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

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

ABERCROMBIE AND FITCH TRADING CO., §
Opposer, §

v. §
SCHNITTGER, ISABELLA ELISABETH, §
Applicant. §

Opposition No. 91218738

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OPPOSER’S TRIAL BRIEF

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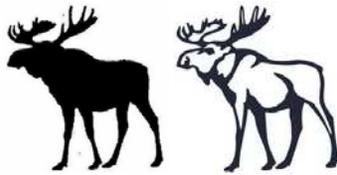
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I. INTRODUCTION

Opposer Abercrombie and Fitch Trading Co. (hereinafter, “Opposer” or “A&F”) is one of the largest manufacturers, wholesalers and retailers of high quality, casual apparel and accessories for men, women and children with an active, youthful lifestyle in the United States, and has offered clothing and other accessories for over one hundred years. In February 2002, A&F started offering clothing under an arbitrary moose design mark (“A&F Mark”¹), and has expanded its use over time such that today the A&F Mark has become one of the most iconic and famous logos in the United States and is a core branding element for A&F’s Abercrombie & Fitch and abercrombie kids brands. Opposer’s Mark is depicted below in solid and outline form:



Over ten years after A&F started using its A&F Mark in connection with clothing and enjoyed billions of sales of clothing and related goods bearing the A&F Mark, and unsolicited media attention underscoring the ubiquity of the A&F Mark and associating said mark with A&F, Applicant Ms. Isabella Elisabeth Schnittger (hereinafter “Applicant” or “Ms. Schnittger”) filed an intent-to-use trademark application for Applicant’s Mark² which primarily consists of the profile of a full-bodied, four legged animal with antlers in silhouette form as depicted below:

¹ As used herein, the terms “Opposer’s Mark” and “A&F Mark” shall mean the marks that are the subject of U.S. Trademark Registration Nos. U.S. Registration Nos. 3,065,016; 4,551,991; 3,964,371; 4,168,384; 3,212,644; and 3,574,198.

² As used herein, the term “Applicant’s Mark” shall mean the mark that is the subject of U.S. Trademark Application No. 86/152,857.



A&F opposes registration of Ms. Schnittger's Mark on the grounds of likelihood of confusion and dilution, and respectfully submits that the evidence of record before the Board warrants judgment in favor of A&F refusing registration of Applicant's Mark. Applicant seeks to register a highly similar mark to A&F's famous Opposer's Mark for use on identical goods sold in the same trade channels to the same class of customers.

II. DESCRIPTION OF THE RECORD

Pursuant to the parties' Joint Stipulation Regarding Testimony and Trial Procedures (11 TTABVUE), which was made of record by the Board's September 4, 2015 Order (12 TTABVUE), the record for this opposition consists of the parties' Joint Stipulation of Facts (13 TTABVUE) ("Joint Stip."), testimonial affidavits submitted by the parties during their respective testimony periods, Applicant's Application No. 86/152,857, and Opposer's Registration Nos. 3,065,016 , 4,551,991, 3,964,371, 4,168,384, 3,212,644, and 3,574,198.

A. Opposer's Evidence

During its opening testimony period Opposer filed (i) public and confidential versions of the Testimony Affidavit of Mr. Reid M. Wilson dated November 19, 2015, and Exhibits 1-31 (16 TTABVUE; 17 TTABVUE, 18 TTABVUE); and (ii) the Testimony Affidavit of Ms. Jessica Bradley dated November 19, 2015, and Exhibits A-C ("Bradley Affidavit"). (15 TTABVUE.) During its rebuttal testimony period Opposer filed (iii) the Rebuttal Testimony Affidavit of Mr. Reid M. Wilson, dated January 15, 2016, and Exhibits 32-37 ("Wilson Rebuttal") (22 TTABVUE); and (iv) Rebuttal Testimony Affidavit of Ms. Jessica Bradley, dated January 15,

2016 (“Bradley Rebuttal”). (21 TTABVUE.) The evidence and testimony contained within these affidavits are summarized below.

1. Testimony Affidavit of Reid M. Wilson

Mr. Wilson testified in his opening affidavit (16 TTABVUE; 17 TTABVUE, 18 TTABVUE) regarding:

- His qualifications to testify and about A&F (¶¶ 1-2);
- A&F’s extensive, longstanding and consistent use of the A&F Mark each retail season since 2002 including use of the A&F Mark on products offered in A&F’s retail stores and on its websites (¶¶ 3-5, 7-12, Exs. 1-16);
- A&F’s significant annual sales of goods bearing the A&F Mark (¶ 6);
- A&F’s significant investment in marketing and promotion of A&F’s Mark including in promotional e-mails subscribed to by its customers, on social media, on a variety of supplies, in catalogs, and on speakers displayed in A&F’s retail stores (¶¶ 13-18, Exs. 17-21);
- Third party recognition of the A&F Mark including coverage in magazines and newspapers (¶¶ 19-20, Exs. 22-26); and
- A&F’s successful enforcement against third party uses of marks similar to A&F Mark (¶ 21, Exs. 27-31).

2. Testimony Affidavit of Jessica D. Bradley

Ms. Bradley testified in her opening affidavit (15 TTABVUE) regarding:

- Her qualifications to testify (¶ 1);
- Documents produced by Applicant during discovery showing use of Applicant’s Mark (¶ 2, Ex. A); and

- Updates to Applicant’s website showing other uses of Applicant’s Mark (¶¶ 3-4, Exs. B-C).

3. Rebuttal Testimony Affidavit of Reid M. Wilson

Mr. Wilson testified in rebuttal to Applicant’s alleged evidence responding that (i) the A&F Mark is not limited to any one color and is used in connection with a variety of colors, including red (22 TTABVUE 2 ¶ 2, Ex. 32 at 6-22 (A&F Mark in variety of colors), Ex. 33 at 23-41 (A&F Mark in red)); (ii) the website www.aftshirt.com is a counterfeit website which A&F has sued, and a court has enjoined (22 TTABVUE 3, ¶¶ 3-4, Exs. 34-36 at 42-100); and (iii) A&F has not started using a “Red Dear” or “Red Deer” word mark or logo (22 TTABVUE 4 ¶ 5, Ex. 37³ at 101-113.)

4. Rebuttal Testimony Affidavit of Jessica D. Bradley

Ms. Bradley testified in rebuttal to Applicant’s alleged testimony responding that she has not provided any legal advice to Ms. Schnittger, and in particular that she has not provided advice regarding Applicant’s use of Applicant’s Mark. (21 TTABVUE 2 ¶ 2.)

B. Applicant’s Evidence

During her testimony period, Applicant filed the Testimony Affidavit of Ms. Isabella Schnittger, unsigned, on December 4, 2015, and Exhibits A-D (“Applicant’s Original Testimony”). (19 TTABVUE.) As addressed in A&F’s Motion to Strike (20 TTABVUE, 24 TTABVUE), and in A&F’s evidentiary objections being filed herewith, much of Applicant’s Original Testimony is inadmissible.

The topics covered in Applicant’s Original Testimony (most of which are irrelevant) are:

³ A corrected copy of Exhibit 37 to the Wilson Rebuttal Testimony is attached hereto in Appendix B. The version at 22 TTABVUE 101-113 did not upload correctly in the ESTTA system, and did not display the full content of the pdf correctly. (Appendix B, Declaration of Allison E. Prevatt ¶¶ 1-2, Ex. A.)

- Her alleged creation of Applicant’s Mark (¶¶ 1-2);
- Documents submitted by A&F from Applicant’s website (¶ 2);
- Applicant’s Mark (¶ 3);
- Biological distinctions between the moose and deer animals in general (¶¶ 4-6, Exs. A-C);
- Content from the website www.aftshirt.com (¶ 7, Ex. D); and
- Google search results of “red deer” or “red dear” (¶ 8).

In response to A&F’s Motion To Strike, Applicant submitted a revised Testimony Affidavit of Ms. Isabella Schnittger, dated January 8, 2016, which included Revised Exhibits A-D therein (23 TTABVUE) filed outside of her testimony period. On March 7, 2016, the Board granted A&F Motion To Strike in part, and ordered Applicant’s Revised Exhibits A-D (23 TTABVUE 26-74) stricken from the record. (25 TTABVUE 3-4.)

III. STATEMENT OF THE PROCEEDINGS AND ISSUES

On October 8, 2014, A&F timely opposed Ms. Schnittger’s Application No. 86/152,857 covering Applicant’s Mark in International Class 25 based on A&F’s prior registrations and use of the A&F Mark asserting that (i) A&F has priority and that Applicant’s Mark is likely to be confused with the A&F Mark under Section 2(d) of the Lanham Act and (ii) that Applicant’s Mark is likely to dilute the famous A&F Mark under Section 43(c) of the Lanham Act. The Board instituted the proceeding as Opposition No. 91218738. Applicant timely answered the Notice of Opposition on October 9, 2014. On September 2, 2015, the parties stipulated to the procedures to be used for their testimony and trial periods (11 TTABVUE), and such stipulation was approved and entered by the Board on September 4, 2015. (12 TTABVUE.) Pursuant to the

stipulated procedures the parties filed a Joint Stipulation of Facts on October 9, 2015 (13 TTABVUE) which was entered by the Board on November 13, 2015. (14 TTABVUE.)

On December 30, 2015, A&F filed a motion to strike portions of Applicant’s Original Testimony (19 TTABVUE) based on procedural deficiencies. (20 TTABVUE.) A&F filed a reply in support of its Motion to Strike on January 28, 2016 based on continued procedural deficiencies as well as new inadmissible material filed by Applicant. (24 TTABVUE.) The Board granted A&F’s Motion To Strike in part, and deferred consideration of the remainder of A&F’s objections until the trial brief. (25 TTABVUE.) A&F has maintained its objections in its statement of objections filed concurrently herewith.

IV. STATEMENT OF FACTS

As demonstrated by the parties’ Joint Stipulation of Facts discussed below in conjunction with Opposer’s and Applicant’s evidence, the core facts demonstrating likely confusion and dilution are not disputed between the parties.

A. A&F’s U.S. Trademark Registrations For The A&F Mark

A&F is the owner of the following U.S. trademark registrations for Opposer’s Mark which are valid, subsisting and have never been abandoned:

<u>Mark</u>	<u>Reg. No.</u>	<u>Reg. Date</u>	<u>Filing Date</u>	<u>First Use</u>	<u>Goods</u>
	3,065,016	3/7/06	9/12/03	2/2002	Cl. 25: clothing, namely, shirts and sweaters
	4,551,991	6/7/14	10/31/05	2/2002	Cl. 25: Clothing, namely, beach cover-ups, bras, camisoles, halter tops and night shirts

<u>Mark</u>	<u>Reg. No.</u>	<u>Reg. Date</u>	<u>Filing Date</u>	<u>First Use</u>	<u>Goods</u>
	3,964,371	5/24/11	10/31/05	12/31/03	Cl. 25: Clothing, namely, polo shirts, blouses, sweaters, t-shirts, knit shirts, knit tops, sweatshirts, sweatpants, sweat suits, pants, jogging suits, jeans, shorts, skirts, caps, hats, scarves, jackets, coats, sandals, flip flops, socks, belts, tank tops, underwear, boxer shorts, swim suits, pajamas, sleepwear and thongs Cl. 35: Retail store services, mail order catalog services and on-line retail store services featuring clothing, footwear, accessories, fragrances and jewelry
	4,168,384	7/3/12	10/31/05	11/02	Cl. 25: Clothing, namely, beachwear, belts, blazers, dresses, footwear, gloves, knee highs, loungewear, mittens, tights and vests
	3,212,644	2/27/07	11/3/05	11/1/04	Cl. 25: Clothing, namely, polo shirts, sweaters, t-shirts, shirts, knit tops, woven tops, sweatshirts, sweatpants, pants, shorts, caps, hats, scarves, jackets, coats, sandals, flip flops, belts, tank tops, underwear, boxer shorts, swim suits, pajamas, sleepwear
	3,574,198	2/10/09	11/3/05	11/2004 4/2007	Cl. 25: Clothing, namely, footwear Cl. 14: Jewelry, namely, necklaces and bracelets

(13 TTABVUE 2-4, Joint Stipulation of Facts (“Joint Stip.”) ¶ 1.) A&F’s Registration Nos. 3,065,016, 3,212,644, and 3,574,198 are incontestable. (13 TTABVUE 4, Joint Stip. ¶ 2.) All of A&F’s trademark registrations for Opposer’s Mark were filed, issued, and the marks were used

prior to the filing date of Applicant's Trademark Application No. 86/152,857 for Applicant's Mark. (13 TTABVUE 5, Joint Stip. ¶¶ 7-8.)

A&F's trademark registrations for Opposer's Mark do not contain any restrictions on channels of trade or classes of consumers. (13 TTABVUE 7, Joint Stip. ¶ 28.) Additionally, A&F's trademark registrations for Opposer's Mark are not limited to any particular color. (22 TTABVUE 2, Wilson Rebuttal ¶ 2.)

B. A& F's Extensive Use And Sales For The A&F Mark

For more than fourteen years, A&F has used the A&F Mark in commerce on apparel and accessories in connection with its Abercrombie and abercrombie kids brands in the United States. (13 TTABVUE 2-4, Joint Stip. ¶¶ 1,3; 17 TTABVUE 4-6, Wilson Affidavit ¶¶ 3, 7-8, Exs. 1-14 at 13-264.) A&F has been using the A&F Mark in solid form (Reg. Nos. 3,065,016, 4,551,991, and 4,168,384) in commerce in connection with clothing since at least as early as February 2002, and in outline form (Reg. No. 3,212,644) since as early as November 1, 2004. (13 TTABVUE 4, Joint Stip. ¶¶ 3-4.) A&F has also used the A&F Mark in solid form in connection with retail store services and on-line retail store services featuring clothing, footwear, accessories, fragrances and jewelry, since at least as early as December 31, 2003. (17 TTABVUE 3, Wilson Affidavit ¶ 4.) A&F has further used the A&F Mark in outline form in connection with jewelry since at least as early as April 2007. (17 TTABVUE 3, Wilson Affidavit ¶ 5.)

A&F currently sells goods bearing Opposer's Mark through its retail stores and Internet websites at www.bercrombie.com and www.bercrombiekids.com. (13 TTABVUE 6, Joint Stip. ¶ 18.) Apparel and accessories bearing the A&F Mark are prominently displayed and offered for sale in A&F's over 370 retail store locations across the United States, including over 240 Abercrombie & Fitch retail store locations and over 120 abercrombie kids retail store locations. (13 TTABVUE 6, Joint Stip. ¶ 19; 17 TTABVUE 6, Wilson Affidavit ¶ 11.) A&F

sells, with Opposer's Mark, all of the goods that are covered by Applicant's Application No. 86/152,857. (13 TTABVUE 5-6, Joint Stip. ¶¶ 5, 17.)

A&F has sold apparel and other items featuring the A&F Mark in every retail season from 2002 to 2015, and its use of the A&F Mark has been significant including some seasons with over 4,000 unique items bearing the A&F Mark. (17 TTABVUE 4-5, Wilson Affidavit ¶¶ 7-8, Exs. 1-14 at 13-264.) In particular, the annual totals of unique products offered for sale bearing the A&F mark since 2002 equaled: 2002 (149 items); 2003 (602 items); 2004 (2,752 items); 2005 (3,183 items); 2006 (4,750 items); 2007 (4,236 items); 2008 (5,066 items); and Spring and Summer 2009 (1,464 items). (17 TTABVUE 4-5, Wilson Affidavit ¶ 7, Exs. 1-8 at 12-191.)

