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

Proceeding	91194864
Party	Plaintiff H&M Hennes & Mauritz AB
Correspondence Address	MARK I PEROFF HISCOCK & BARCLAY LLP SEVEN TIMES SQUARE NEW YORK, NY 10036 UNITED STATES mperoff@hblaw.com, apatel@hblaw.com, jbernard@hblaw.com, trademarks@hblaw.com
Submission	Other Motions/Papers
Filer's Name	Alpa V. Patel
Filer's e-mail	apatel@hblaw.com
Signature	/alpa v. patel/
Date	11/07/2011
Attachments	HM v Undivided Design LLC - HM_s Opposition to Applicant_s Motion to Strike.pdf ( 10 pages )(54096 bytes ) Declaration.pdf ( 5 pages )(15155 bytes ) Exhibit.pdf ( 17 pages )(1801651 bytes )

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

H&M HENNES & MAURITZ AB,

*Opposer,*

v.

UNDIVIDED DESIGN, LLC,

*Applicant.*

Opposition No.: 91194864

**OPPOSERS OPPOSITION TO MOTION TO STRIKE TESTIMONY OF JEFF MILLER**

Opposer, H&M Hennes & Mauritz AB, (“Opposer” or “H&M”) hereby opposes Applicant’s Motion to Strike the testimony of Jeffrey Miller, H&M’s Divided Merchandiser, (“Motion”), and hereby submits its Memorandum of Law and Declaration of Alpa V. Patel in support thereof. As will be explained below, Applicant has failed to establish a valid basis for striking Mr. Miller’s testimony.

**I. Preliminary Statement**

Opposer’s submits that the failure to serve Initial Disclosures upon Applicant has not resulted in any prejudice to Applicant or its ability to defend the opposed application. Applicant has had ample opportunity to engage in discovery of Opposer. Its failure to engage in discovery is the sole result of its own decision not to take discovery. Moreover, Applicant’s own failure to serve Initial Disclosures upon Opposer should preclude it from obtaining the relief requested herein.

Applicant received Opposer's Pretrial Disclosures in a timely fashion and had ample time to request leave to take Mr. Miller's deposition, prior to his testimony deposition. Nevertheless, Applicant failed to do so. In view of the foregoing, justice will be served by not striking Mr. Miller's testimony and the exhibits which were identified and introduced by him.

## **II. Statement of Facts**

Opposer initiated this Opposition proceeding on May 12, 2010, by filing a Notice of Opposition through its former counsel, Fross Zelnick Lehrman & Zissu, P.C. The Board issued a trial order, setting forth the terms for serving their respective disclosures on the adverse party. Initial Disclosures were required to be served on August 20, 2010; Expert Disclosures were required to be served on December 10, 2010; Discovery was scheduled to close on January 17, 2011; and, Plaintiff's Pretrial Disclosures were due to be served on March 3, 2011. Neither party served initial disclosures on the other party. Opposer's current counsel entered an appearance on February 16, 2011, shortly after having received the relevant from Opposer's former counsel. Upon receipt of the file, current counsel examined the relevant files and observed that neither party had served initial disclosures upon the other party. While perusing the file, counsel noted that on September 25, 2010, Applicant stated to Opposer's former counsel that his client instructed him "to respond to the Opposition of H&M Hennes & Mauritz AB ("H&M") aggressively." (Declaration of Alpa V. Patel ["Patel Decl."], ¶ 8.)

Applicant states in its motion that Opposer, through its former counsel, asserted that "Opposer did not intend to offer testimonial or other evidence in connection with the opposition proceeding, but would rely solely upon argument together with the application files and Opposer's registered marks." (Motion to Strike, p. 2) Applicant has not proffered evidence of any written or other communication documenting this statement. Opposer's current counsel has

examined the files transferred from prior counsel and has not be able to locate any communication between counsel for the parties indicating that Opposer would not offer testimony or documentary evidence in support of the opposition. (Patel Decl., ¶ 9.)

Opposer served its Pretrial Disclosures in a timely manner. The Pretrial Disclosures identified Mr. Miller as the individual whose testimony it would rely upon at trial and also the types of documents it would introduce as exhibits.<sup>1</sup> From approximately March to September 2011, the parties engaged in settlement discussions without reaching a settlement which was acceptable to both parties. (Patel Decl., ¶ 11.) Opposer informed Applicant that it intended take the trial testimony deposition of its witness Mr. Miller. After exchanging courtesy emails with Applicant's attorney to set up a mutually convenient time for Mr. Miller's trial deposition, Opposer served a Notice of Trial Testimony Deposition on Applicant. (Patel Decl., ¶¶ 12-13.)

Opposer's current counsel notified Applicant that it was unaware of any agreement between the parties to not introduce testimony or other documentary evidence at trial and, more specifically that Opposer would refrain introducing testimony and other documentary evidence in support of the opposition. Rather, Opposer confirmed it would take Mr. Miller's trial testimony and offer evidence in the categories identified in its Pretrial Disclosure.

