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

Proceeding	91212917
Party	Plaintiff Primal Wear, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

PRIMAL WEAR, INC.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91212917
)	
)	Serial No. 85/689,425
LB BRANDS, LLC,)	
)	
Applicant.)	Opposed Mark: IT STIRS YOUR PRIMAL SENSES
<hr style="border: 0.5px solid black;"/>		
)	

OPPOSER'S MOTION FOR SUMMARY JUDGMENT

AND

REPLY TO APPLICANT'S MOTION

TO EXTEND TIME TO RESPOND TO OPPOSER'S WRITTEN DISCOVERY

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Primal Wear, Inc., a Colorado corporation (“Opposer”), by and through its undersigned attorney, hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, and Trademark Rule 2.127(e), sustaining this opposition against U.S. Trademark Application Serial No. 85/689,425 filed by Applicant LB BRANDS, LLC (“Applicant”) for the mark IT STIRS YOUR PRIMAL SENSES and hereby opposes Applicant’s Motion To Extend Time To Respond To Opposer’s Written Discovery. In support of this Motion, Opposer submits this memorandum pursuant to Trademark Rule 2.217(a), together with the accompanying exhibits hereto.

INTRODUCTION

Since at least as early as 1992, Opposer has been engaged in the development, advertising, distribution and sale of various products and services, focusing primarily on clothing and the custom design of clothing for others, as well as the organization and sponsorship of athletic events. It owns federal trademark registrations for numerous marks incorporating the term PRIMAL, including registrations in Class 25 in connection with various items of apparel. Against this long history, Applicant seeks to register the mark IT STIRS YOUR PRIMAL SENSES which it intends to use in connection with “clothing, namely, tops, bottoms and headwear,” in International Class 25.

As set forth in detail below, Applicant has failed to follow the established rules for discovery and therefore admitted every fact necessary to prove that its registration and use of the mark IT STIRS YOUR PRIMAL SENSES is likely to cause confusion with the long-used, federally-registered PRIMAL marks of Opposer.

I. STATEMENT OF FACTS

A. A Brief Overview of Opposer and the Primal Brand and Registrations

Opposer, a leader in the apparel industry, owns numerous federal registrations for the PRIMAL mark and design marks incorporating the word PRIMAL (the “Primal Marks”), which have been used continuously for the past twenty-two years. As shown in the U.S. PTO status and title records attached hereto – which make the referenced registrations

part of the record pursuant to Trademark Rule of Practice 2.122(d) – Opposer’s registrations cover a variety of apparel. These include registrations for the words PRIMAL and PRIMAL WEAR which have become incontestable.

B. LB BRANDS, LLC, and the IT STIRS YOUR PRIMAL SENSES Application

Applicant, LB Brands, LLC, a Maine Limited Liability Company, first applied for the mark IT STIRS YOUR PRIMAL SENSES on August 31, 2009 in connection with “Restaurant services; take-out restaurant services” in International Class 43. Then, on August 1, 2012, it filed the application at issue in connection with “clothing, namely, tops, bottoms and headwear” as an intent-to-use application in International Class 25.

C. This Opposition Proceeding

Opposer instituted this Opposition Proceeding on October 10, 2013 and the Board instituted the proceeding as Opposition No. 91212917 the next day and issued a governing scheduling order. Applicant filed a response to the Opposition. On December 5, 2013, at Applicant’s request, the parties mutually agreed to amend the discovery dates under which discovery opened and the initial disclosures were due on December 20, 2103, thus accelerating the discovery process. The parties exchanged initial disclosures. Applicant served its initial discovery requests on Opposer on December 20, 2013, with a version correcting typographical errors that Opposer pointed out several days later. Opposer served a Request for Admissions, Request for Interrogatories, and Request for Production of Documents on Applicant on January 7, 2014. On January 22, 2014, Opposer responded to Applicant’s Request for Admissions, sent a Response to Interrogatories and sent a package of documents to respond to the Request for Production of Documents to Applicant. It also requested a time to schedule a deposition with the owner of LB Brands, LLC.

D. Applicant Failed to Respond to Petitioner’s Discovery Requests

The relevant timeline with respect to discovery proceedings is the following:

1. January 7, 2014: Opposer served a Request for Admissions, Request for Interrogatories, and Request for Production of Documents on Applicant.