On many of A&F's products, the A&F Mark is the only visible trademark when worn by a customer. (17 TTABVUE 6, Wilson Affidavit ¶ 12, Ex. 2 at 40-41, 43-46, 48, 50-51.) A&F uses its A&F Mark in a variety of colors including the color red. (22 TTABVUE 2, Wilson Rebuttal Affidavit ¶ 2, Exs. 32-33 at 7-41.) A&F has also used its A&F Mark in connection with a variety of words. (17 TTABVUE 4, Wilson Affidavit ¶ 7, Ex. 1 at 14, 30, Ex. 4 at 89, 102; 18 TTABVUE 64, Ex. 20 at 64.) A&F has further used its A&F Mark in both a left and right facing position. (17 TTABVUE 4, Wilson Affidavit ¶ 7, Ex. 1 at 14 (right), 18 (left), 30 (left and right); 18 TTABVUE 30, Ex. 20 at 30 (left) 31 (right), 32 (left and right).)

A&F's websites www.bercrombie.com and www.bercrombiekids.com prominently display and offer for sale apparel bearing the A&F Mark. (17 TTABVUE 5-6, Wilson Affidavit ¶¶ 8-10, Exs. 15-18 at 267-355.) These websites receive tens of millions of visits each year from A&F's customers. (16 TTABVUE 5-6, Wilson Affidavit ¶¶ 9-10.) Specifically, from 2006 through June 7, 2015, the website www.bercrombie.com received over [REDACTED] visits, and

from 2007 through June 7, 2015 the website www.abercrombiekids.com received over [REDACTED] visits. (16 TTABVUE 5-6, Wilson Affidavit ¶¶ 9-10.)

All together A&F has sold over [REDACTED] in products bearing the A&F Mark in the United States through its retail stores and e-commerce websites since it first began using the mark in 2002. (16 TTABVUE 3, Wilson Affidavit ¶ 6.)

C. A&F's Promotion of Goods Bearing the A&F Mark

A&F promotes Opposer's Mark on its websites at www.abercrombie.com and www.abercrombiekids.com, its Facebook page, in catalogs, in its retail store locations through use on items such as in-store speakers and product stickers and tags, and through promotional emails. (13 TTABVUE 7, Joint Stip. ¶ 30; 16 TTABVUE 4-8, Wilson Affidavit ¶¶ 8-18.) A&F has invested substantial sums in this marketing and promotion of products bearing the A&F Mark. (16 TTABVUE 6, Wilson Affidavit ¶ 13.) The total monetary amounts spent for marketing and promotion of the Abercrombie & Fitch brand in the United States since 2002, which includes products bearing the A&F Mark, exceeded [REDACTED]. (16 TTABVUE 6-7, Wilson Affidavit ¶ 13.) Included in this overall amount is A&F's investment of [REDACTED] in connection with supplies for its retail stores that prominently bear the A&F Mark including tissue paper, boxes, gift card holders, multiple size stickers, and fitting room number tags. (16 TTABVUE 7, Wilson Affidavit ¶ 16; 18 TTABVUE 3, Ex. 19 at 3-10.) A&F has also invested [REDACTED] in connection with speakers displayed in A&F's retail stores that feature the A&F Mark. (16 TTABVUE 8, Wilson Affidavit ¶ 18; 18 TTABVUE 111, Ex. 21 at 111.)

From 2001-2006, A&F released and distributed catalogs displaying and offering for sale clothing bearing Opposer's Mark, with a total U.S. circulation of over 10.3 million copies (13 TTABVUE 7, Joint Stip. ¶ 31.) A&F devoted [REDACTED] to the promotion of the A&F

Mark in the A&F catalogs. (16 TTABVUE 8, Wilson Affidavit ¶ 17 (figure calculated on number of pages of catalogs including merchandise featuring the A&F Mark).) The A&F Mark is highlighted throughout the catalogs including on some of the front and back covers. (18 TTABVUE 15, Wilson Affidavit Ex. 20 at 15, 19, 21, 25, 29, 47, 54, 57, 61, 72-73, 76, 88, 92, 100.)

A&F periodically sends promotional e-mails regarding products, including products bearing Opposer's Mark, to customers who have registered for A&F's e-mail distribution list (13 TTABVUE 8, Joint Stip. ¶ 32; 17 TTABVUE 7, Wilson Affidavit ¶ 14, Ex. 17 at 301-341.) The A&F Mark is prominently featured throughout the promotional e-mails. (17 TTABVUE 302, Wilson Affidavit Ex. 17 at 302, 309, 319, 321) As of June 2015 over [REDACTED] individuals subscribe to the Abercrombie & Fitch e-mail distribution list, and over [REDACTED] individuals subscribe to the abercrombie kids e-mail distribution list. (16 TTABVUE 7, Wilson Affidavit ¶ 14.) A&F also actively promotes the A&F Mark through social media accounts including Facebook and Twitter. (17 TTABVUE 7, Wilson Affidavit ¶ 15.) As of June 2015 posts from the A&F Facebook page had received 8,724,087 "likes" from Facebook users, and a number of these posts prominently feature clothing with the A&F Mark. (17 TTABVUE 7, Wilson Affidavit ¶ 15, Ex. 18 at 343 (home page with 8,724,087 "likes"), 344, 350, 311 (sampling of posts prominently featuring the A&F Mark).)

D. Unsolicited Third Party Recognition Of The A&F Mark

The A&F Mark is instantly recognizable as A&F's trademark, symbolizing and signifying A&F's high quality image, style and goodwill, and confirming the strong public recognition of the A&F Mark as an indicator of a single designer brand source, namely A&F. (17 TTABVUE 8, Wilson Affidavit ¶ 19.) The A&F Mark has received extensive unsolicited third party coverage and recognition in both the media and elsewhere. (13 TTABVUE 8-9, Joint

Stip. ¶¶ 33-39; 17 TTABVUE 8-9, Wilson Affidavit ¶¶ 19-20, 18 TTABVUE 112, Exs. 22-26 at 112-170.) Polo shirts bearing Opposer's Mark were featured and recognized during an episode of the television show *Glee* which aired nationwide on Fox, and on an episode of the television show *Will & Grace* which aired nationwide on NBC. (13 TTABVUE 8, Joint Stip. ¶¶ 33-34; 17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 144, Ex. 26 at 144-150.) Clothing bearing Opposer's Mark has been featured in various magazines with nationwide circulation including *FHM*, *Teen Vogue*, *GQ*, *Jane*, *Details*, *CosmoGirl*, and *Men's Fitness*. (13 TTABVUE 8, Joint Stip. ¶ 37; 17 TTABVUE 8, Wilson Affidavit ¶ 19; 18 TTABVUE 112, Ex. 22 at 112-133.) Newspapers including *The New York Times*, *The Chicago Tribune*, and *The Washington Post* have published articles regarding Opposer's Mark. (13 TTABVUE 8, Joint Stip. ¶ 38; 17 TTABVUE 8-9, Wilson Affidavit ¶ 19; 18 TTABVUE 134, Exs. 23-25 at 134-142.) Even a book of essays recognized the fame of A&F's mark, stating that: "We know who we are by our symbols . . . Abercrombie & Fitch has a moose" (13 TTABVUE 8-9, Joint Stip. ¶ 39.) Moreover, third-party websites such as www.coolspotters.com, www.iheartthat.com, www.theceleblife.com, and www.seenon.com have published photographs identifying and recognizing celebrities such as Jennifer Anniston, David Beckham, and Jessica Simpson (among others) as wearing clothing bearing Opposer's Mark. (13 TTABVUE 8, Joint Stip. ¶¶ 35-36; 17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 143, Ex. 26 at 143-170.)

E. A&F's Enforcement Of The A&F Mark

A&F has enforced its rights in Opposer's Mark against many third parties for uses of marks similar to Opposer's Mark including Michel Design USA, Inc., JJ Basics, Inc., The Wet Seal, Inc., Jake Wear, Moose Creek, Inc., The Idaho Club, LLC, Paul R. Lopes, GoGo Sports, Inc., and Fairview Import Corporation, resulting in these companies agreeing to cease use of similar marks and also abandoning applications for similar marks where filed. (13 TTABVUE 9,

Joint Stip. ¶ 40; 17 TTABVUE 9-10, Wilson Affidavit ¶ 21; 18 TTABVUE 171, Exs. 27-31 at 171-242.) In particular, A&F won a jury trial against Moose Creek Inc. after which the court entered a consent permanent injunction enjoining Moose Creek Inc.'s use of marks similar to the A&F Mark. (17 TTABVUE 9-10, Wilson Affidavit ¶ 21; 18 TTABVUE 171-183, Ex. 27 at 175.) The consent permanent injunction also recognized that "A&F has the exclusive right to use the [A&F Mark] in connection with apparel in the State of California and interstate commerce." (18 TTABVUE 171-183, Wilson Affidavit Ex. 27 at 173 ¶¶ 3, 5, 7.)

F. Ms. Schnittger's Application for Applicant's Mark

Applicant filed U.S. Application No. 86/152,857 on December 26, 2013 for Applicant's Mark covering "caps; hats; hooded sweatshirts; jackets; long-sleeved shirts; socks; sweatshirts; t-shirts; underwear" in International Class 25 and claimed an intent to use filing basis. (13 TTABVUE 5, Joint Stip. ¶ 5.) Prior to the filing of her Application for Applicant's Mark on December 26, 2013, Applicant and members of her immediate family shopped at or visited an Abercrombie & Fitch retail store. (13 TTABVUE 5, 7, Joint Stip. ¶¶ 5, 26.) Applicant has stipulated that both "Applicant's Mark and Opposer's Mark include profiles of full-bodied, four-legged animals with antlers in silhouette form." (13 TTABVUE 6, Joint Stip. ¶ 12.) Color is not claimed as a feature of Applicant's Mark. (13 TTABVUE 6, Joint Stip. ¶ 13). Applicant's Application No. 86/152,857 covers identical items of clothing to the clothing items covered by A&F's Registration Nos. 3,065,016, 3,964,371, 3,212,644, and 4,551,991. (13 TTABVUE 6, Joint Stip. ¶¶ 14-16.) There is no restriction on channels of trade or classes of consumers in Applicant's Application No. 86/152,857 for Applicant's Mark. (13 TTABVUE 7, Joint Stip. ¶ 27.)

G. Ms. Schnittger's Intended Use of Applicant's Mark

Applicant did not use Applicant's Mark or sell or offer to sell any products or services

bearing Applicant's Mark prior to the December 26, 2013 filing date of her application. (13 TTABVUE 5, Joint Stip. ¶¶ 5, 10-11). Applicant intends to sell sport and outdoor clothing and accessories, and intends to license Applicant's Mark to manufacturers and marketers of sport and outdoor clothing made in the U.S.A., and/or to an athletic team in the U.S.A.. (13 TTABVUE 6 Joint Stip. ¶¶ 23-24.) Applicant believes that Applicant's Mark will appeal to young and old alike, and Applicant's Mark is not aimed at a specific income demographic. (13 TTABVUE 6, Joint Stip. ¶ 25.) Applicant has further stipulated that "[c]onsumers of products bearing Opposer's Mark could also be consumers of products bearing the Applicant's Mark." (13 TTABVUE 7, Joint Stip. ¶ 29.)

Applicant intends to sell clothing bearing Applicant's Mark on the Internet. (13 TTABVUE 5, Joint. Stip. ¶ 20.) Applicant has not yet sold any goods with Applicant's Mark, but has posted pictures of t-shirts bearing Applicant's Mark on her website at www.myreddear.com. (13 TTABVUE 6, Joint. Stip. ¶¶ 21-22.) The t-shirts on Applicant's website are not yet available for sale. (13 TTABVUE 6, Joint. Stip. ¶ 22.) Applicant uses the silhouette design in Applicant's Mark on her website and on proposed t-shirt designs without the words "Red Dear." (15 TTABVUE 2,8-9,11,15-16,21-22,24,27, Bradley Affidavit ¶¶ 2-4, Exs. A-B.) Additionally, even when Applicant does use the words "Red Dear" with its silhouette antlered-animal design, the words are often barely visible or legible. (15 TTABVUE 2, Bradley Affidavit ¶¶ 2-3, Ex. A at 13,17, Ex. B at 19, 23, Ex. C at 30-32.) Other t-shirt designs bearing Applicant's Mark on her website include phrases such as "BETTER RED THAN DEAD," "PRO REDNECK," and "GO SOUTH," with the design portion of Applicant's Mark printed over a U.S. Confederate Flag emblem. (15 TTABVUE 2, Bradley Affidavit ¶ 2, Ex. A at 8, 9, 11, 14.) Applicant's website also features a proposed t-shirt design bearing the phrase "There's plenty of

room for all God’s creatures, but not in ‘the South’” with a depiction of a full-bodied antlered animal similar to A&F’s Mark. (15 TTABVUE 2, Bradley Affidavit ¶ 3, Ex. B at 28.)

V. ARGUMENT

A. A&F Has Standing

Standing to bring “[a] claim of likelihood of confusion . . . [can be] based upon current ownership of a valid and subsisting registration or prior use of a confusingly similar mark.” TBMP § 309.03(b). A&F has established its standing through its ownership of valid, subsisting registrations, made of record through the A&F’s Notice of Opposition (1 TTABVUE 1-6); the Parties’ Joint Stipulation of Facts (13 TTABVUE 2-3, ¶¶ 2-4); and A&F’s Testimony Affidavit of Reid M. Wilson (17 TTABVUE 3, ¶¶ 3-5.) *See Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752, 1754 (TTAB 2009) (priority and standing established by making pleaded registrations of record); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008) (standing established where pleaded registrations are of record, valid, subsisting, and show that opposer is the current owner).

B. A&F Has Priority

“[P]riority is not in issue in an opposition where opposer pleads (and later proves) that it owns a registration for its pleaded mark.” TBMP § 309.03(c); *see also L.C. Licensing Inc.*, 86 USPQ2d at 1887 (priority and standing established where pleaded registrations are of record, show that opposer is the current owner, and that each is valid and subsisting, and evidence showing use further established priority). Here, A&F’s priority is established by the parties’ stipulation that A&F is the owner of trademark registrations for the A&F Mark, and such trademark registrations for Opposer’s Mark were filed and issued prior to the filing date of Applicant’s Trademark Application No. 86/152,857. (13 TTABVUE 2-5, Joint Stip. ¶¶ 1,7,9.) A&F’s priority is further established by the parties’ stipulation that A&F used Opposer’s Mark in

commerce prior to the filing date of Applicant's U.S. Trademark Application No. 86/152,857, and that Applicant did not use her mark prior to her application filing date. (13 TTABVue 5, Joint Stip. ¶¶ 5, 8, 10-11.)

C. Applicant's Mark is Likely to Cause Confusion with A&F's Mark

Likelihood of confusion under the Lanham Act, 15 U.S.C. § 1052(d), is a "legal determination based upon factual underpinnings", determined by "applying the thirteen factors set forth in *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)." *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "Not all of the DuPont factors are relevant to every case, and only factors of significance to the particular mark need be considered." *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Here, all the relevant *DuPont* factors weigh in A&F's favor. Moreover, as A&F is the senior user and registrant, "if there is any doubt as to the likelihood of confusion, that doubt must be resolved against the newcomer[,]" which here is Applicant. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 395 (Fed. Cir. 1983).

