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Filing date: **06/22/2020**

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

Proceeding	91239143
Party	Plaintiff W-D Apparel Company, LLC
Correspondence Address	PAUL J KENNEDY PEPPER HAMILTON LLP 3000 TWO LOGAN SQUARE, EIGHTEENTH AND ARCH STREETS PHILADELPHIA, PA 19103-2799 UNITED STATES kennedyp@pepperlaw.com, mcconnells@pepperlaw.com, catalant@pepperlaw.com, pearlmaj@pepperlaw.com 215-981-4194
Submission	Opposition/Response to Motion
Filer's Name	Paul J. Kennedy
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Signature	/Paul J. Kennedy/
Date	06/22/2020
Attachments	Opposition to Motion to Enforce with Exhibits.pdf(975891 bytes)

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

W-D APPAREL COMPANY, LLC, and	:	
IW APPAREL, LLC, as intended	:	Opposition No. 91239143
substitution party per assignment	:	
	:	
Opposer	:	Mark: TERRA LUXE
	:	
v.	:	Application Serial No.: 86/933826
	:	
L2 APPAREL GROUP LLC	:	Published in <i>Official Gazette</i>: November 28,
	:	2017
	:	
	:	Filed: March 9, 2016
Applicant	:	
	:	

**OPPOSER’S OPPOSITION TO APPLICANT’S MOTION TO
ENFORCE DISCOVERY ORDER AND TO EXTEND DEADLINES**

Opposer W-D Apparel Company, LLC, and IW Apparel, LLC, as intended substitution party per assignment, (“Opposer”), by and through its undersigned attorneys, submits this opposition to Applicant L2 Apparel Group LLC’s (“Applicant”) Motion to Enforce Discovery Order and to Extend Deadlines (“Motion”). Applicant’s Motion should be denied because Opposer fully and timely complied with that Order. Further, Applicant’s motion to extend to allow time to file a summary judgment motion should be denied because the request is untimely and Applicant cannot demonstrate that its failure to act was the result of excusable neglect.

I. BACKGROUND

On January 31, 2020, the Board issued an order partially granting Applicant's Motion to Compel ("Discovery Order"). (34 TTABVUE). Therein, the Board only granted Applicant's Motion to Compel "to the extent that Opposer's boilerplate objections are overruled" and Opposer was ordered to provide supplemental responses to Applicant's Interrogatories Nos. 2 and 7 and Production Request No. 17 within thirty days. (*Id.*, at 3). The Board also acknowledged that Opposer "cannot answer or produce evidence that it does not have, but... must so state in its verified responses." (*Id.* at 4). The Board further found that "Opposer has stated it has provided the information and documents in its possession, custody and control, it has responded to the best of its ability to Applicant's discovery requests." (*Id.* at 6). In keeping with this finding, the Board further ordered Opposer to "clarify its verified responses [to Interrogatory No. 7 and Document Request No. 17] in line with this order." (*Id.* at 6-7).

On March 2, 2020, in compliance with the Discovery Order, Opposer served Applicant with Supplemental Answers to Interrogatories Nos. 2 and 7 and a Supplemental Response to Request for Production No. 17. *See* Ex. "A." The text of Opposer's supplemental responses are set forth below for the Board's convenience:

Interrogatory No. 2:

Identify every product that Opposer has offered, now offers, or has a bona fide intent to offer under Opposer's Mark and state the date and place of first use for each such product, whether such product is still being sold, whether each such product has been continuously sold since the first date of use thereof to the present time; if any of such products were not offered continuously, state the periods of sales and the reasons for such discontinuities.

Answer: Opposer objects to this Interrogatory to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer previously stated, and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer's Marks have continuously been in use in connection with footwear as set forth in Opposer's U.S. Registrations No. 2115071 and No. 2449316, respectively. In support of this, Opposer produced detailed sales records from 2010 to 2018 for a wide array of footwear (including work boots, athletic, and casual shoes), namely the documents with Bates Nos. WDAC000604-WDAC000908.

