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United States Patent Trademark Office
Madison Building
600 Dulany St.
9th Floor West Wing
Alexandria, VA. 22313

Re: Body Culture Trial Brief
Serial # 78/487664
Methven & Associates File #2399.1

To Whom it May Concern,

Please find enclosed the following documents:

Appellant's Trial Brief
Declaration of Reece Halpern in Support of Appellant's Trial Brief
Declaration of Manson Leung in Support of Appellant's Trial Brief

Should you have any further questions please contact the offices of Methven & Associates at 510-649-4019.

Regards,



Jenn Fanslow
Office Manager



08-24-2005

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BODY CULTURE, INC., formerly TAI, KIT YUK EJI

7
8 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
9

10 BODY CULTURE, INC.,	)	ESTTA No.: 41532
	)	Serial No. 78/487664
11 Appellant,	)	Mark: ABEBA
12 v.	)	International Class: 025 Lingerie, bodysuits,
	)	pantyhose, boxer shorts, swimsuits, swimming
13 UNITED STATES PATENT &	)	trunks, nightwear, camisoles, shirts, sweaters,
TRADEMARK OFFICE,	)	dresses, pants, skirts, coats, jackets, suits,
14	)	bathing suits, scarves, belts, gloves, hats,
	)	t-shirts, sweatshirts, jogging suits and
15 Respondent.)	sweatpants

Office Action Final Refusal: June 1, 2005

16 **APPELLANT'S TRIAL BRIEF**

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18 **APPELLANT'S TRIAL BRIEF**

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21 Introduction

22 Appellant BODY CULTURE, INC. is in the business of selling women's clothing.
23 Appellant has filed an application to register the mark ABEBA as a trademark for "**lingerie,**
24 **bodysuits, pantyhose, boxer shorts, swimsuits, swimming trunks, nightwear, camisoles,**
25 **shirts, sweaters, dresses, pants, skirts, coats, jackets, suits, bathing suits, scarves, belts,**
26 **gloves, hats, t-shirts, sweatshirts, jogging suits and sweatpants.**" Appellant's application does
27 not include footwear.
28

APPELLANT'S TRIAL BRIEF

1 Respondent has issued a Final Refusal Office Action on the grounds that there is a
2 likelihood of confusion between Appellant's mark and a mark that has been registered for use
3 with **footwear** (U.S. Registration No. 2233656). In Respondent's April 27, 2005 Office Action,
4 Respondent states that "Considering that (1) producers of footwear often produce clothing, (2)
5 these goods are complementary, and (3) these goods are marketed through the same channels of
6 trade to the same consumers, the goods of the two marks are related such that there would be a
7 likelihood of confusion if both marks were registered."

8 Accompanying this appellant brief is a Declaration from Appellant's attorney, Reece
9 Halpern, wherein he states that Exhibits A through E of this appellant brief are true and accurate
10 copies of information available online from the source identified in each exhibit.

11 12 13 Facts

14 On March 23, 1999, the mark ABEBA was registered to the German company ABEBA
15 Spezienschuh-Ausstatter GmbH for use with "footwear." A copy of the USPTO's TESS listing
16 for that registration is attached as Exhibit A. According to the owner's website at
17 http://www.abeba.com/Englisch/index_2.php the owner of the mark is a manufacturer of "safety,
18 protective and professional shoes." See Exhibit B for a copy of the owner's website description
19 of their shoes. The owner's website further describes the shoes as "anti-static shoes or ESD shoes
20 [that] can play an important part in keeping static electricity in check" and skid-resistant shoes.
21 See Exhibit C for a copy of the owner's website description of their anti-static shoes. See Exhibit
22 D for a copy of the owner's website description of their skid-resistant shoes. It does not appear
23 that the owner manufactures any products other than "safety, protective and professional shoes."

24 On September 22, 2004, Appellant filed an application to register the mark ABEBA for
25 use with "lingerie, bodysuits, pantyhose, boxer shorts, swimsuits, swimming trunks, nightwear,
26 camisoles, shirts, sweaters, dresses, pants, skirts, coats, jackets, suits, bathing suits, scarves,
27 belts, gloves, hats, t-shirts, sweatshirts, jogging suits and sweatpants." Appellant's business
28 focuses exclusively on women's clothing. Accompanying this appellant brief is a Declaration

1 from Appellant's president, Manson Leung, wherein he states that, Appellant "is not now and
2 never will be in the business of selling safety, protective and professional shoes."

