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

Dunham's Athleisure Corporation)
 Petitioner,)
))
 v.))
New Balance Athletic Shoe, Inc.))
 Registrant.)

75758998

Cancellation No. 92046260

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June 11, 2007
Date of Signature and of Mail Deposit

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**REGISTRANT'S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**



06-13-2007
U.S. Patent & TMO/TM Mail Rcpt Dt #34

Registrant submits this reply brief in support of its motion for summary judgment pursuant to Rule 2,127, and requests that the Trademark Trial and Appeal Board consider it.

The reply brief corrects mistakes made by both Registrant and Petitioner in their main brief.

The error made by Registrant was in asserting that Petitioner's cancelled registration no. 1496249 (for SINCE 1937 DUNHAM'S SPORT OUTFITTERS) added the proviso "exclusive of footwear and clothing" to "retail store services for the sale of sporting goods" because of an opposition by a predecessor of Registrant. There was an opposition (no. 91075902) by a predecessor of Registrant, namely Dunham Brothers Company, against Dunham's Athleisure Corporation. Registrant relied on the docket entries provided at the PTO website (all that was available to Registrant) and assumed the rest. Petitioner asserts that the proviso "exclusive of footwear and clothing" was in the application as filed and not put in as a response to the opposition, and Registrant accepts that assertion.

Of course, this undercuts Petitioner's contention that there has been a "long period of concurrent use, the coexisting registrations, and the history of the parties and their predecessors-in-interest" that somehow needs to be taken into account in the cancellation proceeding.

Since Petitioner applied to register its mark for "retail store services for the sale of sporting goods, exclusive of footwear and clothing" (emphasis added), it is clear that the co-existence, then and now, was based on the stores not selling "footwear and clothing." By contrast, Petitioner's current applications are attempting to register "Dunham" marks for "retail store services featuring sporting goods and clothing" (emphasis added).

Petitioner never has attacked and now cannot attack, Registrant's 1970 registration of DUNHAM for "footwear," an overwhelming obstacle to Petitioner's various trademark

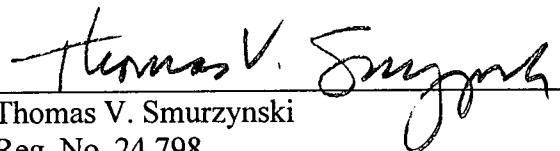
applications. It will be useless for Petitioner to now attack the new registration of DUNHAM for clothing articles, when it already accepts a DUNHAM registration for footwear as preventing it from re-registering its mark for anything other than “retail store services for the sale of sporting goods exclusive of footwear and clothing.”

The mistake Petitioner made was in making a reference, in footnote 2 of page 6 of its brief, to an application (Serial No. 78/044959) by The Source-i to register DUNHAM BY THE SOURCE-I. Although it is irrelevant, this was cited by Petitioner as some kind of proof that The Source-i was continuing a business using the mark DUNHAM (which it had previously assigned to New Balance). There are two things to note about Serial No. 78/044959. One is that the mark applied for is DUNNAM BY THE SOURCE-I (not DUNHAM). The other is that the application was an intent-to-use application, and that it was abandoned, thus proving nothing about use of DUNHAM by the company, The Source-i.

It seems fair for New Balance to not have to defend its registration for clothing, when another registration it owns for footwear is equally pertinent and relevant in blocking Petitioner’s applications.

Registrant therefore requests that its Motion for Summary Judgment be granted.

Respectfully submitted,

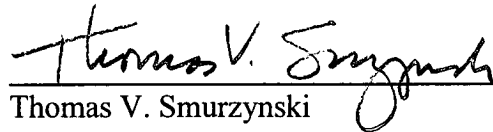


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Dated: June 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REGISTRANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was served by first-class mail, postage prepaid, on Petitioner's counsel, Ronald Nabozny, Esq., Brooks Kushman PC, 1000 Town Center, Southfield, MI 48075, on this 11th day of June, 2007.



Thomas V. Smurzynski