Opposer further verifies that it has offered and continues to offer and sell a wide array of non-footwear clothing and safety products, namely: safety equipment, namely reflective safety vests; men's and women's industrial work related garments for protection against accidents including reflective clothing, namely industrial grade coveralls and overalls, industrial grade work pants and work jeans, industrial grade work outerwear jackets and parkas, industrial grade work vests, industrial grade work shirts, and industrial grade quilted flannel shirts and industrial grade flannel shirts; clothing, namely gloves; men's and women's industrial work related garments not for safety or reflective purposes, namely, industrial grade coveralls and overalls,

industrial grade work pants and work jeans, industrial grade work outerwear jackets and parkas, industrial grade work vests, industrial grade work shirts, and industrial grade quilted flannel shirts and industrial grade flannel shirts. In support of this, Opposer produced detailed sales records of ongoing sales in the United States of Opposer's non-footwear products sold under Opposer's Marks from 2016 to the present (namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917); representative invoices which identify the name of the customer, date of sale, item number/product code, product description and sales data showing delivery to customers in the United States (namely the documents with Bates Nos. WDAC00535-WDAC00546); and representative product catalogs identifying the entire line of products, by item number/product code, which are being marketed, offered for sale, and sold in the United States (namely, the documents with Bates Nos. WDAC00430-WDAC00473).

Opposer herein verifies that it does not possess any other document which would be responsive to this Interrogatory.

Interrogatory No. 7:

For each product identified in response to Interrogatory No. 2, state the dollar and unit volume of sales of each product sold under Opposer's Mark on an annual basis since the date of first use of each such product.

Answer: Opposer objects to this Interrogatory to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer has previously stated and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer produced all documents that it possesses from 2010 to 2018 of sales of its footwear products in the United States. (*See* documents with Bates Nos. WDAC000604-WDAC000908). Opposer has also produced all documents reflecting the sale of clothing products under Opposer's Mark in the United States from 2016 to 2018, namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917.

Opposer herein verifies that it does not possess any other document which would be responsive to this Interrogatory.

Request For Production No. 17

Documents sufficient to establish Opposer's sales of Opposer's Goods in dollars and units on an annual basis for each product offered for sale by Opposer under Opposer's Mark from 2012 to date.

RESPONSE: Opposer objects to this Request to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer has previously stated and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer has produced documents summarizing sales of its products in the United States. Opposer produced detailed sales records from 2010 to 2018 for its footwear products, namely the documents with Bates Nos. WDAC000604-WDAC000908. Summaries of annual sales (units and revenues) are reflected in documents with Bates Nos. WDAC000658, 669, 690, 821, and 908. Opposer also produced documents reflecting the sale of clothing products under Opposer's Mark, namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917.

Opposer herein verifies that it does not possess any other document which would be responsive to this Request.

See Ex. "A."

On April 30, 2020, Applicant's counsel sought Opposer's counsel consent to extend the proceedings by thirty (30) days, which Opposer agreed to provide. *See Ex. "B."* Notably absent from these communications was any mention of Opposer's supplemental responses being deficient in any way. Nor was there any mention of any forthcoming or need to file a motion for summary judgment. The consented motion to extend was filed the same day (one day in advance of the deadline for Opposer's Pretrial Disclosures). (35 TTABVUE).

Opposer received no further communications from counsel for Applicant until Opposer was served with a copy of Applicant's instant Motion on June 1, 2020. The same day Opposer timely served its Pretrial Disclosures. *See Ex. "C."*

II. ARGUMENT

A. Opposer Remains in Full Compliance with the Board's Discovery Order

The Board's Discovery Order was clear. With respect to Interrogatory No. 2, the Board acknowledged that Opposer "cannot answer or produce evidence that it does not have." (34 TTABVUE, at 5). Notwithstanding, the Board stated that "Opposer must clarify its verified response to Interrogatory No. 2 in line with its representation in its response brief." (*Id.*). In accordance with that order, Opposer provided that clarified response to Interrogatory No. 2 on March 2, 2020. *See* Ex. "A", and text thereof, *infra*, pp. 3-4 above.

