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

|                        |                                                                                                                                                                                                 |
|------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Proceeding             | 91213413                                                                                                                                                                                        |
| Party                  | Defendant<br>M Webb, LLC                                                                                                                                                                        |
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| Submission             | Motion to Strike                                                                                                                                                                                |
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| Signature              | /Molly Buck Richard/                                                                                                                                                                            |
| Date                   | 08/03/2015                                                                                                                                                                                      |
| Attachments            | Motion to Strike Evidence in Support of Opposer's Main ACR Brief.pdf(319938 bytes )                                                                                                             |

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

|                        |   |                                  |
|------------------------|---|----------------------------------|
| MAPPIN & WEBB, LIMITED | ) |                                  |
|                        | ) | Opposition No. 91213413          |
| Opposer,               | ) |                                  |
|                        | ) |                                  |
| v.                     | ) | Application Serial No. 85/460569 |
|                        | ) |                                  |
|                        | ) |                                  |
| M WEBB, LLC            | ) | For the Mark M WEBB              |
|                        | ) |                                  |
| Applicant.             | ) |                                  |

**APPLICANT’S MOTION TO STRIKE EVIDENCE  
IN SUPPORT OF OPPOSER’S MAIN ACR BRIEF**

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Sections 707 and 801, Applicant M Webb, LLC (“M Webb”) files this Motion to Strike certain evidence submitted in support of Opposer Mappin & Webb Limited’s (“Opposer”) Main ACR Brief (Doc. 22).

**I. INTRODUCTION**

Opposer has submitted substantial evidence through the Declaration of Elizabeth Galton of its history, gross global sales, market presence, and promotional activities that either in whole or in large part have no connection to United States consumers or the U.S. marketplace, which is the sole relevant focus of this proceeding. Such evidence dealing with Opposer’s foreign activities or for which Opposer provides no context vis-a-vis the U.S. marketplace is irrelevant and should be excluded. In addition, Opposer has submitted purported traveler statistics for London’s Heathrow Airport that are inadmissible hearsay. Based on this inadmissible evidence, Opposer’s declarant

Elizabeth Galton impermissibly speculates as to these purported travelers' experience. In light of the objections detailed below, M Webb moves to strike this evidence.

## II. OBJECTIONS

### **A. Evidence of Opposer's foreign history and promotional activities is irrelevant.**

Through the Declaration of Elizabeth Galton, Opposer details its long British history, its relationship with British royalty, its use of its MAPPIN & WEBB and MAPPIN & WEBB LONDON marks ("Opposer's Marks") in the United Kingdom, and its physical presence and promotional activities within the United Kingdom. (Declaration of Elizabeth Galton in Support of Opposer's Main ACR Brief [Doc. 24, hereinafter "Galton Decl.,"] ¶¶ 6-8, 19-20, 24-25, 28-30). As the Board made clear in *Hard Rock Café Licensing Corp. v. Elsea*, "only the fame of opposer's mark among consumers in the United States is of relevance to us. The renown of opposer's marks outside the United States or exposure of the foreign public to opposer's marks is irrelevant." 48 U.S.P.Q.2d 1400, 1405 (TTAB 1998); *see also Double J of Broward, Inc. v. Skalany Sportswear GmbH*, 21 U.S.P.Q.2d 1609, 1612 (TTAB 1991) ("Information concerning applicant's foreign activities is not relevant to the issues in an opposition proceeding.").

Opposer provides no competent, direct connection between U.S. consumers and Ms. Galton's testimony regarding (1) Opposer's origins in the United Kingdom, (2) the company's service to British royal sovereigns and possession of a British Royal Warrant, (3) use of the MAPPIN & WEBB Marks and MAPPIN & WEBB trade name within the United Kingdom, (4) its advertising and promotion within the United Kingdom and other foreign countries, (5) direct mail and corporate account promotions, and (6) store

locations within the United Kingdom. (Galton Decl. ¶¶ 6-8, 19-20, 24-25, 28-31 Exs. 1-2.) As in *Elsea*, this evidence of foreign activities is irrelevant and should be excluded.