2. January 28, 2014: Applicant's counsel sent an email to Opposer's counsel broadly outlining a proposed settlement, with a note that "as you consider this with your client, it seems prudent for the parties to suspended the opposition proceeding to minimize further expense on both sides. Please confirm if you agree." (Exhibit 1)
3. February 4, 2014, Opposer's counsel responded in detail to the proposal indicating that, if its counter-offer was palatable by Applicant, "we can certainly suspend the opposition pending an acceptable draft of the settlement agreement." (Exhibit 2)
4. February 7, 2014: Applicant's responses to Opposer's discovery requests were due. No response was received.
5. February 7, 2014: Rather than indicating whether or not Opposer's counter-offer would be acceptable, Applicant's counsel asked "Would your client be willing to assent to an extra 30 days on the discovery responses?" When Opposer's counsel asked when a response regarding the proposed settlement was anticipated, Applicant merely responded "I am pressing to discuss your proposal with her, but she is very busy and often difficult to reach. A 30 day extension makes good sense." (Exhibit 3)
6. February 10, 2014: Applicant's counsel indicated "I'm planning to file a motion to extent time to respond to the discovery because the parties are having active settlement discussions and I wanted to give you the heads up before I filed. If you assent, please advise." Opposer declined to assent, reminding Applicant that its responses to the discovery requests are due and it would like to review them in order have a better idea of what kind of settlement, if any, makes sense. (Exhibit 4)

As detailed above, Applicant neither responded to the discovery requests nor timely filed a request to extend time to respond to discovery; rather, it waited until after its deadline had passed, then filed a motion under the rationale that "resolution may be close at hand," and it did not want "to incur the costs of preparing responses" to the written discovery. Opposer did not agree to an extension of time for the response to discovery requests. It has complied with its own deadlines and has asked Applicant to do so as well, so that it may obtain relevant information, which will help it evaluate whether and what settlement, if any, may be appropriate in the matter. It therefore opposes Applicant's Motion To Extend Time To Respond To Opposer's Written Discovery.

II. ARGUMENT

A. Applicant's Motion Fails to Meet Established Criterion Under the Trademark Rules of Practice

Under TBMP 509.01(a), a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted. The Board carefully scrutinizes any motion to extend time, to determine whether the requisite good cause has been shown. See Benedict v. Super Bakery, Inc., 101 U.S.P.Q.2d 1089 (T.T.A.B. 2011) (deeming request for admissions as admitted, and conclusively established when Applicant failed to respond); Luemme, Inc. v. D. B. Plus Inc., 53 U.S.P.Q.2D 1758 (T.T.A.B. 1999), 1760-61 (diligence not shown; discovery requests not served until last day of the discovery period); and Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 U.S.P.Q.2d 1848, 1851 (T.T.A.B. 2000) (applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed until last day to seek an agreement on an extension of time).

Here, Applicant's counsel was clearly aware of the deadline for the response to the discovery request, especially because *it suggested the revised discovery deadlines itself*, and ignored it because it might eventually be able to get in touch with the decision maker regarding a settlement. The Requests for Admission require simple answers and should not involve much time or expense to answer; however, Applicant completely disregarded them. It does not appear that Applicant expended even an ounce of effort in attempting to gather information necessary to admit or deny the Requests for Admission. Indeed, Applicant seems to want to create its own rules for response depending on when it is convenient and cost-efficient for it. However, "mere laziness, expenditure of time or expense does not relieve a party of its obligation to timely respond to Requests for Admission or risk their admission by default." Metpath, Inc. v. Modern Medicine, 1991 U.S. App. LEXIS 10796, 8 (4th Cir. 1991) Precision Franchising, LLC v. Gatej, 2012 U.S. Dist. LEXIS 175450 (E.D. Va. 2012)(granting summary judgment in a breach of contract case where Defendant did not respond to Plaintiff's Requests for Admissions, did not file a motion for an extension of time to respond or a motion to withdraw the deemed

admissions and to file an untimely response, but did file an untimely response two months following the deadline to respond to the Request for Admissions).

Not only has Applicant failed to show good cause for an extension of time to respond to the discovery requests, it has also ignored Trademark Rule 2.127(a), which states that every motion shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. Applicant has indicated that it incorporated the grounds for relief within its two-page Motion; however, there is no case law, rule or other precedent cited that would allow such a flagrant violation of the Federal Rules of Civil Procedure or the Trademark Rules of Practice. Therefore, Applicant's Motion to Extend Time to Respond to Opposer's Written Discovery fails on its face and should be denied.

B. Standard for Summary Judgment

A motion for summary judgment is appropriate for disposing of an inter partes proceeding when "there is no genuine issue as to any material fact [such] that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* 37 C.F.R. §2.116(a) (Federal Rules of Civil Procedure apply generally to inter partes proceedings). Summary judgment "is regarded as a salutary method of disposition," and the Board does not hesitate to dispose of cases on summary judgment when appropriate." TMBP §528.01 (citations omitted). Likelihood of confusion is "a legal conclusion based on underlying facts." Cunningham v. Laser Golf Corp., 55 U.S.P.Q.2d 1842, 1843-44 (Fed. Cir. 2000). As such, it is an issue that the Board may resolve on summary judgment. Sweats Fashions Inc. v. Pannill Knitting Co., 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987); Compliance Review Servs. v. Davis-Osuawu, 2006 U.S. Dist. LEXIS 58034, 14-15 (S.D. Tex. 2006) (granting summary judgment in trademark and copyright infringement matter when defendant failed to answer timely its Requests for Admissions).