Similarly, with respect to Interrogatory No. 7 and Document Request No. 17, the Board concluded that "as Opposer has stated it has provided the information and documents in its possession, custody and control, it has responded to the best of its ability to Applicant's discovery requests." (34 TTABVUE, at 6). Accordingly, the Board denied Applicant's Motion to Compel in part as to Interrogatory No. 7 and Document Request No. 17 to the extent that Opposer answered and produced all that it knew or possessed. (*Id.*). Notwithstanding, the Board asked Opposer to clarify its verified responses "in line with this order." (*Id.* at 7.)

Again, in accordance with that order, Opposer provided its clarified responses to Interrogatory No. 7 and Request No. 17 on March 2, 2020. *See* Ex. "A", and text thereof, *infra*, pp. 4-5 above.

As is evident, Opposer has fully complied with the terms of the Discovery Order. Yet, for nearly three full months, Applicant sat silent - failing to voice a single concern about Opposer's supplemental responses or any perceived failing on Opposer's part to provide those responses. Instead, in its Motion, Applicant makes it appear that Opposer flatly ignored the Board's Discovery Order when clearly that is not the case.

The indisputable fact is Applicant was not denied any information required by the Discovery Order. Opposer was in timely and full compliance with the scope of the Discovery Order. Applicant's Motion is wholly without any merit and its request for sanctions and/or an extension should be denied.

B. The Deadline for Summary Judgment Motions Expired Prior to the Instant Motion and Applicant Cannot Demonstrate Any Excusable Neglect to Reopen that Period

In its Motion, Applicant is improperly seeking an extension of the deadline for it to file a motion for summary judgment. However, the deadline for filing a summary judgment motion (or seeking an extension to do so) expired prior to the filing of Applicant's Motion. Accordingly, Applicant's request is late and should be denied. Further, even if Applicant's Motion is construed as a Motion to Reopen Time, Applicant cannot demonstrate that its failure to act during the time allotted was the result of any excusable neglect.

1. Applicant Missed the Deadline to File or to Request an Extension to File a Motion for Summary Judgment

Here, as reset, the deadline for Opposer's pretrial disclosures was May 31, 2020. (See 35 TTABVUE, and entered 37 TTABVUE). Because May 31, 2020 fell on a Sunday, Opposer's pretrial disclosures were due on June 1, 2020. 37 CFR § 2.196 ("When the day, or the last day fixed by statute or by regulation under this part for taking any action...falls on a...Sunday,...the action may be taken...on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday.").

In order for Applicant to have timely filed a motion for summary judgment, that motion needed to be filed "**before the day of the deadline for pretrial disclosures** for the first testimony period, as originally set or as reset." 37 CFR § 2.127(e)(1) (emphasis added); *see also*

KID-Systeme GmbH v. Turk Hava Yollari Teknik Anonim, 125 USPQ2d 1415, 1416-17 (TTAB 2018) (motion for summary judgment must be filed the day before the deadline for pretrial disclosures) Alternatively, Applicant could have filed a motion to extend that deadline.

However, Rule 2.196 is not applicable to the deadline for filing a motion for summary judgment. *See Asustek Computer Incorporation v. Chengdu Westhouse Interactive Entertainment Co., Ltd.*, 128 USPQ2d 1470, 1471 (TTAB 2018) (Rule 2.196 inapplicable to provisions of the Trademark Rules which do not fix a particular date by which a motion must be filed. Accordingly, as the deadline for pretrial disclosures has passed, the Board will not consider any motion to compel or motion for summary judgment).