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5 Argument

6 Respondent believes there is a likelihood of consumer confusion between the use of
7 ABEBA on women's clothing (lingerie, bodysuits, pantyhose, etc.) and the use of ABEBA on
8 footwear (anti-static and skid-resistant shoes).

9 In considering the likelihood of confusion of marks on related items of wearing apparel,
10 the Trademark Board at one time went so far as to state that the use of an identical or
11 substantially identical mark on items of wearing apparel "no matter how different they may be, is
12 likely to cause confusion in trade as to source." In re Sox Unlimited, Inc., 169 U.S.P.Q. 682
13 (T.T.A.B. 1971).

14 However, the Trademark Board in 1984 backed off from this generalization and
15 disapproved of such a sweeping rule for wearing apparel. As is seen from the following cases, the
16 per se rule for wearing apparel has been abandoned in favor of a case-by-case analysis of the
17 particular facts and circumstances.

18 The court in In re British Bulldog, Ltd., 224 U.S.P.Q. 854 (T.T.A.B. 1984) observed that
19 "the question to be determined in this case is whether men's underwear, on the one hand, and
20 shoes, on the other hand, are so related that their contemporaneous sale by different parties under
21 these similar marks would be likely to cause confusion as to source." The court went on to
22 conclude that there was no likelihood of consumer confusion since men's underwear and men's
23 shoes are distinctly different in nature, would be displayed in different sections of a store, and are
24 not complementary or companion items. Appellant believes the same reasoning is equally
25 applicable to the sale of women's clothing (lingerie, bodysuits, pantyhose, etc.) and the sale of
26 anti-static and skid-resistant shoes.

27 The court in In re Shoe Works, Inc., 6 U.S.P.Q.2d 1890 (T.T.A.B. 1988) observed that
28 there was no likelihood of confusion between the use of PALM BAY for women's shoes and

1 PALM BAY for shorts and pants.

2 The court in *H. Lubovsky, Inc. v. Esprit de Corp.*, 228 U.S.P.Q. 814 (S.D.N.Y. 1986)
3 observed that the use of ESPRIT on shoes would not cause confusion with use of the same mark
4 on wearing apparel. The court went on to note that “shoes are generally sold in shoe stores or
5 shoe departments of department stores. Most frequently, therefore, they are either in a different
6 store, or a different department, from sportswear. Plaintiff’s and defendant’s lines, furthermore,
7 exhibit quite different styles, aiming at different clientele.” Appellant believes the same
8 reasoning is equally applicable to the sale of women’s clothing (lingerie, bodysuits, pantyhose,
9 etc.) and the sale of anti-static and skid-resistant shoes.

10 Respondent’s June 1, 2005 Office Action concludes as follows:

11 “The goods “pantyhose” of the proposed mark are complementary with
12 “footwear” as both are worn on the feet. Therefore these goods are often sold
13 together. Additionally, the goods “lingerie, bodysuits, boxer shorts, swimsuits,
14 swimming trunks, nightwear, camisoles, shirts, sweaters, dresses, pants, skirts,
15 coats, jackets, suits, bathing suits, scarves, belts, gloves, hats, t-shirts, sweatshirts,
16 jogging suits and sweatpants” are various types of clothing, which is often sold
17 and marketed through the same channels of trade as “footwear.”

18 Appellant believes it defies logic for anyone to argue that the purchasers of lingerie and
19 pantyhose will be shopping in the same department or the same store for anti-static, skid-resistant
20 “safety, protective and special work shoes.” **Furthermore, according to the website of the**
21 **manufacturer of these shoes, “Our products are only available at specialised dealers for**
22 **professional shoes.”** See Exhibit E for a copy of the online description of the shoe
23 manufacturer’s distribution information.

24 There is no reasonable likelihood of consumer confusion resulting from Appellant’s use
25 of the mark ABEBA on women’s clothing (lingerie, bodysuits, pantyhose, etc.).
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Conclusion

For all of the foregoing reasons, Appellant respectfully requests that Respondent's final refusal regarding application Serial No. 78/487664 be overruled and said application be published for public comment.

Dated: August 22, 2005

METHVEN & ASSOCIATES,
Attorneys for Appellant
BODY CULTURE, INC.