C. Opposer's Requests for Admission are Conclusively Admitted and Established

As a result of Applicant failing to respond to the written Requests for Admissions, each of those requests is deemed admitted under Federal Rule of Civil Procedure 36(a)(3). The rule provides, among other things, "[t]he matter **is admitted unless**, within 30 days after

service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed **serves upon the party requesting the admission a written answer or objection addressed to the matter**, signed by the party or by his attorney." Fed. R. Civ. P. 36(a); Switchmusic.com, Inc. v. U.S. Music Corp., 416 F. Supp. 2d 812 (C.D. Cal. 2006) (finding for Plaintiffs when Defendants failed to answer the Requests for Admission); Benedict v. Super Bakery, Inc., 101 U.S.P.Q.2D 1089, (T.T.A.B. 2011). No motion to "establish the admissions is needed because Rule 36 is self-executing." Cook v. Allstate Ins. Co., 337 F. Supp. 2d 1206, 1210 (C.D. Cal. 2004). The effect of Rule 36(a) is that any matter admitted pursuant to Rule 36 is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." Id. (citing Fed. R. Civ. P. 36(b)). Furthermore, if a non-answering party does not move to withdraw or amend its admissions, then the admissions "cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." Id. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. Compliance Review Servs. v. Davis-Osuawu, 2006 U.S. Dist. LEXIS 58034, 4.

Courts have found that when party could have easily moved for an extension of time to answer or could have stated that it did not have sufficient information to answer, its efforts to comply with Rule 36 were minimal at best and therefore it was proper to deem its unanswered Requests for Admissions as admitted. Metpath, Inc. v. Modern Medicine, 1991 U.S. App. LEXIS 10796, 8 (4th Cir. 1991); Precision Franchising, 2012 U.S. Dist. LEXIS 175450; *see also* Lincoln Diagnostics, Inc. v. Panatrex, Inc., 2008 U.S. Dist. LEXIS 41649, 45, (C.D. Ill. 2008) (finding for plaintiff under § 43(a) of the Lanham Act and on deceptive trade practice statutes based on unanswered Requests for Admissions deemed admitted when defendant failed to show that it should be allowed to withdraw its admissions, both because it did not file a Motion to Withdraw pursuant to Rule 36(b) and because Plaintiff would be severely prejudiced by allowing Defendant to withdraw its admissions). A party "should not be allowed to ignore deadlines imposed by the federal rules . . . [s]uch a course of action would invite a party to fail to respond to requests for admission when that party grew unsatisfied with the course of litigation in which it was involved and then seek to

reopen whatever issues were covered in those requests on the eve of trial by withdrawing admitted facts. In order for Rule 36 to accomplish its purposes, deemed admissions are entitled to considerably more reliability from litigants than that.” Powerhouse Prods. v. Widgery, 2008 U.S. Dist. LEXIS 71716, 8-9 (E.D. Tex. 2008).

Here, Applicant has failed to respond to discovery requests in a timely manner, under deadlines that is specifically agreed on with Opposer, and its unanswered Requests for Admission are therefore properly deemed admitted.

D. Applicant’s Admissions Establish that its IT STIRS YOUR PRIMAL SENSES Mark is Likely to Cause Confusion as a Matter of Law

To establish a likelihood of confusion on a motion for summary judgment, Opposer must establish that there is no genuine issue of material fact that (1) it has standing to oppose the Application; (2) it has priority of use; and (3) Applicant’s use of the mark IT STIRS YOUR PRIMAL SENSES is likely to cause confusion among consumers as to the sponsorship, affiliation or connection of goods offered under the parties’ respective marks. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 213 U.S. P.Q. 185, 187 (C.C.P.A. 1982); Coach, Inc. v. Horizon Trading USA Inc., 908 F. Supp. 2d 426 (S.D.N.Y. 2012) (granting summary judgment to Coach in a trademark infringement matter, based on part on Defendants’ failure to respond to Requests for Admission). As detailed below, based on undisputed evidence in the record and Applicant’s own admissions, there can be no genuine dispute that Opposer has established each of these elements.

