

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: November 15, 2010

Opposition No. 91191735

ABERCROMBIE & FITCH TRADING CO.

v.

KENNETH MICHAEL CHENEY

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

On September 5, 2010, the day before opposer's main testimony period opened, opposer filed a motion to compel applicant's responses to opposer's first set of interrogatories and first request for production of documents and things. The Board suspended proceedings in an order dated September 17, 2010 pending disposition of the motion to compel. The parties were specifically informed that they should not file any paper which is not germane to the motion to compel. In an apparent "response" to opposer's motion, applicant filed general objections to opposer's discovery requests. Opposer replied thereto. On November 9, 2010, applicant filed a motion for summary judgment.

As a preliminary matter, applicant's motion for summary judgment is untimely because this case was suspended pending disposition of opposer's motion to compel. Moreover, because the suspension order issued after the first testimony period

technically opened, a motion for summary judgment may no longer be filed in this case. *Cf. Super Bakery, Inc. v. Benedict*, 96 USPQ2d 1134 (TTAB 2010) ("... only an order of the Board formally suspending proceedings has such effect.") See also TBMP §528.02 (2d ed. rev. 2004). No further consideration is given to applicant's motion for summary judgment.¹

In support of its motion to compel, opposer states that it served its written discovery requests on July 8, 2010, informing applicant of the due date for the responses;² that applicant confirmed receipt of the requests on July 9, 2010 but never served responses thereto; that, on September 2, 2010, opposer asked applicant if he intended to respond and further informed applicant that opposer would file a motion to compel if applicant did not respond; and that applicant has not served responses. Opposer points out that applicant did not request any extension of time to respond to the discovery requests.

In "response," applicant filed five general objections as his "response to opposer's first request for admissions," and six general objections each as his "response to opposer's first request for production of documents and things" and "response to

¹ The Board notes in passing that applicant's motion for summary judgment is one page long, four numbered paragraphs, and is not accompanied by any evidence. Applicant is referred to TBMP §528 (2d ed. rev. 2004) for a discussion of summary judgment motions in general, including the burden of proof held by the moving party.

² The parties have agreed to service by email. Trademark Rule 2.119(b)(6). The additional five days for taking action, available with service by traditional service methods (*i.e.*, first-class mail, "Express Mail" or overnight courier) is not available when the parties agree to service by email and utilize the email service option. *Cf.* Trademark Rule 2.119(c); and TBMP §113.05 (2d ed. rev. 2004).

opposer's first set of interrogatories." The date of service is October 11, 2010 for such "responses."

In reply, opposer indicates that, after it filed its motion to compel, it contacted applicant several times to ascertain whether he would be serving responses to the discovery requests, thus mooting the motion to compel, and whether he would agree to a six-month suspension to resolve the discovery matters. Opposer points out that, in an email dated September 26, 2010, applicant stated he was "preparing a response" and that he agreed to a six-month suspension. Opposer argues that its motion to compel is uncontested because applicant did not file a response to the motion, which would have been due on September 20, 2010; that applicant's "response," filed October 11, 2010, is untimely and unresponsive to the motion to compel; that the general ("blanket") objections filed by applicant do not respond to the outstanding discovery requests; that applicant has not complied with his obligation to identify specific objections to specific requests; and that applicant effectively has had over four months to prepare responses.

Responses to written discovery requests are due thirty days from the service of such requests. See Trademark Rule 2.120(a); and TBMP §403.03 (2d ed. rev. 2004). Once applicant did not serve responses on time (or request an extension of time to serve such responses), any responses served thereafter are untimely and must be accompanied by a showing of excusable neglect so as to

reopen the time for responding to such responses. Fed. R. Civ. P. 6(b)(1)(B). Applicant did not make any showing of excusable neglect with the service of his general "blanket" objections.³ Applicant's service of general objections to all of opposer's discovery requests is not only untimely, but it is also improper. Objections to discovery requests must be specific to the requests for which the objections are being interposed. That is, in addition to posing the objection, the objecting party must explain why the objection applies to the discovery request at issue. See Wright, Miller & Marcus, 8A Fed. Prac. & Pro.: Civ.2d §§2173, 2213 and 2262 (2009). After reviewing the discovery requests, the Board finds that the subject matter of the requests is proper. See TBMP §414 (2d ed. rev. 2004) for general guidelines on selected discovery topics.⁴ No further consideration is given to applicant's untimely and improperly posed general objections to opposer's written discovery requests.

Applicant has not provided a substantive response to opposer's motion to compel or substantive responses to opposer's

³ Excusable neglect is a high standard to meet. The Supreme Court, in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), set forth four factors to be considered, within the context of all the relevant circumstances, to determine whether a party's neglect of a matter is excusable. Those factors are: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and, (4) whether the moving party has acted in good faith. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have stated that the third factor must be considered the most important factor in a particular case. See *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 at fn.7 (TTAB 1997).

⁴ No. 7 is no longer applicable in view of the amendment made to the Trademark Rules of Practice in 2007.

first set of interrogatories and first request for production. Accordingly, opposer's motion to compel responses to such discovery requests is granted. Applicant is allowed until **THIRTY DAYS** from the mailing date of this order in which to substantively respond, without objection, to opposer's first set of interrogatories and first request for production of documents and things.⁵ See TBMP §527.01(c) (2d ed. rev. 2004). (If applicant does not have documents responsive to a particular request, he should clearly state so. Similarly, if certain interrogatories are not applicable, applicant should clearly state so. For example, if applicant has not had any communications with a third party "referring in substance of effect to the A&F Fish Mark," applicant should so clearly state.)

If applicant does not comply with this order, opposer may seek discovery sanctions pursuant to Trademark Rule 2.120(g)(1). See also TBMP §527.01 (2d ed. rev. 2004).

The discovery period is closed. Operative remaining dates are reset as follows:

⁵ With respect to opposer's first request for admissions, pursuant to Fed. R. Civ. P. 36(a)(3), "[a] matter is deemed admitted unless, within 30 days from being served, the party to whom the request is directed serves on the requesting party a written answer or objection ...". The provisions of the Rule are operative with no further action by the Board or opposer, absent the granting of a motion (not present in this case) under Fed. R. Civ. P. 36(b) from applicant to withdraw and amend effective admissions or a motion to reopen the time to serve responses to the request for admissions. With respect to the latter motion, the standard for reopening is excusable neglect. See *Giersch v. Scripps Networks, Inc.*, 85 USPQ2d 1306 (TTAB 2007); and *Hobie Designs, Inc. v. Fred Hayman Beverly Hills, Inc.*, 14 USPQ2d 2064 (TTAB 1990).

Applicant's untimely service of general objections does not overcome the applicability of the federal rule; and the matters which are the subject of opposer's first request for admissions are deemed admitted pursuant to the rule.

Plaintiff's updated Pretrial disclosures (if any):	12/22/10
Plaintiff's 30-day Trial Period Ends	2/2/2011
Defendant's Pretrial Disclosures	2/17/2011
Defendant's 30-day Trial Period Ends	4/3/2011
Plaintiff's Rebuttal Disclosures	4/18/2011
Plaintiff's 15-day Rebuttal Period Ends	5/18/2011

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.