1. The Similarity of the Marks Factor Favors Opposer

Where, as here, the marks at issue are both design marks, the similarity of the marks must be decided primarily on the basis of visual similarity. TMEP § 1207.01(c). Additionally, "consideration must be given to the fact that the [design] marks usually will not be viewed side-by-side in the marketplace and a purchaser's recollection of design marks is often of a general, rather than specific, nature; thus the marks may be confusingly similar despite differences between them." *Id.*; *Puma-Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064, 1066 (TTAB 1984) (question of likelihood of confusion "requires that we take into account the fallibility of memory and the fact that purchasers normally retain only a general

impression of a design mark”). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Midwestern Pet Foods, Inc. v. Societe Des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012) (test is whether the marks are “sufficiently similar in their overall commercial impression”).

a. The Parties’ Marks Evoke The Same Commercial Impression

The overall commercial impression of the parties’ design marks both consisting of full-bodied, four-legged animals in silhouette form is virtually identical. (13 TTABVUE 2-6, Joint Stip. ¶¶ 1, 5, 12.) Both parties’ marks are posed in a similar stance, and share “a number of common characteristics” arising from the fact that both marks depict antlered animals including but not limited to similar body forms, antlers, leg positioning, head shape, and the lack of any noticeable tail. *BL Cars Limited v. Puma Industria de Veiculos S/A*, 221 USPQ 1018, 1020 (TTAB 1978) (holding feline design marks sharing characteristics common to wild felines confusingly similar).

Any minor differences between the parties’ marks are “not sufficient to distinguish the marks in a meaningful manner” considering even sophisticated purchasers general recollection of design marks. *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1381, 1383 (TTAB 2012); *Puma-Sportschuhfabriken Rudolf Dassler KG*, 224 USPQ at 1066 (even where “specific difference might be noted in a side-by-side comparison” this is not determinative taking into account “the fallibility of memory” and purchasers general retention of design marks). Even any stylistic differences “merely add[] to the likelihood of confusion because one may well assume

that the latter is a stylized version of that which preceded it and so discount any difference which may otherwise be noted.” *BL Cars Limited*, 221 USPQ at 1020; *see also Time Warner Entm’t Co v. Jones*, 65 USPQ2d 1650, 1660 (TTAB 2002) (“the differences in details of the parties’ respective cartoon depictions of a roadrunner do not suffice to distinguish the marks in terms of their overall commercial impression” considering “the basic similarity arising from the fact that both marks include a cartoon depiction of a roadrunner”).

Given consumers’ imperfect recollection of design marks, the Board has held that marks consisting of animal designs within the same family (and in particular wild animals) evoke the same commercial impression and are likely to cause confusion. *Puma-Sportschuhfabriken Rudolf Dassler KG*, 224 USPQ at 1066 (holding applicant’s mountain lion design likely to be confused with opposer’s puma design marks when used on clothing as “undoubtedly a large segment of the purchasing public” lacked the expertise to differentiate between a mountain lion and a puma); *BL Cars Limited*, 221 USPQ at 1020 (confusion likely between a jaguar design and a puma design as Board held “it does not appear to us that distinctions could be readily made by the average consumer between the animals” considering as exotic animals such animals “are viewed only infrequently by an average person”). In *Puma-Sportschuhfabriken*, the Board explained its reasoning for refusing registration as “applicant’s marks, which are representations of large, wild, feline animals in what appear to be running, leaping or stalking poses evoke commercial impressions similar to those produced by opposer’s design marks [also consisting of a wild feline] and would be likely to cause confusion with opposer’s marks when used on such similar goods, whether one has the ability to specifically recognize applicant’s mark as a puma or not.” 224 USPQ at 1066. Similarly, here, Applicant has stipulated that its mark and “Opposer’s Mark include profiles of full-bodied, four-legged animals with antlers in silhouette form.” (13

TTABVUE 6, Joint Stip. ¶ 12.) Accordingly, both of the parties marks fall into the same animal family, and the mere fact that Applicant identifies its animal as a deer, and A&F's Mark is a moose, does not alter the overall same commercial impression of a full-bodied, four-legged antlered animal used as a trademark in connection with clothing, and is not sufficient to prevent confusion.

b. Applicant's Design Is Dominant And Words Are Insufficient To Prevent Confusion

Where “the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences.” TMEP § 1207.01(b)(iii). Accordingly, “if one feature of a mark is more significant than another feature, greater weight may be given to the dominant feature for purposes of determining likelihood of confusion.” TMEP § 1207.01(c)(iii); *In re Chatam Int'l*, 380 F.3d 1340, 1342, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“it is not improper to state that, for rational reasons, more or less weight has been given to a particular feature of the mark”). When comparing a design mark such as A&F's Mark to a composite mark such as Applicant's Mark, “[t]here is no general rule as to whether letters or design will dominate in composite marks,” and where “the design is prominently displayed . . . is proportionally larger than the wording, and is very distinctive” then the design is the dominant element of the mark. *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1940 (TTAB 2013) (holding that opposer's composite mark “dominated by the design elements” and therefore greater weight given to the comparison of the designs); *In re Application of Computer Communications, Inc.*, 484 F.2d 1392, 1393-94, 179 USPQ 51, 52 (C.C.P.A. 1973) (court agreed with Board's reasoning that “design portion of appellant's mark was its most visually prominent feature” and that addition of words “computer communications” not sufficient to prevent confusion).

Here, the design in Applicant's Mark is dominant, as it is proportionally much larger than the words, is prominently displayed both in the drawing of the mark, and when used by Applicant, and is more distinctive than the descriptive wording "red deer." In particular, Applicant often uses the design element of its mark without the words, and even when the words are used they are smaller than the design, and often barely visible. (15 TTABVUE 6-32, Bradley Affidavit, Ex. A at 6-9, 11, 13-17, Ex. B at 19, 21-24, 27, Ex. C at 30-32.) Additionally, the words "red deer" have very little, if any, source-identifying significance, especially when placed next to the depiction of a red deer as they could merely describe the design element of Applicant's Mark (with some play on the words "deer" and "dear"). *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (Board "did not err by according little weight to the adjective 'STONE'" noting that "addition of a suggestive or descriptive element is generally not sufficient to avoid confusion"). Further, A&F has also used the A&F Mark with other words such that consumers are even more unlikely to attribute a source-identifying function to the words "red deer." (17 TTABVUE 14, Wilson Affidavit, Ex. 1 at 14, 30, Ex. 4 at 89, 102.) Accordingly, as the design portion of Applicant's Mark is dominant and as established *supra* has a near identical commercial impression to A&F's Mark, the words "red deer" are insufficient to prevent the likely confusion resulting from the similarity of the dominant design in Applicant's Mark with A&F's Mark. *See Envirotech Corp. v. National Services Industries, Inc.*, 197 USPQ 292, 296 (TTAB 1977) (use of word "Lithonia" with a similar sun design in applicant's mark not sufficient to preclude likelihood of confusion with opposer's sun design mark); *Time Warner Entm't Co*, 65 USPQ2d at 1652, 1658, 1660 (applicant's ROADRUNNER MAPS & Design mark confusingly similar to opposer's Roadrunner Design mark).

c. Lesser Similarity Sufficient To Establish Likely Confusion Due To Identity Of Goods And Fame Of A&F's Mark

Where, as here, “the goods or services are identical or virtually identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines.” TMEP § 1207.01(b); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (reversing dismissal of opposition where Board gave “insufficient weight to the use of these marks on identical services” explaining that the “second factor accentuates the likelihood of consumer confusion about the sources of services marketed under similar marks”); *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (affirming Board’s refusal to register as given the identity of the goods “any minor differences” between the parties marks was insufficient to prevent confusion).

As discussed in Section IV.C.2, Applicant has admitted that the goods in its application are identical to the goods in A&F’s registrations. Accordingly even though A&F has already shown that the marks are highly similar, even a lower level of similarity would demonstrate likely confusion here.

Additionally, “[a]s the fame of a mark increases, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines.” *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1750 (TTAB 2006). The Federal Circuit has explained that a strong mark “casts a long shadow which competitors must avoid” and “[t]here is no excuse for even approaching the well-known trademark of a competitor.” *Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 353, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). A&F establishes *infra* in Section V.C.5 that the A&F Mark is a famous mark, further demonstrating that even a lesser degree of similarity than exists between the highly similar marks at issue here would be sufficient to establish likely confusion.

Considering all of the above, the similarity of the marks factor weighs strongly in A&F's favor.

2. Applicant's Goods Are Identical to Opposer's Goods

Similarity as to one of the goods in the application is sufficient to sustain an opposition as to the entire class as “[i]t is not necessary that opposer prove likelihood of confusion with respect to all of the goods set forth in applicant’s application.” *Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1626 & n. 2 (TTAB 2007); *The North Face Apparel Corp v. Sanyang Industry Co., Ltd.*, 116 USPQ2d 1217, 1229 (TTAB 2015) (“finding of likelihood of confusion with respect to one of the services listed in Applicant’s application in Class 35 is sufficient for us to sustain the opposition as to the entire class.”); *Hardrock Cafe Int’l (USA), Inc. v. Elsea*, 56 USPQ2d 1504, 1512 (TTAB 2000) (sustaining opposition where “applicant’s identified goods are identical in part and otherwise closely related to opposer’s items of apparel”).

Here, Applicant’s Application No. 86/152,857 and A&F’s registrations for the A&F Mark cover the following identical articles of clothing: caps, hats, sweatshirts, jackets, t-shirts, underwear, shirts, and socks. (13 TTABVUE 6, Joint Stip. ¶¶ 14-16.) Additionally, the remainder of the goods in A&F’s registrations including other articles of clothing, footwear, jewelry and retail store services are closely related to the goods covered by Applicant’s Application No. 86/152,857. Because the goods covered by Ms. Schnittger’s Application are identical to the goods covered by Opposer’s registrations for the A&F Mark, this factor weighs heavily in favor of finding a likelihood of confusion.

3. Channels Of Trade And Customers Are Identical And Likelihood of Post-Purchase Confusion Is High

“[I]t is well established that, absent restrictions in the application and registration, goods

and services are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d at 1362, 101 USPQ2d at 1908 (affirming Board’s finding of identical trade channels where goods were identical). “Registrability must be determined on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of the goods are directed.” *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 1377, 63 USPQ2d 1303, 1310-11 (Fed. Cir. 2002) (rejecting applicant’s argument that its goods were sold only to professional customers as the application contained no limiting language). Where “there is no limitation as to their nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers.” TMEP § 1207.01(a)(iii).

Ms. Schnittger’s Application and A&F’s registrations cover identical goods, and (as the parties have stipulated) there is no restriction on the channels of trade or classes of consumers in Ms. Schnittger’s Application No. 86/152,857 for Applicant’s Mark, or in any of A&F’s trademark registrations for Opposer’s Mark. (13 TTABVUE 7, Joint Stip. ¶¶ 27-28; *see also* App. No. 86/152,857 and Reg. Nos. 3,065,016; 4,551,991; 3,964,371; 4,168,384; 3,212,644; and 3,574,198.) Accordingly, goods bearing the A&F Mark and Applicant’s Mark are presumed to travel in the same channels of trade to the same class of purchasers. Additionally, Applicant stipulated that that “[c]onsumers of products bearing Opposer’s Mark could also be consumers of products bearing the Applicant’s Mark,” and that Applicant’s Mark will appeal to young and old consumers and does not target a specific income demographic, thereby further demonstrating the similarity of customers. (13 TTABVUE 7, Joint Stip. ¶¶ 29, 25.) The parties stipulations also

demonstrate the similarity of trade channels as Applicant intends to sell clothing bearing Applicant's Mark on the Internet, just as A&F sells its products on the Internet. (13 TTABVUE 5-6, Joint Stip. ¶¶ 18, 20.) Additionally, Applicant intends to sell sport and outdoor clothing and accessories made in the U.S.A. and intends to license her mark to manufacturers and marketers of sport and outdoor clothing made in the U.S.A., and/or to an athletic team in the U.S.A. (13 TTABVUE 7, Joint Stip. ¶¶ 23-24.) Similarly, A&F is a manufacturer and retailer of "high quality, casual apparel and accessories for men, women and children with an active, youthful lifestyle in the United States." (17 TTABVUE 2, Wilson Affidavit ¶ 2.)

Additionally, there is a substantial likelihood of post-purchase confusion presented by the use of such similar marks on identical goods as the Board has long recognized that "likelihood of confusion under Section 2(d) encompasses situations when even relevant nonpurchasers are confused, mistaken or deceived." *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218-19 (TTAB 2001). *See also In re Star Pharmaceuticals, Inc.*, 221 USPQ 84, 86 (1984) ("It is clear that in evaluating the likelihood of mistake under Section 2(d) of the Act, what may happen subsequent to the sale of the product is also relevant."); *HRL Associates Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819, 1822 (TTAB 1989) ("The Board has, in the past, found likelihood of confusion where source confusion occurred even after the point of purchase."). Here, on many of A&F's products the A&F Marks are the only visible trademark when worn (17 TTABVUE 6, Wilson Affidavit ¶ 12, Ex. 2 at 40-41, 43-44, 46, 48, 50, 51) and on Applicant's proposed clothing, Applicant's Mark is often used by itself or where the words are barely visible. (15 TTABVUE 2, Bradley Affidavit ¶¶ 2-4, Ex. A at 12, 17, Ex. B at 25, Ex. C at 30.) Accordingly, it is highly likely that potential purchasers will see the parties' marks after the point of sale, *i.e.* being worn on the street, and be confused as to the source of the products based on

the use of highly similar marks. *See In re Whole Soul by DAZ, LLC*, Serial No. 77724746, 2012 WL 684460, *1 (TTAB 2012) (affirmed refusal to register, noting the examining attorney’s reliance on post-sale confusion and quoting her determination that “it is plausible that knowledgeable consumers of the registrant’s WHOLE SOUL robes upon encountering the applicant’s WHOLE SOUL clothing items worn by individuals on the street are likely to be confused as to the source of the goods”).

Accordingly, this factor also weighs in favor of A&F.

4. Lower Degree of Care Among Purchasers of Ordinary Goods

This factor examines the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d at 1361, 177 USPQ at 567. Where, as here, “the registrations and applications do not limit their goods to the high end of the market, purchasers would include ordinary members of the general public. The applicable standard of care is that of the least sophisticated purchaser of the goods.” *Chanel, Inc. v. Mauriello*, Opp. No. 91168097, 2010 WL 3873650, *7 (TTAB 2010); *see also Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004) (“the standard of care to be exercised . . . will be equal to that of the least sophisticated consumer in the class.”). Moreover, the Board has held that goods like those covered by A&F’s registrations and Applicant’s application are “ordinary consumer items” and that the “class of consumers for such goods is the public at large, rather than a discriminating or sophisticated market segment. Consumers of at least these ordinary items of clothing are not likely to exercise a high degree of care in their purchasing decisions, thus increasing the likelihood of confusion.” *In re Ginc UK Limited*, 90 USPQ2d 1472, 1477 (TTAB 2006).

