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

Proceeding	91218738
Party	Plaintiff Abercrombie & Fitch Trading Co.
Correspondence Address	SUSAN M KAYSER JONES DAY 51 LOUISIANA AVENUE NW WASHINGTON, DC 20001-2113 UNITED STATES ipdocketingwest@abercrombie.com, skayser@jonesday.com, jbrad-ley@jonesday.com, nytef@jonesday.com
Submission	Motion to Strike
Filer's Name	Jessica D. Bradley
Filer's e-mail	ipdocketingwest@abercrombie.com, skayser@jonesday.com, jbrad-ley@jonesday.com, nytef@jonesday.com, aprevatt@jonesday.com, kbaird@jonesday.com
Signature	/Jessica D. Bradley/
Date	12/30/2015
Attachments	Motion to Strike Applicant's Testimony Affidavit.pdf(305159 bytes)

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

ABERCROMBIE AND FITCH TRADING CO.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91218738
	§	
	§	
SCHNITTGER, ISABELLA ELISABETH	§	
	§	
Applicant.	§	

MOTION TO STRIKE APPLICANT'S TESTIMONY AFFIDAVIT AND EXHIBITS A, B & D

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure § 707.04 requiring that when "testimony is submitted in affidavit form by stipulation of the parties pursuant to 37 CFR 2.123(b), any objection which, is waived if not made at deposition, must be raised promptly after receipt of the affidavit submission, failing which it is waived," Opposer Abercrombie & Fitch Trading Co. ("A&F") hereby files a motion to strike the Testimony Affidavit of Applicant Isabella Schnittger and the Affidavit's Exhibits A, B and D based on procedural deficiencies.[1]

In the September 2, 2015 Joint Stipulation Regarding Testimony and Trial Procedures, entered by the Board on September 4, 2015, the parties agreed to "submit testimonial affidavits during their respective testimony periods." The Parties agreed that "[e]vidence may be submitted during the parties' respective testimony periods by attaching it as exhibits to an

[1] Pursuant to TBMP § 533.03, A&F will address its substantive objections to Ms. Schnittger's testimony and affidavit in its trial brief. TBMP § 533.03 ("[S]ubstantive objections . . . are considered by the Board in its evaluation of the probative value of the testimony at final hearing. . . . Such objections must be maintained in the objecting party's brief[.]").

affidavit." However, the Parties also reserved the "right to object to the admissibility of specific evidence."

Ms. Schnittger's testimony is inadmissible and should be stricken because it is not signed or sworn. Additionally, her testimony exhibits A, B and D are inadmissible for failing to comply with TBMP § 528.05(e) governing the submissions of Internet evidence.[2]

I. Ms. Schnittger's Testimony Affidavit Is Not Signed or Sworn

The Parties agreed that testimonial affidavits would be filed with the Board. *See* Joint Stipulation Regarding Testimony and Trial Procedures. (TTAB Dkt. No. 11). Testimonial affidavits are required to be signed, sworn and notarized. 3 Am. Jur. 2d Affidavits § 8 (An affidavit must satisfy three essential elements: "(1) a written oath embodying the facts as sworn to by the affiant; (2) the signature of the affiant; and (3) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer."). As the Board has recognized, "[a]ffidavits are typically sworn to and subscribed before a notary public whose signature and seal also appear on the document." *Pepsico, Inc. v. Pirincci*, Opposition No. 91187023, 2014 TTAB LEXIS 141, *11 n. 7 (TTAB Apr. 14, 2014) (taking judicial notice of Black's Law Dictionary definition of an affidavit as a "written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation"). A statement which does not show that the person who made it was under oath is

[2] Pro se parties are required to follow the Board's procedural rules. *See ShutEmDown Sports, Inc. v. Lacy*, 102 U.S.P.Q.2d 1036, 1037 (TTAB 2012) ("strict compliance with the Trademark Rules and the Federal Rules of Civil Procedure is expected by all parties whether or not represented by counsel"); *Warren v. Rosenberg*, Cancellation No. 92041636, 2004 TTAB LEXIS 226 (TTAB Apr. 13, 2004) ("Strict compliance with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.").

not an affidavit; "the affiant must perform some corporal act before the officer whereby the affiant consciously takes upon himself or herself the obligation of an oath." 3 Am. Jur. 2d Affidavits § 9.