1) Opposer Has Standing

Under the Lanham Act, “any person who believes that he is or will be damaged. . . by the registration of a mark” may file an opposition. 15 U.S.C. §1063. The threshold standing requirement is satisfied where the petitioner possesses a “real interest” in the proceeding. Compuclean Mktg. & Design v. Berkshire Prods. Inc., 1 U.S.P.Q. 2d 1323, 1324 (T.T.A.B. 1986). As the owner of numerous registrations for PRIMAL made of record, Opposer unquestionably has a “real interest” in challenging the registration of IT STIRS YOUR PRIMAL SENSES.

2) Opposer’s Marks Have Priority

Priority is established by Opposer showing proprietary rights in its marks arising from “a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” Herbko Int’l, Inc. v. Kappa Books, Inc., 64 U.S.P.Q. 2d 1375, 1378 (Fed. Cir. 2002); TBMP §309.03 A). Applicant has admitted that it was aware of Opposer’s long use of the PRIMAL mark for 20 years prior to Applicant’s use or proposed use of the subject mark (Request for Admission #6). Opposer’s marks were used and registered prior to Applicant’s proposed use; thus, it has established priority. *See, e.g., Herbko*, 64 U.S.P.Q. 2d at 1378. Therefore, no dispute exists regarding Petitioner’s priority of rights.

3) Applicant’s IT STIRS YOUR PRIMAL SENSES Mark is Not Entitled To Registration Under Section 2(d) of the Lanham Act.

Section 2(d) of the Lanham Act states in pertinent part that a trademark shall be refused registration if it so resembles a prior used or registered mark so as “to be likely, when used on or in connection with the goods of the applicant, to cause confusion, to cause mistake, or to deceive.” 15 U.S.C. §1052(d). In determining likelihood of confusion, the Board reviews the factors set forth in In re E.I. du Pont de Nemours & Co., 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) (“duPont”) to the extent relevant. Here, the relevant factors are: (a) The similarity or dissimilarity of and the nature of the goods or services as described in an application or registration in connection with which a prior mark is in use; (b) the fame of the prior mark (sales, advertising, length of use); (c) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impressions.; (d) the similarity or dissimilarity of established, likely-to-continue trade channels; and (e) the Applicant’s intent in applying for the mark. In this case, Applicant has admitted all of the facts necessary to show that the du Pont factors overwhelmingly evidence a likelihood of confusion. Accordingly, Petitioner is entitled to summary judgment on its Section 2(d) claim.

a. Goods Are Closely Related

A key du Pont factor is the similarity and relatedness of the parties' products offered under their respective marks. Du Pont, 177 U.S.P.Q. at 567. By Applicant's own admission, the goods on which Applicant uses its mark are very similar to Opposer's goods (Request for Admission #2); the goods on which Applicant uses its mark are used for the same or similar purposes, as Opposer's goods (Request for Admission #3); and the goods on which Applicant uses its mark are within the natural zone of expansion, of Opposer's goods (Request for Admission #4). Indeed, the goods subject of Applicant's application, "clothing, namely, tops, bottoms and headwear," are fully encompassed by the goods listed in Opposer's registrations. Accordingly, this du Pont factor concerning similarity of the parties' respective goods weighs conclusively in Opposer's favor.

b. Opposer's Marks Are Strong and Famous

An important du Pont factor is the strength and fame of the senior mark. By Applicant's own admission, Opposer has been using the mark for more than twenty years and Applicant was aware of this fact. (Request for Admission #6). Therefore, this du Pont factor weighs conclusively in favor of Opposer.

c. Opposer's and Applicant's Marks Are Highly Similar

Another key du Pont factor focuses on the similarity of the marks in their entireties as to appearance, sound, and commercial impression. Where these are similar, the marks are more likely to cause consumer confusion.

By Applicant's own admission, Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to cause confusion among purchaser, users, and the public. (Request for Admissions #15).

By Applicant's own admission, Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to cause purchasers, users, and the public to mistake the origin of the Applicant's goods as originating from Opposer. (Request for Admissions #16).

By Applicant's own admission, Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to deceive purchasers, users, and the public into believing that Applicant's goods originate from Opposer (Request for Admissions #17).

By Applicant's own admission, Use by Applicant of the make on the subject goods is likely to lead to the mistaken belief that Applicant's products are sponsored by, affiliated with, approved by, or otherwise emanate from Opposer (Request for Admissions #18).

Accordingly, this du Pont factor weighs conclusively in favor of Opposer and shows that consumer confusion is likely to exist should Applicant's mark proceed to registration.

d. The Parties' Trade Channels and Consumers Overlap

An additional du Pont factor is the overlap of the parties' trade channels and consumers. It overwhelmingly clear that there is a great deal of overlap in this matter.

By Applicant's own admission, Applicant markets its goods to individuals in the United States. (Request for Admission #5).