Ms. Galton avers that Opposer maintains three store locations on London’s Regent, Old Bond, and Fenchurch Streets, which she testifies are “high-traffic tourist (including U.S. tourist) areas.” (Galton Decl. ¶ 31.) Opposer provides no evidence for this asserted U.S. tourist presence, nor does Ms. Galton provide any foundation for this knowledge. Her testimony on U.S. tourist traffic is therefore beyond her personal knowledge, constitutes impermissible speculation, and should be excluded. FED. R. EVID. 602.

M Webb therefore requests that the Board sustain its objections and exclude the following evidence from consideration:

- Galton Decl. ¶¶ 6-8
- Galton Decl. Ex. 2
- Galton Decl. ¶¶ 19-20
- Galton Decl. ¶¶ 28-31

**B. Evidence of Opposer’s appearance in foreign or indeterminate publications is inadmissible.**

Throughout this proceeding, Opposer has consistently qualified that it advertises in printed publications within the United Kingdom, which Ms. Galton also avers in her declaration. (*Id.* ¶ 25; Declaration of David J. Diamond [hereinafter “Diamond Decl.”] ¶ 5, Ex. 3 at 6-7.) Yet Ms. Galton also avers that M Webb’s “products have been featured in the same fashion and lifestyle publications where Mappin & Webb’s products are routinely featured.” (*Id.* ¶ 58.) As evidence of these publications in which Opposer has purportedly been featured, Opposer submits a British edition of *Harper’s Bazaar*, which

on its face lists its sales price in British Pounds, refers to its United Kingdom domain <www.harpersbazaar.co.uk>, and identifies its publisher as “Hearst magazines UK,” as well as an unidentified excerpt from what appears to be an online posting for the publication *Marie Claire*. (Galton Decl. ¶ 58, Ex. 31.) The publications cited by Ms. Galton for coverage of M Webb’s products, however, are the U.S. edition of *Marie Claire* and coverage in *Harper’s Bazaar* appearing on the U.S. domain <harper’sbazaar.com>. (*Id.* ¶ 32.)

As the Board made clear in *Hard Rock Café v. Elsea*, evidence of foreign publications or publications that do not clearly indicate they are U.S. publications are irrelevant and should be excluded. *Elsea*, 48 U.S.P.Q.2d at 1405. Furthermore, “a proffered excerpt from a newspaper or periodical is lacking in foundation and, thus, is not admissible as evidence to the extent that it is . . . not fully identified by the name and date of the published source. *Id.* The *Harper’s Bazaar* excerpt is clearly a non-U.S. publication, and the *Marie Claire* excerpt is without a date of publication or any other information that would enable verification. (Galton Decl. ¶ 58, Ex. 31.) Consequently they should be excluded. In light of the inadmissibility of this evidence, Ms. Galton’s testimony equating coverage of Opposer and M Webb is thus baseless and constitutes impermissible speculation. FED. R. EVID. 602.

M Webb therefore requests that the Board sustain its objections and exclude the following evidence from consideration:

- Galton Decl. ¶ 58
- Galton Decl. Ex. 31

**C. Evidence of global sales is irrelevant and otherwise misleading and prejudicial.**

Through Ms. Galton's testimony, Opposer submits its global gross sales figures from 2011 through 2015 to substantiate that Opposer's products "have enjoyed widespread commercial success over the years." (Galton Decl. ¶ 12.) As detailed above, evidence of Opposer's purported renown or exposure outside the U.S. is irrelevant. *Elsea*, 48 U.S.P.Q.2d at 1405. Furthermore, these raw sales figures alone without context is misleading. *See Fiserv Inc. v. Electronic Transaction Sys. Corp.*, 113 USPQ2d 1913, 1921 (TTAB 2015) (citing *Bose Corp. v. QSC Audio Prods.*, 63 U.S.P.Q.2d 1303, 1309 (Fed. Cir. 2002) ("raw numbers alone in today's world may be misleading")). Opposer's raw sales figures fail to apportion sales to U.S. consumers, and because of this lack of context, the global sales figures are irrelevant and should be excluded. FED. R. EVID. 402. Even if the Board were to find this evidence relevant, the conflation of all of Opposer's sales into one global figure would present a misleading and prejudicially skewed impression of Opposer's commercial performance and alternatively should be excluded on this basis. FED. R. EVID. 403.