On October 6, 2011 at 4:15 p.m. MT, Opposer's counsel contacted Applicant's counsel via email requesting his agreement to maintain certain documents as confidential prior to sending

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<sup>1</sup> A Applicant seems to imply that Opposer is required to identify each and every document it intends to rely upon in its case in chief in the Pretrial Disclosure. (Motion to Strike, ¶5, p.2) Opposer disputes that Rule 2.121(e) requires anything more other than to identify the person's whose testimony will be taken along with the subject matter thereof, as well as the category of documents which it introduce into evidence in its case in chief. Applicant fails to provide any support for its assertion that Opposer must specifically identify the documents it will introduce at trial.

him documents which would be identified by Mr. Miller during his testimony. In the absence of receiving a reply from Applicant's counsel, Opposer provided non-confidential documents to Applicant's counsel at 7:23 EST pm, which was 5:23 p.m. MT (Applicant's local time.) After receiving Applicant's counsel's confirmation that he would maintain confidentiality of Opposer's exhibits at 8:48 a.m. EST, Opposer emailed the remaining confidential documents to Applicant's counsel. Opposer also emailed photographs of a shirt which it planned to introduce into evidence, which was inadvertently left out of the original documents emailed the prior day. The exhibits consisted of printouts from H&M's website, weblog listing regarding the DIVIDED brand, advertising of the DIVIDED brand, and sales and advertising expenditures. (Patel Decl., ¶ 15-19.)

Opposer took Mr. Miller's trial testimony on October 7, 2011. Opposer had a full and fair opportunity to cross-examine Mr. Miller. (Patel Decl., ¶ 20.) Opposer also allowed Applicant to cross examine the witness without interposing any objections based on the scope of the cross-examination. At the close of the testimony, Opposer formally moved to enter all the exhibits into evidence. Therefore, Applicant's counsel stated: "Undivided Design objects to receipt of Exhibits 17 through 21 on the grounds of lack of adequate foundation and hearsay." (Patel Decl. ¶ 20-21.)

### **III. ARGUMENT**

Applicant's arguments can be summed up in two points: (1) Mr. Miller's testimony should be stricken because H&M did not serve initial disclosures; and (2) Mr. Miller's testimony should be stricken because H&M did not serve expert disclosures. (Motion, pp. 5-7.) Significantly, Applicant does not assert that Opposer's failed to comply with its pretrial

disclosure obligations under Rule 2.123(e)(3), nor does it assert that H&M's Pretrial Disclosure is defective, untimely, or otherwise inadequate. Additionally, Applicant does not contend that Mr. Miller's testimony was taken outside of Opposer's testimony period, was beyond the scope of the noticed topics, or constituted information that was requested but not produced during discovery. Lastly, Applicant does not contend that Opposer's Notice of Trial Deposition (or Notice of Examination) was untimely, insufficient or failed to comply with the Boards rules regarding such notices.

Turning to the second ground for Applicant's Motion to Strike, Opposer confirms that Mr. Miller is not an expert witness, and that it did not ask Mr. Miller questions that could be viewed as expert testimony on any matter. As such, this ground for Applicant's Motion is moot.

As to the first ground, Rule 2.121(e)(3) states that "[a] motion to strike the testimony of a witness for lack of proper or adequate pretrial disclosure may seek exclusion of that portion of the testimony that was not adequately disclosed in accordance with Rule 2.121(e)." Rule 37, Fed. Civ. P., however, states that to the extent the identity of a witness or information is inadvertently not disclosed, such information and/or testimony can be excluded *unless the failure was substantially justified or is harmless*. The basis for allowing exclusions in certain circumstances is to prevent "unduly harsh penalties" in instances where the parties acted inadvertently, or where there is harmless error as a result as the lack of disclosure. Fed.R.Civ.P. 37, Advisory Committee Notes (1993 Amendments, Subdivision (c)).

In determining whether the failure to disclose is substantially justified or harmless, the Board looks to the five-factor test under *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003): 1) surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the surprise; 3) the extent to which

allowing the testimony would disrupt the trial; 4) importance of the evidence; and 5) the nondisclosing party's explanation for its failure to disclose the evidence. *See MicroStrategy Inc. v. Business Objects, S.A.*, 429 F.3d 1344, 1357 (Fed. Cir. 2005).

As to Factors 1 and 2, these factors weigh in Opposer's favor. There was no surprise to Applicant because Mr. Miller was identified in Applicant's Pretrial Disclosure, which were timely served. Applicant further has an opportunity to "cure" any surprise by calling Mr. Miller as a witness during Applicant's testimony period. Additionally, Applicant could have cured this asserted "surprise" by serving its own discovery demands and requests; and/or even moving to compel service of Opposer's initial disclosures. Applicant chose not to avail itself of the available discovery and other procedural tools, which would have avoided any "surprise" resulting from Mr. Miller's identification in Opposer's Pretrial Disclosures.<sup>2</sup>

Moreover, Applicant states that Opposer's former counsel did not serve initial disclosures, however, neither party served initial disclosures. Opposer did not deliberately fail to serve initial disclosures or withhold discovery evidence; rather this was likely an inadvertent error. Opposer's current counsel regrets that it is not in a position to know why such initial disclosures were not made, but it is unclear from Opposer's record exactly what transpired around the deadlines for serving these initial disclosures. As such, Factors 1 and 2 favor Opposer.