Here, if Applicant wanted to file a motion for summary judgment or for an extension of that deadline, it would have needed to make that filing any time *before* the June 1, 2020 deadline. Applicant's Motion, which includes a request to extend the deadline to file a motion for summary judgment was not filed before the pretrial disclosure deadline. Accordingly, the Motion is untimely and should be denied.¹

2. Applicant's Failure to Act in Timely Manner Is Not the Result of Excusable Neglect

"Where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion through ESTTA to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect." TBMP § 509.01(b)(1) (citing Fed. R. Civ. P. 6(b)(1)(B)).

¹ For similar reasons, to the extent Applicant attempts to construe this Motion as a further Motion to Compel, that motion is likewise untimely. *See Asustek Computer Inc.*, 128 USPQ2d at 1471.

In determining whether a party has shown excusable neglect, the Board employs the four-part *Pioneer* test set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993). See *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). Under the *Pioneer* test, the Board “must take into account all relevant circumstances surrounding the party’s omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.” TBMP 509.01(b)(1) and cases cited therein.

“It has been held that the third *Pioneer* factor, *i.e.*, ‘the reason for the delay, including whether it was within the reasonable control of the movant,’ may be deemed to be the most important of the *Pioneer* factors in a particular case.” *Id.* Here, Applicant’s failure to act in a timely manner was squarely within its control. Opposer provided its supplemental discovery responses in a timely manner on March 2, 2020. Applicant had nearly three full months to act and did nothing until after the trial portion of this proceeding had commenced. Applicant was even silent on its concerns when it reached out to Opposer for an extension request in April. See Ex. B. Accordingly, this factor weighs against finding there was any excusable neglect.

The second *Pioneer* factor also weighs against Applicant. Applicant had three months to file a motion for summary judgment and failed to do so. Permitting Applicant to reopen this time period to submit such a motion will result in a substantial delay and unduly burden the Board. As is evident from Applicant’s Motion – Applicant continues to make disputed arguments about the underlying facts of the parties’ respective claims and defenses –

which arguments will assuredly form the basis for any summary judgment motion Applicant would have filed. Such factual issues in dispute cannot be resolved on summary judgment.

Opposer submits the fourth *Pioneer* factor also weighs against Applicant. First, as noted above, Applicant misstated that Opposer failed to act in accordance with the Board's Discovery Order – insinuating that Opposer completely ignored that order when clearly that was not the case. Second, Applicant's silence leading up to the filing of this Motion, including during the parties' April correspondence, suggests no real concerns ever existed about Opposer's supplemental responses. Rather, Applicant is using the Motion and its false claims about Opposer to distract the Board from an otherwise meritless and belated attempt to reopen these proceedings.

Finally, Opposer has already been prejudiced by having to spend resources addressing this meritless motion. Opposer is further prejudiced by Applicant's unfounded claims that Opposer was ignoring the Board's Discovery Order. Should Applicant be given more time, Opposer will be further prejudiced by having to respond to a motion for summary judgment that could not conceivably be granted given the material issues of fact that are in obvious dispute.

As all factors weigh against Applicant, the Board cannot reasonably conclude that Applicant's failure to act in a timely manner to either file its motion for summary judgment or to extend the time to do so, was the result of excusable neglect. Accordingly, Applicant's motion for an extension (or to the extent the Board treats it as a motion to reopen) should be denied.

III. CONCLUSION

For the reasons set forth above, Applicant's Motion should be denied. Opposer is in full compliance with the Board's Discovery Order and nothing more can be compelled. Further, Applicant's belated Motion and Applicant's failure to act in a timely manner are not the

result of excusable neglect. Opposer requests the suspension be lifted and the dates for Opposer's trial testimony period be reset.

Respectfully submitted,

DATE: June 22, 2020

/Paul J. Kennedy/

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*Attorneys for Opposer,
W-D Apparel Company, LLC, and IW Apparel,
LLC, as intended substitution party per
assignment*

EXHIBIT “A”

McConnell, Sean P.