By Applicant's own admission, Applicant and Opposer advertise and market their respective products in similar channels of trade. (Request for Admission #7).

By Applicant's own admission, Applicant's goods or services and Opposer's goods or services are distributed in similar channels of trade (Request for Admission #8).

By Applicant's own admission, Applicant's goods or services are offered for sale in the same venues (including via the Internet) as Opposer's goods or services (Request for Admission #9).

By Applicant's own admission, Applicant's goods or services are offered for sale at a retail location where Opposer's goods or services are offered for sale (Request for Admission #10).

By Applicant's own admission, Applicant's goods appeal to the same class of consumers as Opposer's products and related goods and services (Request for Admission #11).

By Applicant's own admission, Applicant's goods are or will be advertised and promoted to and directed at the same trade channels as Opposer's products and related goods and services (Request for Admission #12).

By Applicant's own admission, Applicant's goods are or will be used in the same environment as Opposer's products and related goods and services (Request for Admission #13).

Thus, the du Pont factor concerning the overlap of trade channels and customers weighs conclusively in favor of Opposer.

e. **Applicant's Intent Was to Confuse the Consuming Public**

It is clear that Applicant was well aware of Opposer's marks for apparel when it applied for IT STIRS YOUR PRIMAL SENSES in connection with various items of apparel.

By Applicant's own admission, Opposer is aware of actual confusion by consumers between Applicant's Mark and Opposer's Mark. (Request for Admission #14).

By Applicant's own admission, Applicant, upon submitting its application for the mark, did not have the requisite good faith belief that no other person, firm, corporation or association has the right to use said mark in commerce, and consequently knew that such use is and would be in derogation and violation of Opposer's rights (Request for Admission #19).

Thus, the du Pont factor concerning the intent of Applicant weighs conclusively in favor of Opposer.

III. CONCLUSION

As detailed above, Applicant has failed to respond in a timely manner to discovery requests, including Requests for Admission, thus deeming them admitted. The undisputed facts and admissions establish a likelihood of confusion, mistake and deception arising from registration of Applicant's IT STIRS YOUR PRIMAL SENSES mark, and thus Opposer is entitled to summary judgment on its Section 2(d) claim. Applicant's mark is confusingly similar to Opposer's family of PRIMAL marks and is intended to be used in connection with the same goods for which Opposer has long-standing use and federal trademark

registrations, and there thus exists a likelihood of confusion precluding registration of Applicant's mark under Section 2(d) of the Lanham Act.

Accordingly, Opposer respectfully requests that the Trademark Trial and Appeal Board deny Applicant's Motion To Extend Time To Respond To Opposer's Written Discovery and submits that this opposition against Application Serial No. 85/689,425 must be sustained pursuant to this Motion as a trial on the matter would entail unnecessary fees and waste of the Board's scarce resources, and prays that judgment for Opposer be entered in this proceeding.

Respectfully Submitted on February 18, 2014

Tamara Pester~original signature on file

Tamara Pester, LLC
100 Fillmore Street #500
Denver, CO 80206

ATTORNEY FOR PRIMAL WEAR, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of OPPOSER'S REPLY TO APPLICANT'S MOTION TO EXTEND TIME TO RESPOND TO OPPOSER'S WRITTEN DISCOVERY AND MOTION FOR SUMMARY JUDGMENT were served via email with a copy via U.S. Mail this February 18, 2014 to:

Edward J. Sackman, Esq.
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James Keenan 

January 28, 2014 11:06 AM

To: Tamara Pester <tamara@tamarapester.com>

[Hide Details](#)

Cc: Ned Sackman

Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

Settlement Communication – Without Prejudice

Hello Tamara,

I've connected with our client and present what we feel is a very reasonable settlement proposal. As you consider this with your client, it seems prudent for the parties to suspended the opposition proceeding to minimize further expense on both sides. Please confirm if you agree.

Tamara Pester <tamara@tamarapester.com>

To: James Keenan

Cc: Ned Sackman

Re: Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

February 4, 2014 8:50 AM

[Hide Details](#)

Hi Jim --

I just heard back from my client about this -- my notes are below with a *tp. Please let me know your thoughts; if your client is amenable, we can certainly suspend the opposition pending an acceptable draft of the settlement agreement.

Thank you,

Tamara Pester
Attorney
Tamara S. Pester, LLC
100 Fillmore Street #500
Denver, CO 80206
tamara@tamarapester.com
skype: tamara5280
(303) 333-4696

James Keenan

To: Tamara Pester <tamara@tamarapester.com>, Ned Sackman

RE: Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

February 7, 2014 3:23 PM

[Hide Details](#)

Tamara,

I am pressing to discuss your proposal with her, but she is very busy and often difficult to reach. A 30 day extension makes good sense.

Be back to you as soon as I am able.