As to Factor 3, there would be no disruption to trial since Opposer has already taken Mr. Miller's deposition, and also because Applicant had a full and fair opportunity to cross-examine Mr. Miller. More importantly, Opposer did not interpose any objections as to scope of the

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<sup>2</sup> Applicant states that Opposer represented it would not take any discovery or introduced evidence into trial, however, Applicant fails to provide documentation confirming this arrangement. Moreover, it is each parties' responsibility to manage its own strategy, and not rely upon representations by other parties as to how it plans on manage a litigation.

questioning during cross-examination, so as to allow Applicant an opportunity to gather any other information it may need to support its defenses. As such, there will be no disruption to trial, weighing in Opposer's favor.

Concerning Factor 4, Mr. Miller's testimony is important because it supports Opposer's claim as to a likelihood of confusion, and it is the Opposer's burden to establish there is priority and a likelihood of confusion between the asserted marks. Mr. Miller's testimony is important because it identifies sales under and advertising, recognition and promotion of Opposer's mark, which are important factors in the likelihood of confusion analysis. Applicant is not seeking to assert the testimony of any other individuals. This factor, therefore, weighs in Opposer's favor.

Lastly, Opposer believes that it adequately disclosed Mr. Miller under the Board's Rules. Applicant has not provided any evidence showing that each party is required to identify its trial witnesses under its initial disclosures. In fact, the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") acknowledges that initial disclosures do not require identification of each and every witness that Opposer will call to trial. TBMP § 533.02(b).

Furthermore, Applicant's reliance on *Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 U.S.P.Q.2d 1443 (T.T.A.B. 2010), is misplaced. The Board struck testimony of an individual because the party seeking to enter the testimony into evidence did not serve its Pretrial Disclosures until the opening day of its own testimony period, and also failed to identify the individual in Pretrial Disclosures.<sup>3</sup> Here, however, Opposer timely served its Pretrial Disclosures on March 3, 2011, and did not take testimony until much later. Other than making unsupported assertions that it has been harmed, Applicant cannot dispute that the inadvertent failure to serve initial disclosures was harmless and/or substantially justified.

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<sup>3</sup> Applicant further relies upon *B*

Opposer again regrets that it is not in a position to explain why neither party served initial disclosures. Opposer can only speculate that the parties may have forgotten about their disclosure obligations because they were involved in discussing a resolution to the matter. Opposer is cognizant that settlement discussions do not dispense with a party's obligations in a TTAB proceeding, however, Opposer believes the failure to provide initial disclosures by both parties was inadvertent and harmless.

### **III. CONCLUSION**

Opposer respectfully requests the Board deny Applicant's Motion to Strike in its entirety and allow Opposer to submit Mr. Miller's trial testimony and exhibits into evidence, and for such other and further relief as the Board may deem appropriate. In the event that the Board order that Mr. Miller's testimony be stricken, Opposer respectfully requests that the Board allow exhibits identified and introduced at trial be permitted to remain in the record or permit Opposer an opportunity to submit a supplemental Notice of Reliance upon such exhibits.<sup>4</sup>

**DATED:** November 7, 2011

By: S/Alpa V. Patel\_\_\_\_\_.

Mark I. Peroff  
Alpa V. Patel  
Hiscock & Barclay, LLP  
Seven Times Square  
New York, NY 10036  
P: 212.784.5800  
F: 212.784.5777

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<sup>4</sup> Opposer did not file a notice of reliance for all exhibits since Applicant acknowledged that many of the exhibits were admissible, and to avoid duplication of entry of documents into the record; as is encouraged by the Board and Rules. *See generally* TBMP § 703 (evidence submitted through trial testimony should not also be submitted through notice of reliance also).

*Attorneys for Opposer*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of November 2011, I served the foregoing Opposer's Opposition to Applicant's Motion to Strike by first class and electronic mail to:

Matthew M. Boley  
PARSONS KINGHORN HARRIS  
111 East Broadway, 11<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
E-mail: mmb@pkhlawyers.com

\_\_\_\_\_  
s/ alpa v. patel

Alpa V. Patel

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

H&M HENNES & MAURITZ AB,

*Opposer,*

v.

UNDIVIDED DESIGN, LLC,

*Applicant.*

Opposition No.: 91194864

**ATTORNEY DECLARATION OF ALPA V. PATEL**

I, Alpa V. Patel, declare:

1. I am an attorney duly licensed to practice law before the courts of the State of New York, and am an associate at the law firm of Hiscock & Barclay, LLP, attorneys for Opposer, H&M Hennes & Mauritz AB (“Opposer”).

2. I make this Declaration in support of Opposer’s Opposition to Applicant’s Motion to Strike Testimony of Jeffrey Miller.

3. Opposer’s initiated Opposition Proceeding No. 91194864 (“Opposition”) by filing a Notice of Opposition to registration of the mark UNDIVIDED identified in U.S. Application No. 77/888150, on May 12, 2010 and paying the appropriate fee.