From: McConnell, Sean P. <mcconnes@pepperlaw.com>
Sent: Monday, March 2, 2020 3:46 PM
To: 'jmoskin@foley.com'
Cc: Kennedy, Paul; Catalano, Theresa
Subject: W-D Apparel Company, LLC v. L2 Apparel Group LLC - Opposition No. 91239143
Attachments: Opp No. 91239143 - Opposer_s Supplemental Answers to Interrogatories Nos. 2 & 7.PDF; Opp No 91239143 - Opposer_s Supplemental Response to Request for Production No. 17.PDF

Jonathan-

Please find attached Opposer's supplemental discovery responses.

Best-

Sean P. McConnell

Attorney at Law



3000 Two Logan Square | Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103-2799
p: 215.981.4252 | f: 800.886.2280 | [bio](#)

Effective April 1, 2020, Pepper Hamilton will combine with Troutman Sanders to become Troutman Pepper Hamilton Sanders LLP (Troutman Pepper). On that date, my email address will change, while my phone number will remain the same. My former Pepper Hamilton email address will work for a short time after April 1. The new Troutman Pepper will offer expanded capabilities and practice strengths while continuing to deliver powerful solutions to clients' legal and business issues with a hallmark focus on client care.

This email is for the use of the intended recipient(s) only. If you have received this email in error, please notify the sender immediately and then delete it. If you are not the intended recipient, you must not keep, use, disclose, copy or distribute this email without the author's prior permission. We have taken precautions to minimize the risk of transmitting software viruses, but we advise you to carry out your own virus checks on any attachment to this message. We cannot accept liability for any loss or damage caused by software viruses. The information contained in this communication may be confidential and may be subject to the attorney-client privilege. If you are the intended recipient and you do not wish to receive similar electronic messages from us in the future then please respond to the sender to this effect.

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

W-D APPAREL COMPANY, LLC	:	
	:	Opposition No. 91239143
Opposer	:	Mark: TERRA LUXE
v.	:	Application Serial No.: 86/933826
L2 APPAREL GROUP LLC	:	Published in <i>Official Gazette</i>: November 28,
	:	2017
Applicant	:	Filed: March 9, 2016

**OPPOSER’S SECOND SUPPLEMENTAL ANSWERS AND OBJECTIONS TO
APPLICANT’S FIRST SET OF INTERROGATORIES - NOS. 2 AND 7**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Trial and Appeal Board Manual of Procedure, Opposer W-D Apparel Company, LLC (“Opposer”), through counsel, hereby provides Applicant L2 Apparel Group LLC’s (“Applicant”) with the following, select, supplemental answers to Applicant’s First Set of Interrogatories (“Applicant’s Interrogatories”) as set forth below.

INTRODUCTORY STATEMENT

Opposer incorporates and restates by reference its Introductory Statement and Objections to Definitions from Opposer’s Responses and Objections to Applicant’s First Set of Interrogatories, originally served on Applicant on August 7, 2018. Opposer continues to reserve the right to supplement or amend its answers or objections pursuant to Rule 26 of the Federal Rules of Civil Procedure.

**SUPPLEMENTAL ANSWERS TO INTERROGATORIES NOS. 2 AND 7
IN VIEW OF JANUARY 31, 2020 TTAB ORDER (34 TTABVUE)**

Interrogatory No. 2:

Identify every product that Opposer has offered, now offers, or has a bona fide intent to offer under Opposer's Mark and state the date and place of first use for each such product, whether such product is still being sold, whether each such product has been continuously sold since the first date of use thereof to the present time; if any of such products were not offered continuously, state the periods of sales and the reasons for such discontinuities.