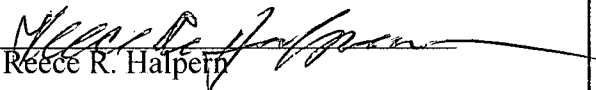
By 
Reece R. Halperin

Exhibit A

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The screenshot shows a Microsoft Internet Explorer browser window with the following details:

- Address bar: <http://tess2.uspto.gov/bin/showfield?f=doc&state=idra4g.2.2>
- Search bar: Search Web
- Navigation buttons: Back, Forward, Home, Stop, Refresh, Print, Mail, My Yahoo!, Games, Personals
- Page content: A stylized logo for 'ABEBA' with a wavy underline.
- Table of trademark information:

Word Mark	ABEBA
Goods and Services	IC 025, US 022 039, G & S: footwear, FIRST USE: 19881231, FIRST USE IN COMMERCE: 19970728
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	75367298
Filing Date	October 2, 1997
Current Filing Basis	1A,44E
Original Filing Basis	1A,44D
Published for Opposition	December 29, 1998
Registration Number	2233856
Registration Date	March 23, 1999
Owner	(REGISTRANT) ABEBA Spezialschuh-Ausstatter GmbH CORPORATION FED REP GERMANY Schlackenbergrasse 7 86386 St. Ingbert
Attorney of Record	RAYMOND J LILLIE
Priority Date	April 5, 1997
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15, SECT 8 (8-YR)
Live/Dead Indicator	LIVE

At the bottom of the browser window, the taskbar shows the Start button, several application icons, and the system tray with the time 2:32 PM.

Exhibit B

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The screenshot shows a Microsoft Internet Explorer browser window. The title bar reads "Willkommen bei ABEBA - Online - Microsoft Internet Explorer". The address bar contains "http://www.abeba.com/Englisch/index_2.php". The page content includes the ABEBA logo, a navigation menu with "Home", "Imprint", and "SiteMap", and a main section titled "About us" with the text: "Dear client, as a manufacturer of safety, protective and professional shoes, our production is subject to the quality assurance system, DIN EN ISO 9001 : 2000. At the same time the requirements of the European norm, EN 20344 - 20347 and EN ISO 20344 - 20347 are leading for us. (Please look at the respective article description)". The browser's taskbar at the bottom shows the Start button, several application icons, and the system tray with the time "2:36 PM".

Exhibit C

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Willkommen bei ABEBA - Online - Microsoft Internet Explorer

File Edit View Favorites Tools Help


Back Forward Stop Home Search Favorites Media

Address http://www.abeba.com/Englisch/index_2.php Go Links

Y! Search Web Mail My Yahoo! Games Personals Music

Home Impressum Sitemap



News About Us Contact Us Services Products Contact

equipment. This causes downtime and repair delays with total worldwide costs estimated to amount to \$1 billion per year. Static discharges (spark generation) can also cause explosions, in the varnish industry for instance.

What role can "anti-static shoes" play?

In addition to many other important safety requirements, anti-static shoes or ESD shoes can play an important role in preventing static electricity in check. They help to prevent the wearer from becoming statically charged.

When can a shoe be termed "antistatic"?

A shoe can be termed as being antistatic when its electrical resistance is measured between 10⁶ and 10⁹ Ohm.

Start I. T. W. A. W. D. Internet 2:45 PM

Exhibit D

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Willkommen bei ABEBA - Online - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites Media

Address http://www.abeba.com/Englisch/index_2.php Go Links

Search Web Mail My Yahoo! Games Personals Music

Home Product Situations

[News](#) [About Us](#) [Product information](#) [Products](#) [Contact](#)

ISO 9001
Skid-resistance
DIN EN
Grade of shoe
HAACP - Production
Symbols
Skid-resistance on vehicle

Skid-resistance of safety, protective and special work shoes

In Germany, the safety requirements and testing procedures to determine the skid-resistance of safety shoes are stipulated by the DIN 4843 standard, part 100.

This standard has been in force in Germany since 1st. August 1993.

Which factors play a role with regard to skid-resistance ?

- type of flooring
- soiled state of the floor or shoe sole due to skid-enhancing substances (e.g. oil)

Start | Internet 2:48 PM

Exhibit E

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Willkommen bei ABEBA - Online - Microsoft Internet Explorer

File Edit View Favorites Tools Help

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Address http://www.abeba.com/Englisch/index_2.php

Refresh Search Web Mail My Yahoo! Games Personals Music

ABEBA

R2
DIN 3473 EN

Home English Site map

News About Us Product Information Products Contact

About Us
Address
ASCO by Teviba

Our products are only available at specialised dealers for professional shoes, meanwhile in more than 2.000 shops in many countries all over the world.

Should you desire additional information concerning our range of products, please do not hesitate to contact the specialised trade.