Best,

Jim

James Keenan
Shareholder
jkeenan@bernsteinshur.com
207 228-7207 direct
207 774-1200 main

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

From: Tamara Pester [<mailto:tamara@tamarapester.com>]
Sent: Friday, February 07, 2014 5:00 PM
To: Ned Sackman
Cc: James Keenan
Subject: Re: Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

I will check. Would we be pushing everything out an additional 30 days then? When do you anticipate hearing back from Ms. Bean?

Tamara Pester
Attorney
Tamara S. Pester, LLC
100 Fillmore Street #500
Denver, CO 80206
tamara@tamarapester.com
skype: tamara5280
(303) 333-4696

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On Feb 7, 2014, at 2:52 PM, Ned Sackman <nsackman@bernsteinshur.com> wrote:

Thanks for the update. Would your client be willing to assent to an extra 30 days on the discovery responses? Thank you.
Ned

Tamara Pester <tamara@tamarapester.com>

To: Ned Sackman

Cc: James Keenan

Re: Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

February 10, 2014 2:56 PM

[Hide Details](#)

Hi Ned -- it is funny timing because your responses to the discovery requests are due. We would like to review these. :) Once we get those back we will have a better idea of what kind of settlement, if any, makes sense.

Tamara Pester
Attorney
Tamara S. Pester, LLC
100 Fillmore Street #500
Denver, CO 80206
tamara@tamarapester.com
skype: tamara5280
(303) 333-4696

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On Feb 10, 2014, at 2:39 PM, Ned Sackman <nsackman@bernsteinshur.com> wrote:

Tamara,
I'm planning to file a motion to extent time to respond to the discovery because the parties are having active settlement discussions and I wanted to give you the heads up before I filed. If you assent, please advise.
Thanks.
Ned

Ned Sackman
Shareholder
nsackman@bernsteinshur.com
603 665-8844 direct
603 623-8700 main

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

From: James Keenan
Sent: Friday, February 07, 2014 5:23 PM
To: 'Tamara Pester'; Ned Sackman
Subject: RE: Settlement Communication - Opposition Proceeding No. 91212917 - ITS STIRS YOUR PRIMAL SENSES

Tamara,

I am pressing to discuss your proposal with her, but she is very busy and often difficult to reach. A 30 day extension makes good sense.

Be back to you as soon as I am able.

Best,

Jim

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

PRIMAL WEAR, INC.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91212917
)	
)	Serial No. 85/689,425
LB BRANDS, LLC,)	
)	
Applicant.)	Opposed Mark: IT STIRS YOUR PRIMAL SENSES
<hr/>		

**OPPOSER PRIMAL WEAR, INC.’S FIRST REQUEST FOR ADMISSIONS
TO APPLICANT LB BRANDS, LLC**

Pursuant to Trademark Rule of Practice 2.120 (37 U.S.C. §2.120). Trademark Trial and Appeal Board Manual of Procedure § 410, and Federal Rule of Civil Procedure 36, Opposer Primal Wear, Inc. (“Opposer”) hereby requests that Applicant LB Brands, LLC (“Applicant”) admit the truth of the Requests for Admissions set forth below within thirty (30) days after service of this Request.

DEFINITIONS

The definitions set forth in Petitioner Primal Wear, Inc.’s First Request for Interrogatories to Applicant shall apply to these requests.

INSTRUCTIONS

1. Your written response to this request must comply with Rule 36 of the Federal Rule of Civil Procedure, in that if you do not admit each matter, you must separately respond under oath to each request within thirty (30) days of the service of this request by: (a) Admitting so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by you; (b) By denying so much of the matter involved in the request as is untrue; and (c) Specifying so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge.
2. If your response to a particular request is that you lack information or knowledge as a reason for failure to admit all or part of a request for admission, then you shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable you to admit that matter.

3. If your response is that only part of a request for admission is objectionable, the remainder of the request shall be answered.
4. If an objection is made to a request or to a part of a request, the specific ground for the objection shall be set forth clearly in the response.
5. These requests for admission are continuing and require further answer and supplementation, as provided by Federal Rule of Civil Procedure 26(e).

REQUESTS

1. Admit that Applicant manufactures, offers for sale, advertises or licenses apparel.

RESPONSE:

2. Admit that the goods on which Applicant uses its mark are very similar to Opposer's goods.

RESPONSE:

3. Admit that the goods on which Applicant uses its mark are used for the same or similar purposes, as Opposer's goods.

RESPONSE:

4. Admit that the goods on which Applicant uses its mark are within the natural zone of expansion, of Opposer's goods.

RESPONSE:

5. Admit that Applicant markets its goods to individuals in the United States.

RESPONSE:

6. Admit that Applicant was aware of Opposer's long use of the PRIMAL mark for 20 years prior to Applicant's use or proposed use of the subject mark.