Moreover, testimony must be sworn, or submitted under oath to be admissible. Fed. R. Evidence 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience."); *see also* TBMP § 707.01(c) (the "introduction of evidence in inter partes proceedings before the Board is governed by the Federal Rules of Evidence"). Even where parties stipulate to submission of testimony by affidavit it must still be signed and sworn as an "[a]pplicant's unsworn statement *does not constitute testimony in the absence of an oath or affirmation thereof.* Accordingly, it can be given no more weight than any other unsworn statement." *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1897 n.3-4 (TTAB 1989) (emphasis added). The Board has held that even where parties agree to submit testimony by affidavit or declaration its rules still "require[] that witnesses attest to their testimonial statements by an oath or affirmation" and that "the [Board] Rules do not permit the consideration of unsworn testimonial statements at trial." *Pepsico, Inc.*, 2014 TTAB LEXIS 141, *14-15. Where such requirements are not met, the Board has stricken testimony. *Pepsico, Inc.*, 2014 TTAB LEXIS 141, *15 (sustaining objection to unsworn testimony declaration noting that "[t]he necessity for proper attestation is not a trivial matter in a Board proceeding"); *Mankind Research Found., Inc. v. Essiac Prods. Servs.*, Cancellation No. 22,218, 2000 TTAB LEXIS 934, *9 (TTAB Sept. 23, 2000) (sustaining objection and refusing to consider unsigned testimony deposition). Ms. Schnittger's testimony affidavit does not meet these requirements, and accordingly, should be stricken.

II. Ms. Schnittger's Affidavit Exhibits A, B & D Are Inadmissible

To be admissible as evidence at the Board, a document obtained from the Internet "must identify its date of publication or the date it was accessed and printed, and its source (URL)." TBMP § 704.08(b); *see also Edom Labs., Inc. v. Lichter*, 102 U.S.P.Q.2d 1546, 1550 (TTAB 2012) (holding web pages are inadmissible as "[t]here is no URL or date appearing on either page, as required under *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010)."). Exhibits A, B and D do not satisfy the Board's requirements. Ms. Schnittger did not provide any website print-outs, dates of publication or access dates for any of her exhibits. Ms. Schnittger has submitted only a pdf of a word document into which she purports to have selectively cut and pasted material from various sources on the Internet. The exhibits are therefore inadmissible. *See Calypso Technology, Inc. v. Calypso Capital Management, LP*, 100 USPQ2d 1213, 1219 (TTAB 2011) (finding that an exhibit taken from a webpage is "not admissible under *Safer*" because "it is not clear that they are even webpages, but even if we assume they are, they do not show the date the webpages were published or printed.").

The exhibits are also inadmissible because they are incomplete excerpts of the online source. *Harjo v. Pro-Football, Inc.*, 50 USPQ2d 1705, 1722, n. 52 (TTAB 1999), *rev'd on other grounds*, 284 F.Supp.2d 96 (D.D.C. 2003) (declining to consider "excerpts that are unidentified as to either source or date" because "the extent to which such material is genuine and available to the public cannot be ascertained"); *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) ("a proffered excerpt from a newspaper or periodical is lacking in foundation and, thus is *not admissible* evidence" because it is incomplete and "not fully identified as to the name and date of the published source.") (emphasis added). Exhibit A combines selective excerpts of text and photographs from at least three Internet sources into one exhibit. Exhibit B copies and pastes a small excerpt of text from one website,

http://maine.gov/ifw/licenses_permits/hunting/index.htm#anydeer, without preserving any record of the appearance, full text, date or author of this source website. Exhibit D combines two photos retrieved through two different URLs that, as of December 22, 2015, do not link to the same photos. (Prevatt Declaration, ¶ 2, Ex. 1.)[3] Moreover, Ms. Schnittger combined the photos with her own paraphrased characterization of the text that appeared on the website. The exhibit does not contain any screenshot, printout or even copied text to verify this characterization.

Ms. Schnittger's Exhibit A is further inadmissible because it contains only internet search engine results. Internet search engine results are also not admissible. TBMP § 704.08(b) ("Internet search summaries, which essentially are links to the website pages, are not admissible by notice of reliance."); *see also Edom Laboratories Inc. v. Lichte*r, 102 USPQ2d 1546, 1550 (TTAB 2012) (holding that a search summary is inadmissible because it merely offers links to information not otherwise of record). The URL pasted onto page 8 of the Schnittger Affidavit's Exhibit A links to search engine results from a Google Image search with no record of the date of the search.