The Board has also held that clothing articles such as those covered by A&F’s registrations and Ms. Schnittger’s application, “encompass inexpensive items that would be

purchased on impulse and without care.” *The North Face Apparel Corp.*, 116 USPQ2d at 1229 (tee shirts and socks); *Wet Seal Inc. v. FD Management Inc.*, 82 USPQ2d 1629, 1640-41 (TTAB 2007) (“Given the relatively low cost and the nature of the goods, the parties’ clothing and fragrances may be subject to impulse purchase and frequent replacement. It has often been stated that purchasers of such products are held to a lesser standard of purchasing care and, thus, are more likely to be confused as to the source of the goods.”). Accordingly, the fact that A&F’s and Applicant’s goods tend to be purchased on impulse, lowering the degree of care that consumers exercise in making their purchasing decisions, increases the likelihood of confusion. This factor also weighs in favor of A&F and in favor finding a likelihood of confusion.

5. The Fame of the Prior Mark Factor Favors Opposer

“[F]ame of the prior mark, when present, plays a ‘dominant’ role in the process of balancing the *Dupont* factors....Famous marks thus enjoy a wide latitude of legal protection.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000) (vacating dismissal of opposition where Board improperly discounted the fame of the prior mark). “Famous marks are accorded more protection because they are more likely to be remembered and associated in the public mind than a weaker mark.” *Id.* Factors the Board considers in measuring the fame of a mark include “volume of sales and advertising expenditures of the goods travelling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Bose Corp.*, 293 F.3d at 1371, 63 USPQ2d at 1305. “Fame for confusion purposes arises as long as a significant portion of the relevant consuming public, . . . recognizes the mark as a source indicator.” *Palm Bay Imps., Inc.*, 396 F.3d at 1375, 73 USPQ2d at 1694.

Length of use in combination with substantial sales and advertising figures is sufficient to establish fame. A&F has sold over [REDACTED] in products bearing the A&F Mark in the

United States through its retail stores and e-commerce websites in the over fourteen years since it first began using the mark in 2002. (16 TTABVUE 3, Wilson Affidavit ¶ 6.) *Bose Corp.*, 293 F.3d at 1371, 63 USPQ2d at 1306 (“...we have consistently accepted statistics of sales and advertising as indicia of fame: when the numbers are large, we have tended to accept them without any further supporting proof.”); *China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 1341, 83 USPQ2d 1123, 1126 (Fed. Cir. 2007) (“Evidence of large sales volume and length of use is highly relevant, whatever the market share.”). Estimated annual sales of products bearing the A&F Mark started at [REDACTED] in 2002, and have grown to hundreds of million per year and even over a billion in annual sales in some years, thereby demonstrating the fame of A&F’s mark. (16 TTABVUE 3, Wilson Affidavit ¶ 6.) *See, e.g., Bose Corp.*, 293 F.3d at 1372, 63 USPQ2d at 1306 (17 years of use and “annual sales of over \$50 million” demonstrated fame); *Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1072, 12 USPQ2d 1901, 1902 (Fed. Cir. 1989) (NINA RICCI famous based on \$200 million in sales over 27 years); *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146-47, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES famous based on over \$300 million in sales over 9 years).

Additionally, A&F has offered a large number of different products each season that bear the A&F Mark; in total from 2002-2009 over 22,202 items offered for sale by A&F used the A&F Mark. (17 TTABVUE 4, Wilson Affidavit ¶ 7, Ex. 1 at 13, 16, 19, 22, 25, 28; Ex. 2 at 32, 35, 37, 39, 42, 45, 49; Ex. 3 at 53, 56, 59, 62, 65, 68, 71, 74; Ex. 4 at 78, 81, 84, 87, 90, 93, 96, 100; Ex. 5 at 104, 107, 110, 113, 116, 119, 122, 125; Ex. 6 at 129, 132, 135, 138, 142, 145, 148, 151; Ex. 7 at 155, 158, 161, 164, 167, 170, 173, 176; Ex. 8 at 180, 183, 186, 189.) Further, A&F frequently uses the A&F Mark on its own as the only visible mark when worn. (17 TTABVUE 6, Wilson Affidavit ¶ 12, Ex. 2 at 40-41, 43-46, 48, 50-51.) *See Bose Corp.*, 293 F.3d at 1372,

63 USPQ2d at 1307 (noting in finding fame that “consumer is presented through the advertising and other promotional material with frequent references to the marked product standing alone and apart from the famous house mark”).

A&F’s investment of substantial sums in marketing and promotion of products bearing the A&F Mark also supports that the mark is famous. (16 TTABVUE 6-7, Wilson Affidavit ¶ 13.) *See, e.g., Nina Ricci*, 889 F.2d at 1072, 12 USPQ2d at 1902 (\$37 million in advertising over 27 years supported fame); *Planters Nut & Chocolate Co. v. Crown Nut Co.*, 305 F.2d 916, 920, 134 USPQ 504, 508 (CCPA 1962) (opposer established that its design mark for an animated peanut was a famous mark and “became so through spending \$1,000,000 a year for 10 years to advertise it.”). The total monetary amounts spent for marketing and promotion of the Abercrombie & Fitch brand in the United States since 2002, which includes products bearing the A&F Mark, exceeded [REDACTED]. (16 TTABVUE 6-7, Wilson Affidavit ¶ 13.) A&F has also specifically invested [REDACTED] in connection with its retail store supplies bearing the A&F Mark (16 TTABVUE 7, Wilson Affidavit ¶ 16; 18 TTABVUE 3, Ex. 19 at 3-10), [REDACTED] in connection with speakers displayed in A&F’s retail stores that feature the A&F Mark, (16 TTABVUE 8, Wilson Affidavit ¶ 18; 18 TTABVUE 242, Ex. 21), and from 2001 to 2006, A&F also devoted [REDACTED] to promoting the A&F Mark in the A&F catalogs. (16 TTABVUE 8, Wilson Affidavit ¶ 17; 18 TTABVUE 11, Ex. 20 at 11-109.) A&F also prominently displays photographs of products highlighting the A&F Mark on the internet through its websites www.abercrombie.com and www.abercrombiekids.com which receive tens of millions of visits each year. (13 TTABVUE 7, Joint Stip. ¶ 30; 16 TTABVUE 5, Wilson Affidavit ¶¶ 9-10; 17 TTABVUE 267, Exs. 15-16 at 267-300.) Additionally, as of June 2015, A&F’s Facebook page which prominently features the A&F Mark in its postings has received

8,724,087 “likes” from Facebook users. (16 TTABVUE 7, Wilson Affidavit ¶ 15; 17 TTABVUE 343, Ex. 18.)

A&F’s broad promotion of and specific highlighting of the A&F Mark over the years through prominent display of the mark as used on clothing through the A&F websites and in promotional emails, and use of the A&F Mark on retail store supplies, speakers, and in catalogs strengthens the commercial impression communicated to consumers of the A&F Mark and also supports a finding of fame. *Bose Corp.*, 293 F.3d at 1375, 63 USPQ2d at 1308-09 (noting advertising and sales literature that highlighted the Mark on their own as supporting fame). A&F highlights the A&F Mark throughout various aspects of its retail stores including on speakers displayed in the stores (16 TTABVUE 8, Wilson Affidavit ¶ 18; 18 TTABVUE 242, Ex. 21), and on tissue paper, boxes, gift card holders, multiple size stickers, tags, and fitting room number tags. (13 TTABVUE 7, Joint Stip. ¶ 30; 16 TTABVUE 7, Wilson Affidavit ¶ 16; 18 TTABVUE 3, Ex. 19 at 3-10) A&F also featured the A&F Mark in its catalogs from 2001-2006, including on front and back covers, which had a total U.S. circulation of over 10.3 million copies. (13 TTABVUE 7, Joint Stip. ¶ 31; 16 TTABVUE 8, Wilson Affidavit ¶ 17; 18 TTABVUE 15, Ex. 20 at 15, 19, 21, 37, 44, 49, 52, 56, 93, 100.) Additionally, A&F highlights the A&F Mark in promotional e-mails sent to the over [REDACTED] individuals that subscribe to the Abercrombie & Fitch and abercrombie kids e-mail distribution lists. (16 TTABVUE 7, Wilson Affidavit ¶ 14; 17 TTABVUE 301, Ex. 17 at 301-341; 13 TTABVUE 7, Joint Stip. ¶¶ 30, 32.)

The extensive unsolicited press coverage for the A&F Mark also supports a finding that the A&F Mark is famous. *See Palm Bay Imps.*, 396 F.3d at 1375-76, 73 USPQ2d at 1695 (fact that VCP’s products “have also been featured in Business Week, American Way (in-flight magazine of American Airlines), The New York Times, the Boston Globe, Money magazine,

and the Detroit News” supported finding of fame). In particular, unsolicited third parties have recognized the A&F Mark as the designer brand for apparel sold by A&F, symbolizing and signifying the strong public recognition of the A&F Mark as an indicator of a single designer brand source for A&F. (13 TTABVUE 7, Joint Stip. ¶¶ 33-39; 17 TTABVUE 7-8, Wilson Affidavit ¶¶ 19-20, 18 TTABVUE 112, Exs. 22-26 at 112-141.) A June 26, 2005 Chicago Tribune article titled identified the A&F Mark as one of the “*Beasts of the Breast*,” in an article discussing logos on polo shirts. (17 TTABVUE 8, Wilson Affidavit ¶ 19; 18 TTABVUE 135, Ex. 23 at 135-136.) An August 16, 2007 New York Times article in discussing “*This Summer, a Bumper Crop of Collars*,” describes “the uniform, spotted everywhere on guys from 15 to 45, was a factor in the runaway success of stores like Abercrombie & Fitch. . .” and noting “[m]ore than a dozen design houses have brought out polo shirts of late, and the various logos – Abercrombie’s moose, Marc Jacob’s rat, Etro’s winged horse – put a bewildering array of tiny animals over fashionable hearts.” (17 TTABVUE 8-9, Wilson Affidavit ¶ 19; 18 TTABVUE 138, Ex. 24 at 138-139.) An August 6, 2006 Washington Post article titled *What does it mean to be . . .?*, describes a young artist’s reflection on what it means to be 12: “[t]he artist’s note describes a 12-year-old’s blue-shirted torso flanked by clothing-store names and symbols (the moose is Abercrombie & Fitch, the butterfly, Aeropostale”). (17 TTABVUE 9, Wilson Affidavit ¶ 19; 18 TTABVUE 141, Ex. 25, 141-142.) Prominent fashion and lifestyle magazines with nationwide circulation have featured the A&F Mark including *teenVogue*, *GQ*, *FHM*, *Jane*, and *Men’s Fitness*. (13 TTABVUE 8, Joint Stip. ¶ 37; 17 TTABVUE 8, Wilson Affidavit ¶ 19; 18 TTABVUE 112, Ex. 22 at 112-133.) Such coverage included: (i) a photo spread in *GQ* on suits featured a tie with the A&F Mark alongside products from Burberry, DKNY and Banana Republic (18 TTABVUE 115, Wilson Affidavit Ex. 22 at 115-117); (ii) a photo spread in *GQ* of

“top shelf” men’s bathing suits with the first pictured product being a bathing suit with the A&F Mark (18 TTABVUE 125, Wilson Affidavit Ex. 22 at 125-127); (iii) a photo array of polo shirts in *Men’s Fitness* magazine featuring a shirt with the A&F Mark as one of four “perfectfit” examples (18 TTABVUE 131, Wilson Affidavit Ex. 22 at 131-133), and (iv) a “fashion” spread in *FHM* magazine featuring a polo shirt with the A&F Mark among other examples such as the Lacoste polo. (18 TTABVUE 113, Wilson Affidavit Ex. 22 at 113-114.)

The extensive media attention accorded specifically to the A&F Mark creates “a very high profile among the general public” having an interest in fashion and weighs in favor of a finding of likelihood of confusion. *Starbucks U.S. Brands*, 78 USPQ2d at 1751 (“STARBUCKS coffee products and stores have attracted intense unsolicited media attention from national television and radio programs and the press, which has resulted in extensive recognition and renown of the STARBUCKS mark among the general public”); *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1439 (TTAB 2014) (citing the opposer’s “extensive public relations efforts,” including “press notices regarding numerous celebrities appearing in public in HARRY WINSTON jewelry” as evidence that the word mark HARRY WINSTON is famous in the field of jewelry, for the purposes of likelihood of confusion). For example, actor Cory Monteith wore an A&F polo shirt bearing Opposer’s Mark during an episode of the television show *Glee* which aired nationwide on Fox, and an A&F polo shirt bearing Opposer’s Mark was also worn on an episode of television show *Will & Grace* which aired nationwide on NBC. (13 TTABVUE 8, Joint Stip. ¶¶ 33-34; 17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 144, Ex. 26 at 144-150.) Additionally, third-party websites such as such as

www.coolspotters.com,⁴ vitoriadavidbecham.blogspot.com, www.ihearthat.com, www.theceleblife.com, and www.seenon.com have published photographs identifying celebrities as wearing clothing bearing the A&F Mark. (17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 151, Ex. 26 at 151-170.) Celebrities including Jennifer Aniston, David Beckham, Jessica Simpson, Jonathan Rhys Meyers, Ashley Tisdale, Kimberley Garner, Lexie Priessman, and Ashley Greene have been featured for wearing clothing bearing the A&F Mark. (13 TTABVUE 8, Joint Stip. ¶ 35; 17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 151, Ex. 26 at 151-170.)

6. There Are No Similar Marks In Use on Similar Goods

Applicant has not submitted any evidence regarding use of any similar third party marks. In the absence of evidence of use by third parties of similar marks on similar goods, this *DuPont* factor favors a finding of likelihood of confusion. *See In re Wilson*, 57 USPQ2d 1863, 1865 (TTAB 2001) (“[T]here is no evidence of any third-party use of similar ‘PINE CONE’ marks on similar goods, a fact which further supports our finding that PINE CONE is an arbitrary and strong mark entitled to a broad scope of protection.”).

Additionally, A&F is vigilant in policing third-party uses that could lead to consumer confusion as to the source of particular products and services or that could otherwise impair the trademark function of the A&F Mark. (17 TTABVUE 9, Wilson Affidavit ¶ 21; 18 TTABVUE 171, Exs. 27-31 at 171-242.) Representative enforcement efforts that resulted in companies ceasing use of similar marks include: (i) a consent permanent injunction, entered after a jury trial verdict in A&F’s favor, permanently enjoining Moose Creek, Inc. from use of marks similar to

⁴ Coolspotters.com advertises that it is an online service that makes it easy to discover and buy the products, brands, and fashions being used by fans’ favorite celebrities – in their real lives, and in movies and television. (13 TTABVUE 8, Joint Stip. ¶ 36). In May 2016, the website www.coolspotters.com had over 230,000 unique visitors in that month. (13 TTABVUE 8, Joint Stip. ¶ 36).

the A&F Marks (18 TTABVUE 171, Ex. 27 at 171-183); (ii) TTAB judgments issued against The Idaho Club LLC's and Mr. Paul R. Lopes' applications to register marks similar to the A&F Mark (18 TTABVUE 184, Ex. 28 at 184-200, Ex. 30 at 216-231); (iii) the abandonment of applications by The Idaho Club, LLC and Fairview Import Corporation based on A&F's registrations for the A&F Mark (18 TTABVUE 201, Ex. 29 at 201-215, Ex. 31 at 233-242; and (iv) other successful enforcement by A&F against third parties use and/or application to register marks similar to the A&F Mark. (13 TTABVUE 9, Joint Stip. ¶ 40.)