4. Opposer initiated the Opposition through its former counsel, Fross Zelnick Lehrman & Zissu, P.C.

5. Opposer’s current counsel, Hiscock & Barclay LLP, filed a Notice of Appearance on February 16, 2011. (*See* Doc. No. 6.)

6. In reviewing the file provided to Hiscock & Barclay LLP by Opposer's former counsel, Applicant failed to serve any initial disclosures.

7. On July 29, 2010, Opposer's former counsel wrote to Applicant requesting that it abandon its application and further responding to certain statements made in Applicant's "Answer" to the Notice of Opposition. (*See Exhibit A, a true and correct copy of the July 29, 2010 correspondence from D. Ehrlich to M. Boley.*)

8. On September 25, 2010, in response to Opposer's July 29<sup>th</sup> correspondence, Applicant stated that his client instructed him "to respond to the Opposition of H&M Hennes & Mauritz AB ("H&M") aggressively." (*See Exhibit B, a true and correct copy of July to September 2011 email chain between D. Ehrlich to M. Boley.*)

9. Opposer did not find any correspondence between Opposer's former counsel and Applicant's counsel indicating that it would not offer testimonial or other evidence in connection with the opposition proceeding.

10. Opposer served its Pretrial Disclosures on March 3, 2011, identifying Jeff Miller, H&M's U.S. Divided Merchandiser, and also the types of documents it would introduce as exhibits. (*See Exhibit C, a true and correct copy of Opposer's Pretrial Disclosure.*)

11. From approximately March to August 2011, the parties engaged in settlement discussions.

12. After reaching impasse, Opposer indicated to Applicant that it would need to schedule the trial deposition of Mr. Miller, and exchanged emails with Applicant to find a mutually beneficial time for the trial deposition.

13. Opposer served a Notice of Trial Testimony Deposition on Applicant on September 19, 2011, providing timely notice of H&M's intent to take Mr. Miller's trial testimony. (*See Exhibit D, a true and correct copy of Opposer's Notice of Examination.*)

14. On October 6, 2011 at 4:15 p.m. MT, Opposer's counsel contacted Applicant's counsel via email requesting his agreement to maintain certain documents as confidential prior to sending him documents which would be identified by Mr. Miller during his testimony.

15. In the absence of receiving a reply from Applicant's counsel, Opposer provided non-confidential documents to Applicant's counsel at 7:23 EST pm, which was 5:23 p.m. MT (Applicant's local time.)

16. After receiving Applicant's counsel's confirmation that he would maintain confidentiality of Opposer's exhibits at 8:48 a.m. EST, Opposer emailed the remaining confidential documents to Applicant's counsel.

17. Opposer also emailed photographs of a shirt which it planned to introduce into evidence, which was inadvertently left out of the original documents emailed the prior day.

18. The exhibits consisted of printouts from H&M's website, weblog listing regarding the DIVIDED brand, advertising of the DIVIDED brand, and sales and advertising expenditures.

19. Opposer's present counsel is not in a position to state whether any documents were previously disclosed or produced since it was not counsel of record until February 16, 2011.





# Exhibit A

# FROSS ZELNICK LEHRMAN & ZISSU, P.C.

## Partners

Ronald J. Lehrman  
Stephan Bigger  
Roger L. Zissu  
Richard Z. Lahr  
David Ehrlich  
Susan Upton Douglass  
Janet L. Hoffman  
Peter J. Silverman  
Lawrence Eli Apolzon  
Barbara A. Solomon  
Mark D. Engelmann  
Nadine H. Jacobson  
Andrew N. Fredbeck  
Craig S. Mende  
J. Allison Strickland  
John P. Margiotta  
Lydia T. Gobena  
Carlos Cucurella  
James D. Weinberger  
David Donahue  
Nancy E. Sabarra  
Charles T. J. Weigelt III  
Laura Popp-Rosenberg  
Cara A. Boyle

## Special Counsel

Michael J. Davis

## Counsel

James D. Silberstein  
Joyce M. Ferraro  
Robert A. Becker  
Michael Chiappetta  
Tamar Niv Bessinger  
Nancy C. DiConza

## Associates

Marilyn F. Kelly  
Karen Lim  
Casey M. Daum  
Xiomara Triana  
Jason Jones  
Alexander L. Greenberg  
Lesley J. Maty  
Giselle C. Wao  
Anna Leipsic  
Lisa M. Willis  
Todd Martin

July 29, 2010

**BY MAIL AND EMAIL** ([mmb@pkhlawyers.com](mailto:mmb@pkhlawyers.com))

Matthew M. Boley, Esq.  
Parsons Kinghorn Harris  
111 East Broadway, 11th Floor  
Salt Lake City, UT 84101

Re: H&M v. Undivided Design, LLC, Opposition No. 91194864 (Our Ref.: HMH USA TC-1003723)

Dear Mr. Boley:

I am writing to follow up on our June 30, 2010 phone conversation. I have received instructions from my client as follows.

First, paragraph 4 of your answer to the Notice of Opposition is absolutely incorrect in stating that H&M does not have a "Divided" brand and does not sell clothing under that label. Enclosed are photographs of H&M clothing bearing the mark on labels. It is true that H&M uses several different brands in its stores, but you should know that DIVIDED is one of the most important of those brands sold in over 100 stores located in many states of the United States. See the enclosed store locator map.

