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

Proceeding	91218738
Party	Plaintiff Abercrombie & Fitch Trading Co.
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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 REPLY BRIEF

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Applicant Ms. Isabella Elisabeth Schnittger (hereinafter “Applicant” or “Ms. Schnittger”) does not cite any legal or factual support in her Trial Brief (30 TTABVUE)¹ to rebut the conclusion that registration of Application No. 86/152,857 (“Applicant’s Mark”), a full-bodied, four-legged animal with antlers in silhouette form, used on identical goods, and sold to the same consumers in the same trade channels, will cause a likelihood of confusion and/ or trademark dilution of Opposer’s famous A&F Mark.²

I. THE PARTIES’ MARKS HAVE A SIMILAR OVERALL COMMERCIAL IMPRESSION

Without regard to applicable precedent, Applicant mistakenly directs the Board to consider the marks in a side-by-side comparison. *Nike, Inc. v. Peter Maher and Patricia Hoyt Maher*, 100 U.S.P.Q.2d 1018 (TTAB 2011) (“we consider the marks, not as they would compare if subjected to a side-by-side comparison, but rather in terms of whether the marks are sufficiently similar in their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result.”); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (“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.”) *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”).

¹ Applicant’s Trial Brief contains numerous assertions that are neither law nor evidence before the Board in the above-captioned Opposition. This Reply Brief and Appendix address only those assertions which relate to the present Opposition.

² 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. 3,065,016; 4,551,991; 3,964,371; 4,168,384; 3,212,644; and 3,574,198.

Applicant's Mark and A&F's Mark evoke a very similar commercial impression. (28 TTABVUE 21-23, Opposer's Trial Brief, § V.C.1.a). It is the general impression consumers have of a design mark, not the minute differences, that is relevant. TMEP § 1207.01(c) (“[C]onsideration 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.”); *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”). Applicant's attempt to emphasize technical species classifications (30 TTABVUE 5, ¶ 2) has no bearing on the Board's assessment or consumer's view of whether there is likely to be confusion between the marks. It is how the marks are viewed, not what technical species they may represent, that is relevant. Trademarks are to be “compared in their entirety and must be considered in connection with the particular goods or services for which they are used.” *See In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750 (Fed. Cir. 1985).

Moreover, Applicant does not cite any law to dispute or distinguish the numerous precedential cases where the Board has held that marks consisting of wild animal designs within the same family evoke the same commercial impression and are likely to cause confusion. *See, e.g.* Opposer's Trial Brief (28 TTABVUE 22-23) *citing 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”).

The dominant feature of both parties’ marks are “profiles of full-bodied, four-legged animals with antlers in silhouette form,” standing in similar positions. (28 TTABVUE 23-24, Opposer’s Trial Brief; 13 TTABVUE 6, Joint Stip. ¶ 12.) Applicant’s inclusion of the words “Red Deer” with her mark is insufficient to prevent confusion resulting from the similarity of the dominant animal design because “consumers are likely to ‘read’ what they see, regardless of what the word below the design actually says.” *Kangol, Ltd. v. KangaROOS U.S.A., Inc.*, 974 F.2d 161, 163 (Fed. Cir. 1992)(finding likelihood of confusion between applicant’s trademark “KANGOL and Kangaroo design” for golf shirts based on opposer’s “KangaROOS and kangaroo design” for athletic shirts).³

I. APPLICANT DOES NOT DISPUTE MULTIPLE DUPONT FACTORS WEIGHING IN SUPPORT OF LIKELIHOOD OF CONFUSION

Applicant concedes that Application No. 86/152,857 covers identical goods to A&F’s prior registrations and acknowledges that the channels of trade overlap. (13 TTABVUE 6, Joint Stip. ¶¶ 14-16; 30 TTABVUE 5, Applicant’s Trial Brief.) Further, Applicant does not dispute

³ Applicant postures that the “public’s right to use images of a different species in [sic] animal kingdom” is at issue in this case. (30 TTABVUE 6, Applicant’s Trial Brief.) Opposer respectfully disagrees with Ms. Schnittger’s characterization of the scope of this proceeding. There are no third-party registrations entered into evidence, nor are any third-party marks at issue in this proceeding. At issue in this Opposition is Application No. 86/152,857 – a confusingly similar antlered animal design on identical goods and trade channels – which is likely to cause confusion between A&F’s valid prior registrations and Applicant’s Mark, and dilute the distinctiveness of the famous A&F Mark. *Nike, Inc. v. Maher*, 100 USPQ2D 1018, 1030-1031 (TTAB 2011) (“Were opposer to make an exception to its policy not to allow third parties to use marks of the structure ‘just ... it’ for any reason, opposer's mark's ability to uniquely identify opposer as a single source and thus maintain its selling power would be impaired.”).

that the following *DuPont* factors favor a finding of likelihood of confusion: the A&F Mark is famous, the channels of trade and customers are identical, purchasers of ordinary consumer items such as apparel exercise a lower degree of care, there are no similar third-party marks or registrations in use on similar goods, and Opposer uses the A&F Mark on a variety of goods. (28 TTABVUE 25-38, Opposer’s Trial Brief.)