A&F's successful enforcement efforts demonstrate both the strength of its mark and recognition by third parties of A&F's rights to the A&F Mark. *See Nike Inc. v. Maher*, 100 USPQ2d 1018, 1031 (TTAB 2011) (in granting opposition, Board noted that the degree of public recognition of the mark is extremely high and that Opposer engages in substantially exclusive use of its mark by policing unauthorized uses); *In re America Online Inc.*, 77 USPQ2d 1618, 1622-23, 1625 (TTAB 2006) (finding that examples of successful policing efforts showed trademark recognition by third parties). *See also McCarthy On Trademarks And Unfair Competition* § 11:91 (“[A]ctive program of prosecution of infringers, resulting in elimination of others' uses of similar marks, enhances the distinctiveness and strength of a mark”).

Accordingly, the absence of third party uses based on A&F's successful enforcement efforts weighs in favor of A&F.

7. The Use on a Variety of Goods Factor Favors Opposer

Use on a variety of goods supports a finding of a likelihood of confusion. *Time Warner Entm't Co.*, 65 USPQ2d at 1663 (finding this *du Pont* factor weighs in opposer's favor where opposer has licensed its marks for use on a large number of diverse products); *see In re Wilson*, 57 USPQ2d at 1867 (variety of goods factor weighed in favor of a likelihood of confusion as “registrant uses its PINE CONE mark on a variety of different fruits and vegetables. We find it

likely that purchasers, when encountering additional fruits such as applicant's marketed under the arbitrary PINE CONE mark, would assume that a source, sponsorship or other connection exists").

A&F has registrations for and has used the A&F Mark on a wide variety of articles of clothing including but not limited to polo shirts, blazers, dresses, loungewear, mittens, sweaters, sweat suits, skirts, hats, scarves, jackets, belts, tank tops, underwear, swim suits and pajamas. (Reg. Nos. 3,065,016, 4,551,991, 4,168,384; *see also* 17 TTABVUE 12-300, Exs. 1-16.) A&F also has registrations for and uses the A&F Mark on footwear (Reg. Nos. 3,964,371 and 3,574,198; *see also* 17 TTABVUE 15, Wilson Affidavit Ex. 1 at 15, Ex. 4 at 84, Ex. 5 at 107,111, Ex. 17 at 308; 18 TTABVUE 103, Ex. 20 at 103), and on jewelry. (Reg. No. 3,574,198; *see also* 17 TTABVUE 109, Wilson Affidavit Ex. 5 at 109.) Additionally, A&F has registrations for, and uses the A&F Mark in connection with retail store services and on-line retail store services featuring clothing, footwear, accessories, fragrances and jewelry. (13 TTABVUE 7, Joint Stip. ¶ 30; 17 TTABVUE 5-6, Wilson Affidavit ¶¶ 9-10, Exs. 15-16 at 267-300). A&F further has used the A&F Mark in connection with bags. (17 TTABVUE 297, Wilson Affidavit, Ex. 16 at 297.) Moreover, A&F has used the A&F Mark on hundreds of unique products each season, and thousands of unique products each year. (17 TTABVUE 4-5, Wilson Affidavit ¶ 7, Ex. 2 at 32, 35, 37, 39, 42, 45, 49; Ex. 3 at 53, 56, 59, 62, 65, 68, 71, 74, Ex. 4 at 78, 81, 84, 87, 90, 93, 96, 100; Ex. 5 at 104, 107, 110, 113, 116, 119, 122, 125; Ex. 6 at 129, 132, 135, 138, 142, 145, 148, 151, Ex. 7 at 155, 158, 161, 164, 167, 170, 173, 176; Ex. 8 at 180, 183, 186, 189.) Given the variety of goods, and the breadth of products offered with the A&F Mark, when purchasers encounter Applicant's Mark used on identical goods they are likely

to assume that a source, sponsorship or other connection exists. *See In re Wilson*, 57 USPQ2d at 1867.

8. The Actual Confusion and Concurrent Use Without Actual Confusion Factors Are Neutral Or Not Relevant

The factors of actual confusion and concurrent use without actual confusion are largely neutral or not relevant in this case. Ms. Schnittger has not sold any goods with Applicant's Mark in the United States. (13 TTABVUE 6, Joint. Stip. ¶ 21.) While Applicant's website, www.myreddear.com, features pictures of t-shirts bearing Applicant's Mark, the t-shirts are not yet available for sale. (13 TTABVUE 6, Joint. Stip. ¶ 22.) Absent evidence of use by the applicant, the opportunities for any actual confusion have to date been limited. *See Uncle Ben's, Inc. v. Stubenberg Int'l, Inc.*, 47 USPQ2d 1310, 1313 (TTAB 1998) (“[L]ack of instances of actual confusion must be seen in the context of any opportunity for confusion to have arisen.”). Because there has been no “meaningful opportunity for actual confusion to have occurred,” the absence of evidence of actual confusion is neutralized. *Time Warner Entm't Co.*, 65 USPQ2d 1650 (TTAB 2002) (finding this factor of actual confusion “offset” and therefore “neutral” because of “the absence of sufficient evidence upon which we might base a conclusion that there has been any meaningful opportunity for actual confusion to have occurred.”). Furthermore, given the difficulty of obtaining evidence of actual confusion, such evidence is not required for a finding of likelihood of confusion. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (holding “lack of evidence of actual confusion carries little weight.”)

9. The Extent of Potential Confusion Factor Weighs Heavily in Favor of Opposer

The extent of potential confusion here is substantial, as evidenced by marks with near identical overall commercial impressions, used on identical goods, the same channels of trade and customers, the low degree of care among customers for these types of goods, and the lack of

any similar third-party marks in use on similar goods. Additionally, A&F currently uses the A&F Mark, and Ms. Schnittger intends to use her mark, on goods sold to the general public, further increasing the potential for substantial confusion. *In re Pizza Pro, Inc.*, Serial No. 86320662, 2015 TTAB LEXIS 240, *17 (TTAB July 9, 2015) (holding “the extent of potential confusion is substantial because Applicant’s and the Registrant’s goods and services are consumer items and services that would be purchased by the general public” and therefore that the *DuPont* factor “favors a finding of likelihood of confusion”). Further, the A&F Mark is famous, and accordingly, “the potential for confusion in these circumstances is accentuated by the significance of a famous mark.” *Recot*, 214 F.3d at 1329, 54 USPQ2d at 1899.

D. Applicant’s Mark Is Likely To Dilute Opposer’s Famous Mark

Applicant’s Mark is also likely to dilute the famous A&F Mark by diminishing the positive associations that the consuming public has between the A&F Mark and A&F apparel. TBMP § 309.03. “Dilution diminishes the selling power that a distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public.” *Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2018 (TTAB 2014).

1. Dilution by Blurring

Dilution by blurring is “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” 15 U.S.C. § 1125(c)(2)(B). Dilution may occur even in the absence of “actual or likely confusion, of competition, or of actual economic injury.” 15 U.S.C. § 1125(c)(1). To prevail on a claim of dilution by blurring in a Board proceeding, a plaintiff must establish that: (a) plaintiff owns a famous mark that is distinctive; (b) the defendant is using a mark in commerce that allegedly dilutes the plaintiff’s famous mark; (c) the defendant’s use of its mark began after the plaintiff’s mark became famous; and (d) the defendant’s use of its mark is likely to cause dilution by

blurring.” *Chanel*, 110 USPQ2d at 2018 (citing *Coach Services Inc.*, 668 F.3d at 1372, 101 USPQ2d at 1723-24).

a. The A&F Mark Is Famous And Distinctive

A mark is famous for dilution purposes “if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A). A&F has established that each of the non-exclusive factors considered by the Board demonstrate that the A&F Mark is famous.⁵:

(1) Duration, Extent And Geographic Reach Of Advertising And Publicity Is Substantial And Nationwide

A&F has invested heavily in the advertisement of the A&F Mark for over 14 years which have reached consumers nationwide. Since 2002, A&F spent over [REDACTED] on marketing and promotion of its Abercrombie & Fitch brand products, which includes apparel bearing the A&F Mark. (16 TTABVUE 6-7, Wilson Affidavit ¶ 13.) Specifically, A&F has invested [REDACTED] in connection with its retail store supplies bearing A&F’s Mark, and [REDACTED] in connection with speakers bearing A&F’s Mark, all of which have been used and displayed in A&F’s over 370 retail store locations across the United States. (16 TTABVUE 7-8, Wilson Affidavit ¶¶ 16, 18; 18 TTABVUE 3, Ex. 19 at 3-10, Ex. 21 at 242; 13 TTABVUE 6-7, Joint Stip. ¶¶ 19, 30.) From 2001 to 2006, A&F also devoted [REDACTED] to promoting the A&F Mark in the A&F catalogs which had a total U.S. circulation of over 10.3 million copies. (16 TTABVUE 8, Wilson Affidavit ¶ 17; 18 TTABVUE 11, Ex. 20 at 11-109; 13 TTABVUE 7, Joint Stip. ¶ 31.) A&F further specifically promotes the A&F Mark nationwide through A&F’s

⁵ The factors are: (1) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties; (2) the amount, volume, and geographic extent of sales of goods or services offered under the mark; (3) the extent of actual recognition of the mark; and (4) whether the mark is registered on the principal register. 15 U.S.C. § 1125(c)(2)(A).

websites, which together have received over [REDACTED] visits from 2006 through June 2015 (including annual visits in the tens of millions, and as high as [REDACTED] (in 2012)) and social media pages including A&F's Facebook page that features the A&F Mark and which has received 8,724,087 "likes". (13 TTABVUE 7, Joint Stip. ¶ 30; 16 TTABVUE 5-7, Wilson Affidavit ¶¶ 9, 15; 17 TTABVUE 343, Ex. 18). *See New York Yankees P'ship v. IET Prods. & Servs.*, 114 USPQ2d 1497, 1503 (TTAB 2015) (citing display of design marks on Facebook page as evidence of geographical reach of publicity for mark supports fame; total attendance of over 63 million since 1990 showed fame); *see also Chanel*, 110 USPQ2d at 2019 (citing website traffic of between 3.5 million – 16 million visits annually as evidence of mark's fame for dilution). Finally, A&F's promotional e-mails which feature products bearing the A&F Mark reach over [REDACTED] subscribers. (16 TTABVUE 7, Wilson Affidavit ¶ 14; 17 TTABVUE 301, Ex. 17 at 301-341; 13 TTABVUE 7, Joint Stip. ¶ 30.)

The publicity and media attention accorded the A&F Mark is also clearly nationwide including (a) appearances on television shows that aired nationwide (13 TTABVUE 8, Joint Stip. ¶¶ 33-34; 17 TTABVUE 9, Wilson Affidavit ¶ 20; 18 TTABVUE 144, Ex. 26 at 144-149); (b) being featured in magazines with nationwide circulation such as *GQ*, *Men's Fitness* and *Teen Vogue* (13 TTABVUE 8, Joint Stip. ¶ 37; 17 TTABVUE 8, Wilson Affidavit ¶ 19; 18 TTABVUE 112, Ex. 22 at 112-133); and (c) articles specifically calling out or featuring the A&F Mark have been published in newspapers such as *The New York Times*, *The Chicago Tribune*, and *The Washington Post*. (13 TTABVUE 8, Joint Stip. ¶ 38; 17 TTABVUE 8-9, Wilson Affidavit ¶ 19; 18 TTABVUE 134, Exs. 23-25 at 134-142.) *See New York Yankees P'ship*, 114 USPQ2d at 1503 (citing display of design Mark on programs "broadcast nationwide on national networks" as evidence of geographical reach of a famous mark); *NASDAQ Stock Market Inc. v.*

Antartica S.r.l., 69 USPQ2d 1718, 1737 (TTAB 2003) (finding mark famous for dilution based in part on nationwide media coverage).

(2) The Amount, Volume, And Geographic Extent Of Sales Of Goods Or Services Offered Under The A&F Mark Are Substantial And Nationwide

As a result of the extensive publicity and promotion of the A&F Mark, the amount, volume, and geographic extent of sales of goods or services offered under the A&F Mark are also substantial. A&F's revenues from sales of products bearing the A&F Mark in the United States total over [REDACTED] since 2002, and on average A&F has offered for sale hundreds of different items each season bearing the A&F Mark, and thousands of different items each year with the A&F Mark. (16 TTABVUE 3-4, Wilson Affidavit ¶¶ 6-7; 17 TTABVUE 12, Exs. 1-8 at 12-191 (totaling the number of items offered for sale bearing A&F's Marks per season, listed on bottom left hand corner of thumbnail images in Exhibits 1-8).) The high volume of sales in dollar and inventory is evidence of the mark's fame for dilution purposes. *See Chanel*, 110 USPQ2d at 2019 (citing opposer's "extremely high" U.S. revenues from sales under CHANEL trademark as evidence of the mark's fame for dilution purposes). Apparel and accessories bearing the A&F Marks are prominently displayed and offered for sale in A&F's over 370 retail store locations across the United States, including over 240 Abercrombie & Fitch retail store locations and over 120 abercrombie kids retail store locations. (13 TTABVUE 6, Joint Stip. ¶ 19; 16 TTABVUE 6, Wilson Affidavit ¶ 11.) *See Chanel*, 110 USPQ2d at 2020 (citing "twenty-nine Chanel boutiques [in the United States] bearing the CHANEL brand name on their signage selling a broad range of fashion products with the CHANEL mark" as evidence in support of finding fame for dilution). A&F also sells goods bearing A&F's Mark through its internet websites at www.abercrombie.com and www.abercombiekids.com. (13 TTABVUE 7, Joint Stip. ¶ 30; 17 TTABVUE 5-6, Wilson Affidavit ¶¶ 9-10, Exs. 15-16 at 267-300.)

(3) Substantial Actual Recognition Of The A&F Mark

The A&F Mark has achieved extensive recognition as a distinctive source identifier of A&F products. For example, a June 26, 2005 Chicago Tribune article identified the A&F Mark as one of the “*Beasts of the Breast.*” (17 TTABVUE 8, Wilson Affidavit ¶ 19; 18 TTABVUE 135, Ex. 23 at 135-136.) An August 16, 2007 New York Times article titled *This Summer, a Bumper Crop of Collars*, “the uniform, spotted everywhere on guys from 15 to 45, was a factor in the runaway success of stores like Abercrombie & Fitch. . .” and noting “[m]ore than a dozen design houses have brought out polo shirts of late, and the various logos – Abercrombie’s moose, Marc Jacob’s rat, Etro’s winged horse – put a bewildering array of tiny animals over fashionable hearts.” (17 TTABVUE 8-9, Wilson Affidavit ¶ 19; 18 TTABVUE 138, Ex. 24 at 138-139.) A Washington Post article titled *What does it mean to be . . . ?*, dated August 6, 2006, describes a young artist’s reflection on what it means to be 12: “[t]he artist’s note describes a 12-year-old’s blue-shirted torso flanked by clothing-store names and symbols (the moose is Abercrombie & Fitch, the butterfly, Aeropostale”). (17 TTABVUE 9, Wilson Affidavit ¶ 19; 18 TTABVUE 141, Wilson Ex. 25 at 141-142.) Finally, a book of essays recognized the fame of A&F’s mark, stating that: “We know who we are by our symbols . . . Abercrombie & Fitch has a moose” (13 TTABVUE 8-9, Joint Stip. ¶ 39.)