Second, I am authorized to tell you that H&M will continue with the present opposition proceeding and litigate it to a conclusion. No argument will convince us otherwise, and I see no way to settle the matter. In addition, H&M reserves its right to sue both your corporate client, Undivided Design, LLC, and the individual person who controls and directs your corporate client (your wife), for trademark infringement if and when any UNDIVIDED brand t-shirts or other clothing are ever made, sold or distributed in the United States. Potential remedies in such a suit include damages, profits and attorney fees, as well as an injunction. Trademark case law permits this piercing of the corporate veil to hold individuals liable.

Third, regarding your position that DIVIDED and UNDIVIDED are not confusingly similar marks, we could not disagree more. This is not a case, like SURGE versus SURF, where the mark are somewhat similar in sight or sound, but have quite unrelated meanings. The meanings of DIVIDED and UNDIVIDED may be opposite, but they certainly will be associated in the minds of consumers. Moreover, it is black letter law that consumers rarely have the opportunity to make a side-by-side comparison of the two marks at issue. Rather, consumers may have a fuzzy memory of the first party's mark when they encounter the mark of the second party. If the law were otherwise, there could never be confusion of marks which are merely similar rather than identical.

Matthew M. Boley, Esq.  
July 29, 2010  
Page 2

Measured against that standard, DIVIDED and UNDIVIDED are confusingly similar marks. Furthermore, it is well-settled law that the TTAB resolves any doubt in favor of a prior trademark owner, that is, the opposer. In addition, your contention that marks with opposite meanings are not confusingly similar has been specifically rejected in every case that has considered that specific issue. E.g. Procter & Gamble Company v. Conway, 419 F.2d 1332 (CCPA 1970) (MR. CLEAN and MISTER STAIN held confusingly similar); The Downtowner Corporation v. Uptowner Inns, Inc., 178 U.S.P.Q. 105 (TTAB 1973) (UPTOWNER and DOWNTOWNER held confusingly similar); Novartis Corp. v. Brady, Opposition No. 91123924 (TTAB, unreported, 2004) (RITALIN and RITALOUT held confusingly similar).

Please discuss this matter with your wife and let me know, within 30 days, whether or not she is willing to abandon this application and agree to refrain from using the mark UNDIVIDED. If she refuses, I strongly suggest that you and she consult a trademark law specialist for a reality check. If you are still determined that the opposition will proceed, then I must remind you that you still owe me a proper, amended answer, which specifically admits, denies or denies knowledge as to each of the numbered paragraphs in the Notice of Opposition, as required by FRCP 8.

I look forward to hearing from you. This communication is without prejudice.