We develop and produce shoes for you.

Many thanks for your confidence!

Start | I. | T. | W. | D. | 2:55 PM

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13 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
14 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
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10	BODY CULTURE, INC.,)	ESTA No.: 41532
11	Appellant,)	Serial No. 78/487664
12	v.)	Mark: ABEBA
13	UNITED STATES PATENT &	)	International Class: 025 Lingerie, bodysuits,
14	TRADEMARK OFFICE,	)	pantyhose, boxer shorts, swimsuits, swimming
15	Respondent.	)	trunks, nightwear, camisoles, shirts, sweaters,
16		)	dresses, pants, skirts, coats, jackets, suits,
17		)	bathing suits, scarves, belts, gloves, hats,
18		)	t-shirts, sweatshirts, jogging suits and
19		)	sweatpants
20		)	Office Action Final Refusal: June 1, 2005
21)	DECLARATION OF MANSON LEUNG IN
22)	SUPPORT OF APPELLANT'S TRIAL
23)	BRIEF

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21 I, MANSON LEUNG, declare:
22
23 1. I am the President of Body Culture, Inc., a Nevada corporation in good standing. My
24 business address is 5736 California Street, San Francisco, CA 94121. Each of the matters set
25 forth below is within my personal knowledge and, if called upon, I am competent to – and will
26 – testify in person to them.
27
28 2. Body Culture, Inc. is a wholesaler of the following women's clothing: lingerie,
29 bodysuits, pantyhose, boxer shorts, swimsuits, swimming trunks, nightwear, camisoles, shirts,
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1 sweaters, dresses, pants, skirts, coats, jackets, suits, bathing suits, scarves, belts, gloves, hats,
2 t-shirts, sweatshirts, jogging suits and sweatpants.

3 3. Body Culture, Inc. does not sell anything other than women's clothing.

4 4. Body Culture, Inc. is not now and never will be in the business of selling safety,
5 protective and professional shoes.

6 I declare under penalty of perjury that the foregoing is true and correct, and that this
7 Declaration was executed in San Francisco, California on August 19th, 2005.

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MANSON LEUNG

1 BRUCE E. METHVEN (California Bar No. 095486)
REECE R. HALPERN (California Bar No. 151291)
2 LOUISE M. QUINTARD (California Bar No. 106230)
METHVEN & ASSOCIATES
3 2232 Sixth Street
Berkeley, California 94710
4 Telephone: (510) 649-4019
Facsimile: (510) 649-4024

5 Attorneys for Applicant
6 BODY CULTURE, INC., formerly TAI, KIT YUK EJI

7
8 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
9

10 BODY CULTURE, INC.,	)	ESTTA No.: 41532
	)	Serial No. 78/487664
11 Appellant,	)	Mark: ABEBA
	)	International Class: 025 Lingerie, bodysuits,
12 v.	)	pantyhose, boxer shorts, swimsuits, swimming
	)	trunks, nightwear, camisoles, shirts, sweaters,
13 UNITED STATES PATENT &	)	dresses, pants, skirts, coats, jackets, suits,
TRADEMARK OFFICE,	)	bathing suits, scarves, belts, gloves, hats,
14 Respondent.	)	t-shirts, sweatshirts, jogging suits and
	)	sweatpants
15)	
16	)	Office Action Final Refusal: June 1, 2005
17)	
18	)	DECLARATION OF REECE HALPERN
19	)	IN SUPPORT OF APPELLANT'S TRIAL
20	)	BRIEF

21 **DECLARATION OF REECE HALPERN IN SUPPORT OF**
22 **APPELLANT'S TRIAL BRIEF**

23
24 I, REECE HALPERN, declare:

25 1. I am an attorney licensed to practice law in California. My business address is 2232
26 Sixth Street, Berkeley, CA 94710. Each of the matters set forth below is within my personal
27 knowledge and, if called upon, I am competent to – and would – testify in person to them.

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DECLARATION OF REECE HALPERN
IN SUPPORT OF APPELLANT'S TRIAL BRIEF

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2. I am providing legal counsel to Body Culture, Inc., a Nevada corporation in good standing.

3. I have prepared Appellant's Brief to be filed in the above-referenced matter.

4. Exhibits A through E attached to Appellant's Trial Brief are true and accurate copies of information available online from the source identified in each exhibit.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed in Berkeley, California on August 22, 2005.


REECE HALPERN

**DECLARATION OF REECE HALPERN
IN SUPPORT OF APPELLANT'S TRIAL BRIEF**