RESPONSE:

7. Admit that Applicant and Opposer advertise and market their respective products in similar channels of trade.

RESPONSE:

8. Admit that Applicant's goods or services and Opposer's goods or services are distributed in similar channels of trade.

RESPONSE:

9. Admit that Applicant's goods or services are offered for sale in the same venues (including via the Internet) as Opposer's goods or services.

RESPONSE:

10. Admit that Applicant's goods or services are offered for sale at a retail location where Opposer's goods or services are offered for sale.

RESPONSE:

11. Admit that Applicant's goods appeal to the same class of consumers as Opposer's products and related goods and services.

RESPONSE:

12. Admit that Applicant's goods are or will be advertised and promoted to and directed at the same trade channels as Opposer's products and related goods and services.

RESPONSE:

13. Admit that Applicant's goods are or will be used in the same environment as Opposer's products and related goods and services.

RESPONSE:

14. Admit that Opposer is aware of actual confusion by consumers between Applicant's Mark and Opposer's Mark.

RESPONSE:

15. Admit that Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to cause confusion among purchaser, users, and the public.

RESPONSE:

16. Admit that Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to cause purchasers, users, and the public to mistake the origin of the Applicant's goods as originating from Opposer.

RESPONSE:

17. Admit that Applicant's mark so resembles marks used by Opposer that, when applied to the goods in Class 25 of the application, Applicant's mark is likely to deceive purchasers, users, and the public into believing that Applicant's goods originate from Opposer.

RESPONSE:

18. Admit that Use by Applicant of the make on the subject goods is likely to lead to the mistaken belief that Applicant's products are sponsored by, affiliated with, approved by, or otherwise emanate from Opposer.

RESPONSE:

19. Admit that Applicant, upon submitting its application for the mark, did not have the requisite good faith belief that no other person, firm, corporation or association has the right to use said mark in commerce, and consequently knew that such use is and would be in derogation and violation of Opposer's rights.

RESPONSE:

Respectfully Submitted on January 7, 2014

Tamara Pester~original signature on file

Tamara Pester, LLC
100 Fillmore Street #500
Denver, CO 80206

ATTORNEY FOR PRIMAL WEAR, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **OPPOSER PRIMAL WEAR, INC.'S FIRST REQUEST FOR INTERROGATORIES TO APPLICANT LB BRANDS, LLC** were served via email this January 7, 2014 to:

Edward J. Sackman, Esq.
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105
603.623.8700
nsackman@bernsteinshur.com

/s/ Tamara Pester

Int. Cl.: 25

Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 3,494,801

Registered Sep. 2, 2008

**TRADEMARK
PRINCIPAL REGISTER**

PRIMAL

PRIMALWEAR, INC. (COLORADO CORPORATION)
8200 E PACIFIC PL. #307
DENVER, CO 80231

FOR: CLOTHING, HEADWEAR AND SPORTSWEAR, NAMELY, SHORTS, TIGHTS, SHIRTS, JERSEYS, JACKETS, HEADBANDS, AND HATS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 8-1-1992; IN COMMERCE 8-1-1992.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 3,213,870 AND 3,350,960.

SER. NO. 77-228,965, FILED 7-13-2007.

DAWN HAN, EXAMINING ATTORNEY

Int. Cl.: 25

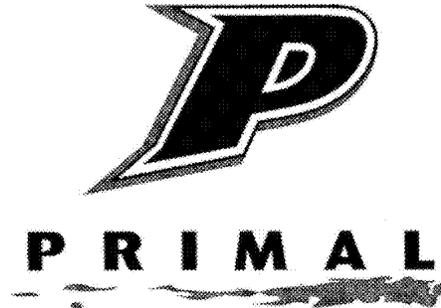
Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 3,626,226

Registered May 26, 2009

**TRADEMARK
PRINCIPAL REGISTER**



PRIMAL WEAR, INC. (COLORADO CORPORATION)

8200 E. PACIFIC PLACE, SUITE 307

DENVER, CO 80231

FOR: CLOTHING, HEADWEAR AND SPORTSWEAR, NAMELY, SHORTS, TIGHTS, SHIRTS, JERSEYS, JACKETS, HEADBANDS, AND HATS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 6-1-2008; IN COMMERCE 6-1-2008.

OWNER OF U.S. REG. NOS. 3,213,870, 3,350,960 AND OTHERS.

THE MARK CONSISTS OF THE WORD "PRIMAL" WITH A FLAME UNDERLINING IT. ABOVE THE WORD "PRIMAL" IS A STYLIZED LETTER "P", WHICH IS OUTLINED AND SHADED.