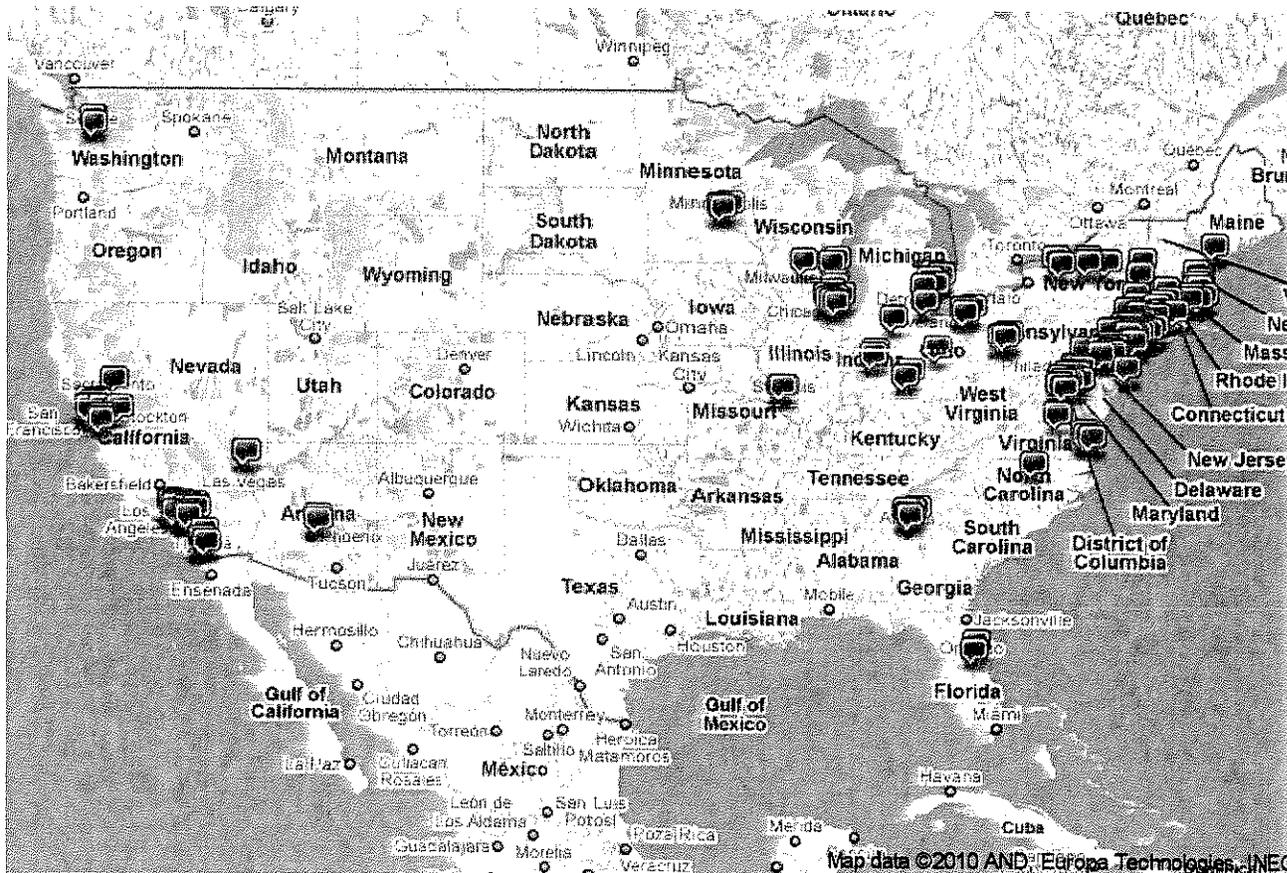
Sincerely,



David Ehrlich  
212.813.5920  
dehrlich@fzllz.com

DE/mg

### Find a store



© H & M HENNES & MAURITZ AB 2010



**DIVIDED**

TIGHTS  
US XS/S  
FR T/P  
CN 165/68A

MADE IN  
ITALY

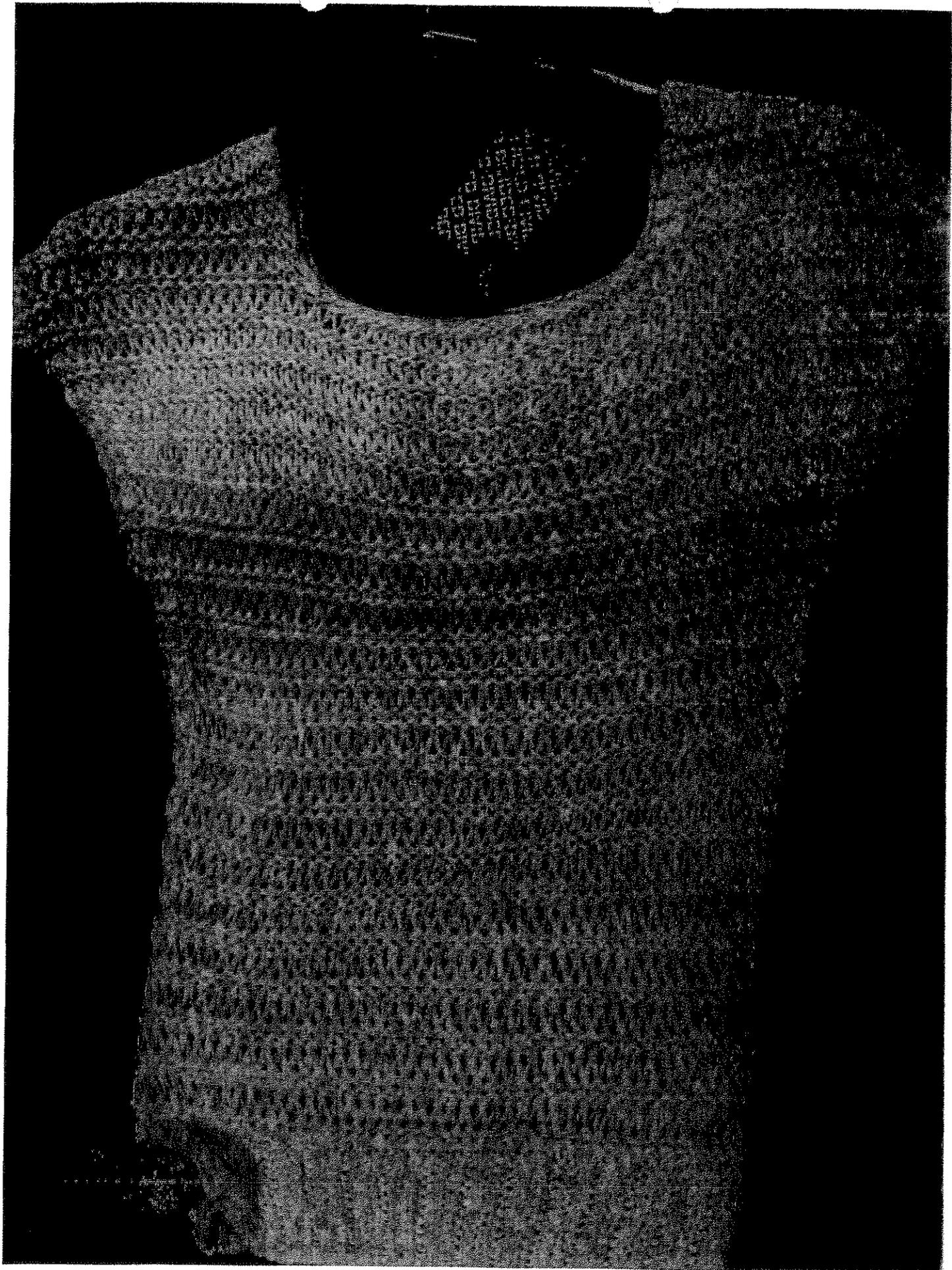
**DIVIDED**

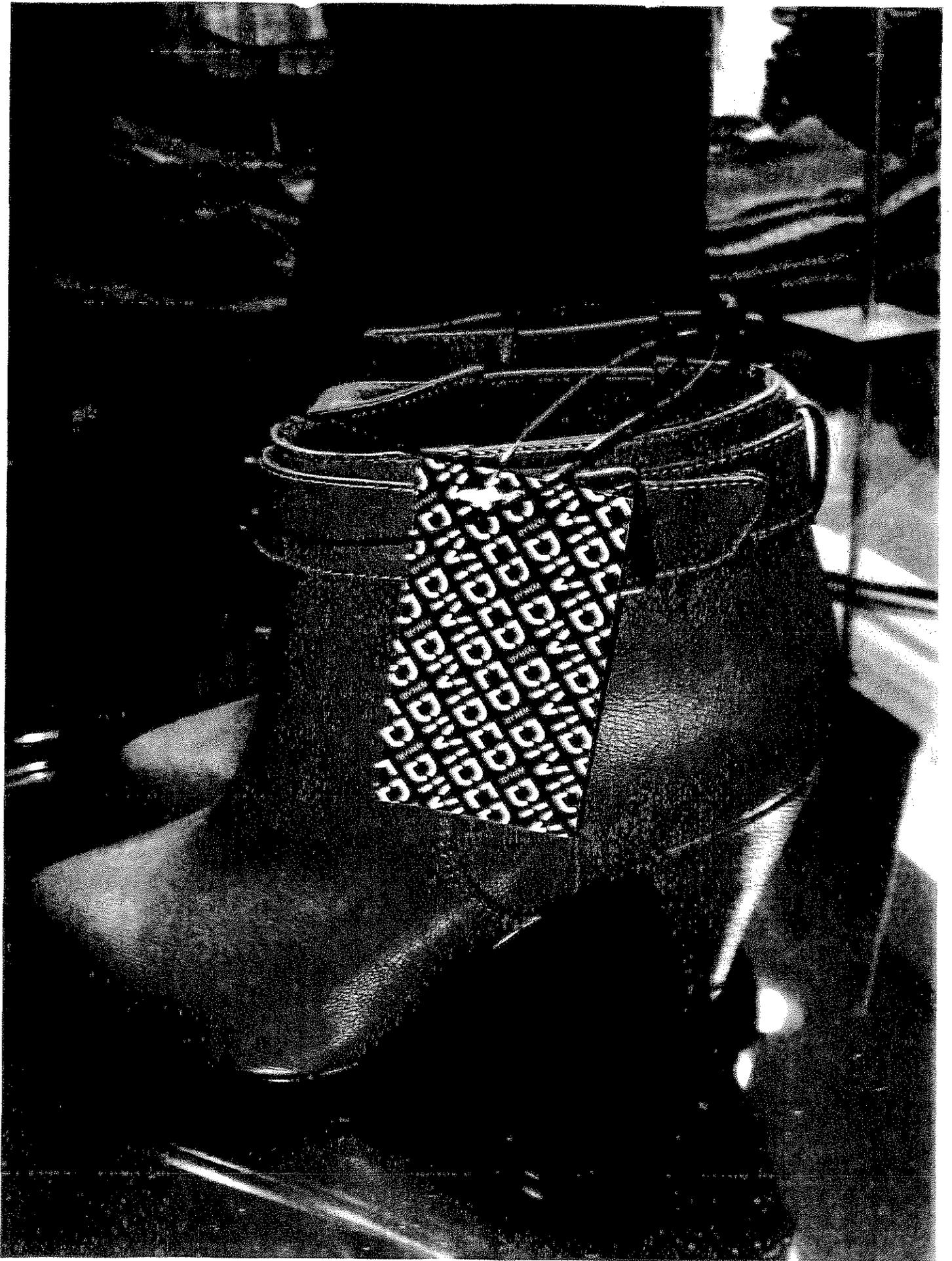
TIGHTS  
US M/L  
CA M/G  
CN 175/88A

MADE IN  
ITALY

US M/L  
CA M/G  
CN 175/88A

US M/L  
CA M/G  
CN 175/88A







# Exhibit B

**Miriam E. Goldman**

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**From:** Matthew M. Boley [mmb@pkhlawyers.com]  
**Sent:** Saturday, September 25, 2010 8:27 AM  
**To:** David Ehrlich  
**Subject:** RE: H&M v. Undivided Design, LLC, Opposition No. 91194864 (Our Ref.: HMH USA TC-1003723)

David,

As you know, we represent Undivided Design, LLC ("Undivided") in connection with the above-referenced "opposition" proceeding pending before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office (the "Board").