(4) A&F Owns Registrations On The Principal Register

The number of registrations covering a mark, and the lack of third-party registrations for similar marks, further support a finding of a mark’s fame and distinctiveness. *See Chanel*, 110 USPQ2d at 2019 (noting that “opposer owns numerous registrations for the mark CHANEL on the Principal Register (or equivalent thereof) which continue to be valid and subsisting” and that the “record is devoid of any third-party registrations of similar marks” in finding fame). A&F owns six valid, subsisting registrations on the principal register covering the A&F Marks. (13

TTABVUE 2-4, Joint Stip. ¶ 1; 17 TTABVUE 3, Wilson Affidavit ¶ 3.) As explained, *supra* IV.E, A&F also vigilantly enforces its trademark rights, and as a result, there is not any evidence in the record of third-party registrations for similar marks.

b. Applicant’s Mark Will Be Used In Commerce

The Board has held that “an application based on intent to use a mark in commerce under Trademark Act Section 1(b) satisfie[s] the commerce requirement.” *New York Yankees P’ship*, 114 USPQ2d at 1505-1506. Here, Ms. Schnittger’s Application Serial No. 86/152,857 based on a Section 1(b) intent to use the mark satisfies this requirement.

c. Applicant’s Use of Her Mark Began After A&F’s Mark Achieved Fame

“The third prong requires the owner of a famous mark to demonstrate that its mark became famous prior to applicant’s established use or filing date.” *Chanel*, 110 USPQ2d at 2024. Therefore the relevant time frame is prior to December 26, 2013, the date that Ms. Schnittger filed her application. *New York Yankees P’ship*, 114 USPQ2d at 1503 (“the time frame most relevant for dilution—that is, before Applicant filed its applications in 2008”). The majority of the extensive publicity and advertising and sales revenue of the A&F Marks occurred before December 2013. From 2002 to 2013, products bearing the A&F Marks generated over [REDACTED] in revenue, with years 2006-2008 earning over [REDACTED] annually. (16 TTABVUE 3, Wilson Affidavit ¶ 6.) Further, from 2006 to 2013, the A&F website www.abercrombie.com received [REDACTED] visits and the website www.abercrombiekids.com received [REDACTED] visits. (16 TTABVUE 5-6, Wilson Affidavit ¶¶ 9-10.) The third party newspaper and magazine recognition of A&F’s Marks also occurred well prior to December 26, 2013. (17 TTABVUE 8-9, Wilson Affidavit ¶ 19; 18 TTABVUE 112, Exs. 22-25 at 112-142.)

d. Applicant's Mark Is Likely to Cause Dilution by Blurring

Dilution by blurring occurs where, as here, a substantial percentage of consumers, upon seeing Applicant's use of her mark on goods are immediately reminded of the famous A&F Mark and associate Applicant's use with A&F, even if they do not believe that the goods come from A&F. *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1888 (TTAB 2011). In determining whether a mark is likely to cause dilution by blurring, the Board may consider and balance the following six non-exhaustive factors from 15 U.S.C. § 1125(c)(2)(B)(i)-(vi): (i) the degree of similarity between the mark or trade name and the famous mark; (ii) the degree of inherent or acquired distinctiveness of the famous mark; (iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (iv) the degree of recognition of the famous mark; (v) whether the user of the mark or trade name intended to create an association with the famous mark; and (vi) any actual association between the mark or trade name and the famous mark. *Id.* at 1888-1889.

In assessing the similarity between the mark and famous mark, the Board "consider[s] the marks in terms of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Id.* at 1888-1889. "The harm dilution does to the selling power of a mark is not only caused by a third-party use or registration of an identical mark. It may be caused by a 'look-alike' mark, one that is close enough to the famous mark that consumers will recall the famous mark and be reminded of it, as this Board has explained, 'even if they do not believe that the goods come from the famous mark's owner'." *Nike*, 100 USPQ2d at 1030. As set forth *supra*, V.C.1, Applicant's Mark is similar in appearance, connotation and overall commercial impression to the famous A&F Mark.

The degree of inherent or acquired distinctiveness factor "requires us to analyze how distinctive or 'unique' the mark is to the public. . . . The more inherently distinctive and

memorable the mark, the more it is likely to be blurred by the use of other identical or similar marks.” *Chanel*, 110 USPQ2d at 2025. The A&F Mark is an arbitrary mark as used in connection with Applicant’s clothing goods, and accordingly is highly distinctive and a strong, inherently distinctive mark. *Palm Bay Imps.*, 396 F.3d at 1372, 73 USPQ2d at 1692 (holding “Veuve” arbitrary as applied to champagne and sparkling wine and “thus conceptually strong as a trademark”). “[A]n arbitrary mark [i]s a known word [or design] used in an unexpected or uncommon way.” *Id.*, 396 F.3d at 1372, 73 USPQ2d at 1692; *see also* TMEP § 1209.01 (“[a]rbitrary marks comprise words that are in common linguistic use but, when used to identify particular goods or services, do not suggest or describe a significant ingredient, quality, or characteristic of the goods or services”). The A&F Mark does not suggest or describe any ingredient, quality or characteristic of A&F’s clothing or other goods, and A&F’s use is unexpected or uncommon given that there is not any evidence of another company using a silhouette of an antlered animal in connection with clothing. Additionally, the extensive unsolicited third party media attention and other evidence of fame discussed *supra* at Sections IV.D and V.C.5 shows that the public uses and recognizes the A&F Mark to refer exclusively to A&F, and establishes a high degree of distinctiveness among consumers. *See Chanel*, 110 USPQ2d at 2025 (holding that fame evidence established high degree of distinctiveness). Accordingly, the inherent distinctiveness of the A&F Mark makes it more likely that the A&F Mark will be blurred by Applicant’s use of Applicant’s Mark.

Opposer is engaging in substantially exclusive use of its A&F Marks, as evidenced by its robust enforcement of trademark rights through lawsuits, cease and desist letters and oppositions before the Board against similar marks. (13 TTABVUE 9, Joint Stip. ¶ 40; 17 TTABVUE 9-10, Wilson Affidavit ¶ 21; 18 TTABVUE 171, Exs. 27-31 at 171-242.) Moreover, Ms. Schnittger

has not offered any evidence into record of third party use of similar design marks. *New York Yankees P'ship*, 114 USPQ2d at 1507, 1511 (finding this factor favors likelihood of dilution where “[t]here is no evidence in the record of any third-party use of a design mark similar to [opposer’s design mark]” and “Applicant introduced no evidence as to the extent of the use and promotion by third parties of their [word] marks”).

As to the element of whether Applicant intended to create an association with the A&F Mark, it would be impossible not to be aware of the A&F Mark given its widespread use and third party recognition, and there further is evidence that Applicant was aware of the A&F Mark when it chose a mark with a near identical commercial impression to be used on identical goods sold and targeted to identical customers. Applicant admitted that prior to the December 26, 2013 filing date of her Application, she and members of her immediate family shopped at or visited an Abercrombie & Fitch retail store. (13 TTABVUE 5, 7, Joint Stip. ¶¶ 5, 26.) Accordingly, Applicant clearly had seen and was aware of the A&F Mark prior to filing her application for Applicant’s Mark given the pervasive use of the A&F Mark in A&F stores including the prominent display of apparel bearing the A&F Mark offered for sale in the A&F retail stores including many products where the A&F Mark is the only visible trademark when worn (17 TTABVUE 6, Wilson Affidavit ¶¶ 11-12), the use on fitting room tags, size stickers, product tags, tissue paper, speakers, tissue paper, boxes, and gift card holders (13 TTABVUE 7, Joint Stip. ¶ 30; 17 TTABVUE 7, Wilson Affidavit ¶ 16), as well as the substantial number of different items each season that bear the A&F Mark. (17 TTABVUE 4-5, Wilson Affidavit ¶¶ 7-8, Exs. 1-14 at 12-266.) Accordingly, Applicant likely intended to create an association with the A&F Mark when it chose and filed for Applicant’s Mark.

The degree of recognition of the A&F Mark is substantial including coverage in nationwide magazines and newspapers, appearances in television shows aired nationwide, numerous unsolicited references on the Internet identifying celebrities wearing the A&F Mark, a reference in a book of essays referring to the A&F Mark as one of the “symbols” of culture, billions of dollars in sales, and hundreds of millions of visits to the A&F websites. (13 TTABVUE 8-9, Joint Stip. ¶¶ 33-39; 17 TTABVUE 5-9, Wilson Affidavit ¶¶ 9, 10, 13, 19, 20; 18 TTABVUE 112, Exs. 22-26 at 112-170.)

Where, as here, the application is filed on an intent to use basis and there has been a limited opportunity for the public to make any actual association between the parties’ design marks, the factor “actual association” between Applicant’s mark and the famous mark is neutral. *New York Yankees P’ship*, 114 USPQ2d at 1509.

Accordingly, consumers, upon seeing Applicant’s use of Applicant’s Mark on her goods, are likely to be immediately reminded of the famous A&F Mark and associate Applicant’s use with A&F.

2. Dilution by Tarnishment

Dilution by tarnishment is “an association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C). A trademark may be tarnished when it is “portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product. . . reduc[ing] the trademark’s reputation and standing in the eyes of consumers as a wholesome identifier of the owner’s products or services.” *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39, 43, 32 USPQ2d 1936, 1939 (2d Cir. 1994).

Registration of Applicant’s Mark threatens to harm the reputation of A&F’s Mark because Applicant proposes to use the mark in connection with the Confederate Flag, a

controversial symbol associated with racial prejudice and evocative of hatred, and in connection with slogans that promote violence. Applicant’s website features t-shirt designs with the design portion of Applicant’s Mark printed over a U.S. Confederate Flag emblem. (15 TTABVUE 2, Bradley Affidavit ¶¶ 2-3, Ex. A at 14, Ex. B at 26.) The display of the Confederate flag and Confederate symbols “have become associated with racial prejudice [and] are so likely to provoke feelings of hatred and ill will in others that they are inappropriate.” *See Scott v. Sch. B.*, 324 F.3d 1246, 1249 (11th Cir. 2003); *see also Denno ex rel. Denno v. School Bd.*, 218 F.3d 1267, 1274 (11th Cir. 2000) (“many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed”). Applicant’s website also features a proposed t-shirt design bearing the phrase “Welcome to South Carolina - There’s plenty of room for all God’s creatures, but not in ‘the South’” with a depiction of a full-bodied antlered animal similar to A&F’s Mark, and another proposed t-shirt design bears the phrase “Better Red Than Dead.” (15 TTABVUE 2, Bradley Affidavit ¶ 3, Ex. B at 28.) The connotation of racially prejudiced symbols and threatening messages used in close connection with Applicant’s Mark is disparaging, and could cause consumers to view the visually similar A&F Mark negatively. *See, e.g. In re Geller*, 751 F. 3d 1355, 1356, 110 USPQ2d 1867, 1872 (Fed. Cir. 2014) (affirming the Board’s refusal to register STOP THE ISLAMISATION OF AMERICA on grounds that associating peaceful political Islamisation with terrorism would be disparaging to a substantial composite of American Muslims). Accordingly, A&F is likely to suffer reputational harm when consumers perceive an association arising from the similarity of Applicant’s Mark with the A&F Mark, in connection with such racially charged and offensive material.

VI. CONCLUSION

A&F has shown that eight of the thirteen *DuPont* factors weight heavily in its favor and a finding of a likelihood of confusion, and the remaining factors are neutral or are not relevant. Additionally, A&F has further demonstrated that there is a high likelihood of dilution by blurring and by tarnishment. Accordingly, A&F respectfully requests that the Board refuse registration of Serial No. 86/152,857 for Applicant's Mark for the goods and services specified therein pursuant to Sections 2(d) of the Trademark Act and 43(c) of the Lanham Act, based on a likelihood of confusion and dilution, and sustain the present opposition proceeding in favor of A&F.

Dated: April 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Trial Brief has been served on Applicant, Isabella Elisabeth Schnittger, on April 06, 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

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*Abercrombie and Fitch Trading Co. v.
Schnittger, Isabella Elisabeth*

Opposition No. 91218738

Offering Party: Abercrombie and Fitch
Trading Co.

Appendix 1

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

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

OPPOSER’S EVIDENTIARY OBJECTIONS TO APPLICANT’S EVIDENCE

Opposer Abercrombie & Fitch Trading Co. (“Opposer” or “A&F”) asserts the following evidentiary objections to Applicant Isabella Elisabeth Schnittger’s (“Applicant” or “Ms. Schnittger”) Testimony Affidavit filed Dec. 1, 2015, (19 TTABVUE (“Applicant’s Original Testimony”)),¹ and Applicant’s Revised Testimony Affidavit filed Jan. 15, 2016 (23 TTABVUE) (“Applicant’s Revised Testimony”).

APPLICANT’S EVIDENCE	GROUNDS FOR OBJECTION
1. Applicant’s Original Testimony (19 TTABVUE 2 ¶ 2, first and second sentences);	Applicant’s statements that she does not have the support of “a corporate trademark and intellectual property division of a General Counsel’s Office, nor a law firm” and that she is “responding to A&F’s Opposition for [her]self” are irrelevant to the determination of any issue in this case. Fed. R. Evid. 401. Additionally, “[s]trict

¹ Opposer notes that Applicant re-filed an identical copy of Applicant’s Original Testimony with the filing of Applicant’s Revised Testimony. (See 23 TTABVUE 10-24.) For clarity, Opposer is only citing to 19 TTABVUE when referencing statements in Applicant’s Original Testimony, and does not re-cite the identical copy of Applicant’s Original Testimony that appears at 23 TTABVUE 10-24.

