

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

EJW

Mailed: March 7, 2016

Opposition No. 91218738

Abercrombie & Fitch Trading Co.

v.

Isabella Elisabeth Schnittger

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

This case now comes up for consideration of Opposer's fully briefed motion (filed December 30, 2015) to strike Applicant's testimony affidavit and exhibits A, B, and D attached thereto.

By way of background, on September 4, 2015, the parties submitted a joint stipulation in which the parties agreed to, *inter alia*, submit testimonial affidavits during their respective testimony periods rather than notices of reliance (11 TTABVUE 2). However, the parties also reserved the right to object to the admissibility of specific evidence (*Id.* at 3). In the subject motion, Opposer objects to Applicant's testimonial affidavit and exhibits A, B, and D attached thereto for the following procedural reasons: the affidavit is unsworn and not notarized; the exhibits do not show the website or date of publication or access; the exhibits comprise partial excerpts of the online source; and Exh. A. comprises only internet search engine results.

In response, Applicant submitted a properly executed testimony affidavit (sworn to before a Notary Public for South Carolina) and additional exhibits comprising the following: a compact disk purporting to show the screen shots and the dates of those screen shots; and numerous printouts from the internet regarding moose and deer (23 TTABVUE 26-58), regarding Maine hunting permit statutes (23 TTABVUE 60-66), and from websites on which purported Abercrombie & Fitch goods can be purchased (23 TTABVUE 68-74). The new exhibits appear intended to supplement Applicant's original exhibits A, B, and D.

In reply, Opposer objects to Applicant's failure to serve Opposer with the executed and sworn copy of the revised affidavit (only an unsigned copy was served). Additionally, Opposer argues that the new internet printouts comprise evidence submitted outside Applicant's testimony period and must be stricken, along with the corresponding paragraph 7 in the revised affidavit; that inasmuch as the Board does not accept evidence by compact disks or other electronic devices, Opposer asserts that the CD must also be stricken; and that the additional printouts are inadmissible because they were not provided to Opposer during discovery as required by the parties' stipulation. Opposer also maintains its objection to part of Exhibit A because it contains only Google search results, and states that to the extent Applicant has typed dates onto the screenshots served with her revised testimony, Opposer reserves the right to object substantively thereto with its trial brief.

- *Decision and Orders*

Opposer's motion to strike is granted in part and deferred in part for the reasons set forth below:

(1) Insofar as Applicant has submitted an amended and executed testimonial affidavit (23 TTABVUE 3), Opposer's motion to strike is moot with respect to its procedural objection that the affidavit is not properly executed, sworn and notarized. However, inasmuch as Applicant failed to serve Opposer with a copy of the sworn affidavit, Applicant is **ORDERED** to serve a copy of her executed and sworn testimonial affidavit on Opposer's counsel within **TEN DAYS** of the mailing date of this order AND to submit to the Board a copy of her certificate of service showing that Applicant served the document on Opposer.

(2) No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. Trademark Rule 2.121(a). Applicant's testimony period closed on December 21, 2015. Applicant did not file a motion to reopen her time to file testimony or otherwise show excusable neglect for failing to submit the evidence proffered with her amended, executed affidavit during her testimony period, *i.e.*, numerous printouts from the internet regarding moose and deer (23 TTABVUE 26-58), regarding Maine hunting permit statutes (23 TTABVUE 60-66), and from websites on which purported Abercrombie & Fitch goods can be purchased (23 TTABVUE 68-74). In view

of the foregoing, Opposer's motion to strike such evidence is **granted**. Accordingly, the above-mentioned new evidence submitted by Applicant in response to the subject motion is hereby ***stricken***.

(3) The Board no longer accepts evidence in the form of CD-ROM, except in limited circumstances not applicable here. *See, e.g., Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1654 (TTAB 2014), *on appeal*, No. 14-CV-4463 (D. Minn.); *Swiss Watch Int'l Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1734 n.5 (TTAB 2012) (petitioner submitted CD-ROM versions of the testimony depositions, as well as the printed versions, and was advised that it was not necessary to submit the CD-ROMs and that the rules no longer provided that testimony can be submitted in this manner). Accordingly, Opposer's motion to strike Applicant's evidence submitted in the form of a compact disk is also **granted**.

(4) Trademark Rule 2.123(b) provides that "[b]y written agreement of the parties, the testimony of any witness ... of any party, may be submitted in the form of an affidavit by such witness" Because the parties' stipulation to submit their respective testimony by affidavit is of record and Applicant refers to her exhibits in her affidavit (see 11 TTABVUE and 19 TTABVUE 4-5, ¶¶ 4, 5, 7), the internet evidence submitted by Applicant during her testimony period may be admissible (*see Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1371 (TTAB 1998)¹), even though such evidence does not comply with

¹ "[T]he declaration of Mr. Baker states that the articles set forth in the printouts of Exhibit 7 were published on the Internet and were accessed by the declarant at the Internet

the requirements set forth in *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010).² In view thereof, Opposer's complaints regarding the nature and reliability of Applicant's original exhibits, *i.e.*, that they are incomplete excerpts of the actual web pages and do not include dates of the searches, raise substantive issues of admissibility, rather than procedural issues that can be cured. The Board does not ordinarily strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, such objections are considered by the Board in its evaluation of the probative value of the testimony at final hearing. *See* TBMP § 533.03 (2015) and cases cited therein. Accordingly, the foregoing substantive issues should have been addressed by Opposer in its rebuttal testimony and should be so addressed in its trial brief. In view of the foregoing, to the extent Opposer seeks to strike Applicant's original Exhibits A, B, and D on the basis that they are incomplete excerpts, do not bear the access dates, or comprise mere URLs, the motion the strike is **deferred**. *Cf. M-Tek Inc. v. CVP Systems Inc.*, 17 USPQ2d 1070, 1073 (TTAB 1990) (whether documents submitted by notice of reliance were properly authenticated and whether they constituted hearsay deferred).

address included on the printouts. The source of the information is within the personal knowledge of the declarant Baker and, thus, it has been adequately shown that Exhibit 7 is what opposer claims it to be, *i.e.*, printouts of information accessed at specified Internet addresses. We find this sufficient to hold the proffered printouts admissible as evidence ...").

² The requirements for internet printouts discussed in *Safer* apply to evidence submitted by notice of reliance. *See id.* at 1039.

Trial Brief Dates Reset

To allow Opposer sufficient time to prepare or modify its trial brief in accordance with the foregoing order, the trial brief dates are reset as shown below:

Brief for party in position of plaintiff shall be due:	April 6, 2016
Brief (if any) for party in position of defendant shall be due:	May 6, 2016
Reply brief (if any) for party in position of plaintiff shall be due:	May 21, 2016

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