SER. NO. 77-570,060, FILED 9-15-2008.

REBECCA EISINGER, EXAMINING ATTORNEY

Int. Cl.: 25

Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 3,626,224

Registered May 26, 2009

TRADEMARK
PRINCIPAL REGISTER



PRIMAL

PRIMAL WEAR, INC. (COLORADO CORPORATION)
8200 E. PACIFIC PLACE, SUITE 307
DENVER, CO 80231

FOR: CLOTHING, HEADWEAR AND SPORTSWEAR, NAMELY, SHORTS, TIGHTS, SHIRTS, JERSEYS, JACKETS, HEADBANDS, AND HATS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 6-1-2008; IN COMMERCE 6-1-2008.

OWNER OF U.S. REG. NOS. 3,213,870, 3,350,960 AND OTHERS.

THE MARK CONSISTS OF THE WORD "PRIMAL" IN WITH AN OUTLINED NUMERAL "3" ATTACHED TO THE TOP OF THE "P". A FLAME UNDERLINES THE WORD "PRIMAL". A DESIGN ELEMENT ABOVE THE WORD "PRIMAL" CONSISTS OF AN OVAL, WHICH IS SHADED, CONTAINING A CAPITAL "P" AND A NUMERAL "3" ATTACHED TO IT.

SER. NO. 77-569,999, FILED 9-15-2008.

REBECCA EISINGER, EXAMINING ATTORNEY

United States of America

United States Patent and Trademark Office

PRIMAL WEAR

Reg. No. 4,198,616

Registered Aug. 28, 2012

Int. Cl.: 25

TRADEMARK

PRINCIPAL REGISTER

PRIMAL WEAR, INC. (COLORADO CORPORATION)
7700 CHERRY CREEK SOUTH DRIVE, SUITE 106
DENVER, CO 80206

FOR: ATHLETIC APPAREL, NAMELY, SHIRTS, PANTS, JACKETS, FOOTWEAR, HATS AND CAPS, ATHLETIC UNIFORMS; CLOTHING, NAMELY, ARM WARMERS; CYCLING SHORTS; CYCLISTS' JERSEYS; LEG WARMERS; SKULLIES; SOCKS; TRIATHLON CLOTHING, NAMELY, TRIATHLON TIGHTS, TRIATHLON SHORTS, TRIATHLON SING-LETS, TRIATHLON SHIRTS, TRIATHLON SUITS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 9-20-1992; IN COMMERCE 9-20-1992.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 3,213,870, 3,494,801 AND OTHERS.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "WEAR", APART FROM THE MARK AS SHOWN.

SER. NO. 85-577,857, FILED 3-23-2012.

MARK T. MULLEN, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office

Int. Cl.: 25

Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 3,350,960

Registered Dec. 11, 2007

**TRADEMARK
PRINCIPAL REGISTER**

The logo for PRIMALwear features the word "PRIMAL" in a large, bold, black, distressed font with a jagged, splattered appearance. To the right of "PRIMAL", the word "wear" is written in a smaller, lowercase, sans-serif font, positioned vertically and partially overlapping the bottom of the "PRIMAL" letters.

PRIMALWEAR, INC. (COLORADO CORPORATION)
8200 E PACIFIC PL. #307
DENVER, CO 80231

FOR: CLOTHING, HEADWEAR, AND SPORTSWEAR, NAMELY, SHORTS, TIGHTS, SHIRTS, JERSEYS, HEADBANDS, AND HATS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 8-1-1992; IN COMMERCE 8-1-1992.

OWNER OF U.S. REG. NOS. 2,875,532 AND 3,213,870.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "WEAR", APART FROM THE MARK AS SHOWN.

SER. NO. 77-078,295, FILED 1-8-2007.

MIDGE BUTLER, EXAMINING ATTORNEY

United States of America
United States Patent and Trademark Office

PRIMAL

Reg. No. 4,194,778

Registered Aug. 21, 2012

Int. Cl.: 42

SERVICE MARK

PRINCIPAL REGISTER

PRIMAL WEAR, INC. (COLORADO CORPORATION)
7700 CHERRY CREEK SOUTH DRIVE
SUITE 106
DENVER, CO 80206

FOR: CUSTOM DESIGN OF ATHLETIC APPAREL BASED ON PERSONAL SELECTIONS MADE BY THE CUSTOMER; DESIGN AND DEVELOPMENT OF CUSTOM ATHLETIC APPAREL; GRAPHIC ILLUSTRATION SERVICES FOR OTHERS, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 9-20-1992; IN COMMERCE 9-20-1992.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 3,213,870, 3,494,801 AND OTHERS.

SER. NO. 85-577,774, FILED 3-23-2012.

MARK T. MULLEN, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office