Accordingly, Exhibits A, B and D should be stricken for their numerous procedural deficiencies. *See Hard Rock Cafe*, 48 USPQ2d at 1405-06 (striking 121 out of 176 exhibits, including procedural deficiencies in 23 exhibits for incompleteness, 10 exhibits for not being in the English language, and 26 exhibits for failing to indicate "the name and/or date of the publication" and expressing "dismay at opposer's apparent disregard for the rules governing the presentation of evidence in proceedings before the Board and at the significant amount of time required by both parties and by the Board to consider the admissibility of [the] exhibits.");

[3] As will be addressed further in A&F's substantive objections and rebuttal testimony, and as further demonstrated by the Prevatt Declaration Ex. 1, Ms. Schnittger also incorrectly identified www.aftshirt.com as Opposer's website.

Marshall Field & Co. v. Cookies, 25 USPQ2d 1321, 1326 (TTAB 1992) (granting a motion to strike procedurally deficient exhibits used during deposition testimony).

III. Conclusion

For the foregoing reasons, A&F respectfully requests that Applicant's Testimony Affidavit and Exhibits A, B and D be stricken for procedural deficiencies.

Dated: December 30, 2015

Respectfully submitted,

By: __/Jessica D. Bradley/____

Susan M. Kayser
Jessica D. Bradley
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
skayser@jonesday.com
jbradley@jonesday.com

Attorneys for Opposer
Abercrombie and Fitch Trading Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Strike has been served on Applicant, Isabella Elisabeth Schnittger, on December 30, 2015, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

_____/Allison E. Prevatt/_____

Attorney for Opposer
Abercrombie and Fitch Trading Co.

UNITED STATES PATENT AND TRADEMARK OFFICE
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DECLARATION OF ALLISON E. PREVATT

I, Allison E. Prevatt, declare and state as follows:

1. I am an associate in the law firm of Jones Day, counsel for Opposer, Abercrombie & Fitch Trading Co. ("A&F"). The matters referred to in this declaration are based upon my personal knowledge, and/or when referencing documents, such documents were reviewed by me.

2. The two links to the website www.aftshirt.com listed in Exhibit D to the Testimony Affidavit of Applicant Isabella Schnittger do not contain the photographs of clothing that Applicant included in Exhibit D. As of December 23, 2015, the links forward to a notification of a lawsuit filed by Opposer Abercrombie & Fitch Trading Co. against abercrombieclassics.com, et al. Attached hereto as **Exhibit 1** is a true and correct print-out, dated December 23, 2015, of the current website automatically redirected to by the two links listed in "Exhibit D" to Applicant's Testimony Affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on December 30, 2015.

/Allison E. Prevatt/
Allison E. Prevatt

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Declaration of Allison E. Prevatt has been served on Applicant, Isabella Elisabeth Schnittger, on December 30, 2015, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

___/Allison E. Prevatt/_____
Allison E. Prevatt

Exhibit 1

ABERCROMBIE & FITCH TRADING CO., vs. ABERCROMBIECLASSIC.COM, et al.,

On December 9, 2015, in the United States District Court for the Southern District of Florida, Abercrombie & Fitch Trading Co. filed a Complaint For Injunctive Relief And Damages against abercrombieclassic.com. The filings and orders in this matter are available below.

NOTICE TO DEFENDANTS

If you fail to respond to this complaint, judgment by default will be entered against you for the relief demanded in the complaint.

To prevent this from happening you must file a response with the court clerk or administrator within 21 days of the date this message was posted. Your response must be in proper form and have proof of service on the plaintiffs' attorney, Stephen M. Gaffigan, P.A, 401 East Las Olas Boulevard, Suite 130-453, Ft. Lauderdale, Florida 33301.

12/09/2015	COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES
12/10/2015	NOTICE AND CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

12/11/2015	PLAINTIFF'S CORPORATE DISCLOSURE STATEMENT	PDF
12/11/2015	AO-120 FORM	PDF
12/11/2015	NOTICE OF ELECTRONIC FILING	PDF
12/11/2015	PLAINTIFF'S EX PARTE APPLICATION FOR ENTRY OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF	PDF
12/11/2015	DECLARATION OF VIRGILIO GIGANTE IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR ENTRY OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	ZIP
12/11/2015	DECLARATION OF SETH WOOD IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR ENTRY OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	PDF
12/11/2015	[PROPOSED] ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER	PDF
12/11/2015	ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER	PDF
12/11/2015	NOTICE OF ENTRY OF PARTIES	

12/21/2015	ORDER GRANTING PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION	