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

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|------------------------|---|
| Proceeding | 91191735 |
| Party | Plaintiff Abercrombie & Fitch Trading Co. |
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| Submission | Motion for Sanctions |
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| Date | 12/23/2010 |
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| 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 FOR DISCOVERY SANCTIONS
AND MEMORANDUM IN SUPPORT THEREOF

I. INTRODUCTION

Pursuant to Rule 37 Fed. R. Civ. P., Rule 2.120(g)(1) of the Trademark Rules of Practice, and Section 527.01 of the Trademark Trial and Appeal Board Manual of Procedure (TBMP), Opposer moves the Trademark Trial and Appeal Board (“the Board”) to enter sanctions as a result of Applicant’s failure to comply with the Board’s November 15, 2010 Order compelling Applicant to provide responses to Opposer’s First Request for Production of Documents and Things and Opposer’s First Set of Interrogatories to Applicant by December 15, 2010.

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

II. FACTUAL BACKGROUND

On September 5, 2010, Opposer filed its Motion to Compel Discovery and for Discovery Sanctions 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.

On October 11, 2010 Applicant filed “blanket” objections to Opposer’s discovery requests with the Board. These documents do not contain any statements as to why Opposer’s Motion was not well taken.

On October 26, 2010 Opposer filed a Reply in Support of its Motion to Compel and for Discovery Sanctions noting that Applicant had neither provided any bases why the Motion to Compel should not be granted, nor provided any discovery responses.

On November 15, 2010 the Board issued an Order granting Opposer’s Motion to Compel and setting a thirty-day time limit for Applicant to substantively respond to Opposer’s (1) First Request for Production of Documents and Things to Applicant: Nos. 1-48 and (2) Opposer’s First Set of Interrogatories to Applicant: Nos. 1-21. Applicant’s deadline expired on December 15, 2010. To date, Opposer has not been served with responses to either of these discovery requests. The Board’s Order further noted that if Applicant did not comply with its order, Opposer may seek discovery sanctions pursuant to Trademark Rule 2.120(g)(1) and TBMP §527.01 (2d ed. rev. 2004).

Opposer, consistent with the Board’s November 15, 2010 Order, hereby requests sanctions against Applicant as originally requested in its Motion to Compel and restated below.

III. ARGUMENT

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. Further, a party's failure to comply with a Board order compelling discovery is an additional basis for an award of sanctions. TBMP § 527.01(a).

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 and has ignored the Board's November 15, 2010 Order requiring said responses to be served by December 15, 2010.

Given Applicant's failure to comply with Opposer's document and interrogatory responses, Applicant's broad and non-responsive objections, and Applicant's failure to comply with the Board's subsequent Order compelling such discovery, Opposer requests the following sanctions and 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 three 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, including when ordered by the Board on November 15, 2010, 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

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

Opposer also requests that the Board stay proceedings pending disposition of the Opposer's for Discovery Sanctions.

ABERCROMBIE & FITCH TRADING CO.

Dated: December 23, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposer's Motion 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 23rd day of December 2010:

/Jessica D. Bradley/