reply); *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 U.S.P.Q.2d 1542 (TTAB 1991) (Board considered reply).

Opposer’s Reply is being filed concurrently herewith.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's Motion for Leave to File Reply was served on Applicant via e-mail at michael@verumsports.com per agreement of the parties this 26th day of October 2010:

/H. Michelle Renne/

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 REPLY IN SUPPORT OF
MOTION TO COMPEL DISCOVERY AND FOR DISCOVERY SANCTIONS

Pursuant to Rule 2.127(a) of the Trademark Rules of Practice, Opposer files this “Reply” to Applicant’s papers filed with the Board on October 11, 2010.¹

A. Factual Background

On September 5, 2010, Opposer filed its Motion to Compel in accordance with Rules 2.120(e) and 2.127(a) of the Trademark Rules of Practice, and served Applicant by email (by agreement), that same day. Applicant confirmed receipt of the Motion on September 10, 2010², but never filed a response to the Motion. Opposer attempted to contact Applicant on three separate occasions after filing the Motion to inquire whether Applicant intended to respond to Opposer’s discovery requests, thereby mooting the Motion and relieving the Board from the

¹ Applicant’s papers filed on October 11, 2010 are three documents purporting to respond to Opposer’s requests for discovery, rather than a response to Opposer’s Motion to Compel Discovery and for Discovery Sanctions (the “Motion”). In the event the Board reviews and/or considers Applicant’s October 11 filing a “response” to Opposer’s motion (even though such papers were filed almost one month *after* the deadline to respond), Opposer requests the Board to consider this Reply.

² A true copy of Applicant’s email confirming receipt of Opposer’s Motion is attached hereto as **Exhibit A**.

burden of having to intervene in the parties' discovery dispute.³ Applicant later stated on September 26, 2010 that he would be providing discovery responses to Opposer, but did not state if he would oppose the Motion.⁴ To date, Applicant has not filed a response to Opposer's Motion nor has Applicant provided answers or documents in response to Opposer's discovery requests.

B. Opposer's Motion is Uncontested Because No Opposition was Filed

The Board should treat Opposer's Motion as conceded because Applicant has not filed a response in opposition of the Motion. Under the Trademark Rules of Practice, "a brief in response to a motion shall be filed within fifteen days from the date of service of the motion," but the deadline may be extended in certain circumstances such as by stipulation of the parties or by order of the Board. 37 C.F.R. §2.127(a). "When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded." *Id.*

Applicant's response in opposition of the Motion was due on September 20, 2010. As of September 20, 2010, Applicant had filed no response nor had he requested an extension of time from Opposer or from the Board despite communication with Opposer during this time. Applicant filed "blanket" objections to Opposer's discovery with the TTAB on October 11, 2010. These documents do not contain any statements as to why Opposer's Motion is not well taken. Opposer submits that the TTAB description of the October 11 filing is inaccurate - - Applicant's "blanket" objections to discovery requests are neither an opposition to nor a response to Opposer's Motion. Further, they clearly are not responses to the outstanding discovery requests. Therefore, the Board should treat Opposer's Motion as conceded.

³ A true copy of Opposer's email chain requesting a response to discovery from Applicant on September 11, 13, and 16, 2010 is attached hereto as **Exhibit B**.

⁴ A true copy of Applicant's email confirming responses to discovery would be forthcoming by October 8, 2010 is attached hereto as **Exhibit C**.

C. Applicant's October 11, 2010 Filing Supports Opposer's Motion and Requested Relief

The Board should not consider Applicant's October 11, 2010 filing of its "blanket" objections to Opposer's discovery a "response" or "opposition" to the Motion because it neither responds to the Motion *or* Opposer's discovery, which could have rendered Opposer's Motion moot. Applicant's disregard and/or ignorance of the rules should not excuse his complete failure to answer Opposer's discovery.⁵

As fully briefed in the Motion, Applicant's discovery responses were due August 8, 2010. Not only are the October 11, 2010 papers almost three months late, they contain only general objections and not a single answer to an interrogatory or document. Applicant merely provided a list of blanket objections and has not even provided objections to specific Interrogatories or Request for Production of Documents. Applicant has again ignored the rules that govern discovery in a Board proceeding. The Federal Rules of Civil Procedure require that "each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath" and that "the grounds for objecting to an interrogatory must be stated with specificity." Fed. R. Civ. P. 33(b)(3-4). For requests for production of documents and things, "for each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). In contravention of the Federal Rules, Applicant has made no attempt to identify objections specific to the requests.

Applicant has had almost four months to prepare responses to Opposer's discovery request, yet all Applicant has provided are non-responsive, blanket objections that are inadequate

⁵ The Board's December 29, 2009 Order clearly stated in part: "Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel."

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's Reply in Support of Motion To Compel Discovery and for Discovery Sanctions was served on Applicant via e-mail at michael@verumsports.com per agreement of the parties this 26th day of October 2010:

_____/H. Michelle Renne/_____

Exhibit A

From: michael@verumsports.com [mailto:michael@verumsports.com]
Sent: Friday, September 10, 2010 7:40 PM
To: McCarty, Kelly; michael@verumsports.com
Cc: Kayser, Susan; Renne, Michelle
Subject: Re: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery

Thank you.....I am in the process of preparing a response.

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

From: McCarty, Kelly [mailto:McCartyK@howrey.com]
Sent: Sunday, September 5, 2010 11:16 PM
To: michael@verumsports.com
Cc: 'McCarty, Kelly', 'Kayser, Susan', 'Renne, Michelle'
Subject: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery

Dear Mr. Cheney,

In accordance with the parties' agreement to service via e-mail, please find attached Abercrombie & Fitch's Motion to Compel Discovery and supporting Appendicies A-D that were electronically filed today.

Best regards,

Kelly
Kelly R. McCarty
Senior Associate

<

HOWREY LLP

1111 Louisiana, 25th Floor
Houston, TX 77002-5242

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McCartyK@howrey.com

www.howrey.com

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Munich New York Northern Virginia Paris Salt Lake City San Francisco Taipei Washington DC

Exhibit B

From: Kayser, Susan
Sent: Thursday, September 16, 2010 1:05 PM
To: 'michael@verumsports.com'
Cc: McCarty, Kelly; Renne, Michelle
Subject: RE: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery
Importance: High

Dear Mr. Cheney:

We emailed you on September 11 and 13, 2010 requesting clarification to your e-mail, but have not heard back. We ask you again to advise whether you plan to:

1. Respond to the Interrogatories and Request for Production of Documents and Things which were due on August 7, 2010. If you intend to respond, please let us know when we will be served with these responses. As we noted previously, if you intend to respond fully to the requests, it could render the Motion to Compel moot.
2. We further advise that we requested in our Motion to Compel that the proceedings be stayed, however, the Board has not yet acted on that request. We have also asked you twice whether you will consent to a 6 month suspension of the proceedings while we work out the discovery issues.

In sum, here are our questions:

1. Are you preparing responses to the Interrogatories and Request for Production of Documents and Things which were due on August 7, 2010? If yes, when will those be served on us?
2. Will you consent to a 6-month suspension of the proceedings which will include resetting the testimony periods?

We would appreciate receiving your prompt response. If you wish to discuss the above, please do not hesitate to call me.

Sincerely,

Susan

Susan M. Kayser
Partner

HOWREY LLP
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Washington, DC 20004-2402
Direct: +1 202.383.7454
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**

From: Kayser, Susan
Sent: Monday, September 13, 2010 1:46 PM
To: 'michael@verumsports.com'
Cc: McCarty, Kelly; Renne, Michelle
Subject: FW: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery
Importance: High

Mr. Cheney,

Please advise re below. Specifically, please advise if you are intending to respond to the discovery requests which would then make the motion to compel moot. Please also advise if you will consent to a 6 month suspension of the proceedings while we work out the discovery issues.

Regards,

Susan

Susan M. Kayser
Partner

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From: Kayser, Susan
Sent: Saturday, September 11, 2010 3:15 PM
To: 'michael@verumsports.com'
Cc: Renne, Michelle; McCarty, Kelly
Subject: RE: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery

Mr. Cheney, Thank you for your e-mail response. Please advise if you are intending to respond to the discovery requests which would then make the motion to compel moot. Please also advise if you will consent to a 6 month suspension of the proceedings while we work out the discovery issues.

Regards,

Susan

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To: McCarty, Kelly; michael@verumsports.com
Cc: Kayser, Susan; Renne, Michelle
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In accordance with the parties' agreement to service via e-mail, please find attached Abercrombie & Fitch's Motion to Compel Discovery and supporting Appendices A-D that were electronically filed today.

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Kelly R. McCarty
Senior Associate

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Exhibit C

From: michael@verumsports.com [mailto:michael@verumsports.com]
Sent: Sunday, September 26, 2010 7:31 PM
To: Kayser, Susan; michael@verumsports.com
Cc: McCarty, Kelly; Renne, Michelle
Subject: Re: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery

Thank you....

- 1) We are preparing a response which will be filed by October 8, 2010
- 2) We agree to a six month suspension.

Best,

Michael Cheney

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

From: Kayser, Susan [mailto:KayserS@howrey.com]
Sent: Thursday, September 16, 2010 01:04 PM
To: michael@verumsports.com
Cc: 'McCarty, Kelly', 'Renne, Michelle'
Subject: RE: VERuM Sports/Abercrombie - Service of A&F's Motion to Compel Discovery
Importance: High

Dear Mr. Cheney:

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