Answer: Opposer objects to this Interrogatory to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer previously stated, and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer's Marks have continuously been in use in connection with footwear as set forth in Opposer's U.S. Registrations No. 2115071 and No. 2449316, respectively. In support of this, Opposer produced detailed sales records from 2010 to 2018 for a wide array of footwear (including work boots, athletic, and casual shoes), namely the documents with Bates Nos. WDAC000604-WDAC000908.

Opposer further verifies that it has offered and continues to offer and sell a wide array of non-footwear clothing and safety products, namely: safety equipment, namely reflective safety vests; men's and women's industrial work related garments for protection against accidents including reflective clothing, namely industrial grade coveralls and overalls, industrial grade work pants and work jeans, industrial grade work outerwear jackets and parkas, industrial grade work vests, industrial grade work shirts, and industrial grade quilted flannel shirts and industrial grade flannel shirts; clothing, namely gloves; men's and women's industrial work related garments not for safety or reflective purposes, namely, industrial grade coveralls and overalls,

industrial grade work pants and work jeans, industrial grade work outerwear jackets and parkas, industrial grade work vets, industrial grade work shirts, and industrial grade quilted flannel shirts and industrial grade flannel shirts. In support of this, Opposer produced detailed sales records of ongoing sales in the United States of Opposer's non-footwear products sold under Opposer's Marks from 2016 to the present (namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917); representative invoices which identify the name of the customer, date of sale, item number/product code, product description and sales data showing delivery to customers in the United States (namely the documents with Bates Nos. WDAC00535-WDAC00546); and representative product catalogs identifying the entire line of products, by item number/product code, which are being marketed, offered for sale, and sold in the United States (namely, the documents with Bates Nos. WDAC00430-WDAC00473).

Opposer herein verifies that it does not possess any other document which would be responsive to this Interrogatory.

Interrogatory No. 7:

For each product identified in response to Interrogatory No. 2, state the dollar and unit volume of sales of each product sold under Opposer's Mark on an annual basis since the date of first use of each such product.

Answer: Opposer objects to this Interrogatory to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer has previously stated and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer produced all documents that it possesses from 2010 to 2018 of sales of its footwear products in the United States. (*See* documents with Bates Nos. WDAC000604-WDAC000908). Opposer has also produced all

documents reflecting the sale of clothing products under Opposer's Mark in the United States from 2016 to 2018, namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917.

Opposer herein verifies that it does not possess any other document which would be responsive to this Interrogatory.

Notwithstanding the above verification, Opposer is still investigating and reserves its right to further supplement its responses and/or to produce additional documents responsive to Applicant's Discovery Requests to the extent additional documents are uncovered.

Respectfully submitted,

DATE: March 2, 2020

/Paul J. Kennedy/
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*Attorneys for Opposer,
W-D Apparel Company, LLC*

CERTIFICATE OF SERVICE

I, Sean P. McConnell, hereby certify that on March 2, 2020, a true and correct copy of the foregoing Opposer's Supplemental Answers and Objections to Applicant's First Set of Interrogatories - Nos. 2 and 7 was served via electronic mail upon the following:

Jonathan E. Moskin, Esquire
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Attorneys for Applicant

/Sean P. McConnell/
Sean P. McConnell

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

W-D APPAREL COMPANY, LLC	:	
	:	Opposition No. 91239143
Opposer	:	Mark: TERRA LUXE
v.	:	Application Serial No.: 86/933826
L2 APPAREL GROUP LLC	:	Published in <i>Official Gazette</i>: November 28, 2017
	:	Filed: March 9, 2016
Applicant	:	

**OPPOSER’S SUPPLMENTAL RESPONSE AND OBJECTIONS TO APPLICANT’S
FIRST SET OF REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS – NO. 17**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Trial and Appeal Board Manual of Procedure, Opposer W-D Apparel Company, LLC, (“Opposer”) by and through its undersigned counsel, hereby responds to Applicant L2 Apparel Group LLC’s (“Applicant”) First Set of Requests for Production of Documents (“Applicant’s Requests”) with the following select supplemental response and objections set forth below.