II. APPLICANT DOES NOT DISPUTE APPLICANT’S MARK IS LIKELY TO DILUTE A&F’S MARK

Applicant affirmatively states that A&F is a “well-known” company and does not dispute that A&F’s Mark is a distinctive, famous mark with substantial nationwide reach and substantial actual recognition pre-dating Applicant’s use of her mark. (30 TTABVUE 4, Applicant’s Trial Brief). Applicant neither addresses nor disputes that her mark is likely to cause dilution by blurring and dilution by tarnishment of the famous A&F Mark.

III. CONCLUSION

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: May 23, 2016

Respectfully submitted,

/Susan M. Kayser/

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APPENDIX 1 – OPPOSER’S PROCEDURAL AND EVIDENTIARY OBJECTIONS TO APPLICANT’S TRIAL BRIEF

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Reply Brief has been served on Applicant, Isabella Elisabeth Schnittger, on May 23, 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.*

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

**OPPOSER’S PROCEDURAL & EVIDENTIARY OBJECTIONS TO APPLICANT’S
TRIAL BRIEF**

Opposer Abercrombie & Fitch Trading Co. (“Opposer” or “A&F”) asserts the following evidentiary objections to Applicant Isabella Elisabeth Schnittger’s (“Applicant” or “Ms. Schnittger”) Trial Brief filed April 28, 2016 (30 TTABVUE) (“Applicant’s Trial Brief”). Opposer maintains all evidentiary objections asserted in Appendix 1 to Opposer’s Trial Brief (28 TTABVUE 58-71) and hereby incorporates the same.

APPLICANT’S EVIDENCE	GROUNDS FOR OBJECTION
1. Applicant’s Trial Brief (30 TTABVUE 4 ¶ 1, fifth and sixth sentences).	Applicant’s statements about the “sixty species in the deer family” and definition, “[t]he deer family is defined by having antlers, including not only moose, but also Brocket deer, caribou and reindeer, Chinese water deer, Chital (Axis deer), elk, fallow deer, Huemul, marsh deer, mule deer, musk deer, Pere David’s deer, Pudu, Red deer, roe deer, or white tail deer” are an impermissible attempt to submit new evidence with a

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>brief. Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 539 (“Evidence may not be submitted with a brief, with the exception of a proper request for judicial notice.”); <i>Lincoln National Corp. v. Anderson</i>, 110 USPQ2d 1271, 1274 n.5 (TTAB 2014) (evidence submitted for the first time with applicant’s trial brief not considered).</p> <p>The statements are also irrelevant to the determination of any issue in this case, which involves a comparison between the marks, not a comparison between the species of animal that purportedly inspired the marks. Fed. R. Evid. 401; <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 entirety and must be considered in connection with the particular goods or services for which they are used.”).</p>
<p>2. Applicant’s Trial Brief (30 TTABVUE)</p>	<p>Applicant did not effectively serve a copy of Applicant’s Trial Brief on Opposing Counsel. Applicant did not serve a copy of Applicant’s Trial Brief through electronic mail pursuant to the parties’ agreement for electronic service under TBMP § 113.04, nor did Applicant use one of the other five permissible methods of service under Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 113.04.</p>

APPLICANT'S EVIDENCE	GROUNDS FOR OBJECTION
	<p>Applicant entered A&F's counsels' e-mail addresses on the ESTTA submission, "copying" counsel on the USPTO ESTTA filing receipt. Service of the ESTTA receipt transmitted notice of the filing but did not serve a copy of the document filed, therefore it did not meet the requirement service pursuant to CFR 2.119(a).</p>

Dated: May 23, 2016

Respectfully submitted,

Attorneys for Abercrombie & Fitch Trading Co.

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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 May 23, 2016, via email at isartdesign7@aol.com and myreddear@aol.com pursuant to the agreement of the parties.

/Allison E. Prevatt /

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