M Webb therefore requests that the Board sustain its objections and exclude the following evidence from consideration:

- Galton Decl. ¶ 12.

**D. Evidence of traveler statistics for Heathrow airport is inadmissible hearsay.**

Opposer attempts to substantiate U.S. consumer awareness of its Marks through Ms. Galton's testimony of London Heathrow airport traveler statistics and through the submission of London Heathrow Terminal Picture Profiles records and printouts from the Heathrow airport website. (Galton Decl. ¶¶ 36-37, Exs. 22-24.) The profiles, however,

identify that the source information is from “the Retail Profiler Survey, BAA Market Research” which has not been offered into evidence. Furthermore, the Heathrow Airport Holdings Limited (formerly the BAA), the purported source of this information, identifies itself as a private company and is therefore not a public office. (Diamond Decl. ¶ 17, Ex. 87.) Opposer submits the profile exhibits for the truth of the matter asserted: the relative quantity of U.S. traveler traffic through specific terminals in London’s Heathrow airport. This constitutes impermissible hearsay and double hearsay for which no exception applies. FED. R. EVID. 802, 803.

Although internet materials may be introduced into evidence as publicly available documents, they “may not be used to demonstrate the truth of what has been printed.” TMBP § 704.08(b). The Heathrow printouts listing the quantity of travelers through Heathrow airport has been submitted by Opposer and relied upon by Ms. Galton for the truth of the matter asserted: the actual number of people traveling through Heathrow airport. (Galton Decl. ¶ 37, Ex. 24.) This evidence likewise constitutes impermissible hearsay to which no exception applies and therefore should be excluded. FED. R. EVID. 802, 803.

Furthermore, Ms. Galton avers on the basis of these inadmissible travel statistics that “[c]ountless U.S. travelers encounter Mappin & Webb stores and MAPPIN & WEBB Marks while traveling through Heathrow.” (Galton Decl. ¶ 36.) Even if these London Heathrow exhibits were admissible as evidence of these statistics, which they are not, they have no bearing on what any U.S. travelers see or encounter during their experience in the Heathrow airport. (Galton Decl. ¶ 36-37, Exs. 22-24.) Ms. Galton’s testimony on

U.S. traveler experiences is therefore beyond her personal knowledge and constitutes impermissible speculation. FED. R. EVID. 602.

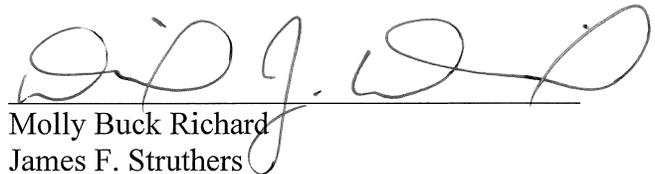
M Webb therefore requests that the Board sustain its objections and exclude the following evidence:

- Galton Decl. ¶¶ 36-37
- Galton Decl. Exs. 22-24

### III. CONCLUSION

Applicant M Webb, LLC respectfully requests that the Board sustain its objections to Opposer Mappin & Webb Limited's evidence submitted in support of its Main ACR Brief and strike the above-referenced testimony and exhibits from consideration in this matter.

Respectfully Submitted,



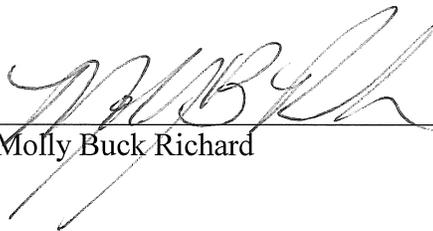
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of August, 2015, a true and correct copy of the foregoing document was been served upon Opposer through its counsel of record, Douglas A. Rettew, via U.S. First Class Mail, postage prepaid, to the following address:

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