INTRODUCTORY STATEMENT

Opposer incorporates and restates by reference its Introductory Statement and Objections to Definitions from Opposer’s Responses and Objections to Applicant’s First Set of Requests for Production of Documents and Things, originally served on Applicant on August 7, 2018. Opposer continues to reserve the right to supplement or amend its answers or objections pursuant to Rule 26 of the Federal Rules of Civil Procedure.

**RESPONSE TO DOCUMENT REQUEST NO. 17
IN VIEW OF JANUARY 31, 2020 TTAB ORDER (34 TTABVUE)**

Request For Production No. 17

Documents sufficient to establish Opposer's sales of Opposer's Goods in dollars and units on an annual basis for each product offered for sale by Opposer under Opposer's Mark from 2012 to date.

RESPONSE: Opposer objects to this Request to the extent it seeks information beyond the scope of Opposer's custody or control. As Opposer has previously stated and in view of the TTAB Order dated January 31, 2020, Opposer again hereby verifies that it is not the original owner of Opposer's Mark and does not possess complete historical sales records for products bearing Opposer's Marks. Notwithstanding this limitation, Opposer has produced documents summarizing sales of its products in the United States. Opposer produced detailed sales records from 2010 to 2018 for its footwear products, namely the documents with Bates Nos. WDAC000604-WDAC000908. Summaries of annual sales (units and revenues) are reflected in documents with Bates Nos. WDAC000658, 669, 690, 821, and 908. Opposer also produced documents reflecting the sale of clothing products under Opposer's Mark, namely the documents with Bates Nos. WDAC000547-WDAC000577 and WDAC000909-WDAC000917.

Opposer herein verifies that it does not possess any other document which would be responsive to this Request.

Notwithstanding the above verification, Opposer is still investigating and reserves its right to further supplement its responses and/or to produce additional documents responsive to Applicant's Discovery Requests to the extent additional documents are uncovered.

Respectfully submitted,

DATE: March 2, 2020

/Paul J. Kennedy/

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mcconnells@pepperlaw.com

Attorneys for Opposer,

W-D Apparel Company, LLC

CERTIFICATE OF SERVICE

I, Sean P. McConnell, hereby certify that on March 2, 2020, a true and correct copy of the foregoing Opposer's Supplemental Response and Objections to Applicant's First Request for Production of Documents and Things – No. 17 was served via electronic mail upon the following:

Jonathan E. Moskin, Esquire
FOLEY & LARDNER LLP
90 Park Avenue
New York, NY 10016
Email: jmoskin@foley.com
ipdocketing@foley.com

Attorneys for Applicant

/Sean P. McConnell/
Sean P. McConnell

EXHIBIT “B”

McConnell, Sean P.

From: SSchoepfer@foley.com
Sent: Thursday, April 30, 2020 4:24 PM
To: McConnell, Sean P.; Kennedy, Paul
Cc: JMoskin@foley.com; Catalano, Theresa
Subject: [EXTERNAL] RE: URGENT - W-D Apparel Company, LLC v. L2 Apparel Group LLC - Request for Consented Extension of Time

Sean,

Thank you kindly for your prompt response. We shall send the service copy of the extension via reply email shortly.

In the meantime, please stay safe, positive and healthy as well!

Warmest regards,
Sky

Sky G. Schoepfer
Paralegal III

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[Visit Foley.com](http://www.foley.com)



From: McConnell, Sean P. <mccones@pepperlaw.com>
Sent: Thursday, April 30, 2020 4:21 PM
To: Schoepfer, Sky G. <SSchoepfer@foley.com>; Kennedy, Paul <KENNEDYP@pepperlaw.com>
Cc: Moskin, Jonathan E. <JMoskin@foley.com>; Catalano, Theresa <catalant@pepperlaw.com>
Subject: RE: URGENT - W-D Apparel Company, LLC v. L2 Apparel Group LLC - Request for Consented Extension of Time

**** EXTERNAL EMAIL MESSAGE ****

You have our consent to the extension.