Our client has instructed us to respond to the Opposition of H&M Hennes & Mauritz AB ("H&M") aggressively. Undivided respectfully declines H&M's proposal to abandon its mark, and strongly disputes H&M's assertion that the "Undivided" mark is confusingly similar to H&M's "Divided" marks.

Before our respective clients fully commit to the time and significant expense that this litigation may entail, however, we have been instructed to explore whether there is any potential for a mutually beneficial resolution.

REDACTED

Finally, per your request, we will be filing an amended answer which responds to each of the four numbered factual averments stated in H&M's formal "opposition."

Very Truly Yours,

Matthew M. Boley  
PARSONS KINGHORN HARRIS  
111 East Broadway, 11th Floor  
Salt Lake City, Utah 84111  
Telephone: (801) 363-4300  
Fax: (801) 363-4378  
[mmb@pkhlawyers.com](mailto:mmb@pkhlawyers.com)

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To ensure compliance with requirements imposed by the IRS in Circular 230, we inform you that, unless we expressly state otherwise in this communication (including any attachments), any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or

9/27/2010

# Exhibit C

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

H&M Hennes & Mauritz AB,	:	
	:	
<i>Opposer,</i>	:	
	:	
v.	:	Opposition No.: 91194864
	:	
Undivided Design, LLC,	:	
	:	
<i>Applicant.</i>	:	
	:	

**OPPOSER'S RULE 2.121(e) PRETRIAL DISCLOSURES**

Pursuant to 37 C.F.R. § 2.121(e), Opposer, H&M Hennes & Mauritz AB ("Opposer") hereby makes the following pretrial disclosures. These pretrial disclosures are based on the information reasonably available and currently known to Opposer, and Opposer reserves the right to amend or supplement these disclosures as required by Rule 26(e) of the Federal Rules of Civil Procedure.

**PRETRIAL DISCLOSURES**

**I. Witness(es) Opposer Expects to Call at Trial:**

1. Mr. Jeffrey Miller,  
c/o Hiscock & Barclay LLP  
Seven Times Square  
New York, NY 10036

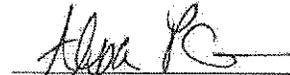
Mr. Miller is the Young Fashion and Denim Merchandiser in the United States division of H&M Hennes & Mauritz AB. Mr. Miller has knowledge of the advertising, marketing, promotion and sale of products bearing the DIVIDED mark in the United States.

**II. Documents Opposer May Introduce as Evidence During the Testimony of the Witness:**

1. Documents relating to the marketing, advertising and promotion of products bearing the DIVIDED mark in the United States; and
2. Documents relating to the sales of products bearing the DIVIDED mark in interstate commerce.

DATED: March 3, 2011

**H&M HENNES & MAURITZ AB**



---

Mark L. Peroff  
Alpa V. Patel

**HISCOCK & BARCLAY, LLP**

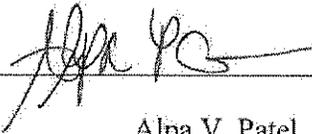
Seven Times Square  
New York, NY 10036  
Tel. No.: (212) 784-5800  
Fax No.: (212) 784-5777  
E-Mail: mperoff@hblaw.com  
E-Mail: apatel@hblaw.com

*Attorneys for Opposer*  
**H&M HENNES & MAURITZ AB**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the **OPPOSER'S**  
**RULE 2.121(e) PRETRIAL DISCLOSURES** was served on the following counsel by first  
class mail and electronic mail, this 3rd day of March, 2011:

Matthew W. Boley, Esq.  
PARSONS KINGHORN HARRIS  
111 East Broadway, 11th Floor  
Salt Lake City, UT 84101  
Email - [mmb@pkhlawyers.com](mailto:mmb@pkhlawyers.com)

  
\_\_\_\_\_  
Alpa V. Patel

# Exhibit D

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

H&M HENNES & MAURITZ AB,

*Opposer,*

v.

UNDIVIDED DESIGN, LLC,

*Applicant.*

Opposition No.: 91194864

**OPPOSER'S NOTICE OF TESTIMONY DEPOSITION**

Please take notice that, pursuant to Trademark Rule 2.123, Opposer, H&M Hennes & Mauritz AB ("H&M"), by its attorney, will take the testimony deposition upon oral examination of its Young Fashion and Denim Merchandiser in the United States division of H&M, Jeffrey Miller, on October 7, 2011 at 10:00 a.m. at the office of Hiscock & Barclay, LLP, Seven Times Square New York, New York 10036.

The deposition will take place before a certified court reporter and will continue until completed.

You are invited to attend and cross-examine.

**DATED:** September 19, 2011

By: \_\_\_\_\_

  
Mark E. Peroff  
Alpa V. Patel  
Hiscock & Barclay, LLP  
Seven Times Square  
New York, NY 10036  
P: 212.784.5800  
F: 212.784.5777

*Attorneys for Opposer*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of September 2011, I served the foregoing Opposer's Notice of Testimony Deposition by first class and electronic mail to:

Matthew M. Boley  
PARSONS KINGHORN HARRIS  
111 East Broadway, 11<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
E-mail: [mmb@pkhlawyers.com](mailto:mmb@pkhlawyers.com)

  
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Alpa V. Patel