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
<p>Applicant's Revised Testimony (23 TTABVUE 4 ¶ 2, first and second sentences).</p>	<p>compliance with the Trademark Rules of Practice and, where applicable, the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel.” (2 TTABVUE 5); <i>ShutEmDown Sports, Inc. v. Lacy</i>, 102 USPQ2d 1036, 1037, n. 4 (TTAB 2012) (same).</p>
<p>2. Applicant's Original Testimony (19 TTABVUE 2-3 ¶ 2, third sentence); Applicant's Revised Testimony, (23 TTABVUE 4-5, ¶ 2, third sentence).</p>	<p>Applicant's statements regarding (a) “documents made when I had a copyright” and (b) that documents from her website were made before “[Applicant] had applied for a Trademark” lack foundation under Fed. R. Evid. 901.</p> <p>(a) Applicant has not made any evidence of a copyright registration of record. Nor does Applicant provide information sufficient to authenticate a copyright record, or to identify and authenticate the “documents” referenced. Documents must be authenticated or identified through the testimony of a witness having firsthand knowledge of the document and its authenticity. <i>See Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha</i>, 77 USPQ2d 1917, 1920 (TTAB 2006) (registration not properly made of record not considered); <i>see also ZAO Gruppya Predpriyatij Ost et al v. Vosk International Co.</i>, 91168423, 2011 TTAB LEXIS 240, *16 (TTAB Aug. 09, 2011) (striking exhibit under Fed. R. Evid. 901 where the witness “did not identify, let alone authenticate this document”).</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>(b) With regard to Applicant's statement that the documents from her website were made before she "applied for a Trademark," the only documents made of record from Ms. Schnittger's website are dated <i>after</i> the December 26, 2013 application filing date of Applicant's Application No. 86/152,857. (<i>See</i> 15 TTABVUE 18-32, Bradley Testimony Affidavit, Exs. B & C.)</p>
<p>3. Applicant's Original Testimony (19 TTABVUE 2-3 ¶ 2, third and fourth sentence); Applicant's Revised Testimony (23 TTABVUE 4-5 ¶ 2, third and fourth sentence).</p>	<p>Applicant's statements that "I have learned from experience, from the Patent & Trademark Office website, from the Internet and from Ms. Bradley" regarding use of the words "Red Dear" with her "silhouette stag" lack foundation under FRE 901 as she does not identify what she purportedly learned, and is further irrelevant to any issue in the case under FRE 401.</p> <p>The unidentified out of court statements from which Applicant allegedly learned are further inadmissible hearsay under FRE 801 and 802. <i>See Southwestern Mgmt., Inc. v. Ocinomled, Ltd.</i>, 115 USPQ2d 1007, 1013 (TTAB 2015) (excluding as hearsay statements of what someone "told me").</p> <p>Further, Applicant's testimony alleging that "[Applicant has] learned. . . from Ms. Bradley" has been rebutted by Ms. Bradley's sworn testimony (Ms. Bradley testified that she has "not provided any advice to Applicant regarding the use of Applicant's applied for mark covered by Application No. 86/152,587, or use of the words</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	‘Red Dear’ in connection with the applied for mark.” (21 TTABVUE 2, Bradley Rebuttal Affidavit, ¶ 2.))
<p>4. Applicant’s Original Testimony (19 TTABVUE 3 ¶ 3, second sentence); Applicant’s Revised Testimony (23 TTABVUE 5 ¶ 3, second sentence).</p>	<p>Applicant’s statement that “I have applied for, and been granted . . . a trademark” lacks foundation under Fed. R. Evid. 901 as USPTO records demonstrate that Applicant only owns a pending application. (<i>See</i> Application No. 86/152,857.) <i>See also Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres, Inc.</i>, 56 USPQ2d 1538, 1541 (TTAB 2000) (“As to respondent’s arguments that the Examining Attorney allowed the mark for publication and registration, the Board and the Court are not bound by decisions of Examining Attorneys”).</p> <p>Applicant has not made of record any information identifying a registration she owns covering the mark depicted in ¶ 3, as required for a party wishing to rely on its ownership of a federal registration under Trademark Rule 2.122(d). <i>See</i> TBMP § 704.03(b)(1)(A); <i>Sterling Jewelers Inc. v. Romance & Co.</i>, 110 USPQ2d 1598, 1601 (TTAB 2014) (registration not of record where party failed to comply with “‘simple and clear’ directives of Trademark Rule 2.122(d)”).</p>
<p>5. Applicant’s Original Testimony (19 TTABVUE 8-11,</p>	<p>Opposer maintains the objections raised in its motion to strike (which consideration was deferred to the trial brief) that Exhibit A is inadmissible because it only contains: (a) cut and pasted url links</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
Exhibit A)	<p>and Internet search results which do not make the content at those websites of record; (b) selective, incomplete text allegedly cut and pasted from certain websites which appears out of context; and (c) none of the material bears any access date. The bases for these specific substantive objections are discussed herein at Objections 6-7 in conjunction with the corresponding statements in Applicant's affidavit.</p> <p>Applicant's Exhibit A is also inadmissible because Applicant never produced these documents during discovery which were responsive to Opposer's document requests.² (Prevatt Decl. ¶ 4.) <i>ConAgra Inc. v. Saavedra</i>, 4 USPQ2d 1245, 1247 n.6 (TTAB 1987) (exhibits not produced during discovery, though encompassed by discovery requests, excluded from consideration); <i>National Aeronautics and Space Administration v. BullyHill Vineyards Inc.</i>, 3 USPQ2d 1671, 1672 n.3 (TTAB 1987) (opposer's exhibits identified in applicant's brief as within the scope of documents requested by applicant but not produced by opposer during discovery, excluded from consideration).</p> <p>Additionally, the parties' stipulated that the evidence that "may be submitted during the parties' respective testimony periods . . .</p>

² The documents in Applicant's Exhibit A were responsive to Opposer's Document Request Nos. 27, 28, 46, 47 and 48 (Opposer's requests and Applicant's responses are attached hereto as Exhibit 1).

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>shall be limited to those documents that were produced by either party during discovery.” (11 TTABVUE 1.) The Board approved this procedure for the submission of evidence on September 4, 2015. (12 TTABVUE.)</p>
<p>6. Applicant’s Original Testimony (19 TTABVUE 4 ¶ 4; 8-11, Exhibit A); Applicant’s Revised Testimony (23 TTABVUE 6 ¶ 4).</p>	<p>Opposer objects to Applicant’s request that the Board take judicial notice of “the fact that although a moose is part of the deer family biologically, it is distinguished in particular by the shape of its antlers (described as “palmate”), which are rounded, as opposed to male deer antlers which are pointed.” Such alleged facts and selective excerpts in Exhibit A are not relevant adjudicative facts that may be judicially noticed under Fed. R. Evid. 201.</p> <p>The Board will only take judicial notice of “a relevant <i>fact</i> not subject to reasonable dispute, as defined in Fed. R. Evid. 201(b).” TBMP § 704.12(b) (emphasis added). The statement regarding deer and moose species classification and antler shape is not a relevant adjudicative fact in this proceeding because the similarity of the parties’ marks are determined by an examination of the marks themselves -- any biological classifications and characteristics of the moose and deer species are not relevant and have no probative value for this determination where the antlered animal as it appears in the mark is relevant as opposed to what the animal may be called. <i>See In re National Data Corp.</i>, 753 F.2d 1056, 1058, 224 USPQ 749,</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>750 (Fed. Cir. 1985) (“The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used.”); <i>Abbott Labs. v. Tac Indus.</i>, 217 USPQ 819, 823 (TTAB 1981) (declining to take judicial notice of definition “without any viable relationship to the issue at hand”).</p> <p>Moreover, the text and images in Exhibit A that were allegedly selectively copied and pasted from the Internet are not “sources whose accuracy cannot reasonably be questioned,” as required for judicial notice under Fed. R. Evid. 201 and TBMP § 704.12. Each page of the exhibit lists a different URL without providing any context for the display, access date, accuracy or authenticity of the content contained therein, which did not make the content of the pages of record. <i>See In re HSB Solomon Assocs., LLC</i>, 102 USPQ2d 1269, 1274 (TTAB 2012) (“reference to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record”). Ms. Schnittger further offers the alleged excerpts for the truth of the matters asserted therein, without providing any evidence of its accuracy or probative value. Because Ms. Schnittger has not submitted “testimony and proof of the extent to which a particular website has been viewed, . . . the document may not be considered to have much probative value” and therefore</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>the source is an improper one for judicial notice. <i>See</i> TBMP §§ 704.08(b); 704.12(b).</p> <p>Applicant's Exhibit A is further inadmissible hearsay under FRE 801 and 802 as she is offering the excerpts, purportedly from the websites at the provided URLs for the truth of the matters asserted therein. <i>See</i> TBMP § 704.08(b) ("documents obtained through the Internet may not be used to demonstrate the truth of what has been printed"); <i>Bd. of Trs. of Univ. of Ala. v. Pitts</i>, 107 USPQ2d 2001, 2007 n. 8 (TTAB 2013) (applicant's internet evidence "does not fall within an exception to the hearsay rule" and "will not be considered to prove the truth of any matter stated therein").</p>
<p>7. Applicant's Original Testimony (19 TTABVUE 9, Exhibit A, second page); Applicant's Revised Testimony (23 TTABVUE 17).</p>	<p>Opposer objects to the second page of Exhibit A because it contains only inadmissible search engine results. <i>See</i> TBMP § 704.08(b). The only identifiable source to the second page of Exhibit A is a Google Search result URL which is inadmissible because it merely offers links to content not otherwise of record. <i>Edom Laboratories Inc. v. Lichter</i>, 102 USPQ2d 1546, 1550 (TTAB 2012) (holding that "Google(R) search summary . . . is further inadmissible because it merely offers links to information not otherwise of record").</p>
<p>8. Applicant's Original Testimony (19</p>	<p>Opposer objects to the excerpt allegedly selectively copied from the Maine Government Department of Fisheries & Wildlife website,</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
TTABVUE 12, Exhibit B).	<p>attached as Exhibit B, because Applicant never produced the screenshots during discovery and such documents were responsive to Opposer's document requests. (Prevatt Decl. ¶ 4.) <i>See also</i> Exhibit 1 (attached hereto); <i>ConAgra Inc. v. Saavedra</i>, 4 USPQ2d 1245, 1247 n.6 (TTAB 1987) (exhibits not produced during discovery, though encompassed by discovery requests, excluded from consideration); <i>National Aeronautics and Space Administration v. BullyHill Vineyards Inc.</i>, 3 USPQ2d 1671, 1672 n.3 (TTAB 1987) (opposer's exhibits identified in applicant's brief as within the scope of documents requested by applicant but not produced by opposer during discovery, excluded from consideration).</p> <p>Additionally, the parties' stipulated that the evidence that "may be submitted during the parties' respective testimony periods . . . shall be limited to those documents that were produced by either party during discovery." (11 TTABVUE 1.) The Board approved this procedure for the submission of evidence on September 4, 2015. (12 TTABVUE.)</p>
9. Applicant's Original Testimony (19 TTABVUE 4-5 ¶ 5; 12-14, Exhibits B & C);	Opposer objects to Applicant's statements in ¶ 5 and Exhibits B and C as irrelevant under FRE 401, as hunting and permit laws have no bearing on the similarities between the parties' marks or on the ability of the parties' consumers to distinguish the marks as used on

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
<p>Applicant's Revised Testimony (23 TTABVUE 6-7 ¶ 5).</p>	<p>clothing. <i>See In re National Data Corp.</i>, 753 F.2d 1056, 1058, 224 USPQ 749, 750 (Fed. Cir. 1985) (“The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used.”).</p> <p>Applicant's Exhibits B and C are also inadmissible hearsay under FRE 801 and 802 as Applicant is offering the excerpts allegedly obtained from the Internet for the truth of the matters asserted therein. <i>See</i> TBMP § 704.08(b) (“documents obtained through the Internet may not be used to demonstrate the truth of what has been printed”); <i>Bd. of Trs. of Univ. of Ala. v. Pitts</i>, 107 USPQ2d 2001, 2007 n. 8 (TTAB 2013) (applicant's internet evidence “does not fall within an exception to the hearsay rule” and “will not be considered to prove the truth of any matter stated therein”); <i>Johnson & Johnson v. Kumar</i>, 91152039, 2009 TTAB LEXIS 663, *20-21 (TTAB Nov. 2, 2009) (accepting opposer's hearsay objection to screenshots from a .gov website and concluding that such documents could not be considered “for the truth of the matters asserted therein”).</p>
<p>10. Applicant's Original Testimony (19 TTABVUE 5 ¶ 6); Applicant's Revised</p>	<p>Opposer objects to Applicant's paraphrased statements allegedly from court opinions of an unrelated proceeding as (i) inadmissible hearsay under FRE 801 and 802 given that Applicant seeks to admit the statements for the truth of the matter asserted therein, and (ii) as</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
<p>Testimony (23 TTABVUE 7 ¶ 6).</p>	<p>irrelevant as the referenced prior proceedings were between Opposer and an unrelated third party regarding a third party's mark not at issue in this proceeding. <i>See Smith Kline & French Labs. v. USV Pharm. Corp.</i>, 175 USPQ 666, 667 n. 1 (TTAB 1972) (“[f]indings of fact in proceedings involving opposer and third persons . . . cannot be considered in determining the issue herein which is completely different from those involved in the specific cases relied on by opposer”); 37 C.F.R. § 2.122(f) (only instance in which testimony from another proceeding may be admitted is if “testimony taken in a suit or action in a court, between the same parties or those in privity”).</p> <p>Additionally, the paraphrased statements are inadmissible as the declarant of the paraphrased statements is not testifying at the current trial or hearing. <i>Seaguard Corp. v. Seaward International, Inc.</i>, 223 USPQ 48, n.5 (TTAB 1984) (finding testimony about statements made by a non-party “manifestly hearsay in nature” and thus given “no consideration in our determination of this case”).</p>
<p>11. Applicant's Original Testimony (19 TTABVUE 5 ¶ 7; 15-16, Exhibit D); Applicant's Revised</p>	<p>Opposer maintains its objection asserted in its Motion to Strike and addressed in the Wilson Rebuttal Testimony to ¶ 7 and Exhibit D containing images from www.aftshirt.com because (i) www.aftshirt.com is a counterfeit website that is not owned or controlled by A&F and accordingly any images are irrelevant under</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
<p>Testimony (23 TTABVUE 7 ¶ 7)</p>	<p>FRE 401, and (ii) Applicant did not produce the exhibit during the parties' discovery, in violation of the parties' Joint Stipulation Regarding Testimony and Trial Procedures, (11 TTABVUE 1), requiring that the evidence that "may be submitted during the parties' respective testimony periods . . . shall be limited to those documents that were produced by either party during discovery." (Prevatt Decl. ¶ 4; 20 TTABVUE 6-7, 11-14; 24 TTABVUE 2-4; 22 TTABVUE 3-4 ¶¶ 3-4, Exhibits 34-36.)</p> <p>Additionally, the documents in Exhibit D that were not produced during discovery were responsive to Opposer's Document Request No. 48. <i>See</i> Exhibit 1 attached hereto; <i>ConAgra Inc. v. Saavedra</i>, 4 USPQ2d 1245, 1247 n.6 (TTAB 1987) (exhibits not produced during discovery, though encompassed by discovery requests, excluded from consideration); <i>National Aeronautics and Space Administration v. BullyHill Vineyards Inc.</i>, 3 USPQ2d 1671, 1672 n.3 (TTAB 1987) (opposer's exhibits identified in applicant's brief as within the scope of documents requested by applicant but not produced by opposer during discovery, excluded from consideration).</p> <p>Further, Applicant's statements in ¶ 7 lack any foundation under FRE 901 given both the counterfeit nature of the website and the fact that Opposer has produced testimony and documentary</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>evidence establishing that it has not started using a “Red Dear” logo in the U.S. or any other country as alleged by Applicant. (22 TTABVUE 3-4 ¶¶ 3-5, and Exhibits 34-37³.)</p> <p>Moreover, the internet print-outs in Exhibit D are inadmissible hearsay under FRE 801 and 802. <i>See</i> TBMP § 704.08(b) (“documents obtained through the Internet may not be used to demonstrate the truth of what has been printed”); <i>Bd. of Trs. of Univ. of Ala. v. Pitts</i>, 107 USPQ2d 2001, 2007 n. 8 (TTAB 2013) (applicant’s internet evidence “does not fall within an exception to the hearsay rule” and “will not be considered to prove the truth of any matter stated therein”).</p>
<p>12. Applicant’s Original Testimony (19 TTABVUE 5 ¶ 8, second sentence); Applicant’s Revised Testimony (23 TTABVUE 7-8 ¶ 8, second sentence).</p>	<p>Opposer objects that Applicant’s statements about internet search results if “one puts ‘red deer’ or ‘read dear’ into a Google search” are inadmissible hearsay under FRE 801 and 802, and are further inadmissible as lacking foundation given that Applicant has not provided any of the alleged search results. <i>See</i> TBMP § 704.08(b) (search engine results are inadmissible); <i>Edom Laboratories Inc. v. Lichter</i>, 102 USPQ2d 1546, 1550 (TTAB 2012) (holding that a search summary is inadmissible because it merely offers links to</p>

³ A corrected copy of Exhibit 37 to the Wilson Rebuttal Testimony is attached hereto in Appendix B. The version at 22 TTABVUE 101-113 did not upload correctly in the ESTTA system, and did not display the full content of the pdf correctly. (Appendix B, Declaration of Allison E. Prevatt ¶¶ 1-2, Ex. A.)