Stay safe-

Sean P. McConnell
Attorney at Law



3000 Two Logan Square | Eighteenth and Arch Streets

Philadelphia, Pennsylvania 19103-2799
p: 215.981.4252 | f: 800.886.2280 | [bio](#)

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From: SSchoepfer@foley.com <SSchoepfer@foley.com>

Sent: Thursday, April 30, 2020 2:57 PM

To: Kennedy, Paul <KENNEDYP@pepperlaw.com>; McConnell, Sean P. <mcconnes@pepperlaw.com>

Cc: JMoskin@foley.com; Catalano, Theresa <catalant@pepperlaw.com>

Subject: [EXTERNAL] URGENT - W-D Apparel Company, LLC v. L2 Apparel Group LLC - Request for Consented Extension of Time

Importance: High

Dear Paul and Sean,

This email serves as a kind request to file a 30-day extension request in the above proceeding. Among other things, our office has been closed the last two months. We shall prepare and file the extension on our end.

We appreciate your time and consideration regarding this matter. We hope you and your families are well amidst the current health crisis.

Best regards,
Sky

Sky G. Schoepfer
Paralegal III

Foley & Lardner LLP
90 Park Avenue
New York, NY 10016-1314
P 212.338.3533

[Visit Foley.com](http://www.foley.com)



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McConnell, Sean P.

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Sent: Thursday, April 30, 2020 6:34 PM
To: McConnell, Sean P.; SSchoepfer@foley.com; Kennedy, Paul
Cc: Catalano, Theresa
Subject: [EXTERNAL] RE: URGENT - W-D Apparel Company, LLC v. L2 Apparel Group LLC - Request for Consented Extension of Time

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Jonathan

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Sean P. McConnell

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EXHIBIT “C”

McConnell, Sean P.

From: McConnell, Sean P. <mcconnes@pepperlaw.com>
Sent: Monday, June 1, 2020 4:35 PM
To: JMoskin@foley.com
Cc: Kennedy, Paul; Catalano, Theresa
Subject: FW: W-D Apparel Company, LLC v. L2 Apparel Group LLC
Attachments: Opposer_s Pretrial Disclosures - W-D Apparel v. L2 Apparel, Opp. No. 91239143.PDF; W-D Apparel to IW Apparel Assignment Reel_Frame 6946-0777.PDF

Jonathan-

Please find attached Opposer's Pretrial Disclosures. We are also attaching a copy of an intra-company assignment that was recorded last week between WD Apparel and IW Apparel. This was an administrative assignment that has not impacted the day-to-day operations of the business. Rather than record the assignment again with the TTAB, we wanted to see if you would consent to substituting the Opposer. If so, we can draft the motion for submission.

We are happy to discuss.

Best-

Sean P. McConnell

Attorney at Law



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p: 215.981.4252 | f: 800.886.2280 | [bio](#)

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CERTIFICATE OF ESTTA FILING

I, Paul J. Kennedy, hereby certify that on June 22, 2020 this Opposition to Applicant's Motion to Enforce Discovery Order and to Extend Deadlines is being electronically filed with the U.S. Patent and Trademark Office Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313, via ESTTA.

/Paul J. Kennedy/
Paul J. Kennedy

CERTIFICATE OF SERVICE

I, Paul J. Kennedy, hereby certify that on June 22, 2020, a true and correct copy of the foregoing Opposer's Opposition to Applicant's Motion to Enforce Discovery Order and to Extend Deadlines was served via electronic mail upon the following:

Jonathan E. Moskin, Esquire
FOLEY & LARDNER LLP
90 Park Avenue
New York, NY 10016
Email: jmoskin@foley.com
ipdocketing@foley.com

Attorneys for Applicant

/Paul J. Kennedy/

Paul J. Kennedy