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>information not otherwise of record); <i>In re Remacle</i>, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002) (finding the results of search by Yahoo! search engine of little probative value, because insufficient context available to determine the nature of the information and, thus, its relevance).</p>
<p>13. Applicant's Original Testimony (19 TTABVUE 5-6 ¶ 8, third sentence); Applicant's Revised Testimony (23 TTABVUE 8 ¶ 8, third sentence).</p>	<p>Opposer objects to Applicant's reference to a quote from the website http://sabian.org/looking__glass6.php as irrelevant to any issue in the case under FRE 401, and lacking foundation under FRE 901 as Applicant has not submitted any evidence showing the referenced website. <i>See In re HSB Solomon Assocs., LLC</i>, 102 USPQ2d 1269, 1274 (TTAB 2012) ("reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record").</p> <p>Additionally, Applicant never made the content of the website of record during her testimony period, nor did she produce copies during discovery, in violation of the parties' Joint Stipulation. (11 TTABVUE.)</p>

Dated: April 6, 2016

Respectfully submitted,

Attorneys for Abercrombie & Fitch Trading Co.

/Susan M. Kayser/

Susan M. Kayser

Jessica D. Bradley

Allison Prevatt

Jones Day

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Email: skayser@jonesday.com

jbradley@jonesday.com

aprevatt@jonesday.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Evidentiary Objections To Applicant's Evidence has been served on Applicant, Isabella Elisabeth Schnittger, on April 06, 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

/Allison E. Prevatt/

Allison E. Prevatt

*Attorney for Opposer
Abercrombie and Fitch Trading Co.*

*Abercrombie and Fitch Trading Co. v.
Schnittger, Isabella Elisabeth*

Opposition No. 91218738

Offering Party: Abercrombie and Fitch
Trading Co.

Appendix 1

Exhibit 1

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

Abercrombie & Fitch Trading Co.,

Opposer,

v.

Isabella Elizabeth Schnittger,

Applicant.

Opposition No. 91218738

**OPPOSER’S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS
TO APPLICANT**

Opposer, Abercrombie & Fitch Trading Co. (“A&F”), hereby requests pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, that Applicant Isabella Elizabeth Schnittger produce documents and/or things in response to each of the following requests. These requests for production are continuing, and any documents or things that may be discovered subsequent to production should be brought to the attention of the Opposer through a supplemental production within a reasonable time following such discovery. Documents and things should be produced at the offices for counsel for Opposer, c/o Jessica Bradley, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001-2113, within thirty (30) days from the date of service hereof.

DEFINITIONS

For definitions of the terms used herein, Opposer adopts and incorporates the Definitions set forth in Opposer’s First Set of Interrogatories.

INSTRUCTIONS

The following instructions apply to the document requests below and should be considered as part of each request:

DOCUMENT REQUEST NO 28:

All documents that indicate any similarities or differences between the RD Mark and A&F's Moose Design Marks.

RESPONSE:

DOCUMENT REQUEST NO 29:

Documents sufficient to show the outlets that sell products bearing the RD Mark or through which you intend to sell products bearing the RD Mark.

RESPONSE:

DOCUMENT REQUEST NO 30:

Documents sufficient to show the annual advertising and promotional expenditures by or on your behalf relating to the promotion of goods and services under the RD Mark, from the first sale or offering of such goods and services to the present.

RESPONSE:

DOCUMENT REQUEST NO 31:

Documents sufficient to show when and through which form of media (including but not limited to, television media, broadcast radio media, print media, and electronic media transmitted over the Internet) you have promoted or used, or intend to promote or use, the RD Mark, including drafts, sketches and mock ups of any such advertisements.

RESPONSE:

DOCUMENT REQUEST NO 32:

All documents evidencing, referring or relating to your first knowledge of A&F's Moose Design Marks or goods or services offered by Opposer under the Moose Design Marks.

RESPONSE:

Dated: March 4, 2015

Respectfully submitted,

/Jessica D. Bradley/

Susan M. Kayser

Jessica D. Bradley

JONES DAY

51 Louisiana Ave, NW

Washington, DC 20001

Telephone: 202-879-3939

Facsimile: 202-626-1700

E-mail: 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 Opposer's First Request for Productions of Documents and Things to Applicant has been served on Applicant, Isabella Elizabeth Schnittger, on March 4, 2015 via email at isartdesign7@aol.com and myreddear@aol.com, pursuant to agreement of the parties.

/Jessica D. Bradley/
Jessica D. Bradley

**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)	
)	

**APPLICANT’S RESEPOSE TO OPPOSER’S FIRST REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS**

In response to Opposer’s First Request for Production of Documents and Things, Applicant, Isabella Elisabeth Schnittger (“Applicant”), states as follows:

1. All documents to be produced hereunder are in the custody and control of Applicant.
2. Applicant does not have an attorney; no documents are withheld on the basis of attorney-client privilege or work product doctrine. In addition, no other privilege against disclosure is claimed.
3. Documents that are dated were created at or about the time of such dates; others are not dated and Applicant is not prepared to set a date on such undated documents. None was created in response to this Request.

RESPONSE TO DOCUMENT REQUEST NO 26:

Applicant has no documents responsive to Document Request No. 26.

RESPONSE TO DOCUMENT REQUEST NO 27:

Applicant will rely upon documents in the Public Domain of which the Tribunal may take Judicial Notice.

RESPONSE TO DOCUMENT REQUEST NO 28:

Applicant's Red Dear Trademark includes the text "Red Dear", and the animal pictured are distinct from Abercrombie & Fitch's Moose Design trademark.

RESPONSE TO DOCUMENT REQUEST NO 29:

Applicant has no documents responsive to Document Request No. 29.

RESPONSE TO DOCUMENT REQUEST NO 30:

Applicant has no documents responsive to Document Request No. 30.

RESPONSE TO DOCUMENT REQUEST NO 31:

Applicant has no documents responsive to Document Request No. 31.

RESPONSE TO DOCUMENT REQUEST NO 32:

Applicant has no documents responsive to Document Request No. 32 other than the documents provided to Applicant as part of this Proceeding.

RESPONSE TO DOCUMENT REQUEST NO 33:

RESPONSE TO DOCUMENT REQUEST NO 48:

See Responses above.

RESPONSE TO DOCUMENT REQUEST NO 49:

Applicant has no documents responsive to Document Request No. 49.

Dated: March 25, 2015.

Respectfully submitted,

By /Isabella Schnittger/
Isabella Schnittger
121B Duffie Road
Simpsonville, SC 29681
(864) 228-7829
isartdesign7@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, I served a true and complete copy of the foregoing **APPLICANT'S RESEPNSE TO OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS** on Opposer through its attorney, Jones Day attorneys Susan M. Kaiser by email to skayser@jonesday.com, pursuant to agreement of the parties. I also certify that I sent paper copies of paper documents, and a Compact Disk with electronic copies of those documents that are electronic to Opposer, through its attorneys Jones Day, by sending them via first-class mail, postage prepaid, addressed Susan M. Kaiser, Jones Day, 511 Louisiana Ave. NW. Washington DC 200001

Signature /s/ Isabella Schnittger Date April 1, 2015

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

Abercrombie & Fitch Trading Co.,

Opposer,

v.

Opposition No. 91218738

Isabella Elizabeth Schnittger,

Applicant.

**APPLICANT'S AMENDED RESPONSES TO OPPOSER'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS AND THINGS**

DOCUMENT REQUEST NO. 1:

All documents relating or referring to the conception, origination, consideration, commissioning, acquisition, selection, creation, or adoption of the RD Mark.

RESPONSE TO DOCUMENT REQUEST NO. 1:

Applicant declines to provide the documents that are part of the public record in the U.S. Patent and Trademark Office and/or the Trademark Trial and Appeal Board. Opposer already has access to these. Applicant will send copies of the following documents to Opposer:

Copyright Registration VAu 1-149-334 effective August 30, 2013. **(SCH 5)**

2. Picture of Red Dear with words "I love made in the U.S.A." produced for submission to the Copyright Office, dated "copyright 2013". **(SCH 15)**

3. Picture of three shirts, one with the Red Dear Trademark, and one marked "Pro Redneck" and the deer silhouette, and one other. The picture was taken in the summer of 2014. **(SCH 43 and 44)**

4. Three **(correction, five)** conceptual drawings of stick figures wearing three different ideas for use of the Red Dear Trademark. **(SCH 22, 23, 24, 25 and 26)**

5. Pictures from new designs **(SCH0070 - 79)** created on May 2015 for use of the Red Dear Trademark (added 05/12/2015)

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 11:

SCH 6 and 7 (CarStickers.com \$41.50)

SCH 9 (Delta Apparel \$75.72)

SCH 9 and 10 (Express Press \$51.84 for business cards; \$81.09 for car magnet)

SCH 11 (Extreme Tees \$123.00)

SCH 12 (Ink Division \$187.86)

SCH 13 (StickersBanners.com \$40.00)

DOCUMENT REQUEST NO. 27:

All documents on which you will rely to support any claim that the RD Mark is sufficiently distinct from A&F Moose Design Marks so as to obviate any likelihood of confusion or mistake as to source or origin.

RESPONSE TO DOCUMENT REQUEST NO. 27:

Applicant will rely upon documents in the Public Domain of which the Tribunal may take Judicial Notice.

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 27:

See The World Book Encyclopedia, Volume 5, “D” article “Deer” published by The World Book, Inc. in 1989, pp. 88 and following. This is copyrighted volume which Applicant’s local FedExOffice will not allow her to copy because of copyright restrictions, despite Opposer’s lawyer’s demand that they do so, or that Applicant violate those rules.

See www.differencebetween.com/difference-between-deer-and-vs-moose/

The relevant pages are submitted with the hard copy of these responses, marked as SCH 0066 and SCH 0067.

The most relevant single sentence of the article is the following:

“Being the largest body-sized member of the deer family, moose is much different from other deer. Also, the unique shape of antlers serves the other major distinction between moose and deer.” [emphasis supplied]

Main Revised Statutes, Title 12, Section 1154 requires a permit to hunt “moose”. See SCH 0068.

Wikipedia Article on Moose [<http://en.wikipedia.org/wiki/Moose>] See SCH 0069

DOCUMENT REQUEST NO. 36:

All documents relating to the application for and registration of the RD Mark with the U.S. Copyright Office, including but not limited to the copyright application, deposit material, and any correspondence with the U.S. Copyright Office.

RESPONSE TO DOCUMENT REQUEST NO. 36:

Applicant objects to Document Request No. 36, on the grounds that it is burdensome and oppressive. Applicant declines to provide the documents that are part of the public record in the U.S. Patent and Trademark Office and/or the Trademark Trial and Appeal Board. Opposer already has access to these.

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 36:

Applicant is no longer able to locate her hard copy records of the copyright application, other than the one previously produced and marked SCH 5. Applicant has also misplaced her password to obtain access to the documents. Applicant will search for the password and hard copy of the documents and will advise Opposer if they are located.

DOCUMENT REQUEST NO. 46:

Any and all documents that support and/or rebut the allegations contained in the Notice of Opposition filed in this Action.

RESPONSE TO DOCUMENT REQUEST NO. 46:

Applicant objects to Document Request No. 46 as duplicative, burdensome, and not calculated to lead to the discovery of admissible evidence. See Responses above.

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 46:

All responsive documents have been produced.

DOCUMENT REQUEST NO. 47:

Any and all documents supporting or controverting the statements contained in Applicant's Answer.

RESPONSE TO DOCUMENT REQUEST NO. 47:

Applicant objects to Document Request No. 46 as duplicative, burdensome, and not calculated to lead to the discovery of admissible evidence. See Responses above.

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 47:

All responsive documents have been produced.

DOCUMENT REQUEST NO. 48:

Any and all documents upon which you rely to defend against A&F's Opposition.

RESPONSE TO DOCUMENT REQUEST NO. 48:

See Responses above.

AMENDED RESPONSE TO DOCUMENT REQUEST NO. 48:

All responsive documents have been produced.

Dated: May 13, 2015

Respectfully submitted,

/s/

Isabella Schnittger
121B Duffie Road
Simpsonville, SC 29681
(864) 228-7829
isaartdesign7@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Applicant's Amended Responses To Opposer's First Request For Production Of Documents And Things has been served on Opposer Abercrombie & Fitch Trading Co., on May __, 2015 via email to Susan M. Kayser (skayser@jonesday.com) and Jessica D. Bradley (jbradley@jonesday.com), pursuant to agreement of the parties.

Isabella Schnittger

*Abercrombie and Fitch Trading Co. v.
Schnittger, Isabella Elisabeth*

Opposition No. 91218738

Offering Party: Abercrombie and Fitch
Trading Co.

Appendix 2

**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.	§	

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. On January 15, 2016, Opposer timely filed and served the Rebuttal Testimony Affidavit of Reid M. Wilson (22 TTABVUE 1-113) through the TTAB ESTTA system. However, Opposer recently discovered that the content of Exhibit 37 to the Rebuttal Testimony Affidavit (22 TTABVUE 101-113) did not upload or display correctly on the TTABVUE system, and shows only the pdf headers and footers without the images and text contained therein.
3. A true and correct copy of Exhibit 37, as was filed on ESTTA on January 15, 2016, and as it was served on Applicant on January 15, 2016, is attached hereto as Exhibit A.
4. Applicant did not produce during discovery the documents in Exhibits A, B or D to Applicant’s original testimony affidavit. (19 TTABVUE 8-12, 15-16.)

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on April 6, 2016.

/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 April 6 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

/Allison E. Prevatt/
Allison E. Prevatt

*Attorney for Opposer
Abercrombie and Fitch Trading Co.*

*Abercrombie and Fitch Trading Co. v.
Schnittger, Isabella Elisabeth*

Opposition No. 91218738

Offering Party: Abercrombie and Fitch
Trading Co.

Appendix 2

Exhibit A

*Abercrombie and Fitch Trading Co. v.
Schnittger, Isabella Elisabeth*

Opposition No. 91218738

Offering Party: Abercrombie and Fitch
Trading Co.

**Rebuttal Testimony
Wilson Affidavit
Exhibit 37**

20% OFF ENTIRE PURCHASE + FREE SHIPPING OVER \$75. USE CODE: 15730 *See Details*

WHAT'S NEW JUST YOUR STYLE

EST. 1892

Abercrombie
& Fitch
NEW YORK

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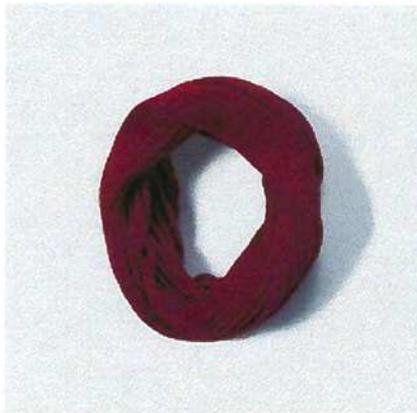
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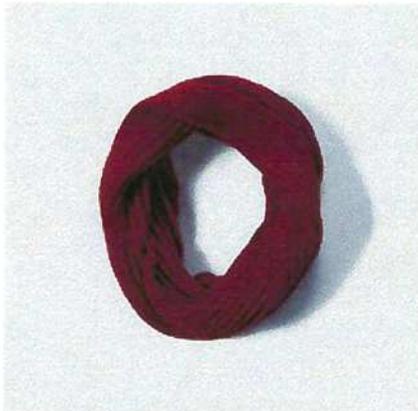
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